

In the Supreme Court of the United States

LT. COL. JONATHAN DUNN, *Applicant*,

v.

LLOYD J. AUSTIN, III, in his official capacity as United States Secretary of Defense;
FRANK KENDALL, in his official capacity as United States Secretary of the Air Force;
COL. GREGORY HAYNES, in his official capacity;
MAJ. GEN. JEFFREY PENNINGTON, in his official capacity;
UNITED STATES DEPARTMENT OF DEFENSE, *Respondents*.

TO THE HONORABLE ELENA KAGAN,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

APPENDIX TO EMERGENCY APPLICATION FOR INJUNCTION
PENDING APPEAL AND CERTIORARI OR, IN THE ALTERNATIVE,
FOR CERTIORARI BEFORE JUDGMENT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR 1 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JONATHAN DUNN, Lieutenant Colonel,

Plaintiff-Appellant,

v.

LLOYD J. AUSTIN III, US Secretary of
Defense; et al.,

Defendants-Appellees.

No. 22-15286

D.C. No. 2:22-cv-00288-JAM-KJN
Eastern District of California,
Sacramento

ORDER

Before: TASHIMA, FRIEDLAND, and BADE, Circuit Judges.

Order by Judges TASHIMA and FRIEDLAND; Dissent by Judge BADE.

Appellant's opposed emergency motion for an injunction pending appeal (Docket Entry No. 11) is denied. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Appellant's request to extend the grant of interim relief, set forth in the reply brief in support of the motion, is denied. The interim stay granted in the March 11, 2022 order is terminated.

The existing briefing schedule remains in effect.

BADE, Circuit Judge, dissenting:

I would grant the emergency motion for an injunction pending appeal and, in the absence of an injunction, I would extend interim relief to allow Appellant to seek emergency relief from the Supreme Court.

From: caed_cmecf_helpdesk@caed.uscourts.gov
Subject: Activity in Case 2:22-cv-00288-JAM-KJN Dunn v. Austin et al Minute Order.
Date: March 8, 2022 at 11:32 AM
To: CourtMail@caed.uscourts.dcn



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Case Name: Dunn v. Austin et al

Case Number: [2:22-cv-00288-JAM-KJN](#)

Filer:

Document Number: 25(No document attached)

Docket Text:

MINUTE ORDER issued by Courtroom Deputy G. Michel for District Judge John A. Mendez on 3/8/2022: On March 4, 2022, Plaintiff filed a Motion for Preliminary Injunction Pending Appeal. See ECF No. [24]. Having reviewed Plaintiff's arguments, the Court DENIES the instant Motion for the same reasons stated at the hearing denying the Motion for Preliminary Injunction. IT IS SO ORDERED. [TEXT ONLY ENTRY] (Michel, G.)

2:22-cv-00288-JAM-KJN Notice has been electronically mailed to:

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Donald Falk dfalk@schaerr-jaffe.com, 5994945420@filings.docketbird.com, paldocket@mayerbrown.com

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Case Name: Dunn v. Austin et al

Case Number: [2:22-cv-00288-JAM-KJN](#)

Filer:

Document Number: 16(No document attached)

Docket Text:

MINUTES for proceedings held via video conference before District Judge John A. Mendez: MOTION HEARING held on 2/22/2022. T. Molloy appeared via video for Plaintiff. C. Enlow appeared via video for Defendants. Plaintiff present via video. The Court DENIED Plaintiff's [4] Motion for Temporary Restraining Order converted to a Motion for Preliminary Injunction. Court Reporter: J. Coulthard. [TEXT ONLY ENTRY] (Michel, G.)

2:22-cv-00288-JAM-KJN Notice has been electronically mailed to:

Courtney Danielle Enlow courtney.d.enlow@usdoj.gov, fedprog.ecf@usdoj.gov

Thomas Murphy Molloy , Jr outreachtom@gmail.com

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
--o0o--

JONATHAN DUNN,) Docket No. 22-CV-288
) Sacramento, California
Plaintiff,) February 22, 2022
) 1:32 p.m.
v.)
)
LLOYD J. AUSTIN, III, ET AL.,) Re: Preliminary injunction
)
Defendants.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN A. MENDEZ
UNITED STATES DISTRICT JUDGE

APPEARANCES (via Zoom):

For the Plaintiff: LAW OFFICE OF THOMAS MOLLOY, JR., by
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For the Defendant: U.S. DEPARTMENT OF JUSTICE by
ASSISTANT U.S. ATTORNEY
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Proceedings reported via mechanical steno - transcript produced
via computer-aided transcription

1 SACRAMENTO, CALIFORNIA, TUESDAY, FEBRUARY 22, 2022

2 --o0o--

3 (In open court via Zoom.)

4 THE CLERK: Calling civil case 22-0288, Dunn v.
5 Austin, et al.

6 THE COURT: Good afternoon. And Counsel, if you
7 would, state your appearances for the record, please.

8 MR. MOLLOY: Good afternoon, Your Honor. This is
9 Thomas Molloy for plaintiff.

10 THE COURT: Okay. If you could get a little closer to
11 your mic. I had a hard time hearing you, Mr. Molloy.

12 MR. MOLLOY: Good afternoon, Your Honor. This is
13 Thomas Molloy for plaintiff.

14 THE COURT: Much better.

15 MS. ENLOW: Good afternoon, Your Honor; Courtney Enlow
16 for the government.

17 THE COURT: Good afternoon. This began last week as a
18 motion filed on behalf of Mr. Dunn, who I understand is also
19 observing the hearing this afternoon, so welcome to the
20 plaintiff.

21 As a temporary restraining order, the Court asked that
22 the parties fully brief, as much as possible in a week's time,
23 the issues raised by the TRO, again, on an expedited basis.
24 And to the lawyers' credit, they were able to submit full
25 briefs and supporting documentation within a week's time, so,

1 first, my compliments to the lawyers who probably didn't get
2 much sleep this week. These are wonderful briefs, excellent
3 briefs. It's an incredibly interesting issue, obviously, going
4 on around the country at this time, including our court. And I
5 always appreciate excellent lawyering and definitely had it in
6 this case.

7 It makes our job harder, in some ways, because the
8 arguments are so well formed and thought out, but it also makes
9 our job easier when we have good lawyers on both sides, so
10 thank you for that.

11 I've converted the TRO into a motion for preliminary
12 injunction. I know, Mr. Molloy, you raised the issue that
13 there may be further action taken against your client tomorrow,
14 but I don't think that really significantly changes the issues
15 as to whether injunctive relief should be granted either in the
16 form of a restraining order or a preliminary injunction.

17 Let me take up first -- and, again, because the briefs
18 are so well written, I don't have a lot of questions. And the
19 way I conduct hearings normally is simply to raise questions
20 and then I am prepared to rule today on the motion. I know
21 that both parties want some type of indication from the Court.

22 And as a further preface, as much as I would love to
23 issue a written order, that's not going to be possible. We're
24 extremely burdened in the Eastern District. I'm not sure if
25 the two of you are aware of how bad our court is, in terms of

1 the caseload that each judge carries. We're one judge down.
2 We've been one judge down or two judges down for the past
3 years. We only have six judges, four in Sacramento and two in
4 Fresno. We only have three in Sacramento right now. We've had
5 a caseload -- I've been on the bench almost 15 years --
6 anywhere from 900 to 1,200 cases. And as much as I would like
7 to issue a written opinion along the lines of the opinions that
8 the lawyers have sent me in this case, it's just not feasible.
9 I've got a lengthy criminal sentencing hearing on Friday; I
10 start a trial on Monday. And I have, as I said, I think
11 roughly 975 other matters that I get to handle right now. So
12 the transcript is going to serve as the Court's decision and
13 the discussions that we have and; in that vein, if there's
14 anything you want to add that isn't already briefed -- I will
15 cut you off if I think it's been thoroughly briefed and I
16 understand the arguments, but if you want to add something for
17 purposes of the record, please do so.

18 Ms. Enlow, let me start with you. I didn't
19 necessarily see this in your opposition, but the case raises a
20 question as to whether the plaintiff's belief in this case is,
21 in fact, religious, that -- the test being obviously that in
22 these cases the belief has to be religious, and it has to be
23 sincerely held. But I'm focusing more on the: Is this really
24 a religious belief or is this a political issue disguised as a
25 religious belief? And so I'm wondering if, in fact, the

1 defendants are challenging the plaintiff with respect to that
2 argument.

3 MS. ENLOW: We didn't raise it in the brief, Your
4 Honor, because the compelling interests and the less
5 restrictive means are so compelling for the government, but,
6 going forward, we reserve the right to challenge it. It is
7 questionable. He says that it's a religious ritual to take the
8 vaccine.

9 Col. Poel's declaration clearly says that taking the
10 vaccine -- putting the vaccine on the list of nine other
11 vaccines was based on scientific principles alone.

12 Lt. Col. Dunn also said he developed this belief
13 mid-September. Of course, that was three weeks after Secretary
14 Austin ordered everyone to get vaccinated, so it's a little
15 unclear why he didn't just go ahead and get vaccinated when he
16 was ordered to do so.

17 So while we didn't challenge it in the preliminary
18 injunction stage, we certainly intend to pursue that going
19 forward.

20 THE COURT: Do you think it's a basis for me for
21 denying injunctive relief at this stage, or do you think he's
22 adequately demonstrated to the Court that this really is a
23 religious-based belief?

24 MS. ENLOW: Your Honor, since we haven't briefed it or
25 put more evidence in the record on that, I would move to

1 compelling interest on least restrictive means to base Your
2 Honor's judgment on.

3 THE COURT: Okay. Mr. Molloy, my question is, it's
4 clear from Lt. Col. Dunn's declaration that this is the only
5 vaccine to which he objects. Isn't that inconsistent with his
6 argument and his position that this is clearly grounded in
7 religion?

8 Let me also expand that question. I'll let you
9 respond. My concern is when I read paragraph 11 of his initial
10 affidavit, not the second affidavit, that's the paragraph that
11 explains to the Court how this is grounded in a sincerely-held
12 religious belief.

13 There's a lot of reference to politics and political
14 officials and government officials and decisions by government
15 officials and very little discussion about the religious
16 grounding of his belief. And so it raised questions such as:
17 Is Lt. Col. Dunn worried about the health effects of the
18 vaccine?

19 Does he disbelieve scientifically-accepted views that
20 the vaccine is harmless to most people?

21 Does he believe that the COVID-19 vaccine may do more
22 harm than good?

23 Is his moral belief that being vaccinated would be a
24 sin an isolated moral teaching rather than a comprehensive
25 system of beliefs about fundamental or ultimate matters?

1 And if he's going to be consistent, shouldn't he ask
2 for a religious accommodation with respect to all vaccines in
3 order for the Court to find that he has raised a protected
4 religious belief in this case?

5 Those are my concerns when I read his affidavit. Go
6 ahead.

7 MR. MOLLOY: Thank you, Your Honor. The first thing I
8 would say in answer to your first question is no. I think that
9 the fact that Lt. Col. Dunn objects only to this vaccine, not
10 the others, actually strengthens his argument that it is a
11 religious objection here.

12 He's not a general antivaxxer. He's not opposed to
13 general health, you know, burdens that might come from
14 vaccines.

15 He really is opposed to what he takes to be a
16 religious ritual and government religious ritual.

17 And, as a Christian, there's ample evidence for this
18 throughout the Old Testament. So King Nebuchadnezzar, Shadrak,
19 Mishach, and Abednego refused to bow the knee to government
20 orders that conflicted with their religious orders or with
21 their religious conscience.

22 So there's ample Old Testament, religious, Christian
23 support for refusing even a highly intertwined and politically
24 charged -- in fact, oftentimes, the most politically charged
25 get to the crux of religious objections even more sharply

1 because, as a Christian, one must worship, bow down, serve only
2 God alone and not the government.

3 THE COURT: How do we go from a political mandate to
4 this becomes a -- it almost sounds like you're arguing it's the
5 establishment of a religion by the government, that President
6 Biden's directive and the Department of Defense's directive
7 that all military personnel need to be vaccinated is, in
8 effect, the establishment of a religion, which would violate
9 his beliefs that he can only worship one God and taking the
10 vaccine would be a sin. Explain that to me again.

11 MR. MOLLOY: Yes, Your Honor. So, first, I would just
12 reiterate, as Counsel Enlow said, they did not challenge the
13 sincerity, they did not challenge that it's a religious belief
14 and, in fact, all of the language by Lt. Col. Dunn is about it
15 being a sin, that it violates his religion, so just want to
16 reiterate that.

17 In terms of the substance of it, though, Lt. Col. Dunn
18 has -- the chaplain agreed, everyone in his chain of command.
19 No one doubts his sincerity. No one doubts that it's a sincere
20 religious belief, that it's substantive and that's it's a sin.

21 What Lt. Col. Dunn has explained --

22 THE COURT: I'm sorry to interrupt. I want to make
23 the record clear. This isn't a question about his sincerity.
24 It really focuses on is this a religious-based objection or is
25 it a political objection, that it doesn't fit the traditional

1 religious-based objections.

2 And there are other cases, obviously, out there where
3 certain individuals who are Catholic have opposed this vaccine
4 or some other vaccines on the basis that it may violate what
5 they believe are tenets of the Catholic Church. That's not
6 really this case. It's somewhat different.

7 And I'm really trying to understand the religious
8 underpinning to his objection. His affidavit is a bit general,
9 and I'm trying to -- and again, I also agree with both of you
10 that it wasn't fully briefed and it's not the primary issue,
11 but when I read briefs and get involved in cases like this,
12 curious questions like this come up and it may be an issue down
13 the road, so I wanted to give both of you an opportunity to
14 address it at this point.

15 MR. MOLLOY: Thank you, Your Honor.

16 And I admit, political and religious questions often
17 are intermixed, and that has not prevented the Supreme Court --
18 for instance, the Pledge of Allegiance cases, objecting to
19 those on religious bases. The Pledge of Allegiance is a highly
20 political act, and it gets really to the core of one's role in
21 society, one's allegiance to the government. So it's not
22 surprising that very politically charged questions would also
23 present really thorny questions of religious conscientious
24 objection. And that has not prevented the Court from
25 protecting religious objectors --

1 COURT REPORTER: I'm sorry, Counsel, I'm having a hard
2 time understanding you.

3 THE COURT: Yeah, I am too. You're breaking up. I
4 don't know if you want to lean in more or -- when you lean back
5 a little, we're having a hard time hearing you.

6 And run it by me again how you believe his objection
7 to only this vaccine actually strengthens the argument that
8 it's based -- it's religious based.

9 MR. MOLLOY: Yes, Your Honor. So just to repeat what
10 I had previously said, in case it was unclear, is, the Court
11 routinely looks at issues that are highly politically charged.
12 And I brought up the case of Pledge of Allegiance cases, which
13 really get at one's role in society.

14 And it's not surprising that such politically charged
15 questions will also present thorny issues for religious
16 objectives. In fact, that can almost guarantee it because
17 highly politically charged questions can raise the specter of
18 idolatry and serving only one God.

19 In terms of Your Honor's second question in terms of
20 general antivax, I think what that demonstrates is Lt. Col.
21 Dunn is not trying to hide a health objection, is not trying to
22 hide a general objection to vaccines in religious language.

23 He very clearly feels that this vaccine and all of the
24 governmental messaging around it, all of the required and
25 implied symbolic acts surrounding it present religious

1 questions.

2 He has taken more vaccines than pretty much any
3 civilian, but this particular vaccine, like Nebuchadnezzar,
4 like Shadrak, Mishach, Abednego, like Daniel, they felt that
5 they could not bow the knee that required that amount of
6 unthinking loyalty when it would result in personal --

7 THE COURT: Why can you bow the knee to a flu vaccine
8 but not to a COVID-19 vaccine if his objection isn't to the
9 health effects or that the vaccine is harmless, that the
10 vaccine actually does more good than harm? Explain that
11 difference. I'm using the flu vaccine as the example, but how
12 does that make it clear that this really is a religious-based
13 objection?

14 MR. MOLLOY: Well, Your Honor, I think what that gets
15 to is the surrounding messaging, symbolism, surrounding acts,
16 that's what makes something particularly religious.

17 The government messaging, the government compulsion,
18 the government demonizing of citizens who refuse to get the
19 vaccine, none of that was present with the flu vaccine. None
20 of that --

21 THE COURT: We lost him.

22 Mr. Molloy, you froze. You froze for a second.

23 Mr. Molloy, stop. You froze. Your connection is awful and
24 we're losing you, so I'm not sure what's going on. We don't
25 hear you at all, so find a spot where we can hear you.

1 MR. MOLLOY: My apologies, Your Honor. Is this
2 better?

3 THE COURT: Much better.

4 Okay. You were explaining to me -- I raised the flu
5 vaccine versus the COVID-19 vaccine issue, and you were
6 explaining to me how that doesn't -- shouldn't cause concern
7 for the Court.

8 MR. MOLLOY: Yes, Your Honor. So I believe Your
9 Honor's question gets to the context surrounding required acts
10 and the symbolic meaning of those required acts.

11 So as Lt. Col. Dunn stated in his affidavit, it really
12 was the general -- the symbolic gesture that he takes this
13 vaccine to require him to partake in the governmental messaging
14 about how all of the problems surrounding the corona virus
15 endemic, all of the not taking the vaccine makes one an immoral
16 person. All of that surrounding messaging goes into requiring
17 him to take the COVID-19 vaccine where none of that was present
18 with the general flu vaccine. And so the fact that he does not
19 object to run-of-the-mill flu vaccines I think really
20 strengthens the fact that this is a real religious objection
21 that Lt. Col. Dunn --

22 THE COURT: We lost you.

23 Ms. Enlow, are you still there? Ms. Enlow?

24 Is she muted?

25 Ms. Enlow? Oh, I love this. Ms. Enlow?

1 Okay. I'm going to take a break. You set this up
2 again.

3 THE CLERK: Okay.

4 (Recess at 1:51 p.m. to 2:11 p.m.)

5 THE COURT: Mr. Molloy and Ms. Enlow, we're back. We
6 apologize for the Zoom issues. I think I was almost done with
7 the first issue I had raised.

8 And, Ms. Enlow, I just wanted to give you an
9 opportunity if you wanted to add anything just on this issue,
10 which, again, wasn't really briefed but was just something that
11 I've been thinking about.

12 MS. ENLOW: No, Your Honor.

13 THE COURT: Or Mr. Molloy -- Mr. Molloy, I know you
14 got cut off. Anything further you wanted to add?

15 MR. MOLLOY: Oh, yes, sir. Just wanted to -- the
16 waiver point, again, the government has not briefed it and for
17 good reason, Your Honor. *Hobby Lobby*, binding precedent, makes
18 clear that federal courts shouldn't inquire into the
19 reasonableness of a religious belief. They can inquire into
20 the sincerity of a religious belief, of course, but *Hobby Lobby*
21 specifically says, I quote, "Federal courts have no business
22 addressing whether the religious belief asserted in a RFRA case
23 is reasonable."

24 And I think no one doubted the sincerity. The
25 chaplain's letter did not doubt sincerity. And the substance

1 of Lt. Col. Dunn's religious exemption, it's in Exhibit 2 of
2 his first affidavit, really kind of in depth --

3 THE COURT: And so the record is clear, I'm not
4 questioning the reasonableness. I'm simply questioning whether
5 this is a religiously-held belief or not or whether it's a
6 politically-based objection. And that, so the record is clear,
7 was the reason for my questions.

8 Let's turn to the issues that were briefed, the two
9 primary issues, among others and that is -- and this goes,
10 obviously, to likelihood of success on the merits in terms of
11 granting injunctive relief, whether there's a compelling
12 governmental interest, the policy that's been adopted by the
13 military and then the second part of that, and I think the guts
14 of this case is whether this is narrowly tailored.

15 Again, the law that both sides agree is applicable
16 here is that because this COVID-19 mandate, the policy adopted
17 by the military, does burden plaintiff's free exercise of
18 religion, the burden shifts to the government to show that the
19 application of the burden to plaintiff specifically furthers
20 the compelling governmental interest; and second, is the least
21 restrictive means of furthering that compelling governmental
22 interest.

23 Ms. Enlow, there were a number of arguments raised in
24 response to your arguments with respect to compelling -- the
25 compelling interest issue, the plaintiff arguing that the

1 Air Force does not have a compelling interest in vaccinating
2 Lt. Col. Dunn; arguments such as this action does not challenge
3 the mandate itself or the military's authority to require
4 vaccinations, it challenges the denial of a religious exemption
5 to a single officer. Defendants cannot justify that decision
6 by invoking a broadly formulated interest in favor of vaccines.

7 They go on to argue -- he goes on to argue, "Other
8 than the real possibility of a deployment, each step in
9 defendant's parade of horrors is implausible."

10 And he goes on to argue that "It's unlikely that Lt.
11 Col. Dunn will be infected because he has robust natural
12 immunity. It's unlikely that any new infection would have any
13 adverse effects on his health. In addition to his existing
14 immunity, he's an extremely healthy 40-year-old, and such
15 individuals are rarely sickened or hospitalized."

16 Third, "Although advanced treatments should almost
17 certainly be unnecessary, there's no reason that oral
18 antivirals, which can be taken at home, would not be available
19 to a deployed unit."

20 Fourth, that it's speculation that he might infect
21 other members of a unit.

22 And then fifth, his assertion that his unit might fail
23 to complete its mission should one or more members of the unit
24 become infected is a thoughtless insult to the dedication and
25 determination of the airmen in that unit.

1 I know there's a lot there, there's several pages of
2 argument, but I wanted to give you an opportunity to respond to
3 anything raised in the reply brief on this compelling interest
4 issue.

5 MS. ENLOW: Thank you, Your Honor. This comes down to
6 what level of risk does the military have to accept when they
7 deploy people abroad. This is not a generalized concern that's
8 just spread across the entire military. This is -- the
9 Air Force conducted an individualized assessment for Lt. Col.
10 Dunn and concluded that given his position in leadership, given
11 his position as a leader of a worldwide, rapidly deployable
12 unit, they get orders to go, and in 72 hours you could be
13 flying across the world, set up an airfield in an austere
14 location with no medical services available. Given all of
15 these factors, the Air Force concluded that he need to be
16 vaccinated in order to further the Air Force's compelling
17 interest in satisfying its mission.

18 And these airfields are used to support combat
19 operations, to support humanitarian aid, to support aid to
20 countries that are dealing with natural disasters. And if the
21 airfield is not set up within the four-hour time frame that
22 they're supposed to set up the airfield, then that risk not
23 only of this particular unit not reaching its goal, not
24 achieving its mission, but also has these trickle down effects.
25 And these trickle down effects can be very serious depending on

1 why the Air Force needed that airfield right then right there.

2 So the idea that this is some kind of broad
3 generalized assessment is false. They conducted the
4 individualized assessment required under RFRA.

5 Now, he presents this -- the string of "mights" that
6 you referenced earlier, Your Honor. That -- the string of
7 mights could happen. That's the point. They could absolutely
8 happen. The Air Force, the military itself has a lot of
9 experience with people getting sick on the battlefield and has
10 determined, based on its experience with that, based on the
11 science of the vaccines, that the way to minimize any kind of
12 risk of outbreak, any kind of risk of serious illness, risk
13 that somebody would have to get airlifted out of there, thus
14 taking away medical services from people that might get wounded
15 in combat, the Air Force doesn't want to take that risk. It
16 shouldn't have to take that risk.

17 The point of the Reserves is to deploy. That is his
18 job, to be ready to deploy. And he is not medically ready.

19 The Air Force has -- the secretary of the Air Force,
20 secretary of defense have both determined that these
21 individuals who are deploying need to be medically ready to go,
22 and especially for his unit that's going to deploy and within
23 72 hours he has to be ready. The Air Force does not have to
24 accept the risk that he might get seriously ill and have to be
25 medevaced out.

1 His assertions that there's treatments and it will be
2 fine because he's healthy, well, we've seen numerous reports,
3 I'm sure the Court's aware, of pure healthy people without any
4 kind of underlying conditions die from COVID. It's just
5 reality. They get hospitalized.

6 And the fact that he's saying, "Oh, well, there could
7 be treatments there," well, these are not areas where there's
8 necessarily going to be a hospital. There may not be anything
9 there. It might be a dirt strip. So the idea that there's
10 going to be these treatments available for him, that's just
11 based on nothing. It's entirely speculative.

12 THE COURT: One of the issues raised in other cases,
13 and in particular the case out of Florida, was -- I don't want
14 to call it a "criticism," but an observation by the Court that
15 they were bothered by the general nature of the letters, almost
16 a form letter rejecting these religious accommodation requests,
17 that, as Mr. Molloy points out, the number of these requests
18 that have been granted is minimal.

19 And then when you look further into what do the
20 letters say, you can see they've been written by a lawyer, not
21 by someone who's in the military, because they use all the
22 right buzz words.

23 And that concerned the judge in Florida because the
24 statute makes it clear that it's got to be an
25 individualized-based decision. What is it about this member of

1 the military that makes it compelling that he be vaccinated?

2 And so it raises a question in my mind. There's a
3 review process that I understand that each person goes through,
4 several levels, it looks like. So even though the letter
5 seemed to be almost a form letter, explain to me what went on
6 in these reviews of his request for a religious accommodation.
7 And do you think that satisfies the concern that was raised by
8 the judge in Florida?

9 MS. ENLOW: It absolutely does, Your Honor. Thank
10 you.

11 Major Streett's declaration lays this out in a lot of
12 detail, but as a -- to kind of succinctly say it, once a member
13 submits the religious accommodation request, his chain of
14 command gives endorsements whether they agree or disagree with
15 the request. They have no authority to grant or deny. It's
16 just whether they agree or disagree.

17 The member meets with a chaplain. The member meets
18 with a medical health provider to talk about the risk to not
19 getting vaccinated and what would happen if he doesn't get
20 vaccinated, like you can't go and deploy, for example.

21 And then this packet goes up to a higher level
22 commander. The Air Force is a little more decentralized than
23 the other services in that they have commanders of what they
24 called "Maj Com" or the things like that. The Air Force
25 reserve commander is what looked at his initial packet.

1 THE COURT: Does each --

2 Sorry to interrupt.

3 Does each person who's reviewing this religious
4 accommodation request, do they provide sort of a written
5 memorandum as to whether they endorse or not endorse?

6 The reason I ask is if this case proceeds and
7 Mr. Molloy asks for discovery, would there be, in effect, this
8 package of written endorsement or no endorsement for both
9 Mr. Molloy and the Court to look at, in terms of the level of
10 discussion and what was reviewed with the plaintiff?

11 MS. ENLOW: So, yes, it is written down.

12 THE COURT: Okay.

13 MS. ENLOW: The chain of command's recommendations are
14 written. I believe the chaplain writes a memo. There's at
15 least documentation about the medical review. And then there
16 is a --

17 THE COURT: Are there psychologists involved at all?

18 MS. ENLOW: That's a really good question. I don't
19 think so.

20 THE COURT: Okay.

21 MS. ENLOW: I believe it's just a medical,
22 immunization specialty or just a general health specialty.

23 And so then after the Air Force Reserve command --
24 commander makes a decision on the initial review, if there's an
25 appeal, like there was here, then the packet goes -- the

1 appeal -- the appeal and then the packet all go up to the
2 Air Force surgeon general for another independent review.

3 And the Air Force surgeon general is advised by a
4 religious resolution team. It's a multidisciplinary team. It
5 consists of chaplains, JAGs, medical professionals, and they
6 each also review the packet and they provide their assessment.

7 And so when the Air Force surgeon general is
8 getting -- what you see with this letter at the end, that is
9 based on his assessment, you know, informed by his team that's
10 informing him as well. So it is an individualized assessment.

11 The fact that the letter does not spell out every
12 single, you know, command duty or things that like that that he
13 has, that does not mean that it wasn't an individualized
14 assessment.

15 THE COURT: Okay.

16 MS. ENLOW: And the Court and for that, unfortunately,
17 is not engaging with that declaration for Major Streett or
18 with -- you know, with the facts that they are individualized.

19 THE COURT: Okay. Mr. Molloy, do you want to respond
20 at all? I know your reply brief covers this, but go ahead.

21 MR. MOLLOY: Yes, Your Honor. I would just say this
22 long, individualized process of review has resulted in all --
23 no exemptions for any airmen up until just a couple of weeks
24 ago, so I don't think that that really supports the idea that
25 the military, behind these boilerplate letters, is giving real

1 close scrutiny to an individual airman, their risks, their
2 missions, because it's resulted in the exact same thing, exact
3 same boilerplate letter every single time.

4 Second, I wanted to address -- I think it's telling
5 Ms. Enrow used the word it "might" result in these impairments
6 to the mission. I think that is correct. This could
7 theoretically happen. But the Air Force regulations are clear
8 that it has to have a real, not merely theoretical adverse
9 impact. And it's clear that that's not the case here where
10 only 28 airmen have been hospitalized in the entire period of
11 the pandemic, only 6 have died. So I do think this qualifies
12 as a theoretical, not a real impact.

13 THE COURT: Your client, if he was called up today to
14 go to New Zealand or Australia, couldn't do it. They wouldn't
15 allow him in the country.

16 Why shouldn't I be concerned about that? And there --
17 I guess there's other countries. I know the government raised
18 that in their opposition, but that's concerning to me. If I'm
19 issuing orders and I'm in the military and I say to your
20 client, to the Lieutenant Colonel, "Hop on the next plane,
21 you're going to be in New Zealand," and he says, "Oh, I can't
22 go there, I'm not vaccinated," how is that of benefit to the
23 military?

24 MR. MOLLOY: Well, two things, Your Honor, I would
25 say. First off, thankfully, we are now in a situation where

1 more and more countries are realizing that these draconian
2 COVID measures are no longer required. And country after
3 country, state after state, is -- including California, which
4 has had some of the stricter regulations in the U.S., is
5 realizing that these are no longer required and that COVID-19
6 is endemic.

7 Second, I would say even if all of that's true, the
8 military is in no worse position because if they get rid of
9 Col. Dunn or he's on inactive Ready Reserve, they're down an
10 airman anyway. And so allowing the exemption at least allows
11 the Air Force have a plus one to their roster, to someone that
12 they can maybe shift around and send to a different country.

13 THE COURT: Okay. And then lets talk about is this
14 narrowly tailored. Are there other alternatives out there that
15 would allow the government to accomplish its compelling
16 interest but not require vaccination? There wasn't -- there
17 was some mention, I don't think, Mr. Molloy, I got the
18 impression, we're not really talking about teleworking. I
19 didn't really consider that. I know it was raised, but I don't
20 think that's something that your client is either advocating or
21 pursuing. I just wanted to make sure that that's accurate.

22 MR. MOLLOY: Yes, Your Honor. That is accurate.

23 THE COURT: Okay. There's a lot of -- not a lot, but
24 a significant amount of argument on what I would call the
25 "natural immunity alternative." In affidavits submitted from

1 other cases, as the plaintiff writes in the reply brief, "While
2 it's true that the CDC recommends vaccination even for
3 individuals who have previously been infected, the relevant
4 question is not whether a vaccine might provide Lt. Col. Dunn
5 with some level of additional protection. The question is
6 whether natural immunity is roughly equivalent or superior to
7 the vaccine alone."

8 Is that the question, Ms. Enlow? Isn't natural
9 immunity the least restrictive alternative here; and if not,
10 why not?

11 MS. ENLOW: It is not, Your Honor. Col. Rans's
12 declaration and Col. Poel's declaration made clear that there's
13 no scientific consensus regarding the duration of any natural
14 immunity or the level of protection that previous infection
15 bestows upon an individual.

16 It's also unclear, for example, what variant plaintiff
17 had or how many antibodies he has, what level of antibodies is
18 even necessary to give someone immunity, what variant he was
19 infected with, what his level of protection might be against a
20 reinfection.

21 And because the science is unclear in the face of that
22 uncertainty, the military, in accordance with CDC guidance, has
23 determined that not being vaccinated is an unacceptable risk to
24 the health of service members and to mission accomplishment.

25 And the Air Force recognizes -- they have that

1 regulation AFI -- sorry. I'm now blanking on the Act -- 48110,
2 that's it, that says that prior infections for some diseases
3 may alleviate the need for vaccination, essentially. But
4 that's only when there's scientific proof that a person who has
5 measles, for example, is not going to get reinfected. We don't
6 have that with COVID. The science is unclear.

7 Col. Rans's declaration also points out that the
8 studies involving vaccines are -- there are more of them and
9 they're of higher quality, you know, control trials, things
10 like that, that we just don't have with these natural immunity
11 studies yet and, therefore, the military has assessed that it
12 is not a lesser restrictive means of accomplishing the same
13 interests in having everyone be healthy and ready to deploy.

14 And again, they couldn't deploy -- even having natural
15 immunity, you can't deploy, as Your Honor pointed out, to
16 certain countries.

17 THE COURT: Mr. Molloy writes in his reply brief,
18 talking about your opposition, "Instead of engaging with any of
19 the evidence presented by plaintiff, defendants simply throw up
20 their hands and claim there are too many unknowns to accept
21 natural immunity. Of course the efficacy of the vaccines
22 themselves is unknown, and claims about the level of protection
23 they provide has changed dramatically over the past year. We
24 were initially told that vaccine effectiveness was at least 97
25 percent at preventing symptomatic disease, severe and critical

1 disease and death. The CDC later admitted that vaccine
2 efficacy wanes after just a few months.

3 "More recently, the CDC has admitted that vaccines are
4 not as effective in preventing infection from the Omicron
5 variant. Given the ever-changing guidance relating to vaccine
6 efficacy, defendant should not be allowed to hide behind their
7 purported ignorance regarding the benefits of natural immunity,
8 which is, by now, well established."

9 MS. ENLOW: Again, I disagree that it's well
10 established.

11 Based on Col. Rans's and Col. Poel's declarations, it
12 is not. It is not. And in the face of that uncertainty, it is
13 entirely reasonable for the military to put an approved vaccine
14 on the list and not allow folks to rely on prior infection.

15 This is no different, really, from the flu vaccine.
16 Flu vaccines' effectiveness is only -- I mean, flu -- Col. Poel
17 said the flu vaccine was less than 50 percent some years, yet
18 the military still requires it, and they still require it and
19 they don't allow evidence of prior infections because the
20 military is concerned that people are going to get sick on the
21 battlefield and have to get airlifted out and cause harm to the
22 mission.

23 THE COURT: Okay. Mr. Molloy, anything further you
24 want to add to your brief?

25 MR. MOLLOY: Yes, Your Honor.

1 I would just say the government has the burden of
2 proving that, so if there's any unclarity in the data, that is
3 their burden of proof.

4 But the CDC even recognizes that persons who survived
5 a previous infection had lower case rates than persons who are
6 vaccinated alone and that the vaccine does not currently help
7 against transmission and infection, especially of omicron, so
8 to that point.

9 And then just one last thing. The only thing I wanted
10 to press generally is that the need for an immediately -- an
11 immediate preliminary injunction or at least a TRO taking
12 effect ideally before the end of the day simply because
13 Col. Haynes has already taken punitive action by removing
14 Lt. Col. Dunn from command, he's signaled his intention to
15 further punish him, and Lt. Col. Dunn expects further punitive
16 action when he reports for orders tomorrow. So only the Court
17 can prevent that, Your Honor.

18 THE COURT: Save that. We're going to get to
19 irreparable injury in a second.

20 The other issue that's raised in this discussion
21 regarding least restrictive measures is two others, routine
22 testing and masking and social distancing. I know you raised
23 those, Mr. Molloy. Honestly, I wasn't that convinced that
24 those arguments were compelling.

25 I don't see that routine testing or simply having Col.

1 Dunn mask and social distance would be least restrictive
2 alternatives that would carry out the compelling government
3 interest.

4 I've read your reply brief. I just wanted to see if
5 there's anything that you wanted to argue with respect to those
6 two other arguments you raised in terms of least restrictive
7 alternatives?

8 MR. MOLLOY: Yes, Your Honor. Just a simple point
9 that even if any one of those particular measures may not be
10 the most effective in isolation, them combined, along with the
11 robust protections the CDC recognizes natural immunity provides
12 is a much -- it's far less or far, yeah, less restrictive means
13 of achieving a compelling interest.

14 THE COURT: Okay. The other components of injunctive
15 relief, obviously, are likelihood of irreparable harm to the
16 plaintiff in the absence of preliminary relief.

17 Mr. Molloy just spoke to that briefly as to what is
18 likely to happen tomorrow. And, again, the argument that I see
19 in all these cases is that there is a presumption of
20 irreparable harm because constitutional and/or statutory rights
21 have been infringed.

22 Ms. Enlow, why doesn't the discussion end there?

23 MS. ENLOW: Well, of course, they haven't been
24 infringed, Your Honor. The government's brief makes clear that
25 the military has complied with RFRA. There's no RFRA

1 violation. And then we didn't discuss First Amendment.
2 Because the government wins on RFRA, we win on First Amendment
3 as well. So that presumption goes out the window.

4 I also don't think the Ninth Circuit has, in
5 particular, recognized that a RFRA violation is presumptive
6 irreparable harm.

7 So then we're just left with what's going to happen to
8 him now. And nothing that's going to happen to him is --
9 constitutes irreparable harm. And there's two points here.
10 The first one is these disciplinary actions that he's talking
11 about; he might get a letter of reprimand, there might be
12 something negative in his file that's issued tomorrow. That is
13 not irreparable.

14 There is an Air Force board for correction of military
15 records whose job it is, whose sole purpose is to correct any
16 error or injustice in a service member's record. So he can
17 always petition to that board. And if the board agrees with
18 him, he could have that removed from his record. It's like it
19 wasn't there.

20 THE COURT: Okay. That reminded me of a question I
21 wanted to ask because I think -- I got the impression from his
22 second affidavit that one of the things that can't possibly
23 happen is he can't be reinstated as a lieutenant colonel. Is
24 that accurate?

25 MS. ENLOW: He's still a lieutenant colonel. He

1 hasn't lost his rank, as far as I understand.

2 THE COURT: Right.

3 MS. ENLOW: He's been removed from command. Yes. So
4 he he's been removed from command and that is correct. That
5 it's a nonjusticiable action.

6 The Court cannot and should not entertain putting
7 someone back in command when his commander has lost confidence
8 in his leadership and judgment. That should not happen and
9 cannot happen.

10 THE COURT: So he's ineligible for promotions as well,
11 right? No matter what, he's going to leave the military as a
12 lieutenant colonel?

13 MS. ENLOW: So promotions are considered by promotion
14 boards, and I wouldn't speculate what they would do based on
15 the record in front of them, but he would be -- he would be --
16 if he still refuses to get vaccinated, he would be removed to
17 the Individual Ready Reserve.

18 THE COURT: I get that. Let's assume, though, that
19 he's successful, ultimately successful in his lawsuit here, and
20 so he goes back to the Air Force board, he gets his military
21 record corrected, but he can't advance any further in the
22 Air Force. He can't -- I don't know what's after lieutenant
23 colonel. Colonel, I would assume.

24 MS. ENLOW: Yes.

25 THE COURT: He will never become a colonel. Is that

1 right, Mr. Molloy? Is that accurate?

2 MR. MOLLOY: Yes, Your Honor. Being relieved from
3 squadron command because of lack of faith from the commander,
4 any type of recommendations that would come from his commander,
5 there are just so many ways when a promotion board sees that,
6 he's not going to be -- he's not going to be promoted. And
7 that's definitely so if he's transferred to the inactive Ready
8 Reserve.

9 THE COURT: If he's ultimately successful, does he get
10 backpay?

11 MS. ENLOW: Yes, Your Honor. He can get backpay if
12 he's ultimately successful.

13 THE COURT: Okay. Okay.

14 MS. ENLOW: He can be reinstated into the Reserves
15 with backpay.

16 THE COURT: But he would be -- again, he would be
17 reinstated as a lieutenant colonel, correct?

18 MS. ENLOW: Which is what he is now.

19 THE COURT: Okay.

20 MS. ENLOW: Yes.

21 THE COURT: But if he's reinstated, why would he not
22 be eligible, then, at that point, for promotions? If his
23 military record is cleared up and he's back and reinstated --
24 fully reinstated, why would he not be eligible for a promotion?

25 MS. ENLOW: So you're correct. He would be eligible

1 for a promotion. It's a promotion board that would consider
2 it.

3 THE COURT: Okay. Mr. Molloy, do you agree with that?

4 MR. MOLLOY: No, Your Honor, I do not.

5 So the promotion board is in October. So all the
6 materials have to be before there.

7 And that promotion board, what they're going to see is
8 that Lt. Col. Dunn was removed from squadron command because
9 his superior officer lost faith in him, did not consider him
10 effective to be a leader of men, all of that, to submit a
11 lawful order. And that's discounting even any "around the
12 side" recommendation letters that have to come from the
13 superior officers. That's -- whether he can even find any
14 other command anywhere else in the Air Force for him to
15 continue to gain that experience and continue to gain that --
16 those items on his resumé. So he's effectively been sidelined
17 from any opportunities that would -- the promotion board would
18 look to when considering his advancement to the rank of
19 colonel, Your Honor.

20 THE COURT: Okay. I know we're speculating a little
21 as to what could happen. And I know this puts -- in effect, it
22 puts a big obstacle in his way. But it sounds to me as if he's
23 not absolutely prohibited from being promoted if he actually is
24 successful in his lawsuit and clears up his military record and
25 is reinstated. There's nothing that says because he's now been

1 relieved of his command that he absolutely can no longer be
2 promoted. Is there something? Go ahead.

3 MR. MOLLOY: Yes, Your Honor. He would miss that
4 October review board, and there's no second chance for that.
5 So if he misses that October 22 review board, it's over.

6 THE COURT: Why? I mean, is he retiring? Is he
7 leaving the military? Is he --

8 MR. MOLLOY: Your Honor, because he'll miss all
9 service opportunities between now and then. And so he's going
10 to have, essentially, no military service for that October
11 review board to review when assessing him for promotion.

12 THE COURT: But is there a review board every year?

13 MR. MOLLOY: I don't know the exact timing of every
14 review board, Your Honor.

15 THE COURT: Okay. We're speculating a little. Okay.
16 I get it.

17 And then the third and fourth elements of injunctive
18 relief which get combined in these cases are balance of
19 equities and the injunction is in the public interest. Both of
20 you have thoroughly briefed those issues. I really don't have
21 questions with regard to those issues.

22 Anything further that either counsel want to add?
23 We'll take a short break, then I'll come back out and let you
24 know my decision on the motion for injunctive relief.

25 But, Mr. Molloy, starting with you, anything further

1 that you want me to add?

2 MR. MOLLOY: Yes, Your Honor. I would just like to
3 clarify if Lt. Col. Dunn misses that October 2022 promotion
4 board, it is possible that in a future board he could be
5 promoted, but all of that time of missing squadron command and
6 missing military opportunities, that's gone forever. He is
7 behind forever from that now.

8 THE COURT: Okay. Thank you for that.

9 Ms. Enlow, anything further?

10 MS. ENLOW: No, Your Honor. Thank you.

11 THE COURT: Okay. Give me a few minutes and then
12 we'll come back out and discuss the Court's decision on this
13 motion. Thank you so much for responding to my questions.

14 (Recess at 2:44 p.m. to 2:57 p.m.)

15 THE COURT: Okay. Back on the record. If you freeze
16 up again, it's on our end, so we'll let you know. Wave your
17 hands or something and let me know if you cannot hear me.

18 Okay. As I indicated, I am prepared to issue a ruling
19 on this motion today. I know that, as I said, the parties
20 would appreciate a ruling. I know the plaintiff would
21 appreciate a ruling, given all that's going on, on a daily
22 basis. Again, I wish I could issue a -- and have the time and
23 the lack of 1,000 cases to issue a more comprehensive written
24 ruling, but the transcript is going to have to serve as the
25 Court's ruling.

1 As with all motions for preliminary injunction, you
2 start with the legal principle that preliminary injunctions are
3 extraordinary remedies and that courts should only issue
4 injunctive relief if, in fact, the four elements of injunctive
5 relief, likelihood of success on the merits, irreparable harm,
6 balance of equities and the injunction is in the public
7 interest have been demonstrated.

8 This issue, the issues raised by this lawsuit, place
9 burdens on the government to prove to the Court, in particular
10 as we discussed in this case that the policy in this case, the
11 requirement of vaccinating or taking a COVID-19 vaccination is
12 in furtherance of a compelling governmental interest and, in
13 fact, that the government is employing the least restrictive
14 means of furthering that compelling governmental interest.

15 In terms of -- and focusing just -- there are two
16 claims here upon which the plaintiff is basing his motion, his
17 claim under the Religious Freedom Restoration Act and then his
18 claim -- his free exercise claim under the First Amendment.
19 And the Court will take up both of those claims as to whether
20 there's a basis for injunctive relief.

21 In terms of whether this policy is in furtherance of a
22 compelling governmental interest, is there a likelihood of
23 success on the merits that the Court would find that the policy
24 is not in furtherance of a compelling governmental interest?
25 The evidence and the arguments at this point do convince the

1 Court that this policy is, in fact, in furtherance of a
2 compelling governmental interest.

3 As courts have said over and over again, and this
4 Court takes to heart, the Court must give great deference to
5 the professional judgment of military authorities concerning
6 the relative importance of a particular military interest.

7 The government -- I'm sorry. The military has argued
8 in this case that the mandatory vaccination policy against
9 COVID-19 is necessary to protect the force and defend the
10 American people, that it's necessary to ensure military
11 readiness and it's necessary to ensure the health and safety of
12 airmen and prevent the spread of infectious disease.

13 This comes down to me, to this Court, in terms of what
14 Ms. Enlow raised, as to what is an acceptable level of risk.
15 What level of risk is appropriate is the way that Ms. Enlow
16 phrased it and argued it.

17 And, again, in this Court's view, the acceptable level
18 of risk is a military decision that deserves great deference.
19 And given that deference in these circumstances, it's clear to
20 me that just on that issue of whether there is a compelling
21 governmental interest that's been demonstrated here, that that
22 issue comes out in favor of the military.

23 The plaintiff is not medically ready to deploy 100
24 percent, as we discussed. There are still -- even though
25 things change from day-to-day and month to month, I can only

1 take this case as we sit here today. He's not medically ready
2 to deploy to certain areas of the world where he might be
3 required to deploy.

4 And it does come down, as I said, to what level of
5 risk is appropriate. If the military can eliminate almost all
6 risk through this policy, then there is a compelling
7 governmental interest. And if it's going to impact, as the
8 government has argued or possibly impact -- I don't think it's
9 speculation that it is a possibility that this could impact
10 both military readiness and the need to adequately deploy in a
11 fashion that the military wants deployment to occur, that the
12 policy is necessary.

13 The tougher issue is, is this the least restrictive
14 means of furthering this compelling governmental interest?

15 The government argues that the practice of vaccination
16 and ordering the COVID-19 vaccination for all members of the
17 Air Force is, in fact, the least restrictive means in fully
18 accomplishing what the Court has found to be a compelling
19 governmental interest.

20 There were, as we discussed, at least four reasons
21 raised by the plaintiff as to why requiring the plaintiff to be
22 vaccinated, why it is not, in fact, the least restrictive means
23 of furthering the government's compelling governmental
24 interest.

25 The government fails to satisfy this test when there

1 are, in fact, other alternatives of achieving its goal without
2 imposing a substantial burden on the plaintiff's exercise of
3 religion.

4 Here, again, the Court finds that at this stage of the
5 proceedings, obviously the case has only been in front of the
6 Court for a week and there is a lot more evidence that would be
7 presented over time, but as we sit here today, the Court does
8 find that the government has met its standard of showing why
9 the proposed alternatives are not viable options.

10 First, although it was briefed, it really wasn't
11 pursued, the idea that teleworking might be a least restrictive
12 alternative. I think both sides agree that that's not an issue
13 that the Court needs to take up or is really being pursued.
14 You obviously cannot telework when you're deployed.

15 The second is the closer issue, the tougher issue in
16 these cases. And I wanted to also mention, as the briefs do
17 mention, we're operating in these cases right now in an area
18 of, in effect, first impression.

19 While the parties have done an excellent job of giving
20 the Court decisions issued by district court judges from around
21 the country facing similar issues, almost identical issues to
22 this Court, there's no Ninth Circuit precedent, there's no
23 Supreme Court precedent in which this statute has been applied
24 in a military context.

25 Obviously these cases will be appealed and we'll start

1 getting some guidance, but we're operating, as I've done in
2 many cases over the past few years, in an area where there's no
3 case on point, there's no precedent on point. And, again, you
4 need to look simply at instructive cases in other areas, but
5 none of these cases are binding on this Court.

6 So the issue is whether the natural immunity argument
7 raised by the plaintiff is a sufficient alternative, is a least
8 restrictive alternative that the Air Force should follow here.
9 And the argument that was raised is that right now there is no
10 scientific consensus and it's not well established in the face
11 of that uncertainty. It's not well established in terms of the
12 data concerning natural immunity and, in the face of that
13 uncertainty, that the Court should not and cannot accept that
14 and find that that is, in fact, the least restrictive means of
15 furthering the compelling government interest here.

16 It was several Supreme Court judges that said that
17 judges aren't scientists. This issue involves a lot of
18 science. I appreciate the affidavits, but affidavits aren't
19 subject to cross-examination, they aren't subject to full-blown
20 hearings. And while they're helpful --

21 I lost Mr. Molloy. Okay.

22 -- they don't replace full-blown hearings or a
23 full-blown explanation of issues like this.

24 And absent that, I am, like many judges, reluctant to
25 make a scientific determination. And I do agree with the

1 government that on this issue there is a lack of consensus, and
2 it's not well established that a natural immunity is effective,
3 more effective or as effective as the vaccine.

4 And given that uncertainty, the Air Force here has
5 determined that the best way to minimize risk is to require
6 vaccination. Again, there are host countries that require
7 vaccination and given the need for the military to be able to
8 deploy the plaintiff on short notice to any location, the
9 natural immunity alternative isn't feasible.

10 The plaintiff raises another argument that routine
11 testing would be another least restrictive means of furthering
12 a compelling government interest. The Court finds, however,
13 that it's not always feasible to get the testing done,
14 especially when you have to deploy quickly, and to get testing
15 done within the time period required.

16 In the event that plaintiff did, in fact, test
17 positive, the military would be forced to scramble to find a
18 replacement. The military shouldn't be forced to scramble in
19 these types of situations.

20 Again, the Court raises the fact raised by the
21 defendants that there are a number of host nations that require
22 vaccination for members to enter their countries. And, again,
23 that wasn't specifically addressed by the plaintiff in the
24 opposition -- in the reply brief.

25 As another district court also explained, the speed of

1 transmission usually outpaces test results, making test result
2 availability not an effective alternative measure.

3 And then finally, masking and social distancing is
4 another means that was raised by the plaintiff. It's not,
5 again, the Court finds, feasible under these circumstances and
6 given the plaintiff's specific responsibilities and duties in
7 his role as the -- formally as the leader of -- I think it was
8 up to at least 40 men.

9 We lost Mr. Molloy again.

10 Mr. Molloy, can you hear me? No.

11 Ms. Enlow, can you hear me?

12 MS. ENLOW: Yes, Your Honor.

13 THE COURT: Okay. So it's just Mr. Molloy right now.
14 You're in Washington, D.C., right?

15 MS. ENLOW: Yes, I am.

16 THE COURT: Okay. I think Mr. Molloy is in Texas.
17 He's back.

18 Can you hear me, Mr. Molloy?

19 MR. MOLLOY: Yes, Your Honor, I can. Yes, Your Honor.
20 I'm sorry.

21 THE COURT: Okay. All right. And so I -- my finding
22 with respect to the preliminary injunction motion is that, in
23 fact, the government has demonstrated that requiring the
24 vaccination -- requiring the plaintiff to be vaccinated, the
25 COVID-19 vaccine, is, under these circumstances, these specific

1 circumstances, the least restrictive means of furthering the
2 compelling governmental interest.

3 And again, as I have mentioned previously, I
4 recognize, and there's a lot of discussion in the cases that I
5 read, that military members are not excluded from the
6 protection of statutes or constitutional rights. That is
7 discussed over and over again.

8 But these same cases also make it clear that the Court
9 should be more deferential to the defendant's judgment on what
10 is required to obtain maximum readiness of the military.

11 There's a case out of the District of Columbia,
12 *Singh v. McHugh*, which is cited by the defendants in that case.
13 The Court noted the need to respect military judgment while
14 still applying RFRA's strict standard.

15 For those reasons, the Court does find that the
16 government is likely to show that the vaccination is the least
17 restrictive means of achieving a compelling interest and that
18 the plaintiff is unlikely to succeed on the merits of the RFRA
19 claim.

20 I also would find that the plaintiff has not
21 demonstrated a likelihood of success on his free exercise
22 claim.

23 The Supreme Court has held that the right of free
24 exercise does not relieve an individual of the obligation to
25 comply with a valid and neutral law of general applicability on

1 the grounds that the law prescribes conduct that his religion
2 prescribes.

3 A law that is neutral and of general applicability
4 need not be justified by a compelling governmental interest
5 even if the law has the incidental effect of burdening a
6 particular religious practice. A law failing to satisfy these
7 requirements must be justified by a compelling governmental
8 interest and must be narrowly tailored to advance this
9 interest.

10 There's a recent Ninth Circuit case and not a case
11 involving military but involving a school district, *Doe v.*
12 *San Diego Unified School District*, a 2021 Ninth Circuit case.
13 In that case, the Ninth Circuit found that a student
14 challenging her school district's vaccine mandate, which did
15 not allow for a religious exception, was not likely to succeed
16 on a free-exercise claim, as she had not raised a serious
17 question about whether the mandate was neutral or generally
18 applicable.

19 As to neutrality, the Ninth Circuit noted that the
20 terms of the mandate did not make any reference to religion,
21 nor had the student shown a likelihood that the mandate was
22 implemented with the aim of suppressing religious belief rather
23 than protecting the health and safety of students, staff and
24 the community.

25 Turning to general applicability, the Court noted --

1 the Ninth Circuit noted that the only exempted students were
2 those who qualified for a medical exemption, which furthered
3 the government's interest in protecting student health and
4 safety, and so it did not undermine the district's interest as
5 a religious exception would and, accordingly, the mandate was
6 subject to rational basis.

7 Similar to what is involved here, the terms of the
8 Air Force mandate do not make any reference to religion, and
9 plaintiff has not claimed and does not claim that the mandate
10 was implemented with the aim of suppressing religious belief.

11 The fact that the Air Force has granted medical and
12 administrative exemptions does not render the mandate not
13 generally applicable. And as the Ninth Circuit recognized in
14 the *Doe v. San Diego Unified School District* case, granting the
15 medical exemption furthers their interest in ensuring military
16 readiness and the health of their members as requiring a
17 service member who is, for example, allergic to a component of
18 the vaccine would harm their health.

19 Accordingly, these exemptions do not undermine the
20 government's interests the way a religious exemption would and,
21 thus, the government is likely to show that the mandate is
22 generally applicable and does not violate the free exercise
23 clause.

24 In the event that a court -- appellate court might
25 believe, under the free exercise claim, that it's subject to

1 strict scrutiny for the same reasons that the Court has found
2 that there's not a likelihood of success on the Religious
3 Freedom Restoration Act, I also believe that the free exercise
4 challenge would fail as well for the same reasons as the Court
5 provided with respect to the Religious Freedom Restoration Act.

6 In terms of the likelihood of irreparable harm to the
7 plaintiff and the other factors, given that the Court has found
8 that there is not a likelihood of success on the merits of the
9 two claims, the Court does not have to reach those issues, but
10 I -- in terms of if it assists both the litigants and the
11 appellate court, I think the irreparable harm issue is a close
12 issue. I think it requires some further evidence.

13 There obviously is a number of cases, precedent, that
14 indicates that there simply -- a court should find simply that
15 there's a presumption of irreparable harm when a constitutional
16 or statutory right has been infringed, but in a case where
17 plaintiff has failed to demonstrate a sufficient likelihood of
18 success on the merits, then a presumption wouldn't apply.

19 The plaintiff has argued that he is -- he's already
20 suffered and he's likely to suffer irreversible harm to his
21 career and reputation if he is removed from command.

22 I'm not sure the evidence is clear on that at this
23 stage, as evidenced by the Court's questions on what could
24 happen if he is ultimately successful in his lawsuit.

25 Military administrative and disciplinary actions,

1 including separation, are not, at least at this point in the
2 Court's review of the evidence, not irreparable injuries.

3 It appears that the plaintiff could later be
4 reinstated and provided backpay if he did prevail on his claim.
5 So at this point I would find that the plaintiff, because he
6 hasn't shown a likelihood of success, has also not met his
7 burden on demonstrating a likelihood of irreparable harm.

8 And then the last factor is balance of equities in the
9 injunction and public interest, third and fourth requirements
10 of a preliminary injunction. Those two requirements merge when
11 the government is involved. And in this case, again, court's
12 are to give great deference to the professional judgment of
13 military authorities concerning the relative importance of a
14 particular military interest.

15 In *Winter*, the primary Supreme Court case that set
16 forth the requirements for issuance of a preliminary
17 injunction, the Supreme Court, in fact, reversed the granting
18 of a preliminary injunction on the Navy on just the balance of
19 equities in the injunction and the public interest factors
20 alone.

21 The Court in *Winters* noted the importance of
22 plaintiff's ecological, scientific and recreational interest in
23 marine mammals but found those interests were plainly
24 outweighed by the Navy's need to conduct realistic training
25 exercises to ensure that it is able to neutralize the threat

1 posed by enemy submarines. Again, similarly here, the public's
2 interest in military readiness and the efficient administration
3 of the federal government does outweigh plaintiff's claims of
4 job-related and pecuniary loss.

5 Serious questions have been raised. This is not,
6 obviously, given what's gone on around the country in other
7 cases, a case that district courts don't need further guidance
8 on; but, as I mentioned, at this stage a preliminary
9 injunction, especially enjoining the military, given all that's
10 going on in the world at this time, it would be an
11 extraordinary remedy in this Court's mind. And it can only be
12 granted upon a clear showing that the plaintiff is entitled to
13 the relief that he seeks here.

14 Courts should be and this court in particular is
15 reluctant to enjoin the military when military readiness is at
16 stake. I thought the discussion in the Texas case -- no. It
17 was Georgia, I'm sorry -- by the judge in Georgia was
18 particularly instructive even though I disagreed with where he
19 came out on the issue, but there's a lot of discussion in this
20 case and other cases I've seen in which the Court talks about
21 how important it is for judges and district courts to seriously
22 weigh what type of anticipated interference there is with the
23 military function; would an injunction seriously impede the
24 military in their performance of vital duties.

25 The cases strongly suggest that these type of cases

1 militate strongly against judicial review. We are entitled to
2 review and the plaintiff is certainly entitled to his day in
3 court, given the serious nature of his claim and the fact that
4 it involves both statutory and constitutional issues.

5 But the judge in the Georgia case, again, which went
6 in favor of the Air Force officer, it was an Air Force officer
7 versus Lloyd Austin, says that "Courts must consider the extent
8 to which the exercise of military expertise or discretion is
9 involved, and courts should defer to the superior knowledge and
10 experience of professionals in matters such as promotions or
11 orders directly related to specific military function." And he
12 writes over and over again, "Judges don't make good generals."
13 I couldn't agree with that statement more.

14 These are difficult issues that you're asking a
15 district court to make. And given the role of the military in
16 protecting the American people and people around the world, I
17 am reluctant to issue injunctive relief under these
18 circumstances absent a clear -- a clearer or a clear showing
19 that such injunctive relief should be granted.

20 That's really where I come out and where I disagree
21 with the other cases that have been submitted, particularly by
22 the plaintiff, where injunctive relief has been granted by the
23 district court judge.

24 Hopefully I've made my decision clear, the basis for
25 my decision. The motion for preliminary injunction is denied.

1 And I know that this will be pursued. Hopefully the transcript
2 will be clear enough.

3 And again, I truly appreciate the lawyering in this
4 case. I know it will continue as it moves up through the
5 appellate courts. And given what's going on all around the
6 country, it may end up in the Supreme Court. But thank you for
7 contributing to the discussion and the legal issues, and we'll
8 see where we end up. Thank you both.

9 Sorry, again, for the Zoom interruptions. We're going
10 to go back to live hearings starting March 1st, so I appreciate
11 your patience as well. Okay. Have a good afternoon.

12 MR. MOLLOY: Thank you, Your Honor.

13 MS. ENLOW: Thank you, Your Honor.

14 THE COURT: Thank you.

15 (Concluded at 3:29 p.m.)

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C E R T I F I C A T E

I certify that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled matter.



JENNIFER L. COULTHARD, RMR, CRR
Official Court Reporter

February 28, 2022
DATE