

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' RESPONSE TO NEW ARGUMENTS AND FACTS
RAISED IN PLAINTIFFS' MOTION FOR HEARING ON MOTION FOR
PRELIMINARY INJUNCTION**

Plaintiffs' latest submission claims that thousands of the Texas National Guard remain unvaccinated, some have pending requests for religious accommodation, and that if those pending requests are denied, Texas will be irreparably harmed. Mot. for Hearing, ECF No. 41. But none of that changes the fundamental legal question in this case—under the Constitution and applicable law, the federal government is not required to pay to train National Guardsmen who do not meet the minimum qualifications for federal service. These new facts also do not show irreparable harm. Even if every unvaccinated member left the Texas National Guard, those losses would be comparable to, or even less than, typical annual attrition. Moreover, Texas has identified nothing that stops it from hiring into its State Guard every individual who fails to maintain federal minimum requirements.¹

I. Case Law Cited in Plaintiffs' Motion Is Not Relevant to Merits of the Case.

No case cited by Plaintiffs in their latest filing is relevant to whether the federal government can set medical readiness standards for the National Guard or whether compliance with those readiness standards can be a condition of participating in federally funded training. Plaintiffs cite three cases that involve Religious Freedom Restoration Act and First Amendment challenges. Motion for Hearing, at 1–2 (citing *Doster v. Kendall*, No. 1:22-cv-84, 2022 WL 982299 (S.D. Ohio Mar. 28, 2022); *U.S. Navy SEALs 1–26*, No. 4:21-cv-1236, 2022 WL 1025144 (N.D. Tex. Mar. 28, 2022); *Air Force Officer v. Austin*, No. 5:22-cv-9, 2022 WL 468799 (M.D. Ga. Feb. 15, 2022)). Plaintiffs fail to note that all three decisions are currently on appeal.² And the motion omits that the Supreme Court has already

¹ Alaska has not provided evidence that the federal vaccine requirement will impact its National Guard.

² Plaintiff's briefing also ignores the many other cases raising similar claims where courts have either dismissed or concluded that plaintiffs are not likely to succeed on the merits. *See e.g., Knick v. Austin*, No. CV 22-1267, ECF No. 20 (D.D.C. June 15, 2022) (denying preliminary injunction); *Roth v. Austin*, No. 8:22CV3038, 2022 WL 1568830, at *2 (D. Neb. May 18, 2022) (denying preliminary injunction because Air Force plaintiffs not likely to succeed on the merits of their RFRA and first amendment claims) *appeal filed* (8th Cir. May 20, 2022); *Navy SEAL 1 v. Austin*, No. CV 22-0688 (CKK), 2022 WL 1294486, at *17 (D.D.C. Apr. 29, 2022) (denying preliminary injunction, in part because plaintiff failed to show likelihood of success on the merits) *appeal filed* (D.C. Cir. May 5, 2022); *Thomas Short v. Berger*, No. CV-22-00444-PHX-DJH, 2022 WL 1203876, at *16 (D. Ariz. Apr. 22, 2022) (denying preliminary

weighed in on one of those cases, granting a partial stay of an injunction pending appeal. *Austin v. U.S. Navy SEALs 1–26*, 142 S.Ct. 1301 (2022) (staying injunction insofar as it interfered with the military’s discretion to “mak[e] deployment, assignment, and other operational decisions” related to unvaccinated persons). Justice Kavanaugh explained that courts “‘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.* at 1302 (Kavanaugh, J., concurring) (citation omitted). “I see 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 same reasoning applies here. There is no reason why this Court should allow a governor to override the decisions of our military leaders on how to best keep our fighting forces—including the National Guard—ready to defend our nation.

II. Plaintiffs’ Evidence Shows, At Best, Minimal Impact on the Texas National Guard.

Plaintiffs’ latest submission underscores just how few members of the Texas Air National Guard (“ANG”) remain unvaccinated: 182. Suelzer Decl. ¶ 8, ECF No. 41-1. Even if all leave the Texas ANG, that is far less than the average annual losses of 356. Norris Decl., ¶ 28, ECF No. 25-7. The newly filed declaration also states that 144 are seeking religious exemption. Suelzer Decl. ¶ 8. While their requests are pending, those individuals are temporarily exempt from the COVID-19 vaccination requirement and usually may continue to train with their unit. Department of Air Force Instruction (DAFI) 52-201 ¶ 2.12 (June 23, 2021), available at <https://perma.cc/47QL-2SUM>. The

injunction because RFRA claim not likely justiciable and Marine plaintiff did not show likelihood of success on the merits) *appeal filed* (9th Cir. May 18, 2022); *Vance v. Wormuth*, No. 3:21-CV-730-CRS, 2022 WL 1094665, at *7 (W.D. Ky. Apr. 12, 2022) (dismissing RFRA claim as not ripe); *Mark Short v. Berger*, No. CV221151DMGAGR, 2022 WL 1051852, at *10 (C.D. Cal. Mar. 3, 2022) (denying preliminary injunction because claims not likely to be justiciable and Marine plaintiff not likely to succeed on the merits) *appeal filed* (9th Cir. Apr. 5, 2022); *Robert v. Austin*, No. 21-CV-02228-RM-STV, 2022 WL 103374, at *3 (D. Colo. Jan. 11, 2022) (denying preliminary injunction and dismissing case) *appeal filed* (10th Cir. Feb. 2, 2022); *Church v. Biden*, No. CV 21-2815 (CKK), 2021 WL 5179215, at *19 (D.D.C. Nov. 8, 2021) (denying preliminary injunction).

claim that “virtually all [religious exemption] requests” are denied is wrong. As of June 14, 2022, the Air Force had granted at least 118 religious accommodation requests. DAF COVID-19 Statistics – June 16, 2022, available at: <https://perma.cc/8UHE-SAN4>. In any event, the religious accommodation approval process is irrelevant to the legal questions at issue in this case of whether the federal military leaders may set readiness requirements for members of the National Guard.

Plaintiffs also submitted new facts on the number of unvaccinated service members in the Texas Army National Guard (NG). But the deadline for Army NG to be fully vaccinated is June 30, 2022, so there is still time for those individuals to come into compliance. Like the Texas ANG, even if all 3,386 unvaccinated members (as of June 3) left the Texas NG, that would be less than or comparable to typical attrition. Over the past five years, Texas lost on average 15.8% of its NG force every year. Decl. of J. Torres, ¶ 2 (Ex. A). In 2018, for example, Texas NG had attrition of 3,462 members, which was 19.3% of its assigned strength. *Id.* Even if all unvaccinated members left the National Guard, Plaintiffs have not shown that will have a significant impact—such a loss would still be less than attrition experienced in 2018, both in absolute numbers and as a percentage of total force. In any event, this data is again irrelevant to the legal questions at issue in this case of whether the federal military leaders may set readiness requirements for members of the National Guard. And, as discussed next, nothing prevents Texas from paying these unvaccinated service members.

III. Texas Remains Free to Fund the Service of Unvaccinated Service Members.

Finally, nothing in Plaintiffs’ latest submission disputes that Texas remains free to pay unvaccinated service members. Texas remains free to pay the salaries of unvaccinated Guard members serving on State Active Duty, like in Operation Lone Star. ECF No. 25-6, ¶ 5. And it can hire anyone it likes into the Texas State Guard, which does not require meeting federal readiness standards. The bottom line—and the dispositive point in this case—remains that states cannot force the federal government to pay to train their National Guard members who are not medically fit for federal service.

Dated: June 16, 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 June 16, 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

Exhibit A

IN THE UNITED STATES DISTRICT COURT
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GOVERNOR GREG ABBOTT, in his
official capacity as Governor of the State
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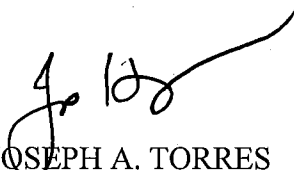
DECLARATION OF JOSEPH A. TORRES

I, Lieutenant Colonel (LTC) Joseph A. Torres, hereby state and declare as follows:

1. I am the Branch Chief, for End Strength Analysis and Forecasting Branch, for the Army National Guard Readiness Center (ARNG-G1-HRMS-S), National Guard Bureau, Temple Army National Guard Readiness Center, Arlington, Virginia. As Branch Chief, I serve as principal manager of monitoring military personnel numbers in the present and historically. I have served in this position since March 2022. Previous to this assignment, I served as Manpower Analyst at

Army manning document, which may be a higher number but not always met due to resource constraints). Total attrition losses is defined as attrition due to retirements, death, administrative personnel actions which result in separation from the military, and Service Member transfers to other military components, Services, or National Guard States. Total attrition loss rate is defined as the total number of attrition losses during the past 12 months divided by the average assigned strength during the past 12 months.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 14th day of June 2022.



JOSEPH A. TORRES
Lieutenant Colonel, USA
Branch Chief, End Strength Analysis and
Forecasting
Army National Guard