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

REPLY IN SUPPORT OF PLAINTIFF NAVY SEAL 4'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Not all military decisions are alike. Some are within the competency of the judicial branch to review and some are not. For example, when the Commander-in-Chief and top military officials decided to surrender perimeter security during an evacuation at Kabul's Hamid Karzai International Airport in Afghanistan this past summer to members of the Taliban, a terrorist organization that seeks to do harm to the interests of the United States, resulting in the needless deaths of thirteen American servicemembers and over a hundred civilians,[1] the courts have no business second-guessing this decision, regardless of how deadly or incompetent it may have been. Deference is owed to military commanders in such circumstances. In comparison, if the Commander-in-Chief and top military officials decided that Roman Catholics are nondeployable because in their judgment, Catholics are more loyal to the Pope than to the Commander-in-Chief, no one would suggest that a court of law could not review such a decision as it plainly violates federal constitutional and statutory law even though it is a "deployment, assignment, [or] other operational decision." And the government's interest does not morph into a compelling interest that trumps the fundamental right to religious freedom the larger the number of Catholics involved. That is, an "aggregate harm" argument is nonsense when it comes to the fundamental right to religious exercise. It devalues that right. And it "violates the very document [these government officials] swore to support and defend." *See Air Force Officer v. Austin*, No. 5:22-cv-00009-TES, 2022 U.S. Dist. LEXIS 26660, at *34-35 (M.D. Ga. Feb. 15, 2022).

The challenge at issue here resembles more closely the latter decision rather than the former. Indeed, the deference that Defendants ask of this Court—a coequal branch of the

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[1] *See* RealClear Politics, "Biden's Afghanistan Debacle Looks Worse and Worse," https://www.realclearpolitics.com/articles/2022/02/11/bidens_afghanistan_debacle_looks_worse_and_worse_147181.html (last visited Apr. 11, 2022).

government—does harm to our Constitution and the fundamental right to religious freedom. At the end of the day, "it is the 'duty of the judicial department **. . .** to say what the law is.'" *NLRB v. Canning*, 573 U.S. 513, 525 (2014) (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)). Defendants urge this Court to be negligent in this duty.

Additionally, the U.S. Constitution grants authority to Congress to regulate the military. U.S. Const., art. I, § 8, cl. 14 ("To make Rules for the Government and Regulation of the land and naval Forces."). As noted by the U.S. Supreme Court:

> Congress has exercised its *plenary constitutional authority* over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provides for the *review and remedy of complaints* and grievances . . . .

Chappell v. Wallace, 462 U.S. 296, 302 (1983) (emphasis added). Pursuant to its authority, Congress enacted the Religious Freedom Restoration Act (42 U.S.C. § 2000bb, *et seq*.) ("RFRA"), and made it expressly applicable to any "branch, department, agency, instrumentality, and official . . . of the United States," which unquestionably include military officials such as Defendants. 42 U.S.C. § 2000bb-2(1).

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). To justify a substantial burden on the free exercise of religion under RFRA, the government 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).

Defendants do not argue that RFRA does not apply here, nor could they. Accordingly, strict scrutiny applies to the challenge at issue. Nothing less. Congress provided no statutory exemption for the military. And strict scrutiny is the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). "That standard 'is not watered down'; it 'really means what it says.'" *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (internal citation omitted).

While Defendants acknowledge that RFRA and its "most demanding test" apply here, they nonetheless argue that the Court should apply something much less in "deference" to the military. (Defs.' Opp'n at 6). Such "deference" in this case would do violence to the fundamental right to religious freedom.

In the final analysis, Defendants do not challenge the fact that Plaintiff's religious beliefs are sincerely held, nor do they challenge the fact that the vaccine mandate substantially burdens Plaintiff's religious exercise. (*See* 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."], Doc. No. 19-1; *id.*, ¶ 24, Ex. B [Chaplain Review] ["I believe [Plaintiff's] request to be sincere and is consistent with his religious faith."]). Consequently, the principal issue for this Court to resolve is whether Defendants can satisfy strict scrutiny under the facts of *this case* as they relate to *this plaintiff*. Defendants cannot meet their "most demanding" burden, and it's not a close call.

ARGUMENT IN REPLY

"In First Amendment cases, the likelihood of success will often be the determinative factor in the preliminary injunction analysis." *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) (internal quotations and citation omitted); *Obama for Am. v. Husted*, 697 F.3d

423, 436 (6th Cir. 2012) ("'When a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.'") (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)). This principle of law applies to Plaintiff's RFRA claim as 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"). In other words, RFRA expressly protects the fundamental right to religious freedom guaranteed by the First Amendment as a matter of federal statutory law.

The reason why likelihood of success is the most important factor is because "[t]he loss of First Amendment freedoms, *for even minimal periods of time*, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (emphasis added); *see also Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (stating that "[a]lthough a plaintiff seeking equitable relief must show a threat of substantial and immediate irreparable injury, a prospective violation of a constitutional right constitutes irreparable injury for these purposes") (internal citation and quotations omitted). Moreover, "enforcement of an unconstitutional law is ***always*** contrary to the public interest." *Id.* at 653 (emphasis added). There isn't a "military deference" exception, and this Court should not create one. Thus, once a likelihood of success is established in cases involving First Amendment freedoms, such as this one, it follows that the remainder of the preliminary injunction factors favor granting the injunction.

Having demonstrated in his motion (Doc. No. 14) a substantial likelihood of succeeding on his federal statutory and constitutional claims, the requested injunction should issue, thereby

protecting Plaintiff's fundamental right to religious freedom and providing relief from the ongoing irreparable harm. Justice and the public interest demand it.

I. Defendants' Exhaustion Argument Is Wrong.

Defendants argue that "Plaintiff cannot succeed on the merits of his claims because he has failed to exhaust his administrative remedies." (Defs.' Opp'n at 7-9). Defendants are wrong for at least two reasons. First, as the undisputed record reveals, "[t]he Chief of Naval Operations is the final adjudication [for Plaintiff's request for a religious exemption] and *an appeal is no longer an option*." (Navy SEAL 4 Decl. ¶ 29, Ex. E [Notice of CNO Denial] [emphasis added], Doc. No. 19-1). Accordingly, a final decision by the relevant decision maker has been made, and this decision is causing irreparable harm by placing a substantial burden on Plaintiff's religious exercise. (*See infra*). Defendants' argument incorrectly conflates the finality requirement with exhaustion of remedies. As stated by the Supreme Court:

> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position *on the issue that inflicts an actual, concrete injury*; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 193 (1985) (emphasis added). A final decision has been rendered in the case of Navy SEAL 4, he has already been harmed by this decision, and this harm will continue absent the requested injunction. This Court's decision in *Church v. Biden*, No. 21-2815 (CKK), 2021 U.S. Dist. LEXIS 215069 (D.D.C. Nov. 8, 2021), provides a useful comparison. In *Church*, this Court noted that "the Service Member Plaintiffs' initial requests for religious accommodations to the DoD Vaccine Mandate were denied and their appeals of those denials *are pending*." *Id*. at *32 (emphasis added). Here, there are no pending appeals; "*an appeal is no longer an option*."

Second, RFRA does not have an exhaustion requirement. "Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to." *Ross v. Blake*, 578 U.S. 632, 639 (2016). "Congress nowhere inserted any exception for the U.S. Armed Forces from RFRA's application or any exhaustion requirement." *Singh v. Carter*, 168 F. Supp. 3d 216, 226 (D.D.C. 2016); *see also Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012) ("We decline . . . to read an exhaustion requirement into RFRA where the statute contains no such condition, . . . and the Supreme Court has not imposed one."). Even the Court of Appeals for the Armed Forces, the highest court in the military justice system, "recognize[s] that RFRA does not itself contain an exhaustion requirement." *United States v. Sterling*, 75 M.J. 407, 419 (C.A.A.F. 2016).

Here, Plaintiff applied for a religious exemption to the vaccine mandate, and it was denied. He appealed that denial to the final adjudication authority, and it was denied. The decision is final. Defendants' exhaustion argument is wrong as a matter of fact and law.

II. Defendants Cannot Satisfy Strict Scrutiny.

The resolution of this motion comes down to whether Defendants can satisfy the "most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534. Because there is no dispute that the vaccine mandate substantially burdens Plaintiff's religious exercise, the "burden is placed squarely on the Government" to show that its mandate satisfies strict scrutiny. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006). Defendants cannot meet their exceedingly heavy burden.

The question for the Court is not whether the government has a compelling interest in enforcing its vaccine mandate *generally*, *but whether it has such an interest in denying an exception to Navy SEAL 4* under the facts of this case. *See Fulton v. City of Phila.*, 141 S. Ct.

1868, 1881 (2021). Under RFRA, Defendants 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.

A. Defendants' Compelling Interest Argument Is Based on Broadly Formulated and Sweeping Interests and thus Fails under Strict Scrutiny.

Defendants assert broadly formulated and sweeping interests to argue that they have a compelling interest *in forcing Plaintiff to inject into his body* a largely experimental COVID-19 vaccine in violation of his sincerely held religious beliefs. Defendants assert that "[s]pecifically as to Plaintiff [Navy SEAL 4], the Deputy Chief of Naval Operations reviewed Plaintiff's individual religious exemption request and determined that an exemption 'would have a predictable and detrimental effect on [Plaintiff's] readiness and the readiness of Sailors who serve alongside [Plaintiff] in both operational and non-operational (including training) environments." (Defs.' Opp'n at 12). The strange thing about this assertion is that the Deputy Chief of Naval Operations stated *precisely* (word for word) the same reason for why he denied Plaintiff Navy SEAL 3's religious exemption even though Navy SEAL 3 is in a different command with different assignments. (Navy SEAL 4 Decl. ¶ 26, *compare* Ex. B (Bates No. 005) *with* Ex. C, Doc. No. 19-1). Boilerplate denials do not satisfy the strict demands of RFRA.

Defendants boldly and broadly assert that "the Navy has a compelling interest in maintaining a healthy and worldwide deployable force" (Defs.' Opp'n at 36), arguing as if it were 2020 and not 2022. The relevant time frame for considering whether Defendants have a compelling interest in forcing Plaintiff to receive a COVID-19 vaccine is now. It's not in 1918

when the Spanish flu was causing havoc, and it is not in 2020, when the pandemic was at its peak. As the district court in *U.S. Navy Seals 1-26* observed:

> At least 99.4% of all active-duty Navy servicemembers have been vaccinated. . . . The remaining 0.6% is unlikely to undermine the Navy's efforts. Today, Plaintiffs present a lower risk of infection and transmission than in the earlier days of the pandemic. Several Plaintiffs have tested positive for antibodies, showing the presence of natural immunity. . . . With a 99.4% vaccination rate, the Navy's herd immunity is at an all-time high. COVID-19 treatments are becoming increasingly effective at reducing hospitalization and death.

U.S. Navy SEALS 1-26 v. Biden, No. 4:21-cv-01236-O, 2022 U.S. Dist. LEXIS 2268, at *28-29 (N.D. Tex. Jan. 3, 2022). Defendants counter that Plaintiff "is not just 'one service member' but part of an overall naval force who serves with others to protect the public and national security interests of the United States."[2] (Defs.' Opp'n at 37). In other words, Defendants want it both ways. Either way, they are mistaken.

For example, Defendants claim that the COVID-19 vaccines are so efficacious that *no alternative*—and they mean <u>none</u>—can stop the spread of COVID-19 throughout the entire military. The ***<u>only</u>*** option is these miracle vaccines. (*See* Defs.' Opp'n at 11). The fact that these vaccines target a largely extinct COVID-19 variant doesn't matter to Defendants. Herd immunity is rejected. Masks don't work, despite the fact that the government (including the CDC, which Defendants rely upon) has been telling us for months that masks are efficacious. According to Defendants (and contrary to science), demographics has nothing to do with the effects of COVID-

[2] Also cutting against Defendants' arguments is that by separating Plaintiff from the Navy SEALs, the Navy will be losing a highly-trained, seasoned veteran with extensive operational experience. As Defendants note, "every member of a SEAL team is vital, and '[t]he loss of even one member can degrade the effectiveness of small NSW units and may compromise a mission.'" (Defs.' Opp'n at 13). Consequently, Defendants' inane vaccine mandate is, in fact, degrading the Navy's ability to conduct its operations because it is removing warriors such as Plaintiff from the battlefield. There is no legitimate, let alone compelling, reason for imposing the mandate on Plaintiff under the facts of this case.

19. Available therapeutics apparently won't work either, yet Defendants refuse to even consider them. Not even natural immunity suffices. Nothing (and Defendants mean nothing) but these super vaccines are capable of protecting the entire naval force. Without these miracle vaccines being injected into the arm of every sailor, we will certainly lose the next war. That is what Defendants are telling us. Yet, when you point out that only a fraction of 1% of the Navy is not vaccinated (and thus over 99% have received this shield of invincibility known as the COVID-19 vaccine), Defendants stammer and are forced to make contradictory arguments. If there are no alternatives to vaccines (zero, according to Defendants), then Defendants' *only* concern (based on their claims of the efficacy of the COVID-19 vaccines)—that is, the only *interest* that they have when one closely examines what they are saying—is that less than 1% of the Navy may at some point threaten to infect the remainder of this less than 1% of the force. And what percentage of this less than 1% of unvaccinated sailors are in Plaintiff's SEAL team/unit? This is Defendants' burden to prove. But the answer is none. So, what again is Defendants' compelling interest *in forcing Plaintiff* to violate his sincerely held religious beliefs? The answer should be obvious by now. There is none.

But there is more that exposes Defendants' compelling interest fantasy. Aside from their own *ipse dixit*, Defendants have presented zero evidence to refute the scientific evidence presented by Plaintiff that (1) the pandemic is over; (2) the vaccines are ineffective as they were developed for now extinct variants of COVID-19; (3) natural immunity provides at least as good, if not better, protection from COVID-19 as any of the current vaccines;[3] (4) Plaintiff belongs to the

[3] Defendants' medical expert could not definitively refute the evidence supporting the efficacy of natural immunity. (*See* McCullough Decl. ¶¶ 65-70, Doc. No. 14-3). At best, the expert opined that "[d]ebate continues about whether natural immunity versus vaccine-induced immunity is more protective against breakthrough infections (a reinfection in someone who was previously infected versus an infection in a previously not infected individual who was fully immunized)." (Defs.'

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 has suffered any adverse outcomes from having contracted COVID-19, including Plaintiff;[4] and (5) there are serious adverse health consequences caused by the COVID-19 vaccines to individuals such as Plaintiff. (*See* McCullough Decl. ¶¶ 18-70, Op. ¶ 3, 4, 6, Doc. No. 14-3). This last fact undermines Defendants' claim that granting medical exemptions is different because these individuals could be harmed by getting the vaccine. (*See* Defs.' Opp'n at 18-19). Plaintiff has a better chance of being sidelined by an adverse reaction to the vaccine than being sidelined by a virus which he already had and from which he recovered. And he is certainly more likely to be sidelined by the intense and dangerous training he undergoes on a regular basis as a Navy SEAL. (Navy SEAL 4 Decl. ¶¶ 16, 17, Doc. No. 19-1).

Time alone further refutes Defendants' compelling interest claims as Plaintiff has yet to be vaccinated, and he has caused zero harm to his unit or its operational capabilities. He remained operational throughout the COVID-19 pandemic when it was at its peak and when no vaccine was available. He "deployed, trained, and conducted operational and non-operational tasks worldwide, with minimum impact due to COVID-19." (*Id*. ¶¶ 18, 19). Moreover, Plaintiff had COVID and has recovered from it. "Having COVID-19 did not prevent [him from] performing [his] duties as a SEAL." (*Id*. ¶ 17). Per Defendants, "Navy SEAL 4 is assigned to NSWDG and serves in a tactical development and evaluation squadron. The mission of NSWDG is to conduct research, development, testing, evaluation, and integration of current and emerging technology, special

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Ex. 9, ¶ 30, Doc. No. 22-10). And the question of whether natural immunity provides as good, if not better, protection than the current vaccines is not the same as arguing that serology tests may not be an effective means of testing for anti-bodies. The latter argument obfuscates the issue. Plaintiff had COVID-19 and recovered. He is not relying on a serology test to demonstrate his natural immunity.

[4] (*See* Navy SEAL 4 Decl. ¶¶ 15-19, Doc. No. 19-1).

operations tactics, and joint warfare fighting capability." (Defs.' Ex. 13, ¶ 5, Doc. No. 24-1). There is no evidence that Plaintiff could not continue this mission as a Navy SEAL. And while "members of NSWDG *may* embark on maritime vessels, where there is often confined shared berthing spaces, narrow passageways, and a centralized galley" (*id.* at ¶ 6), they, of course, *may not*. Accordingly, there is no evidence demonstrating that Defendants could not accommodate Plaintiff's religious exemption request by permitting him to continue to provide his current and valuable service to the Navy. Indeed, as Defendants note, "[b]etween March 2020 and September 2021, Navy SEAL 4 conducted approximately thirteen (13) U.S.-based evolutions. In those evolutions, some COVID-19 mitigations such as physical distancing and mask wearing were not feasible due to confined travel spaces and activity requirements." (*Id.* at ¶ 8). Yet, Defendants report no issues with COVID-19 during these operations, and this is when the virus was at its peak period of infection. (*See also* Navy SEAL 4 Decl. ¶ 19, Doc. No. 19-1).

Additionally, according to Defendants, when Plaintiff participated in an "international operational evolution," "several participants contracted COVID-19 and were placed in isolation." (Defs.' Ex. 13, ¶ 8, Doc. No. 24-1). Yet, Defendants do not disclose whether these "participants" were SEALs. They do not disclose if one of these "participants" was Plaintiff. They do not claim that this "isolation" measure prevented Plaintiff from performing his duties in any way. And they do not claim that this "isolation" measure prohibited the SEALs from accomplishing the objectives of this "operational evolution" in any way. There is no doubt that had COVID-19 prohibited or meaningfully prevented this "international operational evolution," Defendants would have told us. But they didn't, and it is their burden. Consequently, it is proper for this Court to infer that COVID-19 did not adversely affect this evolution. Moreover, the fact that the Navy SEALs were able and willing to participate in this "international operational evolution" at a time when no

vaccine was available but yet COVID-19 was at its peak is quite telling. It tells us that Defendants' claimed interests are not compelling. In short, Defendants cannot show that enforcing the vaccine mandate against Plaintiff is "actually *necessary*" to achieve its aims. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (emphasis added).

Defendants also assert that the Navy has a compelling interest in maintaining its vaccine program in general. (*See generally* Defs.' Ex. 6, Doc. No. 22-7). However, upon closer examination, this too fails to support Defendants' refusal to grant Plaintiff a religious exemption. Pursuant to its 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* Defs. Ex 6, ¶ 6 [quoting BUMEDINST 62330.15B] [emphasis added], Doc. No. 22-7). Apparently, basic concepts of virology are discarded when it comes to the highly-politicized COVID-19 vaccine. Natural immunity has always been thought to be the best defense against a virus. (McCullough Decl. ¶¶ 65-70, Op. ¶ 3, Doc. No. 14-3). Yet, Defendants completely ignore this science. (*See supra* n.3).

Finally, as stated by the U.S. Supreme Court, "It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993) (internal quotations and citation omitted). It is undisputed that Defendants have granted medical and administrative exemptions but have yet to grant one religious exemption. Defendants' response: but we have only granted 13 *permanent* medical exemptions, and that is all that matters. These exemptions, and the others (temporary and administrative exemptions) are different, so say Defendants. (Defs.' Opp'n at 28). Defendants are correct about this: medical and administrative exemptions are different in that they

do not involve the exercise of a fundamental right. To be clear, the exemption numbers on this record are as follows: 13 permanent medical exemptions (Defs.' Opp'n at 18), "212 temporary medical exemptions, 26 administrative exemptions, and zero religious accommodation requests for the COVID-19 vaccine approved." (Navy SEAL 4 Decl. ¶ 30, Doc. No. 19-1). Defendants' argument rings hollow. We are applying *strict scrutiny* in this case and not some watered-down version of it. There is no question that those with medical or administrative exemptions (whether temporary or permanent) to the vaccine mandate undermine the very same asserted interest (reducing the spread of COVID-19) as someone who objects to the vaccine based on his sincerely held religious beliefs. Defendants cannot claim an "interest 'of the highest order'" as a matter of fact and law. And this is further evidenced by the fact that Defendants are employing punitive measures against Navy SEALs who raise a religious exemption. As the record demonstrates, "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 *not* pertain to medical contraindications or allergies to vaccine administration." (Navy SEAL 4 Decl. ¶ 13, Ex. A [Page 13 Entry] [emphasis added], Doc. No. 19-1). Consequently, a sailor with a medical exemption remains qualified for SO duty, including deployment and special pays. But a sailor (such as Plaintiff) who objects based on his "religious beliefs" is "disqualified from SO duty" and "special pays." And exactly how does this advance any compelling interest? It doesn't. Defendants claim that this official entry in Plaintiff's service record doesn't mean what it actually says. But they obfuscate the issue because they know it is fatal for them in many ways. (*See* Defs.' Opp'n at 19-20). And while someone with a medical exemption may have to get additional waivers to deploy or serve in a certain capacity, as this official entry makes clear, such additional waivers are not

available to Plaintiff because he objects to the vaccine "based on [his] religious beliefs." Plaintiff is thus "disqualified" from seeking any such waivers. In sum, Defendants cannot advance an interest of the "highest order."

B. Mandating an Ineffective Vaccine Is Not the Least Restrictive Means.

Defendants also carry the burden to demonstrate that the vaccine mandate is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). Under this "exceptionally demanding" test, *Hobby Lobby*, 573 U.S. at 728, "if there are other, reasonable ways to achieve those [interests] with a lesser burden on constitutionally protected activity, [the government] may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (citation omitted). "[S]o long as the government can achieve its interests in a manner that does not burden religion, it ***must*** do so." *Fulton*, 141 S. Ct. at 1881 (emphasis added). In other words, it is mandatory.

Under this "exceptionally demanding" test, when a plaintiff identifies acceptable less restrictive alternatives, the government must demonstrate that it has considered and rejected the efficacy of those alternatives. *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). As noted, Defendants have not given "serious, good faith consideration" to (1) natural immunity (*see supra* n.3), (2) herd immunity, particularly where over 99% of the Navy has been vaccinated, (3) the use of therapeutics, and (4) other mitigation measures, which apparently worked quite well for Plaintiff's command during the time when a vaccine was not available, (*see supra*). Defendants also ignore the serious and harmful adverse effects of the vaccines on individuals that fit Plaintiff's demographic. (McCullough Decl. ¶¶ 42-64, Op. ¶ 6 [opining based on his medical expertise and the scientific data that "the risks associated with the investigational COVID-19 vaccines,

particularly for young healthy men such as Navy SEALs, outweigh any theoretical benefits, are not minor or unserious, and many of those risks are unknown or have not been adequately quantified nor has the duration of their consequences been evaluated" and that "the mandatory administration of COVID-19 vaccines creates an unethical, unreasonable, clinically unjustified, unsafe, and unnecessary risk to servicemembers"], Doc. No. 14-3). Defendants have failed to meet this "exceptionally demanding" test.

III. Plaintiff Is Likely to Succeed on His Free Exercise Claim.

We begin with the "[t]he principle that government may not enact laws that suppress religious belief or practice. . . . [This principle] is . . . well understood." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 523. Or so it should be.

Plaintiff generally agrees with Defendants that there is considerable overlap between his RFRA claim and his claim arising under the Free Exercise Clause. (Defs.' Opp'n at 25 n.4). That is, if Plaintiff prevails on his RFRA claim, he should likewise prevail on his Free Exercise claim, and the converse is true as strict scrutiny applies for both claims.

Defendants argue that the challenged mandate is a neutral law of general applicability, yet they fail to address (let alone cite) *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), which is the most recent Supreme Court case addressing this issue. *Fulton* is dispositive. In *Fulton*, the Court identified at least *two* ways in which a law may not be generally applicable. First, "[a] law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877 (internal quotations, punctuation, and citations omitted). And second, "[a] law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that

undermines the government's asserted interests in a similar way." *Id.* Defendants only address the first, but both apply here.

First, with regard to the "mechanism for individualized exemptions," the Court stated:

> The *creation of a formal mechanism* for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude.

Fulton, 141 S. Ct. at 1879 (internal punction, quotations, and citation omitted) (emphasis added). Defendants seek to avoid the straightforward application of this principle of law to the facts of this case by arguing that the medical and administrative exemptions provide "objective" criteria for granting or denying an exemption. (Defs.' Opp'n at 26-28). But that argument misses the point. Exemptions are granted for serious medical reasons but not granted for serious religious reasons. The former is given great weight and the latter is given none at all. The fact that the former requires review of "objective criteria" is irrelevant as the latter does not. Defendants do acknowledge, however, that "exemption procedures [that] allow secularly motivated conduct to be favored over religiously motivated conduct" are impermissible. (Defs.' Opp'n at 26 [quoting case]). While Defendants are (improperly) dismissive of the "comparison of the numbers of nonreligious vs. religious exemptions" (which is many granted vs. zero granted), they fail to come to terms with the fact that "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," thereby "affect[ing] deployment and *special pays*." Yet, "[t]his provision does ***not*** pertain to medical contraindications or allergies to vaccine administration." This is a prime example of "allow[ing] secularly motivated conduct to be favored over religiously motivated conduct." Accordingly, because the mandate is not a neutral law of general applicability, it must satisfy strict

scrutiny. As noted above and in Plaintiff's memorandum in support of his motion for preliminary injunction (Doc. No. 14-1), the mandate fails this most demanding test.

Second, as the evidence above illustrates, the vaccine mandate prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. *Fulton*, 141 S. Ct. at 1877. This is a separate basis for concluding that the mandate is not generally applicable. Persons with administrative or medical exemptions to the vaccine mandate are, by definition, unvaccinated. Therefore, they can still spread and become infected with COVID-19, thus undermining Defendants' asserted interest. Per the record of this case, Defendants have granted13 *permanent* medical exemptions, 212 temporary medical exemptions, 26 administrative exemptions, and zero religious exemptions. The mandate is not a neutral law of general applicability, and it fails under strict scrutiny. (*See supra*).

IV. Plaintiff Is Likely to Succeed on His Equal Protection Claim.

When the government treats an individual disparately "as compared to similarly situated persons and that such disparate treatment . . . burdens a fundamental right, targets a suspect class, or has no rational basis," such treatment violates the equal protection guarantee. *Bible Believers v. Wayne Cnty.,* 805 F.3d 228, 256 (6th Cir. 2015) (*en banc*) (internal quotations and citation omitted). As noted above, there is disparate treatment between those with medical objections to the mandate and those with religious objections, and this disparate treatment burdens the fundamental right to religious exercise, thereby triggering strict scrutiny. *See id*. The mandate cannot satisfy this most demanding test known to constitutional law. (*See supra*).

V. Defendants' Irreparable Harm Argument Is Wrong.

A. *Doe v. Trump* Conclusively Demonstrates Irreparable Harm in this Case.

As predicted in his motion for preliminary injunction (*see* Pl.'s Mem. at 28-30, n.5, Doc. No. 14-1), Defendants conflate the irreparable harm caused by the substantial burdens placed on Plaintiff's right to religious exercise with the various burdens themselves. Defendants do not dispute that the vaccine mandate has placed a substantial burden on Plaintiff's religious exercise. This burden (which takes many forms, including, but not limited to, an adverse fitness report, initiation of adverse separation proceedings, formal accusations of having committed a "Serious Offense," removal from the Navy SEALs, loss of pay and benefits, and threats of criminal prosecution) on religious exercise is the *cause* of the irreparable harm.

This Court's decision in *Doe v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017), in which the Court rejected the "military judgment" of the Commander-in Chief and other military leaders and enjoined the restriction on the service of transgendered individuals in the military, undermines Defendants' argument that Plaintiff is suffering no irreparable harm. Per this Court:

> Absent an injunction, Plaintiffs will suffer a number of harms that cannot be remediated after that fact even if Plaintiffs were to eventually succeed in this lawsuit. The impending ban ***brands and stigmatizes Plaintiffs as less capable of serving in the military, reduces their stature among their peers and officers, stunts the growth of their careers, and threatens to derail their chosen calling or access to unique educational opportunities***. *See Elzie v. Aspin*, 841 F. Supp. 439, 443 (D.D.C. 1993) (holding that plaintiff would suffer irreparable injury in the absence of preliminary injunctive relief because "plaintiff faces the stigma of being removed from active duty as a sergeant in the Marine Corps—a position which he has performed in a sterling fashion for eleven years—and labeled as unfit for service solely on the basis of his sexual orientation, a criterion which has no bearing on his ability to perform his job"). Money damages or other corrective forms of relief will not be able to fully remediate these injuries once they occur. Moreover, these injuries are also imminent, in that they are either ongoing or, at the latest, will begin when the Accession and Retention Directives take effect early next year.
>
> These injuries are irreparable for the ***additional*** reason that they are the result of alleged violations of Plaintiffs' rights to equal protection of the laws under the Fifth

> Amendment. "It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("'[A] prospective violation of a constitutional right constitutes irreparable injury.'") (quoting *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998)); *Chaplaincy* [*of Full Gospel Churches v. England*, 454 F.3d 290, 305 (2006)] ("By alleging that Appellees are engaging in conduct that violates the Establishment Clause, Appellants have satisfied the irreparable injury prong of the preliminary injunction framework."). *Under this line of authority, Plaintiffs' allegation of constitutional injury is sufficient to satisfy the irreparable injury requirement for issuance of a preliminary injunction*.

Id. at 216 (Kollar-Kotelly, J.) (emphasis added).

Here, in addition to having to suffer through adverse separation proceedings (which have been *momentarily* put on hold) and threats of criminal prosecution, Defendants "brand[] and stigmatize[] Plaintiff[] as less capable of serving in the military,[5] reduce[his] stature among [his] peers and officers, stunt[] the growth of [his] career[], and threaten[] to derail [his] chosen calling or access to unique educational opportunities" on account of his sincerely held religious beliefs. "[T]hese injuries are also imminent, in that they are either ongoing or, at the latest, will begin [upon completion of the adverse separation proceedings, which have already been initiated but are temporarily on hold]."

In sum, based on this Court's decision in *Doe v. Trump*, the Court should have little difficulty concluding that Plaintiff is suffering irreparable harm as a result of the vaccine mandate.

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[5] Plaintiff has already 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 Decl. ¶ 32, Ex. F, Doc. No. 19-1). Plaintiff also remains subject to criminal penalties, including confinement and loss of pay. (*See id.* ¶ 10, Ex. A [Page 13 Entry] [advising Plaintiff that the vaccine mandate is "a lawful order. Refusal to be fully vaccinated against COVID-19, absent an approved exemption, will constitute a failure to obey a lawful order and *is punishable under the Uniform Code of Military Justice* <u>and/or</u> may result in administrative action." (emphasis added)]).

And, as this Court noted in *Doe v. Trump*, "[t]hese injuries are irreparable for the *additional* reason that they are the result of alleged violations of" Plaintiff's rights to religious freedom (and equal protection) for it is well established that "[t]he loss of First Amendment freedoms, *for even minimal periods of time*, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373 (emphasis added).

B. The Nationwide Injunction Does Not Preclude Injunctive Relief in *this* Case.

While it is true that Plaintiff falls within the class of persons protected by the nationwide injunction issued by the federal court in *U.S. Navy Seals 1-26 v. Austin*, No. 4:21-cv-01236-O, 2022 U.S. Dist. LEXIS 65937 (N.D. Tex. Mar. 28, 2022), this does not preclude the Court from granting the requested injunctive relief to Plaintiff in *this case* for several reasons. First, Defendants do not address the scope of the nationwide injunction. At best, they assert that it only applies to separation proceedings. (Defs.' Opp'n at 8, n.3). And while this injunction may *delay* the adverse separation proceedings that Defendants have initiated against Plaintiff, it does not remove the adverse fitness report from Plaintiff's file, it does not change the fact that Defendants have stigmatized Plaintiff as less capable of serving in the military due to his religious beliefs and have formally accused Plaintiff of committing a "serious offense" for exercising his religion, it does not preclude Defendants from removing Plaintiff from his hard-earned position as a Navy SEAL (while permitting those with medical exemptions to continue as Navy SEALs), and it does not preclude a host of other punitive measures, including criminal prosecution under the Uniform Code of Military Justice, and a loss of pay and benefits due to any reassignment from the SEALs (*i.e.*, Navy SEALs receive special pay, such as dive and jump pay). Second, as Defendants note, they are appealing this ruling and others. Per Defendants, "The government strongly disagrees with those decisions [granting injunctions] and to date has filed a notice of appeal in *Navy SEALs*

1-26 and *Navy SEAL 1*," and it is "considering its appellate options in other cases." (Defs.' Opp'n at 5). And third, the carveout from the nationwide injunction, which matches the partial stay granted by the U.S. Supreme Court of the *preliminary injunction* previously issued by the district court in Texas, is not binding here as this case (and thus the facts of this case) was not before the Supreme Court. In the partial stay granted through the Supreme Court's shadow docket, the majority provided no explanation for why it issued the stay and the facts it relied upon to do so.[6] One thing we know for certain is that Plaintiff was not a party to that petition, and thus it was impossible for Defendants to "demonstrate that the compelling interest test is satisfied through application of the challenged law [to]" him. *Burwell,* 573 U.S. at 726-27.

VI. The Balance of Equities and the Public Interest Support Protecting Religious Freedom and Granting the Injunction.

Plaintiff agrees with Defendants that "the balance of harms and whether the requested injunction will serve the public interest merge when the Government is the opposing party." (Defs.' Opp'n at 35 [internal punctuation and citation omitted]); *see also Pursuing Am.'s Greatness*, 831 F.3d at 511 (stating that "in this case, the FEC's harm and the public interest are one and the same, because the government's interest *is* the public interest").

"[T]here is always a strong public interest in the exercise of [First Amendment] rights otherwise abridged by an unconstitutional regulation and, without a preliminary injunction, [Plaintiff] is unable to exercise those rights. . . ." *Id.*; *Gordon*, 721 F.3d at 653 ("[E]nforcement of an unconstitutional law is always contrary to the public interest.").

[6] As Defendants assert, "[t]he Supreme Court's decision granting a partial stay . . . necessarily rejects some conclusions of the same lower court opinions . . . ." (Defs.' Opp'n at 12). But which ones? If the Court rejected "some conclusions" of the lower courts, did it accept others? Defendants don't know. Plaintiff doesn't know. And this Court doesn't know. This, of course, is a problem with the shadow docket. And the problem is compounded here as RFRA claims are determined on an *individual* basis.

These factors decisively favor granting the requested injunction.

CONCLUSION

The Court should grant Plaintiff's motion and enter the requested injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2022, 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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