UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

BRITTANY BONGIOVANNI, *et al.*,

Plaintiffs,

v. **NO. 3:22-CV-00237-MMH-MCR**

LLOYD AUSTIN, III, *et al.*

Defendants.

PLAINTIFFS' REPLY BRIEF

Movants request that this Court grant an injunction to preserve the status quo by preventing Defendants from discharging or disciplining them, pending resolution of these matters on the merits, consistent with the Supreme Court's directive regarding the scope of interim relief in *Austin v. U.S. Navy SEALs 1-26*, --- S. Ct. ---, 2022 WL 882559 (Mar. 25, 2022). In their March 10, 2022 motion for injunctive relief ("Motion"), ECF 13, Plaintiffs explained that federal courts in three circuits and four districts, including this one, have found that the Air Force, Navy, and Marine Corps have violated service members' rights to free exercise protected by the Religious Freedom Restoration Act ("RFRA") and the First Amendment based on nearly identical conduct as that alleged in their Complaint and Motion.[1] Since then, both the Supreme Court

[1] *See Navy SEAL 1 v. Austin,* --- F.Supp.3d ---, 2022 WL 534459 (M.D. Fla. Feb. 18, 2022) ("*Navy SEAL 1* PI Order"), *stay denied pending appeal* No. 22-10645 (11th Cir. Mar. 30, 2022) ("*Navy SEAL 1* Stay Order"); *U.S. Navy SEALs 1-26 v. Biden*, ---

and the Eleventh Circuit Court of Appeals have rejected the applications of the Navy and Marine Corps to overturn the injunctions issued in the *Navy SEAL 1* and *Navy SEALs 1-26* proceedings on the merits, leaving in place the key findings of the district courts regarding justiciability, substantial likelihood of success on the merits of the RFRA and First Amendment claims, irreparable harm, and the other injunction factors.[2]

Movants merely ask that they be granted comparable treatment and exemptions for their religious beliefs as the Defendants have granted to several thousand other service members on medical and administrative grounds. They do not, as Defendants claim, seek a "golden ticket." ECF at 27. In fact, many if not most Movants and Plaintiffs seek what is in effect a temporary accommodation until alternative, ethical vaccines to which they do not have religious objections receive approval from the Food and Drug Administration

---

F.Supp.3d. ---, 2022 WL 34443 (N.D. Tex. Jan. 3, 2022) ("*Navy SEALs 1-26* PI Order"), *stay denied*, --- F.4th ---, 2022 WL 594375 (5th Cir. Feb. 28, 2022) ("*Navy SEALs 1-26* Stay Order"); *Air Force Officer v. Austin*, --- F.Supp.3d ---, 2022 WL 468799 (M.D. Ga. Feb. 15, 2022) ("*Air Force Officer*"); *Poffenbarger v. Kendall*, --- F.Supp.3d ---, 2022 WL 594810 (S.D. Oh. Feb. 28, 2022). A few days ago, a fifth district court granted an injunction against the Air Force for RFRA and First Amendment violations in *Doster v. Kendall*, --- F.Supp.3d ---, 2022 WL 982299 (S.D. Ohio Mar. 31, 2022) ("*Doster*").

[2] While the government styled its filing with the Supreme Court as an "Application for Partial Stay of the Injunction" issued by the district court in *Navy SEALs 1-26* PI Order, the bulk of the application is spent attacking the district court's decision on the merits. *See* Ex. 3, Lloyd J. Austin, III, *et al.*, *Application for a Partial Stay of the Injunction Issued by the United States District Court for the Northern District of Texas*, No. 21A477 (Mar. 7, 2022).

("FDA"), or even to travel to other countries where these vaccines are available now. As such, the duration, scope, and impact on military readiness of the requested accommodations and injunction are nearly identical to the thousands of "temporary" medical exemptions granted by Defendants.

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION.

A. Plaintiffs' Claims Are Justiciable in District Court.

Defendants claim that this Court lacks jurisdiction to hear Plaintiffs' claims. Yet they do not even attempt to distinguish the binding precedent from this District, the Fifth Circuit cases applying *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), or the Sixth Circuit district courts applying *Harkness v. Sec'y of the Navy*, 858 F.3d 437 (6th Cir. 2017), which adopted the *Mindes* framework. Instead, Defendants simply state that "[t]he government strongly disagrees with those decisions" and has appealed the decisions in *Navy SEALs 1-26* and *Navy SEAL 1*. ECF 31 at 3 n.3 (and cases cited therein). The government fails, however, to acknowledge that the Supreme Court and the Eleventh Circuit left the injunctions and findings regarding the merits and justiciability in place. The government also points to several inapposite cases (all but one outside the Eleventh Circuit)[3] that are easily distinguishable due

[3] The only Eleventh Circuit case cited by Defendants, *Doe #1-#14 v. Austin*, --- F.Supp.3d ---, 2021 WL 5816632 (N.D. Fla. Nov. 12, 2021) (now *Coker v. Austin*), did not raise any RFRA or First Amendment claims.

to differences in procedural posture, ripeness, types of claims, and/or legal standards.[4] Further, RFRA does not contain a statutory exhaustion requirement, and the Fifth Circuit suggested that RFRA may have implicitly overruled *Mindes*' exhaustion and other justiciability requirements. *See Navy SEALs 1-26* Stay Order, 2022 WL 594375, *7 & n.8.

Defendants instead rely heavily on a California district court decision finding service member's RFRA claim nonjusticiable.[5] That court's decision rested on incorrect factual findings and legal interpretations that are contradicted by those in this Circuit including *Navy SEAL 1*. First, the *Short* court accepted the Marine Corps' assertions that they had in fact granted a small number of religious exemptions. *See* ECF 31-2, *Short* slip op. at 7. In *Navy SEAL 1*, the court found that these exemptions were granted only to

[4] *See Church v. Biden*, --- F.Supp.3d ---, 2021 WL 5179215 (D.D.C. Nov. 8, 2021) (plaintiffs' motion denied because appeals were still pending); *Robert v. Austin*, No. 21-cv-02228, 2022 WL 103374 (D. Colo. Jan. 11, 2022) (motion denied because plaintiffs had pending appeal and active exemption); *Guettlein v. U.S. Merch. Marine Acad.*, --- F. Supp. 3d ----, 2021 WL 6015192 (E.D.N.Y. Dec. 20, 2021) (plaintiffs did not raise RFRA or First Amendment claims); *Oklahoma v. Biden*, --- F. Supp. 3d ----, 2021 WL 6126230 (W.D. Okla. Dec. 28, 2021) (plaintiff was a State, rather than individual service member); *Roberts v. Roth*, 2022 WL 834148 (D.D.C. Mar. 21, 2022) (starting in 2018, plaintiff sought exemption from all immunization requirements, and he did not appear to have specifically challenged COVID-19 vaccine mandate).

[5] *See* ECF 31-2, *Short v. Berger*, No. 2:22-cv-1151, ECF No. 25 (C.D. Cal. Mar. 3, 2022) ("*Short*"). *See also* ECF 31-3, *Dunn v. Austin*, No. 22-cv-00288, ECF No. 25 (E.D. Cal. Feb. 22, 2022) (reaching same conclusion on justiciability, though reasoning not clear).

Marines at the end of their term of service.[6] Accordingly, these "accommodations" should instead be characterized as administrative exemptions, and the number of actual religious accommodations granted remains zero. More importantly, the *Short* court, contrary to the courts in the Fifth, Sixth and Eleventh Circuits, erroneously found that religious and secular exemptions were qualitatively different because medical and administrative exemptions were time limited, while religious exemptions are permanent. As discussed below, this assertion is contradicted by Defendants' own regulations, and with the requests of many Movants and Plaintiffs.

B. Plaintiffs' Claims Are Ripe.

Movants easily satisfy the requirements for ripeness as set forth in their Motion. *See* ECF 13 at 10-12. Six of the seven Movants have had their appeals denied, and since the Motion was filed, Plaintiffs Hamilton and Singletary have also had their appeals denied. *See* Ex. 1, Hamilton Appeal Denial Letter; Singletary Appeal Denial Letter. All other Plaintiffs (with the exception of

[6] *See Navy SEAL 1*, 2022 WL 534459, at *19; *Poffenbarger*, 2022 WL 594810, at *13 n.6 (finding same for Air Force approvals). In the *Poffenbarger* hearing, Air Force counsel confirmed that religious accommodations approved by the Air Force were equivalent to administrative exemptions for terminal leave. *See* Ex. 4, Poffenbarger v. Austin Transcript at 59:19-59:25 (Air Force counsel stated that the airmen receiving approval submitted "admin exemptions for terminal leave … as a religious exemption even though they were eligible for terminal leave when it was granted under those same administrative – same sort of factors" required for approval of administrative exemptions.").

Freincle) have had their initial RARs denied. Plaintiff Freincle easily satisfies the futility exemption, as discussed below.

Further, Defendants have initiated separation proceedings for several Movants. The informal separation process of for Movants Freincle, Harwood, and Kins have already begun. *See* Ex. 1, Freincle Supp. Decl., ¶ 1 & Kins Supp. Decl., ¶ 1; ECF 13, Harwood Supp. Decl. Nykun has completed her retirement processing by May 1, 2022. Nykun Supp. Decl., ¶ 1.

C. Plaintiff Harwood Is Not Improperly Claim Splitting.

Defendants erroneously claim that Plaintiff Harwood is "improperly claim splitting." ECF 31 at 15 (*citing Vanover v. NCO Fin. Servs. Inc.*, 857 F.3d 841 (11th Cir. 2017)). Harwood's claims in *Coker* are distinct from those in the instant action; do not "arise from the same transaction;" and are not "based on the same nucleus of operative facts." *Vanover*, 837 F.3d at 842.

In this action, Harwood "asserts only … RFRA and First Amendment claims." ECF 10, ¶ 16. He does not assert that the DOD Mandates "violates 21 U.S.C. § 360bbb-3 and 10 U.S.C. § 1107a" ("Informed Consent Claims") as Defendants erroneously assert. ECF 31 at 16. The Informed Consent claims challenge the lawfulness of the DOD Mandate itself under the Administrative Procedure Act ("APA"), while the RFRA and First Amendment claims challenge the Defendants' unlawful and unconstitutional denial of religious exemptions, both as applied to Harwood and the general policy of uniformly

denying such requests. Thus, Harwood claims violations of entirely distinct constitutional provisions, statues, and regulations in the two actions. No claim in *Coker* is premised on the denial of religious exemptions, which are the "transaction" and "operative facts" upon which the RFRA and First Amendment claims are based.

Improper "claim splitting" is based on claim preclusion. *Vanover* at 841. A finding in *Coker* that the DOD Mandate was lawful would not preclude this Court from finding, based on entirely distinct facts related to the denial of Harwood's accommodation request, that the DOD and Marine Corps' religious exemption policies are unlawful; nor would a finding in *Coker* that the DOD Mandate is unlawful preclude this Court from finding that the denial of Harwood's religious accommodation was lawful. Moreover, a finding that the DOD Mandate violates the APA would not provide any relief for the distinct violations of RFRA and the First Amendment. Further, if Defendants' argument were accepted, Harwood would be entirely deprived of any means to challenge or vindicate the violations of his rights under RFRA and the First Amendment.

D. Plaintiff Nykun Has Not "Voluntarily" Chosen To Retire.

Plaintiff Nykun did not, as Defendants claim, "voluntarily" choose to retire. ECF 31 at 17. When her appeal was denied she had three choices: (1) vaccination, (2) early retirement (without additional disciplinary action) or

(3) involuntary separation with potential additional disciplinary action under the Uniform Code of Military Justice ("UCMJ"). *See* Nykun Supp. Decl., ¶ 1. Her "decision to select retirement was coerced under threat of punishment." *Id*. Like all other Plaintiffs, she faced "a choice between [her] job(s) and [her] jab(s)," *Navy SEALs 1-26* Stay Order, 2022 WL 594375, at *9 (citation and internal quotations omitted), as a direct result of an unlawful order and the Air Force's unlawful denial of her religious exemption and appeal.

The civilian employment cases cited by Defendants[7] are inapposite because civilian employees faced a choice between resignation and termination, not between retirement and termination plus further discipline under the UCMJ and blemished service records. Defendants' reliance on military backpay cases is also misplaced. *See* ECF 31 at 18 & n. 10. These cases addressed whether the Court of Federal Claims had jurisdiction over an individual service member's monetary claims under the Tucker Act,[8] rather

[7] *See* ECF 31 at 17-18 (*citing Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262 (11th Cir. 2001); *Taylor v. FDIC*, 132 F.3d 753 (D.C. Cir. 1997); *Hargray v. City of Hallandale*, 57 F.3d 1560, 1568 (11th Cir. 1995)).

[8] *See, e.g., Moyer v. United States*, 190 F.3d 1314 (Fed. Cir. 1999) (finding resignation to avoid court martial voluntary for limited purpose of affirming that Court of Federal Claims lacked jurisdiction for Tucker Act backpay claim); *Brown v. U.S.*, 30 Fed. Cl. 227 (Ct. Fed. Cl. 1993) (same); *Kim v. U.S.*, 47 Fed. Cl. 493 (Ct. Fed. Cl. 2000) (finding resignation voluntary for Tucker Act because termination not challenged in Board of Inquiry). The facts surrounding her retirement may impact any Tucker Act claim Plaintiff Nykun might make for monetary compensation, but that does not deprive this Court of jurisdiction to address her requests for injunctive and declaratory relief.

than whether a district court has jurisdiction to provide injunctive and declaratory relief based on unlawful generally applicable regulations or policies. Further, unlike in the instant action, the plaintiffs in the cases cited by Defendants did not challenge the constitutionality or legality of the underlying statute, regulation or policy that they allegedly violated.[9] Accordingly, this Court should not import the complex and technical jurisdictional requirements of the Tucker Act and other employment laws to bar Plaintiffs' constitutional claims.

Moreover, Nykun has identified a "redressable injury," ECF 31 at 17. and she would benefit from the requested equitable relief. Prompt court action finding that Defendants' denial of her religious accommodation likely violated RFRA would enable her to avoid forced early retirement currently scheduled for May 1, 2022. An injunction preventing such forced retirement (without dictating her assignment) would be fully consistent with the Supreme Court's directive in *Navy SEALs 1-26*.

[9] In *Bois v. Marsh*, 801 F.2d 462 (D.C. Cir. 1986) the Plaintiff "brought sweeping constitutional attack against the Army's" entire system of military remedies, *id.* at 466, without first pursuing any of them, and he had already retired, with no intention to return and thus could not benefit from an injunction. By contrast, Nykun seeks to avoid forced early retirement so that she can continue to serve; the injunction sought here would allow her to do just that until this Court renders a decision on the merits.

E. Plaintiff Freincle Qualifies For Futility Exemption.

While Plaintiff Freincle has strong moral objections to the COVID-19 vaccines, he did not pursue religious exemption because he believed, with good reason, that it would be futile. *See* Freincle Supp. Decl., ¶ 2 ("I was told that it would be futile to submit any religious or medical exemption."). The district courts in *Navy SEAL 1* and *Navy SEALs 1-26* found that the military's religious exemption process satisfied the *Mindes* exemptions for exhaustion as both futile and inadequate. *Navy SEALs 1-26* PI Order, 2022 WL 34443, at *5. Where, as here, "the record all but compels the conclusion that the military process will deny relief, exhaustion is inapposite and unnecessary."[10]

II. SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

A. Defendants' Religious Exemption Process Violates RFRA.

1. Religious Exemptions Are Time-Limited.

Relying on *Short*, Defendants attempt to create a false dichotomy between religious and secular exemptions by claiming that: "all of the administrative exemptions, and nearly all of the medical exemptions, are "*time-limited*—in contrast to the presumptive permanency of a sincerely-held

[10] *Id.*, at *5 (citation and internal quotation omitted). *See also Navy SEALs 1-26* Stay Order, at *8 (finding evidence of systematic denials to "sufficiently probative of futility"); *Navy SEAL 1* PI Order, 2022 WL 534459, at *14 (affirming the "likely futility" of military remedies) (citations omitted); ECF 13 at 8 & Table 1 (over 11,000 denials, with only a handful granted, all of which were found to be administrative exemptions for members on terminal leave in *Navy SEAL 1* and *Poffenbarger*).

religious belief." ECF 31 at 26 (emphasis in original). *See also id.* (*citing Short* Op. at 7 ("Only *permanent* medical exemptions are analogous to religious exemptions, because a religious belief is not likely to be temporary.").

Defendants' assertion is contradicted by the express terms of their own regulations, which provide that all religious accommodations are temporary. Religious accommodations may, at any time, be revoked, reevaluated, revised, rescinded, and/or withdrawn, on a temporary or permanent basis, due to a change in circumstances or due to a compelling governmental interest.[11]

2. Religious Exemptions Are Comparable in Duration and Scope To Temporary Medical Exemptions.

Many Movants and Plaintiffs have expressly requested temporary, time-limited religious accommodations. Movants and Plaintiffs object to the

[11] *See, e.g.,* Ex. 5, DOD Instruction 1300.17, *Religious Liberty in the Military Services*, ¶ 3.2.g.1(Sept. 1, 2020) ("an approved accommodation may be subject to review and recission, in whole or in part, at any time" based on change in circumstances); Ex. 6, Dept. of the Air Force Instruction ("DAFI") 52-501, *Religious Freedom in the Department of the Air Force*, ¶¶ 5.7.2 (reevaluation due to change in circumstance), 5.7.4 (commander may withdraw accommodation temporarily or permanently based on compelling governmental interest) (June 23, 2021); Ex. 7, Dept. of the Navy, MILPERSMAN 1730-020, *Immunization Exemptions for Religious Beliefs*, ¶ 7 (Aug. 15, 2020) (revocation of accommodation); Ex. 8, Dept. of the Navy, BUPERSINST 1730.11A CH-1, *Standards and Procedures Governing the Accommodation of Religious Practices*, ¶ 5.g (Mar. 11, 2022) ("Religious accommodations are subject to review, suspension or revocation, in whole or in part, any time there is a change in circumstances …"); Ex. 9, Coast Guard, COMDTINST 1000.15, *Military Religious Accommodations*, ¶ 11.c.3 (Aug. 30, 2021) (accommodation may be terminated at any time).

mRNA COVID-19 vaccines and not vaccines in general,[12] or even COVID-19 vaccines in general. As set forth in the attached declarations and appeals,[13] many Movants and Plaintiffs have requested or are willing to take alternative, ethical vaccines such as Novavax or Covaxin once they are approved by the FDA as safe and effective, and in some cases even before. For example, Plaintiff Hamilton has a pending request to travel to India to take Covaxin there. *See* Hamilton Supp. Decl., ¶ 13.[14]

Medical exemptions are also vaccine-specific, *i.e.*, an exemption from the currently FDA-approved vaccines does not exempt a service member from other vaccination requirements. Apart from temporary exemptions based on pregnancy or recent infections, medical exemptions may be granted for medical

---

[12] Defendants have not alleged that any Movant or Plaintiff has not received any other required vaccination or that Movants or Plaintiffs have sought broader exemption. Further, all Movants have received all other required vaccinations, with the limited exception of the flu vaccine for at least one Movant (Nykun).

[13] *See* Ex. 1, Hamilton Supp. Decl., ¶ 11; Mazure Supp. Decl., ¶ 7 (stating that Novavax and Nuvavoxid "may be permissible to my moral conscience"); Singletary Supp. Decl., ¶ 2; Harwood RAR Appeal, ¶ 5; McAfee RAR Appeal, ¶ 11.g.

[14] The option to take alternative vaccines appears is expressly permitted under the DOD Mandate and Secretary Austin's August 24, 2021 memorandum. *See, e.g.,* ECF 1-2, DOD Mandate at 1 ("Service Members voluntarily immunized with a COVID-19 vaccine under FDA [EUA] or World Health Organization Emergency Use Listing ["WHO EUL"] … prior to, or after, the establishment of this policy are considered fully vaccinated."). This option is not, however, widely known by service members or commanders, and in any case, the WHO EUL vaccines are not available in the United States, requiring service members like Hamilton to obtain authorization to travel abroad. If this option were more widely known by service members and commanders, and if WHO EUL vaccines were made available by Defendants, it is likely that a large percentage of service members would pursue this form of temporary accommodation.

conditions or allergic reactions that are likely permanent with respect to the current FDA-approved COVID vaccines. For service members with medical conditions (or contraindications) or severe allergic reactions, their temporary exemptions may be renewed until there is a "future COVID-19 vaccine of a different formulation" and will be reassessed when "an updated or new vaccine has been [FDA] approved." ECF 31-7, ¶ 11. As such, their exemptions will likely have the same (or longer) duration as Movants or Plaintiffs willing to receive other, ethical COVID-19 vaccines.

The scope of the exemption, and the impact on military readiness, is also the same for these categories of religious and medical exemptions. Defendants assert that the same "restrictions and/or limitations" on deployment, training, and travel apply to all unvaccinated service members who are unvaccinated, regardless of whether they are unvaccinated for religious or medical reasons. ECF 31-7 at ¶ 14. Yet Defendants have granted thousands of "temporary" medical exemptions and effectively zero religious accommodations, and in doing so have violated RFRA and the First Amendment by treating comparable secular actively more favorably than religious exercise. In light of the Supreme Court's directive in *Navy SEALs 1-26*, Movants and Plaintiffs seek only to enjoin Defendants from disciplining or discharging them until this Court can rule on the merits of their claims.

3. Many "Temporary" Medical Exemptions Are Likely To Be Permanent.

Because "temporary" exemptions are renewable—and because Defendants like the Air Force have categorically excluded the possibility of permanent medical exemptions, *see* ECF 31-7, ¶ 11 ("Air Force policy is to only grant temporary exemptions")—it is likely that a significant number of these temporary exemptions will be permanent, or will be in effect for the remainder of the service member's career. As noted above, a service member may have a permanent medical condition or allergic reaction to current and future COVID-19 vaccines. Further, service members who participate in a clinical trial for a vaccine, and who actually receive an FDA EUA or WHO EUL vaccine, will receive a permanent exemption. ECF 31-7, ¶ 17.

4. Less Restrictive Means and Relative Risks and Benefits of Vaccination and Natural Immunity.

While disease has historically been the leading cause of death for U.S. service members, ECF 31 at 1, that is no longer the case and has not been for decades. Tragically, suicide is far and away the biggest killer, and Defendants' illegal expulsions of tens of thousands will only make matters worse.

A total of 31 active-duty service members have died of COVID-19 over the last two years from previous COVID-19 variants. But no active-duty service member has died since November 2021, ECF 31-4, ¶11 & Table, when the currently prevalent Omicron variant emerged. Since the rollout of the

vaccines, however, there have been at least 82 military fatalities from vaccines reported in the VAERS system; unlike the numbers of COVID-related deaths, vaccine-related deaths have continued after the emergence of the Omicron variant. *See* Ex. 2, Willis Decl., ¶ 10 & Figs. 4-5 (78 deaths in 2021 and four more in 2022). *See also id.* ¶ 8 & Figs. 2-3 (515 vaccine-related hospitalization in 2021, a 20-fold increase over 2020).

Defendants least restrictive means analysis has failed altogether to consider the reduced risks posed by unvaccinated service members like Movants and Plaintiffs with natural immunity, most of whom acquired it recently in the nearly 25-fold spike infections[15] from the Omicron variant that occurred in December 2021-January 2022 period.[16] Despite the fact that the CDC studies cited by Defendants demonstrated that immunity from previous infection was superior to that provided by vaccination,[17] Defendants gave no weight or consideration to the lower risk they pose in denying their requests.

---

[15] *See* ECF 31-4, ¶ 11 & Table (showing increase in infections from 4,997 in November 2021 to 28,797 in December 2021 to 119,943 in January 2022). This spike followed immediately after the vaccination deadlines at which point approximately 98% of active-duty service members were vaccinated. ECF 31-4, ¶ 3.

[16] *See, e.g.,* ECF 1-1, Davis Decl., ¶ 9 (early 2022); Freincle Decl., ¶ 7 (Jan. 2022); Hamilton Decl. ¶ 23; Hyatt Decl., ¶ 10 (Feb. 2022); Macie Decl., ¶ 9 (Jan. 2022); Mathis Decl., ¶ 10 (Jan. 2022); Mazure Decl., ¶ 9 (Jan. 2022); Singletary Decl., ¶ 9 (Jan. 2022).

[17] *See* ECF 31-5, ¶ 38 (*citing* Leon TM, et al. COVID-19 Cases and Hospitalizations by COVID-19 Vaccination Status and Previous COVID-19 Diagnosis – California and New York, May-November 2021. MMWR Morb Mortal. Wkly Rep 2022;71:125-131) ("CDC Study"). *See*

Despite achieving a vaccination rate supposedly reached 98%, ECF 31-4, ¶ 3, Defendants intend to discharge over 25,000 service members who seek religious accommodations and many of whom have natural immunity. While the recent Omicron data calls into question whether further vaccination would save any lives, even if it is assumed that vaccination of the remaining 1-2% would save the same number of lives that have been lost over the last two years (*i.e.*, 94), the Armed Services would lose roughly 250 highly trained, experienced and patriotic service members for every life saved.

B. Defendants' Religious Exemption Policy Violates First Amendment Free Exercise Clause.

Defendants' erroneously claim that Plaintiffs did not brief their First Amendment claims. ECF 31 at 31. Because the elements of a RFRA and First Amendment claim largely overlap, Plaintiffs briefed the RFRA and First Amendment claims concurrently, following the approach adopted by courts in this District and other circuits. *See, e.g., Navy SEAL 1* PI Order, at *12; *Air Force Officer*, 2022 WL 468799, at *11.

The principal difference between RFRA and First Amendment claims is that, for First Amendment claims, Plaintiffs must establish that the government's policy is neither neutral nor generally applicable. In the Motion,

---

also Ex. 2, Willis Decl., ¶ 19 & Figs. 7-10 (summarizing results of CDC study showing that, for Delta variant, protection from acquired from previous infections was three to four times greater than protection acquired by vaccination).

Plaintiffs did so by demonstrating that Defendants treat comparable secular activity—medical and administrative exemptions—more favorably than religious exemptions. *See* ECF 13 at 8-9, Table 1 & Table 2 (out of over 25,000 requests submitted, over 11,000 have been denied and zero actual accommodations have been granted, while over seven thousand medical and administrative exemptions have been granted). In this reply, Plaintiffs further demonstrate that the religious accommodations sought are comparable to medical exemptions in terms of duration, scope and impact on military readiness. *See infra* Section II.A.

C. Defendants' Religious Exemption Policy Violates Plaintiffs' Fifth Amendment Due Process Rights.

The Defendants' policy of systematic and uniform denial of 100% of religious accommodation requests is just as much a deprivation of their Fifth Amendment Due Process rights, U.S. CONST. AMEND. V, as it is of First Amendment Free Exercise rights. Contrary to Defendant's assertions, ECF 31 at 33, Plaintiffs identify the protected liberty interest, namely, Defendants' unconstitutional policy forcing Plaintiffs to choose "between their job(s) and their jab(s)." *Navy SEALs 1-26* Stay Order, at *9 (citation and internal quotations omitted). *See also* ECF 10, ¶¶ 123-126 (identifying protected life, liberty and property interests) & *supra* Section II.A.4 (at least 82 military vaccine-related deaths reported in VAERS in 2021-2022). Further, the uniform

denial of at least 11,000 requests, while granting zero accommodations, strongly supports the inference that the outcome is pre-determined and that the decisionmakers are not impartial, depriving Plaintiffs of due process.

III. PLAINTIFFS HAVE SUFFERED IRREPARABLE HARM.

Plaintiffs have shown above that Plaintiffs are currently being deprived of First Amendment rights through procedures that do not meet the requirements of RFRA or Procedural Due Process under the Fifth Amendment. As the Supreme Court observed in *Cuomo*, there can be "no question" that these types of restrictions on religious exercise "will cause irreparable harm." *Cuomo*, 141 S.Ct. at 67. This applies equally to violations of statutes like RFRA that enforce First Amendment freedoms. *See Navy SEAL 1* PI Order, at *19 (citation omitted).

The irreparable harm commenced and deprivation of their rights commenced no later than the denial of Movants' appeals and is ongoing to the present. Defendants misunderstand and misstate the nature of the harm Plaintiffs are facing and the available remedies. First, separation is not the irreparable harm claimed, but rather the deprivation or infringement of First Amendment Free Exercise. Second, the Board of Inquiry and potential retention are not administrative remedies for the claimed harm, nor are petitions to the BCMR for wrongful discharge. These are administrative

remedies for other additional harms that could flow from the claimed errors and harm, but they are not remedies for the errors and harm being claimed.

IV. BALANCE OF EQUITIES, PUBLIC INTEREST & SCOPE OF INJUNCTIVE RELIEF

Plaintiffs initially sought injunctive relief identical to that granted in *Navy SEAL 1*. *See* ECF 13 (Motion) & ECF 26 (Proposed Order). To the extent that relief exceeds the scope of interim relief authorized by the Supreme Court's directive in *Navy SEALs 1-26* and the Eleventh Circuit's order in *Navy SEAL 1* Stay Order, Plaintiffs and Movants seek relief consistent with the Supreme Court's directive.[18] Accordingly, the scope of relief sought is: (1) to enjoin Defendants from enjoining or discharging (or retaliating against) them while this matter is pending before this Court; and (2) to receive comparable treatment in terms of assignments, deployments, and other operational matters as service members who have received medical or administrative exemptions. This allows Defendants to impose the same restrictions on

[18] Plaintiffs Bongiovanni, Dee, Kins, Montoya and Macie are all in the Navy and would be part of the class (but not the two sub-classes) certified by the Northern District of Texas and covered by the class-wide injunction issued by that court for all Navy personnel who have submitted a religious accommodation request. *See generally U.S. Navy SEALs 1-26 v. Biden*, No. 4:21-cv-01236-O (N.D. Tex. March 28, 2022). It is likely that the government will appeal both the class certification and the class-wide injunction. Accordingly, Movants Bongiovanni, Kins and Montoya continue to seek an injunction from this Court given the possibility that the class certification and/or injunction may be overturned on appeal, or limited to the sub-classes of which they are not members.

Plaintiffs and other unvaccinated service members with exemptions to minimize any risk of infection or outbreaks while the injunction is in effect.

Further, Defendants assert that unvaccinated service members are subject to the same restrictions and limitations on training, travel, deployments, and other operational matters, regardless of the reasons for which they remain unvaccinated. *See, e.g.,* ECF 31-7, ¶ 14. Consequently, the requested injunction would ensure that Movants would receive comparable treatment to the thousands of service members who have received temporary medical exemptions while this matter is pending before the Court.

V. EVIDENTIARY HEARING

Plaintiffs and Movants seek an evidentiary hearing to the extent that Defendants dispute the sincerity of Movants' religiously held beliefs and the religious nature of those beliefs. *See, e.g.,* ECF 31 at 20 n.11. The sincerity of their beliefs is the essential threshold factual issue for Plaintiffs to meet their initial burden under RFRA and the First Amendment claims and to switch the burden to the government to prove that their policy satisfies strict scrutiny. Plaintiffs and Movants would also seek an evidentiary hearing to the extent the government raises any material factual disputes with respect to Plaintiffs' exemptions and willingness to take alternative, ethical vaccines.

VI. CONCLUSION

Movants Motion and the relief requested therein should be granted.

Respectfully Submitted,

/s/ Brandon Johnson
Brandon Johnson, DC Bar No. 491370
/s/ Travis Miller
Travis Miller, Texas Bar No. 24072952
Defending the Republic
2911 Turtle Creek Blvd., Suite 300
Tel. (214) 707-1775
Email: bcj@defendingtherepublic.org
Email: twm@defendingtherepublic.org

CERTIFICATE OF SERVICE

This is to certify that I have on this day e-filed the foregoing Plaintiffs' Reply Brief using the CM/ECF system.

Dated: April 4, 2022

Respectfully Submitted,

/s/ Brandon Johnson
Brandon Johnson