IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NAVY SEAL 1, NAVY SEAL 2, NAVY SEAL 3, and NAVY SEAL 4,

Plaintiffs,

v.

LLOYD AUSTIN, in his official capacity as Secretary of the United States Department of Defense; CARLOS DEL TORO, in his official capacity as Secretary of the United States Navy; and ADMIRAL MICHAEL M. GILDAY, individually and in his official capacity as Chief of Naval Operations,

Defendants.

Case No. 1:22-cv-00688 (CKK)

Hon. Colleen Kollar-Kotelly

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO ADMIRAL GILDAY'S RENEWED MOTION TO DISMISS PLAINTIFFS' INDIVIDUAL-CAPACITY CLAIMS

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INTRODUCTION

Defendant Gilday (also referred to as "Defendant"), in his individual capacity, moves to dismiss this lawsuit pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. No. 67). In support of his motion, Defendant advances three arguments. First, he argues that sovereign immunity bars Plaintiffs' claim for damages against him in his individual capacity under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4. Second, he argues that qualified immunity bars Plaintiffs' RFRA claim. And finally, he argues that damages against him would not be "appropriate relief" under RFRA. Defendant is mistaken.

Sovereign immunity does not apply to Plaintiffs' RFRA claim against Defendant in his individual capacity. There is no question that Defendant is subject to RFRA, and as the U.S. Supreme Court confirmed, damages are an "appropriate remedy" under this statute. Congress made no exceptions for military officials, high-ranking or otherwise, nor should this Court. And finally, Defendant does not enjoy qualified immunity for violating Plaintiffs' clearly established rights. The motion should be denied.

STANDARD OF REVIEW

"In evaluating a Rule 12(b)(6) motion, the Court must construe the complaint in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged." *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012) (internal quotations and citation omitted). Pursuant to Rule 8(a), the pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To survive Defendant's motion, Plaintiffs must allege facts that are sufficient to state a claim for relief that is "plausible on its face" and, when accepted as true, are sufficient to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). As stated

by the Supreme Court, "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Moreover, "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Nietzke v. Williams*, 490 U.S. 319, 327 (1989); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (stating that a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").[1]

"[W]hen reviewing a motion to dismiss pursuant to Rule 12(b)(1), the court is required to assume the truth of all material factual allegations in the complaint and construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged." *Shushkov v. Rubio*, Civil Action No. 24 - 2265 (LLA), 2025 U.S. Dist. LEXIS 159789, at *4 (D.D.C. Aug. 18, 2025) (internal quotations and citations omitted).

SUMMARY OF FACTS

Plaintiffs are Christians. When this lawsuit was filed, Plaintiff Navy SEALs 1, 2, 3, and 4 were all active-duty members of the U.S. Navy Sea, Air, and Land Teams, commonly known as Navy SEALs. SEALs are the U.S. Navy's primary special operations force, and they are a component of the Naval Special Warfare Command. Plaintiffs have served honorably on active duty in the U.S. Navy for many years. Indeed, Navy SEAL 3 served honorably for three decades. (First Am. Compl. ¶¶ 9-15 [Doc. No. 43] [hereinafter "FAC"]).

As Navy SEALs, Plaintiffs faced death and suffered many hardships defending our freedoms around the globe. They each took an oath to support and defend the Constitution of the

[1] The Federal Rules do not require a "heightened" pleading requirement as that "can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation." *Twombly*, 550 U.S. at 569 n.14.

United States against all enemies, foreign and domestic. Plaintiffs remained willing to make the ultimate sacrifice in defense of our freedoms enshrined in the Bill of Rights. (FAC ¶ 13).

Then-Secretary of Defense Lloyd Austin announced on August 9, 2021, that COVID-19 vaccines would be added to the list of mandatory vaccines required for all service members "by no later than mid-September, or immediately upon [FDA] licensure, whichever comes first." (FAC ¶ 23).

Failure to abide by the vaccine mandate carried with it harsh and severe penalties, including criminal prosecution, loss of pay and benefits, removal from the Navy SEALs, and separation from the armed services. Accordingly, Plaintiffs were advised by their chains of command via a page 13 entry in their service record that "[u]nless medically or administratively exempt, any refusal to be vaccinated may constitute a Failure to Obey a Lawful Order and may be punishable under the Uniform Code of Military Justice (UCMJ) and/or administrative action for Failure to Obey a Lawful Order (UCMJ, Article 92)." A page 13 entry is an adverse entry in Plaintiffs' official service records. (FAC ¶¶ 30, 31).

Plaintiffs objected to the vaccine mandate on religious grounds as the mandate substantially burdened their religious exercise. (FAC ¶¶ 43-63). As a result, each Plaintiff submitted a timely request for a religious exemption to the mandate pursuant to the established procedures.[2] (FAC ¶¶ 64-70).

[2] The fact that there was a procedure in place for seeking a religious exemption to the vaccine mandate demonstrates that Defendant Gilday knew that servicemembers had a right to seek such an exemption under military regulations and, in particular, pursuant to RFRA as the regulations were drafted to take into account this federal law, which applies to the military. *See infra*.

At all times relevant, Defendant was the Chief of Naval Operations ("CNO"), and he had plenary authority to grant or deny religious exemptions to the vaccine mandate for Navy personnel, including Plaintiffs. (FAC ¶¶ 20, 22).

On May 7, 2022, Navy SEAL 1's request for a religious exemption was denied by the Deputy Chief of Naval Operations. The denial letter utilized the same boilerplate justification and language used in every other such rejection. While Navy SEAL 1 timely submitted an appeal to Defendant Gilday, this appeal was futile as Defendant unlawfully issued blanket denials of such appeals, particularly for Navy SEALs. (FAC ¶¶ 65, 66).

Navy SEAL 2 submitted a timely request for a religious exemption, and on March 2, 2022, he received official notice that his request was denied by the reviewing authority on February 6, 2022. The February 6, 2022, denial letter contained the same boilerplate justification and language used to deny all of the religious exemption requests made by Navy SEALs. On March 3, 2022, Navy Seal 2 submitted a timely appeal of his denial to Defendant Gilday. Defendant Gilday sat on this appeal and refused to grant it. Nonetheless, this appeal was futile as Defendant Gilday unlawfully issued blanket denials of such appeals, particularly for Navy SEALs. (FAC ¶ 67).

Navy SEAL 3 submitted a timely request for a religious exemption, and on November 30, 2021, he received an email with an attached letter from the Deputy Chief of Naval Operations informing him that his religious exemption was denied. The letter was dated November 22, 2021, and it contained the same boilerplate justification and language used to deny all of the religious exemption requests made by Navy SEALs. Navy SEAL 3 timely submitted an appeal of his denial to Defendant Gilday, who also sat on this appeal. However, as noted previously, this appeal was futile as Defendant Gilday issued blanket denials of such appeals, particularly for Navy SEALs. (FAC ¶ 68, 69).

Navy SEAL 4 made his request for a religious exemption to the vaccine mandate on October 15, 2021. This request was denied by the reviewing authority on November 26, 2021, utilizing the same boilerplate justification and language used for all other such denials. Navy SEAL 4 timely appealed this denial to Defendant Gilday, who denied the appeal on February 10, 2022, pursuant to Defendant Gilday's practice of issuing blanket denials of such appeals, particularly for Navy SEALs.[3] (FAC ¶ 70).

Defendant Gilday's delay in responding to the religious exemption requests of Navy SEALs 1 through 3 was purposeful, and it was intended to thwart the efforts of this litigation so that the government could argue that the claims were not ripe. (FAC ¶ 71). Moreover, the delay was further evidence of the fact that the government did not have a compelling interest in mandating the COVID-19 vaccine (and that Defendant Gilday did not have a compelling reason for denying the requests for a religious exemption).

Based on clearly established law, the government, and in this case Defendant Gilday, is required to review requests for religious accommodations/exemptions on a case-by-case basis. Yet, the denial letters were boilerplate form letters that did not address the specific situation of each Navy SEAL. Indeed, the letters received by Plaintiffs were identical to the disapproval letters

[3] It is false to assert that the First Amended Complaint "lack[s] allegations regarding any wrongful conduct by Admiral Gilday." (Def.'s Mem. at 6). Defendant Gilday was the person *central* to and *intimately involved with* the denial of Plaintiffs' requests for a religious exemption to the mandate (irrespective of the legality of the mandate itself). Finding Defendant Gilday personally liable for damages for violating RFRA based on his refusal to grant Plaintiffs' requests for a religious exemption to the vaccine mandate does not force the government to change any policy, including the mandate itself. Defendant is wrong to suggest otherwise. (*See* Def.'s Mem. at 5-7). And the cases cited by Defendant regarding challenges to various COVID-19 policies all involved claims for damages against government officials for enforcing the policy itself, and not claims against the official who was personally responsible for granting/denying religious exemptions to the vaccine mandate, as in this case. (*See* Def.'s Mem. at 7 [citing cases]). Defendant's cases are distinguishable on the facts.

received by numerous sailors stationed at Plaintiffs' commands and at other commands. The carbon copy disapproval letters demonstrate a "blanket disapproval" of religious accommodation requests regardless of factors articulated in the initial requests. Blanket disapprovals of religious accommodation requests violate military service members' religious liberties and the right to case-by-case consideration and review as specified in DOD INSTRUCTION 1300.17 and as mandated by RFRA, which requires the government to demonstrate that the compelling interest test is satisfied through application of the challenged mandate "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened. Based on clearly established law, Defendant Gilday, the person with final decision-making authority for the religious exemptions, did not satisfy that standard with regard to Plaintiffs. (FAC ¶ 72).

The punitive measures imposed (or threatened to be imposed) upon Plaintiffs for exercising their religion and objecting to the vaccine mandate on religious grounds included, but were not limited to, removal from special warfare operations, adverse fitness reports, loss of special duty pay and benefits, loss of education and training opportunities, separation from the service, loss of reputation, and loss of personal decorations and insignia, specifically including the Special Warfare / SEAL Trident insignia. (FAC ¶ 74).

Because Plaintiffs were unvaccinated due to their sincerely held religious beliefs and were denied a religious exemption to the mandate by Defendant Gilday, Plaintiffs were denied benefits, including tuition assistance, benevolence support such as Transition Assistance Programs, which included DOD SkillBridge and the Warrior Care Program (Care Coalition) (https://www.socom.mil/care-coalition), among other support programs. Because Plaintiffs were unvaccinated due to their sincerely held religious beliefs and were denied a religious exemption to the mandate by Defendant Gilday, Plaintiffs were not eligible for promotions, regular leave to visit

family members, permanent change of station ("PCS") orders, nor were they eligible to attend any schools, among other punishments. Denying Plaintiffs these benefits did not promote any legitimate governmental interest nor did it serve any legitimate governmental purpose. Rather, the actions against Plaintiffs were punitive and taken to punish Plaintiffs for exercising their religion. The denial of these benefits substantially burdened Plaintiffs' religious exercise. (FAC ¶ 75). Defendant Gilday had the authority to grant Plaintiffs' requests for religious exemptions, but he refused to do so. (FAC ¶¶ 2, 22, 65-71).

For example, Navy SEAL 4 received an adverse fitness report. He was formally accused of the "Commission of a Serious Offense" for exercising his religious beliefs. And he was notified that he would be separated "by reason of Misconduct –Commission of a Serious Offense . . . [a]s evidenced by [his] refusal of the COVID-19 vaccination." Navy SEAL 4's reputation has been harmed as a result. (FAC ¶ 78).

All Plaintiffs remained subject to criminal penalties, including confinement and loss of pay, for objecting to the vaccine mandate on religious grounds without a religious exemption. As stated in Plaintiffs' page 13 entries in their official services records, the mandate was "a lawful order. Refusal to be fully vaccinated against COVID-19, absent an approved exemption [which Defendant Gilday refused to provide], will constitute a failure to obey a lawful order and is punishable under the Uniform Code of Military Justice and/or may result in administrative action." (FAC ¶ 79).

Consequently, in addition to having to suffer through adverse separation proceedings (which were eventually put on hold) and threats of criminal prosecution, Plaintiffs were branded and stigmatized as criminals, considered less capable of serving in the military, and reduced in their stature among their peers and officers. Plaintiffs' growth of their careers was stunted, and

they were denied access to unique educational and future career opportunities on account of their sincerely held religious beliefs. Damages are an appropriate relief under RFRA for these injuries and violations, and the reason for these injuries was Defendant Gilday's failure to grant Plaintiffs' requests for a religious exemption to the mandate. (FAC ¶ 80).

Plaintiffs suffered real harm as a direct result of Defendant Gilday's refusal to grant them a religious exemption to the vaccine mandate. As a result of Defendant Gilday's failure to abide by clearly established law, Plaintiffs were treated disparately on account of their religious objection to the mandate, they were stigmatized, they lost educational benefits and opportunities, and they were denied travel and skill development opportunities, among the other harms. In sum, all Plaintiffs suffered a cognizable injury caused by Defendant Gilday's refusal to grant them a religious exemption to the mandate. (FAC ¶ 84).

While the government may have an interest in mandating COVID-19 vaccination, that interest was not compelling. The readiness and fitness of the military force was not enhanced by mandating a vaccine that was experimental, ineffective, and dangerous. The readiness and fitness of the military force was not advanced by removing Plaintiffs from their special operator status as Navy SEALs and sending them to other fleet billets or discharging them from the military because Plaintiffs objected to the vaccine mandate based on their sincerely held religious beliefs. (FAC ¶¶ 85-87).

Vaccinations to prevent reinfection of recent or even remote history of any viral infection have never been mandated or even recommended by any health prevention organization. Normal biology and virology principles are violated when a patient is vaccinated to produce neutralizing antibodies which already exist in the patient. There would be no physiologic reason to vaccinate

anyone with reasonable titers of neutralizing antibodies; this would be considered a procedure which is not medically indicated. (FAC ¶¶ 126, 127).

Plaintiffs had natural immunity at the time of their requests for a religious exemption. All Plaintiffs contracted COVID-19 and recovered with little difficulty. As a result, Plaintiffs have active antibodies that have been proven to be more protective to their personal health than the vaccines. These antibodies would also more effectively reduce the transmission of COVID-19 to their fellow sailors. (FAC ¶ 101; *see also id*. FAC ¶¶ 34, 37, 38, 96, 103, 112, 117, 129, 130).

Plaintiffs are extraordinarily fit. The physical demands of being a SEAL required them to be some of the most physically fit men in the country, if not the world. Consequently, Plaintiffs belong to a demographic that is the least susceptible to suffering any adverse consequences from COVID-19. However, Plaintiffs remained at risk of adverse and serious health consequences from the COVID-19 vaccines. Indeed, the risks associated with the investigational COVID-19 vaccines, particularly for young, healthy men such as Navy SEALs, outweighed any theoretical benefits, were not minor or unserious, and many of those risks were unknown or had not been adequately quantified nor had the duration of their consequences been evaluated. Consequently, the mandatory administration of COVID-19 vaccines created an unethical, unreasonable, clinically-unjustified, unsafe, and unnecessary risk to servicemembers, specifically including Plaintiffs. (FAC ¶¶ 14, 88-97, 104-08).

No Navy SEAL died, let alone was hospitalized, by COVID-19. Plaintiffs were aware of other Navy SEALs who had COVID-19, and the symptoms had all been those similar to a weak case of the seasonal flu, with the most common symptom being a loss of smell or taste. Navy SEALs suffer far more injuries, some of which are disabling, from their routine and rigorous training than anything COVID-19 caused. (FAC ¶¶ 115, 116).

For more than a year prior to the introduction of the COVID-19 vaccines and when the pandemic was in full force, Plaintiffs and their commands continued to execute mission requirements. They deployed, trained, and conducted operational and non-operational tasks worldwide, with minimum impact due to COVID-19. Consequently, during the pandemic and without the benefit of a vaccine, Plaintiffs and their fellow SEALs traveled and conducted operations as well as exercises. In fact, they traveled within and outside of CONUS (the continental United States) for training. COVID-19 had no impact on Plaintiffs' operational capabilities or the operational capabilities of their commands. (FAC ¶ 136; *see also id*. at ¶¶ 137-41). Defendant Gilday, as the CNO, certainly knew (or should have known) of this.

The COVID-19 vaccines are not safe. These genetic vaccines (Pfizer, Moderna, Johnson & Johnson ["J & J"]) skipped testing for genotoxicity, mutagenicity, teratogenicity, and oncogenicity. In other words, it is unknown whether or not these products will change human genetic material, cause birth defects, reduce fertility, or cause cancer. The Pfizer, Moderna, and J & J vaccines were considered "genetic vaccines," or vaccines produced from gene therapy molecular platforms, which, according to FDA regulatory guidance, are classified as gene delivery therapies and should be under a 15-year regulatory cycle with annual visits for safety evaluation by the research sponsors. (FAC ¶ 104).

Reports through the Vaccine Adverse Event Reporting System ("VAERS"), which collects data on a voluntary basis from health care providers and patients, show dramatic and concerning outcomes. The total number of adverse events in VAERS from the three COVID-19 gene therapy vaccines was 1,131,984 as of February 18, 2022, while all of the other vaccines combined since 1990 reported only 872,313. In addition, the number of deaths from this gene therapy was 24,402 during this same period, while all the other vaccines combined from 1990 totaled 9,573. Finally,

the number of permanent disabilities caused by this experiment was 44,512, while all of other vaccines combined contributed to only 20,861 permanent disabilities. As of June 19, 2022, the following numbers related to the COVID-19 gene therapy vaccines were reported in VAERS: 31,533 deaths; 56,215 disabilities; 1,201 congenital abnormalities; 178,116 hospitalizations; and 138,394 emergency room visits. (FAC ¶ 105).

In January 2022, Department of Defense "whistleblowers" revealed disturbing information regarding dramatic increases in medical diagnoses among military personnel. The concern was that these increases were related to the COVID-19 vaccines that service members, including Plaintiffs, were mandated to take. Based on data from the Defense Medical Epidemiology Database ("DMED"), these whistleblowers found a significant increase in registered diagnoses on DMED for miscarriages, cancer, and many other medical conditions in 2021 compared to a five-year average from 2016-2020. (FAC ¶¶ 106-07).

The available COVID-19 vaccines were not effective against current and future variants of COVID. Each variant is the result of an immune escape mechanism built into the corona virus family. The virus survives by escaping our current immune system and mutating away from the original or native form of the virus. The three available COVID-19 gene therapy vaccines at the time focused on the native spike protein production within our bodies to produce neutralizing antibodies effective only for the native form and perhaps the first couple of mutations. As more and more humans either contract the virus or become fully immunized with the gene therapy, we reach herd immunity, and the virus has no choice but to mutate to survive. (FAC ¶ 109).

Before mandating vaccines that violate the sincerely held religious beliefs of military personnel, the Department of Defense should study operators with natural immunity and establish a base control group to monitor and study vaccinated and unvaccinated members for long term

control. The Department of Defense had no interest in doing so because the vaccine mandate was purely political and not based on science. (FAC ¶ 120).

Testing, wearing a mask (which the government claimed was an effective way to stop the spread of COVID), social distancing, reporting symptoms and close contacts, and available therapeutics and treatments were all less restrictive means of promoting the government's interests without violating Plaintiffs' sincerely held religious beliefs. (FAC ¶¶ 40, 133).

In summary, as the facts demonstrated: (1) the vaccines were ineffective as they were developed for extinct variants of COVID-19; (2) effective therapeutics, treatments, and other less restrictive means to advance the government's interests were available; (3) natural immunity provided better protection from COVID-19 than any of the current vaccines, and the Navy's own regulations acknowledge this fundamental principle of virology;[4] (4) Plaintiffs belong to the demographic that is the least susceptible to any bad outcomes caused by COVID-19, and this is evidenced by the fact that no Navy SEAL suffered any adverse outcomes from having contracted COVID-19, including Plaintiffs; and (5) there were serious adverse health consequences caused by the COVID-19 vaccines to individuals such as Plaintiff. (FAC ¶¶ 38-40, 85-145). Thus, Plaintiffs had a better chance of being sidelined by an adverse reaction to the vaccine than being sidelined by a virus which they already had and from which they fully recovered. And Plaintiffs were certainly more likely to be sidelined by the intense and dangerous training they underwent on a regular basis as Navy SEALs. (*See, e.g.,* FAC ¶¶ 115-17).

[4] Pursuant to the Navy's own regulations, exemptions to vaccines are provided if there is "[e]vidence of immunity based on serologic tests, documented infection, or similar circumstances." BUMEDINST 62330.15B]; *see* FAC ¶ 123). Here, basic concepts of virology were discarded when it came to the highly-politicized COVID-19 vaccine. Natural immunity is the best defense against a virus, as the Navy's regulations confirm. (*See* FAC ¶¶ 34, 37, 38, 96, 101, 103, 112, 117, 129, 130).

In the final analysis, Defendant Gilday had the authority to grant Plaintiffs' requests for a religious exemption to the vaccine mandate. The buck stopped with him personally. Defendant Gilday had a duty to grant the exemptions under RFRA and existing military regulations. Yet, he refused to do so, causing harm (including damages) to Plaintiffs.

ARGUMENT

I. Defendant Gilday's Actions Violated Plaintiffs' Clearly Established Rights under RFRA.

Congress, through RFRA, intended to bring Free Exercise Clause jurisprudence back to the test established prior to *Employment Division v. Smith*, 494 U.S. 872 (1990). *See, e.g.,* 42 U.S.C. § 2000bb (enacting RFRA "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened").

Under RFRA, the government and its officials "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). RFRA protects "any exercise of religion." *Id*. at §§ 2000bb-2(4), 2000cc-5(7)(A). To justify a substantial burden on the free exercise of religion under RFRA, a government official must demonstrate that the challenged action is "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id*. at § 2000bb-1(b). The official's burden is a heavy one.

Strict scrutiny is the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997); *see also Tandon v. Newsom*, 593 U.S. 61, 64-65 (2021) ("[S]trict scrutiny requires the State to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.' . . . That standard 'is not watered down'; it 'really means what it says.'") (internal citation omitted).

Under strict scrutiny, "so long as the government can achieve its interests in a manner that does not burden religion, it *must* do so." *Fulton v. City of Phila.*, 593 U.S. 522, 541 (2021) (emphasis added); *see also id*. ("The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS."). Thus, the question here is not whether Defendant can assert a compelling interest in enforcing the vaccine mandate generally, but whether he has such an interest in denying a religious exemption to each of the Navy SEALS before this Court.

As set forth in the summary of facts and in the First Amended Complaint, the adverse consequences/penalties/costs caused by Defendant Gilday's refusal to grant Plaintiffs a religious exemption to the mandate imposed a substantial burden on Plaintiffs' religious exercise. As Supreme Court precedent makes clear, the simple denial of unemployment benefits (*Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981)), the threat of "disciplinary action" (*Holt v. Hobbs*, 574 U.S. 352, 358 (2015)), and adverse economic incentives (*Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 722 (2014)) all were sufficient for the Court to find a substantial burden. Plaintiffs have demonstrated a substantial burden on their religious exercise due to Defendant Gilday's refusal to grant them a religious exemption to the mandate. Indeed, Defendant Gilday does not dispute this. In his letter denying Navy SEAL 4's request for a religious exemption, Defendant Gilday states, "I evaluated the request under the assumption that your religious beliefs *are sincere* and *would be substantially burdened*." (R-19-1, Navy SEAL 4 Decl. ¶ 28, Ex. D [Gilday Denial]at Ex. 1)[5] (emphasis added).

[5] Defendant Gilday's denial letters are specifically referenced in the First Amended Complaint. (*See, e.g.,* FAC ¶¶ 65-70). As Defendant notes, "the Court may consider 'documents incorporated into the complaint by reference.'" (Def.'s Mem. at 3, n.3 [quoting *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007)]). And his personal denial of Plaintiffs' requests for a religious

As Defendant's refusal to grant Plaintiffs a religious exemption to the vaccine mandate substantially burdened Plaintiffs' exercise of religion, the "burden is placed squarely on" Defendant to show that his actions satisfy strict scrutiny. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006). Defendant cannot meet that demanding standard in this case.

Under RFRA, the government and its officials must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *Hobby Lobby Stores, Inc.*, 573 U.S. at 726 (internal quotations and citation omitted). "[B]roadly formulated" or "sweeping" interests are inadequate. *O Centro*, 546 U.S. at 431; *Wis. v. Yoder*, 406 U.S. at 221. Government officials must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Wis. v. Yoder*, 406 U.S. at 236.

Defendant cannot meet that demanding standard nor has he attempted to do so. Plaintiffs have stated a plausible claim for relief under RFRA.

II. Sovereign Immunity Does Not Bar Plaintiffs' RFRA Claim against Defendant Gilday in His Individual Capacity.

Congress expressly made the military and its officials subject to RFRA. 42 U.S.C. § 2000bb-2(1) (applying RFRA to any "branch, department, agency, instrumentality, and *official* . . . of the United States") (emphasis added); *see also* DOD INSTRUCTION 1300.17 (establishing DoD policy applying RFRA and the Free Exercise Clause in the military context). Consequently, RFRA applies to the U.S. Armed Forces and its officials, including Defendant Gilday. *Singh v.*

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exemption is further evidence refuting Defendant's claim that he lacked any personal involvement in the violation of Plaintiffs' rights under RFRA.

Carter, 168 F. Supp. 3d 216, 226 (D.D.C. 2016) ("Congress nowhere inserted any exception for the U.S. Armed Forces from RFRA's application . . . .).

Plaintiffs acknowledge that "RFRA does not waive the federal government's sovereign immunity for damages." *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006). But Plaintiffs' claim for damages is not against the federal government. The claim is made against Defendant Gilday in his individual capacity. (*See* FAC ¶ 2 ["Plaintiffs also seek damages under RFRA against Admiral Gilday in his individual capacity as he is the final decision maker directly responsible for the harm caused to Plaintiffs."]; "Prayer for Relief" ¶ G ["That Defendant Gilday, in his individual capacity, pay damages to Plaintiffs for the harm caused by his actions as set forth in this First Amended Complaint . . ."]). And while a goal of this lawsuit (or "object" per Defendant's description, *see* Def.'s Mem. at 6) was to enjoin and declare unlawful the vaccine mandate (*i.e.*, the official capacity claims), that goal/object is distinct from seeking damages against Defendant Gilday in his individual capacity based on his refusal to grant Plaintiffs a religious exemption to the mandate—an exemption required by RFRA. This refusal was ultimately Defendant Gilday's personal decision, and his alone. And this decision caused Plaintiffs to suffer damages. Had Defendant Gilday followed the clearly established law (RFRA) and granted Plaintiffs' requests for a religious exemption, that would *not* have changed the vaccine mandate (the official governmental policy) in any way. As noted, under RFRA (and military regulations), the policy allowed servicemembers such as Plaintiffs to seek and obtain a religious exemption. It was Defendant Gilday's decision, made in his individual capacity, to unlawfully deny Plaintiffs' requests. Sovereign immunity does not apply. Indeed, in light of Defendant's logic, any time a government official acting *under color of his authority* violates the constitutional or statutory rights of a government employee then sovereign immunity should attach. Such an

argument undermines *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (holding that a violation of the Fourth Amendment's protection against unreasonable searches and seizures by a federal agent *acting under color of his authority* gives rise to a cause of action for damages consequent upon his unconstitutional conduct), it is contrary to the plain language of RFRA, and it is contrary to the U.S. Supreme Court's holding in *Tanzin v. Tanvir*, 592 U.S. 43, 51 (2020) (holding that damages is an appropriate remedy against a government official who violates RFRA). Defendant Gilday's sovereign immunity argument has no merit.

III. Defendant Gilday Does Not Enjoy Qualified Immunity for Violating Plaintiffs' Clearly Established Rights.

The defense of qualified immunity does not shield Defendant Gilday from liability for violating Plaintiffs' clearly established rights. When deciding this issue, the Court must "[p]resum[e] all of Plaintiff[s'] factual allegations are true." *Arrington v. United States Park Police*, No. 01-1391 (CKK), 2003 U.S. Dist. LEXIS 30547, at *9 (D.D.C. Sep. 30, 2003) (denying defense of qualified immunity at motion to dismiss stage).

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court stated the applicable standard as follows: government officials are protected from personal liability and thus enjoy qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. And "[t]his is not to say that an official action is protected by qualified immunity *unless the very action in question has previously been held unlawful*, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citation omitted) (emphasis added); *see also Wilson v. Layne*, 526 U.S. 603, 614-15 (1999) ("'Clearly established' for purposes of qualified immunity means that the contours of the right

must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.") (internal quotations and citation omitted). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the '*objective legal reasonableness*' of the action, . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson*, 483 U.S. at 639 (quoting *Harlow*, 457 U.S. at 819) (emphasis added). And "officials can still be on notice that their conduct violates established law *even in novel factual circumstances*." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (emphasis added).

In *Saucier v. Katz*, 533 U.S. 194 (2001), the Court mandated a two-step sequence for resolving qualified immunity claims. First, a court must decide whether the facts alleged or shown by a plaintiff make out a violation of a constitutional or statutory right. And second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Id*. at 201; *see also Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (stating that courts have discretion to "decid[e] which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand"). As noted, whether a right is "clearly established" is ultimately an *objective*, legal analysis. As stated by the Supreme Court, "By defining the limits of qualified immunity essentially in *objective* terms, we provide no license to lawless conduct." *Harlow*, 457 U.S. at 819 (emphasis added). In other words, the novelty of the factual situation (COVID-19 pandemic) does not mean that the *objective* right to religious exercise protected by RFRA was not clearly established. There is no question that the mandate placed a substantial burden on Plaintiffs' religious exercise (as Defendant Gilday acknowledged in his denial letter to Navy SEAL 4, *see supra*). Therefore, Defendant Gilday has the burden to prove that his denial of

Plaintiffs' requests for a religious exemption was the least restrictive means to promote a compelling interest, which he cannot do here (nor does he attempt to do so).

"In order to defeat qualified immunity at the motion to dismiss stage, plaintiff must allege facts that plausibly establish the individual defendants knew *or should have known* that the action [they] took within [their] sphere of official responsibility would violate plaintiff's rights." *Boatwright v. Jacks*, 239 F. Supp. 3d 229, 233 (D.D.C. 2017) (internal quotations and citation omitted) (emphasis added).

RFRA and its demands are not a military secret. DOD INSTRUCTION 1300.17 "[e]stablishes DoD policy in furtherance of the Free Exercise Clause of the First Amendment to the Constitution of the United States, recognizing that Service members have the right to observe the tenets of their religion, or to observe no religion at all"; it "[e]stablishes DoD policy providing that an expression of sincerely held beliefs (conscience, moral principles, or religious beliefs) may not, in so far as practicable, be used as the basis of *any* adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment"; and it "[i]mplements requirements in Section 2000bb-1 of Title 42, United States Code (U.S.C.), also known as 'The Religious Freedom Restoration Act' (RFRA), and other laws applicable to the accommodation of religious practices for DoD to provide, in accordance with the RFRA, that DoD Components will normally accommodate practices of a Service member based on a sincerely held religious belief." (FAC ¶ 43) (emphasis added). Defendant Gilday, a senior military official, knew, or at least should have known, that his decision to deny Plaintiffs' requests for a religious exemption to the vaccine mandate would run afoul of RFRA's most demanding test.

Accordingly, at the time the vaccine mandate was issued and enforced, the law was clearly established that government officials, including Defendant Gilday, could not violate Plaintiffs'

sincerely held religious beliefs without satisfying strict scrutiny, and that this law applies to the vaccine mandate. Thus, based on the *objective* legal reasonableness of Defendant Gilday's actions, assessed in light of the legal rules that were clearly established at the time they were taken *as applied to the factual allegations set forth in the First Amended Complaint* (facts which demonstrate that the mandate does not satisfy strict scrutiny), Defendant Gilday does not enjoy qualified immunity in this case.[6] *See also Navy Seal 1 v. Austin*, 586 F. Supp. 3d 1180 (M.D. Fla. 2022) (granting preliminary injunction, enjoining vaccine mandate); *Air Force Officer v. Austin*, 588 F. Supp. 3d 1338 (M.D. Ga. 2022) (granting preliminary injunction, enjoining vaccine mandate); *U.S. United States Navy Seals 1-26 v. Biden*, 578 F. Supp. 3d 822 (N.D. Tex. 2022) (granting preliminary injunction, enjoining vaccine mandate). In fact, it was clearly established law that the right to free exercise of religion—a right safeguarded by RFRA—did not lose its force or effect during the COVID-19 pandemic. *See Tandon*, 593 U.S. 61 (granting injunction, enjoining COVID-19 restriction on religious worship). *Tandon* was decided on April 9, 2021, *see id*., which was well before Defendant Gilday began issuing his blanket denials of religious exemption requests from Navy SEALs, including Plaintiffs.

Indeed, Defendant Gilday's personal decision to issue blanket denials plainly (and objectively) violates the dictates of RFRA. *See Doster v. Kendall*, 48 F.4th 608, 613 (6th Cir. 2022) (denying the government's motion to stay a class-wide injunction issued against the vaccine mandate and noting that RFRA "allows the Department to impose that burden on a service member's exercise of [his] faith only as a last resort, after examining all the circumstances relevant

[6] It should not go unnoticed that Defendant Gilday did not move this Court to dismiss for failure to state a substantive claim under Rule 12(b)(6) for violating RFRA. And the reason is simple: the allegations in the First Amended Complaint plainly (and objectively) set forth facts establishing a violation of RFRA.

to [his] individual case" and concluding that "[a] *de facto* policy to impose that burden upon class members in gross, regardless of their individual circumstances, *would seem rather plainly* to violate that restriction") (emphasis added). Defendant Gilday does not enjoy qualified immunity. His motion should be denied.

IV. A Claim for Damages Is "Appropriate Relief" under RFRA.

Plaintiffs' claim for damages is authorized by RFRA, which Congress expressly applied to military officials, including Defendant Gilday. There is no statutory exemption, and this Court has no authority to create one. *Tanzin*, 592 U.S. at 51 ("[I]t would be odd to construe RFRA in a manner that prevents courts from awarding [damages]. Had Congress wished to limit the remedy to that degree, it knew how to do so. *See, e.g.*, 29 U.S.C. § 1132(a)(3) (providing for 'appropriate equitable relief'); 42 U.S.C. § 2000e-5(g)(1) (providing for 'equitable relief as the court deems appropriate'); 15 U.S.C. § 78u(d)(5) (providing for 'any equitable relief that may be appropriate or necessary').").

As set forth in *Tanzin v. Tanvir*, 592 U.S. 43, 51 (2020), "[a] damages remedy is not just 'appropriate' relief as viewed through the lens of suits against Government employees. It is also the *only* form of relief that can remedy some RFRA violations." In other words, under RFRA, Congress authorized a damages remedy—which is an appropriate relief. Defendant Gilday misreads *Tanzin* to conclude that damages would not be an "appropriate relief" against him simply because he is a high-ranking military official. But that is not what *Tanzin* says nor is it what the case stands for. Under RFRA, a damages claim is an appropriate remedy. Consequently, if Plaintiffs can prove damages at trial against Defendant Gilday, then damages must be awarded as an "appropriate relief."

Defendant Gilday claims that he was simply "faithfully executing the Navy's vaccination policy." (Def.'s Mem. at 14). But, of course, he wasn't. The policy gave him plenary authority to grant religious exemptions to the vaccine mandate under RFRA. He personally chose to violate RFRA by denying Plaintiffs' requests for such an exemption. Defendant Gilday's personal decisions, which imposed a substantial burden on Plaintiffs' religious exercise, do not survive strict scrutiny. Indeed, he doesn't even attempt to argue that they do. Moreover, granting Plaintiffs a religious exemption did not require Defendant Gilday to "deviate" from the policy as the policy permitted such exemptions. Defendant's "unenviable Catch-22" argument (Def.'s Mem. at 15) is false.

Defendant Gilday claims that permitting damages in this case would pose a threat to order and discipline in the military. (Def.'s Mem. at 14). Plaintiffs strongly disagree. Damages would create an incentive for senior military officials to comply with RFRA and the U.S. Constitution. This would restore the faith and trust that junior military members, including enlisted servicemembers, have in their senior leaders who may have to lead them into battle. As stated by the court in *Air Force Officer v. Austin*, "[W]hat real interest can our military leaders have in furthering a requirement that violates the very document they swore to support and defend? . . . [We all] want a military force strong enough to respect and protect its service members' constitutional and statutory religious rights." *Air Force Officer v. Austin*, 588 F. Supp. 3d at 1357. In short, allowing damages in this case would promote good order, discipline, and morale (as well as the rule of law).

Defendant Gilday argues that the *Feres* doctrine should apply. (Def.'s Mem. at 14). He is mistaken. In *Feres*, the Court explained the foundation for this doctrine as follows:

> We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of

> activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively *by federal law*. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the *absence of express congressional command*.

Feres v. United States, 340 U.S. 135, 146 (1950) (emphasis added). As the Court said more recently in *Tanzin*:

> To be sure, there may be policy reasons why Congress may wish to shield Government employees from personal liability, and *Congress is free to do so*. But there are no constitutional reasons why we must do so in its stead. To the extent the Government asks us to create a new policy-based presumption against damages against individual officials, we are not at liberty to do so. *Congress is best suited to create such a policy*.

Tanzin, 592 U.S. at 52 (emphasis added). If Congress does not want damages to be an available remedy under RFRA against military officials (including the former CNO), then it is Congress's role, and not the role of this Court, to say so. As noted, RFRA expressly applies to military officials, including Defendant Gilday. If this Court were to accept Defendant Gilday's invitation "to create a new policy-based presumption against damages against individual officials," the Court would be violating its "task . . . to interpret the law as an ordinary person would." *Tanzin*, 592 U.S. at 52.

As the Court concluded in *Tanzin*: "We conclude that RFRA's express remedies provision permits litigants, when appropriate,[7] to obtain money damages against federal officials in their individual capacities." *Tanzin*, 592 U.S. at 52. Money damages are appropriate here.

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[7] The Court earlier described what "when appropriate" means. Per the Court, "A damages remedy is not just 'appropriate' relief as viewed through the lens of suits against Government employees. It is also the *only* form of relief that can remedy some RFRA violations. For certain injuries, such as respondents' wasted plane tickets, effective relief consists of damages, not an injunction. *See, e.g.*, *DeMarco v. Davis*, 914 F.3d 383, 390 (CA5 2019) (destruction of religious property); *Yang v. Sturner*, 728 F. Supp. 845 (RI 1990), *opinion withdrawn* 750 F. Supp. 558 (RI 1990) (autopsy of son that violated Hmong beliefs)." *Tanzin*, 592 U.S. at 51.

CONCLUSION

The Court should deny Defendant Gilday's motions to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2025, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

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