No. 21A599

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN DUNN, APPLICANT

v.

LLOYD J. AUSTIN III, SECRETARY OF DEFENSE, ET AL.

RESPONSE IN OPPOSITION TO THE EMERGENCY APPLICATION FOR AN INJUNCTION PENDING APPEAL OR FOR CERTIORARI BEFORE JUDGMENT

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The Solicitor General, on behalf of Lloyd J. Austin, III, in his official capacity as Secretary of Defense, et al., respectfully files this response in opposition to the emergency application for an injunction pending appeal or, in the alternative, for certiorari before judgment.

Applicant is a Lieutenant Colonel in the Air Force Reserve who brought this suit under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb et seq., and the Free Exercise Clause of the First Amendment, to challenge the denial of his request for a religious exemption from the Air Force's COVID-19 vaccination requirement. Applicant does not assert that the COVID-19 vaccine itself or compulsory vaccination in general is inconsistent with his Christian faith, and indeed he has received without objection many other immunizations required by the Air Force. He instead maintains that in September 2021 -- after he was ordered

to become vaccinated against COVID-19 -- a speech by the President caused him to conclude that "the vaccine ceased to be merely a medical intervention and took on a symbolic and even sacramental quality," and that his faith forbids him from participating in what he now views as the "religious ritual" of COVID-19 vaccination. C.A. E.R. 368. When the Air Force denied his request for a religious exemption, applicant responded by sending his third-level superior -- a Major General in command of 30,000 reservists -- a one-word memorandum that simply read: "NUTS!". C.A. E.R. 245.

The district court denied applicant's motion for a preliminary injunction, as well as an injunction pending appeal. Appl. App. 2a, 37a-52a. The court of appeals similarly denied applicant's motion for an injunction pending appeal. Id. at 1a. Those decisions were correct. As the district court recognized, applicant has not established that he is likely to succeed on the merits of his claims. Even if the vaccination requirement burdens his sincere religious exercise, the Air Force has a compelling interest in requiring applicant to be as medically and physically prepared for deployment with his reserve unit as possible, particularly because his unit is designed to be deployable worldwide with just 72 hours' notice. And the Air Force has determined, as an exercise of its military judgment, that vaccination of servicemembers is an essential component of military readiness and is critical to pro-

tecting the health and safety of servicemembers. The Air Force has also concluded, after an individualized review of the particular circumstances, including applicant's military duties, that no less restrictive means exist to achieve the government's compelling interests.

Applicant also failed to establish any irreparable harm. He has already been removed from his former command -- including for reasons of poor judgment and abuse of authority, which justified the removal independent of his refusal to be vaccinated. In the lower courts, applicant sought an injunction that would have compelled the Air Force to assign and deploy him without regard to his unvaccinated status. In light of this Court's intervening order in Austin v. U.S. Navy SEALs 1-26, 142 S. Ct. 1301 (2022) (No. 21A477), petitioner now changes tack and asserts (e.g., Appl. 1-2, 11-12, 36-39) that his requested injunction would place him on equal footing with the plaintiffs in that case. But the precise contours of the injunction applicant now seeks are unclear; even in this Court, applicant suggests he would like to handpick a different unit and receive injunctive relief that would forbid the Air Force from preventing his transfer to that unit (see Appl. 38-39). In any event, it is applicant's burden to show that he faces irreparable harm, and he has not done so. Absent an injunction, he will continue to be in a "no pay/no points" status (meaning he does not participate in "drill weekends" and thus does not collect

reservist pay or accrue retirement credits for those drills), and the Air Force may initiate a process for reassigning him to the Individual Ready Reserve, which does not constitute a discharge or separation from service. His asserted injuries from those decisions, such as loss of pay or opportunities for career advancement, are quintessentially reparable because he could be reinstated and could seek backpay, retirement credits, and other remedies if he prevails. Applicant would prefer to maintain his status in the Reserve while his appeal is pending, but that preference does not justify an extraordinary grant of injunctive relief by this Court.

STATEMENT

A. The Air Force's COVID-19 Vaccination Requirement

The U.S. military has relied on mandatory immunization since 1777, when George Washington directed the inoculation of the Continental Army against smallpox. Stanley Lemon et al., Protecting Our Forces: Improving Vaccine Acquisition and Availability in the U.S. Military 11-12 (2002), go.usa.gov/xubrd. As of 2021, nine vaccines were required for all servicemembers, including an annual influenza vaccine, and eight additional vaccines were required when certain risk factors are present. C.A. E.R. 199.

In August 2021, the day after the Food and Drug Administration (FDA) granted full approval to the first COVID-19 vaccine, the Secretary of Defense announced that vaccination against COVID-19 would be added to the required list. C.A. E.R. 136. The Secretary

observed that "mission-critical inoculation is almost as old as the U.S. military itself," and that, "[t]o defend this Nation, we need a healthy and ready force." Ibid. On September 3, 2021, the Secretary of the Air Force directed commanders to ensure that servicemembers are vaccinated expeditiously, with members of the Air Force Reserve to be fully vaccinated by December 2, 2021, unless exempted from the requirement. Id. at 207.

As with other vaccines, a servicemember may seek an exemption from the Air Force's COVID-19 vaccination requirement for administrative, medical, or religious reasons. C.A. E.R. 224. Administrative exemptions are generally available only to servicemembers who are on terminal leave (i.e., taking leave until retirement or separation) or who were in the process of retiring or separating by April 1, 2022. Id. at 231, 338-339. Medical exemptions are granted by medical providers for medical reasons. Id. at 305-309, 567. Many of the conditions that might warrant a medical exemption are temporary (for example, a current COVID-19 infection or a pregnancy), and a servicemember with such a condition must receive the vaccine when the condition clears. Id. at 309-310; see id. at 220. For that reason, the Air Force grants only temporary -- not permanent -- medical exemptions from its immunization requirements, including for COVID-19. Id. at 309. And the number of medical exemptions has steadily declined as the underlying conditions have cleared. Id. at 307-308.

Under the Air Force's pre-existing religious-accommodation policy, a servicemember seeking a religious exemption must consult with his chaplain, his commander, and a military medical provider, and each commander in the chain of command makes a recommendation about whether to approve the request. C.A. E.R. 316-317, 319-321; see id. at 430-451. The decisionmaking official then conducts an individualized review "to determine (1) if there is a sincerely held religious (as opposed to moral or conscience) belief, (2) if the vaccination requirement substantially burdens the applicant's religious exercise based upon a sincerely held religious belief, and if so, (3) whether there is a compelling government interest in requiring that specific requestor to be vaccinated, and (4) whether there are less restrictive means [of] furthering that compelling government interest." Id. at 318. If the request is denied, the service member may appeal to the Air Force Surgeon General. Id. at 317. Unlike medical exemptions, religious exemptions are permanent and "remain in effect * * * for the duration of a Service member's military career," absent a change in circumstances. Id. at 439; see id. at 227.

As of April 12, 2022, out of a total force of about 500,000 Air Force servicemembers, 1013 had a temporary medical exemption from the COVID-19 vaccination requirement and 1273 had an administrative exemption. Air Force, DAF COVID-19 Statistics - Apr. 12, 2022, go.usa.gov/xuTu3. The Air Force had also granted 42

permanent religious exemptions, with several thousand requests still pending before the initial decisionmaker or on appeal. Ibid.

Servicemembers who are unvaccinated against COVID-19 -- for any reason -- generally are not considered medically ready for deployment. See Air Force Instruction 10-250, ¶ 2.1.3 (July 22, 2020), go.usa.gov/xu2xY (listing, among the "[i]ndividual medical readiness requirements," that servicemembers must "complete all required immunizations") (emphasis omitted); see also, e.g., C.A. E.R. 344 (declaration of the Chief of Public Health at the Air Force Medical Readiness Agency, explaining that vaccination is "vital to * * * maintaining mission readiness"). Servicemembers who are unvaccinated for any reason are also generally prohibited from traveling for temporary duty assignments and from attending many trainings. C.A. E.R. 250.

Servicemembers who refuse the order to be vaccinated and who lack an exemption may be subject to administrative and disciplinary action. C.A. E.R. 326-330. Air Force reservists, in particular, "will be placed in a no pay/no points status and involuntarily reassigned to the Individual Ready Reserve" (IRR). Id. at 329. "The IRR * * * is composed of former active-duty, national guard, and reserve military personnel, who, though not actively participating in the military, are still affiliated with the Reserve Component. Placing a member in a no pay/no points status means that the member will not be drilling with the member's unit and

thus will not be earning pay for that work nor credit [i.e., points] toward retirement." Id. at 335. Involuntary reassignment to the IRR is not a "discharge or separation" from the service, and "there is no policy mandating administrative separation for" members of the Reserve who refuse to be vaccinated against COVID-19. Id. at 329.

B. The Present Controversy

1. Applicant is a Lieutenant Colonel in the Air Force Reserve who was previously the Commander of the 40-member 452d Contingency Response Squadron at March Air Reserve Base in California. C.A. E.R. 238-239. Contingency Response forces are "rapidly worldwide deployable units sent to locations where air operational support is non-existent or insufficient." Id. at 239. They establish airfield operations and other basic infrastructure to support aircraft from all branches of the United States Armed Forces in combat missions and in response to humanitarian crises or natural disasters. Id. at 239-240. Applicant's unit must be ready to deploy on 72 hours' notice. Id. at 241. Once deployed, it is expected to be prepared "to begin receiving aircraft within four hours of arrival." Id. at 240. And it must "be capable of 5 days of total self-sufficiency" before "the arrival of additional supporting forces and equipment." Id. at 239. "The ability to rapidly deploy service members to establish operational airfields is critical to the Department of Defense's mission because it allows the Air Force

to establish a forward staging area for military operations that extends the reach of combat personnel and equipment from all branches of the United States armed forces and our allies." Ibid.

On October 14, 2021, applicant submitted a written request for a religious exemption from the Air Force's COVID-19 vaccination requirement. C.A. E.R. 243. Although applicant had received many prior vaccines in the Air Force without objection to those mandatory requirements, he stated that he had chosen not to become vaccinated against COVID-19 after praying on the matter; that he had contracted COVID-19 in June 2021 and had recovered without requiring medical treatment; and that the experience had "reinforced" his conviction that he is "led by the Holy Spirit in refusing the vaccine." Id. at 376.

In addition, applicant stated that he believed that being vaccinated had taken on a "quasi-religious sacramental aspect[]" when government authorities made the vaccine mandatory in some circumstances. C.A. E.R. 376. In his view, "[f]orced COVID vaccination today includes all the hallmarks of a religious act[:] a public display of submission to a higher power, presentation of our physical bodies, and a faith that suspends rational thought." Ibid. In a later affidavit, applicant confirmed that he had developed that view only after the Air Force had ordered him to be vaccinated. He stated that, "beginning on September 9, 2021, when President Biden delivered a speech blaming the unvaccinated for

the ongoing pandemic, federal, state, and local leaders have described the vaccine as a moral obligation" and a prerequisite for "participating in civil society." Id. at 368. He further stated that, "[f]rom that time onward, the vaccine ceased to be merely a medical intervention and took on a symbolic and even a sacramental quality," "akin to the ancient Roman laws requiring that sacrifices be made to Caesar." Ibid.

On November 16, 2021, the Commander of the Air Force Reserve Command denied applicant's request for a religious exemption. C.A. E.R. 244. The Commander did not "doubt the sincerity of [applicant's] beliefs" but nonetheless determined that an exemption was unwarranted in light of countervailing concerns for military readiness. Id. at 381. Applicant appealed to the Air Force Surgeon General, who denied the appeal on January 29, 2022. Id. at 389. The Surgeon General explained that he had taken into account applicant's leadership role and had determined that applicant's "present duty assignment requires intermittent to frequent contact with others and is not fully achievable via telework or with adequate distancing." Ibid. The Surgeon General also explained that the Air Force "must be able to leverage [its] forces on short notice as evidenced by recent worldwide events" and that applicant's "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." Ibid.

On February 8, 2022, applicant received the Air Force Surgeon General's decision denying his appeal, and he was lawfully ordered to begin a vaccination sequence, submit a retirement request, or refuse the vaccine in writing within five days. C.A. E.R. 245. Five days later, applicant sent a memorandum to the Commander of the 4th Air Force -- a two-star general who was several steps above applicant in the chain of command -- entitled "Response to Denial of Religious Accommodation Request Appeal." Ibid. The body of the memorandum contained only one word: "NUTS!". Ibid.; see id. at 393. Applicant's direct commander described this conduct as a "highly disrespectful affront to the chain of command" that showed "a shocking lack of military decorum." Id. at 252.[1]

On February 15, 2022, applicant was removed from his command. C.A. E.R. 251. His commanding officer had by then "lost trust in [his] leadership and judgment" based on applicant's "pattern of

[1] "NUTS!" has a well-known "military historical connotation." C.A. E.R. 251-252. In 1944, during the Battle of the Bulge, General Anthony McAuliffe responded to a German message requesting American surrender with the one-word reply, "NUTS!". Ibid.; see S.L.A. Marshall, Bastogne: The First Eight Days 115-118 (reprt. 2010), go.usa.gov/xu2WX. Applicant now maintains (Appl. 6) that he meant no "disrespect" by directing at his third-level superior officer the response that General McAuliffe famously directed at the Nazis. But see Marshall, supra, at 117 (recounting that the American officer who delivered McAuliffe's message to German officers also told them, "If you don't understand what 'Nuts' means, in plain English, it is the same as 'Go to hell.'").

lack of respect for military authority." Ibid. In addition to his "NUTS!" memorandum, applicant had tried to "misuse * * * his position" of authority to obtain non-public documents about his religious-exemption request outside of the proper procedures for doing so -- after being notified of those procedures by his commander. Id. at 252. Applicant's commanding officer considered applicant's lapses in judgment serious enough to warrant his removal from command independent of his "refusal to comply with the COVID-19 vaccination order." Id. at 253.

2. On February 14, 2022, applicant brought this action in the Eastern District of California, alleging that the Air Force's denial of his request for a religious exemption violates RFRA and the First Amendment. See Compl. ¶¶ 54-84. On February 15, applicant moved for a temporary restraining order. D. Ct. Doc. 4, at 2, 10-12. Applicant asked the court to enjoin the Air Force from applying its vaccination requirement to him and from "taking any adverse action against [him] based on his refusal to take the COVID-19 vaccine, including but not limited to removing [him] from command, imposing non-punitive disciplinary measures, denying training or [temporary duty] opportunities available to vaccinated service members, or discharging [him] from the Air Force." D. Ct. Doc. 4-4, at 2 (Feb. 15, 2022). The district court treated applicant's motion as a request for a preliminary injunction and denied the motion orally at a hearing on February 22, 2022. C.A.

E.R. 575; see Appl. App. 4a-53a (hearing transcript).

The district court found that applicant had failed to establish a likelihood of success. With respect to RFRA, the court determined that the Air Force has a "compelling governmental interest" in ensuring that applicant is "medically ready to deploy," and the court deferred to the Air Force's military judgment that vaccination is "necessary * * * to ensure military readiness." Appl. App. 39a-40a. The court viewed RFRA's "least restrictive means" requirement as a "tougher issue," id. at 40a, but agreed with the government that the alternatives proposed by applicant, such as masking or routine testing, "are not viable options" in his individual circumstances, id. at 41a -- including because testing before a rapid deployment would not always be feasible, and because some nations to which applicant might be deployed require vaccination, see id. at 43a-44a. The court also declined to second-guess the Air Force's judgment, informed by medical experts, that "natural immunity" from a prior infection is not a "sufficient alternative" to being vaccinated. Id. at 42a. With respect to the First Amendment, the court found that the Air Force's vaccination requirement is a neutral and generally applicable policy and that, in any event, applicant's constitutional claim would fail for the same reasons as his RFRA claim. See id.

at 47a-48a.[2]

Turning to the other preliminary-injunction factors, the district court determined that applicant had failed to establish any irreparable harm, in part because he "could later be reinstated and provided backpay if he did prevail on his claim." Appl. App. 49a; see id. at 48a-49a. The court further found that the balance of equities weighed against granting an injunction, explaining that "the public's interest in military readiness and the efficient administration of the federal government * * * outweigh[s] [applicant's] claims of job-related and pecuniary loss." Id. at 50a.

On February 24, 2022, applicant noticed an appeal. C.A. E.R. 575. On March 4 -- two weeks after the district court's order -- applicant moved in the district court for an injunction pending appeal. Ibid. On March 8, the court denied applicant's motion "for the same reasons stated at the hearing." Appl. App. 2a.

3. On March 9, 2022, applicant filed a motion in the court of appeals for an injunction pending appeal and an immediate temporary injunction pending the disposition of his motion. See

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[2] In litigation, applicant again described his religious objection as resting on the belief that COVID-19 vaccination took on a "sacramental quality" after the President and other leaders framed becoming vaccinated as a "moral obligation." D. Ct. Doc. 4, at 18. The district court questioned whether that asserted belief, even if sincerely held, qualified as a "religious-based objection" or was instead "a political issue disguised as a religious belief." Appl. App. 7a; see id. at 7a-17a. The court did not ultimately resolve that issue.

Appellant's C.A. Inj. Mot. 1-2. A two-judge panel of the court of appeals granted applicant's request for "immediate interim relief" pending briefing on his motion. C.A. Order 1 (Mar. 11, 2022). On April 1, 2022, the court of appeals denied applicant's motion for an injunction in a brief order, citing Winter v. NRDC, 555 U.S. 7, 20 (2008), and terminated the interim relief it had previously granted. Appl. App. 1a. Judge Bade dissented. Ibid.

ARGUMENT

The application for an injunction pending further review should be denied. A temporary injunction generally requires the movant to demonstrate that his "claims are likely to prevail, that denying [him] relief would lead to irreparable injury, and that granting relief would not harm the public interest." Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam). Because such an injunction "grants judicial intervention that has been withheld by the lower courts," Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers), it "'demands a significantly higher justification' than a request for a stay," Respect Maine PAC v. McKee, 562 U.S. 996, 996 (2010) (citation omitted). Such an injunction should be granted "sparingly and only in the most critical and exigent circumstances," Wisconsin Right to Life, Inc. v. FEC, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (citation omitted), such as when "the legal rights at issue are 'indisputably

clear,'" ibid. (citation omitted); see Roman Catholic Diocese, 141 S. Ct. at 66 (granting injunction where "applicants ha[d] clearly established their entitlement to relief"). Applicant has not met that heavy burden here.

I. APPLICANT HAS NOT ESTABLISHED HIS ENTITLEMENT TO RELIEF

Applicant has not demonstrated a right to injunctive relief on his RFRA or First Amendment claims, much less an "indisputably clear" right to such relief. Wisconsin Right to Life, 542 U.S. at 1306 (citation omitted).

A. The Preliminary Injunction Applicant Seeks Is Not A Proper Remedy

"[J]udges are not given the task of running the Army" or the Air Force, and it is the Executive officials charged with protecting our national security and defending our borders -- not courts -- who have authority to determine servicemembers' fitness for duty and assignments. Orloff v. Willoughby, 345 U.S. 83, 93 (1953); see id. at 92-93. For that reason, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." Department of the Navy v. Egan, 484 U.S. 518, 530 (1988). Indeed, "[j]udicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters committed to the other branches.'" Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017) (citation omitted). "It is this power of oversight and control of military force by elected representatives and officials which un-

derlies our entire constitutional system." Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

The problems with judicial intervention in military affairs are not limited to formal separation-of-powers concerns, but include practical ones, too. "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments." Gilligan, 413 U.S. at 10. Accordingly, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." Ibid.; cf. Bryant v. Gates, 532 F.3d 888, 899 (D.C. Cir. 2008) (Kavanaugh, J., concurring) ("[M]ilitary decisions and assessments of morale, discipline, and unit cohesion * * * are well beyond the competence of judges."). In Reaves v. Ainsworth, 219 U.S. 296 (1911), for example, this Court refused to second-guess the military's determination of a servicemember's "fitness for promotion." Id. at 298. And in Orloff, the Court emphasized that it had "found no case where this Court ha[d] assumed to revise duty orders as to one lawfully in the service." 345 U.S. at 94.

This Court recently applied those principles in Austin v. U.S. Navy SEALs 1-26, 142 S. Ct. 1301 (2022) (No. 21A477), granting the government's application for a partial stay of a preliminary injunction in a case challenging the Navy's COVID-19 vaccination requirement on similar RFRA and Free Exercise grounds. The dis-

trict court in that case had granted an injunction similar to the one applicant unsuccessfully sought here, see Compl. 20-21; D. Ct. Doc. 4, at 2, but this Court granted the government's request to stay the injunction "insofar as it precludes the Navy from considering [the plaintiffs'] vaccination status in making deployment, assignment, and other operational decisions," Navy SEALs, 142 S. Ct. at 1301. Justice Kavanaugh concurred "for a simple overarching reason: Under Article II of the Constitution, the President of the United States, not any federal judge, is the Commander in Chief of the Armed Forces." Id. at 1302. Justice Kavanaugh observed that by issuing the injunction in that case, the lower court had "in effect inserted itself into the Navy's chain of command, overriding military commanders' professional military judgments." Ibid.; see Chappell v. Wallace, 462 U.S. 296, 300 (1983) (warning against suits that "tamper with the established relationship between enlisted military personnel and their superior officers").

In light of this Court's order in Navy SEALs, applicant now purports to disclaim seeking from this Court any injunctive relief that would impede the Air Force's "ability to 'consider his vaccination status in making deployment, assignment, and other operational decisions.'" Appl. 2 (brackets and citation omitted). But applicant's request for relief in the lower courts is not so limited: He has not disclaimed his request for preliminary and

permanent injunctive relief barring the Air Force from considering his unvaccinated status in assigning and deploying him. Even in this Court, moreover, applicant contradicts his disclaimer of relief governing assignments. He suggests that he would like to handpick a different unit, Appl. 38-39, and he requests a broad injunction precluding the Air Force from taking "adverse action against applicant based on his refusal to take the COVID-19 vaccine," including "preventing or delaying Permanent Change of Status," an apparent reference to his desired transfer to a new unit, Appl. 39. An injunction intruding into military decisionmaking would be neither "appropriate relief" under RFRA, 42 U.S.C. 2000bb-1(c), nor consonant with the "traditional principles of equity jurisdiction," Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318-319 (1999) (citation omitted), that constrain the available relief on applicant's Free Exercise claim, see Armstrong v. Exceptional Child Center, Inc., 575 U.S. 320, 327-328 (2015).

B. Applicant's RFRA Claim Lacks Merit

In any event, even apart from questions about the scope of relief, applicant is not entitled to an injunction because he has not shown that he is likely to succeed on the merits of his RFRA claim. 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 government interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(a) and (b). The application of the COVID-19 vaccination requirement to applicant satisfies those requirements.

1. A RFRA plaintiff bears the initial burden of establishing that the challenged government practice substantially burdens his sincere religious exercise. Among other things, that requires a showing that his request is "sincerely based on a religious belief and not some other motivation." Ramirez v. Collier, 142 S. Ct. 1264, 1277 (2022); see Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 429–430 (2006). Here, the district court identified substantial questions about whether applicant's stated objection to being vaccinated, even if sincere, is "a political issue disguised as a religious belief." Appl. App. 7a. The court observed, for example, that applicant's initial affidavit included "a lot of reference[s] to politics and political officials and government officials and decisions by government officials and very little discussion about the religious grounding of his belief." Id. at 9a. The court ultimately denied a preliminary injunction for other sound reasons, but the questions the court raised underscore that applicant -- at a minimum -- lacks any clear entitlement to relief.

2. Even if the vaccination requirement substantially bur-

dens applicant's sincere religious exercise, it is consistent with RFRA because the Air Force has a compelling interest in requiring servicemembers to be vaccinated against COVID-19. "Stemming the spread of COVID-19 is unquestionably a compelling interest." Roman Catholic Diocese, 141 S. Ct. at 67. It is all the more compelling in the military, given the "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). And "when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

RFRA did not displace those longstanding principles. To the contrary, Congress specifically emphasized when it enacted RFRA that "[t]he 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." S. Rep. No. 111, 103d Cong., 1st Sess. 12 (1993). Congress "intend[ed] and expect[ed] that such deference w[ould] continue under [RFRA]." Ibid.; see H.R. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993).

Here, the Air Force extensively justified its military judgment that it has a compelling interest in vaccinating its servicemembers, including applicant. As Air Force Reserve Colonel Gregory P. Haynes explained, "the possibility that Airmen could get seriously ill, become hospitalized, or die from COVID-19 create[s] an unacceptable risk to personnel and substantially increase[s] the risk of mission failure, both in garrison (i.e., a non-deployed setting) and in a deployed environment." C.A. E.R. 247.

Colonel Haynes observed that "[t]he mission of the military Reserves is to be ready to deploy" when called upon, and that "[r]eadiness is essential for a unit like" the one applicant formerly commanded, "which exists to be rapidly deployable." C.A. E.R. 243. That unit is a "rapidly world-wide deployable unit[] sent to locations where air operational support is non-existent or insufficient." Id. at 239. It must be ready to deploy anywhere in the world on 72 hours' notice and be entirely self-sufficient for up to five days. Id. at 239, 245.

Once deployed, the unit applicant formerly commanded must create a fully functioning airfield within four hours, a task that could become impossible if any member of the unit -- not to mention the unit's commander -- were to fall seriously ill. C.A. E.R. 240; see also id. at 249 (explaining that airmen are deployed with "little redundancy" and that "each casualty due to illness has a significant impact"). Failure to create an airfield would "risk[]

mission failure for * * * supported aircraft" from all branches of the Armed Forces and from allied nations. Id. at 240. Applicant would also risk infecting members of his team while deployed, likewise threatening "mission failure." Id. at 249. An outbreak at March Air Force Base while applicant was not deployed would also undermine military readiness; Colonel Haynes explained that applicant's duties often required him to interact face-to-face with dozens of servicemembers, often in settings where social distancing was infeasible. Id. at 242.

Moreover, a servicemember who is unvaccinated would be barred from some of the countries to which the unit could be deployed. C.A. E.R. 246-247. And the unit's "deployments are likely to be to austere, remote locations overseas" that lack adequate medical facilities. Id. at 247. In those circumstances, a servicemember who developed severe symptoms would have to be "medically evacuated." Ibid. "Depending on the severity of the symptoms and necessary treatment, this could require an entire aircraft to be diverted from its intended mission." Ibid. And it could "further reduce the medically trained personnel available to provide medical care at the deployed location" to other airmen. Ibid.

Those individualized considerations are supported by broader interests in military readiness. As of mid-February 2022, there had been nearly 400,000 COVID-19 cases within the military, 2522 service members had been hospitalized, and 92 had died. C.A. E.R.

267; see id. at 296-300 (declaration of Major Scott Stanley, Ph.D., describing the effects of COVID-19 on the military). "[T]he overwhelming majority of individuals hospitalized or who died were not vaccinated or not fully vaccinated." Id. at 267. COVID-19 has also affected military "exercises, deployments, redeployments, and other global force management activities"; caused the cancellation of numerous "major training events, many of which involved preparedness and readiness training with our foreign partners"; and "required significant operational oversight" by the most senior military leaders. Id. at 296-298. Vaccination has permitted higher levels of occupancy in Department of Defense (DoD) facilities and in-person training. Id. at 300. All of those interests support the Air Force Surgeon General's conclusion that allowing applicant to remain unvaccinated "would have a real adverse impact on military readiness and public health and safety." Id. at 254. Indeed, the Secretary of Defense himself determined, after "consultation with medical experts and military leadership," that "mandatory vaccination against [COVID-19] is necessary to protect the Force and defend the American people," and that "vaccination of the Force will save lives." Id. at 136.

Applicant observes (Appl. 22) that he has successfully served as a reservist for the past two years without being vaccinated. Fortunately, applicant was not deployed when he contracted COVID-19 in June 2021, and he apparently did not become seriously ill.

But as noted above, others have not been so lucky; before vaccines were available, the pandemic severely disrupted the Armed Forces, causing thousands of hospitalizations and dozens of deaths. C.A. E.R. 267. In any event, past good fortune is no guarantee of future success. That vaccines were not previously available, or that the Air Force did not require them until after full FDA approval, does not mean the Air Force lacks a compelling interest in preventing COVID-19 infections among servicemembers going forward.

Applicant's reliance (Appl. 16-17, 24, 31) on the Air Force's having granted relatively few religious exemptions as compared to medical and administrative exemptions is misplaced. Applicant demands a permanent religious exemption -- as do the thousands of other Air Force servicemembers who have requested religious exemptions, C.A. E.R. 509. That is not comparable to servicemembers who receive temporary medical exemptions (e.g., for pregnancy), as they must get vaccinated after their temporary medical exemptions expire, see C.A. E.R. 301, and in the meantime are subject to the same restrictions as other unvaccinated servicemembers. Nor is it comparable to servicemembers who receive exemptions because they are on the verge of separation from the military (cf. Appl. 16). That the Air Force grants almost no permanent exemptions to servicemembers similarly situated to applicant underscores the compelling interest the military has in ensuring that our Armed Forces

are as healthy and ready to deploy as possible.

Applicant also suggests (Appl. 18-19) that his request for a religious exemption was not given individualized consideration because it was denied in what he characterizes as a form letter. But that initial denial letter expressly states that the decisionmaker "carefully consider[ed] the specific facts and circumstances of [applicant's] request," as well as the recommendations of his chain of command and a separate multidisciplinary review team. C.A. E.R. 381; see id. at 318-319. That determination is entitled to a presumption of regularity. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971). And in any event, RFRA does not require any particular administrative procedure or form of explanation for the denial of an exemption. Instead, the question in a RFRA case is whether the government has demonstrated in court that it has a compelling interest in the "application of the challenged law" to "the particular claimant[s] whose sincere exercise of religion is being substantially burdened." Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 726 (2014) (citation omitted). The government has done that here with detailed, specific declarations from senior military officers, including a sixteen-page declaration from applicant's former direct superior. C.A. E.R. 238-253. Given that showing, applicant's complaints about the process by which his exemption request was considered and the form and content of the letter initially denying

his request are beside the point.

Applicant's reliance (Appl. 22-23, 26) on the military's having persevered through the pandemic and on its generally high vaccination rate is likewise misplaced. The relevant interest here is not simply achieving herd immunity or doing the best under the circumstances. Rather, the military has an interest in reducing the risk to servicemembers and mission success to the greatest extent possible. As Justice Kavanaugh emphasized, quoting a declaration from the second-highest uniformed officer in the Navy:

> Sending 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, is dereliction of duty. The same applies to ordering unvaccinated personnel into an environment in which they endanger their lives, the lives of others and compromise accomplishment of essential missions.

Navy SEALs, 142 S. Ct. at 1302 (Kavanaugh, J., concurring) (citation omitted). It is no less a "dereliction of duty" with respect to airplanes, flight crews, and those responsible for establishing and operating the forward airfields on which they rely.

3. Requiring applicant to be vaccinated against COVID-19 is the least restrictive means of furthering the Air Force's compelling interests in ensuring that its servicemembers are as physically prepared as possible to execute their demanding missions and in minimizing avoidable risks to mission success. Vaccines are singularly effective at preventing COVID-19 infection and reducing the severity of illness in the event of a breakthrough infection.

As Air Force Colonel James R. Poel, Chief of Public Health at the Air Force Medical Readiness Agency, explained, "vaccines are the most effective way of mitigating the risk of spreading infectious diseases to other members, both in non-deployed and deployed environments, and preventing service members from becoming ill and dying." C.A. E.R. 342. Because vaccines "are vital to ensuring the health and safety of the force, maintaining mission readiness, and * * * protecting the individual from infectious diseases and preventing transmission," they have "long been a cornerstone of military strategy." Id. at 343-344. Vaccination is especially crucial for servicemembers like applicant, whose role "require[d] interaction with others in close quarters or travel, whether to an austere, deployed setting or for training at another location in the US." Id. at 344.[3]

No less restrictive alternatives are available. The Air Force Surgeon General found that applicant's role required "contact with others and [was] not fully achievable via telework or with adequate distancing." C.A. E.R. 254. Masking, which "is not as effective as vaccination," is likewise an inadequate alternative. Id. at

[3] Even in non-military settings, courts have held that in contexts where preventing transmission is particularly important, a uniform practice of vaccination may be the least restrictive means of furthering the government's compelling interest in preventing the spread of infectious diseases in a workforce. See, e.g., Does 1-6 v. Mills, 16 F.4th 20 (1st Cir. 2021), cert. denied, 142 S. Ct. 1112 (2022); We the Patriots USA, Inc. v. Hochul, 17 F.4th 266 (2d Cir. 2021) (per curiam), petition for cert. pending, No. 21-1143 (filed Feb. 14, 2022).

347. "Human behavior limits the effectiveness of masks when they are not worn consistently and correctly," and even when masks are "worn consistently and correctly, extended durations in close contact with an infectious person can still lead to transmission." Id. at 347-348. In addition, unlike vaccination, masks do not reduce the severity or duration of illness for people who become infected with COVID-19. Id. at 348. The Air Force accordingly concluded that "mask wear[ing] is a supplement to, but not an effective substitute for, vaccination." Ibid.

The same is true of social distancing. "[S]hort of fully isolating [a service] member from any contact with others both on the job and off -- which is not practicable" -- social distancing cannot reduce risks as effectively as vaccination. C.A. E.R. 345. And social distancing is obviously incompatible with deployment, which often requires servicemembers to sit shoulder-to-shoulder on long flights and to live, work, eat, and sleep in close quarters in tents and other temporary structures. Id. at 239-240, 249; see id. at 356 (explaining why "isolation is not practicable" in light of applicant's duties).

Testing likewise is not a viable alternative: as the district court explained, "it's not always feasible," "especially when you have to deploy quickly," and if applicant tested positive, "the military would be forced to scramble to find a replacement." Appl. App. 10a; see C.A. E.R. 245-246, 349-351. "[T]he speed of trans-

mission" can also "outpace[] test results, making test result availability not an effective alternative measure." Appl. App. 10a-11a. Applicant suggests that the Air Force use "rapid antigen tests" to obtain results more quickly, Appl. 30, but the Air Force explained that antigen tests are "less accurate" and would therefore increase the risk that applicant would "deploy while actually infectious, risking both his health and the health of his unit," C.A. E.R. 351.

In any event, testing would not permit applicant to enter countries that bar unvaccinated foreigners. "[M]any host nations require vaccination for service member[s] to enter their countries," and "[t]esting will not satisfy those requirements." C.A. E.R. 351; see ibid. (noting that "Combatant Commanders (who oversee operations for all Services in a particular area of the world)" also "require vaccination for deployment to their areas of responsibility"). Applicant states that some countries have recently relaxed their vaccination requirements, see Appl. 26-27, but various countries still require vaccination, and the mission of the unit applicant formerly commanded is to deploy anywhere in the world when a need arises, with little notice, see C.A. E.R. 241. It would obviously undermine the military's compelling interests if a member of the unit (not to mention its commander) were barred from entering the country in which a mission was to take place.

Applicant also contends that another "less restrictive al-

ternative" would be to treat him "the same as the fully vaccinated" because of his claimed "natural immunity" attributable to his June 2021 infection. Appl. 28. But relying on CDC guidance and scientific evidence, DoD has determined that there is insufficient evidence to support a conclusion that prior infection provides adequate protection against future infection. See C.A. E.R. 277. There is uncertainty about the "antibody threshold" that is needed to protect an individual against reinfection, for example, and about how long any protection from prior infection might last. See id. at 352-353. The Air Force assessed available studies and concluded that much remains "unknown about the strength, consistency, and duration of protection from prior SARS-CoV-2 infection." Id. at 353; see id. at 353-354 (describing studies). By contrast, evidence shows that "[v]accination provides a strong boost in protection for people who have recovered from COVID-19," and the Air Force has therefore concluded that "the best way to minimize the risk to service members and the Air Force mission is to require vaccination." Id. at 353-354.

Applicant and his amici cite various studies that they believe support his views about natural immunity. E.g., Appl. 20-21; Zywicki et al. Amici Br. 5-18. But the CDC has concluded, based on its ongoing assessment of new scientific evidence, that "[p]eople who already had COVID-19 and do not get vaccinated after their recovery are more likely to get COVID-19 again than those who get

vaccinated after their recovery." CDC, Frequently Asked Questions, go.usa.gov/xzUSk.[4] Applicant emphasizes (Appl. 21) that this statement compares people who remain unvaccinated after a COVID-19 infection with people who get vaccinated after an infection (rather than comparing them to vaccinated people at large). But that is precisely the point -- the CDC has concluded that post-infection vaccination provides important protection to a person in applicant's situation when compared with "natural immunity" standing alone.

In addition, natural immunity, like testing, would not enable applicant to enter countries that bar unvaccinated foreigners. Applicant asserts that the European Union sometimes accepts "proof of recovery from infection" as an alternative to vaccination. Appl. 29 (citation omitted). But applicant's June 2021 infection

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[4] Amici also misread the studies they cite. To take just one example, they assert that vaccination makes people more "vulnerab[le]" to variants. Zywicki et al. Amici Br. 16. But the study they cite merely found that "antibody-resistant lineages comprised a higher percentage of cases in fully vaccinated" individuals. Venice Servellita et al., Predominance of Antibody-Resistant SARS-CoV-2 Variants in Vaccine Breakthrough Cases from the San Francisco Bay Area, California, 7 Nature Microbiology 277, 279 (Feb. 2022), www.nature.com/articles/s41564-021-01041-4.pdf. In other words, if vaccinated people become infected, they are more likely to become infected with antibody-resistant variants. But vaccinated people are far less likely to become infected in the first place: "[V]accine breakthrough infections comprised only a minority of total infections (9%, 125 out of 1,373 cases)," "consistent with previous reports showing that vaccination is effective in decreasing viral transmission." Id. at 284.

would not even qualify under the European Union's standard, which requires that "no more than 180 days have passed since the date of the first positive PCR test." European Commission, EU Digital COVID Certificate, ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate_en. Applicant's observation therefore only casts further doubt on the effectiveness of his claimed immunity. See, e.g., C.A. E.R. 353 (noting questions about the duration of protection).

Applicant observes that the Air Force sometimes grants medical exemptions from other vaccination requirements when there is sufficient "evidence of immunity," including immunity resulting from prior infection. Appl. 28 (citation omitted). But as the Air Force has explained, the analysis is circumstance- and disease-specific: Long experience has shown that infection with some diseases, such as measles and chickenpox, can result in longstanding immunity, while infection with other diseases, such as influenza and whooping cough, does not. C.A. E.R. 274. Relying on FDA and CDC guidance and available scientific evidence, the Air Force has determined that a "history of COVID-19 disease" or a test showing antibodies does not constitute the "[e]vidence of immunity" that is necessary to support a medical exemption under military immunization policies. Id. at 272-273; see id. at 273 (citing "[g]rowing epidemiological evidence * * * indicat[ing] that vac-

cination following infection further increases protection from subsequent infection," including in light of "increased circulation of more infectious variants").

Applicant also makes the startling proposal that the Air Force allow him to "accompany [his] unit" even if he tests positive, suggesting that unless he becomes "severely ill, he could perform his duties with a few added precautions." Appl. 30. That proposal illustrates applicant's disregard for military readiness and the health of other servicemembers. It also underscores the extent to which he seeks to intrude on military commanders' judgment about how best to run the military: The judiciary should not compel the Air Force to assign to a unit a servicemember who is currently infected with a highly contagious virus that could render him disablingly ill, require a dangerous and disruptive medical evacuation, and infect other servicemembers.

C. Applicant's Free Exercise Claim Lacks Merit

Applicant's Free Exercise claim adds little to his RFRA claim: Because the Air Force's vaccination requirement satisfies strict scrutiny under RFRA, it necessarily complies with the most stringent standard that could apply under the Free Exercise Clause, see Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

That said, we respond briefly to the incorrect suggestion (Appl. 31-32) that the Air Force's vaccination requirement treats secular activity more favorably than religious exercise. As noted,

medical or administrative exemptions generally are temporary and thus not comparable to the permanent exemption that applicant seeks. See Doe v. San Diego Unified School Dist., 19 F.4th 1173, 1179 (9th Cir. 2021) (concluding that due to its "temporary duration," a 30-day exception from a COVID-19 vaccination mandate did not "undermine a school district's interests in student health and safety the way a religious exception would"). Servicemembers with temporary medical exemptions must get vaccinated as soon as the temporary condition resolves. C.A. E.R. 301. In addition, as the district court explained (Appl. App. 47a), the Air Force's goal in requiring vaccination is to ensure a maximally healthy force -- and vaccinating someone for whom a vaccine is temporarily medically contraindicated would undermine, not further, that goal. See Doe, 19 F.4th 1173, 1178; We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 285 (2d Cir. 2021), petition for cert. pending, No. 21-1143 (filed Feb. 14, 2022); Does 1-6 v. Mills, 16 F.4th 20, 30-31 (1st Cir. 2021), cert. denied, 142 S. Ct. 1112 (2022). Temporary medical exemptions are thus categorically different from the permanent religious exemption that applicant seeks.

Moreover, contrary to applicant's suggestion (Appl. 32), Air Force policy does not treat individuals who cannot be vaccinated for temporary medical reasons more favorably than individuals who cannot be vaccinated for religious reasons. As previously explained, servicemembers who are unvaccinated against COVID-19 --

for any reason -- generally are not considered medically ready for deployment. See p. 7, supra. Restrictions on travel by unvaccinated servicemembers or training opportunities likewise generally do not turn on whether a servicemember is unvaccinated for secular or religious reasons. See C.A. E.R. 250.

II. THE EQUITABLE FACTORS COUNSEL AGAINST RELIEF

Applicant has shown neither that he would suffer irreparable harm absent an injunction pending appeal, nor that an injunction would serve the public interest, which merges with the government's interest here. Nken v. Holder, 556 U.S. 418, 435 (2009); Winter v. NRDC, Inc., 555 U.S. 7, 12 (2008).

The Air Force has "no policy mandating administrative separation for" members of the Reserve who refuse to be vaccinated against COVID-19. C.A. E.R. 329. Instead, all of applicant's claimed harms flow from his no-pay/no-points status and contemplated reassignment to the IRR, which he says "prevents [him] from drawing a salary, incurring points toward retirement, reporting for duty, or being attached to a unit." Appl. 38; see C.A. E.R. 335. But those are entirely reparable harms. If applicant ultimately were to succeed on the merits of his claims, backpay is a potential remedy. See, e.g., 10 U.S.C. 1552(c)(1) (authorizing payment of "a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits"); cf. Tanzin v. Tanvir, 141 S. Ct. 486, 491 (2020). Likewise, applicant can seek to

restore his points toward retirement and even to correct his service record to avoid any adverse impact on future promotions. See, e.g., 10 U.S.C. 1552(a)(1) (authorizing military departments to "correct any military record" to "correct an error or remove an injustice"). The availability of such "adequate compensatory or other corrective relief * * * weighs heavily against a claim of irreparable harm." Sampson v. Murray, 415 U.S. 61, 90 (1974) (citation omitted). And that is especially so in the military context, where injunctive relief is a grave intrusion on the Executive Branch's supervision of the military. See pp. 16-19, supra.

Applicant also asserts (Appl. 38-39) that injunctive relief is necessary to allow him to serve with a "unit that is willing to hire him" and to pursue "training and temporary duty assignment opportunities available to other unvaccinated servicemembers." But applicant cites no authority supporting his assertion that the denial of such opportunities qualifies as irreparable harm -- and if they did, virtually any employment dispute, in the military or otherwise, would be fodder for an injunction. What is more, applicant does not explain how a unit could "hire" him consistent with Air Force policies on vaccination. Nor are training and temporary duty assignment opportunities generally available to unvaccinated servicemembers -- as applicant himself previously acknowledged. C.A. E.R. 78; see id. at 250.

Finally, denying an injunction pending appeal also would not result in any "loss of First Amendment freedoms, for even minimal periods of time," Elrod v. Burns, 427 U.S. 347, 373 (1976), because applicant would remain free to adhere to his stated religious beliefs by declining to become vaccinated while in the IRR.

On the other side of the balance, the risk to mission success and to other servicemembers weighs heavily against an injunction forcing the Air Force to disregard applicant's unvaccinated status and to allow him to be assigned to particular trainings or units. See pp. 19-34, supra. And the manner in which applicant refused to become vaccinated not only jeopardizes mission success, but also has the potential to create "a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities." Orloff, 345 U.S. at 95. Applicant's commander relieved applicant from his command "based on [a] loss of faith and confidence in his ability to lead" due to his "pattern of lack of respect for military authority," including his "highly disrespectful affront to the chain of command" in sending the "NUTS!" memorandum, which "show[ed] a shocking lack of military decorum," and his misuse of his position in an effort to obtain information from a subordinate. C.A. E.R. 250-253. It is not in the public interest to absolve applicant of the consequences for that conduct.

Indeed, the judicial intrusion into military affairs that applicant seeks would harm the public interest on an even more

fundamental level, because the Constitution assigns the defense of our Nation to military leaders, not courts. See Egan, 484 U.S. at 530; Gilligan, 413 U.S. at 10. As in Navy SEALs, there is "no basis in this case for employing the judicial power in a manner that military commanders believe would impair the military of the United States as it defends the American people." 142 S. Ct. at 1302 (Kavanaugh, J., concurring).

This Court should thus simply deny the application. If, however, the Court grants any relief, it should not adopt applicant's unclear and contradictory formulation, cf. Appl. 38-39, and should make clear that nothing in its order precludes the Air Force from "considering [applicant's] vaccination status in making deployment, assignment, and other operational decisions." Navy SEALs, 142 S. Ct. at 1301.

III. CERTIORARI BEFORE JUDGMENT IS UNWARRANTED

Applicant's alternative request for certiorari before judgment also should be denied. Certiorari before judgment is warranted "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Applicant fails to meet that "very demanding standard." Mt. Soledad Mem'l Ass'n v. Trunk, 573 U.S. 954, 955 (2014) (Alito, J., respecting the denial of a petition for a writ of certiorari before judgment).

Briefing in the Ninth Circuit already is underway on applicant's appeal from the denial of a preliminary injunction, and the court of appeals presumably will hear argument and issue a ruling with appropriate dispatch. See 9th Cir. R. 3-3. Once that court has issued its decision, this Court can then consider a petition for a writ of certiorari, if any, to review that decision. Applicant provides no sound basis -- in fact, no basis at all -- to deviate from that normal appellate practice here. Moreover, applicant did not move to further expedite appellate proceedings in the court of appeals, despite the express availability of such expedition. See 9th Cir. R. 3-3(c), 27-12, and 34-3(3) and (5). Having forgone any attempt to secure further expedition in the lower court, applicant cannot justify his request that this Court grant certiorari before judgment and short-circuit the orderly process in the court of appeals.

CONCLUSION

The application should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

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