No. 21A477

In the Supreme Court of the United States

LLOYD J. AUSTIN, III, IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE, ET AL.,

Applicants,

v.

U.S. NAVY SEALS 1-26, ET AL.,

Respondents.

RESPONSE IN OPPOSITION TO APPLICATION FOR PARTIAL STAY OF THE INJUNCTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

INTRODUCTION AND REASONS TO DENY THE APPLICATION

The preliminary injunction at issue does not require the Navy[1] to deploy any of the thirty–five plaintiffs—U.S. Navy SEALs and Naval Special Warfare personnel honorably serving our country. Both the district court and the Fifth Circuit confirmed that. App.14a, 27a-28a, 60a, 66a.[2] The injunction merely preserves the status quo while this case is litigated. Far from supplanting military judgment, the injunction retains the judgments the Navy *already made* in terms of plaintiffs' jobs, pay, and training. The only things that changed those judgments were plaintiffs' requests for accommodation of their sincere religious beliefs against COVID-19 vaccination. The evidence shows that before those requests, the Navy assigned plaintiffs to their current duty stations and even successfully deployed many of them during the pandemic despite vaccination status. But the Navy has not granted a single request for religious accommodation for any servicemember, though it has granted hundreds of non-religious exemptions. While judges should not presume to run the military, neither may courts turn a blind eye to violations of the Constitution or the Religious Freedom Restoration Act (RFRA). And the Navy cannot cloak its desire to punish plaintiffs for

[1] Applicants are Secretary of Defense Lloyd Austin and Secretary of the Navy Carlos Del Toro in their official capacities, as well as the Department of Defense (DoD). This brief refers to the Applicants collectively as "the Navy."

[2] "App." refers to the Applicants' appendix. "Resp.App." refers to the Respondents' appendix. "ROA" refers to the record on appeal filed with the Fifth Circuit.

requesting religious accommodation in claimed "operational" needs without judicial scrutiny.[3] Allowing blind deference to military preferences, as the Navy urges, would rewrite RFRA. Only Congress may do that. And it would be inappropriate to create new legal doctrine in this procedural posture.

A stay is unwarranted. The Navy cannot show that it is likely that this Court would grant certiorari because the Navy is unlikely to prevail on the merits. Despite over 99% of the Navy being vaccinated, App.6a, the Navy has not granted a single religious exemption for the COVID-19 vaccination to any active or reserve duty servicemember while granting hundreds of exemptions for secular reasons, including to other members of Naval Special Warfare (NSW), App.7a. The Navy argues that plaintiffs' positions in the NSW community justify the denial of their requests, but individual circumstances are not considered in the Navy's religious accommodation process, which the district court found to be "by all accounts . . . theater," based on the evidence. App.31a. The Navy is "rubber stamp[ing]" a denial on every religious accommodation request regardless of individual circumstances, merely paying lip service to their exacting burden. App.31a; *see also* Part I.A *infra*. The Navy's stay application does not even mention this important part of the lower court decisions and the district court's factual findings. Thus, the Navy also cannot show that it is likely to succeed on the merits because its farcical religious accommodation process violates

[3] *See Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018) ("Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.")

RFRA. And while this case involves an important issue, there is no circuit split, and both this case and others involving RFRA claims against military vaccine mandates are still in preliminary stages of litigation. *See* Sup. Ct. R. 10.

If the injunction does not require the Navy to deploy plaintiffs,[4] what is the Navy really asking this Court to allow it to do while the case proceeds? Simple: It wants license to engage in hostile tactics designed to coerce plaintiffs into disregarding their religious beliefs. The Navy claims a stay permitting these actions is necessary for health, safety, and force readiness, but those broadly stated concerns are a fig leaf. The Navy's implementation of the vaccine mandate is underinclusive because it has allowed secular exemptions and tolerates the presence of COVID-positive individuals, which undermines the Navy's asserted compelling interests. *See* Part I.B *infra*. It does not take specialized military judgment to see that the Navy's actions have little to do with those interests, as the evidence shows. As a few examples, the Navy:

(1) denied one plaintiff medical treatment for a traumatic brain injury because it will not allow him to travel by car to receive it, ROA.2408, 2662-63, 2674-76, 2978-79, 3005-07;

[4] The Navy contends that the injunction "compelled it to send one respondent to Hawaii for duty on a submarine against its military judgment." Appl. 2. This is inaccurate for several reasons: (1) That respondent, Navy Diver 2, who just arrived in Hawaii on March 9, already had orders from the Navy to report to Hawaii for duty before asserting his religious beliefs; (2) Navy Diver 2's orders do not attach him to a submarine; and (3) Navy Diver 2's master diver in Hawaii informed him that he would not be attached to a submarine or deployed while unvaccinated. Resp.App. 2a-3a. In January, Respondents filed a motion alleging that the Navy violated the preliminary injunction by preventing Navy Diver 2 from executing his orders to report to Hawaii for permanent duty, thereby keeping him for several months in a location where he could not do his job and was only supposed to be for a few weeks. ROA.2679. The Navy disagrees. But the district court has yet to rule on this motion.

(2) demands that a former SEAL Team Six member, decorated officer, and 25-year veteran on the cusp of medical retirement comply with the vaccination mandate despite his sincere religious beliefs, ROA.1201-04, 2196, 2977, Resp.App.10a-11a;

(3) denied some plaintiffs training to obtain or maintain highly specialized qualifications, even though those qualifications are needed and enhance safety, ROA.2685-86, 2694-95, 3012-14, 3049-50; Resp.App.5a-6a, 12a;

(4) punished other plaintiffs by forcing them to pick up trash, pull weeds, take out the Chief's trash, and pick lint out of Velcro, *see* ROA.2687, 3010; Resp.App.2a; *see also* ROA.2993-94, 2999, 3042 (explaining that these actions are punitive).

Irrationally, the Navy continues to rely on other plaintiffs in their normal capacities despite their vaccination status, *see, e.g.*, Resp.App.6a; ROA.3045, 3049, and even assigned one plaintiff to take the temperatures of those entering base facilities, Resp.App.2a, and others to escort retired servicemembers, ROA.3041. Meanwhile, the world continues to recognize that the threat of COVID-19 is waning,[5] as the Navy's own policies acknowledge. In

[5] As one prominent example of this recognition, "[d]ue to substantial changes in the scope and severity of the pandemic as well as the guidance of public-health authorities, United has announced that all employees who were placed on temporary unpaid leave as an accommodation will be returned to their previous jobs." Motion to Vacate Panel Opinion and Dismiss Appeal as Moot 1, *Sambrano v. United Airlines*, No. 21-11159 (5th Cir. Mar. 10, 2022). "This change in policy is the result of materially reduced rates of COVID-19 incidence, high levels of vaccination, and the reduced severity of the Omicron variant (which is much less likely to result in hospitalization or death than earlier variants)." *Id.* at 3.

United's decision reinstates 2,200 employees (out of 67,000) who had accommodations to the vaccine requirement. *See* David Shepardson, "United Airlines to let unvaccinated

short, the Navy cannot show that it is suffering irreparable harm because it may not take adverse action against the thirty-five plaintiffs due to their religious accommodation requests. DoD policy does not permit that anyway. *See* Part II.A *infra*. On the other hand, the preliminary injunction is needed to protect plaintiffs' rights from further violation.

Intervention in this posture is also unwarranted because the district court is still considering the effect of the injunction. *See* Statement Part III *infra*. Thus, this Court's intervention may be unnecessary, depending on the lower courts' resolution of the motion. *See* Sup. Ct. R. 23.3 ("An application for a stay shall set out with particularity why the relief sought is not available from any other court or judge.")[6]

The application should be denied.

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employees return to jobs March 28- memo," *Reuters* (Mar. 10, 2022), https://www.reuters.com/business/aerospace-defense/united-airlines-let-unvaccinated-employees-return-jobs-march-28-memo-2022-03-10/.

Further, "the CDC said last week that 93% of the U.S. population is in a location where COVID levels are low enough that people do not need to wear masks." David Shepardson, "U.S. to extend airplane, transit mask mandate through April 18," *Reuters* (Mar. 10, 2022), https://www.reuters.com/world/us/us-extend-airplane-transit-mask-mandate-through-april-18-official-2022-03-10/. "The administration is also considering lifting requirements that international visitors get a negative COVID-19 test within a day of travel, officials said, as many countries have dropped testing requirements." *Id.*

[6] This Court has denied stays where the litigation is proceeding quickly. "Respect for the assessment of the Court of Appeals is especially warranted when that court is proceeding to adjudication on the merits with due expedition." *Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers). The Navy's opening brief in the Fifth Circuit is due on March 28, 2022, and the Navy has not requested that the Fifth Circuit expedite the appeal. Preliminary injunction appeals in the Fifth Circuit receive calendaring priority and preference in processing and disposition. Fifth Cir. R. 47.7. Proceedings in the district court also continue. App.14a at n.7. Thus, the case is proceeding with all "due expedition," *Doe*, 546 U.S. at 1308, and the Navy does not argue otherwise. In fact, it waited weeks to request a stay from the district court. *Compare* App.56a *with* ROA.2545-48.

STATEMENT OF THE CASE

I. Factual Background

Plaintiffs are U.S. Navy SEALs, Special Warfare Combatant Craft Crewmen (SWCCs), an Explosive Ordnance Disposal Technician (EOD), and Divers who object to receiving a COVID-19 vaccination based on their sincerely held religious beliefs. ROA.32-33. Plaintiffs are each assigned to NSW Command units. ROA.34. Many plaintiffs are assigned to training commands; others are assigned to SEAL Teams. *See* ROA.2740, Resp.App.6a. Except for a few SEALs in a certain group (which no plaintiff is in), SEALs are not deployed with short notice. Resp.App.7a, 11a-12a; ROA.2740-41.[7] Their commands operate on a predictable, cyclical basis. Resp.App.7a, 11a-12a; ROA.2741. That allows each SEAL Team to obtain training and qualifications required for specific missions, which is facilitated by the training commands. *Id.* Many plaintiffs hold highly specialized qualifications that enable them to perform their special operations missions and train other SEALs. ROA.39; *see* Resp.App.12a. Plaintiffs' sincerely held religious beliefs forbid them from receiving the COVID-19 vaccine for various reasons rooted in their Christian faith. ROA.40-42, 1124-1275, 2396-97. Plaintiffs have each requested accommodation of their religious beliefs against COVID-19 vaccination from the Navy. ROA.47.

[7] Thus, none of the plaintiffs would be deployed with short notice on a mission like rescuing Captain Phillips from Somali pirates, *see* Appl. 4. The declarations of SEAL 16 and SEAL 18 (who was once a member of the Naval Special Warfare Development Group (DEVGRU)/SEAL Team Six, *see* ROA.2977) reproduced in the appendix, provide more explanation. *See* Resp.App.4a-15a.

A. The Navy's vaccination policies

On July 29, 2021, in addition to announcing vaccination mandates for federal employees and contractors, the President directed the Department of Defense (DoD) to require military servicemembers to receive a COVID-19 vaccination. ROA.523-25. About a month later, Secretary of Defense Lloyd Austin ordered DoD to vaccinate all active-duty and reserve servicemembers. ROA.399-400. Six days later, Secretary of the Navy Carlos Del Toro directed Navy active-duty and reserve personnel to become vaccinated within 90 and 120 days, respectively. ROA.402-03. Secretary Del Toro's order "exempted from mandatory vaccination" service members "actively participating in COVID-19 clinical trials[,]" even those receiving a placebo. ROA.403. His order warned that "failure to comply is punishable as a violation of a lawful order" and "may result in punitive or adverse administrative action or both." *Id.* It also authorized the Chief of Naval Operations and Commandant of the Marine Corps "to exercise the full range of administrative and disciplinary actions to hold non-exempt Service Members appropriately accountable." *Id.* Such actions "include, but [are] not limited to, removal of qualification for advancement, promotions, reenlistment, or continuation, consistent with existing regulations, or otherwise considering vaccination status in personnel actions as appropriate." *Id.*

In October 2021, the Chief of Naval Operations issued Navy Administrative Message (NAVADMIN) 225/21, which threatens religious objectors not only with the loss of their careers, but also with potentially crippling debt. App.81a-85a. NAVADMIN 225/21 states that "Navy service members refusing the COVID-19 vaccination, absent a pending or approved exemption, shall be processed for administrative separation." App.81a. It also provides that the Navy "may seek recoupment of applicable bonuses, special and incentive

pays, and the cost of training and education for service members refusing the vaccine." App.82a. Because of plaintiffs' extensive training, this means that the Navy could force each of them to pay back over $1 million. ROA.39. NAVADMIN 225/21 also authorizes temporary reassignment of "Navy service members who refuse the COVID-19 vaccine, regardless of exemption status, based on operational readiness or mission requirements." App.83a. It also mandates that "[c]ommands shall not allow those refusing the vaccine to promote/advance, reenlist, or execute orders, with the exception of separation orders, until the CCDA has completed disposition of their case." App.84a.

In November 2021, the Navy issued NAVADMIN 256/21, App.86a-94a, which states that "Navy service members whose COVID-19 vaccination exemption request is denied are required to receive the COVID-19 vaccine . . . within 5 days of being notified of the denial." App.88a. It also authorizes adverse performance evaluations, denial of promotion or advancement, loss and required repayment of Navy-funded education, and possible loss of eligibility for some VA benefits such as the GI Bill, including the transfer of GI Bill benefits to dependents. App.90a-94a.

In recent months, the Navy relaxed COVID-related requirements but continues to enforce its vaccine mandate. In December 2021, the Department of Defense issued new guidance permitting DoD contractors to show a negative COVID test for access to DoD facilities instead of vaccination, and not requiring vaccination for members of the public accessing DoD facilities. Resp.App. 20a-22a. Many plaintiffs work regularly with contractors. In January 2022, the Navy issued NAVADMIN 07/22, which recognizes that COVID-19 will still be an issue despite nearly universal vaccination. ROA.2733-38. It permits individuals at high

risk for COVID-19 complications to be deployed. ROA.2736. It also instructs against retesting servicemembers on a ship after quarantine for COVID because they will likely still test positive, accepting that COVID-positive individuals will mingle with others. ROA.2735. In January 2022, the Navy admitted that over 99% of servicemembers are vaccinated, and that the Omicron variant has had "really no operational impact."[8] In March 2022, DoD removed masking requirements for all DoD personnel and visitors in counties with medium or low COVID-19 community levels. Resp.App.48a-49a.

B. The Navy's discriminatory actions

On their face, the Navy's policies feign compliance with RFRA, as they require individualized assessment of religious accommodation requests and place the burden on the military to demonstrate a compelling justification for denials. *See* ROA.420-38, 440-48, 450-66, 468-71. But as to the vaccine mandate, the district court found that the individualized assessments and compelling interest demonstration the policies require are a farce. The Navy uses a six-phase, fifty-step procedure to process religious accommodation requests. Resp.App.51a-84a. The process begins, however, by instructing an administrator to use a prepared disapproval template containing the same rationale, despite the differing circumstances of each servicemember submitting a request. Resp.App.58a, 73a. Each of the plaintiffs received virtually identical denials, and their denials are nearly identical to non-NSW servicemembers. *See, e.g.*, Resp.App.202a-211a. The Navy denied SEAL 2 and SEAL 3's

[8] ROA.2396, 2729; *see* also App.21a; Diana Stancy Correll, "Omicron isn't significantly impacting Navy operations, admiral says," *Navy Times* (Jan. 27, 2022), https://www.navytimes.com/news/your-navy/2022/01/27/omicron-isnt-significantly-impacting-navy-operations-admiral-says/ [https://perma.cc/77R3-WEUC].

requests despite their commanding officer, who is in charge of all SEAL training on the East and West coasts, recommending approval. ROA.3285-86, 3346-47. As that officer stated:

> [T]he training environment [of the command] often requires close quarters contact for prolonged periods of time, however, successful mitigation measures have been implemented since the onset of COVID-19 to ensure the safety of the staff and students . . . The cumulative impact of repeated accommodations of religious practices of a similar nature would mean my command *is still able* to safely accomplish its mission and protect the health and safety of its members.

App.10a. The Navy applies the same purported "least restrictive means" analysis to each accommodation request, and it relies on outdated COVID-19 data from over six months ago, despite the dramatic changes in the virus, including its known transmissibility by vaccinated people. The Navy refuses to reconsider requests for accommodation based on changed circumstances. Resp.App.151a-196a. The Navy has also displayed "outright hostil[ity]" to plaintiffs' beliefs. App.26a; *see also, e.g.*, App.8a-9a, 12a. To date, the Navy has not granted a single exemption to an active-duty or active reserve servicemember for the COVID-19 vaccination, or at all in the last seven years.[9] By contrast, the Navy has granted

[9] The Navy claims that it very recently granted one religious exemption to a member of the inactive reserve. *See* Appl. 9 n.2. But it does not appear that the mandate even applies to inactive servicemembers. *See* ROA.399 ("all members of the Armed Forces under DoD authority on active duty or Ready Reserve"); App.82a (Navy vaccine mandate applies to "Active-duty service members and service members in the Selected Reserve only[,]" not Individual (inactive) Ready Reserve.) The Navy states elsewhere that this was only a "conditional approval" which means that "the individual is not required to be vaccinated while in the IRR, but must be fully vaccinated as defined in NAVADMIN 190/21 prior to returning to service." *See* U.S. Navy COVID-19 Updates, Mar. 9, 2022, https://www.navy.mil/US-Navy-COVID-19-Updates/ [https://perma.cc/5XB9-DYJ5].

exemptions to COVID-19 vaccination for secular reasons: twelve permanent medical exemptions, thirty-one administrative exemptions, and hundreds of temporary medical exemptions, including exemptions to members of the NSW community.[10]

Even if it were possible for plaintiffs to receive a religious exemption, Article 15-105(4)(n)(9) of the Manual of the Navy Medical Department (MANMED) states that special operations personnel, which includes plaintiffs, "refusing to receive recommended vaccines . . . based solely on personal or religious beliefs are disqualified. This provision does not pertain to medical contraindications or allergies to vaccine administration." App.77a. Trident Order #12 was issued in September 2021 and repeats the MANMED automatic disqualification for personal or religious objections. App.79a-80a. This means that even if a SEAL or other special warfare operator receives a religious exemption to a vaccine requirement, that servicemember is automatically disqualified from special operations duty (*i.e.*, made non-deployable), which means the loss of special duty pays and the potential loss of the member's special warfare device pin. (SEALs wear the famous "Trident.") The district court reserved judgment on whether these policies are neutral between religious and secular exemptions until the merits stage. App.62a-63a.

C. Harm to plaintiffs

Even if the Navy's religious accommodation process were not a farce with a predetermined outcome, it has provided plaintiffs no relief. Each plaintiff submitted an accommodation request, some as early as August 2021, but none have been approved. ROA.2397, 2856.

[10] U.S. Navy COVID-19 Updates, *supra* n.6 (as of March 9, 2022); *see also* App.20a.

Even submission of an accommodation request resulted in coercive and punitive action against plaintiffs. *See* ROA.1131-32, 1136, 1144-45, 1158-59, 1173, 1176, 1181, 1185, 1189-90, 1199, 1202-04, 1208, 1215-16, 1224-25, 1232, 1237, 1242, 1255, 1260, 1263, 2146, 2175, 2181, 2184, 2190, 2193, 2196, 2199, 2205-06, 2209, 2217-18, 2221, 2224, 2228, 2239, 2242, 2247-48, 2254-55, 2674-75, 2678-80, 2685-87, 2694-95, 2697-98, 2700-01, 3005-07, 3009-10, 3012-14, 3037-38, 3040-42, 3044-45, 3048-50; App.8a-9a, 45a, 53a-54a.

II. Procedural History

Plaintiffs sued on November 9, 2021, asserting claims under the Free Exercise Clause, RFRA, and other provisions of federal law. ROA.32-80. Plaintiffs moved for a preliminary injunction based on their religious liberty claims on November 24. ROA.201-46. The district court held a preliminary injunction hearing on December 20, ROA.25, and three plaintiffs testified. *See* App.9a-12a (summarizing testimony). The Navy offered no witnesses. The district court granted the preliminary injunction on January 3, 2022. App.56a. The preliminary injunction order enjoined the Navy "from applying MANMED § 15-105([4])(n)(9); NAVADMIN 225/21; Trident Order #12; and NAVADMIN 256/21 to plaintiffs. Defendants are also enjoined from taking any adverse action against Plaintiffs on the basis of Plaintiffs' requests for religious accommodation." *Id.*

The Navy filed a notice of interlocutory appeal on January 21 and filed a motion for partial stay of the injunction pending appeal in the district court on January 24. ROA.2508-09, 2545-47.[11] Plaintiffs filed a motion for order to show cause as to why the Navy should

[11] The Navy requested only a "partial stay" because it conceded that it would not court martial or separate plaintiffs pending the litigation.

not be held in contempt for violating the preliminary injunction on January 31. ROA.2650-69. That motion is fully briefed as of February 13. ROA.2974-86. The district court denied the Navy's motion for partial stay on February 13. App.66a.

The Navy filed a motion for partial stay pending appeal on February 16, and the Fifth Circuit denied the motion on February 28. App.1a. The Fifth Circuit rejected the Navy's argument that the preliminary injunction interfered with their "deployment, assignment, and other operational decisions." App.27a. It noted that "the district court clarified that the preliminary injunction 'simply prohibits adverse action against Plaintiffs based on their requests for religious accommodation.' Defendants therefore remain able to make decisions based on other neutral factors." App.27a-28a.

III. The Preliminary Injunction

The Navy heavily emphasizes its claim that the preliminary injunction "usurps the Navy's authority to decide which servicemembers should be deployed to execute some of the military's most sensitive and dangerous missions." Appl. 1. But that is not true. Neither plaintiffs, the district court, nor the court of appeals have ever contended that the Navy is compelled by the preliminary injunction to deploy any of the thirty-five plaintiffs.

The Navy moved the district court to stay the preliminary injunction "to the extent the order precludes Defendants from making the assignment and reassignment decisions that the military deems appropriate, taking into account Plaintiffs' vaccination status, including with respect to deployment and training." App.13a. The district court denied the motion to stay, but it acknowledged that it "cannot[]require the Navy to place a particular SEAL in a particular training program. But it can—and must—prevent the Navy from taking punitive

action against that SEAL by blocking him from the training program *he would otherwise attend*." App.60a (emphasis added). The district court stated:

> This Court has not required Defendants to make any particular personnel assignments. All strategic decisions remain in the hands of the Navy. Rather, the preliminary injunction simply prohibits adverse action against Plaintiffs based on their requests for religious accommodation.

App.60a. While clarifying that plaintiffs did not have license to "defy mitigation measures under the guise of following" the preliminary injunction order, the district court reiterated that "[t]he preliminary injunction is limited in scope. It enjoined the Defendants from applying the vaccine mandate to the thirty-five Plaintiffs here and prohibited adverse action on the basis of their religious accommodation requests." App.65a. The district court also reiterated that the preliminary injunction preserves the status quo by prohibiting adverse actions like deprivations of pay, training, and medical treatment: "[P]reserving the status quo means maintaining the preliminary injunction—in other words, preventing Plaintiffs from being deprived of pay, training, medical treatment, travel opportunities, and more." App.66a. The district court had no need to stay the injunction's application to deployment decisions if the injunction does not apply to them.

The Navy asked the Fifth Circuit to stay the preliminary injunction pending appeal "insofar as it precludes the Navy from considering plaintiffs' vaccination status in making deployment, assignment, and other operational decisions." App.2a. The Fifth Circuit also declined to issue such a stay because it had a similar understanding of the scope of the injunction. In response to the Navy's argument about deployment, the Fifth Circuit noted:

> [T]he district court clarified that the preliminary injunction "simply prohibits adverse action against Plaintiffs based on their requests for religious accommodation." Defendants therefore remain able to make decisions based on other neutral factors.

App.27a-28a. Thus, neither the district court nor the court of appeals stated that the preliminary injunction requires the Navy to deploy plaintiffs.

Because of the district court's admonition that the preliminary injunction prevents the Navy from depriving plaintiffs of "pay" or taking "adverse action" because of their accommodation requests, the Navy may not classify plaintiffs as non-deployable and thus remove them from special operations duty because of their religious accommodation request under the preliminary injunction. As the Fifth Circuit said, "[t]he Navy may permissibly classify any number of Plaintiffs as deployable or non-deployable for a wide variety of reasons. But if the Navy's plan is to ignore RFRA's protections, as it seems to be on the record before us, courts must intervene . . . ." App.21a. Critically, however, classifying plaintiffs as "deployable" while the lawsuit proceeds (to ensure they will continue to receive special operations pay, which plaintiffs' families depend on) does not mean the Navy must actually *deploy* any of the plaintiffs, and therefore does not "usurp[] the Navy's authority to decide which servicemembers should be deployed." Appl. 1. And given that NSW members may be deployed or not deployed for many reasons, and that it is unclear that deployment is a benefit, choosing not to deploy a particular plaintiff would not constitute "adverse action" under the injunction. App.56a, 65a.

While it is clear that the injunction does not require the Navy to deploy plaintiffs, the district court is still considering the full effect of the injunction on other decisions. Plaintiffs believe that the preliminary injunction prohibits the Navy from punishing plaintiffs or denying plaintiffs promotions and the ability to carry out orders given before plaintiffs submitted their religious accommodation requests, and the Navy disagrees. App.57a-58a. But

the district court has yet to say whether it agrees with plaintiffs on anything except training, medical treatment, travel, and pay, *see* App.60a, 66a, and has yet to rule on the plaintiffs' motion for order to show cause.[12] As a result, the court of appeals has not passed on these questions either. Thus, this Court's intervention at this stage may be unnecessary, depending on the lower courts' resolution of the motion. *See* Sup. Ct. R. 23.3 ("An application for a stay shall set out with particularity why the relief sought is not available from any other court or judge.")

ARGUMENT

A stay pending appeal is an "extraordinary" remedy. *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers); *see also Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers). "A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citation omitted). The applicant bears the "especially heavy" burden of proving that such relief is warranted. *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C. J., in chambers). To obtain a stay of an order issued by a lower court, "an applicant must show (1) a reasonable probability that four Justices will consider the issue meritorious enough to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

[12] There is also still a motion to dismiss and transfer venue pending in the district court. App.14a at n.7.

The applicant must make a "strong showing" that it is likely to succeed on the merits. *Nken*, 556 U.S. at 426. "In close cases, the Circuit Justice, or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190. The Navy has not met its burden to justify the extraordinary relief of a stay of the preliminary injunction.

I. The Navy Is Unlikely to Succeed on the Merits Because the Application of Its Vaccine Mandate to Plaintiffs Violates RFRA.

This case does involve important questions. But the Court's intervention at this stage is unwarranted for procedural and prudential reasons. It is also unwarranted because the Navy has not met its burden, as it cannot establish that it is likely to succeed on the merits, and thus that the Court would grant certiorari. The Navy's religious accommodation process, which it used to deny plaintiffs' religious accommodation requests, starts and ends with a boilerplate denial. *See* Resp.App.51a-84a. The Navy's stay application does not even acknowledge (or dispute) the district court's factual findings or the court of appeals' analysis on this point. The Navy's across-the-board, rubber-stamped denials do not comport with the individualized analysis required under RFRA. The Navy now argues that its boilerplate denials are justified as to the thirty-five plaintiffs because they are members of the NSW community, but it recites only more generalized interests inapplicable to many, if not all, of the plaintiffs. *See* Appl. 23-31. In any event, the Navy cannot show that it has a compelling interest in forcing each of the thirty-five plaintiffs to violate their religious beliefs by accepting COVID vaccination. It also cannot show, given current circumstances, that vaccination is the least restrictive means of accomplishing its interest. Nor can the Navy show that

it is suffering irreparable harm due to the preliminary injunction, which only requires what the DoD policies and those of other military branches require. *See* Part III *infra*.

A. The Navy's religious accommodation process is a sham.

"RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 n.3 (2014); *accord Holt v. Hobbs*, 574 U.S. 352, 357 (2015) (RFRA "provide[s] greater protection for religious exercise than is available under the First Amendment.") Not only does RFRA require that the Government must demonstrate a "compelling governmental interest" to justify a substantial burden on religious beliefs, it also requires that the Government use the "least restrictive means" available for doing so. 42 U.S.C. § 2000bb–1(b). "The least-restrictive-means standard is exceptionally demanding . . . ." *Hobby Lobby*, 573 U.S. at 728.

Defendants expect to meet this "exceptionally demanding" test by merely quoting the words "compelling interest" and "least restrictive means" in boilerplate denials, but the law requires far more than the Government's ipse dixit. "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' —the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) (quoting 42 U.S.C. § 2000bb-1); *Hobby Lobby*, 573 U.S. at 726. As the Fifth Circuit said, Defendants' "institutional interests" here are "nevertheless insufficient under RFRA. The Navy must instead 'scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.'" App.24a. "RFRA 'demands much

more[]' than deferring to 'officials' mere say-so that they could not accommodate [a plaintiff's religious accommodation] request.'" *Id.* at 25a (quoting *Holt*, 574 U.S. at 369.)

The Navy uses a form denial letter produced by a six-phase, fifty-step process that begins with a prepared disapproval template. Resp.App.58a, 67a. This form denial, which appears to be used in adjudicating all requests, *see* Resp.App.202a-211a, vaguely states that the military has a compelling interest in military readiness, unit cohesion, good order and discipline, and health and safety, on both unit and individual levels. *Id.* Nowhere in the denial letters does the Navy explain with any degree of specificity why it has a compelling interest in denying a particular accommodation request. Instead, it relies on a categorical denial through conclusory assertions unsupported by specific evidence. See App.26a ("[I]n none of the letters denying religious accommodations to these Plaintiffs has the Navy articulated Plaintiff-specific reasons for its decisions.") As the district court concluded, this process more closely resembles "theater" than the case-by-case rigorous analysis demanded by RFRA. App.31a. The evidence plaintiffs have been able to obtain so far, even without the benefit of discovery, confirms the woefully inadequate process the Navy is using to deny servicemembers' religious liberty:

First, as the Fifth Circuit explained, "[f]urther evidencing that there is a pattern of disregard for RFRA rights rather than individualized consideration of Plaintiffs' requests, the Navy admits it has not granted a single religious accommodation." App.26a-27a.

Second, the Navy's denial letters, even outside the NSW community, appear to be nearly identical. Resp.App.202a-211a. According to the Navy's evaluation, then, there is

nothing particular about NSW that requires a different outcome. The same is true of religious accommodation appeals. Resp.App.200a-201a.

Third, and relatedly, the Navy appears to use the same "least restrictive means" analysis for every servicemember. Resp.App. 86a, 95a-145a. As the court of appeals noted, "surely, had the Navy been conscientiously adhering to RFRA, it could have adopted least restrictive means to accommodate religious objections against forced vaccinations, for instance, to benefit personnel working from desks, warehouses, or remote locations." App.27a. Contrary to the depiction of SEALs in Hollywood movies, plaintiffs are not jumping out of helicopters into warzones every day.

Fourth, the Navy's analysis for each RA request is simplistic, rote, and involves the same boilerplate. Resp.App.202a-211a. In response to a Navy officer's Freedom of Information Act request for "[a]ll responsive records reviewed by the Deputy Chief of Naval Operations . . . in adjudicating" his religious accommodation request, the Navy produced one line of a spreadsheet as its "entire[]" response. Resp.App.87a, 147a-150a.

Fifth, as even more evidence that the Navy is not considering individual circumstances or whether vaccination is the least restrictive means available, the Navy refuses to consider changed circumstances in reevaluating requests submitted several months ago, such as the job and location of the requestor, newly acquired natural immunity, and a different variant of COVID-19 which has caused widespread infection in vaccinated personnel. Resp.App.151a-196a. Instead, it continues to rely on outdated information about the virus, even though other agencies have revised health guidelines many times since last fall. Resp.App. 106a-145a.

As the district court determined based on the record, the Navy's religious accommodation process "by all accounts … is theater" and the Navy "merely rubber stamps each denial." App.31a. The Navy does not dispute this factual finding in its stay application. All it offers is an argument that despite the evidence, the Court should take the Navy's word for it that it is doing an individualized assessment that complies with the law. Appl. 32 n.8. But the record so far does not show that they Navy satisfies its high burden under RFRA, which means the Navy is unlikely to succeed on the merits.

B. The Navy lacks a compelling interest in forcing plaintiffs to receive a COVID-19 vaccination despite their sincere religious beliefs.

1. Even assuming the Navy's religious accommodation process were not a sham, the Navy is still unlikely to succeed because it fails to show that it has a compelling reason to apply its mandate *to plaintiffs*, as RFRA requires. "Rather than rely on 'broadly formulated interests,' courts must 'scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants.'" *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (quoting *Gonzales*, 546 U.S. at 431). "In other words, Defendants must provide more than a broadly formulated interest in 'national security.' They must articulate a compelling interest in vaccinating the thirty-five religious servicemembers currently before the Court." App.49a. It strains credulity to assert that plaintiffs' non-vaccination—or even the non-vaccination of the other individuals who submitted RA requests, which amounts to 0.6% of all Navy servicemembers—will make or break the Navy's or NSW's ability to operate or to combat the virus. Navy servicemembers do not live in a hermetically sealed environment and interact with their own families and the public while on shore duty and before embarking on a fleet vessel. As the district court pointed out, because of nearly universal military

vaccination, "vaccinated servicemembers are far more likely to encounter other unvaccinated individuals off-base among the general public than among their ranks." App.64a. The Navy contends that accommodating plaintiffs cannot be "cabined to these 35 respondents . . . more than 4000 Navy servicemembers have requested religious exemptions." Appl. 31. But as this Court held in *Holt*, "this argument is but another formulation of the 'classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions.' We have rejected a similar argument in analogous contexts, and we reject it again today." 574 U.S. at 368 (citations omitted).

2. The Navy's argument that plaintiffs threaten operations ignores extensive evidence that shows the Navy—and plaintiffs in particular—continued operations successfully regardless of plaintiffs' vaccination status. Health, safety, and mission success are generally compelling interests, but "past practice" shows that the Navy may ensure health, safety, and mission success without vaccinating plaintiffs. *See Dunn v. Smith*, 141 S. Ct. 725, 725–26 (2021) (Kagan, J., concurring in denial of application to vacate injunction). Throughout the pandemic, multiple plaintiffs deployed overseas, both before and after the vaccine became available, and their missions succeeded. ROA.2156, 2159, 2162, 2172, 2184, 2213, 2224, 2232, 2742-43. EOD 1 received a Joint Service Commendation Medal for his "flawless execution" in conducting 76 large-scale exercises over several months with partner forces in South Korea during the early part of the pandemic, with successful COVID mitigation as one of the noted achievements. Resp.App.197a-198a; App.11a, 26a. SWCC 4 completed his entire 24-month deployment cycle during the worst of the COVID-19 pandemic before the

vaccine mandate. Resp.App.19a. He stood up a troop that deployed to the Middle East during the early part of the pandemic and was highly successful. Resp.App.18a. Mitigation measures prevented COVID from having an impact on their success. *Id.* This deployment required extensive training (for over 12 months) which involved multiple inter-fleet operations and large-scale military exercises. *Id.* SWCC 4 also participated in a major multi-theater deployment during the pandemic. Resp.App.19a. The mission was successful even though a vaccine was not mandated and roughly 50% of the team was unvaccinated. *Id.* Throughout the pandemic, plaintiffs trained other SEALs preparing for deployments, with vaccination status being inconsequential to mission accomplishment. ROA.2149, 2153, 2162, 2165, 2169, 2178, 2187, 2205, 2213-14, 2227, 2242, 2247, 2993. There is, therefore, "no evidence that the [plaintiffs] have contributed to the spread of COVID-19 . . . ." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). In contrast, some NSW training has been compromised because of the removal of some plaintiffs. *See* ROA.2153, 2165, 2695. And the dangers faced by plaintiffs during training and deployments are far greater than the risk of COVID-19 in a young team in peak physical condition. Resp.App.8a-9a, 14a-15a. The Navy and NSW are already equipped to deal with illnesses and injuries, which are common in deployments. Resp.App.8a, 14a. And as explained above, only a select few SEALs (and none of plaintiffs) are on "beeper status," and because of the need for extensive mission-specific training, other SEALs are not deployed at a moment's notice. Resp.App.7a, 11a-12a.

Despite its concerns, the Navy points to *zero* examples during the last two years when a plaintiffs' vaccination status—or anyone's, for that matter—compromised an NSW mission, though it claims that plaintiffs' vaccination is critical to NSW mission success. Thus, "that record suggests that [the Navy] could satisfy its . . . concerns through a means less restrictive . . . ." *Dunn*, 141 S. Ct. at 726. SEALs and other members of NSW are not all the same—personal characteristics, skills, and qualifications are no doubt routinely considered when assigning members to particular tasks, roles, missions, commands, or deployments. If a plaintiff is unvaccinated in line with his sincere religious beliefs, the Navy has articulated no reason why those decisions could not be made with that in mind, among other neutral factors, as a less restrictive alternative. The Navy's refusal to consider any alternative except complete acquiescence is illustrated by their actions as to SEAL 18, a decorated officer with twenty-five years of service, a former member of SEAL Team Six, and a veteran of eleven combat deployments. Resp.App.10a-11a; ROA.2196, 2977. Despite being on the cusp of medical retirement due to injuries (which also means he would not be deployed), the Navy has insisted that he comply with the mandate despite his religious beliefs. ROA.1201-04. His command also would not allow him to go to a rehab center for treatment on temporary duty, as he previously was allowed to before the mandate, unless he has approved leave. ROA.2196. The Navy's treatment of SEAL 18 shows its insistence on compliance is divorced from any legitimate mission-based needs.

3. The Navy's arguments are also underinclusive and based on outdated science. The Navy claims all thirty-five plaintiffs must be vaccinated immediately or missions will be

compromised, yet the Navy has granted twelve permanent medical exemptions and hundreds of temporary ones (including to NSW members). *See* U.S. Navy COVID-19 Updates, *supra* n.9; App.7a. And testing is permitted as a substitute for vaccination for military contractors, whom plaintiffs work with regularly, but not for plaintiffs. Resp.App.20a. Servicemembers or contractors unvaccinated for secular reasons—whether temporarily so or not—present the same risk as plaintiffs who are unvaccinated for religious reasons.[13]

In denying plaintiffs' religious accommodation requests, the Navy also relied on COVID-19 data collected before September 2021. We now know that vaccination does not prevent spread, so vaccination status is not a proxy for whether someone is infected. The Navy's current policies recognize that contending with COVID-19 is necessary even with 100% vaccination. *See* ROA.2734-38. The Navy's claim that the mandate is justified because unvaccinated individuals are more likely than vaccinated individuals generally to suffer serious cases is severely undermined by Navy policy explicitly permitting deployment of vac-

[13] For First Amendment purposes, a law is not neutral and generally applicable if it treats "any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam); *see also Fulton*, 141 S. Ct. at 1877; *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542–46 (1993). And "[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 (cleaned up). "[T]his and other forms of underinclusiveness mean[] that the ordinances were not generally applicable." *Id.* Thus, even if plaintiffs had no RFRA claim, strict scrutiny would still apply under the Free Exercise clause, and the Navy's mandate fails that scrutiny for the same reasons it cannot satisfy RFRA. *Id.*

The district court, however, noted that it was not relying on plaintiffs' First Amendment claims for the preliminary injunction, and the court of appeals did not address them. App.63a; 13a at n.6. Plaintiffs therefore believe it is unnecessary to address their First Amendment claims in greater detail here.

cinated individuals at *recognized high risk* for COVID complications. ROA.2736. Restriction of movement before NSW deployments to prevent illness will be required regardless of unvaccinated operators. Resp.App.13a-14a. Even if there is a COVID-19 outbreak on a ship at sea, operations will continue. ROA.2734-38.

The Navy does not even require servicemembers on a ship who test positive to be retested after quarantine, as they will likely continue to test positive for 90 days. ROA.2735. The Navy will therefore accept COVID-positive individuals mingling with other servicemembers on a ship but deem COVID-negative plaintiffs an intolerable risk. That is irrational, especially since COVID outbreaks are occurring on ships that are 100% vaccinated with no operational impact, ROA.2729. It is also underinclusive. And underinclusiveness undercuts the idea that denying an accommodation is the least restrictive means of accomplishing a compelling interest. *See Holt*, 574 U.S. at 368 ("'[t]he proffered objectives are not pursued with respect to analogous nonreligious conduct,' which suggests that 'those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree.'" (quoting *Lukumi*, 508 U.S. at 546). It does not require military expertise to recognize that the Navy's claims do not align with current reality. "And without a degree of deference that is tantamount to unquestioning acceptance," it is hard not to conclude that the Navy fails to meet its exacting burden under RFRA to justify forcing plaintiffs to comply with its vaccine mandate. *Holt*, 574 U.S. at 364.

II. The Preliminary Injunction Is Appropriate Equitable Relief.

As the district court reiterated when it denied a stay, the preliminary injunction merely preserves the status quo by protecting plaintiffs from being discriminated against because they requested religious accommodation. App.66a. The Navy insists that this Court must

now intervene to allow it to change the status quo and take actions against plaintiffs because of their religious accommodation requests. But permitting such blatant religious discrimination would turn RFRA—which applies to the military—on its head. Of course, RFRA does not prohibit even blatant religious discrimination if the Government has a compelling interest and no less restrictive means for accomplishing that interest. But the Navy does not identify any specific, "to the person," compelling reasons why it must be allowed to reassign the thirty-five plaintiffs because of their religious accommodation request, who were carrying out their jobs without incident before they requested accommodation. 42 U.S.C. § 2000bb-1(b). Nor has it explained a need for doing so that is so urgent that it warrants this Court's immediate intervention despite the preliminary procedural posture of this case. The Navy's claim that the preliminary injunction dictates who it must deploy is incorrect. *See* Statement Part III *supra*. And its belated argument that an injunction preserving the status quo for these plaintiffs is not "appropriate relief" under RFRA or departs from traditional principles of equity is both waived and wrong. No one disputes that the military's job, and the tasks of NSW, are important. But the importance of those missions to protect the American people does not permit the military to abdicate its responsibility to obey the law. Nor may the Navy avoid judicial scrutiny by packaging its preferences as inviolable "military judgment."

A. The preliminary injunction preserves the status quo.

1. The Navy calls the district court's injunction "extraordinary." Appl. 16. But the preliminary injunction merely preserves the status quo by protecting plaintiffs from being discriminated against because they requested religious accommodation. App.66a. "The maintenance of the status quo is an important consideration in granting a stay." *Dayton*

Bd. of Educ. v. Brinkman, 439 U.S. 1358, 1359 (1978) (Rehnquist, J., in chambers); *see also Houchins v. KQED, Inc.*, 429 U.S. 1341, 1346 (1977). Other district courts have followed suit in issuing preliminary injunctions to protect the status quo for other servicemembers. Those decisions also enjoin application of the vaccine mandate to the plaintiffs and prohibit adverse action based on a request for religious accommodation. *See Poffenbarger v. Kendall*, No. 3:22-CV-1, 2022 WL 594810, at *20–21 (S.D. Ohio Feb. 28, 2022); *Navy Seal 1 v. Austin*, No. 8:21-CV-2429-SDM-TGW, 2022 WL 534459, at *20 (M.D. Fla. Feb. 18, 2022); *Air Force Officer v. Austin*, No. 5:22-CV-00009-TES, 2022 WL 468799, at *13 (M.D. Ga. Feb. 15, 2022).[14]

Prohibiting adverse action against plaintiffs because of their religious accommodation request is not extraordinary. It isn't inconsistent with RFRA or the First Amendment, which do not permit retaliation against individuals for requesting accommodation of their religious beliefs. It isn't even inconsistent with military guidance. DoD policy states that "[a] Servicemember's expression of [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." ROA.423. Even more specifically, Army policy specifies

[14] The Navy asserts that "other district courts have correctly declined to enjoin the military's COVID-19 vaccination requirement" and cites three cases. Appl. 16 at n.6. One of these cases does not involve a RFRA or Free Exercise claim, *see Robert v. Austin*, No. 21-cv-2228, 2022 WL 103374 (D. Colo. Jan. 11, 2022); and two of the decisions were based on ripeness and not on the merits, *see id.*; *Church v. Biden*, No. 21-cv-2815, 2021 WL 5179215 (D.D.C. Nov. 8, 2021).

The Air Force has not requested a stay of the preliminary injunction in either *Poffenbarger* or *Air Force Officer*.

that no "adverse action" is to be taken against any soldier with a pending religious accommodation request for the COVID-19 vaccination, and that while requests are pending, "[s]oldiers with pending exemption requests will be considered compliant with the mandatory vaccination order . . . ." ROA.3024, 3038. The preliminary injunction here requires no more than that. That the injunction merely upholds what the military requires by policy undermines the Navy's argument that treating servicemembers with religious accommodation requests as vaccinated or refraining from taking adverse action against those servicemembers under the injunction will result in irreparable harm.

2. Because the preliminary injunction does not dictate deployment decisions as explained above, *see* Statement Part III *supra*., the Navy's fear that it "trenches on core Article II prerogatives" is illusory. Appl. 3. In any event, the Executive exercised its "Article II prerogatives" when President Clinton signed RFRA into law. It further exercised its Article II powers by ensuring implementation and compliance through the promulgation of DoD regs. *See, e.g.*, ROA.423. The Navy's argument for unquestioned military deference also overlooks *Article I* prerogatives "[t]o make Rules for the Government and Regulation of the land and naval forces," U.S. Const. art. I § 8. Congress exercised that prerogative when it enacted RFRA and included the military within its definition of "government." *See* 42 U.S.C. § 2000bb-2(1). This partnership between both elected branches protects religious freedom, even in the military. And through RFRA, both Congress and the President have instructed federal courts to enforce its provisions. The preliminary injunction thus does not improperly usurp Article II power.

The military also admits that RFRA applies to it. *See, e.g.*, ROA.420-21; *see also United States v. Sterling*, 75 M.J. 407, 410 (C.A.A.F. 2016) (RFRA "applies in the military context.") And RFRA makes no exceptions for "military judgment." While in other contexts, "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society," *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986), Congress decided to change that deferential review via RFRA to "provide very broad protection for religious liberty," *Hobby Lobby*, 573 U.S. at 693.[15]

B. Blind deference to the military is inconsistent with RFRA.

The Navy argues that the Court should not second-guess its judgment, but only one case it cites even involves RFRA, *see* Appl. 19–21. All of the cited cases either pre-date RFRA, *see Dep't of the Navy v. Egan*, 484 U.S. 518 (1988); *Chappell v. Wallace*, 462 U.S. 296 (1983); *Gilligan v. Morgan*, 413 U.S. 1 (1973); *Orloff v. Willoughby*, 345 U.S. 83 (1953); *Reaves v. Ainsworth*, 219 U.S. 296 (1911); *Sebra v. Neville*, 801 F.2d 1135 (9th Cir. 1986); or do not involve RFRA claims, *see Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017); *Harkness v. Sec'y of the Navy*, 858 F.3d 437 (6th Cir. 2017); *Antonellis v. United States*, 723 F.3d 1328 (Fed. Cir. 2013); *Bryant v. Gates*, 532 F.3d 888 (D.C. Cir. 2008). And the only case cited that does involve a RFRA claim applied strict scrutiny to the military's determinations, not a relaxed or deferential standard. *See* Appl. 20 (citing *United States v. Webster*, 65 M.J. 936, 945, 946–

[15] Before passing RFRA, Congress also responded directly to *Goldman* by passing a law that required greater respect for religious liberty. *See* 10 U.S.C. § 774.

48 (Army Ct. Crim. App. 2008).[16] Thus, the Navy fails to point to any authority that applies a deferential standard in the RFRA context. The preliminary injunction therefore does not violate any applicable longstanding principle of deference to the military, as the Navy claims. And "import[ing]" reasoning from other contexts despite RFRA's "greater protection" would be "improper[]." *Holt*, 574 U.S. 361–62.

Despite RFRA's clear application to the military, this Court has yet to apply it in that context (which is a good reason why the Court should not get involved at this preliminary and rushed stage, *see Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief)). But the Court has had the opportunity to apply RFRA's "sister statute," the Religious Land Use and Institutionalized Persons Act (RLUIPA), in the prison context. *Holt*, 574 U.S. at 356. That is instructive because prison officials also assert interests in security and safety, courts recognize those officials' expertise, and this Court considered whether RLUIPA allowed for deference to those assertions. *Holt* establishes that the Navy's concept of military deference in the face of RFRA is mistaken.

Like deference to military judgment on operational needs, this Court has generally acknowledged that "prison security is a compelling state interest, and that deference is due

[16] In *Webster*, the court held that the Army satisfied RFRA's exacting standard, noting that the Army made "numerous allowances" for the military defendant, including by reasonably accommodating his religious practices. 65 M.J. at 947. "The Army afforded him the opportunity to request relief as a conscientious objector. The Army gave him the right to request reasonable accommodation of his religious practices. Finally, although apparently not required to do so by any regulation, appellant's commander generously allowed appellant to deploy with his unit in a non-combatant role. We conclude that the First Amendment does not require anything more . . ." *Id.* (cleaned up).

to institutional officials' expertise in this area." *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005). But in *Holt*, this Court unanimously rejected the lower courts' deference to prison officials' judgment that forbidding short beards was necessary for security, noting that RLUIPA "does not permit such unquestioning deference." 574 U.S. at 364. The Court applied a searching analysis of the prison officials' proffered reasons for the beard restriction and the denial of the prisoner's accommodation request and ultimately rejected the prison official's arguments as insufficient to meet their burden. *Id.* at 364–69. The Court emphasized that applying less than RLUIPA's demanding standard of scrutiny would shirk the Court's responsibility given by Congress:

> RLUIPA, *like RFRA*, "makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress." That test requires the Department not merely to explain why it denied the exemption but to prove that denying the exemption is the least restrictive means of furthering a compelling governmental interest. Prison officials are experts in running prisons and evaluating the likely effects of altering prison rules, and courts should respect that expertise. But that respect does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard. And without a degree of deference that is tantamount to unquestioning acceptance, it is hard to swallow the argument that denying petitioner a ½–inch beard actually furthers the Department's interest in rooting out contraband.

Id. at 364 (emphasis added) (quoting *Gonzales*, 546 U.S. at 434).

It is hard to see how RFRA's text could allow a different result in the military context. It is also difficult to see how the Court's reasoning in *Holt* would not equally apply here. While the Court has acknowledged that "[s]temming the spread of COVID-19 is unquestionably a compelling interest," *Roman Cath. Diocese*, 141 S. Ct. at 67, that is not the end of the analysis, *see Holt*, 574 U.S. at 363–64. The Navy stresses Admiral Lescher's assertion (and that of other high-ranking officials) that vaccinating NSW members against COVID

is critical for mission success. Appl. 4. But the Court does not have to agree with his statements in the face of evidence suggesting otherwise. *See* Part I.B *supra.* Adopting the Navy's concept of deference would therefore require the Court to both rewrite RFRA (something only Congress may do) and create new constitutional doctrine. The emergency docket presents neither the time nor place for blazing new legal trails. *See Does 1-3,* 142 S. Ct. at 18 (Barrett, J., concurring in the denial of application for injunctive relief) (noting difficulty of using "the emergency docket to force the Court to give a merits preview . . . without the benefit of full briefing and oral argument"); *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting) (noting the difficulty of resolving novel questions on the emergency docket).

C. The preliminary injunction is appropriate equitable relief under RFRA.

To the extent that the Navy now argues that the preliminary injunction is not "appropriate relief" under RFRA, 42 U.S.C. § 2000bb-1(c), or inconsistent with "traditional principles of equity jurisdiction," *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999), *see* Appl. 3, that argument has never been raised before, so it is waived. But even if not waived, it is meritless, and not only for the reasons above. What is meant by the phrase "appropriate relief" in RFRA resembles relief available under 42 U.S.C. § 1983, which includes injunctive relief against government officials to preserve the status quo. *See Tanzin v. Tanvir*, 141 S. Ct. 486, 490–92 (2020). And injunctive relief against federal employees to preserve the status quo aligns with longstanding principles of equity. "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive

action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

III. The Navy Has Not Shown It Will Suffer Irreparable Harm Without a Stay and the Balance of Equities Weighs in Plaintiffs' Favor.

The Navy chafes at the fact that the lower courts did not blindly defer to their desire to force the thirty-five plaintiffs to accept vaccination despite their sincerely held religious beliefs. Respectfully, that does not mean that the Navy will suffer irreparable harm without the Court's intervention at this preliminary stage of the case. As discussed above, the preliminary injunction does not require the Navy to deploy anyone. *See* Statement Part III *supra*. And in prohibiting adverse action being taken against plaintiffs because of their religious accommodation requests, the injunction tracks what military policies require and also preserves the status quo while this case is litigated, so it cannot be said that the Navy is being harmed. *See* Part II.A *supra*. The evidence shows that plaintiffs and other unvaccinated servicemembers participated fully in the Navy's missions throughout the COVID pandemic, *see* Part I.B.2 *supra*, and the Navy points only to one non-NSW example from the earliest days of the pandemic, when a more dangerous and virulent strain was circulating, and when zero servicemembers were vaccinated, to support its claim, *see* Appl. 26-27. Elsewhere, the Navy merely asserts that "past good fortune is no guarantee of future success." Appl. 30. But as this Court has recognized, "simply showing some 'possibility of irreparable injury,'" in the context of a stay pending appeal, is insufficient. *Nken*, 556 U.S. at 434–35 (citation omitted). With 99% of the force vaccinated and the virus weakened, the Navy cannot show that anything remotely like the U.S.S. *Roosevelt*'s serious outbreak is likely to happen again. And the Navy may require genuine mitigation measures (as have

been successful in the past, even during large-scale foreign deployments in the middle of the pandemic without a vaccine) if it determines that plaintiffs present an elevated risk to anyone.

Plaintiffs, on the other hand, will certainly suffer irreparable injury if the Court grants the partial stay. The Navy's stay application does not dispute that plaintiffs' religious beliefs are substantially burdened by the vaccine mandate. If the Court stays the preliminary injunction, plaintiffs will be subject to the same hostile and discriminatory actions the Navy took against them before the injunction was entered. And "[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) (plurality op.). Because plaintiffs "are irreparably harmed by the loss of free exercise rights 'for even minimal periods of time'; and the [Navy] has not shown that 'public health would be imperiled' by employing less restrictive measures," plaintiffs "are entitled to [relief pending adjudication]," as the district court granted, and as the court of appeals affirmed. *Tandon*, 141 S. Ct. at 1297 (quoting *Roman Cath. Diocese*, 141 S. Ct. at 68.)

* * *

It is true that "[m]embers of this Court are not public health experts," nor are they military officers. *Roman Cath. Diocese*, 141 S. Ct. at 68. "But even in a pandemic, the Constitution cannot be put away and forgotten." *Id.* The preliminary injunction protects plaintiffs from the immediate effects of the Navy's violation of their religious liberty, and this Court should not deny plaintiffs that interim protection while this case proceeds.

CONCLUSION

The application for partial stay of the district court's preliminary injunction should be denied.

Respectfully submitted.

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MARCH 2022