

No. 21A599

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IN THE  
**Supreme Court of the United States**

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JONATHAN DUNN,

*Applicant,*

*v.*

LLOYD J. AUSTIN III, SECRETARY OF DEFENSE, *et al.*,

*Respondents.*

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**ON EMERGENCY APPLICATION FOR INJUNCTION PENDING  
APPEAL TO THE HONORABLE ELENA KAGAN, ASSOCIATE  
JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE  
FOR THE NINTH CIRCUIT**

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**MOTION FOR LEAVE TO FILE BRIEF  
AND BRIEF FOR *AMICI CURIAE* AIR FORCE  
OFFICER, AIR FORCE NCO, AIR FORCE  
SPECIAL AGENT, AND AIR FORCE ENGINEER  
IN SUPPORT OF APPLICANT**

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**MOTION FOR LEAVE TO FILE BRIEF AS  
AMICI CURIAE IN SUPPORT OF APPLICANT**

*Amici curiae* Air Force Officer, Air Force NCO, Air Force Special Agent, and Air Force Engineer, respectfully move for leave to file a brief explaining why this Court should grant applicant Lt. Col. Jonathan Dunn’s Emergency Application for Injunction Pending Appeal and Certiorari, or, in the Alternative, for Certiorari before Judgment. *Amici* have promptly notified counsel of record for both parties that they intended to submit the attached brief. *Amici* submit this motion for leave pursuant to this Court’s Rule 37.2(b) only out of an abundance of caution, as counsel for respondent “takes no position” regarding this filing, though they consented to the filing of an *amici curiae* brief below, and Lt. Col. Dunn has consented to the filing of this brief.

Like Applicant Lt. Col. Dunn, *amici* are fellow Air Force service members who have all been denied religious accommodations to the Air Force’s COVID-19 vaccine mandate. The experience of all four *amici* reveals that the Air Force’s religious-accommodation process to its COVID-19 vaccine mandate is illusory and pure theater. Despite their varying circumstances, all four *amici* were ultimately denied religious accommodations via nearly identical rote letters from the Air Force Surgeon General, relying on generalized interests that made no attempt to explain why thousands of exemptions have been granted to the mandate for

secular reasons but essentially none have been granted for religious reasons.

*Amicus* Air Force Officer has already obtained a preliminary injunction against the Air Force's rote denial of her religious accommodation request, and respectfully submits that the District Court's analysis of her circumstances is especially illuminating. *See Air Force Officer v. Austin*, No. 5:22-CV-00009-TES, 2022 WL 468799 (M.D. Ga. Feb. 15, 2022). Indeed, Air Force Officer is a decorated and longtime reservist, is naturally immune, has never been deployed, works in a purely administrative position, with demonstrated ability to effectively work remotely, socially distance, test, and mask—and yet was still rotely denied a religious accommodation based on the same alleged interests that apply to, for example, an active-duty Navy Seal (yet which interests somehow do not apply to the thousands of Air Force service members with medical and administrative exemptions).

*Amici's* experience will thus aid this Court's understanding of the sincerity and legitimacy (or lack thereof) underlying the denial of their fellow Air Force service member Lt. Col. Dunn's request for religious accommodation from the Air Force's COVID-19 vaccine mandate. Additionally, *amici's* experience confirms that the Air Force is inflicting per se irreparable harms on these and other similarly situated service members by, among other things, threatening to withhold their military pay, benefits, advancement opportunities, etc., *as a*

*means* of pressuring them to forgo their sincerely held religious beliefs about COVID vaccination. This combination of across-the-board denials of religious but not secular accommodations to the Air Force's COVID-19 vaccine mandate, and the infliction of ongoing irreparable harm on Air Force service members who have made the "wrong" kind of accommodation request, cries out for intervention and resolution by this Court. Accordingly, the motion to file the brief of *amici curiae* should be granted.

Respectfully submitted,

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February 28, 2022 Memorandum from the  
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[https://media.defense.gov/2022/Mar/01/2002947117/  
-1/-1/1/D2022-D000AW-0081.000.PDF](https://media.defense.gov/2022/Mar/01/2002947117/-1/-1/1/D2022-D000AW-0081.000.PDF) .....10

Lincoln, Abraham, The Gettysburg Address,  
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**INTEREST OF *AMICI CURIAE*<sup>1</sup>**

Four Air Force service member *amici*—“Air Force Officer,” “Air Force NCO,” “Air Force Special Agent,” and “Air Force Engineer”—support Plaintiff Lt. Col. Dunn’s pursuit of injunctive relief against the military’s COVID-19 vaccine mandates.

*Amici* (“the Four Airmen”) are named plaintiffs or proposed named plaintiffs in a putative class action pending in the United States District Court for the Middle District of Georgia, *Air Force Officer v. Austin*, No. 5:22-cv-00009-TES. Like Lt. Col. Dunn, the Four Airmen received final denials of their requests for religious accommodation regarding the military’s COVID-19 vaccine mandates.

Originally, one of the Four Airmen, Air Force Officer, brought a case seeking, *inter alia*, an injunction against enforcement of the military’s

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<sup>1</sup> No counsel for any party authored this brief in whole or in part. No person or entity, other than the *amici* and their counsel, Thomas More Society, has contributed monetarily to the brief’s preparation or submission. Additionally, *amici* timely notified counsel for both parties of their intent to file this brief. Applicant consents, but Respondents’ position is not clear, as Respondents’ counsel’s reply to *amici*’s request for Respondent’s position was as follows: “The government takes no position.” Accordingly, out of an abundance of caution, *amici* have submitted a motion for leave to file this brief.

COVID-19 vaccine mandates. On February 15, 2022, the court granted a preliminary injunction in her favor against the military defendants. *Air Force Officer v. Austin*, No. 5:22-CV-00009-TES, 2022 WL 468799 (M.D. Ga. Feb. 15, 2022). The court “easily f[ound] that the Air Force’s process to protect religious rights is both illusory and insincere.” *Id.* at \*10. The “religious accommodation process... proved to be nothing more than a quixotic quest.” *Id.* at \*1.

The Four Airmen recently sought leave to file a Second Amended Complaint adding Air Force NCO, Air Force Special Agent, and Air Force Engineer as plaintiffs, and alternatively these three airmen sought to intervene, alleging claims on behalf of themselves and a putative class of all Air Force service members who submitted a request for religious accommodation and already received or will receive a final denial.<sup>2</sup>

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<sup>2</sup> The Four Airmen are proceeding or seeking to proceed under pseudonyms in *Air Force Officer*. In an order issued separately from but on the same day as the preliminary injunction, the court granted Air Force Officer leave to proceed anonymously, recognizing a social climate, both on the national and local levels, that is hostile to those who decline a COVID-19 vaccine for any reason, and that religion is a quintessentially private matter. *Air Force Officer v. Austin*, No. 5:22-CV-00009-TES, 2022 WL 468030, at \*2 (M.D. Ga. Feb. 15, 2022). A motion to proceed anonymously with

As the Middle District of Georgia concluded in *Air Force Officer*, the process for requesting a religious accommodation regarding the military's COVID-19 vaccine mandates is "illusory and insincere." The military's denial of the religious accommodation requests of the Four Airmen, Lt. Col. Dunn, and thousands of other similarly situated airmen unlawfully abridges their religious freedom under the Religious Freedom Restoration Act (RFRA) and the First Amendment of the U.S. Constitution.

*Amici* submit that this brief will assist the Court in more fully understanding the military's essentially uniform practice of denying religious accommodations and the need for emergency relief.

### SUMMARY OF ARGUMENT

This brief focuses on two issues: the sham religious accommodation request process and the irreparable harm caused by the military's denial of religious accommodation requests.

As the court found in *Air Force Officer*, the Air Force's religious accommodation process is illusory and insincere. The Air Force's formulaic

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respect to the three new plaintiffs, on the same grounds, is currently pending.

final denial letters are indicative of this sham process. The Air Force has not approved any or essentially any of the thousands of religious accommodation requests, while it has approved thousands of non-religious accommodation requests and grants a blanket exemption that may last indefinitely for participants in “COVID-19 clinical trials.” Like the court in *Air Force Officer*, several other courts have held that the Air Force’s accommodation request process or other military branches’ similar process is illusory and insincere.

The Air Force’s denial of religious accommodation requests causes irreparable harm because it imposes “spiritual rather than pecuniary” harms on their ability to exercise their respective religious beliefs. *Ramirez v. Collier*, No. 21-5592, 2022 WL 867311, at \*12 (U.S. March 24, 2022). Indeed, this Court and lower courts have long recognized that threatening to withhold (or actually withholding) pecuniary benefits in order to pressure one to forgo a particular religious belief or practice is a quintessential “substantial burden” on religious exercise that constitutes irreparable harm under both the First Amendment and the Religious Freedom Restoration Act. The Air Force has done exactly that here in denying the religious accommodation requests submitted by Applicant Lt. Col. Dunn and the four *amici*—and those of many other similarly situated religious service members. In doing so, the Air Force also irreparably deprives them of the incommensurable ability to patriotically serve their country.

**ARGUMENT****A. The Air Force's religious accommodation request process is "illusory and insincere."**

The Air Force's religious accommodation process is "illusory and insincere," "nothing more than a quixotic quest" for service members seeking a reasonable and lawful accommodation. *Air Force Officer*, 2022 WL 468799, at \*1, \*10. This is true for all service members, regardless of the role or capacity in which they serve. For example, Air Force Officer is a reserve officer and has never been deployed. Air Force NCO is a non-commissioned officer and has been deployed four times. Air Force Special Agent works in the Air Force Office of Special Investigations, and in his current position there are virtually no physical interactions. Air Force Engineer is an active-duty officer and licensed civil engineer. All Four Airmen have natural immunity to COVID-19. To varying degrees, all Four Airmen have worked remotely and can work remotely.

Despite the dissimilarities in their circumstances, these Four Airmen received essentially identical letters finally denying them accommodations on the basis of religious belief. This is a clear indicator of a sham process. *See Exhibit A* hereto (the Four Airmen's final denial letters). While none of the letters disputes the sincerity or reasonableness of the service member's religious objection, the letters otherwise

reflect no real consideration of Plaintiffs' particular circumstances. *Id.* Each letter incants the same generic and self-evidently false statement of Air Force Surgeon General Robert I. Miller: "I have carefully reviewed your request for religious accommodation," then recites substantially all of the same canned generalizations, word-for-word (*e.g.*, "Your health status as a non-immunized individual in this dynamic environment, and aggregated with other non-immunized individuals in steady state operations, would place health and safety, unit cohesion, and readiness at risk. Foregoing the above immunization requirement would have a real adverse impact on military readiness and public health and safety."). *Id.* The letters even include the same identical copy of Surgeon General Miller's handwritten signature. *Id.* In this case, the final denial letter Lt. Col. Dunn received is no different.

The Four Airmen and Lt. Col. Dunn are just five of the 7,500+ service members who unsuccessfully sought religious accommodation, and the Air Force treats them all the same—brazenly violating RFRA's requirement that the Air Force demonstrate a compelling interest in applying its mandate "to the person," 42 U.S.C. § 2000bb-1(b)(1). The Air Force has not approved any or essentially any of these requests. The Air Force posts its exemption statistics on its public website, <https://www.af.mil/News/Article-Display/Article/2959594/daf-covid-19-statistics->

[march-2022/](#) (“Air Force Statistics”), showing the thousands of unapproved requests for religious accommodation. The Air Force claims to have “approved” a small number of requests for religious accommodation, but those requests were “approved” because the service members were already slated for separation. *See Navy Seal 1 v. Austin*, No. 8:31-cv-2429-SDM-TGW, 2022 WL 534459, at \*19 (M.D. Fla. Feb. 18, 2022); *Poffenbarger v. Kendall*, No. 3:22-CV-1, 2022 WL 594810, at \*13 n.6 (S.D. Ohio Feb. 28, 2022). Regardless, as the District Court for the Southern District of Ohio recently found, “of the thousands of religious exemptions the Air Force has adjudicated, the Air Force has only approved a shameful number of 23 religious exemptions.” *Doster v. Kendall*, No. 1:22-CV-84, 2022 WL 982299, at \*4 (S.D. Ohio Mar. 31, 2022).<sup>3</sup>

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<sup>3</sup> Meanwhile, the Air Force has granted thousands of non-religious—medical and/or administrative—accommodation requests. *See* Air Force Statistics. And the military provides a blanket exemption for *all* “COVID-19 clinical trial[]” participants, as expressly stated in the Department of Defense’s August 24, 2021 military-wide COVID-19 vaccine mandate order. Such clinical trials presumably involve COVID-19 studies other than vaccination, with some participants taking a placebo in any event (*Navy Seals 1-26 v. Biden*, No. 4:21-cv-01236-O, 2022 WL 34443, at \*11 (N.D. Tex. Jan. 3, 2022), and could last indefinitely. *See* August 24 Order (“Service members who are actively participating in COVID-19 clinical trials are exempted from

As the District Court for the Middle District of Georgia “easily found” in *Air Force Officer*, the Air Force’s religious accommodation request process is “illusory and insincere”:

[T]he Air Force has rejected 99.76% of all religious accommodation requests, and until about two weeks ago, it had rejected every single one it ‘carefully consider[ed].’ ... With such a marked record disfavoring religious accommodation requests, the Court easily finds that the Air Force’s process to protect religious rights is both illusory and insincere.

*Air Force Officer*, 2022 WL 468799, at \*10.

Several other courts have likewise held that the Air Force’s religious accommodation request process or other military branches’ similar process is a sham. *See, e.g., Poffenbarger*, 2022 WL 594810, at \*13 (“The current evidence appears to support

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mandatory vaccination against COVID-19 until the trial is complete....”). This favoritism shows that the Air Force lacks a compelling interest, and fails the least-restrictive-means test, in categorically denying service members’ requests for religious accommodation. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542-46 (1993) (no compelling interest where law burdening religious exercise is substantially underinclusive as to its purposes).

Poffenbarger’s assertion that the **Air Force is systematically denying religious exemptions.**”) (emphasis added); *Doster*, 2022 WL 982299, at \*13 (the **broad formulaic claims** of ‘stemming the spread of COVID-19’ and promoting military readiness and national security **ring hollow....** The only difference between the over 2,500 Airmen who have otherwise received exemptions and the 18 Plaintiffs before this Court is solely the type of exemption they requested. It appears to the Court that **the Air Force has freely granted medical and administrative exemptions while denying almost all religious exemption requests.**”) (emphasis added); *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 352 (5th Cir. 2022) (discussing the Navy’s “**pattern of disregard for RFRA rights** rather than individualized consideration of Plaintiffs’ requests”) (emphasis added); *Navy Seals 1-26 v. Austin*, 2022 WL 34443, at \*1 (N.D. Tex. Jan. 3, 2022) (“The Navy provides a religious accommodation process, but **by all accounts, it is theater.** The Navy has not granted a religious exemption to any vaccine in recent memory. It merely rubber stamps each denial.”) (emphasis added); *Navy Seal 1 v. Austin*, No. 8:21-CV-2429-SDM-TGW, 2022 WL 710321, at \*7 (M.D. Fla. Mar. 2, 2022) (discussing aspects of the “**deeply entrenched failure of the**

**[military] defendants to respond effectively to the requirements of RFRA”** (emphasis added).<sup>4</sup>

The uniform denial of religious accommodation requests by the military constitutes a gross disregard for fundamental religious-liberty rights that is visiting irreparable harm upon thousands of our nation’s service members. This Court should enter the injunction pending appeal in order to preserve the status quo ante and to allow time to address this important question of federal law.

**B. The military’s denial of religious accommodation requests in violation of RFRA and the First Amendment causes irreparable harm.**

Violations of military service members’ RFRA and First Amendment rights cause them “spiritual rather than pecuniary,” and thereby

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<sup>4</sup> With the military facing such rebukes, the Inspector General of the Department of Defense recently announced an investigation into “whether the Military Departments are processing exemption requests for the Coronavirus Disease–2019 vaccination and taking disciplinary actions for active duty Service members in accordance with Federal and DoD guidance.” See February 28, 2022 Memorandum from the Office of the Inspector General, <https://media.defense.gov/2022/Mar/01/2002947117/-1/-1/1/D2022-D000AW-0081.000.PDF>.

irreparable, harms. *Ramirez v. Collier*, No. 21-5592, 2022 WL 867311, at \*12 (March 24, 2022); accord *Air Force Officer*, No. 5:22-CV-0009-TES, 2022 WL 468799, at \*12.<sup>5</sup>

The fact that the military’s COVID-19 vaccine mandate causes *some* compensable injuries, like cutting off military pay, does not mean it imposes *no* irreparable harm. The contrary argument would be absurd, since it would mean that anyone who suffers compensable harms *as a result of a RFRA violation* could *never* suffer irreparable harm and obtain a corresponding injunction. Cf. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (“It would prove too much” to say plaintiffs have not suffered irreparable harm because they can “view, experience, and utilize other areas of the forest” that are not irreparably fire-damaged, as that would mean “a plaintiff can *never* suffer irreparable injury resulting from environmental harm in a

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<sup>5</sup> It goes without saying that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). This analysis focuses on irreparable harm under RFRA.

forest area as long as there are other areas of the forest that are not harmed”) (emphasis added).

The military’s imposition of compensable harms, such as loss of pay and retirement benefits, on service members for seeking religious exemptions from the vaccine mandate accentuates the reality that where, as here, service members’ compensation, careers, and very livelihoods are threatened by a *government* actor like the military because of their *religious* beliefs and practices, the resulting “pressure . . . to forego th[ose] [beliefs and] practice[s] is unmistakable”—and thus irreparably harmful. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

In *Air Force Officer*, this substantial pressure came in the form of ceasing Air Force Officer’s military pay, denying her the right to apply for a permanent change of station, denying her at least one Temporary Duty Assignment, and denying her the right to any military orders of any kind, together with the prospect of final separation. See *Air Force Officer*, 2022 WL 468799, at \*4. The military told those requesting a religious accommodation that the mere act of requesting an accommodation “may have an adverse impact on... deployability, assignment, and/or international travel.” *Air Force Officer*, No. 5:22-CV-0009-TES, Doc. 2-11. Such “pressure on an adherent to modify his [or her] behavior and to violate his [or her] beliefs” is a quintessential “substantial burden” on religion *and thus a non-compensable spiritual harm*. *Kaemmerling v. Lappin*, 553 F.3d 669, 678

(D.C. Cir. 2008) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)); *see also Singh v. McHugh*, 185 F. Supp. 3d 201, 217 (D.D.C. 2016) (holding that a final denial of religious exemption request is a “substantial burden” under RFRA).

Indeed, the Fifth Circuit recently recognized that vaccine mandates which “substantially burden” an individual’s free exercise of religion per se cause “irreparable harm.” *BST Holdings, L.L.C. v. Occupational Safety & Health Admin. United States Dep’t of Lab.*, 17 F.4th 604, 618 (5th Cir. 2021).

It thus comes as no surprise that this Court has *twice* affirmed Circuit decisions holding that violations of RFRA necessarily cause irreparable harm. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 704, 736 (2014), *affirming Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013) (holding that “by analogy to First Amendment cases . . . establishing a likely RFRA violation satisfies the irreparable harm factor”); *and Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006), *affirming O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170, 1187 (10th Cir. 2003) (noting “a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA”).

Indeed, most Circuits, too, have held that RFRA violations constitute irreparable harm. *See Joy v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (“Courts have persuasively found that irreparable

harm accompanies a substantial burden on an individual's rights to the free exercise of religion under RFRA."); *Merced v. Kasson*, 577 F.3d 578, 595 (5th Cir. 2009); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 615-16 (6th Cir. 2020); *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025, at \*3 (8th Cir. Feb. 1, 2013) (unpublished); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013); *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340 (11th Cir. 2014).

This Court has deemed the same to be true for violations of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1—the "sister statute" of RFRA. See *Holt v. Hobbs*, 574 U.S. 352, 356 (2015). As this Court noted in *Holt*, RLUIPA was enacted in response to this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which held that Congress lacked the power to apply RFRA to the states and their subdivisions (including state prisons) under its Fourteenth Amendment Section 5 powers. *Holt*, 574 U.S. at 357. As a result, Congress enacted RLUIPA pursuant to its Spending and Commerce Clause powers, *id.*, and Section 3 of that Act "allows prisoners to seek religious accommodations pursuant to the same standard as set forth in RFRA," *id.* at 358.

Thus, in *Holt*, this Court granted an injunction pending appeal against the Arkansas

Department of Correction's refusal to let a Muslim prisoner grow a half-inch beard in accord with his religious faith, before ultimately holding that RLUIPA required that he be given such permission permanently. *See Holt*, 574 U.S. at 360; *see also Am. Trucking Assocs., Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (noting that injunction pending resolution of petition for writ of certiorari requires showing "there is a likelihood that irreparable injury will result if relief is not granted").

And just last month, in *Ramirez*, this Court held that failure to accommodate the petitioner inmate's religious faith by allowing his pastor to touch him and pray over him in the execution chamber, within due limits, would render him "unable to engage in protected religious exercise in the final moments of his life." *Ramirez*, 2022 WL 867311, at \*12. This Court rightly observed that "[c]ompensation . . . would not remedy this harm, which is spiritual rather than pecuniary." *Id.* (emphasis added).

Nearly every Circuit has likewise recognized (either explicitly or implicitly) that violations of RLUIPA cause or can cause irreparable harm. *See Fortress Bible Church v. Feiner*, 694 F.3d 208, 220, 225 (2d Cir. 2012); *Washington v. Klem*, 497 F.3d 272, 286 (3d Cir. 2007); *Lovelace v. Lee*, 472 F.3d 174, 206 (4th Cir. 2006) (Wilkinson, J., concurring); *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012); *River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill.*, 611 F.3d 367, 391-92 (7th Cir. 2010) (Sykes, J.,

dissenting); *Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 754 (8th Cir. 2014); *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005); *Ray v. Commissioner, Alabama Dep't of Corrections*, 915 F.3d 689 (11th Cir. 2019). This logic extends directly to violations of RFRA as the “sister” statute of RLUIPA.

For this reason, in recent months lower courts have had no trouble holding that the military’s reflexive application of the COVID-19 vaccine mandate to service members seeking religious accommodations unquestionably inflicts irreparable harm. *See, e.g., Air Force Officer*, 2022 WL 468799, at \*12; *Navy Seal 1*, 2022 WL 534459, at \*19; *Poffenbarger*, 2022 WL 594810, at \*18; *Navy Seals 1-26 v. Austin*, No. 4:21-cv-01236-O, 2022 WL 1025144, at \*13 (N.D. Tex. Mar. 28, 2022); *Doster*, 2022 WL 982299, at \*15.

This Court should adopt the same reasoning in Applicant Dunn’s case.

Finally, application of the military’s COVID-19 vaccine mandate to service members who cannot comply for religious reasons also deprives them—in the most meaningful way imaginable—of the opportunity to continue serving their country in uniform out of a sense of patriotism and piety. *See, e.g., Will Atkins*, “A veteran’s perspective of

patriotism on this Independence Day,” Military Times, July 4, 2021.<sup>6</sup> No sum can compensate for that loss, which is no less than the permanent and superimposed inability to “g[i]ve the last full measure of devotion.” See Abraham Lincoln, The Gettysburg Address, Gettysburg, Pennsylvania, Nov. 19, 1863.<sup>7</sup>

This patriotic harm, like the above-described “spiritual” harms, is plainly non-compensable and also irreparable. And it is a direct result of the military’s refusal to make *any* real room for religious accommodations regarding its vaccine mandates, notwithstanding the contrary and clear demands of the Constitution and laws the military is sworn to defend.

## CONCLUSION

For all the foregoing reasons, the injunction pending appeal should be reinstated.

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<sup>6</sup>

<https://www.militarytimes.com/opinion/commentary/2021/07/04/a-veterans-perspective-of-patriotism-on-this-independence-day/>.

<sup>7</sup>

<https://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>.

Respectfully submitted,

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**EXHIBIT A**

# Exhibit A

## Air Force Officer Final Denial:

Case 5:22-cv-00009-TES Document 2-16 Filed 01/06/22 Page 1 of 1



DEPARTMENT OF THE AIR FORCE  
HEADQUARTERS UNITED STATES AIR FORCE  
WASHINGTON DC

Exhibit 14

MEMORANDUM FOR [REDACTED]

FROM: HQ USAF/SG  
1780 Air Force Pentagon  
Washington, DC 20330-1780

SUBJECT: Decision on Religious Accommodation Appeal

Your final appeal is denied. In accordance with Department of the Air Force Instruction (DAFI) 52-201, *Religious Freedom in the Department of the Air Force*, paragraph 3.2, I have carefully reviewed your request for religious accommodation, specifically for an exemption from the COVID-19 immunization.

The Department of the Air Force has a compelling government interest in requiring you to comply with the COVID-19 immunization requirement because preventing the spread of disease among the force is vital to mission accomplishment. Specifically, in light of your circumstances, your present duty assignment requires intermittent to frequent contact with others and is not fully achievable via telework or with adequate distancing. We must be able to leverage our forces on short notice as evidenced by recent worldwide events. Your health status as a non-immunized individual in this dynamic environment, and aggregated with other non-immunized individuals in steady state operations, would place health and safety, unit cohesion, and readiness at risk. Foregoing the above immunization requirement would have a real adverse impact on military readiness and public health and safety. There are no less restrictive means available in your circumstance as effective as receiving the above immunization in furthering these compelling government interests.

A copy of this decision memorandum will be placed in your automated personnel records. Please contact your unit leadership for questions or concerns.

  
ROBERT I. MILLER  
Lieutenant General, USAF, MC, SFS  
Surgeon General

## Air Force NCO Final Denial:

Case 5:22-cv-00009-TES Document 65-7 Filed 03/31/22 Page 1 of 1 EXHIBIT 4



DEPARTMENT OF THE AIR FORCE  
HEADQUARTERS UNITED STATES AIR FORCE  
WASHINGTON DC

DEC 27 2021

MEMORANDUM FOR [REDACTED]

FROM: HQ USAF [REDACTED]  
1780 Air Force Pentagon  
Washington, DC 20330-1780

SUBJECT: Decision on Religious Accommodation Appeal

Your final appeal is denied. In accordance with Department of the Air Force Instruction (DAFI) 52-201, *Religious Freedom in the Department of the Air Force*, paragraph 3.2, I have carefully reviewed your request for religious accommodation, specifically for an exemption from the COVID-19 immunization.

The Department of the Air Force has a compelling government interest in requiring you to comply with the COVID-19 immunization requirement because preventing the spread of disease among the force is vital to mission accomplishment. Specifically, in light of your circumstances, your present duty assignment as a [REDACTED] requires intermittent to frequent contact with others and is not fully achievable via telework or with adequate distancing. Additionally, your duties may require travel for [REDACTED] conferences, and other engagements which increases your exposure to other personnel. We must be able to leverage our forces on short notice as evidenced by recent worldwide events. Your health status as a non-immunized individual in this dynamic environment, and aggregated with other non-immunized individuals in steady state operations, would place health and safety, unit cohesion, and readiness at risk. Foregoing the above immunization requirement would have a real adverse impact on military readiness and public health and safety. There are no less restrictive means available in your circumstance as effective as receiving the above immunization in furthering these compelling government interests.

A copy of this decision memorandum will be placed in your automated personnel records. Please contact your unit leadership for questions or concerns.

  
ROBERT I. MILLER  
Lieutenant General, USAF, MC, SFS  
Surgeon General

## Air Force Special Agent Final Denial:

Case 5:22-cv-00009-TES Document 65-13 Filed 03/31/22 Page 1 of 1



DEPARTMENT OF THE AIR FORCE  
HEADQUARTERS UNITED STATES AIR FORCE  
WASHINGTON DC

EXHIBIT 4

FEB 10 2022

MEMORANDUM FOR [REDACTED]

FROM: HQ USAF/SG  
1780 Air Force Pentagon  
Washington, DC 20330-1780

SUBJECT: Decision on Religious Accommodation Appeal

Your final appeal is denied. In accordance with Department of the Air Force Instruction (DAFI) 52-201, *Religious Freedom in the Department of the Air Force*, paragraph 3.2, I have carefully reviewed your request for religious accommodation, specifically for an exemption from the COVID-19 immunization.

The Department of the Air Force has a compelling government interest in requiring you to comply with the COVID-19 immunization requirement because preventing the spread of disease among the force is vital to mission accomplishment. Specifically, in light of your circumstances, your present duty assignment requires intermittent to frequent contact with others and is not fully achievable via telework or with adequate distancing. In addition, your required in-person meeting attendance includes prolonged, intermittent contact with multiple individuals. We must be able to leverage our forces on short notice as evidenced by recent worldwide events. Your health status as a non-immunized individual in this dynamic environment, and aggregated with other non-immunized individuals in steady state operations, would place health and safety, unit cohesion, and readiness at risk. Foregoing the above immunization requirement would have a real adverse impact on military readiness and public health and safety. There are no less restrictive means available in your circumstance as effective as receiving the above immunization in furthering these compelling government interests.

A copy of this decision memorandum will be placed in your automated personnel records. Please contact your unit leadership for questions or concerns.

  
ROBERT I. MILLER  
Lieutenant General, USAF, MC, SFS  
Surgeon General

# Air Force Engineer Final Denial:

Case 5:22-cv-00009-TES Document 65-20 Filed 03/31/22 Page 1 of 1



DEPARTMENT OF THE AIR FORCE  
HEADQUARTERS UNITED STATES AIR FORCE  
WASHINGTON DC

JAN 21 2022

## EXHIBIT 4

MEMORANDUM FOR [REDACTED]

FROM: HQ USAF/SG  
1780 Air Force Pentagon  
Washington, DC 20330-1780

SUBJECT: Decision on Religious Accommodation Appeal

Your final appeal is denied. In accordance with Department of the Air Force Instruction (DAFI) 52-201, *Religious Freedom in the Department of the Air Force*, paragraph 3.2.1 I have carefully reviewed your request for religious accommodation, specifically for an exemption from the COVID-19 immunization.

The Department of the Air Force has a compelling government interest in requiring you to comply with the COVID-19 immunization requirement because preventing the spread of disease among the force is vital to mission accomplishment. Specifically, in light of your circumstances, your present duty assignment as the [REDACTED] requires frequent contact with others and is not fully achievable via telework or with adequate distancing. Your leadership role was also taken into consideration. While some of these duties may be completed remotely, institutionalizing remote completion of those duties permanently would be detrimental to readiness, good order and discipline, and unit cohesion. In addition, your unit has high-risk personnel that have an elevated potential for severe illness or death, if they were infected. We must be able to leverage our forces on short notice as evidenced by recent worldwide events. Your health status as a non-immunized individual in this dynamic environment, and aggregated with other non-immunized individuals in steady state operations, would place health and safety, unit cohesion, and readiness at risk. Forgoing the above immunization requirement would have a real adverse impact on military readiness and public health and safety. There are no less restrictive means available in your circumstance as effective as receiving the above immunization in furthering these compelling government interests.

A copy of this decision memorandum will be placed in your automated personnel records. Please contact your unit leadership for questions or concerns.

  
ROBERT I. MILLER  
Lieutenant General, USAF, MC, SFS  
Surgeon General