
IN THE SUPREME COURT OF THE UNITED STATES

LT. COL. JONATHAN DUNN,
Applicant,

v.

LLOYD J. AUSTIN, III, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF
DEFENSE; FRANK KENDALL, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY
OF THE AIR FORCE; COL. GREGORY HAYNES, IN HIS OFFICIAL CAPACITY;
MAJ. GEN. JEFFREY PENNINGTON, IN HIS OFFICIAL CAPACITY;
UNITED STATES DEPARTMENT OF DEFENSE,
Respondents.

**MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND TO SUBMIT
PAPER COPIES ON 8.5-BY-11-INCH PAPER OF THE STATES OF
MISSISSIPPI, ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA,
GEORGIA, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSOURI,
MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH DAKOTA,
OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, VIRGINIA,
WEST VIRGINIA, AND WYOMING**

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The States of Mississippi, Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, Texas, Utah, Virginia, West Virginia, and Wyoming respectfully move for leave to file a brief as amici curiae in support of applicant and the Emergency Application for Injunction Pending Appeal and Certiorari or, in the Alternative, for Certiorari Before Judgment, without 10 days' notice to the parties of amici's intent to file. The States also respectfully move for leave to file this brief on 8.5-by-11-inch paper rather than in booklet form.

Given the expedited nature of the application—which was filed yesterday—it was infeasible for the States to provide 10 days' notice of their intent to file. Counsel of record for all parties received notice on Friday, April 8, 2022, of undersigned counsel's intent to file this brief. Applicant consents to the filing of this brief; respondents take no position. In light of the expedited proceedings and emergency nature of the application, the States also ask that the Court accept their brief in 8.5-by-11-inch paper rather than booklet form.

Granting leave to the States and accepting their brief is further warranted because the States have a strong interest in this case and have important experience that will help the Court in ruling on the application. Amici regularly confront the challenge presented in this case, where a sincere claim of religious freedom competes with powerful government interests. Every day, amici pursue such interests—managing prisons, maintaining public order, enforcing drug laws, policing, quelling violence, overseeing public property, and more. At the same time, amici are committed to protecting religious freedom. All amici respect the restrictions imposed by the Free Exercise Clause, several amici have enacted statutes analogous to the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* (RFRA), and amici regularly defend religious liberty in litigation.

Amici know well the challenges that come with these competing commitments, and so amici respect the challenge the federal government faces in this case. In areas of particularly sensitive government interests, amici agree that courts should respect the professional judgments of experienced officials. In military affairs, for example, military officials exercising professional judgment are due respect for their decisions. The same holds true at the state level. The prison-safety decisions of state correctional authorities, for example, deserve respect.

But even when government interests are compelling, religious exercise demands respect too. The amici States have a powerful interest in holding true the balance between pursuing important state interests and protecting sincerely held religious beliefs. Respect for policymakers' judgments should not be permitted to mask abuse of religious freedom.

The amici States have still further experience of special relevance to this case. For years now, the States have managed the COVID-19 pandemic in their own borders. The States have seen what works in managing COVID-19, what does not work, and how fundamental freedoms—such as religious exercise—can flourish even in the pandemic. And over the past year, amici have challenged many of the federal government's major policies addressing the pandemic. The States know well the federal government's COVID-19 response. That response has been beset by tenuous claims of legal authority, policies adopted despite the evidence undercutting them, and a willingness to override basic liberties. The federal government has often claimed deference in urging courts to let its policies stand. It invokes deference again in this case.

This brief is submitted in light of the amici States' experience defending religious freedom, promoting government interests that may compete with religious exercise, managing COVID-19 within their borders, and successfully challenging the

legality of the Administration’s response to the pandemic. The States’ brief explains that the Administration’s actions over the past year should—even in the sensitive context of military affairs—make this Court skeptical of its claims for deference.

The States therefore respectfully ask that the Court grant leave to file this brief and to submit it in 8.5-by-11-inch paper.

Respectfully submitted.

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April 12, 2022

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VIRGINIA, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN
SUPPORT OF APPLICANT AND THE EMERGENCY APPLICATION**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION AND INTEREST OF AMICI CURIAE..... 1

SUMMARY OF ARGUMENT 2

REASONS FOR GRANTING THE APPLICATION 3

 I. Deference Is Warranted For Military Decisions On Military Matters,
 But Policymakers’ Actions Can Erode The Deference That Policies
 Governing The Military Might Otherwise Enjoy 3

 II. The Administration’s Actions Over The Past Year Undermine Its Claim
 To Deference In This Case 6

CONCLUSION..... 20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Alabama Ass’n of Realtors v. HHS</i> , 141 S. Ct. 2320 (2021)	7, 8
<i>Alabama Ass’n of Realtors v. HHS</i> , 141 S. Ct. 2485 (2021) (per curiam)	8, 12
<i>Alabama Ass’n of Realtors v. HHS</i> , 539 F. Supp. 3d 211 (D.D.C. 2021)	7
<i>Austin v. U.S. Navy Seals 1-26</i> , — S. Ct. —, No. 21A477, 2022 WL 882559 (U.S. Mar. 25, 2022).....	5, 6, 20
<i>Biden v. Missouri</i> , 142 S. Ct. 647 (2022) (per curiam)	14
<i>BST Holdings, LLC v. OSHA</i> , 17 F.4th 604 (5th Cir. 2021).....	12, 15, 16, 18
<i>Feds for Medical Freedom v. Biden</i> , 25 F.4th 354 (5th Cir. 2022) (per curiam)	13
<i>Feds for Medical Freedom v. Biden</i> , — F.4th —, No. 22-40043, 2022 WL 1043909 (5th Cir. Apr. 7, 2022).....	14
<i>Feds for Medical Freedom v. Biden</i> , — F. Supp. 3d —, No. 3:21-CV-356, 2022 WL 188329 (S.D. Tex. Jan. 21, 2022).....	13, 14
<i>Florida v. HHS</i> , 19 F.4th 1271 (11th Cir. 2021).....	14
<i>Georgia v. Biden</i> , — F. Supp. 3d —, No. 1:21-CV-163, 2021 WL 5779939 (S.D. Ga. Dec. 7, 2021).....	13
<i>Gilligan v. Morgan</i> , 413 U.S. 1 (1973)	4
<i>Goldman v. Weinberger</i> , 475 U.S. 503 (1986)	3, 4, 17
<i>Holt v. Hobbs</i> , 574 U.S. 352 (2015)	5, 6

<i>Kentucky v. Biden</i> , 23 F.4th 585 (6th Cir. 2022)	13
<i>Louisiana v. Becerra</i> , — F. Supp. 3d —, No. 3:21-CV-04370, 2022 WL 16571 (W.D. La. Jan. 1, 2022)	14
<i>National Federation of Independent Business v. OSHA</i> , 142 S. Ct. 661 (2022) (per curiam)	12, 13, 15
<i>Ramirez v. Collier</i> , — U.S. —, 2022 WL 867311 (U.S. Mar. 24, 2022)	5, 6, 19
<i>Texas v. Becerra</i> , — F. Supp. 3d —, No. 5:21-CV-300, 2021 WL 6198109 (N.D. Tex. Dec. 31, 2021)	14
<i>U.S. Navy Seals 1-26 v. Biden</i> , — F. Supp. 3d —, No. 4:21-CV-01236-O, 2022 WL 34443 (N.D. Tex. Jan. 3, 2022)	5
<i>Winter v. Natural Resources Defense Council, Inc.</i> , 555 U.S. 7 (2008)	3

Statutes

5 U.S.C. § 3301	10, 11
5 U.S.C. § 3302	10
5 U.S.C. § 7301	10
10 U.S.C. § 774	4
29 U.S.C. § 651 <i>et seq.</i>	10
29 U.S.C. § 655	10
40 U.S.C. § 101	10
40 U.S.C. § 101 <i>et seq.</i>	10
42 U.S.C. § 1395x	14
42 U.S.C. § 2000bb <i>et seq.</i>	1
42 U.S.C. § 2000cc <i>et seq.</i>	5

Executive Orders

Executive Order 13999, <i>Protecting Worker Health and Safety</i> , 86 Fed. Reg. 7211 (Jan. 21, 2021)	7
---	---

Executive Order 14042, <i>Ensuring Adequate COVID Safety Protocols for Federal Contractors</i> , 86 Fed. Reg. 50985 (Sept. 9, 2021).....	9, 10, 11, 13, 16
Executive Order 14043, <i>Requiring Coronavirus Disease 2019 Vaccination for Federal Employees</i> , 86 Fed. Reg. 50989 (Sept. 9, 2021).....	9, 10, 13, 16
Miss. Executive Order 1463 (Mar. 24, 2020).....	19
Rulemakings	
<i>COVID-19 Vaccination and Testing; Emergency Temporary Standard</i> , 86 Fed. Reg. 61402 (Nov. 5, 2021)	9, 10, 11, 12, 13, 15, 16
<i>COVID-19 Vaccination and Testing; Emergency Temporary Standard</i> , 87 Fed. Reg. 3928 (Jan. 26, 2022)	13
<i>Medicare and Medicaid Programs;</i> <i>Omnibus COVID-19 Health Care Staff Vaccination</i> , 86 Fed. Reg. 61555 (Nov. 5, 2021)	9, 14, 16
<i>Occupational Exposure to COVID-19; Emergency Temporary Standard</i> , 86 Fed. Reg. 32376 (June 21, 2021).....	7, 8, 10, 16
<i>Vaccine and Mask Requirements To Mitigate the Spread of COVID-19 in Head Start Programs</i> , 86 Fed. Reg. 68052 (Nov. 30, 2021)	9, 12, 13, 14, 16
Other Authorities	
<i>CDC COVID Data Tracker</i>	16
H.R. Rep. No. 103-88	4, 5
Oral Argument Transcript, <i>National Federation of Independent Business v. OSHA</i> , 142 S. Ct. 661 (2022)	15
Callie Patteson, <i>Biden chief apparently admits vaccine mandate 'ultimate work-around,'</i> N.Y. Post (Sept. 10, 2021).	15
S. Rep. No. 103-111.....	5
U.S. Department of Defense, <i>Coronavirus: DOD Response</i>	17, 18

U.S. Air Force, <i>DAF COVID-19 Statistics—April 5, 2022</i>	18
The White House, <i>Press Briefing by White House COVID-19 Response Team and Public Health Officials</i> (Dec. 17, 2021)	12
The White House, <i>Remarks by President Biden Laying Out the Next Steps in Our Effort to Get More Americans Vaccinated and Combat the Spread of the Delta Variant</i> (July 29, 2021)	8
The White House, <i>Remarks by President Biden on Fighting the COVID-19 Pandemic</i> (Sept. 9, 2021)	9
The White House, <i>Remarks by President Biden After Meeting with Members of the COVID-19 Response Team</i> (Dec. 16, 2021)	12
The White House, <i>Remarks of President Joe Biden— State of the Union Address As Prepared for Delivery</i> (Mar. 1, 2022).....	16, 17

INTRODUCTION AND INTEREST OF AMICI CURIAE*

Amici curiae are the States of Mississippi, Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, Texas, Utah, Virginia, West Virginia, and Wyoming. Amici regularly confront the challenge presented in this case, where a sincere claim of religious freedom competes with powerful government interests. Every day, amici pursue such interests—managing prisons, maintaining public order, enforcing drug laws, policing, quelling violence, overseeing public property, and more. At the same time, amici are committed to protecting religious freedom. All amici respect the restrictions imposed by the Free Exercise Clause, several amici have enacted statutes analogous to the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* (RFRA), and amici regularly defend religious liberty in litigation.

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But even when government interests are compelling, religious exercise demands respect too. The amici States have a powerful interest in holding true the balance between pursuing important state interests and protecting sincerely held religious beliefs. Respect for policymakers' judgments should not be permitted to mask abuse of religious freedom.

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This brief is submitted in light of the amici States’ experience defending religious freedom, promoting government interests that may compete with religious exercise, managing COVID-19 within their borders, and successfully challenging the legality of the Administration’s response to the pandemic. The brief explains that the Administration’s actions over the past year should—even in the sensitive context of military affairs—make this Court skeptical of its claims for deference.

SUMMARY OF ARGUMENT

This Court should discount the Administration’s claim to deference for its decision refusing to accommodate Lt. Col. Dunn’s sincerely held religious belief.

I. This Court has at times afforded deference to military authorities on military matters. The Administration claims that it is due such deference here. Deference to military authorities makes sense when those authorities’ judgments reflect trustworthy, non-political assessments of sensitive matters within their unique expertise. But policymakers can, through their actions, erode those assumptions and the deference that might otherwise be due.

II. This Court should discount the Administration’s claim to deference in this case. The Administration’s COVID-19 response—particularly its package of vaccine mandates—and the facts of Lt. Col. Dunn’s case undermine its claim for deference. In the past year, courts have recognized the overreaching and flawed claims of legal authority underlying the Administration’s response, the tension between its policies and the facts, and its inconsistent statements and actions that undercut its claims of good faith and suggest pretext. These recurring features of the Administration’s response, evident again in this case, provide a solid basis to believe that its actions toward Lt. Col. Dunn reflect political motivations rather than military judgment.

REASONS FOR GRANTING THE APPLICATION

I. Deference Is Warranted For Military Decisions On Military Matters, But Policymakers’ Actions Can Erode The Deference That Policies Governing The Military Might Otherwise Enjoy.

In some contexts, “courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.” *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). But such deference rests on the presumption that military authorities are making judgments based on trustworthy, non-political assessments within their unique expertise. When policymakers’ actions erode that presumption, they erode any claim for deference.

“[M]ilitary interests do not always trump other considerations.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 26 (2008). The deference afforded to military officials stems from a recognition that “to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.” *Goldman*, 475 U.S. at 507. This Court has accordingly afforded deference to decisions made by “military authorities” concerning a “military interest.” *Ibid.* In *Goldman*, a case decided before RFRA’s enactment, this Court upheld Air Force regulations on uniform dress that prevented the petitioner from wearing a yarmulke. *Id.* at 504, 510.

In recognizing that deference to the military was warranted, this Court noted that the policy was put in place by “the appropriate military officials” who were exercising “their considered professional judgment.” *Id.* at 509. The Court thus did not question the military’s stated need for uniformity—though it exercised judgment in concluding that the policies “reasonably and evenhandedly regulate dress” in the interest of that stated need. *Id.* at 510, *superseded by statute*, 10 U.S.C. § 774.

Cabining deference to military decisions by military authorities makes sense. “The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments,” even though such judgments are ultimately subject to civilian control through elected leaders. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see id.* at 10-12 (holding that a question concerning the proper training, equipping, and control of the Ohio National Guard was a non-justiciable political question). Though civilian leaders may exercise their own judgment based on the expertise and recommendations of their professional military advisors, it is military professionals themselves who can fully appreciate the “complex” and “subtle” decisions that must be made. Policy decisions that apply to the military but are made without that professional advice, however, are like the decisions made by those same policymakers in non-military areas.

Congress recognized the limits of military deference when enacting RFRA. Nothing in RFRA’s text or structure removes the military from the obligation to respect religious exercise. RFRA’s history reflects that this was no accident. The House Report did recognize that “religious liberty claims in the context of prisons and the military present far different problems for the operation of those institutions than they do in civilian settings.” H.R. Rep. No. 103-88 at 8. But, the Report said, even in the military context, “[s]eemingly reasonable regulations” that are based on

“speculation,” “exaggerated fears,” or “thoughtless policies” “cannot stand.” *Ibid.* The Senate Report reflects a similar understanding that religious liberty can and should be protected in the military: “The committee is confident that the bill will not adversely impair the ability of the U.S. military to maintain good order, discipline, and security.” S. Rep. No. 103-111 at 12.

This Court has recognized limits on claims of deference in the similarly sensitive, government-interest-laden prison context under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*, RFRA’s “sister statute.” *Ramirez v. Collier*, — U.S. —, 2022 WL 867311, at *8 (U.S. Mar. 24, 2022). In *Ramirez*, this Court recognized that it was “not enough” to simply “defer to [officials]’ determination” about when an individual’s religious liberties must give way, particularly where history provides good reason to question that determination. *Id.* at *10; *see also id.* at *18 (Kavanaugh, J., concurring) (“As the Court explains, experience matters in assessing whether less restrictive alternatives could still satisfy the State’s compelling interest.”). And in *Holt v. Hobbs*, 574 U.S. 352 (2015), this Court rejected the proposition that “respect” for prison officials’ expertise “in running prisons” calls for “unquestioning acceptance” of their claims that prison management requires curbing religious liberty. *Id.* at 364.

Recent litigation culminating in this Court’s order in *Austin v. U.S. Navy Seals 1-26*, — S. Ct. —, No. 21A477, 2022 WL 882559 (U.S. Mar. 25, 2022), illustrates these points. There, the district court’s injunction both protected the servicemember respondents from discipline or discharge due to their unvaccinated status and also prevented military professionals from considering respondents’ vaccination status when making deployment, assignment, and other operational decisions. *Id.* at *1; *U.S. Navy Seals 1-26 v. Biden*, — F. Supp. 3d —, No. 4:21-CV-01236-O, 2022 WL 34443, at *14 (N.D. Tex. Jan. 3, 2022). This Court granted the federal government’s

request to stay the latter part of the injunction while leaving in place the first part, which the federal government notably had not asked to be stayed. *U.S. Navy Seals 1-26*, 2022 WL 882559, at *1; see Application for a Partial Stay of the Injunction Issued by the United States District Court for the Northern District of Texas 2-3, *Austin v. U.S. Navy Seals 1-26*, 2022 WL 882559 (U.S. Mar. 25, 2022) (No. 21A477) (explaining that the government was not seeking “to stay the portion of the injunction that protects respondents from discipline or discharge for remaining unvaccinated”). The federal government had a stronger claim to the stay it sought: COVID-19 vaccination status could be more relevant to military decisions—such as operational decisions concerning Special Forces units whose deployment may require close-quarters operation—than to decisions in some other contexts. See *U.S. Navy Seals 1-26*, 2022 WL 882559, at *1 (Kavanaugh, J., concurring) (“[T]he Navy has an extraordinarily compelling interest in maintaining strategic and operational control over the assignment and deployment of *all Special Warfare personnel*—including control over decisions about military readiness. And no less restrictive means would satisfy that interest *in this context*.”) (emphases added). But different considerations would apply to basic decisions to discipline or discharge servicemembers because they requested religious exemptions or are unvaccinated. As in *Ramirez* and *Holt*, when facing that question, courts must squarely consider the competing interests without “unquestioning acceptance” of the government’s decision. *Holt*, 574 U.S. at 364.

II. The Administration’s Actions Over The Past Year Undermine Its Claim To Deference In This Case.

In defending its refusal to afford Lt. Col. Dunn a religious exemption, the Administration has invoked the deference afforded to military authorities on military matters. It cites the circumstances presented by COVID-19 and the military’s “vital interest” in maintaining a capable fighting force. Response to Emergency Motion for Injunction Pending Appeal 11, *Dunn v. Austin*, No. 22-15286 (9th Cir. Mar. 16, 2022).

Given the Administration’s actions in its COVID-19 response and the facts presented in Lt. Col. Dunn’s case, this Court should discount its claims to deference here.

1. When President Biden took office in January 2021, his Administration began taking steps to respond to the COVID-19 pandemic. An early step was to direct the Department of Labor’s Occupational Safety and Health Administration (OSHA) to consider whether “any emergency temporary standards on COVID-19 ... are necessary” and, if so, to “issue them by March 15, 2021.” Executive Order 13999 § 2(b), *Protecting Worker Health and Safety*, 86 Fed. Reg. 7211, 7211 (Jan. 21, 2021). Although no such action was taken by March 15, OSHA issued an emergency temporary standard on June 21, 2021, requiring healthcare providers to develop plans to reduce COVID-19 transmission in the workplace. *Occupational Exposure to COVID-19; Emergency Temporary Standard*, 86 Fed. Reg. 32376 (June 21, 2021) (Healthcare ETS). The Healthcare ETS stated that COVID-19 vaccines were “safe and highly effective,” yet did not mandate vaccination. *Id.* at 32377.

Days after the Healthcare ETS was issued, this Court addressed an emergency application seeking relief from the Center for Disease Control’s (CDC) nationwide moratorium on evictions. The district court had granted summary judgment—ruling the moratorium unlawful—but it granted the federal government’s request to stay that judgment pending appeal. *Alabama Ass’n of Realtors v. HHS*, 539 F. Supp. 3d 211, 218 (D.D.C. 2021). This Court denied the request to vacate the stay, though four Justices noted that they would have granted the request. *Alabama Ass’n of Realtors v. HHS*, 141 S. Ct. 2320, 2320 (2021). Justice Kavanaugh wrote a concurring opinion, noting that he believed that the CDC “exceeded its existing statutory authority by issuing a nationwide eviction moratorium.” *Ibid.* (concurrence). Justice Kavanaugh emphasized that the moratorium was set to expire in a few weeks, at which time

“clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium.” *Id.* at 2321.

Despite a strong signal that five Justices believed that the moratorium was unlawful, the Administration reissued it days after it expired. The matter was soon back in this Court. This time the Court ruled that the moratorium was likely unlawful. *Alabama Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (per curiam). This Court explained that the Administration’s “claim of expansive authority” under the relevant statute “is unprecedented. Since that provision’s enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium.” *Id.* at 2489.

Around the time of the eviction moratorium’s defeat, President Biden grew frustrated with the country’s vaccination rate. He asked his Administration to develop plans to mandate vaccination, despite prior policies (like the Healthcare ETS) stopping short of such action. The first such mandate was the one at issue in this case, applicable to the armed forces. On July 29, 2021, the President announced that he was “asking the Defense Department to look into how and when they will add COVID-19 to the list of vaccinations our armed forces must get.” The White House, *Remarks by President Biden Laying Out the Next Steps in Our Effort to Get More Americans Vaccinated and Combat the Spread of the Delta Variant* (July 29, 2021), <https://bit.ly/3xeUG39>. On August 9, Secretary of Defense Lloyd Austin sent a memo to Department employees noting that “President Biden asked me to consider how and when we might add the coronavirus disease 2019 (COVID-19) vaccines to the list of those required for all Service members.” Defendants’ Opposition to Plaintiff’s Motion for Temporary Restraining Order, Ex. 1 at 1, *Dunn v. Austin*, No. 2:22-cv-00288 (E.D. Cal. Feb. 18, 2022). Secretary Austin made the military vaccine mandate official on August 24, in a memo to senior Department leadership. *Id.*, Ex. 2 (Military Mandate).

This second memo departed from the Secretary's first by stating that the Mandate was being imposed not because the President wanted it, but because Secretary Austin "determined that mandatory vaccination against coronavirus disease 2019 (COVID-19) is necessary to protect the Force and defend the American people." *Id.* at 1.

On September 9, the President addressed the nation to outline further "new steps" that his Administration would be taking to fight COVID-19. The White House, *Remarks by President Biden on Fighting the COVID-19 Pandemic* (Sept. 9, 2021), <https://bit.ly/3Ey4Zj6> (Sept. 9 Remarks). These steps included vaccine mandates for federal employees, federal contractors, private employers employing over 100 workers, and healthcare providers receiving Medicare or Medicaid funds. *Ibid.* These mandates were issued in the coming months, along with a mandate requiring workers and volunteers in federal Head Start education assistance programs to be vaccinated and children aged two and older in such programs to be masked. See Executive Order 14043, *Requiring Coronavirus Disease 2019 Vaccination for Federal Employees*, 86 Fed. Reg. 50989 (Sept. 9, 2021) (Federal Employee Mandate); Executive Order 14042, *Ensuring Adequate COVID Safety Protocols for Federal Contractors*, 86 Fed. Reg. 50985 (Sept. 9, 2021) (Federal Contractor Mandate); *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402 (Nov. 5, 2021) (Private Employer Mandate); *Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination*, 86 Fed. Reg. 61555 (Nov. 5, 2021) (CMS Mandate); *Vaccine and Mask Requirements To Mitigate the Spread of COVID-19 in Head Start Programs*, 86 Fed. Reg. 68052 (Nov. 30, 2021) (Head Start Mandate).

These mandates were issued because the President's patience was "wearing thin" with the unvaccinated, whose "refusal has cost all of us." Sept. 9 Remarks.

2. The President's package of vaccine mandates was beset by clear problems. Litigation followed. And the Administration responded in a way that is now familiar.

Like the eviction moratorium, several mandates rested on unsound claims of legal authority. The best known of these is the Private Employer Mandate that—like the Healthcare ETS—was issued as an emergency temporary standard by OSHA under the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* That Act enables OSHA to set workplace “occupational safety or health standard[s].” *Id.* § 655(b). But unlike the Healthcare ETS, which aimed to address the specific occupational danger of COVID-19 transmission to healthcare workers, the Administration used the Private Employer Mandate as a broad public-health measure seeking to reach tens of millions of Americans. The Private Employer Mandate applied to all “employers with a total of 100 or more employees at any time the standard is in effect,” requiring employees to either vaccinate or be tested weekly (at their own cost). 86 Fed. Reg. at 61403, 61437. The Mandate applied across all industries and did not account for how COVID-19 transmission may differ by occupation or workplace.

The President’s Federal Contractor Mandate and Federal Employee Mandate also rested on strained claims of statutory authority. According to Executive Order 14042, the Federal Contractor Mandate was issued under the Federal Property and Administrative Services Act, 40 U.S.C. § 101 *et seq.* *See* 86 Fed. Reg. at 50985. As its name suggests, the Act is not a public-health statute. Instead, it enables the federal government’s “economical and efficient” procurement of property and services. 40 U.S.C. § 101. Executive Order 14043 states that the Federal Employee Mandate was based on authority from 5 U.S.C. §§ 3301, 3302, and 7301. *See* 86 Fed. Reg. at 50989. These statutes say that the President “may prescribe regulations for the conduct of employees in the executive branch,” 5 U.S.C. § 7301, “may prescribe rules governing the competitive service,” *id.* § 3302, and “may ... prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best

promote the efficiency of that service,” *id.* § 3301. The Administration read these general grants to provide a springboard to dictate that millions of federal employees must choose between vaccination or termination.

Lawsuits followed, challenging various mandates based on the absence of statutory authority and other legal flaws. In response, the Administration leaned on claims of deference and the unprecedented nature of the pandemic. In defending the Private Employer Mandate, it pointed to the “substantial deference” due to OSHA in its interpretation of the statute. Respondents’ Emergency Motion to Dissolve Stay 17, *In Re: OSHA Rule on COVID-19 Vaccination and Testing*, 21 F.4th 357 (6th Cir. 2021) (No. 21-7000). The Administration argued that the Private Employer Mandate was designed to prevent “thousands of employee deaths and hundreds of thousands of hospitalizations,” *id.* at 32, and that an order blocking the Mandate would “threaten” deaths and hospitalizations, *id.* at 50. *See also* Response in Opposition to the Applications for a Stay 40, *National Federation of Independent Business v. OSHA*, 142 S. Ct. 661 (2022) (Nos. 21A244 and 21A247) (“Applicants provide no basis for the Court to second-guess OSHA’s judgment that the Standard is necessary to protect against a grave danger to younger unvaccinated employees.”); *id.* at 17 (“[A]ny further delay in the implementation of the Standard will result in unnecessary illness, hospitalizations, and deaths because of workplace exposure to SARS-CoV-2.”).

The Administration made similar arguments for deference in defending the Federal Contractor Mandate. It argued that “courts have respected the President’s judgment that policies will enhance economy and efficiency in federal procurement, including by increasing the efficiency and productivity of federal contractor operations.” Corrected Brief for Appellants 20, *Kentucky v. Biden*, 23 F.4th 585 (6th Cir. 2022) (No. 21-6147).

In defending the Head Start Mandate, the Administration again relied on deference. It argued: “Because, at a minimum, nothing in the statute forecloses the agency’s interpretation of the statute as including the authority to require masks and vaccinations, that interpretation also warrants deference.” Defendants’ Response in Opposition to Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction 21-22, *Louisiana v. Becerra*, No. 3:21-CV-04370, 2022 WL 16571 (W.D. La. 2022).

As the courts considered the legality of the mandates, the Administration stepped up its rhetoric. On December 16, 2021, President Biden told the unvaccinated that “we are looking at a winter of severe illness and death—if you’re unvaccinated—for themselves, their families, and the hospitals they’ll soon overwhelm.” The White House, *Remarks by President Biden After Meeting with Members of the COVID-19 Response Team* (Dec. 16, 2021), <https://bit.ly/3reZz8D>. The White House reaffirmed that position a day later. The White House, *Press Briefing by White House COVID-19 Response Team and Public Health Officials* (Dec. 17, 2021), <https://bit.ly/3v525zj> (“For the unvaccinated, you’re looking at a winter of severe illness and death for yourselves, your families, and the hospitals you may soon overwhelm.”).

3. As litigation progressed, the Administration’s package of vaccine mandates began to fall apart. The Fifth Circuit almost immediately stayed the Private Employer Mandate, ruling that “its promulgation grossly exceeds OSHA’s statutory authority.” *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 612 (5th Cir. 2021). Soon, the Private Employer Mandate reached this Court. In language echoing *Alabama Ass’n of Realtors*, this Court stayed the Private Employer Mandate, finding it “telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace.” *National Federation of Independent Business v. OSHA*, 142

S. Ct. 661, 666 (2022) (per curiam). “This ‘lack of historical precedent,’ coupled with the breadth of authority that the Secretary now claims, is a ‘telling indication’ that the mandate extends beyond the agency’s legitimate reach.” *Ibid.* The Private Employer Mandate was withdrawn after the Court’s decision, though OSHA left it in place as a proposed rule for possible future adoption. *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 87 Fed. Reg. 3928 (Jan. 26, 2022).

Lower courts enjoined the Federal Employee Mandate, Federal Contractor Mandate, and Head Start Mandate, holding each to have been issued without (or likely without) statutory authority.

In *Kentucky v. Biden*, 23 F.4th 585 (6th Cir. 2022), the Sixth Circuit declined to stay an injunction of the Federal Contractor Mandate, explaining that, “[b]y its plain text, the [Federal Property and Administrative Services] Act does not authorize the contractor mandate. The government itself offers virtually no textual analysis, which is unsurprising given that the text undermines its position.” *Id.* at 604. District courts, too, found this mandate likely to be without statutory authority. *E.g., Georgia v. Biden*, — F. Supp. 3d —, No. 1:21-CV-163, 2021 WL 5779939, at *9 (S.D. Ga. Dec. 7, 2021) (“While the Procurement Act explicitly and unquestionably bestows some authority upon the President, the Court is unconvinced ... that it authorized him to direct the type of actions by agencies that are contained in EO 14042.”).

The Federal Employee Mandate was enjoined nationwide when a court held that each of the three statutory provisions cited by Executive Order 14043 was inadequate. *Feds for Medical Freedom v. Biden*, — F. Supp. 3d —, No. 3:21-CV-356, 2022 WL 188329, at *4-6, *7 (S.D. Tex. Jan. 21, 2022). The Fifth Circuit declined to stay the injunction pending appeal. *Feds for Medical Freedom v. Biden*, 25 F.4th 354, 355 (5th Cir. 2022) (per curiam). Although a divided Fifth Circuit panel just vacated the district court’s decision, it did so on jurisdictional grounds without contesting the

lower court’s merits ruling that the Mandate was issued without legal authority. *Feds for Medical Freedom v. Biden*, — F.4th —, No. 22-40043, 2022 WL 1043909, at *6 (5th Cir. Apr. 7, 2022).

The Head Start Mandate was enjoined in 25 states. *See Louisiana v. Becerra*, — F. Supp. 3d —, No. 3:21-CV-04370, 2022 WL 16571, at *11 (W.D. La. Jan. 1, 2022) (“This Court has no hesitation in finding that the Head Start Mandate is a decision of vast economic significance and that Congress has not clearly spoken to give Agency Defendants the authority to impose it.”); *Texas v. Becerra*, — F. Supp. 3d —, No. 5:21-CV-300, 2021 WL 6198109, at *11 (N.D. Tex. Dec. 31, 2021) (“Congress’s failure to use ‘exceedingly clear language’ in any part of the statute further supports what the plain language of ‘performance standards’ indicates: defendants do not have authority to issue the mask and vaccine mandates at issue here.”). The federal government did not appeal from these injunctions against the Head Start Mandate.

Only the CMS Mandate has survived direct scrutiny by this Court (the Court has faced the Military Mandate only when considering individual exemptions). The CMS Mandate rests on 42 U.S.C. § 1395x(e)(9), which permits the Secretary of Health and Human Services to impose conditions on the receipt of Medicare and Medicaid funds that he finds “necessary in the interest of the health and safety of individuals who are furnished services.” This nexus to protecting the “health and safety” of patients was central to this Court’s decision to lift a stay on the CMS Mandate. *Biden v. Missouri*, 142 S. Ct. 647, 652 (2022) (per curiam) (quoting statute). The Court reasoned that “[i]t would be the ‘very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with COVID-19.’” *Ibid.* (quoting *Florida v. HHS*, 19 F.4th 1271, 1288 (11th Cir. 2021)).

4. As the Administration’s package of vaccine mandates was falling apart, many recognized that the package was not issued based on considered judgments of facts and circumstances, and was driven instead by political considerations.

The Private Employer Mandate, for example, was ostensibly designed to protect employees from hazards of the workplace. 86 Fed. Reg. at 61403 (contending that the “ETS is necessary to protect unvaccinated workers from the risk of contracting COVID-19 at work”). Yet the Mandate’s terms contradicted that purpose. It applied on its face to all industries while simultaneously exempting employers with 99 or fewer employees from the emergency measure. *Ibid.* This inconsistent reasoning was cleared up by the White House Chief of Staff’s decision to retweet a commentator stating that OSHA was using the vaccine mandate as “the ultimate work-around” for the government to mandate vaccinations. Callie Patteson, *Biden chief apparently admits vaccine mandate ‘ultimate work-around,’* N.Y. Post (Sept. 10, 2021).

Courts recognized the discrepancy between the Private Employer Mandate’s stated workplace nexus and the President’s desire to mandate vaccination nationwide. As a Member of this Court noted, “[i]t seems, too, that the agency pursued its regulatory initiative only as a legislative ‘work-around.’” *National Federation of Independent Business*, 142 S. Ct. at 668 (Gorsuch, J., concurring) (quoting *BST Holdings*, 17 F.4th at 612). At oral argument, the Chief Justice had similarly observed: “It seems to me that it’s that the government is trying to work across the waterfront and it’s just going agency by agency. I mean, this has been referred to, the approach, as a workaround.” Oral Argument Tr. 79, *National Federation of Independent Business v. OSHA*, 142 S. Ct. 661 (2022) (Nos. 21A244 and 21A247); see also *BST Holdings*, 17 F.4th at 612 (“After the President voiced his displeasure with the country’s vaccination rate in September, the Administration pored over the U.S.

Code in search of authority, or a ‘work-around,’ for imposing a national vaccine mandate.”) (internal footnotes omitted).

The mandates are also inconsistent with prior Administration COVID-19 actions that did not mandate vaccination. As one example, the CMS Mandate is inconsistent with the earlier Healthcare ETS, which also applied to frontline healthcare workers but omitted any vaccination requirement. The Healthcare ETS omitted this requirement despite recognizing that vaccines were “safe and highly effective,” 86 Fed. Reg. at 32377, even though vaccines were widely available at the time, and even though 37 million fewer persons were fully vaccinated. *See CDC COVID Data Tracker*, CDC.gov, <https://covid.cdc.gov/covid-data-tracker/>.

The Administration’s own actions also called into question the claimed need for any nationwide mandate. None of the Federal Employee Mandate, Federal Contractor Mandate, CMS Mandate, Head Start Mandate, or Military Mandate provides an option for employees to produce periodic negative tests or mask as an alternative. Yet the Private Employer Mandate—which potentially affected 84 million Americans—said that a test-and-mask alternative provided “roughly equivalent protection” to vaccination. 86 Fed. Reg. at 61515.

These statements and actions, when taken together with the repeated judicial recognition that the Administration exceeded its legal authority, erode claims that the Administration’s pandemic response has been motivated by sound, detached judgments on public-health considerations. The Administration’s political motivations explain why, when it became clear that most Americans were vaccinated and were tiring of COVID-19 restrictions, the President began to claim the benefits of rolling back those restrictions. At his recent State of the Union Address, he touted that under new CDC guidelines “most Americans in most of the country can now be mask free” and that “based on the projections, more of the country will reach that

point across the next couple of weeks.” The White House, *Remarks of President Joe Biden—State of the Union Address As Prepared for Delivery* (Mar. 1, 2022), <https://bit.ly/3vbb8P0>. Yet, despite trying to reap the benefits of a world in which COVID-19 is no longer the grave threat that the Administration once claimed, the Administration still presses forward with its mission to mandate vaccination.

5. Into this comes Lt. Col. Dunn. Lt. Col. Dunn was commissioned in the U.S. Air Force in 2003 and flew bomber missions over Afghanistan in three combat tours. Application 2. He left active duty and joined the Air Force Reserve in 2014, where he has been active in planning missions. *Id.* at 3. On August 21, 2021, he took command of the 452nd Contingency Response Squadron. *Ibid.* He will qualify for a military pension next year. *Ibid.*

The denial of Lt. Col. Dunn’s request for a religious exemption from the Military Mandate was based on a stated interest in military readiness. Response to Emergency Motion for Injunction Pending Appeal 13-14, *Dunn v. Austin*, No. 22-15286 (9th Cir. Mar. 16, 2022). In defending the denial, the Administration has again claimed deference, emphasizing the military context. *Id.* at 11-12 (quoting *Goldman*, 475 U.S. at 507, for the proposition that “[c]ourts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest”); *see also id.* at 12 n.2, 16, 18.

Even putting aside the Administration’s broader COVID-19 response, the facts undermine the Administration’s claim to deference for its near-blanket denial of religious exemptions from the Military Mandate. The Military Mandate applies to a population in which only 94 deaths have been reported in 394,293 reported cases, a fatality rate of 0.02%. U.S. Department of Defense, *Coronavirus: DOD Response*, <https://www.defense.gov/Spotlights/Coronavirus-DOD-Response/> (last visited Apr. 11, 2022). Only 2,597 of those 392,353 cases have resulted in hospitalization, a rate

of 0.66%. *Ibid.* And those numbers drop when one looks only at the U.S. Air Force, in which Lt. Col. Dunn serves. Of the 92,924 reported cases, only 15 deaths have occurred and 53 hospitalizations, 0.016% and 0.057% respectively. U.S. Air Force, *DAF COVID-19 Statistics—April 5, 2022*, <https://www.af.mil/News/Article-Display/Article/2989918/daf-covid-19-statistics-apr-5-2022/> (last visited Apr. 11, 2022). These statistics reflect the entire pandemic, do not reflect unreported cases, and do not reflect the fact that cases, hospitalizations, and deaths are likely lower now due to vaccination and natural immunity. Against this backdrop of very low risk to servicemembers, the Air Force has approved almost no religious exemptions. Of the 7,693 requests for such exemptions, 32 have been granted. *Ibid.* Even accounting for the 2,827 requests still pending, that results in a denial rate of 99.34%. *Ibid.*

The Administration’s nearly 100% denial rate for religious exemptions suggests—just standing on its own—that the Administration has cast aside RFRA’s demands to pursue a political decision to mandate widespread vaccination. The Administration appears to be using another “work-around”—overstepping statutory limits to achieve a higher vaccination rate, as it did with the eviction moratorium and with its vaccine mandates. *BST Holdings*, 17 F.4th at 612.

When considered within its broader response to the pandemic, the denial rate takes on a different cast. It supports the view that the Administration is again advancing political judgments rather than making sound decisions on health. The amici States speak from experience in concluding that the Administration’s near-blanket refusal to grant religious exemptions is not credible and that its denial in this case is not entitled to deference.

Amici regularly must account for and respect religious liberties when pursuing compelling government interests—managing prisons, maintaining public order and safety, enforcing drug laws, policing, halting violence, exercising stewardship over

public property, and more. Holding the balance true can be challenging. And some matters warrant particular respect for government assessments, such as maintaining order in prisons or readiness of the military. But that balancing can be achieved while respecting religious freedom. *See Ramirez*, 2022 WL 867311, at *9-10.

In the pandemic itself, amici have direct experience balancing the need to protect public health while respecting religious exercise. In Mississippi, for example, Governor Reeves issued an executive order early in the pandemic that limited public gatherings of more than ten citizens at a time and prohibited in-person dining at restaurants and bars. Miss. Executive Order 1463 at 2 (Mar. 24, 2020). But the order also recognized that religious entities—like churches—were essential businesses or operations. *Id.* at 5. The balance allowed Mississippi to manage COVID-19’s effects without sacrificing its citizens’ religious liberties. Other amici have struck a balance and left religious liberty to flourish even as they combatted the pandemic.

Given the States’ experience in addressing COVID-19 in their own borders and in challenging the Administration’s COVID-19 policies, the States have seen that the Administration has fallen short in respecting the limitations on its authority. The Administration has acted despite legal limitations and then asked for deference to its judgments. But it is “not enough” to “defer to [an official’s] determination” about when an individual’s religious liberties must give way, particularly where history provides good reason to question that determination. *Ramirez*, 2022 WL 867311, at *10. The history detailed above gives good reason to question the decision here. *Supra* at 6-17. Lt. Col. Dunn does not ask for the Air Force to be precluded from considering his vaccination status when making operational decisions. He does not seek to be returned to his position in command. Rather, he seeks to prevent future adverse action from being taken against him. The Administration can hold true the balance between its important interests and a servicemember’s sincerely held religious

beliefs. *Cf. Austin v. U.S. Navy Seals 1-26*, — S. Ct. —, No. 21A477, 2022 WL 882559, at *1 (U.S. Mar. 25, 2022) (granting partial stay that respected military’s need to make deployment and operational determinations, but leaving in place injunctive relief allowing respondents to continue serving their country without facing discipline or discharge). That is what Lt. Col. Dunn seeks and, on the facts here, that is the relief that he should be granted.

CONCLUSION

The application should be granted.

Respectfully submitted.

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