No. 22-10645

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NAVY SEAL 1, et al.,

Plaintiffs-Appellees,

v.

SECRETARY OF THE
UNITED STATES DEPARTMENT OF DEFENSE, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida

OPENING BRIEF FOR APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for defendants-appellants certify that the following persons have an interest in the outcome of this appeal.

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Counsel for defendants-appellants further certifies that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

Dated: April 11, 2022

/s/ Sarah J. Clark
Sarah J. Clark

STATEMENT REGARDING ORAL ARGUMENT

The government respectfully requests that the Court hear oral argument in this case because the government and the public have weighty interests at stake in this appeal and because the district court made a number of errors in issuing a preliminary injunction here.

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INTRODUCTION

Plaintiffs are two senior military officers who held or were scheduled to hold command positions in the Navy and the Marine Corps—a commander Surface Warfare Officer in the Navy (Navy Commander) who was the commanding officer of a guided-missile destroyer and its crew of over 300 sailors and a lieutenant colonel in the Marine Corps (Lieutenant Colonel 2) who was selected to command a forward-deploying battalion of over 300 Marines that will operate within the confined spaces of an amphibious ship for six to ten months and be on call for rapid crisis response.

Plaintiffs object for religious reasons to being vaccinated against COVID-19, but the Navy and the Marine Corps have determined that vaccination is necessary for plaintiffs to be able to carry out their military duties safely and effectively. Following the denial of their religious exception requests, plaintiffs filed this action alleging that those denials violated the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause. The district court then granted a preliminary injunction barring the Navy and the Marine Corps "from enforcing against Navy Commander and Lieutenant Colonel 2 any order or regulation requiring COVID-19 vaccination" and from taking "any adverse or retaliatory action against Navy Commander or Lieutenant Colonel 2 as a result of, arising from, or in conjunction with" their "requesting a religious exemption, appealing the denial of a request for a religious exemption, requesting reconsideration of the denial of a religious exemption, or pursuing this action or any other action for

relief under RFRA or the First Amendment." A1005-06 (Dkt. 111, at 47-48).[1] On March 30, 2022, this Court stayed the injunction "insofar as it precludes the Navy from considering the plaintiffs' vaccination status in making deployment, assignment, and other operational decisions until disposition of this appeal." Order 3.

The preliminary injunction should be vacated. As an initial matter, it vastly exceeds the district court's authority by intruding on core military decisions. The court usurped the military's authority to decide which service members are fit for command, what precautions must be taken to reduce the risk that service members will compromise military readiness, and how best to maintain good order and discipline. This contravenes long-standing precedent from this Court and the Supreme Court holding that courts are not suited to review such decisions. Indeed, the Supreme Court recently stayed a similar district court injunction "insofar as it preclude[d] the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions." *Austin v. U.S. Navy SEALs 1-26*, No. 21A477, 2022 WL 882559 (U.S. Mar. 25, 2022) (per curiam). As Justice Kavanaugh recognized in his concurrence to that order, "the Court has long emphasized" that "the 'complex, subtle, and professional decisions as to the composition, training, equipping, and control of a

[1] Citations to A__ are to the Appellants' Appendix. Page numbers in parentheticals are to the page numbers generated by the district court ECF system.

military force are essentially professional military judgments.'" *Id.* at *1 (Kavanaugh, J., concurring) (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

Moreover, plaintiffs failed to demonstrate that their RFRA and Free Exercise Clause claims are likely to succeed on the merits. The military has a compelling interest in maintaining military readiness, including by ensuring that all service members are healthy and ready to deploy around the world at a moment's notice. This interest is vital to the national security of the United States, and requiring that Navy Commander and Lieutenant Colonel 2 be vaccinated is the least restrictive means of vindicating it. As long as these plaintiffs remain unvaccinated, they cannot deploy worldwide, severely hampering their ability to carry out critical missions. Moreover, plaintiffs remain at greater risk of serious illness and pose a greater risk of spreading COVID-19 to the hundreds of men and women under their command, further jeopardizing their ability to perform core military functions.

The military has made an expert judgment that, for these plaintiffs, vaccination is by far the best way to avoid these harms. The district court erred in rejecting that judgment and ignoring the military's individualized determinations that these plaintiffs cannot safely and effectively serve while they refuse to obey the lawful order to become vaccinated against COVID-19.

The harms flowing from the district court's order are clear. The Navy concluded that it could not deploy Navy Commander's $1.8 billion guided-missile destroyer while he remained in command. Accordingly, until this Court granted its partial stay, the

preliminary injunction rendered non-deployable one of the Navy's most versatile warships during an international crisis. And the Marine Corps was required to continue preparing Lieutenant Colonel 2 to assume command and was precluded from selecting another officer to fill this command role, even though it had determined that she was not fit to hold a command position (including because she would not be permitted to enter some of the countries to which her unit might be deployed). The preliminary injunction thus overrides the military's professional judgment that keeping plaintiffs in command creates an intolerable threat to military readiness and to good order and discipline. Moreover, by preventing the military from initiating separation proceedings or other discipline against plaintiffs, the preliminary injunction requires the Navy and the Marine Corps to retain officers in their forces who are not deployable worldwide and in whom the military has lost trust and confidence. This further impairs military readiness and good order and discipline. Those substantial harms outweigh any interests plaintiffs may have in avoiding compensable, employment-related consequences while this litigation proceeds.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1367. *See* A76 (Dkt. 1, at 38). On February 18, 2022, the district court issued a preliminary injunction barring defendants from enforcing their COVID-19 vaccination requirements against plaintiffs and from taking any adverse action against plaintiffs on the basis of their requests for religious exceptions from those requirements. *See* A1005-

06 (Dkt. 111, at 47-48). Defendants filed a timely notice of appeal on February 25, 2022. A1007 (Dkt. 115); Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the preliminary injunction should be vacated because plaintiffs failed to demonstrate a substantial likelihood of success on the merits of their claims.

2. Whether the preliminary injunction should be vacated because plaintiffs failed to show irreparable injury or that the balance of equities and the public interest favor preliminary relief.

STATEMENT OF THE CASE

A. The Navy's and Marine Corps' COVID-19 Vaccination Requirements

1. The military has long required that service members receive a range of vaccinations. *See* A159 (Dkt. 1-4, at 1). Even before the COVID-19 pandemic, nine vaccines were required for all service members, and eight others were required in the presence of certain risk factors. *See* U.S. Dep't of the Navy, BUMEDINST 6230.15B, *Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases*, at Table D-1 (Oct. 7, 2013), https://go.usa.gov/xzpGW. This approach implements Department of Defense Instruction 6205.02, which states that the military departments should, "[t]o the maximum extent practicable, provide for the immunization of personnel for protection against . . . naturally occurring infectious diseases of military or national

importance, in time to develop sufficient immunity before deployment." A204 (Dkt. 23-5, at 13).

COVID-19 has taken a serious toll on the military. *E.g.*, A453-56 (Dkt. 66-4, at 9-12, ¶¶ 11-14); A529-33 (Dkt. 74-5, at 3-7, ¶¶ 3-13). The day after the Pfizer COVID-19 vaccine received full FDA approval, the Secretary of Defense—recognizing this toll and the prospective risks to the force posed by COVID-19—directed the military departments to require all service members be fully vaccinated against COVID-19. A159 (Dkt. 1-4). The Secretary of the Navy in turn directed all active-duty service members in the U.S. Navy and the Marine Corps to be fully vaccinated by November 28, 2021. *See* A214 (Dkt. 23-8, at 2) (ALNAV 062/21); A263-64 (Dkt. 23-18, at 3-4, ¶ 3). *See generally* A216 (Dkt. 23-9) (NAVADMIN 225/21, implementing the vaccination requirement for the U.S. Navy); A225 (Dkt. 23-10) (MARADMIN 462/21 and MARADMIN 533/21, implementing the vaccination requirement for the Marine Corps). The Secretary of the Navy explained that "[p]rotecting the health of the force and warfighting readiness is of paramount importance," that COVID-19 "adversely impacts [the Navy's] force readiness and mission execution," and that vaccination is "the most effective tool we have in our arsenal against this threat." A214 (Dkt. 23-8, at 2). Indeed, of all active-duty personnel hospitalized with COVID-19 from December 2020 to January 2022, only 0.012% were vaccinated. A535 (Dkt. 74-5, at 9, ¶ 18).

2. The Navy and Marine Corps provide two types of exceptions from their vaccination requirements: medical and administrative. A264-65 (Dkt. 23-18, at 4-5, ¶ 5);

A309-13 (Dkt. 23-19, at 5-9, ¶¶ 6-11). Medical exceptions are granted to service members by medical personnel for medical reasons. A264-65 (Dkt. 23-18, at 4-5, ¶¶ 5-6). Most medical exceptions are temporary and are provided for time-limited conditions like pregnancy. *See* A538-39 (Dkt. 74-8, at 3-4, ¶¶ 4, 6); *see also* U.S. Dep't of the Navy, *Navy & Marine Corps COVID-19 Vaccination Requirements: Pregnant and Postpartum Service Members FAQ* (Sept. 17, 2021), https://go.usa.gov/xzBcS. As of February 3, 2022, the Navy had granted 11 permanent medical exceptions and the Marine Corps had granted 21. *See* A487 (Dkt. 73-3, at 3); A489 (Dkt. 73-4, at 3); *see also* A538, A541 (Dkt. 74-8, at 3, 6, ¶¶ 4, 10).[2] At that time, there were 252 active temporary medical exceptions in the Navy and 232 in the Marine Corps. *See* A487 (Dkt. 73-3, at 3); A489 (Dkt. 73-4, at 3). Administrative exceptions cover a variety of situations. Most are time-limited—based, for example, on a service member's pending separation or retirement, or on emergency leave. A271-73 (Dkt. 23-18, at 11-13, ¶ 14). If the service member is not leaving the force, he or she must be vaccinated when the circumstance occasioning the exception ends. By contrast, administrative exceptions based on religious accommodations are permanent. *Cf. id.*; A313-15 (Dkt. 23-19, at 9-11, ¶ 12).

[2] By way of example, ten of the Navy's permanent medical exceptions were based on serious medical reactions to the first dose of the COVID-19 vaccine; the eleventh was based on the service member's history of serious vaccine reactions. A541 (Dkt. 74-8, at 6, ¶ 10).

A service member seeking a religious exception must submit a request to his or her commanding officer. *See* A271-73 (Dkt. 23-18, at 11-13, ¶ 14); A313-15 (Dkt. 23-19, at 9-11, ¶ 12). Such requests are governed by longstanding Navy and Marine Corps policies, which require that each request be "evaluated on a case-by-case basis" considering factors including "military readiness, unit cohesion, good order, discipline, health, [and] safety." A273 (Dkt. 23-18, at 13, ¶ 14.c); *see also* A314-15 (Dkt. 23-19, at 10-11, ¶ 12.c). A request for religious accommodation may be denied only if the denial furthers a compelling government interest and is the least restrictive means of furthering that interest. *See* A273 (Dkt. 23-18, at 13, ¶ 14.d); A314 (Dkt. 23-19, at 10, ¶ 12.b). Service members in the Navy may appeal the denial of a religious exception to the COVID-19 vaccination requirement to the Chief of Naval Operations. A271-72 (Dkt. 23-18, at 11-12, ¶ 14.b). Marines may appeal similar denials to the Commandant of the Marine Corps, the highest-ranking uniformed officer in the Marine Corps, and the Commandant or the Assistant Commandant of the Marine Corps may rule on the appeal. A314-15 (Dkt. 23-19, at 10-11, ¶ 12.c & n.11).

The COVID-19 vaccination requirement triggered a sharp increase in religious accommodation requests. A344 (Dkt. 34-2, at 3, ¶ 3); A350-51 (Dkt. 34-3, at 2-3, ¶ 3). As of early February 2022, the Navy had received over 4,000 religious exception requests, and the Marine Corps over 3,500. *See* A487 (Dkt. 73-3, at 3); A489 (Dkt. 73-4, at 3). At that point, most of the over 2,000 appeals of initial denials were still pending. *See* A487 (Dkt. 73-3, at 3); A489 (Dkt. 73-4, at 3). Of the 203 requests for

accommodation that had been fully resolved in these Services, three were granted and 200 were denied. *See* A487 (Dkt. 73-3, at 3); A489 (Dkt. 73-4, at 3).

3. If a service member in the Navy or the Marine Corps refuses vaccination without an approved exception, the Navy or the Marine Corps will initiate administrative separation proceedings. *See* A273-74 (Dkt. 23-18, at 13-14, ¶ 15); *see also* A318-19 (Dkt. 23-19, at 13-14, ¶ 15). In addition, the service member may be subject to discipline, *see* A214 (Dkt. 23-8, at 2).[3] Neither separation nor discipline will be initiated against a service member with a pending exception request. *See* A221 (Dkt. 23-9, at 7); A268, A272 (Dkt. 23-18, at 8, 12, ¶¶ 9 n.6, 14 n.12).

The separation process affords the service member notice and the opportunity to provide a defense and typically takes several months to complete. *See* A277 (Dkt. 23-18, at 17, ¶ 19.a) (explaining that it takes "between 6 to 12 months" for an officer to be separated from the Navy); A319 (Dkt. 23-19, at 15, ¶ 18) (explaining that the Marine Corps' goal is to process a separation for a non-probationary officer within 90 days of commencing proceedings). A service member who is discharged as a result of this

[3] For the Navy, the Chief of Naval Personnel initiates separation procedures for Sailors who refuse the COVID-19 vaccination without a pending exception request. A221 (Dkt. 23-9, at 7). In addition, the Vice Chief of Naval Operations—the second-highest ranking uniformed officer in the Navy—can initiate court-martial and non-judicial punishment for such Sailors. *See id.* For the Marine Corps, the general court-martial convening authority may initiate administrative or judicial proceedings for service members who refuse the COVID-19 vaccination without a pending exception request. A228-29 (Dkt. 23-10, at 5-6, ¶ 3.*l*).

process may obtain review of their discharge through the relevant Discharge Review Board and from the Board for Correction of Naval Records, which is empowered to void a discharge, as well as order reinstatement and back pay. *See* A281-82 (Dkt. 23-18, at 21-22, ¶ 22); A320-21 (Dkt. 23-19, at 16-17, ¶ 22); *see also* 10 U.S.C. § 1552(c)(1) (permitting reimbursement "for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits" if due to a service member as a result of a record correction). The least favorable characterization of service for Navy or Marine Corps officers who decline the COVID-19 vaccine is "GENERAL (under honorable conditions)." A223 (Dkt. 23-9, at 9); *see also* MARADMIN 612/21, ¶ 4.b, https://perma.cc/7G4S-W6K8.

B. Factual Background and Prior Proceedings

1. In October 2021, a group of service members, federal civilian employees, and federal contractors filed this lawsuit on behalf of a putative class, challenging a number of federal vaccination requirements—including, as relevant here, the military's COVID-19 vaccination requirement—under RFRA and the Free Exercise Clause. A39 (Dkt. 1). Plaintiffs first sought a temporary restraining order (TRO) and preliminary injunction barring enforcement of the COVID-19 vaccination requirement as to all United States service members. A161 (Dkt. 2). The district court declined that request but permitted plaintiffs to move for individualized relief in exigent circumstances. A187 (Dkt. 9);

A355 (Dkt. 40). The district court also permitted plaintiffs to proceed under pseudonyms. A955 (Dkt. 110).[4]

2. On February 1, 2022, plaintiffs sought a TRO as to two officers—Navy Commander and Lieutenant Colonel 2. A410 (Dkt. 60). Until this Court's stay order, Navy Commander served as the commanding officer of a $1.8 billion guided-missile destroyer and its crew of over 300 Sailors. A968 (Dkt. 111 at 10); A556-57 (Dkt. 74-12, at 3-4, ¶¶ 4-6). In August 2021, Lieutenant Colonel 2—who served as a logistics officer with the Marine Forces Special Operations Command—was selected to assume command of a combat logistics battalion in fall 2022. That battalion is a "forward-deployed Marine expeditionary organization," which is designed to provide "rapid crisis response capability to execute a full range of military operations" and "may be the first [United States] force at the scene of a crisis." A552 (Dkt. 74-11, at 6, ¶ 8). Had she assumed command, Lieutenant Colonel 2 would have been responsible for over 300 Marines. A551 (Dkt. 74-11, at 5, ¶ 7).

Navy Commander and Lieutenant Colonel 2 requested religious exceptions to the COVID-19 vaccination requirement. Their initial requests were denied, as were their administrative appeals. *See* A440 (Dkt. 66-2) (Navy Commander); A442 (Dkt. 66-

[4] On February 12, the district court severed the claims filed by non-service member plaintiffs and opened two new civil cases for claims filed by federal civilian employees, *see State Dep't Emp. 1 v. Austin*, No. 8:22-cv-364 (M.D. Fla.), and claims filed by federal contractors, *see Federal Civilian Contractor Emp'r v. Austin*, No. 8:22-cv-365 (M.D. Fla.). *See* A777 (Dkt. 89).

3) (Lieutenant Colonel 2). The Chief of Naval Operations explained in denying Navy Commander's appeal that he took into account Navy Commander's "status as a Surface Warfare Officer commanding an operational warship" and that granting Navy Commander a religious exception would have a detrimental effect on the readiness of Navy Commander and the Sailors serving with him. A440 (Dkt. 66-2, at 2). And the Assistant Commandant of the Marine Corps explained in denying Lieutenant Colonel 2's appeal that vaccination was necessary for Lieutenant Colonel 2 in part because she was "attached to a deployable unit" and "must be prepared to deploy at a moment's notice" and because she was "work[ing] primarily indoors and [could not] perform all of [her] duties remotely." A444 (Dkt. 66-3, at 4).

In their TRO request, plaintiffs alleged that Navy Commander faced imminent removal from command and Lieutenant Colonel 2 faced rescission of her command selection because their religious exception requests had been denied. The district court granted a TRO, barring the military "from diminishing or altering in any manner and for any reason the current status of Navy Commander and Lieutenant Colonel 2" through February 11, 2022. A485 (Dkt. 67, at 10). On February 10, the district court held a preliminary injunction hearing, and, on February 11, extended the TRO through February 18. A774 (Dkt. 85).[5]

[5] Navy Commander is listed in plaintiffs' amended complaint as "Commander Surface Warfare Officer." The district court *sua sponte* joined Navy Commander to the suit when it granted plaintiffs' TRO request. A476 (Dkt. 67).

3. On February 18, the district court issued a preliminary injunction, enjoining the defendants "from enforcing against Navy Commander and Lieutenant Colonel 2 any order or regulation requiring COVID-19 vaccination" and "from any adverse or retaliatory action against Navy Commander or Lieutenant Colonel 2 as a result of, arising from, or in conjunction with Navy Commander's or Lieutenant Colonel 2's requesting a religious exemption, appealing the denial of a request for a religious exemption, requesting reconsideration of the denial of a religious exemption, or pursuing this action or any other action for relief under RFRA or the First Amendment." A1005-06 (Dkt. 111, at 47-48).

The district court first concluded that plaintiffs' claims were justiciable because RFRA "expressly creates a remedy in district court" and "includes no administrative exhaustion requirement." A988 (Dkt. 111, at 30).

The district court next concluded that plaintiffs' RFRA claims were likely to succeed on the merits, reasoning that the military had failed to establish that requiring plaintiffs to be vaccinated was the least restrictive means of achieving a compelling government interest. The district court believed the Navy and Marine Corps' analysis of the relevant interests was insufficiently individualized, concluding that the Navy and Marine Corps had failed to establish that plaintiffs could not use other COVID-19

mitigation measures or continue "under altered conditions including remote work and isolation protocol" and "under altered duties." A999 (Dkt. 111, at 41).[6]

The district court went on to conclude that plaintiffs would suffer irreparable harm absent a preliminary injunction, as they would be forced to choose between "follow[ing] a direct order contrary to a sincerely held religious belief or . . . fac[ing] immediate processing for separation or other punishment." A1003 (Dkt. 111, at 45).

Finally, the district court determined that the balance of the equities and the public interest weighed in favor of a preliminary injunction. According to the district court, "the public has no interest in tolerating even a minimal infringement on Free Exercise," which RFRA protects. A1003 (Dkt. 111, at 45). Moreover, the district court suggested, "to the extent a 'substantial disruption' results from the defendants' systemic failure to assess a religious exemption request 'to the person,' the 'harm' suffered by defendants results only from the defendants' own failure to comply with RFRA." A1004 (Dkt. 111, at 46). Declaring that plaintiffs had "ably discharged their duties" throughout the pandemic despite being unvaccinated, the district court asserted that it saw no "meaningful increment of harm to national defense likely to result because [plaintiffs] continue to serve unvaccinated but in accord with other, proven, rigorous, and successful safety protocols." A1004-05 (Dkt. 111, at 46-47).

[6] The court did not separately analyze plaintiffs' First Amendment claims on the logic that RFRA provides greater protection for a service member than the First Amendment. A987 (Dkt. 111, at 29).

4. Defendants filed a notice of appeal on February 25, *see* A1007 (Dkt. 115), and on February 28 asked the district court to grant an administrative stay and to stay the preliminary injunction pending appeal, A1009 (Dkt. 118). The district court denied defendants' motion for an administrative stay on March 2 and set an evidentiary hearing on defendants' stay motion for March 10. A1093 (Dkt. 122). Although the district court had previously enjoined the military from taking any "adverse" action stemming from plaintiffs' religious exception requests, A1005-06 (Dkt. 111, at 47-48), the court suggested that "the preliminary injunction includes no instructions to the military about composing, training, equipping, or otherwise controlling the military or about assigning, promoting, or demoting anyone," A1103 (Dkt. 122, at 11); *see also id.* ("If the military has a non-retaliatory reason for some adverse action against Navy Commander and Lieutenant Colonel 2, the military can move for a modification of the injunction, which is always an option for a party subject to a preliminary, or even a permanent, injunction."). The court also questioned the basis for the military's "loss of confidence" in plaintiffs, which the court asserted demanded "closer examination." A1103-04 (Dkt. 122, at 11-12).

The district court acknowledged plaintiffs' concession "that the military has a compelling governmental interest in the 'health and safety of the force' and consequently in vaccinating the force," but concluded that the military had failed to demonstrate that requiring plaintiffs be vaccinated against COVID-19 was the least restrictive means for furthering that interest. A1106 (Dkt. 122, at 14). The court also

acknowledged that the Navy and Marine Corps had presented declarations from high-level military commanders explaining that the preliminary injunction "causes irreparable harm because these unvaccinated individuals place themselves and their units at higher risk of illness, hospitalization and death, and this creates a gr[e]ater risk of mission failure." A1108 (Dkt. 122, at 16). The court nevertheless asserted that those declarations failed "to focus on the assignment, duty, and performance of Navy Commander and Lieutenant Colonel 2" and "contain generalizations and conclusions about 'the force' as a whole," without "disaggregat[ing] by age, by medical characteristics (for example, BMI, diabetes, high blood pressure, etc.), by assignment, and the like," saying nothing about "the marginal risk" from plaintiffs not being vaccinated. *Id.*

On March 11, the district court denied defendants' motion for a stay pending appeal. The court reiterated its view that "the defendants remain at liberty to issue commands, assignments, orders, and the like in the normal course of business, including an order directed to Navy Commander or Lieutenant Colonel 2." A1114-15 (Dkt. 133, at 2-3). At the same time, the court invited plaintiffs to move for relief if they were subject to an order that they believed was retaliatory. A1115, A1119 (Dkt. 133, at 3, 7). In the alternative, the court invited defendants to a seek a ruling in advance of any specific order it might want to issue as to Navy Commander or Lieutenant Colonel 2—effectively suggesting that the military pre-clear any assignment decisions for plaintiffs with the court. A1119 (Dkt. 133, at 7). The court also suggested that defendants would

need to support their positions with live testimony in the future, rather than sworn declarations. A1116-17 (Dkt. 133, at 4-5).

5. In the meantime, defendants sought a stay pending appeal in this Court. On March 30, 2022, the Court partially granted and partially denied defendants' motion, staying the injunction "insofar as it precludes the Navy from considering the plaintiffs' vaccination status in making deployment, assignment, and other operational decisions until disposition of this appeal . . . ." Order 3. Following this Court's partial stay, the Navy reassigned Navy Commander to shore duty in Norfolk, Virginia and is assigning a new prospective commanding officer to the commanding officer billet that Lieutenant Colonel 2 was slated to fill later this year.

C. Standard of Review

"The district court's grant of a preliminary injunction is reviewed for abuse of discretion." *America's Health Ins. Plans v. Hudgens*, 742 F.3d 1319, 1329 (11th Cir. 2014). Its "findings of fact underlying the grant of an injunction are reviewed for clear error, and its conclusions of law are reviewed *de novo*." *Id.*

SUMMARY OF ARGUMENT

The district court abused its discretion in granting the preliminary injunction. Until this Court partially stayed that injunction, it effectively required the Navy and the Marine Corps to keep or place plaintiffs in command of hundreds of service members, despite the military's judgment that plaintiffs could not safely and effectively command while remaining unvaccinated. In issuing the preliminary injunction, the court

improperly substituted its views for the military's considered judgments as to plaintiffs' fitness for command and deployment—dismissing the sworn declarations of numerous high-ranking military officials and decades of precedent requiring judicial restraint in the face of military expertise. The preliminary injunction risks substantially undermining our national defense—a grave harm that outweighs any interests plaintiffs may have in avoiding reassignment or other reparable, employment-related consequences during the pendency of this suit.

1. Plaintiffs have not carried their burden of showing a substantial likelihood of success on the merits.

As an initial matter, the preliminary injunction exceeded the district court's authority because it intrudes on a core area of military expertise—determining which service members to entrust with the responsibilities of command. This Court and the Supreme Court have explained that assignment and discipline decisions are not reviewable in civilian courts, as "judges are not given the task of running the Army." *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953); *see also Speigner v. Alexander*, 248 F.3d 1292, 1298 (11th Cir. 2001). The district court erred by second-guessing the military's expertise-laden judgment that plaintiffs are not fit for command and usurping the prerogative of the military and the political branches in this area.

Plaintiffs also failed to demonstrate a substantial likelihood of success on the merits of their RFRA and Free Exercise Clause claims because requiring plaintiffs to be vaccinated against COVID-19 is the least restrictive means of furthering multiple

compelling military interests. *See Austin v. U.S. Navy SEALs 1-26*, No. 21A477, 2022 WL 882559, at *1 (U.S. Mar. 25, 2022) (Kavanaugh, J., concurring). The Navy and the Marine Corps have compelling interests in ensuring that every member of their services be ready to deploy around the world at any time—and, accordingly, in ensuring the military readiness and health of every service member. Those concerns are particularly acute for Navy Commander and Lieutenant Colonel 2 given their responsibilities and their seniority. Not only must plaintiffs be ready to deploy anywhere around the world on short notice, they must do so on naval vessels where traditional mitigation measures, including social distancing, are not feasible and where medical facilities may be limited. As long as plaintiffs remain unvaccinated, they are at a greater risk of catching and spreading COVID-19. And they cannot be deployed to a foreign country with a COVID-19 vaccination requirement. Senior military leaders have therefore determined that Navy Commander and Lieutenant Colonel 2 cannot carry out their duties effectively and safely if they are not vaccinated.

For similar reasons, the district court erred by assuming that interfering with military deployment, assignment, and other operational-duty decisions can qualify as "appropriate relief" under either RFRA or the Free Exercise Clause.

2. The equities also weigh heavily against preliminary relief. Plaintiffs will not be irreparably harmed absent a preliminary injunction. Employment-related harms do not constitute irreparable injury, absent a "genuinely extraordinary situation." *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974). Even if plaintiffs were discharged during the

pendency of the case, they could receive reinstatement and back pay if they prevailed. And, contrary to the district court's suggestion, *see* A1002-03 (Dkt. 111, at 44-45), any "pressure" employment-related harms might create for service members to receive vaccines does not constitute an independent form of irreparable injury.

Plaintiffs' purported harms also are outweighed by the serious harms to military readiness inflicted by the preliminary injunction. Until this Court's partial stay, the preliminary injunction required the Navy and the Marine Corps to keep or place plaintiffs in command notwithstanding the Navy's and the Marine Corps' determination that doing so would unnecessarily risk the health and safety of other service members and undermine military readiness. The preliminary injunction thus effectively took a valuable military asset—a $1.8 billion guided-missile destroyer—out of the Navy's arsenal and prevented the Marine Corps from selecting an officer for command who could actually deploy with her rapid-response battalion around the world. Even as narrowed by this Court, the preliminary injunction continues to require the Navy and the Marine Corps to retain officers in its force who cannot deploy worldwide and in whom the military has lost trust and confidence. Those harms to the national defense—and thus the public interest—outweigh any prospective harm to plaintiffs.

ARGUMENT

A preliminary injunction is an "extraordinary remedy," which should only be granted if a party seeking it has "clearly establish[ed]" an entitlement to that remedy with respect to each of the four requirements for preliminary relief. *Bloedorn v. Grube*,

631 F.3d 1218, 1229 (11th Cir. 2011). Specifically, plaintiffs must show that (1) there is a "substantial likelihood" that they will succeed on the merits; (2) they will be irreparably injured unless an injunction issues; (3) the threatened injury to the plaintiffs "outweighs whatever damage the proposed injunction may cause the opposing party"; and (4) "the injunction would not be adverse to the public interest." *Id.* (quoting *American Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009)). Plaintiffs have not carried their burden as to any of these requirements.

I. The Preliminary Injunction Should Be Vacated Because Plaintiffs Failed To Demonstrate a Likelihood of Success on the Merits.

A. The Preliminary Injunction Exceeds the District Court's Authority.

As this Court and the Supreme Court have repeatedly held, challenges to military assignment and discipline decisions—especially with respect to decisions concerning service members' fitness for command—are not justiciable in civilian courts. By requiring the military to keep Navy Commander in command of a destroyer and to place Lieutenant Colonel 2 in command of a battalion of Marines, the district court usurped an authority reserved to the political branches.

The "Constitution vests '[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force' exclusively in the legislative and executive branches," *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1511 (D.C. Cir. 1989) (alteration in original) (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)). Indeed, "it is difficult to conceive of an area of governmental activity in which the courts

have less competence." *Gilligan*, 413 U.S. at 10. "[J]udges are not given the task of running the Army," *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953), and it is for the military, not the courts, to determine service members' fitness for duty, discipline, and assignments. *See id.* at 92; *Bynum v. FMC Corp.*, 770 F.2d 556, 562-63 (5th Cir. 1985) (noting that "[i]t has long been recognized that interference by civilian courts with military authority inevitably raises both questions about judicial [competency] in this area and separation of powers concerns"); *accord Austin v. U.S. Navy SEALs 1-26*, No. 21A477, 2022 WL 882559, at *1 (U.S. Mar. 25, 2022) (Kavanaugh, J., concurring) (admonishing district court for "insert[ing] itself into the Navy's chain of command" and "overriding military commanders' professional military judgments").

Decisions about command assignments are the quintessential expression of military expertise and discretion. *See, e.g.*, *Harkness v. Secretary of the Navy*, 858 F.3d 437, 444-45 (6th Cir. 2017) (explaining that "[d]uty 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 of its vital operations and would impede its overall preparedness"); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24-25 (2008) (noting that courts must "give great deference" to "professional military judgments" regarding what is needed to ensure military readiness (first quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); then quoting *Gilligan*, 413 U.S. at 10)). Accordingly, the Supreme Court has long held that decisions as to who is placed in command of our troops are beyond the judiciary's competence and are

constitutionally entrusted to the military and political branches. *See, e.g.*, *Orloff*, 345 U.S. at 93-94; *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (warning against suits that "tamper with" the military's command hierarchy).

This Court has echoed that conclusion, as have the other courts of appeals, which routinely find challenges to military assignment and disciplinary decisions to be non-justiciable. *See, e.g.*, *Speigner v. Alexander*, 248 F.3d 1292, 1298 (11th Cir. 2001) ("[C]ivilian courts have traditionally deferred to the superior experience of the military in matters of duty orders, promotions, demotions, and retentions." (quoting *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 771 (7th Cir. 1993))); *Antonellis v. United States*, 723 F.3d 1328, 1336 (Fed. Cir. 2013) ("Courts are in no position to determine the 'best qualified Officer' or the 'best match' for a particular billet."); *Bryant v. Gates*, 532 F.3d 888, 899 (D.C. Cir. 2008) (Kavanaugh, J., concurring) ("[T]he Supreme Court has indicated" that "military decisions and assessments of morale, discipline, and unit cohesion . . . are well beyond the competence of judges."); *Cargill v. Marsh*, 902 F.2d 1006, 1007 (D.C. Cir. 1990) (explaining that courts should not "second-guess the Secretary's decision about how best to allocate military personnel in order to serve the security needs of the Nation" (quoting *Kreis*, 866 F.2d at 1511)); *Pitcher v. Laird*, 415 F.2d 743, 745 (5th Cir. 1969) (per curiam) (declining to stay service member's transfer to Vietnam because "[t]o issue [a] stay order in this instance would in effect constitute an unwarranted judicial revision of a lawful military duty assignment"); *see also Harkness*, 858 F.3d at 443-45 (collecting cases).

The district court's preliminary injunction directly interferes with core military prerogatives to make assignment and command decisions and necessarily second-guesses the military's operational judgment. Until the partial stay, the preliminary injunction required the Navy and Marine Corps to keep or place plaintiffs in command notwithstanding military leaders' assessment that neither was fit to hold such positions. And it forbids the Navy and Marines Corps from disciplining plaintiffs. In issuing the preliminary injunction, the district court stepped beyond its constitutional limits and into a role reserved for military leaders and the political branches. *See U.S. Navy SEALs 1-26*, 2022 WL 882559, at *1 (Kavanaugh, J., concurring) (explaining that the district court in that case had "in effect inserted itself into the Navy's chain of command, overriding military commanders' professional military judgments").

The record reveals the significance of this incursion. The Secretary of Defense "determined that mandatory vaccination against [COVID-19] is necessary to protect the Force and defend the American people"—a decision that was made after consulting with "medical experts and military leadership," A159 (Dkt. 1-4, at 1), including the "Chairman of the Joint Chiefs of Staff, the Secretaries of the Military Departments, [and] the Service Chiefs," A192 (Dkt. 23-2, at 2). And the Navy and the Marine Corps determined that, because plaintiffs are not vaccinated, they could not safely and effectively hold command positions. *See* A549-50 (Dkt. 74-11, at 3-4, ¶¶ 4-5) (explaining that Lieutenant Colonel 2's authority would be undermined because she herself refused to comply with a lawful military order); A556-58 (Dkt. 74-12, at 3-5, ¶¶ 4, 7) (similar

for Navy Commander). In short, senior leaders in the Navy and the Marine Corps determined that Navy Commander and Lieutenant Colonel 2 should not be assigned to command roles because allowing them to hold those roles impairs military readiness, undermines national security, and risks disrupting military operations. By preventing the Navy and Marine Corps from acting on those judgments, the preliminary injunction exceeded the district court's authority.

B. Plaintiffs Failed to Demonstrate a Substantial Likelihood of Success on the Merits of Their Claims.

Even if the district court had authority to second-guess military assignment decisions, it was wrong to grant a preliminary injunction because plaintiffs did not show a substantial likelihood of success on the merits of their RFRA and Free Exercise Clause claims.

1. Plaintiffs' RFRA Claims Lack Merit.

RFRA provides that the federal government "shall not substantially burden a person's exercise of religion" unless the government "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(a)-(b). The military has a compelling interest in mitigating the effect of COVID-19 on its missions, units, and personnel and requiring Navy Commander and Lieutenant Colonel 2 be vaccinated against the virus is the least restrictive means to advance that interest.

a. Requiring Plaintiffs to Be Vaccinated Against COVID-19 Furthers Compelling Military Interests.

Requiring plaintiffs to be vaccinated against COVID-19 furthers compelling military interests, particularly when evaluated against the backdrop of the substantial deference that courts have always given to military operational decisionmaking. "Stemming the spread of COVID-19 is unquestionably a compelling interest . . . ." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam). That is all the more true for the military, given the government's "vital interest" of maintaining a fighting force "that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances." *United States v. O'Brien*, 391 U.S. 367, 381 (1968); *see also U.S. Navy SEALs 1-26*, 2022 WL 882559, at *3 (Alito, J., dissenting) (dissenting from stay order but agreeing that "the Navy has a compelling interest in preventing COVID-19 infection from impairing its ability to carry out its vital responsibilities, as well as a compelling interest in minimizing any serious health risk to Navy personnel").

Extensive record evidence demonstrates that the military has a compelling interest in minimizing the effect of COVID-19 on its service members and ensuring they are healthy and ready to deploy worldwide at any time. *See, e.g.*, A395 (Dkt. 42-3, at 7, ¶ 14); A405 (Dkt. 42-4, at 8, ¶ 11); A552-53 (Dkt. 74-11, at 6-8, ¶¶ 9-10); A557, A560-62 (Dkt. 74-12, at 4, 7-9, ¶¶ 6, 12-13); *see also* A1048-49 (Dkt. 118-4, at 6-7, ¶ 8) ("[E]very Sailor must be deployable" and "be ready to deploy at a moment's notice.");

A1055-57 (Dkt. 118-5, at 6-8, ¶¶ 8, 10) (discussing the Marine Corp's compelling interest in ensuring that "every Marine [is] deployable and ready to fight tonight"). The military thus has a continuing, compelling interest in ensuring that all its troops, including plaintiffs, are vaccinated. *See* A159 (Dkt. 1-4); A395 (Dkt. 42-3, at 7, ¶ 14) (explaining that the Marine Corps has a compelling interest in ensuring "military readiness" and "health and safety" of every service member, as "necessary elements of mission accomplishment"); A405 (Dkt. 42-4, at 8, ¶ 11) (same for Navy).

The Secretary of the Navy has found that COVID-19 "adversely impacts . . . force readiness and mission execution." A214 (Dkt. 23-8, at 2). Unvaccinated service members are at heightened risk of contracting and spreading COVID-19 and of suffering more severe health consequences from contracting the virus. *See, e.g.*, A447 (Dkt. 66-4, at 3, ¶ 2) (explaining that "[u]nvaccinated or partially vaccinated service members are at higher risk to contract COVID-19, and to develop severe symptoms requiring hospitalizations that remove them from their units and impact mission execution"); A544-45 (Dkt 74-10, at 3-4, ¶ 5 & n.1) (summarizing COVID-19 infection rates in the Navy and noting that unvaccinated service members are "more likely to have 'Long COVID,'" which presents "ongoing health problems" after the initial infection). "The environment in which Navy personnel operate—in close quarters for extended periods of time—make[s] them particularly susceptible to contagious respiratory diseases such as COVID-19 and renders mitigation measures such as social distancing unrealistic." A454 (Dkt. 66-4, at 10, ¶ 12).

This compelling interest applies to every service member and is not lessened by the fact that the vast majority of service members have already received the COVID-19 vaccination. *E.g.*, A444 (Dkt. 66-3, at 4) ("For a unit to function effectively, either in garrison, in field training, or in combat, all personnel must be able to perform their individually assigned duties, which ensures military readiness . . . ."); *see also* A396 (Dkt. 42-3, at 8, ¶ 16); A406-07 (Dkt. 42-4, at 9-10, ¶ 13); A1067 (Dkt. 118-6, at 5, ¶ 7). The consequences of even one deployed service member contracting COVID-19 can be severe, particularly when they live and work in close quarters on a ship. *See, e.g.*, A396 (Dkt. 42-3, at 8, ¶¶ 15-16); A407-08 (Dkt. 42-4, at 10-11, ¶ 15); A560-62 (Dkt. 74-12, at 7-9, ¶ 12); *see also* A1031-32, A1035 (Dkt. 118-3, at 6-7, 10, ¶¶ 6, 10); A1047-49 (Dkt. 118-4, at 5-7, ¶¶ 6-8) ("[The] [s]pread of communicable diseases among Sailors who live and work in confined quarters aboard ships . . . can cause mission failure if one or more personnel become too sick to perform their jobs. . . . [I]f a service member becomes severely ill onboard a ship, the ship may have to abandon its mission . . . ."); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010) (recognizing that the government's empirical conclusions are entitled to deference where the government is attempting to prevent harms to national security).

Were a service member to develop severe COVID-19 symptoms while deployed on a Navy destroyer, for example, "it would require the ship to return to port (and abandon its present mission) or arrange for an emergency medical evacuation using a helicopter." A560-62 (Dkt. 74-12, at 7-9, ¶ 12); *see also* A406-07 (Dkt. 42-4, at 9-10,

¶ 13); A1028-29 (Dkt. 118-3, at 3-4, ¶ 2); A1057-59 (Dkt. 118-5, at 8-10, ¶ 11). And even a medical evacuation would likely involve the "long-term loss" of several members of the ship's crew, adversely affecting "the ability of the ship to execute its assigned missions." A560-62 (Dkt. 74-12, at 7-9, ¶ 12). In short, one unvaccinated service member can derail an entire mission.

Similarly, one unvaccinated service member could prevent the military from deploying a battalion or a ship to a country with a COVID-19 vaccination requirement. *See* A552-53 (Dkt. 74-11, at 6-7, ¶ 9) (noting that, as of early February, a number of "key partner nations . . . require[d] those who enter their country to be vaccinated"); A557 (Dkt. 74-12, at 4, ¶ 6) (explaining that Navy Commander's unvaccinated status "limit[ed] the destroyer's worldwide deployability"); *see also* A1031-32 (Dkt. 118-3, at 6-7, ¶ 6) ("[E]very Sailor is important to mission accomplishment and must be available to perform their duties globally when called upon."); A1056-59 (Dkt. 118-5, at 7-10, ¶¶ 10-11) (explaining that "Marines respond to crises around the world" and that, were Lieutenant Colonel 2 to assume her command role, "[s]he [would] very likely need to travel to countries that require a COVID-19 vaccination as a condition of entry or where there are requirements for significant delays to entry because of quarantine requirements for unvaccinated persons"). *See generally* A543 (Dkt. 74-10); A490 (Dkt. 74-4) (summarizing the necessity of having vaccinated military service members).

These issues are especially acute with respect to officers in command roles. Commanding officers have "authority, responsibility and accountability for mission

accomplishment and the readiness, health and welfare" of every service member under their command. *See* A549-50 (Dkt. 74-11, at 3-4, ¶ 4); A558-59 (Dkt. 74-12, at 5-6, ¶¶ 8-9); *see also* A550 (Dkt. 74-11, at 4, ¶ 5) (explaining that "[t]he responsibility of the commanders for their commands is *absolute* except to the extent that the commander is relieved of responsibility by competent authority or by regulations" (alteration in original) (quoting U.S. Marine Corps, PCN 50100342503, *Marine Corps Manual* § 1006, ¶ 2.a (Mar. 21, 1980) (C1-3, May 13, 1996)); A556-57 (Dkt. 74-12, at 3-4, ¶ 5) (describing a similar Navy regulation). If a commanding officer develops severe symptoms from contracting COVID-19, it could dramatically affect his or her ship or battalion's ability to carry out its mission. *See, e.g.*, A552-54 (Dkt. 74-11, at 6-8, ¶¶ 8-10); A560-62 (Dkt. 74-12, at 7-9, ¶ 12); *see also* A1071 (Dkt. 118-6, at 9, ¶ 15). Commanding officers must also "instill a culture of good order and discipline" in their Sailors or Marines. *See* A549-50 (Dkt. 74-11, at 3-4, ¶ 4); A556 (Dkt. 74-12, at 3, ¶ 4). Indeed, because commanding officers are expected to enforce the vaccination requirement, an officer's refusal to comply with the requirement undermines their own authority. A549-50 (Dkt. 74-11, at 3-4, ¶ 4); A558-59 (Dkt. 74-12, at 5-6, ¶ 8); *see also* A1070-71 (Dkt. 118-6, at 8-9, ¶ 14).

As the Secretary of the Navy has found, "[v]accination is the most effective tool we have to prevent widespread manifestation of COVID-19 in [the] force." A214 (Dkt. 23-8, at 2). Admiral William K. Lescher—Vice Chief of Naval Operations and the second-highest ranking uniformed officer in the Navy—concurred, explaining that "[f]ully vaccinated naval forces are required to ensure readiness to carry out Navy

missions throughout the world." A447 (Dkt. 66-4, at 3, ¶ 2); *see id.* ("Vaccination against COVID-19 has proven to be essential in keeping Navy units on mission . . . ."). Indeed, in Admiral Lescher's view, to "order[] unvaccinated personnel into an environment in which they endanger their lives, the lives of others and compromise accomplishment of essential missions" would be a "dereliction of duty" akin to "[s]ending ships into combat without maximizing the crew's odds of success, such as would be the case with ship deficiencies in ordnance, radar, working weapons or the means to reliably accomplish the mission." A453-54 (Dkt. 66-4, at 9-10, ¶ 11); *see also U.S. Navy SEALs 1-26*, 2022 WL 882559, at *1 (Kavanaugh, J., concurring) (quoting Admiral Lescher's declaration). Other military leaders have reiterated the critical role that vaccination plays in ensuring military readiness. *E.g.*, A395-98 (Dkt. 42-3, at 7-10, ¶¶ 14-19); A405-09 (Dkt. 42-4, at 8-12, ¶¶ 11-16); A1055-56 (Dkt. 118-5, at 6-7, ¶ 8) ("Immunizations are a vital component of individual and unit medical readiness, as Marines operate in environments and under conditions that increase their exposure and susceptibility to illness."); *see also* A1067 (Dkt. 118-6, at 5, ¶ 7) ("Having fully vaccinated naval forces is essential to ensure maximum health and readiness of forces to carry out our mission throughout the world and, if required, engage in combat operations.").

Experience has borne out the military's view that "vaccines are the most effective tool the Armed Forces have to keep our personnel safe, fully mission capable[,] and prepared to execute the Commander-in-Chief's orders to protect vital United States' national interests." A453-54 (Dkt. 66-4, at 9-10, ¶ 11). Before COVID-19 vaccines were

available, an outbreak on the U.S.S. Theodore Roosevelt resulted in "more than 4,000 crew removed from the ship and a 51-day loss of mission." A454-55 (Dkt. 66-4, at 10-11, ¶¶ 12-13). By contrast, a December 2021 outbreak on the U.S.S. Milwaukee—where all deployed service members were vaccinated—yielded only mild and asymptomatic infections and resulted in only a "minor deployment delay" of an additional week in port. *Id.*

b. Requiring Plaintiffs to Be Vaccinated Against COVID-19 Is the Least Restrictive Means of Furthering Compelling Military Interests.

The Navy and the Marine Corps have determined that the vaccination of Navy Commander and Lieutenant Colonel 2 is the least restrictive means of ensuring military readiness and furthering the military's compelling interests. Navy Commander and Lieutenant Colonel 2 cannot carry out their duties effectively and safely if they are not vaccinated. These determinations were the result of specific and particularized assessments on the part of the Navy and the Marine Corps and necessarily involved weighing plaintiffs' experience and circumstances against the military's interest in their vaccination. Admiral Michael M. Gilday, the highest-ranking uniformed officer in the Navy and a member of the Joint Chiefs of Staff, personally assessed and denied Navy Commander's appeal. *See* A440-41 (Dkt. 66-2, at 2-3); *see also* A1044-45, A1049-50 (Dkt. 118-4, at 2-3, 7-8, ¶¶ 1-2, 9). In doing so, Admiral Gilday considered Navy Commander's initial request, his appeal, all enclosed materials, and Navy Commander's "status as a Surface Warfare Officer commanding an operational warship." A440 (Dkt.

66-2, at 2); A1045 (Dkt. 118-4, at 3, ¶ 2). He explained that granting Navy Commander's request would "have a direct and foreseeable negative impact on the compelling governmental interest in military readiness and health of the force" and that vaccination was the least restrictive means of achieving these interests. A440 (Dkt. 66-2, at 2). Navy Commander's commanding officer echoed these conclusions and described the particular conditions on a Navy destroyer that necessitate vaccination—namely, the lack of medical facilities on the ship to treat severe COVID-19 symptoms while deployed, and the infeasibility of social distancing or teleworking. A560-62 (Dkt. 74-12, at 7-9, ¶ 12); *see also* A544-45 (Dkt. 74-10, at 3-4, ¶ 5) (describing the risk of "material injury" in permitting Navy Commander to "remain in command of a destroyer at sea" while unvaccinated).

General Eric M. Smith—the second-highest ranking uniformed officer in the Marine Corps—similarly personally assessed and denied Lieutenant Colonel 2's appeal. A442 (Dkt. 66-3, at 2); *see also* A1057-59 (Dkt. 118-5, at 8-10, ¶ 11). In doing so, General Smith considered Lieutenant Colonel 2's initial request, her appeal, her supporting materials, and her current and prospective responsibilities. A443-44 (Dkt. 66-3 at 3-4); *see also* A1052-53, A1057-59 (Dkt. 118-5, at 3-4, 8-10, ¶¶ 2, 11). General Smith explained that Lieutenant Colonel 2 "must be prepared to deploy at a moment's notice" and could not carry out her duties remotely. A444 (Dkt. 66-3, at 4); *see also* A1057-59 (Dkt. 118-5, at 8-10, ¶ 11) (explaining that Lieutenant Colonel 2 was slated to embark "on a ship in confined quarters and where mitigation measures are virtually impossible to enforce"

and would "likely need to travel to countries that require a COVID-19 vaccination as a condition of entry"). Given Lieutenant Colonel 2's responsibilities, and given "the government's compelling interests in military readiness and the health and safety of the force," vaccination was the least restrictive means of vindicating these interests. A444 (Dkt. 66-3, at 4); *see also* A1056-59 (Dkt. 118-5, at 7-10, ¶¶ 9-11). Lieutenant Colonel 2's commanding officer observed the same, noting in particular that Lieutenant Colonel 2 could not "effectively lead Marines when she herself cannot deploy with them." A552-54 (Dkt. 74-11, at 6-8, ¶¶ 9-10); *accord* A1055-59 (Dkt. 118-5, at 6-10, ¶¶ 8-11).

Courts have held in non-military settings that a vaccination requirement is the least restrictive means of vindicating the government's interest in preventing the spread of infectious diseases. *See, e.g.*, *We the Patriots USA Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021) (per curiam) (rejecting challenge to COVID-19 vaccination requirement that included no religious exception); *Does 1-6 v. Mills*, 16 F.4th 20 (1st Cir. 2021) (similar), *cert. denied sub nom. Does 1-3 v. Mills*, 142 S. Ct. 1112 (2022). The Supreme Court denied emergency requests for injunctive relief in both of these cases. *See Dr. A v. Hochul*, 142 S. Ct. 552 (2021); *Does 1-3 v. Mills*, 142 S. Ct. 17 (2021). More generally, even while concluding that the government had not shown that a contraceptive coverage mandate was the least restrictive means to advance its compelling interests, the Court emphasized that "[o]ther coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases)

and may involve different arguments about the least restrictive means of providing them." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014).

The case is even clearer in the military context. Vaccines are singularly effective at preventing COVID-19 infection and reducing the severity of illness. *See supra* pp. 30-32. And neither plaintiffs nor the district court has been able to identify any viable less restrictive means of furthering the Navy's and the Marine Corps' compelling interests. To the contrary, plaintiffs ask the military to simply tolerate the added risks posed by deploying unvaccinated high-ranking officers. Requiring plaintiffs to be vaccinated against COVID-19 is thus the least restrictive means of furthering the military's compelling interests in minimizing avoidable risks to mission success and in ensuring that its commanding officers are as prepared as possible to oversee their missions and to protect the service members in their charge.

c. The District Court's Reasons for Concluding that the Navy Has Violated RFRA Do Not Withstand Scrutiny.

The district court erred in supplanting the military's reasonable, expert evaluation of the evidence regarding the necessity of COVID-19 vaccination. *See Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) (explaining that "judgments concerning military operations and needs . . . unquestionably" require deference (citation omitted)). The district court imposed its own judgments about the "comparative effectiveness" of vaccines vis-à-vis "natural immunity" in maintaining a ready military force, A995 (Dkt. 111, at 37 n.10), discounted the effect of vaccine refusal on good order and discipline in the military,

A1000 (Dkt. 111, at 42), and ignored the declarations addressing the military's particularized compelling interest in vaccinating Navy Commander and Lieutenant Colonel 2. In substituting its own evaluation for the military's, the district court far exceeded its authority. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2421-22 (2018) (declining in matters of national security to "substitute" the Court's own "predictive judgments," or its own "evaluation of the underlying facts," for those of the President). The Navy and Marine Corps have determined that vaccination is the most effective means of mitigating the risk to their missions, units, and personnel from COVID-19. The assessment of such operational risks is squarely within the military's purview, not the judiciary's.[7]

In particular, the district court misconstrued the record in concluding that the military failed to conduct a case-by-case assessment of plaintiffs' religious exception requests. A1002 (Dkt. 111, at 44); *see* A440 (Dkt. 66-2) (appeal denial for Navy Commander); A442 (Dkt. 66-3) (similar for Lieutenant Colonel 2); *see also* A1044 (Dkt. 118-4) (describing individualized assessment for Navy Commander); A1051 (Dkt. 118-

[7] The Fifth Circuit made a similar error in denying the military's request for a partial stay pending appeal of a similar preliminary injunction in *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336 (5th Cir. 2022) (per curiam), wrongly rejecting the Navy's assessment that certain members of the Navy special warfare community must be vaccinated to effectively carry out their duties, *see id.* at 351-53. As noted above, the Supreme Court has since granted the government's request for a partial stay pending appeal, staying the preliminary injunction "insofar as it precludes the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions." *Austin v. U.S. Navy SEALs 1-26*, 2022 WL 882559 (per curiam).

5) (similar for Lieutenant Colonel 2). Although the court noted similarities between the appeal denial letters in the record, A994-1002 (Dkt. 111, at 36-44), it failed to recognize that many of the Navy's and Marine Corps' reasons for requiring vaccination are generally applicable—for example, the fact that unvaccinated service members cannot deploy worldwide, *see, e.g.*, A444 (Dkt. 66-3, at 4); *see also* A440 (Dkt. 66-2, at 2); A1048 (Dkt. 118-4, at 6, ¶ 7) (explaining that the Navy's concern for the spread of communicable diseases applies with particular force "to those in deployable units"). The court also ignored that each letter contains individualized analysis and failed to account for voluminous record materials filed under seal that further elaborate on why there are no less-restrictive means for promoting defendants' compelling interests with respect to Navy Commander and Lieutenant Colonel 2 based on their roles, their responsibilities, and the requirements for deployment. *See, e.g.*, A761, A775, A780, A782 (Dkts. 81, 87, 90, 103).

The district court further erred in several additional respects. For example, the court placed undue weight on plaintiffs' testimony that they had conducted successful missions during the pandemic while unvaccinated. *See* A968 (Dkt. 111, at 10). As a preliminary matter, missions conducted before the vaccine were, in fact, constrained. *See, e.g.*, A529-33 (Dkt. 74-5, at 3-7, ¶¶ 5-13); *see also* A454-55 (Dkt. 66-4, at 10-11, ¶¶ 12-13); A1039 (Dkt. 118-3, at 14, ¶ 14) (highlighting the cost to readiness caused by mitigation policies requiring isolation). In any event, past good fortune is no guarantee of future success, and the Navy and the Marine Corps are not required to wait until an

unvaccinated service member actually contracts COVID-19 and jeopardizes a vital mission before acting to prevent that kind of grave harm. *Ramirez v. Collier*, No. 21-5592, 2022 WL 867311, at *18 n.2 (U.S. Mar. 24, 2022) (Kavanaugh, J., concurring) ("[I]n assessing risk, a government need not wait for the flood before building the levee."). The military need not establish that all of its missions would fail without vaccination; it must simply demonstrate that vaccination is the least restrictive method of vindicating its compelling interest in maximizing military readiness and the likelihood of mission success. Defendants have done so. The military required COVID-19 vaccination as soon as a vaccine received full FDA approval. The fact that there was previously a period when vaccines had not been developed or approved does not mean the military has no compelling interest in preventing COVID-19 infections among service members going forward or that vaccination is not currently the least restrictive means of vindicating that interest. To hold otherwise would cast doubt on the military's ability to implement other new techniques or technologies when doing so would significantly reduce operational risks.

Moreover, contrary to the district court's suggestion, A997-98 (Dkt. 111 at 39-40), plaintiffs' relative seniority *enhances* the military's interest in their vaccination, as the consequences for military readiness if plaintiffs were to get seriously ill or be barred from entering a country on a deployment would be even more severe than for lower-ranking service members. *See supra* pp. 29-30; *see also* A1089-90 (Dkt. 118-7, at 6-7, ¶ 9) (noting that Lieutenant Colonel's Marine Expeditionary Unit would not be able to

effectively conduct certain operations on account of her being unvaccinated); A1071 (Dkt. 118-6, at 9, ¶ 15) (describing Navy Commander as a "critical member of the [destroyer's] command").

2. Plaintiffs' Free Exercise Clause Claims Lack Merit.

If the Court concludes that plaintiffs have not shown that they are likely to succeed on their RFRA claims, it need not separately address plaintiffs' Free Exercise Clause claims, as the vaccination requirement would necessarily survive strict scrutiny, the most demanding standard that could apply under the First Amendment. Indeed, the district court did not address plaintiffs' First Amendment claims for that reason. *See* A987, A993 (Dkt. 111, at 29, 35 n.9).

In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that neutral laws of general applicability need not be justified by a compelling interest to satisfy the Free Exercise Clause. *See id.* at 878-79; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). The Navy and Marine Corps' COVID-19 vaccination requirements are facially neutral toward religion: they require all non-exempted active-duty Navy and Marine Corps service members to be fully vaccinated, not just service members who decline vaccination for religious reasons. A264 (Dkt. 23-18, at 4, ¶ 4); A309 (Dkt. 23-19, at 5, ¶ 5); A545-47 (Dkt. 74-10, at 4-6, ¶¶ 6-7); *cf. Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1177 (9th Cir. 2021) (holding that a COVID-19 vaccination requirement for students was facially neutral because "[t]he terms of the mandate do not make any

reference to religion or 'a religious practice without a secular meaning discernable from the language or context'" (quoting *Lukumi*, 508 U.S. at 533)); *see also Kane v. De Blasio*, 19 F.4th 152, 164 (2d Cir. 2021) (per curiam) (holding that a COVID-19 vaccination requirement for school staff was facially neutral because "[i]ts restrictions apply equally to those who choose to remain unvaccinated for any reason").

Nor have plaintiffs made any showing that "the object of" the vaccination requirements "is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. The Navy's and the Marine Corps' determinations that Navy Commander and Lieutenant Colonel 2 must be vaccinated turn exclusively on whether the vaccination requirement is narrowly tailored to achieve a compelling government interest. *See supra* pp. 8, 32-35. They do not involve any judgments about whether their reasons for requesting a religious exception are "worthy of solicitude." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1879 (2021).

As described above, the military's purpose in requiring COVID-19 vaccination is to protect the health and safety of its force and to promote military readiness. Its interest in vaccination is equally strong regardless of why a given service member is not vaccinated. *See supra* Part I.B.1.a. The fact that many requests for religious exceptions have been denied is not evidence that the military has sought to restrict religious practices. Rather, it is the natural result of the military's compelling interest in ensuring that as many service members as possible are vaccinated and ready to deploy. *See, e.g.*, A552 (Dkt. 74-11, at 6, ¶ 8) (explaining that the unit that Lieutenant Colonel 2 was

selected to command was "slated to deploy" as part of a unit that may "travel anywhere in the world"); A557, A562 (Dkt. 74-12, at 4, 9, ¶¶ 6, 13) (explaining that the destroyer formerly under Navy Commander's command was "preparing for deployment" and could be deployed on a very fast turnaround); *see also* A1057-59 (Dkt. 118-5, at 8-10, ¶ 11) ("[T]he few exemptions to the vaccine are a direct reflection of the Marine Corps' *commitment* to the daunting and unrelenting demands the Nation requires of us, as the most flexible, versatile, and adaptable Service, to execute any mission immediately anywhere in the world.").

Nor does the fact that the Navy and the Marine Corps have granted more medical exceptions than religious exceptions mean that they are disfavoring religion. The vast majority of medical exceptions are temporary and last only as long as the medical condition or contraindication at issue. *See Doe*, 19 F.4th at 1179 (concluding that a 30-day vaccination exemption did not "undermine [a school district's] asserted interests in student health and safety the way a religious exemption would"). Moreover, medical exceptions facilitate service members' fitness for duty—the same interest that underlies the military's COVID-19 vaccination requirement—and the military can and does consider the condition occasioning the medical exception in making decisions as to the service member's training, assignments, and ability to continue on in service. *See* A541-42 (Dkt. 74-8, at 6-7, ¶ 11); A492-94 (Dkt. 74-4, at 4-6, ¶¶ 6-8).

3. The Preliminary Injunction Is Not Appropriate Relief

Insofar as the preliminary injunction dictates the Navy's deployment, assignment, and operational decisions, it also does not represent "appropriate relief" under RFRA. 42 U.S.C. § 2000bb-1(c). Nor does it comport with "traditional principles of equity jurisdiction," *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999) (quotation marks omitted), which constrain the available relief on plaintiffs' Free Exercise Clause claims, *see Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327-28 (2015). An injunction that trenches on core Article II prerogatives concerning which military service members are qualified for which missions is both unprecedented and inconsistent with those traditional principles. *See U.S. Navy SEALs 1-26*, 2022 WL 882559, at *1 (Kavanaugh, J., concurring).

The fact that, as the district court noted, "RFRA secures for a service member a claim against the military for violation of Free Exercise," A987 (Dkt. 111, at 29); *see also* A1102-03 (Dkt. 122, at 10-11), does not mean that there are no limits on the type of relief the district court may provide. While RFRA applies to the military, Congress did not intend for RFRA to supplant military judgments or provide civilian courts oversight of military deployment and command assignments. *Cf. United States v. Webster*, 65 M.J. 936, 946-48 (2008) (rejecting argument that RFRA entitled Muslim service member to challenge his deployment to Iraq in support of Operation Iraqi Freedom). Indeed, when enacting RFRA, Congress expressly noted that "courts have always recognized the compelling nature of the military's interest" in "good order, discipline, and security"

and have "always extended to military authorities significant deference in effectuating those interests"—a practice that Congress "intend[ed] and expect[ed] . . . w[ould] continue under [RFRA]." S. Rep. No. 103-111, at 12 (1993); *see also* H.R. Rep. No. 103-88, at 8 (1993).

II. Plaintiffs Also Failed To Show Irreparable Injury or that the Balance of Harms and the Public Interest Favor Preliminary Relief.

A. Plaintiffs Failed to Demonstrate Irreparable Injury.

The district court also erred in issuing a preliminary injunction because plaintiffs failed to show that they will likely suffer irreparable harm absent injunctive relief. *Swain v. Junior*, 961 F.3d 1276, 1292 (11th Cir. 2020) (describing the necessity of demonstrating irreparable harm as the "*sine qua non* of injunctive relief" (quotation marks omitted)). To establish irreparable harm, plaintiffs must show that they have "no adequate remedy at law." *Transcontinental Gas Pipe Line Co. v. 6.04 Acres, More or Less, Over Parcel(s) of Land of Approximately 1.21 Acres, More or Less, Situated in Land Lot 1049*, 910 F.3d 1130, 1165 (11th Cir. 2018). If there is a "possibility that adequate compensatory or other corrective relief will be available at a later date," plaintiffs cannot establish that the harm is, in fact, irreparable. *Northeastern Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). The standard is particularly demanding in the military context. *See Pitcher*, 415 F.2d at 745 ("The fact that appellant may be shipped to Vietnam is not an 'irreparable injury'

to one who is lawfully in the service and subject to lawfully issued military orders."); *see also Guitard v. U.S. Sec'y of the Navy*, 967 F.2d 737, 742 (2d Cir. 1992).

Military assignment decisions do not constitute irreparable injury. Even if a service member is discharged—a process that takes many months for a senior officer—he or she could be reinstated and could receive back pay. *See Chappell,* 462 U.S. at 302-03 (describing the "comprehensive internal system of justice" that Congress has established "to regulate military life," which "provides for the review and remedy of complaints and grievances," including plaintiffs' assignments); *see also*, *e.g.*, *McCurdy v. Zuckert*, 359 F.2d 491, 493-94 (5th Cir. 1966) (finding that separation from service with a general discharge is not irreparable); *Chilcott v. Orr*, 747 F.2d 29, 34 (1st Cir. 1984) (same); *see also Hartikka v. United States*, 754 F.2d 1516, 1518 (9th Cir. 1985) (reversing district court's grant of preliminary injunction and holding that the "loss of income, loss of retirement and relocation pay, and damage to [the plaintiff's] reputation" did "'not support a finding of irreparable injury, however severely they may affect a particular individual'" (quoting *Sampson*, 415 U.S. at 92 n.68)).

In any event, the prospect that plaintiffs may face discipline or administrative separation in the future is neither concrete nor imminent. Navy Commander and Lieutenant Colonel 2 are not currently facing such proceedings. *See Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (per curiam) ("As we have emphasized on many occasions, the asserted irreparable injury must be neither remote nor speculative, but actual and imminent." (internal quotation marks omitted)); *Chacon v. Granata*, 515 F.2d

922, 925 (5th Cir. 1975) ("An injunction is appropriate only if the anticipated injury is imminent or irreparable."). Were the military to initiate discipline or separation proceedings against either plaintiff, those proceedings would take place over many months, during which time plaintiffs would not have to undergo vaccination, would be entitled to counsel, and would have further opportunity to present evidence and to argue that they should be retained in their respective Services. A276-77 (Dkt. 23-18, at 16-17, ¶¶ 18-19.a); A317-19 (Dkt. 23-19, at 13-15, ¶¶ 14, 16-18).

The district court reasoned that, absent an injunction, plaintiffs would face "substantial pressure" to violate their sincerely held religious beliefs. A1002 (Dkt. 111, at 44-45). But that does not constitute irreparable injury in this context. As the Supreme Court has explained, employment-related harms, including those alleged by plaintiffs here, do not constitute irreparable injury, absent a "genuinely extraordinary situation." *Sampson*, 415 U.S. at 92 n.68. As courts have recognized, *Sampson*'s "reasoning applies with as much or greater force in the case of a military discharge." *Guitard*, 967 F.2d at 742; *see also, e.g.*, *Chilcott*, 747 F.2d at 33 (holding that "the rule in *Sampson* should be applied to military personnel"); *Hartikka*, 754 F.2d at 1518 (same). The district court's suggestion that irreparable harm exists whenever there is religious pressure in the workplace, *see* A1002 (Dkt. 111, at 44), is irreconcilable with the high bar that the Supreme Court set in *Sampson*.

B. The Balance of Equities and the Public Interest Weigh Against Preliminary Relief.

Plaintiffs have not demonstrated that the public interest and the balance of harms—which "merge when the Government is the opposing party," *Nken v. Holder*, 556 U.S. 418, 435 (2009)—favor preliminary relief.

Enjoining the Navy and the Marine Corps from applying their COVID-19 vaccination requirements to plaintiffs harms military readiness and, by extension, the national defense and the public interest. Until this Court granted a partial stay, the preliminary injunction gravely impaired the military's ability to effectively deploy a $1.8 billion guided-missile destroyer and a forward-deployed battalion of Marines. In weighing these interests, courts must "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Winter*, 555 U.S. at 24 (quoting *Goldman*, 475 U.S. at 507). Here, as Admiral Lescher explained, "[r]estriction of the Navy's ability to reassign unvaccinated personnel in order to mitigate COVID-19 related risks to units preparing to deploy, or that are deployed, will cause direct and immediate impact to mission execution." A447 (Dkt. 66-4, at 3, ¶ 2).

As explained, plaintiffs cannot safely and effectively carry out their duties while they remain unvaccinated. *See supra* Part I.B.1. Plaintiffs could not enter foreign countries with vaccination requirements, and would not be deployable worldwide. *E.g.*, A552-53 (Dkt. 74-11, at 6-7, ¶ 9). Were plaintiffs to fall seriously ill with COVID-19

while deployed, a medical evacuation might be necessary, which would risk the lives of other service members and endanger their underlying missions. A454 (Dkt. 66-4, at 10, ¶ 12); A560-62 (Dkt. 74-12, at 7-9, ¶ 12). Moreover, while unvaccinated, plaintiffs are more likely to spread COVID-19 to other service members, particularly given the close quarters in which they necessarily work. *See* A238-39 (Dkt. 23-15, at 5-6, ¶ 9); A257 (Dkt. 23-16, at 5, ¶ 8). And unvaccinated service members infected with COVID-19 could experience the effects of "long COVID," which can cause various ailments, such as fatigue, functional mobility impairments, and respiratory abnormalities for months after infection. A238-39 (Dkt. 23-15, at 5-6, ¶¶ 8-9); A544-45 (Dkt. 74-10, at 3-4, ¶ 5 & n.1). Forcing the Navy and the Marines Corps to accept these preventable risks is not in the public interest.

The injunction also undermines the public interest by barring the Navy and Marine Corps from implementing discipline and adverse action consistent with its ordinary military processes. The Navy's and the Marine Corps' "interest in good order and discipline is best served by adjudicating each refusal [to comply with the vaccine directive] on a case-by-case basis." A282 (Dkt. 23-18, at 22, ¶ 23); A321 (Dkt. 23-19, at 17, ¶ 23). By halting that process, the injunction is "a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities." *Orloff*, 345 U.S. at 95. The injunction therefore contravenes the "strong judicial policy against interfering with the internal affairs of the armed forces." *Chilcott*, 747 F.2d at 33. This harm is especially egregious with regard to Navy Commander, in whom the Navy lost trust for other

reasons as well: he misled his commanding officer about a recent leave request, A766-71 (Dkt. 81-1, at 3-8, ¶¶ 8-18); A772 (Dkt. 83-1), and he exposed dozens of his crew to COVID-19 in December 2021, having initially failed to test himself for the virus or to quarantine after experiencing symptoms, A765-66 (Dkt. 81-1, at 2-3, ¶¶ 4-7).

By extension, the preliminary injunction harms the military's effectiveness by undermining its culture of obedience to lawful orders. *See* A549-50 (Dkt. 74-11, at 3-4, ¶¶ 4-5); A556, A558-59 (Dkt. 74-12, at 3, 5-6, ¶¶ 4, 8-9); *see also* A1037 (Dkt. 118-3, at 12-14, 16-17, ¶¶ 14, 17). As the Supreme Court has explained, "[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection." *Chappell*, 462 U.S. at 300. Were the Navy and Marine Corps required to keep or place plaintiffs in command roles, their unvaccinated status would undermine their authority as commanding officers, as they would be tasked with enforcing the vaccination requirement while failing to comply with it themselves. A551, A553-54 (Dkt. 74-11, at 5, 7-8, ¶¶ 7, 10); A560, A563 (Dkt. 74-12, at 7, 10, ¶¶ 11, 15); *see also* A1070-71 (Dkt. 118-6, at 8-9, ¶ 14). And the Navy and Marine Corps would be forced to place hundreds of Sailors and Marines under the command of officers in whom it has lost trust and confidence. A549-51 (Dkt. 74-11, at 3-5, ¶¶ 4-5, 7); A556-57 (Dkt. 74-12, at 3-4, ¶ 5).

More generally, the preliminary injunction undermines the strong public interest in slowing the spread of COVID-19 among millions of service members and the

members of the public with whom they interact. Underscoring the government's "compelling interest" in "[s]temming the spread of COVID-19," *Roman Catholic Diocese*, 141 S. Ct. at 67, this Court has recognized the government's "particularly compelling" interest in reducing the spread of COVID-19 in settings where infection could result in "severe complications," as in deployed service members. *Florida v. Dep't of Health & Human Servs.*, 19 F.4th 1271, 1293 (11th Cir. 2021). Similarly, numerous courts reviewing "executive action designed to slow the spread of COVID-19" have concluded that "[t]he public interest in protecting human life—particularly in the face of a global and unpredictable pandemic—would not be served by" an injunction. *Tigges v. Northam*, 473 F. Supp. 3d 559, 574 (E.D. Va. 2020); *see also, e.g.*, *Church v. Biden*, No. 21-cv-2815, 2021 WL 5179215, at *18-19 (D.D.C. Nov. 8, 2021); *Rydie v. Biden*, No. 21-cv-2696, 2021 WL 5416545, at *5-6 (D. Md. Nov. 19, 2021). The same logic applies here.

The district court declared that "the public has no interest in tolerating even a minimal infringement on Free Exercise." A1003 (Dkt. 111, at 45). But the military has not infringed on plaintiffs' Free Exercise rights, *see supra* Part I.B.2. And in any event, the balance of interests weighs heavily against the entry of preliminary injunctive relief in light of the injunction's threat to military readiness and national defense.

CONCLUSION

For the foregoing reasons, the preliminary injunction should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,718 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Sarah J. Clark
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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

/s/ Sarah J. Clark
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ADDENDUM

TABLE OF CONTENTS

42 U.S.C. § 2000bb

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb-1

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

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.

(c) Judicial relief

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. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-2

§ 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. § 2000bb-3

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

42 U.S.C. § 2000bb-4

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.