No. 22-10077

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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U.S. NAVY SEALS 1-26; U.S. NAVY SPECIAL WARFARE COMBATANT CRAFT CREWMEN 1-5; U.S. NAVY EXPLOSIVE ORDNANCE DISPOSAL TECHNICIAN 1;
U.S. NAVY DIVERS 1-3,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States of America; LLOYD AUSTIN, SECRETARY, U.S. DEPARTMENT OF DEFENSE, individually and in his official capacity as United States Secretary of Defense; UNITED STATES DEPARTMENT OF DEFENSE; CARLOS DEL TORO, individually and in his official capacity as United States Secretary of the Navy,

Defendants-Appellants.

_____

On Appeal from the United States District Court
for the Northern District of Texas

_____

Brief For *Amicus Curiae* National Institute of Military Justice
in Support of Defendants-Appellants

_____

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CERTIFICATE OF INTERESTED PERSONS

U.S. Navy SEALs 1-26, et al. v. Joseph R. Biden Jr., et al., No. 22-10077

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs:

U.S. Navy SEALs 1-26
U.S. Navy Special Warfare Combatant Craft Crewmen 1-5
U.S. Navy Explosive Ordnance Disposal Technician 1
U.S. Navy Divers 1-3

Defendants:

Joseph R. Biden, Jr., in his official capacity as President of the United States of America
Lloyd Austin, Secretary, U.S. Department of Defense, individually and in his official capacity as United States Secretary of Defense
United States Department of Defense
Carlos Del Toro, individually and in his official capacity as United States Secretary of the Navy

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

Regulations

INTEREST OF *AMICUS CURIAE*[1]

The National Institute of Military Justice (NIMJ) is a private, District of Columbia non-profit organization founded in 1991, dedicated to the fair administration of justice in the armed forces and improved public understanding of military justice. Under Rule 26.1, *amicus* certifies that NIMJ is a non-profit organization and does not have parent corporations. NIMJ's board of directors includes former judge advocates, private practitioners, and legal scholars. NIMJ fellows include law professors, private practitioners, and other experts in the field, none of whom are on active duty, but several have served as military lawyers (judge advocates). The Department of Defense currently employs no member of the NIMJ board.

Amicus supports defendants-appellants in reversing the preliminary injunction issued by the district court; Amicus certifies that this brief is necessary because it reflects a perspective on this case not found in the parties' briefs or any anticipated amicus briefs. Specifically, this brief reflects NIMJ's expertise in the law of military orders.

[1] This brief is submitted under Federal Rule of Appellate Procedure 29(a) with the consent of all parties. Undersigned counsel for *amicus curiae* certifies that this brief was not authored in whole or part by counsel for any of the parties; no party or party's counsel contributed money for the brief, and no one other than *amicus* and their counsel has contributed money for this brief.

I. SUMMARY OF ARGUMENT

Involuntary vaccinations have been an integral part of military personnel management since General George Washington ordered the Continental Army to be vaccinated against smallpox. Today, vaccination orders against contagious diseases are issued routinely for necessary reasons and are directed by the Department of Defense Immunization Program. The country has no more compelling interest than maintaining a healthy, effective, and deployable fighting force, and obedience to lawful vaccination orders is necessary to advance that interest. RFRA does not alter the law of military orders. It would be a Pyrrhic victory to sacrifice the national defense on the altar of free exercise. Therefore, claims purporting to resist orders to be vaccinated against a contagious disease should fail in all but the most unusual cases.

ARGUMENT

A. Military Vaccination Orders Have a Long History

Military history is replete with examples of armies reduced in effectiveness or defeated by disease more than by force of arms alone. *See*, *e.g.*, Joellenbeck LM, Russell PK, Guze SB, editors, Strategies to Protect the Health of Deployed U.S. Forces: Medical Surveillance, Record Keeping, and Risk Reduction, Institute of Medicine (US) Medical Follow-Up Agency; Washington (DC): National Academies Press (US); 1999. 2, [available from:

https://www.ncbi.nlm.nih.gov/books/NBK225082/]. Accordingly, even the earliest periods of this Nation's history contain examples of compulsory military vaccinations. General George Washington established a policy of inoculating the Continental Army against smallpox because of the threat to the health and efficiency of his troops.[2]

Today, this practice endures in the military policy of vaccinating service members against a host of illnesses. Additionally, as part of being assigned duty in certain parts of the world, a service member will be immunized against local diseases. *See* Department of Defense Instruction 6205.02, DoD Immunization Program [https://tinyurl.com/mvkwm79z]; Joint Regulation on Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases, (Navy) Bureau of Medicine Instruction 6230.15B [https://tinyurl.com/4wzuz2p9].

B. Obedience to Lawful Orders is a Core Requirement of Operational Readiness

It is "'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). Accordingly, "[t]he laws and traditions governing that discipline have a long history [and] are founded on unique military exigencies as powerful now as in the past."

[2] Ann M. Becker, *Smallpox in Washington's Army: Strategic Implications of the Disease during the American Revolutionary War*, 68 J. MILITARY HISTORY, 422-23 (2004); ELIZABETH A. FENN, POX AMERICANA: THE GREAT SMALLPOX EPIDEMIC OF 1775-1782, 94-95 (NY: Hill and Wang, 2001).

United States v. Heyward, 22 M.J. 35, 37 (C.M.A. 1986), quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975).

In order to ensure the nation's security, the military demands obedience to orders in ways without counterpart in civilian life. The Court of Appeals for the Armed Forces (CAAF) has recognized the necessity for obedience to orders.

> Orders are clothed with an inference of lawfulness. "An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime."

United States v. New, 55 M.J. 95, 106 (C.A.A.F. 2001) certiorari denied in *New v. United States*, 534 U.S. 955 (2001) (citations omitted). In the absence of legislative opposition or when commensurate with constitutional or statutory authority, military regulations and policies approved by the commander in chief or designee, here the Secretary of Defense, are presumed to be endowed with "the sanction of law." *See, e.g.*, *Smith v. Whitney*, 116 U.S. 167, 181 (1886) citing *United States v. Maurice*, 26 F. Cas. 1211, 1214 (D. VA 1823).

Vaccination orders are no different from any other order. Thus, in the late 1990s and early 2000s, hundreds of service members were convicted at court-martial for refusing to receive the anthrax vaccine as they were ordered. *See, e.g., United States v. Schwartz*, 61 M.J. 567 (N-M Ct. Crim. App. 2005), aff'd 64 M.J. 199 (C.A.A.F. 2006) (upholding a conviction for a failure to obey a lawful order to

submit to an Anthrax vaccine). Earlier, military convictions followed a refusal to receive the smallpox vaccine as ordered. *See United States v. Chadwell*, 36 C.M.R. 741 (NBR 1965).

C. RFRA Does Not Alter the Law of Military Orders

RFRA does not alter the settled law of military orders. Congress itself said this when passing RFRA. First, it provided a broad exception to the application of the Act. *See* 42 U.S.C. § 2000bb-1(b). Second, the legislative history evidences an expectation of judicial deference. The House Report on RFRA stated: "The Committee recognizes that the religious liberty claims in the context of . . . the military present far different problems . . . than they do in civilian settings. . . . [M]aintaining discipline in our armed forces, [has] been recognized as [a] governmental interest of the highest order." And the Senate Report noted that "[t]he courts have always recognized the compelling nature of the military's interests in these objectives [maintaining good order, discipline, and security] in the regulation of our armed services. Likewise, the courts have always extended to military authorities significant deference in effectuating these interests. The committee intends and expects that such deference will continue under this bill."

Thus, in *United States v. Sterling*, 75 M.J. 407 (C.A.A.F. 2016), the court upheld, against a RFRA challenge, the principle that military orders are presumed to be lawful when such orders "relate to military duty, which includes all activities

reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service." *Id*., at 414, citing to MANUAL FOR COURTS-MARTIAL (MCM) pt. IV, para. 14.c.(2)(a)(iv). The CAAF further cited the MCM for the proposition that an individual's conscience, religion, or personal philosophy cannot justify or excuse willful disobedience of a lawful order.

Lower military courts have dealt similarly with RFRA claims related to orders violations. For example, in *United States v. Webster*, the Army Court of Criminal Appeals applied the RFRA's compelling justification test to determine that soldiers could not use their religious beliefs as a shield against deployment orders. *United States v. Webster*, 65 M.J. 936, 948-949 (A. Ct. Crim. App. 2008). The military has a compelling interest in sending trained and healthy forces into conflict zones. *Id*.

When military leaders give orders designed to reduce the spread of an infectious and debilitating disease, RFRA cannot be used to defeat their efficacy. Moreover, in this case, the interest asserted is far more compelling than that contended in any of these prior RFRA cases, none of which dealt with the widespread emergence of a contagious disease that directly affected operational readiness. As Justice Kavanaugh recently wrote in *Austin v. U.S. Navy Seals 1-26*, No. 21A477, 2022 WL 882559 at *1 (U.S. Mar. 25, 2022), "the Navy has an extraordinarily compelling interest in maintaining strategic and operational control

over the assignment and deployment of all Special Warfare personnel—including control over decisions about military readiness." *Austin*, 2022 WL 882559 at *2.

II. CONCLUSION

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

Respectfully submitted,

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April 5, 2022

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system. Both parties have waived paper service.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B) and 32(g)(1), I hereby certify that this brief contains 4,376 words, as calculated by the word count function in Microsoft Word, and excluding the items that may be excluded under Federal Rule of Appellate Procedure 32(f). This brief uses a proportionally spaced typeface, Times New Roman, with a 14-point typeface, in compliance with Federal Rules of Appellate Procedure 32(a)(5)(A) and 32(a)(6).

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