ORAL ARGUMENT NOT YET SCHEDULED

No. 22-5114

In the

United States Court of Appeals for the District of Columbia Circuit

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NAVY SEAL 1; NAVY SEAL 2; NAVY SEAL 3,
Plaintiffs-Appellees,

NAVY SEAL 4,
Plaintiff-Appellant

v.

LLOYD J. AUSTIN, III, 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-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
HONORABLE COLLEEN KOLLAR-KOTELLY
CASE NO. 1:22-cv-00688-CKK

APPELLANT'S REPLY BRIEF

ROBERT JOSEPH MUISE, ESQ.
AMERICAN FREEDOM LAW CENTER
P.O. BOX 131098
ANN ARBOR, MICHIGAN 48113
(734) 635-3756

Counsel for Plaintiff-Appellant

DAVID YERUSHALMI, ESQ.
AMERICAN FREEDOM LAW CENTER
2020 PENNSYLVANIA AVENUE NW
SUITE 189
WASHINGTON, D.C. 20006
(646) 262-0500

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GLOSSARY OF TERMS

CNO	Chief of Naval Operations
RFRA	Religious Freedom Restoration Act
SEAL	Sea, Air, Land
CDC	Centers for Disease Control

INTRODUCTION

There was a time in our nation's history when the application of strict scrutiny meant something. No doubt, when a decision erodes this most demanding test known to constitutional law, it also erodes the fundamental right that it is intended to protect. In this case, that right is the fundamental right to religious freedom.

As Justice Gorsuch warned, "[Courts] may not shelter in place when the Constitution [or more specifically in this case, religious liberty] is under attack. Things never go well when we do." *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring).

Strict scrutiny is the most demanding test known to law. An objective application of the law to the facts of this case compels a reversal of the District Court. This is not a hard case.

SUMMARY OF THE ARGUMENT

A preliminary injunction is appropriate in this case because (1) the government cannot satisfy strict scrutiny; (2) the momentary loss of religious freedom constitutes irreparable harm as a matter of law; (3) the balance of equities favors protecting religious freedom; and (4) it is always in the public interest to uphold fundamental rights.

Resolution of this appeal turns on whether the District Court appropriately applied strict scrutiny.[1] Upon this Court's *de novo* review of the lower court's application of this most demanding test known to constitutional law,[2] the Court should reverse the District Court and remand for entry of the requested injunction.

ARGUMENT IN REPLY

I. The Government Cannot Satisfy Strict Scrutiny.

It is the government's burden (and not Appellant's) to satisfy strict scrutiny in this case. The government does not contest the fact that the vaccine mandate places a substantial burden on Appellant's religious exercise. (*See* JA 78, 104-05,

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[1] Once there is a finding that the vaccine mandate violates Appellant's right to religious freedom, the other preliminary injunction factors fall in his favor. *See Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) ("In First Amendment cases, the likelihood of success will often be the determinative factor in the preliminary injunction analysis.") (internal quotations and citation omitted); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Navy Seal 1 v. Austin*, No. 8:21-cv-2429-SDM-TGW, 2022 U.S. Dist. LEXIS 31640 at *63 (M.D. Fla. Feb. 18, 2022) ("Requiring a service member either to follow a direct order contrary to a sincerely held religious belief or to face immediate processing for separation or other punishment undoubtedly causes irreparable harm."); *Air Force Officer v. Austin*, No. 5:22-cv-00009-TES, 2022 U.S. Dist. LEXIS 26660, at *32 (M.D. Ga. Feb. 15, 2022) ("[F]ocusing exclusively on financial harm misses the mark because the loss of First Amendment freedoms, even for minimal periods of time unquestionably constitutes irreparable injury."); *U.S. Navy Seals 1-26 v. Biden*, 578 F. Supp. 3d 822, 839 (N.D. Tex. 2022) (same); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is <u>always</u> contrary to the public interest.") (emphasis added).

[2] *Smith v. Univ. of Wash.*, 392 F.3d 367, 371 (9th Cir. 2004) ("A district court's conclusions regarding the sufficiency of the facts in meeting strict scrutiny are reviewed *de novo*.").

R-19-1, Navy SEAL 4 Decl. ¶ 28, Ex. D [CNO Denial] ["I evaluated the request under the assumption that your religious beliefs are sincere and would be substantially burdened."]; *see also* JA 76-77, 85-99, R-19-1, Navy SEAL 4 Decl. ¶¶ 21-24, Ex. B [Religious Exemption Package]). Consequently, the heavy burden now shifts to the government to justify its suppression of Appellant's religious freedom under strict scrutiny. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (describing strict scrutiny as the "most demanding test known to constitutional law").

The decision below and the government's opposition here demonstrate a misapprehension of the demands of the Religious Freedom Restoration Act ("RFRA"), as well as the First Amendment. *See, e.g., Mast v. Fillmore Cnty.*, 141 S. Ct. 2430 (2021) (granting petition, vacating adverse ruling, and remanding for reconsideration in light of a *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021)); *id*. at 2432 (Gorsuch, J., concurring) ("*Fulton* makes clear that the County and courts below misapprehended RLUIPA's demands. That statute requires the application of 'strict scrutiny.' Under that form of review, the government bears the burden of proving both that its regulations serve a 'compelling' governmental interest—and that its regulations are 'narrowly tailored.'").

Under RFRA, the government "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), including Appellant's objection to the vaccine mandate. To justify a substantial burden on the free exercise of religion under RFRA, the government must demonstrate that the challenged action "(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 government claims to understand this burden (*see* Appellees' Br. at 8 [acknowledging that "[a] request for a religious accommodation may be denied only if the denial furthers a compelling government interest and is the least restrictive means of furthering that interest"]), but yet proceeds to ignore it or to pretend that it is something much less than strict scrutiny.[3]

[3] While judicial deference to military personnel actions may be appropriate in some circumstances, it is not unlimited. As this Court explained, although "the operation of the military is vested in Congress and the Executive, and . . . it is not for the courts to establish the composition of the armed forces . . . *constitutional* questions that arise out of military decisions regarding the composition of the armed forces are not committed to the other coordinate branches of government." *Emory v. Sec'y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987). "Where it is alleged, as it is here, that the armed forces have trenched upon *constitutionally guaranteed rights* through the promotion and selection process, the courts are not powerless to act." *Id.* "*The military has not been exempted from constitutional provisions that protect the rights of individuals*" and, indeed, "[*i*]*t is precisely the role of the courts to determine whether those rights have been violated*." *Id.* (emphasis added); *see also Chappell v. Wallace*, 462 U.S. 296, 304 (1983) ("This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.").

At the end of the day, the law places the burden squarely on the government's shoulders to justify its mandate under strict scrutiny. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006) (stating that the "*burden is placed squarely on the Government*" to satisfy strict scrutiny) (emphasis added). In other words, it is the government's burden to present evidence as to why it has a *compelling interest* (an interest of the "highest order") to force a vaccine on Appellant when, *inter alia*, (1) the pandemic is over, (2) Appellant has natural immunity, and (3) vaccinated individuals can still get infected and spread the virus. It is the government's burden to present credible evidence demonstrating that the COVID-19 vaccine is safe for Appellant and that it offers protection superior to Appellant's natural immunity. It is the government's burden to present credible evidence to show why someone with a health exemption is *permitted to serve* (undermining the government's alleged interests), but someone with a religious objection (and/or natural immunity) is not.[4]

[4] The government claims that Appellant misapprehends this distinction. (*See* Appellee Br. at 30-31). The government is wrong. In fact, the government required appellant to sign an adverse page 13 entry in his service record that stated the following: "special operations (SO) duty personnel (SEAL and SWCC) who refuse to receive the COVID-19 vaccine *based solely on personal or religious beliefs* will be *disqualified* from SO duty . . . . This will affect deployment and special pays. This provision does <u>not</u> pertain to medical contraindications or allergies to vaccine administration." (JA 75, 83, R-19-1, Navy SEAL 4 Decl. ¶ 13, Ex. A [Page 13 Entry] [emphasis added]). It appears that the government is being less than candid here. The government's arguments in its brief and its assertion in the mandated page 13 entry cannot both be true.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) ("[A] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."). And it is the government's burden to present credible evidence demonstrating the inefficacy of available therapeutics. *See, e.g., Fisher v. Univ. of Tex.*, 570 U.S. 297, 311-15 (2013) (requiring a "serious, good faith consideration of workable [alternatives]") (citation omitted).

In sum, the government must present credible *evidence* that the vaccine mandate is the *only* effective, feasible, and safe way to protect the health and safety of the military force. *Fulton*, 141 S. Ct. at 1881 (stating that under strict scrutiny, "so long as the government can achieve its interests in a manner that does not burden religion, it *must* do so") (emphasis added). The government cannot remotely meet this burden. This is not a difficult case.

As argued more fully in Appellant's brief (Appellant's Br. at 48-55), because this case involves the violation of the right to religious freedom, the likelihood of success factor in the preliminary injunction analysis is dispositive as a violation of that right creates irreparable harm as a matter of law and it is *always* in the public interest protect religious liberty. *See supra* n.1.

A. The Government's Interest Is Not Compelling.

The Navy's stated "interest" for the vaccine mandate is "to prevent widespread manifestation of COVID-19 in our force." (JA 120; *see also* JA 89 ["Primary *prevention* of disease through immunizations has been a key enabler for maintaining force health and avoiding disease-related non-battle injury."] [emphasis added]). In other words, the stated purpose for the vaccine mandate was to ***stop the spread***. But, of course, we know that the COVID-19 vaccines do not stop the spread. So, what now? Move the goal posts; a favorite tactic of COVID-19 despots.

In its brief filed in this Court, the government avoids this critical fact (*i.e.*, that the vaccines do not stop the spread) and now claims that the "COVID-19 vaccine" is mandatory because it "*reduces the **severity** of the disease for those who contract the illness*."[5] (Appellees' Br. at 16 [emphasis added]). Consequently, the government acknowledges (as it must) that vaccinated SEALs can still become ill from COVID-19. Yet, these vulnerable (and vaccinated) SEALs are still permitted

[5] This begs the question: by how much does a COVID-19 vaccine *reduce the severity* of illness? And more to the point: how much would a COVID-19 vaccine reduce the severity of illness in Appellant, an exceedingly healthy young man who has natural immunity? No one knows. Indeed, this is such an individual determination it is not measurable in any meaningful way. And it is rather disingenuous for the government to make this claim when the *existing* variants of the virus result in only minor symptoms in most people, such as the young and healthy (*i.e.*, Appellant). The more severe wild and Delta variants (which Appellant contracted with only minor symptoms and recovered) are extinct. (JA 50, 51, 69).

to "conduct insertions and extractions by sea, air, or land; capture high-value enemy personnel and terrorists around the world; carry out small-unit direct action missions against military targets; and perform underwater reconnaissance and strategic sabotage." (*See* Appellees' Br. at 3).

Moreover, as the record shows, Appellant contracted an earlier and far more severe variant of COVID-19, and his symptoms were exceedingly minor. (JA 75-76). Appellant's ability to perform and operate as a SEAL was never impaired by COVID-19. (JA 76). Under RFRA, the government 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." *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 726-27 (2014) (citation omitted). "[B]roadly formulated" or "sweeping" interests are inadequate. *O Centro*, 546 U.S. at 431. Here, the government cannot demonstrate that forcing Appellant to receive an ineffective vaccine, particularly when he already has natural immunity, promotes *any* legitimate interest, let alone one that is compelling. Whereas, removing a highly-trained, experienced special operator such as Appellant from the battlefield does significant damage to our national defense and our national security. In sum, the government's vaccine mandate is so outrageous, unnecessary, and ultimately harmful it is hard to not be cynical when responding to the government's arguments. This is an easy case. The mandate is

unlawful. Unfortunately, the politics (and not the science) of COVID-19 are the largest barrier to clear thinking on this issue.

One final point. The government claims that "[t]he military has long required that service members receive a range of vaccinations." (Appellees' Br. at 6). Yet, the government fails to acknowledge the fact that the military has *long exempted* service members from having to receive a vaccine for a virus when the member has previously had the virus. That is, the government has long acknowledged what any competent virologist/immunologist would acknowledge: natural immunity is superior to any vaccine immunity. Pursuant to the Navy's own regulations, exemptions to vaccines are typically provided if there is "[e]vidence of immunity based on serologic tests, documented infection, or similar circumstances." (*See* JA 172, R-22-7, Defs. Ex 6, ¶ 6 [quoting BUMEDINST 62330.15B]). Yet, the government ignores virology/immunology 101 when it comes to the highly politicized COVID-19 vaccines. The government's alleged interest is not compelling. It is not a close call.

B. Less Restrictive Means Are Available.

The existence of one less restrictive means to promote the government's alleged interests is fatal to the government's position. There are at least two here. The first is natural immunity—something that the government has long acknowledged as a basis for not requiring a vaccine. *See* JA 172, R-22-7, Defs. Ex

6, ¶ 6 [quoting BUMEDINST 62330.15B]). And the other is the availability of therapeutics (particularly since the government has now shifted its interests from *stopping* the spread to *reducing* illness).

The government has not considered the efficacy of natural immunity or therapeutics, let alone presented evidence that these alternatives do not work (which it couldn't without contradicting its own regulations, basic virology, and the CDC, among others). This is fatal for the government. *See, e.g., Fisher*, 570 U.S. at 311-15 (requiring a "serious, good faith consideration of workable [alternatives]") (citation omitted).

In his rejection letter, the CNO never refutes (nor does he mention) the efficacy of natural immunity and therapeutics. In his letter, the CNO states, in relevant part,

> [Vaccination] reduces the risk to the individual for disease-related performance impairment, and it reduces the risk to the unit for disease outbreaks of contagious diseases such as COVID-19. While non-pharmaceutical measures such as personal hygiene, mask wearing, and social distancing can also reduce the risk of disease outbreaks, they too are not 100 percent effective [previously admitting that "no vaccine is 100 percent effective"] and must be implemented in conjunction with immunization to reduce the risk of mission failure. As explained in reference (f), these measures are not as effective as vaccination in maintaining military readiness and the health of the force.

(JA 105).

In its brief, the government attempts to dismiss these reasonable and efficacious alternatives (natural immunity and available therapeutics), but its attempt is weak, unconvincing, and hardly sufficient to satisfy strict scrutiny. (*See* Appellees' Br. at 34-37). As an initial matter, the government improperly seeks to shift the burden to Appellant to prove that natural immunity is not a less restrictive alternative, and it does so by making the *false* claim that Appellant "provides no evidence to support his assertion that natural immunity provides 'equivalent or superior' protection against COVID-19 compared to vaccination."[6] (Appellees' Br. at 34). To make its bold and false claim regarding natural immunity, the government makes this absurd assertion: "While Navy regulations authorize an exemption from vaccination when there is evidence of immunity based on 'documented infection,' . . . that evidence is lacking with respect to COVID-19." (Appellees' Br. at 34-35). What does this mean? Is it the government's position that it is not possible to document a COVID-19 infection? Then what is the point of all of the COVID-19 testing and reports regarding COVID-19 infections? Or is

[6] Appellant, through the declaration of its expert, set forth *independent* studies demonstrating the efficacy of natural immunity. (JA 66-68). The government (and the District Court) may want to engage in *ad hominem* attacks and dismiss the expert (Appellees' Br. at 29), but this tactic does not work to dismiss the independent studies cited by the expert, particularly when the government has not cited to any contrary studies (because it cannot), and it is the government's burden to demonstrate that natural immunity is not a less restrictive alternative to vaccination (and to explain why it is disregarding its own regulations on this issue).

it the government's position that COVID-19 operates in such a way that it is not possible to acquire immunity? If that's the case, then what's the point of the vaccine? The government's argument is so astonishingly wrong, it is difficult to fully comprehend.

In addition to the Navy regulations that provide vaccine exemptions for those who had a prior infection, consider also the Centers for Disease Control's ("CDC") explanation as to how the COVID-19 vaccines (mRNA vaccines) work:

> To trigger an immune response, many vaccines put a weakened or inactivated germ into our bodies. Not mRNA vaccines. Instead, mRNA vaccines use mRNA created in a laboratory to teach our cells how to make a protein—or even just a piece of a protein—that *triggers an immune response inside our bodies*. This immune response, which produces antibodies, is what helps protect us from getting sick from that germ in the future.[7]

The body of a person who has had COVID-19 and recovered (such as Appellant) has already "trigger[ed] an immune response . . . which produce[d] antibodies" to the virus, thereby "protect[ing the person] from getting infected [again]." If the antibodies developed from having had COVID-19 do not protect the person, then the antibodies artificially created by the vaccines are useless. This is virology/immunology 101.

[7] Ctrs. for Disease Control & Prevention, *Understanding How COVID-19 Vaccines Work*, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/how-they-work.html? (Sep. 16, 2022) (emphasis added).

Regarding therapeutics, even the CDC acknowledges their efficacy. Per the CDC,

> Antiviral medications . . . and monoclonal antibodies . . . are available to treat COVID-19 in persons who are at increased risk for severe illness, including older adults, unvaccinated persons, and those with certain medical conditions. . . . Antiviral agents reduce risk for hospitalization and death when administered soon after diagnosis.[8]

One final point here. The government is dismissive of the fact that Appellant has operated as a SEAL without difficulty for many months, stating that Appellant's "self-assessment conflicts with the record, which shows among other things that in one operation in which [Appellant] participated, several participants contracted COVID-19 and had to be placed in isolation." (Appellees' Br. at 34). The government is playing fast and loose with the facts. The record shows that <u>no</u> Navy SEAL has suffered any severe, adverse consequences from COVID-19. The fact that *some* SEALs were placed in isolation is evidence of the government's hyper-sensitive reaction to COVID-19; it's not evidence that COVID-19 actually caused any serious consequences for these SEALs, because it didn't. The common cold is forever with us, and the government could isolate SEALs for catching a cold on a deployment or exercise, but that doesn't prove that the cold actually

[8] Ctrs. For Disease Control & Prevention, *Summary of Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems — United States, August 2022*, https://www.cdc.gov/mmwr/volumes/71/wr/mm7133e1.htm?s_cid=mm7133e1_w (updated Aug. 19, 2022).

deterred operations. The government's arguments are unimpressive, wrong as a matter of law, destructive to religious liberty, and ultimately dangerous to our national defense. The injunction should issue.

CONCLUSION

The Court should reverse the District Court and remand the case with instructions to grant Appellant's motion and enter a preliminary injunction enjoining the government from (1) enforcing against Appellant any order or regulation requiring COVID-19 vaccination and (2) from instituting or enforcing any adverse or retaliatory action against Appellant as a result of, arising from, or in conjunction with Appellant's religious objection to the COVID-19 vaccination mandate, his request for a religious exemption from the vaccine mandate, or pursuing this action or any other action for relief under RFRA or the First and Fifth Amendments.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq. (D.C. Court Bar No. MI 0052)
P.O. Box 131098
Ann Arbor, Michigan 48113
rmuise@americanfreedomlawcenter.org
Tel: (734) 635-3756

/s/ *David Yerushalmi*
David Yerushalmi, Esq. (D.C. Bar No. 978179)
2020 Pennsylvania Avenue NW, Suite 189
Washington, D.C. 20006
dyerushalmi@americanfreedomlawcenter.org
Tel: (646) 262-0500
Fax: (801) 760-3901

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 3,473 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

Counsel for Plaintiff-Appellant