IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Governor GREG ABBOTT, in his official capacity as Governor of the State of Texas; and Governor MIKE DUNLEAVY, in his official capacity as Governor of the State of Alaska, *Plaintiffs*, v. JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*, *Defendants*.	No. 6:22-cv-3-JCB

DEFENDANTS' SUR-REPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

There is no dispute that Plaintiffs bear the burden to establish, by a clear showing, the four factors for a preliminary injunction, and that failure to demonstrate even one of the factors is sufficient to deny injunctive relief. *See Allied Mktg. Grp., Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 809 (5th Cir. 1989). Plaintiffs' reply underscores that they have failed to carry that burden. *See* Pls.' Reply ISO Mot. for Prelim. Inj., ECF No. 36 ("Pls.' Reply").

I. Plaintiffs Cannot Succeed On the Merits.

A. Their Constitutional Claims Are Meritless.

Several key concessions make it impossible for Plaintiffs to succeed on their constitutional claims. First, Plaintiffs concede that the federal government has the constitutional authority to set medical readiness standards for members of the National Guard, including the authority to add a required COVID-19 vaccination. *See* Governor Abbott's Mot. for Prelim. Inj., ECF No. 24 at 8-9 ("Abbott Br."); Pls.' Reply at 1. Second, Plaintiffs admit that the federal government has the authority to withhold funding for noncompliance with medical readiness standards. Abbott Br. at 13–14. Third, Plaintiffs never challenge the authority of DoD's Defense Finance and Accounting Service (DFAS) to determine the appropriate federal pay and benefits for National Guard members. *See generally* Pls.' Reply (no mention of DFAS). Given these admissions and concessions, Plaintiffs cannot show that the federal government has overstepped its constitutional authority by not paying for National Guard training that does not conform with federal readiness standards.

In their reply, Plaintiffs claim that they are likely to succeed under their "novel *governing* argument." Pls.' Reply at 1. But that theory—based on the Tenth Amendment—is not nearly so "novel" as Plaintiffs claim. Plaintiffs argue that the Constitution granted Congress the authority of "governing such Part of [the Militia] as may be employed in the Service of the United States," U.S. Const. art. I, § 8, cl. 15–16, and it must then follow, Plaintiffs argue, that "the Tenth Amendment reserved that *governing* power to the States," Abbott Br. at 8.

Under any Tenth Amendment inquiry, a court must look to whether the power to take the challenged actions was "delegated to Congress in the Constitution," and if so, "the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v. United States*, 505 U.S. 144, 156 (1992). "[I]t makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment." *Id.* at 159. To defeat Plaintiff's Tenth Amendment challenge, Defendants just need to show that their actions are authorized by the Constitution. As Defendants explained in great detail (and as Plaintiffs concede), the Constitution gives the federal government the authority to set medical readiness requirements and the authority to withhold funding for training that does not comply with those standards. *See* Defs.' Opp'n to Mot. for Prelim. Inj., ECF No. 33, at 7–12 ("Defs.' Opp'n").

Properly understood as a traditional Tenth Amendment theory, Judge Friot in *Oklahoma* rejected Plaintiffs' "novel governing argument" when he found the federal government's actions to be constitutional. *Oklahoma v. Biden*, ---F. Supp. 3d ---, 2021 WL 6126230, at *12 (W.D. Okla. Dec. 28, 2021) (citing *New York*, 505 U.S. at 156). "[T]he power to impose the vaccination mandate at issue here is bottomed on an express Article I grant of power to Congress" and "this express grant of power to Congress (importantly, accompanied by an equally express allocation of responsibilities between federal and state authorities) leaves no room" for a viable Tenth Amendment claim. *Id.* (footnote omitted).

Plaintiffs' reply also suggests that the federal government's power to unilaterally withdraw federal recognition, pursuant to 32 U.S.C. §324(a)(2), of officers who fail to maintain medical readiness might not be constitutional. Pls.' Reply at 2 (claiming that at least one academic in 1940 "questioned the constitutionality of this statutory provision"). At present, this is a purely hypothetical issue that

need not be addressed: there are no allegations that the federal government has unilaterally withdrawn—or is imminently withdrawing—federal recognition for Texas or Alaska National Guard members for failure to meet readiness requirements. And even if the Government were contemplating using this power, the process takes many months and any claims challenging such actions would not be ripe. *Cf. Roberts v. Roth*, No. CV 21-1797 (ABJ), 2022 WL 834148, at *6 (D.D.C. Mar. 21, 2022) (challenge to withdrawal of federal recognition not ripe until discharge is complete). In any event, the federal government certainly has the authority to set standards for who can serve as an officer in the Reserve and can remove those who fail to comply. *Holdiness v. Stroud*, 808 F.2d 417, 420–21 (5th Cir. 1987) (National Guard members are "subject to federal standards and capable of being 'federalized' soldiers."). So Plaintiffs are not likely to succeed on this theory either.

B. Plaintiffs' Reply Ignores Their Administrative Procedure Act Claims.

Plaintiffs make no effort to defend their Administrative Procedure Act ("APA") claims in their reply. *See generally* Pls.' Reply. Defendants' brief described the high legal bar Plaintiffs must overcome to make out a viable APA claim, and explained why the evidence submitted in this case means that Plaintiffs cannot meet that burden. Defs.' Opp'n at 12–17. Plaintiffs offer no response to those arguments or those facts.

II. Plaintiffs Have Not Demonstrated Irreparable Harm.

Plaintiffs argue that they suffer irreparable harm from an alleged intrusion upon their gubernatorial powers. Pls.' Reply at 2–3. Plaintiffs, however, never dispute that Texas and Alaska state laws prohibit governors from issuing orders that conflict with federal law and regulations. *See* Tex. Gov't Code Ann. § 437.004; Alaska Stat. § 26.05.340(d). Insofar as orders from Governors Abbott and Dunleavy conflict with federal regulations applicable to the National Guard, those orders are void under state law and cannot be a source of irreparable harm.

Plaintiffs also argue that they are irreparably harmed by confusion about whether it is the

federal government or Governors Abbott and Dunleavy requiring vaccination for National Guard members. Pls.' Reply at 3. Leaving aside whether such "confusion" could constitute irreparable harm sufficient to obtain extraordinary injunctive relief here, Plaintiffs fail to carry their burden to show any such harm because there is no evidence that any members of the Texas or Alaska National Guard think that their governor is setting National Guard vaccination requirements. Given the high profile nature of vaccine requirements and each governor's well-known and outspoken objection to those requirements (including this very lawsuit), it is highly unlikely that individual National Guard members would mistakenly think that their governor is responsible for the military's COVID-19 vaccine requirement.

In their reply, Plaintiffs for the first time claim irreparable harm arising from individual National Guard members' religious objections to COVID-19 vaccines. Pls.' Reply at 3. This argument fails for several reasons. First, there are no claims in this case regarding religious freedom. *See* Am. Compl., ECF No. 4. Second, "[r]eply briefs cannot be used to raise new arguments." *Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016). Finally, even if Plaintiffs had alleged a relevant claim and timely raised the issue, Plaintiffs have no standing to assert this supposed harm. Neither Governor Abbott nor Governor Dunleavy is a member in the National Guard. They do not raise any of their own religious claims, and they do not have third-party standing to raise the claims of others. The States of Alaska and Texas are not parties to this suit, but even if they were, Plaintiffs would still not have standing. *See Oklahoma*, 2021 WL 6126230, at *3 ("the State does not have *parens patriae* standing to bring this action"); *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923). And to the extent that Plaintiffs rely on the Fifth Circuit's decision to deny a stay of a preliminary injunction pending appeal, *U.S. Navy SEALs 1-26 v. Biden*, 27 F.4th 336 (5th. Cir. 2022), the Supreme Court necessarily rejected the Fifth Circuit's reasoning in *granting* the Government's motion to partially stay the injunction at issue there, *Austin v. U. S. Navy SEALs 1-26*, --- S. Ct. ---, 2022 WL 882559 (U.S. Mar. 25, 2022) (mem.).

Finally, Plaintiffs "wrongly argue[] that [they] need not show irreparable injury at this stage." *Gallagher Benefit Servs., Inc. v. Richardson*, No. 6:19-cv-00427, 2020 WL 1435111, at *2 (E.D. Tex. Mar. 24, 2020) (Barker, J.). Plaintiffs take the extraordinary position that state actors need not make a showing of irreparable harm when challenging a COVID-19 vaccine requirement. Pls.' Reply at 4–5 (citing *Missouri v. Biden*, --- F. Supp. 3d ---, 2021 WL 5998204 (E.D. Mo. Dec. 20, 2021), *appeal filed*, *Missouri v. Biden*, No. 22-1104 (8th Cir. Jan. 18, 2022)). But the decision of a district court in Missouri—one that Defendants respectfully contend is wrong and is currently being appealed to the Eighth Circuit—has no bearing on the fact that in *this* Court evidence of irreparable injury "remains one of the four showings that a moving party must make to obtain a preliminary injunction." *Gallagher*, 2020 WL 1435111, at *2.

III. Balance of the Equities and Public Interest Tilt Strongly in Favor of Defendants.

The final two factors also support denying the motion for preliminary injunction. There is a strong public interest in a vaccinated military. "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." *Austin*, 2022 WL 882559, at *1 (Kavanaugh, J., concurring) (citation omitted).

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." *Id.* "The Court 'should indulge the widest latitude' to sustain the President's 'function to command the instruments of national force, at least when turned against the outside world for the security of our society.'" *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring)).

The public depends on the National Guard to be ready to deploy "with little or no notice" in response to "natural (e.g., hurricanes, earthquakes, forest fires) or manmade disasters (e.g., oil spills like Deepwater Horizon, civil unrest)" and even "terrorists attacks." Decl. of Steve L. Bradley, ECF No. 33-2, ¶ 3. As recent geopolitical events show, our military must be able to respond nimbly to ever-evolving national security threats and cannot wait weeks for a medically unfit National Guard unit to get up-to-date on its vaccinations before being medically fit to deploy. "In a crisis every minute and hour matters. Delays spent mobilizing can cost lives." *Id.*

Against these weighty interests, Plaintiffs claim an interest in receiving federal funding for National Guard members who are not medically fit for federal service. While Plaintiffs certainly have an interest in receiving more federal funding, the public interest does not support spending federal tax dollars on training for individuals who refuse to comply with military requirements governing their medical fitness for federal service. As Defendants explained, Texas and Alaska remain free to use state funds to train those individuals, and States can pay for individuals who are not medically fit for federal service while they are in State Active Duty or serve in their State guards.

The fact that the Secretary of Defense announced the funding limitation—rather than the President himself—has no bearing on the balance of the equities. Pls.'s Reply at 6 (arguing the President is "hid[ing] behind" the Secretary of Defense). As the Supreme Court has recognized for well over a century, when orders have "been issued by the Secretary of War,—the head of the Department through whom the President would speak and act upon the subject,—in the absence of evidence to the contrary, it would be presumed that he acted by the direction of the President." *Scott v. Carew*, 196 U.S. 100, 112–13 (1905); *id.* at 109 ("in the exercise of the power vested in the President as Commander-in-Chief of the Army, the order of the War Department [is] presumed to be that of the President"). "The [S]ecretary of [W]ar is the regular constitutional organ of the [P]resident, for the administration of the military establishment of the nation; and rules and orders publicly

promulgated through him must be received as the acts of the executive." *United States v. Eliason,* 41 U.S. (16 Pet.) 291, 302 (1842); *see also Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496–97 (2010) ("Article II 'makes a single President responsible for the actions of the Executive Branch.'") (quoting *Clinton v. Jones*, 520 U.S. 681, 712-13 (1997)); *Wilcox v. Jackson ex rel. M'Connel*, 38 U.S. (13 Pet.) 498, 513 (1829) ("The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties."); *Dunmar v. Ailes*, 348 F.2d 51, 55 (D.C. Cir. 1965).

Finally, Plaintiffs claim that principles of federalism support an injunction. Not so. The Constitution requires States to ensure that "the militia [] be prepared for federal service if it [becomes] necessary." Abbott Br. at 12. As Plaintiffs admit, "the President is tasked with setting federal standards for Guardsmen's deployability, physical fitness, and the like." *Id.* at 4 (citing 32 U.S.C. § 110). And, as explained above, Texas and Alaska state laws recognize that their governors have no right to issue orders that conflict with federal law and regulations. The principles of federalism do not favor Plaintiffs; rather they weigh overwhelmingly in favor of denying the injunction.

CONCLUSION

The Court should deny Plaintiffs' motion for a preliminary injunction.

Dated: April 1, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Director

/s/ *Zachary A. Avallone*
ANDREW E. CARMICHAEL
Senior Trial Counsel
ZACHARY A. AVALLONE (DC Bar No. 1023361)
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW

Washington, DC 20005
Tel: (202) 514-2705
E-mail: zachary.a.avallone@usdoj.gov

BRIT FEATHERSTON
United States Attorney

JAMES GILLINGMAN
Assistant U.S. Attorney
Eastern District of Texas
110 N. College Street, Suite 700
Tyler, Texas 75702

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that on April 1, 2022, this document and attachments were filed through the Court's CM/ECF system, which automatically serves all counsel of record.

/s/ Zachary A. Avallone