**No. 22-10645**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

NAVY SEAL 1, et al.,

Plaintiffs–Appellees,

*v.*

SECRETARY OF THE UNITED STATES DEPARTMENT OF DEFENSE, et al.,

Defendants–Appellants

On Appeal from the United States District Court
for the Middle District of Florida

# BRIEF OF AMICI AIR FORCE OFFICER, AIR FORCE NCO, AIR FORCE SPECIAL AGENT, AND AIR FORCE ENGINEER

**in support of Plaintiffs–Appellees and affirmance**

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## CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amici hereby certify that, in addition to the individuals and entities identified in Appellants' and Appellees' briefs, the following individuals and entities are known to have an interest in the outcome of this case:

Air Force Engineer*

Air Force NCO*

Air Force Officer*

Air Force Special Agent*

Crampton, Stephen

Hirsh, Michael

Hochschild, Adam

Hodes, Mary Catherine

Jonna, Paul Michael

Knapp, Cody T.

McHale, Michael

Self, Hon. Tilman E.

Snyder, Cassandra M.

Thomas More Society

No publicly traded company or corporation has an interest in the outcome of this case.

* This brief is submitted by the four pseudonymous plaintiffs in *Air Force Officer v. Austin*, No. 5:22-cv-00009-TES (M.D. Ga.). The district court in that case granted them leave to proceed under pseudonyms (Air Force Engineer, Air Force NCO, Air Force Officer, and Air Force Special Agent). Doc. 52 & 83 in *Air Force Officer*. They are willing to provide their legal names to this Court under seal for *in camera* review, if the Court so requests.

/s/Adam S. Hochschild
Counsel for Amici

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## IDENTITY AND INTEREST OF AMICI CURIAE[1]

Four Air Force service member amici—"Air Force Officer," "Air Force NCO," "Air Force Special Agent," and "Air Force Engineer" ("Amici" or the "Four Airmen")—support affirmance of the preliminary injunction the district court entered in favor of Plaintiff-Appellees Navy Commander and Lieutenant Colonel 2 ("Appellees") and against Defendant-Appellants (the "Government" or "Appellants") in this case. The Four Airmen are the 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 Appellees, the Four Airmen received final denials of their requests for religious accommodation regarding the military's COVID-19 vaccine mandates (the "Mandate").

One of the Four Airmen, Air Force Officer, originally filed the *Air Force Officer* case seeking, *inter alia*, an injunction against enforcement of the Mandate. On February 15, 2022, the court granted a preliminary injunction in her favor against the Government. *Air Force Officer v. Austin*, 2022 WL 468799 (M.D. Ga. Feb. 15, 2022) ("Air Force Officer Injunction"). The court "easily f[ound] that the

[1] All parties consented to the filing of this brief. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed to fund preparing or submitting the brief; and no person—other than the Amici or their counsel—contributed money that was intended to fund preparing or submitting the brief.

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 court further found that Air Force Officer faced irreparable harm by virtue of the final denial of her religious accommodation request; "the choice to adhere to her religious beliefs or modify her behavior to violate those beliefs suffices to trigger constitutional protection." *Air Force Officer*, 2022 WL 468799, at *12. The Second Amended Complaint added Air Force NCO, Air Force Special Agent, and Air Force Engineer as plaintiffs and alleges claims on behalf of the Four Airmen 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.

On April 12, 2022, the Government appealed the Air Force Officer Injunction to this Court, 11th Circuit Appeal No. 22-11200. In the *Air Force Officer* appeal the parties identified the present case as a related or similar case. The Government's opening brief in the *Air Force Officer* appeal is currently due July 27, 2022.

The Government's denial of the religious accommodation requests of Navy Commander, Lieutenant Colonel 2, the Four Airmen, and thousands of other similarly situated service members unlawfully abridges their religious freedom under the Religious Freedom Restoration Act (RFRA) and the First Amendment of

the U.S. Constitution. In each branch of the military, the Government has granted zero religious accommodation requests (other than for service members already slated to leave), while it has granted numerous secular requests.

The Four Airmen submit that this brief will assist the Court in more fully understanding that (1) the substantial burden that the Mandate imposes on free exercise is not in furtherance of a compelling governmental interest, and (2) Appellees, the Four Airmen, and thousands of other service members face irreparable harm absent injunctive relief.

## STATEMENT OF THE ISSUES

1. Whether the substantial burden that the Mandate imposes on free exercise is in furtherance of a compelling governmental interest.

2. Whether Navy Commander and Lieutenant Colonel 2 face irreparable harm absent injunctive relief.

## SUMMARY OF THE ARGUMENT

The Government's compelling-interest arguments all fail. The Government ignores blackletter strict-scrutiny principles that protect religious claimants from exactly the kind of capricious burdens the Government seeks to impose here.

Contrary to the Government's analysis, (1) military actions are not entitled to blind deference under RFRA; (2) speculation and conjecture about hypothetical future harms blatantly fail strict scrutiny; (3) mere assertions of risk and evidentiary equipoise favor injunctive relief under strict scrutiny; and (4) the

Government has no compelling interest in only marginally advancing its goals at the expense of religious exercise.

Moreover, (5) the Government misrepresents Justice Alito's recent dissent in *Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301 (2022), where the majority granted only a "partial stay" and otherwise preserved an injunction against the Mandate as applied to several Navy Special Warfare service members. Justice Alito did *not* concede that categorical application of the Mandate to any service member advances a compelling interest. The District Court's preliminary injunction for Navy Commander and Lieutenant Colonel 2 is entirely consistent with both the majority and the dissent in *Austin*, 142 S. Ct. 1301.

The Government's no-irreparable-harm arguments also fail. Substantial pressure to forego free exercise rights unquestionably constitutes irreparable harm. The Government mischaracterizes Appellees' harm as solely monetary and reputational and therefore reparable. Appellees' harm is irreparable.

The Court should affirm.

## ARGUMENT AND CITATIONS OF AUTHORITY

### I. The Government's compelling-interest analysis is fundamentally flawed and fails to demonstrate that application of the Mandate here satisfies strict scrutiny.

#### A. The Government is not entitled to blind deference in its assertions of a compelling interest.

The Government argues its Mandate furthers a compelling interest on the basis of "substantial deference" it claims it is due. Govt. Br. 26. But the "respect" owed to military "expertise" in administering RFRA, *see Holt v. Hobbs*, 574 U.S. 853, 864 (2015) (noting analogous respect owed to prisons administering RLUIPA), does not "render entirely nugatory in the military context the guarantees of the First Amendment." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); *see also Austin*, 142 S. Ct. at 1307 (Alito, J., dissenting). The same is all the more true of the protections of RFRA, under which Congress, while "not[ing] its expectation that courts would adhere to the tradition of judicial deference in matters involving both prisons and the armed forces . . . [,] also expressed its clear understanding that the heightened standard of review would still apply in both contexts." *Singh v. McHugh*, 185 F. Supp.3d 201, 218 (D.D.C. 2016).

Indeed, both the Senate and House Reports made clear that military deference does not supersede traditional strict scrutiny analysis under RFRA. *Id.* at 218-219. The Senate Report expressly repudiated prior Supreme Court caselaw "carv[ing] out an exception to the compelling interest test for military regulations

that burden religious practice." S. Rep. No. 103-111, at 111 (1993) (stating also that under RFRA, "courts *will* review the free exercise claims of military personnel under the compelling governmental interest test") (emphasis added); *see also Singh*, 185 F. Supp. 3d at 218-219 (citing similar statement in H.R. Rep. No. 103-88). Accordingly, in *Holt v. Hobbs*, the Supreme Court recognized that deference owed to prison officials' judgments under RLUIPA, the "sister statute" of RFRA, "does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard." *Holt*, 574 U.S. at 364. The same holds true for RFRA's application to military regulations.

While Justice Kavanaugh's recent solo concurrence in *U.S. Navy Seals 1-26 v. Austin* emphasized the President's authority under Article II of the Constitution to set rules for the military, *see Austin*, 142 S. Ct. at 1302, Congress, too, has *parallel authority* "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, Sec. 8. Congress exercised precisely this authority in enacting RFRA. *See Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 695 (2014) ("As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work.").

The Government cites *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010) for its proposition that even in the First Amendment context, "the government's empirical conclusions are entitled to deference where the

government is attempting to prevent harms to national security." Govt. Br. 28. But *Holder* turned on the fact the government was "uniquely positioned" to determine whether the provision of support for the "lawful activities" of designated terrorist organizations actually "further[ed] terrorist conduct." *Holder*, 561 U.S. at 35. Here, the Government is *not* uniquely positioned to judge the unequal nature of its own actions (*i.e.*, whether it denies equal treatment to similarly situated service members) or to evaluate the widely available and non-military-specific epidemiological data on the efficacy—or lack thereof—of COVID-19 vaccines. *Air Force Officer*, 2022 WL 468799, at *8 ("[J]udges don't make good generals . . . But, by that same token, . . . Generals don't make good judges."). As such, the respect owed to military decision-making in this context does not shield the Government from full-fledged strict scrutiny review of its requirement that Navy Commander and Lieutenant Colonel 2 submit to mandatory COVID-19 vaccination in violation of their religious briefs.

### B. The Government's alleged compelling interest relies heavily on conjecture and speculation that contradicts the record and blackletter law.

The Supreme Court recently made clear that, when evaluating government burdens on religious exercise, "speculation is insufficient to satisfy strict scrutiny." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) ("the City offers only speculation that it might be sued over" religious claimant's policy of not

facilitating same-sex adoptions); *see also Ramirez v. Collier*, 142 S. Ct. 1264, 1280 (2022) (holding that government's "conjecture regarding what a hypothetical spiritual advisor might do in some future case" did not justify its categorical prohibition on spiritual advisors from laying hands on an inmate and engaging in audible prayer in the execution chamber). But here the Government's compelling-interest analysis is riddled with similar assertions *of speculative and hypothetical future harms*, which blatantly fail strict scrutiny.

Specifically, the Government argues that the spread of COVID-19 on a ship "*can* cause mission failure *if* one or more personnel become too sick"; "*if* a service member becomes severely ill onboard a ship, the ship *may* have to abandon its mission"; "*Were* a service member to develop severe COVID-19 symptoms while deployed on a Navy destroyer, *for example*," it would require either mission abandonment or emergency medical evacuation via helicopter, with a cascading effect "likely involv[ing] the long-term loss of several members of the ship's crew," having a further "adverse[] effect[]" on the entire mission; and "one unvaccinated service member *could* prevent the military from deploying a battalion or a ship to a country with a COVID-19 vaccination requirement." Govt. Br. 28-29 (emphasis added) (cleaned up).

The Government's arguments mirror those of Texas in *Ramirez*, where the state argued allowing a spiritual advisor to pray audibly in the execution chamber

"*could* be exploited to make a statement to the witnesses or officials," and "*might* cause further trauma to the victim's family or otherwise interfere with the execution." *Ramirez*, 142 S. Ct. at 1280 (emphasis added). But "there [was] simply no evidence in the record that Pastor Moore would cause the sorts of disruptions that respondents fear." *Id.*

So too here. As Appellees explain, the record shows Navy Commander and Lieutenant Colonel 2 have engaged in exemplary and uninterrupted service and execution of their duties throughout COVID-19—even while their requests for religious accommodation were pending *after* the Mandate went into effect. Appellees' Br. 12-18. The Government's conjectural predictions of future harms, over and against Appellees' lived reality as demonstrated in the record, thus plainly fail strict scrutiny.

**C. Mere assertions of risk and evidentiary equipoise fail strict scrutiny.**

The Government also substantially relies on a multiplicity of assertions that unvaccinated service members, and thus Navy Commander and Lieutenant Colonel 2, pose a necessarily higher risk than vaccinated service members of contracting, spreading, and being sidelined with COVID-19. But as the Supreme Court recently held, under strict scrutiny review governments "must do more than assert that certain risk factors are always present in [religiously motivated activity], or always absent from the other secular activities the government mayallow"—including the

numerous exemptions allowed for medical but not religious reasons here. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (internal quotation marks omitted). And the Government ignores countervailing evidence that those who have received COVID-19 vaccination are just as likely to contract and spread COVID-19. Such "evidentiary equipoise" on vaccine efficacy cuts *in favor of* a preliminary injunction under strict scrutiny. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 427-28 (2006).

Here, the Government repeatedly asserts that unvaccinated service members "are at a higher risk to contract COVID-19" and even to develop severe symptoms hypothetically resulting in hospitalizations. Govt. Br. 27. Even if the Government established this as fact (which it cannot; *see*, *e.g.*, Appellees' Br. 44-46), it could not rely on it to establish a compelling interest, because these alleged risks would be the same for service members who are *medically* unable to take the vaccine and yet have been granted *medical* accommodations of *indefinite* duration. Appellees' Br. 34.

This is the same fallacy California committed in *Tandon*, where it failed to show that suspended religious worship activities had a greater risk of spreading COVID-19 than similarly crowded secular activities that were allowed to continue. *Tandon*, 141 S. Ct. at 1296-97. As the Supreme Court put it: "Where the government permits other activities to proceed with precautions, it must show that

the religious exercise at issue is more dangerous even when the same precautions are applied[,] [o]therwise, precautions that suffice for other activities suffice for religious activities, too." *Id.* at 1297. Here, the Government is allowing hundreds of medically exempt service members to remain in the military using alternative precautions, despite the risk they pose of getting and spreading COVID-19, without showing that Navy Commander and Lieutenant Colonel 2 are "more dangerous even when the same precautions are applied." Thus these two Appellees must be afforded the same treatment as medical exemptees.

Further, despite the Government's assertions of vaccine efficacy, the CDC acknowledges that "anyone" with the recently dominant "Omicron variant, *regardless of vaccination status* . . . can spread the virus to others."[2] And experts acknowledge that the original COVID-19 regimen is increasingly ineffective,[3] which is especially notable given that the military does not require a booster shot after obtaining initial "primary" vaccination, contrary to CDC guidance.[4] Meanwhile, the CDC acknowledges that "Masks and respirators are effective at

[2] CDC, Omicron Variant: What You Need to Know, Mar. 29, 2022 (emphasis added), https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html.
[3] Elie Dolgin, "Omicron thrwarts some of the world's most-used COVID vaccines," Nature, Jan. 13, 2022, Omicron thwarts some of the world's most-used COVID vaccines (nature.com).
[4] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html.

reducing transmission of SARS-CoV-2 . . . when worn consistently and correctly," and N95 masks "filter at least 95% of particles in the air."[5]

The fact that both Navy Commander and Lieutenant Colonel 2 have previously been infected with COVID-19, and thus acquired natural immunity, is also key under strict scrutiny analysis. Appellees' Br. 17. The science shows that while immunity from a two-dose vaccine regimen waned to approximately 22% to 69% after six months, prior COVID-19 infection among the unvaccinated reduced their risk of infection by 81% to 89% up to a year after infection.[6]

Given this evidence, including the efficacy of vaccine alternatives (as exhibited by medical exemptees *and* Navy Commander and Lieutenant Colonel 2 themselves over the past two years) and the Appellees' own natural immunity, the Government's insistence on the necessity of mandatory vaccination here is based on "ambiguous proof"—at best—and thereby fails strict scrutiny. *Brown v. Ent.*

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[5] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/types-of-masks.html.

[6] Hall, Victoria et al., *Protection against SARS-CoV-2 after COVID-19 Vaccine and Previous Infection*, The New England Journal of Medicine, March 31, 2022, https://www.nejm.org/doi/full/10.1056/NEJMoa2118691; *see also* CDC, *Science Brief: SARS-CoV-2 Infection-induced and Vaccine-induced Immunity*, Oct. 29, 2021 ("The immunity provided by vaccine and prior infection are *both high* but not complete"; also noting meta-analysis finding "no significant difference in the overall level of protection provided by" each), www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/vaccine-induced-immunity.html.

*Merchants Ass'n*, 564 U.S. 786, 799-800 (2011) (noting that in strict scrutiny review, the government "bears the risk of uncertainty").[7]

**D. The Government has no compelling interest in imposing religious burdens that only marginally advance its goals.**

Relatedly, the Supreme Court has also held that in strict scrutiny analysis, "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown*, 564 U.S. at 803 n.9. Yet the Government consistently asserts that COVID-19 vaccination here would simply be the *most effective* means of achieving its interests, without ever establishing that requiring the two individual Appellees here to vaccinate would more than *marginally* advance its interests. *See* Govt. Br. 30-31. The Government entirely ignores, and conspicuously does not dispute, the underlying effectiveness of masking, sanitization, natural immunity, quarantining, travel restrictions, and

[7] This principle also undermines the Government's point that before COVID-19 vaccines, "an outbreak on the U.S.S. Theodore Roosevelt resulted in more than 4,000 crew removed from the ship and a 51-day loss of mission," whereas "a December 2021 outbreak on the U.S. Milwaukee—where all deployed service members were vaccinated—yielded only mild and asymptomatic infections and resulted in only" a one-week delay. Govt. Br. 32. This "show[s] at best some correlation" between vaccination and mission accomplishment without actually "show[ing] a direct causal link between [vaccination] and harm to [the military]," *Brown*, 564 U.S. at 799-800—especially without more evidence about the number and severity of infections in the Roosevelt outbreak, which occurred in March 2020 (a fact the Government conspicuously omits) when far less was known about COVID-19 in the first days of its spread.

social distancing where feasible—presumably the very same alternatives deemed sufficient for medical exemptees.

Similarly in *Brown*, in striking down under the First Amendment a California law restricting minors from purchasing certain violent video games, the Supreme Court reasoned in part that "[t]he video-game industry has in place a voluntary rating system" that already "does much to ensure that minors cannot purchase seriously violent video games on their own." *Brown*, 564 U.S. at 803. Thus, "[f]illing the remaining modest gap in concerned parents' control can hardly be a compelling state interest." *Id.*

The same is true here. The CDC acknowledges the near 100% efficacy of N95 mask-wearing. Peer-reviewed science verifies the efficacy of the natural immunity possessed by both Appellees. And the Government allows presumptively effective vaccine alternatives for numerous medical exemptees. These alternatives (including "sanitization of the ship's spaces and door handles," "restriction of movement protocols for traveling sailors or those experiencing symptoms, and a quarantine/isolation protocol for underway operations" (Appellees' Br. 14)) are readily available to, and are being successfully used by, Navy Commander and Lieutenant Colonel 2. The Government has no compelling interest in "filling in the modest gap" between the protection afforded by these alternatives and the

temporary and increasingly ineffective benefits of primary COVID-19 vaccination. The Government thus fails strict scrutiny for this reason too.

### E. Justice Alito's dissent in *Austin* did *not* concede that application of the Mandate here furthers a compelling interest, nor does the majority decision in that case undermine the District Court's injunction here.

The Government notes that Justice Alito's recent dissent in *Austin* stated that "the Navy has a compelling interest in preventing COVID-19 infection from impairing its ability to carry out its vital responsibilities, as well as a compelling interest in minimizing any serious health risk to Navy personnel." Govt. Br. 26 (quoting *Austin*, 142 S. Ct. at 1305 (Alito, J., dissenting)). This statement simply followed from the Supreme Court's undisputed point two years ago, in 2020, that "[s]temming the spread of COVID-19 is unquestionably a" *generalized* "compelling interest." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam). Justice Alito did *not* suggest that application of the Mandate to military service members satisfies the "properly narrowed" compelling-interest test more recently clarified by the Supreme Court, in which the "question [] is not whether the [government] has a compelling interest in enforcing its [challenged] policies generally, but whether it has such an interest in denying an exception to [the religious claimants]." *Fulton*, 141 S. Ct. at 1881. On the contrary, Justice Alito concluded, in passages the Government omits, that "the Navy had *no compelling need*" to *categorically reject* the service members'

requests for religious accommodation; mere speculation that not being vaccinated "*might* produce [negative] consequences" does not satisfy strict scrutiny; strict scrutiny must account for "the effectiveness of the vaccines" among other factors; and that "[t]he Navy has *no interest* in different treatment for accommodation requests that produce otherwise identical outcomes." *Austin*, 142 S.Ct. at 1305-1308 (Alito, J., dissenting) (first and third emphasis added).

The Government's lack of compelling interest in this case is apparent even under the Supreme Court majority's "partial stay" of the lower court injunction in *Austin*. *See id.*at 1301. The Supreme Court's narrowing order was predicated on the unique and extreme nature of the duties of Special Warfare service members, which "take[] place in every part of the world under harsh conditions at the extremes of human physical capabilities," "in small teams and close quarters for extended periods," and are "among the most physically and mentally demanding assignments of the U.S. military," limited only "to the most physically and mentally qualified personnel."[8] These factors do not apply to Navy Commander and Lieutenant Colonel 2, who do not consistently operate under such extreme conditions. Appellees' Br. 12-18. Critically, the Court's narrowing "partial stay"

[8] U.S. Solicitor General, Application for a Partial Stay of the Injunction Issued by the United States District Court for the Northern District of Texas, Mar. 7, 2022, at 3, 5, https://www.supremecourt.gov/DocketPDF/21/21A477/217841/20220307123349362_21A%20Texas%20Navy%20SEALS%20stay%20app.pdf.

did *not* vacate the underlying injunction in that case. *Austin*, 142 S. Ct. at 1301. Thus, three days thereafter, the District Court granted a motion for *classwide* preliminary injunctive relief against the Government and in favor of thousands of Navy religious objectors (including Navy Commander) in light of the same principles recognized by Justice Alito, while simply aligning the scope of the injunction with the Supreme Court's "partial stay" of the earlier non-classwide preliminary injunction.[9] *See U.S. Navy SEALs 1-26 v. Austin*, No. 4:21-cv-01246-O, 2022 WL 1025144 (N.D. Tex. Mar. 28, 2022).[10]

Accordingly, the principles relied on by Justice Alito (and described by Amici above) have enduring effect and apply here. The Government's compelling-interest analysis in this case violates all of them, and thus application of the Mandate to Navy Commander and Lieutenant Colonel 2 cannot withstand strict scrutiny under RFRA.

[9] The Court's March 30, 2022 order in this appeal similarly aligned the scope of the injunction here with the Supreme Court's "partial stay."

[10] The Government here (and elsewhere) provides no evidence that the Navy-wide injunction, which has been in place for more than 11 weeks, has undermined military readiness at all, including by leading to increased deaths, hospitalizations, or even "cases." Notably, the Government waited until the last possible day to appeal the Navy class order (day 60) and sought no emergency stay of it, further indicating the Government knows that the injunction poses no actual threat to readiness.

## II. Absent the preliminary injunction, Navy Commander and Lieutenant Colonel 2 face irreparable harm.

Violations of military service members' RFRA and First Amendment rights cause "spiritual rather than pecuniary," and thereby irreparable, harms. *Ramirez*, 142 S. Ct. at 1282; *accord Air Force Officer*, 2022 WL 468799, at *12.[11] The Government's brief tellingly omits this principle. Instead, the Government wrongly considers these harms to be purely economic and reputational.

### A. Substantial pressure to forego the free exercise rights of Appellees unquestionably constitutes irreparable harm.

The Government's imposition of compensable harms, such as loss of pay and retirement benefits, does not diminish the fact that threats to service members' compensation, careers, and very livelihoods from a government actor like the military because of their religious exercise creates "pressure . . . to forego th[ose]

[11] "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Diocese of Brooklyn*, 141 S. Ct. at 67 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Eternal Word Television Network, Inc.*, 756 F.3d at 1350 (Pryor, J. concurring) (quoting *Elrod* and stating that "[t]he statutory promise [of RFRA] is necessarily intertwined with the constitutional promise of the Free Exercise Clause."); *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983) ("One reason for such stringent protection of First Amendment rights . . . is the intangible nature of the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future."); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). This analysis therefore focuses on irreparable harm under RFRA.

[beliefs and] practice[s] [that] 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 Government 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*, Doc. 2-11. The Government placed similar substantial pressures on Appellees. *See Navy Seal 1 v. Austin*, 2022 WL 534459, at *7 (M.D. Fla. Feb. 18, 2022). 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). The Supreme Court has *twice* affirmed Circuit decisions holding that violations of RFRA necessarily cause irreparable harm. *See Hobby Lobby*, 573 U.S. at 704, *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 O Centro*, 546 U.S. at 439, *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, following *Hobby Lobby Stores, Inc*., 573 U.S. at 704, this Court has granted an injunction in favor of a party asserting RFRA violations. *Eternal Word Television Network, Inc.*, 756 F.3d 1339, 1340 (11th Cir. 2014). *See also id.* at 1350 (Pryor, J. concurring) (discussing the specific irreparable harm under RFRA: plaintiff "will be subject to fines or will be required" to provide contraceptive coverage, "an act it alleges constitutes material cooperation with evil"). *See also 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."); *Kikumura v. Hurley,* 242 F.3d 950, 963 (10th Cir. 2001) (citing *Joy* and granting preliminary injunction to a RFRA

claimant); *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).

The Supreme 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*, 574 U.S at 356-58. In *Holt*, the Supreme 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").

This Court has likewise recognized that violations of RLUIPA cause or can cause irreparable harm. *Ray v. Commissioner, Alabama Dep't of Corrections*, 915 F.3d 689, 701 (11th Cir. 2019). *See also 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). This logic extends directly to violations of RFRA as the "sister" statute of RLUIPA.

For this reason, in recent months several courts have had no trouble holding that the Government's reflexive application of the 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 v. Kendall*, No. 3:21-cv-1, 2022 WL 594810, at *18 (S.D. Ohio Feb. 28, 2022); *Navy Seals 1-26 v. Austin*, 2022 WL 1025144, at *13; *Doster v. Kendall*, No. 1:22-cv-0008-MWM, 2022 WL 982299, at *15 (S.D. Ohio Mar. 31, 2022). This Court should adopt the same reasoning in the present case.

### B. The Government mischaracterizes Appellees' harm as being solely monetary and reputational to falsely categorize free exercise harm as reparable.

The Government argues that Appellees' harm is reparable and therefore not entitled to injunctive relief, because a discharged service member "could be reinstated and could receive back pay." Govt. Br. 44. The Government misleadingly suggest that the free exercise harms experienced by service members are nothing more than "employment-related harms" which "do not constitute

irreparable injury." Govt. Br. 45. And it does so despite the court below, as well as numerous courts around the country, rightly rejecting the notion that Appellees' harms are limited to compensation and reputation. *Navy Seal 1 v. Austin*, 2022 WL 534459, at *19 ("the 'substantial pressure' on a religiously objecting service member to obey the COVID-19 vaccination order and violate a sincerely held religious belief constitutes an irreparable injury redressable by a preliminary injunction); *see also U.S. Navy SEALs 1-26*, 2022 WL 1025144, at *13 ("Any losses the class members have suffered in connection with their religious accommodation requests sufficiently demonstrate irreparable injury, even if injuries like demotion, reassignment, and separation are otherwise compensable."); *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 348 (5th Cir. 2022) ("At base, Plaintiffs are staring down even more than 'a choice between their job(s) and their jab(s).' By pitting their consciences against their livelihoods, the vaccine requirements would crush Plaintiffs' free exercise of religion.") (internal citations omitted); *Austin*, 142 S. Ct. 1301 (leaving in place the district court's finding of irreparable harm and grant of preliminary injunction insofar as it did not "preclude[] the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions"); *Air Force Officer,* 2022 WL 468799, at *12 ("focusing exclusively on financial harm misses the mark"); *Poffenbarger*, 2022 WL 594810, at *18-19 (finding that although loss of

income, retirement, and relocation pay are not irreparable, the plaintiff service member nonetheless "suffered the loss of First Amendment freedoms" and warranted a preliminary injunction); *Doster*, 2022 WL 982299, at *16 ("Yet, even if the harm is fully compensable by monetary damages, the Sixth Circuit has previously found that violations of the First Amendment and RFRA rights satisfy the irreparable harm requirement…Plaintiffs have also established irreparable harm.").

Ignoring these rulings, the Government attempts to obfuscate the irreparable harm analysis based on selective citations to twelve cherry-picked cases. Govt. Br. 43-45. But *not a single one* involves a RFRA claim, nor even a First Amendment claim. Indeed, the Government cites *no authority* that harms to First Amendment or RFRA rights are reparable exclusively by monetary compensation. Rather, the Government cites irrelevant cases such as one involving economic harm for a business seeking an easement for pipeline construction (*Transcon. Gas Pipe Line Co., LLC v. 6.04 Acres, More or Less*, 910 F.3d 1130 (11th Cir. 2018)) and one involving property owners challenging expansion of an Air Force base (*Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975)). Indeed, several cases the Government cites *expressly distinguish* reparable economic harms found therein with harms which, like those faced by Appellees and the Four Airmen, stem from "[t]he only area of constitutional jurisprudence where we have said that an on-going violation

constitutes irreparable injury," namely, "the area of first amendment and right of privacy jurisprudence." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285–86 (11th Cir. 1990). "[B]ecause of their intangible nature," First Amendment rights "could not be compensated for by monetary damages." *Id.* Another case the Government cites held that "it is the 'direct penalization . . . of First Amendment rights [which] constitutes irreparable injury.'" *Siegel v. LePore*, 234 F.3d 1163, 1178 (11th Cir. 2000) (citing *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir.1983)).

The Government tries (and fails) to equate Appellees' First Amendment- and RFRA-based irreparable harms with mere reputational stigma (*i.e.*, potentially monetarily reparable) allegedly suffered by other service members. The cases the Government cites include a service member discharged for "lewd and lascivious acts, indecent exposure, and indecent acts with [his eleven-year-old stepdaughter and his seven-year-old daughter]" (*McCurdy v. Zuckert*, 359 F.2d 491, 492 (5th Cir. 1966)), a service member discharged for "selling . . . L.S.D. to an undercover police officer" (*Chilcott v. Orr*, 747 F.2d 29, 31 (1st Cir. 1984)), and a service-member-pilot discharged for being "too intoxicated to perform his duties" *twice* and "discharging a semi-automatic weapon in the direction of a neighbor's house while highly intoxicated" (*Hartikka v. United States*, 754 F.2d 1516, 1517 (9th Cir. 1985)). The Government urges this Court to regard the irreparable harm of

Appellees, who seek to exercise the same fundamental rights they have sworn their lives to defend, as no different than reparable reputational injury alleged by service members discharged for clearly criminal acts. Aside from demeaning sacrosanct free exercise rights and disparaging the distinguished service of Appellees and other service members, the Government's argument is without any legal basis.

The Government asserts that the harms here are only "employment-related harms" that "do not constitute irreparable injury in this context." Govt. Br. 45. The Government relies heavily on yet another inapposite case, *Sampson v. Murray*, 415 U.S. 61 (1974), which involved a probationary civilian employee requesting an injunction pending her appeal to the Civil Service Commission. The employee, however, alleged *only* lost income and reputational damage. *Id.* at 89. *Sampson*, like every other case cited by Appellants on this issue, is silent regarding First Amendment or RFRA rights. And even though one court ruled that *Sampson* applied to a service member fighting a discharge for illegal drug use (*Guitard v. U.S. Sec'y of Navy*, 967 F.2d 737 (2d Cir. 1992)), other appellate courts have rightly cast doubts in recent years on the applicability of *Sampson* in discharge proceedings. *Roe v. Shanahan,* 359 F. Supp.3d 382, 419 (E.D. Va. 2019)*, aff'd sub nom. Roe v. Dep't of Def.*, 947 F.3d 207 (4th Cir. 2020) (granting a preliminary injunction based on the irreparable harm of discharge, pointing out that "*Sampson* is…a relic" and, although termination of employment does not constitute

irreparable injury "under normal circumstances," "it is not guaranteed to be true in every case" such as those having "unusual actions relating to the discharge itself"); *cf. Sambrano v. United Airlines, Inc*., 19 F.4th 839, 842 (5th Cir. 2021) (Ho, J., dissenting) (citing *Sampson,* 415 U.S. at 92 n.68, as providing that "extraordinary cases" may result in an irreparable harm, and stating "[i]f this dispute [over mandatory COVID-19 vaccination] does not present the 'extraordinary case'…I don't know what case would.").

In sum, the Government asks this Court to regard its attack on religious-liberty rights as nothing more than a run-of-the-mill employment dispute remediable with money. But as discussed above, affronts to the First Amendment and RFRA result in harms that are "spiritual rather than pecuniary." *Ramirez*, 142 S. Ct. at 1282. The fact that the Mandate causes some compensable injuries, like cutting off military pay, does not mean it imposes no irreparable harm. To conclude otherwise 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 forest area as long as there are other areas of the forest that are not harmed") (emphasis added). Worse, if the Government were correct, any government authority could infringe a First Amendment (or RFRA) right and entirely avoid a preliminary injunction simply by conceding some financial harm. The Government's irreparable-harm analysis is fundamentally wrong.

## CONCLUSION

For the reasons set forth above and in Appellees' brief, the Court should affirm.

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I hereby certify that on June 17, 2022, the foregoing brief was filed via the Court's CM/ECF system to be served by operation of that system on all counsel of record.

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