No. 21A477

IN THE SUPREME COURT OF THE UNITED STATES

LLOYD J. AUSTIN, III, IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE, ET AL., APPLICANTS

v.

U.S. NAVY SEALS 1-26, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR A PARTIAL STAY

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The district court's preliminary injunction compelling the Navy to assign and deploy elite Special Warfare personnel without regard to their vaccination status is an extraordinary and unprecedented intrusion into military decisionmaking. Admiral William K. Lescher, the Navy's second-highest ranking uniformed officer, has attested that it will cause "immediate harm to the Navy" and "to the national security of the United States" by mandating what he regards as a "dereliction of duty." Appl. App. 103a, 110a. Respondents' opposition further confirms that a partial stay of that injunction as it applies to the Navy's operational decisions is both urgently needed and demonstrably warranted.

Respondents do not seriously attempt to defend an injunction requiring the Navy to assign and deploy SEALs and other Special Warfare personnel against its military judgment. Instead, respondents now suggest that the injunction may not have that effect.

That contradicts respondents' prior representations, the contempt motion they have already filed in district court, and the decisions below. It also confirms that a partial stay is warranted: Contrary to respondents' assertions, the Navy does not seek to retaliate against or discipline respondents for requesting religious accommodations, and granting the partial stay would not allow it to do so. Instead, the Navy seeks only an order from this Court permitting it to consider respondents' lack of vaccination in making assignment, deployment, and other operational decisions -- just as it does with every other unvaccinated servicemember. Respondents offer no reason to withhold that modest relief.

A partial stay is also warranted because respondents' RFRA claims lack merit. As Admiral Lescher and other senior officers have explained, the Navy has an extraordinarily compelling interest in ensuring that Special Warfare personnel are fully medically ready to deploy, and that interest justifies requiring them to be vaccinated against COVID-19. Respondents all but ignore that showing and instead criticize various other aspects of the Navy's COVID-19 policies that have no bearing on their RFRA claims.

Finally, the equities overwhelmingly favor a partial stay. The injunction is forcing the Navy to subordinate its judgment about military readiness to the contrary views of a civilian court. It is also compelling Navy officers to make operational decisions under constant threat of judicial second-guessing and on pain of

contempt. Respondents, in contrast, would suffer no irreparable harm from a partial stay that would allow them to remain unvaccinated without risk of discipline or discharge.

I. THIS COURT WOULD LIKELY GRANT REVIEW IF THE COURT OF APPEALS AFFIRMED THE DISTRICT COURT'S INJUNCTION

Respondents do not seriously dispute that this Court would likely grant review if the Fifth Circuit affirmed the district court's unprecedented injunction. They note in passing (Opp. 3) the absence of a "circuit split" and the case's "preliminary" posture. But the Court has granted review of preliminary injunctions that interfered with national security even in the absence of a division of authority. See, e.g., Winter v. NRDC, Inc., 555 U.S. 7, 19-20 (2008). It would likely do so here as well.

II. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

This Court would likely reverse or narrow the preliminary injunction because it intrudes on core Article II military prerogatives and because respondents' RFRA claims lack merit.[1]

A. The Injunction Is Not An Appropriate Remedy

1. As the government has explained (Appl. 18-22), insofar as the injunction prohibits the Navy from considering whether a servicemember is vaccinated in making deployment, assignment, and other operational decisions, it overrides military commanders'

[1] Respondents disclaim reliance on their First Amendment claims in opposing a partial stay. Opp. 25 n.13; cf. Appl. 32-35.

"professional military judgments" about the best way to prepare for and conduct military operations. Gilligan v. Morgan, 413 U.S. 1, 10 (1973). That is neither "appropriate relief" under RFRA, 42 U.S.C. 2000bb-1(c), nor consonant with "traditional principles of equity," Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 319 (1999) (citation omitted).

Respondents assert (Opp. 33) that "injunctive relief against government officials" is appropriate relief. But that frames the issue at too high a level of generality. The question is whether this specific injunction is appropriate insofar as it trenches on core Article II military prerogatives. It is not. Indeed, respondents still have not identified any precedent for such a judicial intrusion, which contradicts an unbroken line of decisions holding that courts may not second-guess military judgments about assignments and fitness for duty. Appl. 18-20.[2]

2. Rather than defend that unprecedented injunction, respondents now strive to obscure its terms. They repeatedly assert that the injunction "does not require the Navy to deploy any of the thirty-five plaintiffs," Opp. 1 (footnote omitted); see Opp.

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[2] Respondents dismiss (Opp. 30-31) those precedents because they did not involve RFRA. But nothing in RFRA displaced the deeply rooted judicial "reluctan[ce] to intrude upon the authority of the Executive in military and national security affairs," Department of the Navy v. Egan, 484 U.S. 518, 530 (1988). To the contrary, in enacting RFRA, Congress sought to preserve those traditional principles of military deference. Appl. 23.

3, 13, 14, 15, 27, 29, 34, and "merely upholds what the military requires by policy," Opp. 29; see Opp. 5, 28. That is wrong. And even if there were some doubt on that score, it would only reinforce the propriety of a partial stay to ensure that the injunction does not impose burdens that even respondents are unwilling to forthrightly defend.

The district court enjoined the Navy from enforcing orders implementing the vaccination requirement, including an order specifying that "service members who are not vaccinated, regardless of exemption status, may be temporarily reassigned" based on "operational readiness and mission requirements." Appl. App. 87a-88a (NAVADMIN 256/21); see id. at 56a. The court also enjoined the Navy from taking "adverse action" against respondents based on their "requests for religious accommodation." Id. at 56a.

The government sought a partial stay of that injunction insofar as it precludes the Navy from taking into account respondents' lack of vaccination "in making deployment, assignment, or other operational decisions." Appl. App. 2a. Had either of the lower courts understood the injunction not to have that effect, they would have said so. But they did not. Instead, the district court reiterated that the injunction compels the Navy to assign respondents as if they were vaccinated. Id. at 60a. The court emphasized that the injunction would prevent the Navy from "blocking [a SEAL] from the training program he would otherwise attend"

based on his lack of vaccination -- and so presumably would likewise prevent the Navy from blocking the SEAL from deployment based on his lack of vaccination. Ibid. And the Fifth Circuit rested its decision on its (mistaken) conclusion that respondents could be deployed without undermining their missions. Id. at 25a-26a.

Admiral Lescher's declaration underscores the impact of those orders: Because of the injunction, the Navy is being forced to make operational decisions contrary to its military judgment by assigning and deploying respondents without regard to their lack of vaccination. Appl. App. 103a, 118a-119a. Already, that has included sending one respondent "to Hawaii for duty on a submarine." Appl. 2.[3]

Respondents, for their part, understood the injunction exactly the same way. In the Fifth Circuit, respondents explained that they "were previously deployed, promoted, trained, and

[3] Respondents quibble (Opp. 3 n.4) with that description. But they concede that the injunction has required the Navy to assign the respondent in question to an operational unit in Hawaii, where he will join a SEAL Delivery Vehicle (SDV) team. Opp. App. 3a. The Navy has informed this Office that, as a member of that team, the respondent will help operate a Dry Deck Shelter, which is a small enclosed module attached to the back of a submarine that allows SEALs and SDVs to egress while submerged. The respondent states (ibid.) that he was told he would not be "attached to a submarine while * * * unvaccinated," but he offers no reason to think that the person who allegedly told him that was aware that he is a plaintiff in this case and therefore covered by the injunction, especially given that he is proceeding under a pseudonym. Cf. Appl. 38.

trained others" and asserted that the injunction "requires the Navy to treat [them] as they were treated before." C.A. Stay Opp. 2. Respondents' contempt motion characterizes the injunction as preventing the Navy from considering their unvaccinated status in changing their job duties, D. Ct. Doc. 96, at 4 (Jan. 31. 2022), and asserts that various assignment decisions warrant contempt, including that SEAL 21 has allegedly been prevented from "participat[ing] in training, which means he cannot deploy," id. at 7.

Even now, respondents' opposition carefully avoids clearly stating what it seeks to imply: That the Navy may, consistent with the injunction, refuse to assign or deploy respondents because they are unvaccinated. To the contrary, respondents ultimately appear to recognize that the injunction requires the Navy to "treat[] servicemembers with religious accommodation requests as vaccinated," Opp. 29 (emphasis added), even though they are not.

Respondents also assert, citing their own declarations, that they are not actually at risk of deployment. Opp. 6. But Admiral Lescher has made clear that most respondents occupy positions that may require them to "deploy anywhere in the world in the immediate future" for sensitive, high-risk missions. Appl. App. 118a. Other respondents currently have training assignments, ibid., but even "servicemembers currently serving in a training capacity may be called upon at any moment to deploy for matters of the utmost urgency." D. Ct. Doc. 111, at 14 (Feb. 7, 2022).

Finally, even if respondents had raised some doubt about the injunction's scope, that would only be a further reason to grant a partial stay. The injunction is compelling Navy officers to assign and deploy respondents against their military judgment -- and to do so under a Damoclean threat of ongoing contempt proceedings should respondents be dissatisfied with their assignments or duties. Yet both lower courts refused to clarify or partially stay the injunction to remove that intolerable intrusion on military prerogatives. Only this Court can grant effective relief.

B. Respondents' RFRA Claims Lack Merit

1. The government has demonstrated at length (Appl. 22-31) that the Navy has a compelling interest in requiring servicemembers, especially Naval Special Warfare personnel, to be vaccinated against COVID-19 (and up to 17 other illnesses too, see Appl. 6). Navy SEALs and other members of the Special Warfare community can be called upon to deploy anywhere in the world on short notice; to complete high-risk missions under extreme conditions; and to operate in small teams and close quarters for extended periods. Appl. App. 107a. The Navy has an extraordinarily compelling interest in ensuring that those servicemembers are as physically and medically prepared as possible, and vaccination is the least restrictive means of furthering that interest. Like the lower courts, respondents do not seriously engage with -- much less contest -- any of the extensive declarations from high-ranking

Navy officers establishing those points.

Instead, respondents seek to substitute their own judgment for that of senior military leaders. For instance, they assert (Opp. 21-22) that their "non-vaccination" will not "make or break the Navy's or [Special Warfare's] ability to operate" because they and the putative class members constitute "0.6% of all Navy servicemembers," and the Navy otherwise enjoys a "nearly universal military vaccination" rate. But even one SEAL who falls ill can jeopardize an entire mission, making it vital for all servicemembers serving in those elite units to be vaccinated against COVID-19 and other contagious diseases. See Appl. 31. Admiral Lescher has emphasized that he would regard it as a "dereliction of duty" to order "unvaccinated personnel into an environment in which they endanger their lives," risk "the lives of others," and "compromise accomplishment of essential missions." Appl. App. 110a. Respondents offer no sound basis to second-guess that military judgment.

Respondents also rely heavily (Opp. 22-24) on the fact that the Navy was able to successfully conduct missions over the past two years without requiring servicemembers to be vaccinated. But other Armed Forces missions have not been so fortunate, and the Navy is entitled to seek to eliminate preventable risks to servicemembers' safety and mission success. Appl. 29-30.[4]

[4] Respondents assert without citation (Opp. 25) that "vaccination does not prevent spread" of COVID-19. That is wrong.

2. Respondents repeat their assertion (Opp. 24-26) that the Navy's vaccination requirement is underinclusive. But they do not and cannot dispute the relevant point: No member of the Special Warfare community has been granted a permanent exemption from the vaccination requirement on any ground, and the handful who have temporary medical exemptions are not similarly situated to respondents because they will be vaccinated when their temporary conditions clear and will not be deployed in the meantime. Appl. 7, 32-34.[5]

Respondents also attack various other aspects of the Navy's COVID-19 policies, but their criticisms are both wrong and irrelevant. Respondents observe that the Navy does not re-test asymptomatic servicemembers who have completed a quarantine after testing positive for COVID-19. Opp. 26 (citing C.A. ROA 2735, which reprints NAVADMIN 07/22). But that is because re-tests would generate false positives "due to the presence of persistent non-

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"COVID-19 vaccines are effective and can lower your risk of getting and spreading the virus that causes COVID-19. COVID-19 vaccines also help prevent serious illness and death in children and adults even if they do get COVID-19." CDC, Benefits of Getting a COVID-19 Vaccine, go.usa.gov/xznGV (emphasis added).

[5] The Navy previously informed this Office that there were "only four temporary medical exemptions among all Naval Special Operators" and "that all four of the recipients will get vaccinated when their temporary medical issue clears." Appl. 8 n.1. The Navy informs this Office that one of those exemptions has now expired, but that the Navy has determined that the recipient happens to be a respondent in this case -- and thus will not get vaccinated on that basis even though his temporary medical issue has cleared.

infectious viral fragments." NAVADMIN 07/22 (emphasis added). Respondents also note that the Navy does not categorically prohibit deployment of servicemembers who may be at high risk for COVID-19 complications. Opp. 25-26 (citing C.A. ROA 2736, which reprints NAVADMIN 07/22). But "[t]he decision to operate and deploy with vaccinated high-risk personnel rests with the Commander, as advised by medical providers." NAVADMIN 07/22. That is precisely the sort of decisionmaking that the injunction prevents military commanders from exercising with respect to respondents. And in any event, conditions that would put a servicemember at high risk of COVID-19 complications generally would also disqualify him from Special Warfare duty. Appl. 5-6; see Appl. App. 71a-76a.

3. Rather than confronting the Navy's compelling case for requiring that they be vaccinated, respondents principally attack the Navy's procedures for addressing religious-accommodation requests. Opp. 2-3, 7-9, 18-21. But even if those criticisms had merit, they would not entitle respondents to relief. The question in a RFRA case is whether the government has demonstrated in court that it has a compelling interest in the "application of the challenged law" to "the particular claimant[s] whose sincere exercise of religion is being substantially burdened." Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 726 (2014) (citation omitted). The question here is thus whether the Navy has shown that it has a compelling interest in vaccinating these 35 members of its elite

Special Warfare community. The government has established that interest with detailed, specific declarations from senior military officers. Appl. App. 95a-188a. Given that showing, respondents' complaints about the process by which their exemption requests were considered, the form and content of the letters denying their requests, and the Navy's treatment of other exemption requests from differently situated servicemembers are beside the point.

In any event, respondents' description of the process is not accurate.[6] That the Navy rarely grants religious exemptions from vaccination requirements (cf. Opp. 19) reflects not a hostility to religion, but a compelling interest in minimizing the risk to, and maximizing the success of, its dangerous and critical missions. Appl. App. 114a-115a. Furthering that interest requires all personnel who are or may be deployed on such missions to be vaccinated. And that the Navy uses similar language in letters denying exemption requests (see Opp. 19-20) does not imply that Navy officers are falsely representing that they gave individualized

[6] In particular, respondents' description (Opp. 19) of a "six-phase, fifty-step process that begins with a prepared disapproval template" is a gross mischaracterization. Commanders are provided with templates recommending both for and against granting a religious accommodation. Appl. App. 152a. And the 50 steps -- reproduced at Opp. App. 61a-77a -- include detailed instructions for staff to log and track accommodation requests, such as "Once at the Inbox, select New > Templates > Religious Accommodation Request" (step 18) and "Move to the right side of the spreadsheet" (step 37). Id. at 69a, 75a. That process does not impose onerous burdens on servicemembers requesting such accommodations.

consideration to each request. Finally, respondents identify no authority for their assertion (Opp. 19) that the Navy must "explain with * * * specificity" its reasons for each denial, especially given that similar programmatic interests apply to each.

III. THE EQUITIES OVERWHELMINGLY FAVOR A PARTIAL STAY

The remaining considerations overwhelmingly favor granting the partial stay the government seeks here, which would allow the Navy to take into account respondents' lack of vaccination in making operational decisions, including assignments and deployments, while ensuring that respondents are not disciplined or discharged during the litigation for not being vaccinated. Appl. 35-40. Respondents' speculation (Opp. 34) that another "serious outbreak" of COVID-19 is unlikely is not a sound basis for disregarding the risk assessments made by senior military officials, who have determined that vaccination is essential to military readiness -- particularly for elite Navy SEALs, who can be called on at any time to execute extraordinarily sensitive missions under conditions in which other "mitigation measures" (ibid.) like masking, social-distancing, or teleworking are impracticable or impossible. See, e.g., Appl. App. 67a, 103a, 109a-120a. Respondents assert that "the Court does not have to agree with" Admiral Lescher's judgment that "vaccinating [Naval Special Warfare] members against COVID is critical for mission success." Opp. 32-33. But the Court should decline respondents' invitation to "substitute [their] own

assessment" of those matters for the "predictive judgments" made by the Executive officials responsible for defending the country. Trump v. Hawaii, 138 S. Ct. 2392, 2421 (2018).

The injunction in its current form also cannot be defended as merely preserving the "status quo." Opp. 34. As respondents nowhere dispute, the status quo before litigation was that all servicemembers who were not vaccinated against COVID-19, "whether for religious or secular reasons," could not be assigned to an operational unit and were not deployable absent a separate medical waiver. Appl. App. 98a; see Appl. 10. The injunction, by contrast, requires the Navy to treat respondents as deployable notwithstanding their lack of medical waivers. The injunction has also upended the status quo by forcing Navy officers to consider whether a civilian court may perceive particular assignments or other operational decisions as forms of adverse action -- on pain of contempt. Appl. 37-38. That the district court has not yet acted on respondents' current contempt motion (Opp. 15-16) cannot undo the ongoing and irreparable harm the injunction is already causing.

On the other side of the balance, respondents assert that the Navy has retaliated against or punished them because they have requested religious exemptions. That is incorrect.[7] But to be

[7] Respondents recycle many of their retaliation allegations (e.g., Opp. 3-4) from their pending contempt motion, which lacks

clear: The partial stay that the government seeks would not permit retaliation because of respondents' requests for religious exemptions; instead, it would merely allow the Navy to consider respondents' lack of vaccination in assigning and deploying them -- exactly as the Navy does with all other unvaccinated servicemembers, regardless of the reason for their lack of vaccination.

Respondents also assert irreparable harm in the form of "loss of First Amendment freedoms." Opp. 35 (citation omitted). But the government has already explained that respondents would remain free during litigation to adhere to their stated religious beliefs without fear of being discharged or disciplined. Appl. 39-40. Allowing the Navy to apply its generally applicable and religiously neutral policies on deployment and assignment of unvaccinated servicemembers would not violate respondents' First Amendment rights, even momentarily. Appl. 32-35.

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merit. See D. Ct. Doc. 110, at 10-17 (Feb. 7, 2022) (government response). The Navy did not, for example, deny any respondent treatment for traumatic brain injury. For the respondent in question, the Navy was "unable to secure permission for him to travel in time for his preferred [treatment] start date at his preferred facility," but it has since secured the necessary permission, with a "start date of March 27, 2022." Id. at 15. Other respondents object to being assigned duties that they regard as unpleasant, such as picking up trash. But commanding officers have attested that those duties "are typical and appropriate duties within the Navy" and were not "related to [respondents'] exemption requests." Id. at 14; see D. Ct. Doc. 111, at 9 n.8 ("[I]t it is common Navy practice for all servicemembers to pick up trash as part of their duties."); id. at 36 (describing the maintenance of SEAL facilities and equipment as an "all-hands responsibility").

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For the foregoing reasons and those stated in the government's application, this Court should partially stay the district court's preliminary injunction pending the completion of further proceedings in the court of appeals and, if necessary, this Court. Specifically, the injunction should be stayed insofar as it precludes the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions.

Respectfully submitted.

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