APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2022

[Filed March 10, 2023]

No. 22-5114
1:22-cv-00688-CKK

Navy Seal 1, et al.,
Appellees

Navy Seal 4,
Appellant

v.

Lloyd J. Austin, III, in his official capacity as Secretary of the United States Department of Defense, et al.,
Appellees

No. 22-5135
1:22-cv-00981-CKK

Mariella Creaghan, Captain,
Appellant

v.

Lloyd J. Austin, III, in his official capacity)
as the Secretary of the United States)
Department of Defense, et al.,)
Appellees)
_____)

BEFORE: Henderson, Wilkins, and Katsas, Circuit Judges

O R D E R

In light of the January 10, 2023 Memorandum issued by the Secretary of Defense rescinding the military's COVID-19 vaccination mandate for all service members, and the subsequent directives formally implementing the Secretary of Defense's rescission of the COVID-19 vaccination requirement, including but not limited to:

> the February 24, 2023 Memorandum issued by the Deputy Secretary of Defense,
>
> the February 24, 2023 Memorandum issued by the Secretary of the Air Force,
>
> the February 24, 2023 Memorandum issued by the Secretary of the Navy,
>
> the February 23, 2023 NAVADMIN 038-23 issued by the Chief of Naval Operations,

and

> the January 30, 2023 Memorandum issued by the Under Secretary of Defense.

It is **ORDERED**, on the court's own motion, that appellants' appeals of the denial of their preliminary

injunctions in No. 22-5114 and No. 22-5135 be dismissed as moot. The district court's judgments denying the preliminary injunctions are vacated. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). These actions are remanded to the district court for further proceedings consistent with this order.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 22-0981 (CKK)

[Filed May 12, 2022]

MARIELLA CREAGHAN, Plaintiff	)
v.	)
LLOYD AUSTIN, in his official capacity as Secretary of the United States Department of Defense, *et al.*, Defendants.	)

MEMORANDUM OPINION
(May 12, 2022)

Plaintiff Mariella Creaghan ("Plaintiff" or "Captain Creaghan") is a Captain in the United States Space Force and religious objector of one of several vaccines mandated by her branch of service. Captain Creaghan's [11] Motion seeks preliminary relief from this Court barring Defendants from "punishing, prosecuting, or taking any adverse or retaliatory action against Plaintiff as a result of, or arising from, or in conjunction with Plaintiff's request for a religious accommodation or Defendants' denial of Plaintiff's

religious accommodation." As the Court explained in a similar case, requests for religious exemptions from military-mandated medical requirements "raise particularly difficult questions that implicate a storm of colliding constitutional interests." *Navy SEAL v. Austin*, 2022 WL 1294486, at *1 (D.D.C. Apr. 29, 2022). Although this case is much closer than *Navy SEAL*, the Court remains concerned that it lacks the competence to "evaluate the merits of military [epidemiological and tactical] expertise" or to "weigh technical issues of public health and immunology" necessary to resolve the case. *Id.* at *5. Justiciability is all the more uncertain given the unfixed, evolving science on which *this* vaccination mandate is based. These concerns permeate the merits of Plaintiff's claims as well. Accordingly, after careful review of the pleadings,[1] the relevant legal and historical authorities, and the entire record, Court shall **DENY** Plaintiff's [11] Motion for Preliminary Injunction.

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[1] This Memorandum Opinion focuses on the following documents:

- Plaintiff's Complaint, ECF No. 3;
- Plaintiff's Memorandum in Support of Plaintiff Navy SEAL 4's Motion for Preliminary Injunction, ECF No. 14-1 ("Motion" or "Mot.");
- Defendants' Response in Opposition to Plaintiff Navy SEAL 4's Motion for Preliminary Injunction, ECF No. 22 ("Opp.");
- Plaintiff's Reply in Support of Plaintiff Navy SEAL 4's Motion for Preliminary Injunction, ECF No. 25 ("Repl.").

In an exercise of its discretion, the Court finds that holding oral argument would not be of material assistance in rendering a decision.

I. BACKGROUND

A. General Background

As this Court has previously noted, military vaccine mandates have a long history in this country. "[E]xecutive immunization requirements predate the birth of this country, with George Washington famously requiring members of the Continental Army to be inoculated against smallpox." *Feds for Med. Freedom v. Biden*, 25 F.4th 354, 357 n.6 (5th Cir. 2022) (Higginson, J., dissenting). Until August 2021, the United States Department of the Air Force ("Air Force") mandated a number of vaccines, including those against influenza, hepatitis A & B, mumps, rubella, and tetanus. *See* ECF 22-11 at 9. On August 24, 2021, the Secretary of Defense directed the Air Force to add another vaccine to the list—vaccination combatting COVID-19. *Id.* at 8. The Secretary of Defense explained that, "[t]o defend this Nation, we need a healthy and ready force." *Navy SEAL*, 2022 WL 1294486, at *2. Accordingly, "[a]fter careful consultation with medical experts and military leadership, and with the support of the President [of the United States], [the Secretary of Defense] determined that mandatory vaccination against coronavirus disease 2019 (COVID-19) is necessary to protect the Force and defend the American people." *Id.*

Consistent with that order, the Secretary of the Air Force, on September 3, 2021, directed all active duty servicemembers (within the Air Force and Space Force) to be fully vaccinated against COVID-19 by

November 2, 2021.[2] All Air Force orders are applicable to the United States Space Force ("Space Force") as a constituent branch of the Air Force and all Space Force servicemembers (called "Guardians"). ECF 22-4 at 1. On December 7, 2021, the Secretary of the Air Force issued an order providing for "medical, religious[,] or administrative exemptions," and temporarily exempted servicemembers from discharge or adverse action while exemption requests were pending.[3] The recognition of these exemptions was largely perfunctory, as requests for COVID-19 vaccination exemptions are governed by the same rules and regulations, active since 2018, that govern all other requests for exemptions from other vaccinations. ECF 22-4 at 2. As of April 26, 2022, the Air Force has granted 460 medical exemptions (including seven for Space Force Guardians), and 41 religious exemptions.[4]

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[2] DAF, "Mandatory Coronavirus Disease 2019 Vaccination of Department of the Air Force Military Members" (Sept. 3, 2021), https://www.hqrio.afrc.af.mil/Portals/149/Documents/COVID/20210903%20DAF %20SecAF%20Memo%20-%20Mandatory%20Coronavirus%20Disease%202019%20Vaccination%20of%20Department%20of%20the%20Air%20Force%20Military%20Members.pdf?ver=YogX1KMirgEUGIvzJtgUSw%3D%3D.

[3] DAF, "Supplemental Coronavirus Disease 2019 Vaccination Policy" (Dec. 7, 2021), https://www.af.mil/Portals/1/documents/2021SAF/12 Dec/Supplemental Coronavirus Disease 2019 Vaccination Policy.pdf.

[4] DAF, "COVID-19 Statistics - Apr. 26, 2022" https://www.af.mil/News/Article-Display/Article/2989918/daf-covid-19-statistics-apr-26-2022/.

Pursuant to that policy, AFI 48-110_IP (Oct. 7, 2013) *as amended* (Feb. 16, 2018), a Guardian seeking a religious exemption first submits a written request to the applicable commanding officer. ECF 22-5 at 2. The Guardian then consults with the applicable commanding officer and a medical military provider, who address, respectively, the effect of nonvaccination on the Guardian's mission and the Guardian's health. *Id.* at 4. The Guardian must also consult with an Air Force chaplain, and the chaplain assesses the sincerity and religiosity of the exemption request. *Id.* With these three assessments in hand, the omnibus request is reviewed by each commanding officer in the Guardian's chain of command. *Id.* at 5. Each commanding officer makes a recommendation (termed an "endorsement") as to whether to grant the exemption request, but the ultimate decision is made by the "approval/disapproval authority."[5] For Space Force Guardians, the approval authority is the Commander of Space Operations Command, Lt. Gen. Stephen N. Whiting. *See id.* at 18. Disapproval may be appealed to the Air Force Surgeon General. ECF No. 22-5 at 2. To assist Lt. Gen. Whiting in his review, as the approval authority, the Space Force employs "Religious Resolution Teams" ("RRT"). DAFI 52-201 at 6. These teams are made up of at least one commander, chaplain, public affairs officer, and staff judge advocate. *Id.* Where a medical objection is raised, the team must also include a medical provider. *Id.* At each stage of review, those involved determine: (1) the sincerity of the religious request; (2) the

[5] DAFI 52-201 at 8 (June 23, 2021), https://static.e-publishing.af.mil/production/1/af_hc/publication/dafi52-201/dafi52-201.pdf.

military interests at issue; (3) whether those interests are compelling; (4) whether vaccination substantially burdens the Guardian's religious belief(s); and (4) whether vaccination is the least restrictive means to accomplish the military's interests in vaccinating that particular Guardian. *Id.* at 7-8.

A Guardian whose appeal has been denied and who still objects to vaccination is subject to discipline, up to and including administrative, general (under honorable conditions) discharge and military courts-martial. ECF No. 6 at 4-5. Before adverse action may be taken on continued objection to COVID-19 vaccination, noncompliance must first be reviewed by a high-ranking officer (a Colonel or higher). *Id.* at 2.

B. Background Specific to Plaintiff

Plaintiff is a Space Force Captain assigned to the Space Force's National Reconnaissance Office ("NRO") in Chantilly, Virginia. ECF No. 22-10 at 1. Her precise role is somewhat difficult to discern from the record thus far, perhaps because much of it involves particularly sensitive, classified operations. From what the Court understands, the NRO provides offensive and intelligence support to the Air Force, other branches of the military, and the intelligence community. ECF No. 22-10 at 2. It manages a number of satellite systems and spacecraft that are evidently capable of engaging in electronic warfare and that also gather signals and geospatial intelligence. Captain Creaghan is a "Mission Director." *Id.* She "has operational control and on-line decision-making responsibilities for all aspects of NRO operations during [her] shift." *Id.* That includes the direction of those assets, ensuring the

operational health of the assets, overseeing the security of the site in which those assets are managed, and overseeing "daily reports for [the] NRO and government senior leaders." *See id.* at 2-3. She works in a compartmentalized area known as a "SCIF" (Secure Compartmentalized Information Facility) that is fully indoors and limits airflow. *Id.* at 3. Because all her work is classified, she cannot telework. *See id.* The nature of her work evidently involves frequent interpersonal contact within her workspace. *See id.* at 4.

On September 30, 2021, Plaintiff requested a religious accommodation. She articulated a religious belief predicated on the religious view that life begins at conception, and insisted that receiving any COVID-19 vaccine would contravene her sincerely held belief because each vaccine's development involved fetal cells in some way. ECF 22-13 at 22-24. She included in her request a litany of supporting documents from religious figures in her life testifying to the sincerity of her belief and its connection to her Catholic faith. *See, e.g.*, ECF No. 22-13 at 31. On October 18, 2021, an Air Force chaplain concluded that she held a sincerely held religious belief and that vaccination against COVID-19 would substantially burden that belief. *Id.* at 62. On December 14, 2021, the Religious Resolution Team assigned to Captain Creaghan's request agreed with the chaplain, and also concluded that the Space Force had a compelling government interest in requiring her health as a Space Force Mission Director and that vaccination was the least restrictive means of accomplishing that interest. *Id.* at 63-66. That report concluded that "[s]ervice members have a responsibility

to maintain their health and fitness, meet individual medical readiness requirements, and report medical and health issues that may affect their readiness to deploy or [medical] fitness to continue serving in an active status." *Id.* at 66.

Notwithstanding this finding, Captain Creaghan's direct commanding officer, Lt. Col. Benjamin Andrea ("Col. Andrea") recommended approval of Captain Creaghan's request. *Id.* at 88. Most relevant for present purposes, he found that "[t]he projected impact to [Plaintiff's] unit is low" if she remains "unvaccinated." *Id.* at 89. He suggested that Plaintiff's unit "has backup personnel available to provide positional coverage in the event of any operations personnel requiring quarantine." *Id.* Col. Andrea also expressed a personal belief that the risk to Plaintiff's health was acceptable because Plaintiff "supplied sufficient medical evidence indicating presence of the SARS-CoV-2 antibody." *Id.* at 90. The record does not suggest that Plaintiff's direct commanding officer had any medical expertise to make such a judgment.

On the same form, Plaintiff's second-level commanding officer circled "concur" and "approval" to ratify, without explanation, Col. Andrea's recommendation. *Id.* at 90. On January 30, 2022, Plaintiff's third-level commanding officer, Major General Donna D. Shipton, disagreed, finding that "there are no less restrictive means available to meet the government's compelling interest without placing in jeopardy the health, safety, and availability of Capt[ain] Creaghan." *Id.* at 92. Captain Creaghan, Major General Shipton continued, "makes important

contributions to the mission at [her] NRO [facility] . . . where she is responsible for directing daily operations and maintenance of NRO space and ground systems." *Id.* Major General Shipton therefor concluded that placing Captain Creaghan at a "higher risk of prolonged illness, hospitalization, and death" by granting a mandate would unacceptably jeopardize Captain Creaghan's military duties and the NRO's military mission. *See id.*

Weighing these differing recommendations, Lieutenant General Whiting sided with Major General Shipton and the interdisciplinary RRT. *Id.* at 93. He found that "as a Mission Director responsible for directing daily operations and maintenance for NRO space and ground systems, and ensuring overall spacecraft health and mission success," vaccination was the least restrictive means to accomplish military goals. *Id.* Lieutenant General Whiting's finding was limited to "the spread of the COVID-19 virus," however, and made no mention of the necessity of vaccination to protect Plaintiff's health. *See id.* On appeal, Lieutenant General Robert Miller, the Surgeon General of the Air Force, affirmed Lieutenant General Whiting's decision on March 25, 2022, concluding that lack of Plaintiff's immunization "in [Plaintiff's] dynamic [military] environment, and aggregated with other non-immunized individuals in steady state operations, would place health and safety, unit cohesion, and readiness at risk." *Id.* at 103. Like Lieutenant General Whiting, Lieutenant General Miller's findings appear to rest almost entirely on transmission, although an attached appendix does mention that vaccinated "personnel are much less likely to develop severe

disease, be hospitalized, or die as a result of being vaccinated." *Id.* at 105.

Denial in hand, Plaintiff filed for suit for injunctive relief in this court. Although the Space Force may take any number of disciplinary or administrative actions against Plaintiff for continued religious objection to Space Force medical requirements, no such action, including the institution of separation proceedings, has been taken against Plaintiff as of April 29, 2022. ECF No. 22-10 at 13.

II. LEGAL STANDARD

Preliminary injunctive relief is an "extraordinary remedy that may only be awarded upon a *clear showing* that the plaintiff is entitled to such relief." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (emphasis added) (quoting *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)); *see also Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)).[6] A plaintiff seeking preliminary injunctive relief "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of the equities

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[6] Plaintiff argues in her supplemental briefing that the Court in *Navy SEAL* "seem[ed] to require a heightened standard for granting a preliminary injunction." Pl.'s Supp. Br. at 4. Plaintiff appears to rest that argument on the Court's conclusion that the plaintiff in *Navy SEAL* "has not carried his burden to show that he is 'clearly warranted' preliminary relief." 2022 WL 1294486, at *4. To be clear, the Court used the term "clearly warranted" to restate the D.C. Circuit's instruction that a preliminary injunction must only be granted "upon a clear showing that the plaintiff is entitled to such relief." *Sherley*, 644 F.3d at 392.

tips in his favor, and [4] that an injunction is in the public interest." *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014). When seeking such relief, "the movant has the burden to show that all four factors, taken together, weigh in favor of the injunction." *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014). "The four factors have typically been evaluated on a 'sliding scale,'" whereby if "the movant makes an unusually strong showing on one of the factors, then [he] does not necessarily have to make as strong a showing on another factor." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009).

It is unclear whether the United States Court of Appeals for the District of Columbia Circuit's ("D.C. Circuit") sliding-scale approach to assessing the four preliminary injunction factors has survived the Supreme Court's decision in *Winter*. *See Save Jobs USA v. Dep't of Homeland Sec.*, 105 F. Supp. 3d 108, 112 (D.D.C. 2015). Several judges on the D.C. Circuit have "read *Winter* to suggest if not to hold that 'a likelihood of success is an independent, free-standing requirement for a preliminary injunction.'" *Sherley,* 644 F.3d at 393 (quoting *Davis*, 571 F.3d at 1296 (Kavanaugh, J., concurring)). However, the D.C. Circuit has yet to hold definitively that *Winter* has displaced the sliding-scale analysis. *See id.* In light of this ambiguity, the Court shall consider each of these factors and shall only evaluate the proper weight to accord to the likelihood of success if the Court finds that its relative weight would affect the outcome. *Accord Church v. Biden*, --- F. Supp. 3d ---, 2021 WL 5179215, at *7 (D.D.C. 2021).

III. DISCUSSION

For the most part, this case raises the same questions as those in *Navy SEAL*. That said, the parties' supplemental briefing in response to the Court's opinion in *Navy SEAL* have narrowed the issues somewhat. The parties do not appear to seriously contest the Court's discussion of the merits of Free Exercise and Equal Protection claims as to religious objections to military vaccination orders. Rather, they contest: (1) the Court's justiciability discussion; and (2) the application of RFRA in military context, i.e., what degree of deference the military is due on the merits of a RFRA claim and whether a vaccination order is narrowly tailored as to Plaintiff. Additionally, this case raises two new questions that were not present in *Navy SEAL*: (1) whether a servicemember has Article III standing to contest the denial of a religious accommodation where separation proceedings (or any other adverse action) have not yet begun; and (2) whether administrative, general (under honorable conditions) discharge is irreparable harm as a matter of law. As such, the Court will proceed to these four questions and refer to its opinion in *Navy SEAL* for the remaining issues presented in the parties' briefing.

A. Standing

First, the Government argues that Plaintiff lacks standing to challenge the denial of her requested religious accommodation because separation proceedings have not yet begun. Not so.

To receive a preliminary injunction, the moving "party must show, among other things, a 'substantial likelihood of success on the merits.'" *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir 2015). "The merits on which plaintiff must show likelihood of success encompass not only substantive theories but also establishment of jurisdiction," including Article III standing. *See Elec. Priv. Info. Ctr. v. Dep't of Com.*, 928 F.3d 95, 104 (D.C. Cir. 2019). To show standing, a plaintiff must show an "injury-in-fact that is 'imminent' or 'certainly impending.'" *Am. Petrol. Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2013).

Defendants seem to construe the alleged injury as separation proceedings or other adverse action predicated upon the denial of Plaintiff's accommodation request. Plaintiff, however, relies on, the deprivation of a statutory or constitutional right as an "injury-in-fact" triggering Article III jurisdiction. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975). Insofar as Plaintiff has exhausted her administrative remedies *to receive a religious exemption from COVID-19 vaccination*, the Court agrees that Plaintiff has demonstrated a likelihood success in demonstrating that she ahs standing to challenge that denial.

B. Justiciability

In *Navy SEAL*, the Court explained that "'[c]laims are nonjusticiable where: (1) their resolution requires decisions which are not matters of judicial expertise but are matters of management, public policy or technical expertise; (2) the relief requested usurps the functions of a coordinate branch of government; or (3) the relief requested is not justicially manageable."

Nat'l Coal Ass'n v. Marshall, 510 F. Supp. 803, 805 (D.D.C. 1981) (citing *Baker*, 369 U.S. at 217). Here, as in *Navy SEAL*, there remain serious questions as to whether a judicial challenge to a military medical requirement (1) "usurps the functions" of powers committed to the Executive through the Commander-in-Chief Clause and (2) involves scientific determinations that "are not matters of judicial expertise but are matters of . . . technical expertise." 2022 WL 1294486, at *5.

As to military judgments, the Court stressed that some are undoubtedly justiciable. Justiciable military cases involving the rights of military personnel generally do not require evaluation of strategic or technical decisions. Rather, they look to whether a service member has received constitutionally sufficient process, or to evaluate constitutional claims that do not involve a particularly technical record. *See, e.g.*, *Piersall v. Winter*, 435 F.3d 319, 324 (D.C. Cir. 2006) (justiciable where review was limited to whether decision by civilian administrative board was arbitrary or capricious); *Doe 2 v. Shanahan*, 755 F. App'x 19, 23 (D.C. Cir. 2019) (suggesting that a "blanket ban" prohibiting indefinitely the accession of transgender individuals into the military would be justiciable).

At the same time, most cases involving fitness for duty are generally not justiciable, sometimes because they involve complex medical judgments, and sometimes because they involve highly subjective judgments regarding the servicemember's military capabilities. *See Emory v. Sec'y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987); *see also, e.g.*, *Kries v. Sec'y of Air*

Force, 866 F.2d 1508, 1512 (D.C. Cir. 1989) ("This court is not competent to compare appellant with other officers competing for [] a promotion."); *Charette v. Walker*, 996 F. Supp. 46, 50 (D.D.C. 1998) (holding a former military officer's "request for reinstatement . . . not justiciable"); *Harkness v. Sec'y of Navy*, 858 F.3d 437, 444-45 (6th Cir. 2017) ("Duty assignments lie at the heart of military expertise and discretion, and we are wary of intruding upon that sphere of military decision-making." (internal quotation marks omitted)). Cases involving actual *strategic* decisions are perhaps the epitome of "complex, subtle, and professional decisions" otherwise left to the Commander-in-Chief and their subordinates. *See Short v. Berger*, 2022 WL 1051852, at *5 (C.D. Cal. Mar. 3, 2022); Trans. at 42, ECF No. 22, *Dunn v. Austin*, No. 2:22-cv-00288-JAM-KJN (E.D. Cal. Feb. 28, 2022), *application for injunction pending appeal denied*, No. 21A599, Doc. 7 (U.S. Apr. 15, 2022); *see also Orloff v. Willoughby*, 345 U.S. 83, 91-92 (1953).

In response, Plaintiff points the Court to *Doe v. Rumsfeld*, 297 F. Supp. 2d 119 (D.D.C. 2003). In that case, which is not binding upon this Court, two military servicemembers challenged an anthrax vaccination mandate under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq. Id.* at 123. The question in that case was whether the Food and Drug Administration had classified the particular vaccine "as an investigational new drug or as a drug unapproved for its intended use." *Id.* at 131. An applicable federal law provided that the military may not "administer[] investigational new drugs, or drugs unapproved for their intended use, to serve members without their

informed consent." *Id.* at 125. The merits question, therefore, was not the wisdom of mandating a particular vaccine generally or to particular servicemembers, but rather whether a particular vaccine fell within a certain legal category that could be determined through traditional tools of statutory interpretation. That question fell within the familiar ambits of the APA—whether a federal agency had acted arbitrarily or capriciously. *Id.* at 128.

On justiciability, *Doe* in fact employed a similar analysis as this Court in *Navy SEAL*. The *Doe* court asked whether judicial intervention involved "the exercise of military expertise or discretion," and evidently concluded otherwise. *See id.* at 127. Rather, an APA claim is justiciable insofar as it merely asks whether the military acted arbitrarily and capriciously in its procedural review. *See id.* at 128. The Court would be inclined to agree that those sorts of claims are justiciable because (1) the test is concerned predominantly with legal process and (2) it does not involve second-guessing the wisdom of military judgments dealing with readiness and lethality. As such, the Court is not inclined to depart from its tentative conclusion in *Navy SEAL* that RFRA challenges to military medical requirements more likely raise justiciability concerns.

As for justiciability regarding scientific determinations that "are not matters of judicial expertise but are matters of . . . technical expertise," Plaintiff offers little argument to the contrary. To support such a proposition, Plaintiff cites, in a footnote, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) and *Roman*

Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020). In the former, and as this Court explained in *Navy SEAL*, the Supreme Court did not come close to determining the immunological wisdom of certain public health restrictions. Rather, it held that a state may not treat religious and non-religious institutions differently when imposing a public health restriction. 141 S. Ct. at 1297-98. Indeed, of the federal courts that have enjoined federal health measures in the recent past, they have done so almost exclusively on procedural, and not technical, grounds. *See, e.g.*, *Georgia v. Biden*, --- F. Supp. 3d ---, 2021 WL 5779939, at *9-10 (S.D. Ga. Dec. 7, 2021) (enjoining federal contractor vaccine mandate on grounds that mandate exceeded statutory authority); *Health Freedom Def. Fund, Inc. v. Biden*, --- F. Supp. 3d ---, 2022 WL 1134138, at *12 (M.D. Fla. Apr. 18, 2022) (enjoining federal mask mandate on airplanes on grounds that mandate exceeded statutory authority). On the other hand, this case and *Navy SEAL* require a detailed review of the scientific, medical, immunological, and epidemiological bases of a vaccination mandate *as to Plaintiff* to answer whether vaccination is the least restrictive means of accomplishing Plaintiff's specific military duties. These are fraught questions of medical science that the judiciary generally "lacks the background, competence, and expertise to assess." *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring). Accordingly, both military and scientific justiciability concerns remain in this case.

C. Merits

Before proceeding to the likelihood of success on Plaintiff's RFRA claim, the heart of this case, a word on Plaintiff's Free Exercise claim is necessary. Plaintiff's supplemental briefing does not appear to seriously contest that the rational basis test in *Goldman v. Weinberger*, 475 U.S. 503 (1986) remains good law. Plaintiff writes that RFRA "deliberately narrowed" *Goldman*'s holding that a Jewish servicemember had no Free Exercise right to wear a yarmulke in military uniform. 475 U.S. 504. It likely goes without saying that Congress cannot narrow a constitutional holding, although it can provide statutory rights beyond that which the Constitution protects. Plaintiff seems to also argue that, even if *Goldman* stands, it applies only to "operational, strategic, or tactical" military decisions. Pl.'s Supp. Br. at 8. The Court does not find such a holding in that decision, and the Court would be hard-pressed to consider grooming standards "operational, strategic, or tactical."[7]

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[7] Plaintiff in her supplemental briefing seems to suggest a historical right to religious accommodation during military service. Whatever history Plaintiff may bring to bear, history cannot rewrite statutes, *Spicer v. Biden*, --- F. Supp. 3d ---, 2021 WL 5769458, at *5 (D.D.C. Dec. 4, 2021) (DLF), and Plaintiff does not ask the Court to overturn a century of Supreme Court precedent articulated in *Goldman* and its progeny by finding such a right in the Free Exercise Clause as an original matter. Responding briefly, however, although Plaintiff accurately notes that colonial authorities granted religious exemptions from service during the colonial period, it is inaccurate to say that once drafted, militiamen could always be religiously exempted from otherwise necessary military duties. *See, e.g.*, Peter Brock, "Colonel Washington and the Quaker Conscientious Objectors," 53 Quaker History 12, 14

As to RFRA, the law provides that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). To

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(1964). Indeed, the military history of colonial America and the Early Republic suggest that most early military leaders considered strict military discipline absolutely necessary to accomplish military ends, even more so among those not conscripted to fight. *See, e.g.*, Bradley J. Nicholson, "Courts-Martial in the Legion Army: American Military Law in the Early Republic, 1792-1796," 144 Mil. L. Rev. 77, 84 (1994) (further noting that early American military law essentially incorporated British law).

Moreover, the fact that some colonial legislatures gave statutory reprieve from a militia draft should not distract from the colonial history establishing a deep skepticism of religious objectors having a *right* to avoid military service. *See* Ellis West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & Religion 367, 376-77 (1994). *Cf. also Fulton v. City of Phila.*, 141 S. Ct. 1868, 1906 (2021) (Alito, J., concurring in the judgment) (noting Free Exercise claims have long been due different constitutional treatment in military context notwithstanding colonial reprieves from service).

Even during the nascent civil liberties movement during the First World War, legal authorities met conscientious objectors with a great degree of incredulity. *See* Christopher Capozolla, *Uncle Sam Wants You* 82 (2008) (recounting letter authored by Justice Harlan Fiske Stone in which he wrote, reflecting on his service as an adjudicator of religious exemptions, that he had not had "a change of heart" after rejecting a number of requests because "one must obey some laws of which [he] does not approve, and even participate in a war [one may] think ill advised"). This cursory historical discussion is largely academic, however. Whatever history's purported role in resolving RFRA disputes, the parties have not fully briefed it, and the Court need not rest any legal analysis upon it.

prevail on a RFRA claim, a plaintiff must first show a "religious exercise" that has been burdened. *Wilson v. James*, 139 F. Supp. 3d 410, 424 (D.D.C. 2014) (APM); *United States v. Sterling*, 75 M.J. 407, 415 (CAAF 2016). If confronted with a "religious exercise," the government may impose a substantial burden on that religious exercise "only if it demonstrates that the application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." *Id.* § 20000bb-1(b).

The parties do not contest that Plaintiff maintains a sincerely held religious belief and that vaccination would substantially burden that belief. Rather, the parties mainly contest this Court's understanding of RFRA in the military context and whether the facts in this case mandate a different result based on that law. In *Navy SEAL*, the Court looked to *Singh v. McHugh*, 109 F. Supp. 3d 72, 86 (D.D.C. 2015) (ABJ) *amended and superseded in irrelevant part* 185 F. Supp. 3d 201 (D.D.C. 2016). After a discussion of that case, RFRA's text, and its legislative history, the Court agreed with *Singh*'s main holding that RFRA applies to the military, and any military regulation that substantially burdens free exercise is due RFRA's statutory strict scrutiny. *Navy SEAL*, 2022 WL 1294486, at *8. Nevertheless, the Court "stresse[d] that context is important." *Id.* In part relying on *Singh*'s discussion of RFRA's legislative history, the Court concluded that the best reading of the statute, at least with a dearth of authority and a relatively undeveloped record in *Navy SEAL*, was that the military's technical and scientific conclusions should receive due regard in determining

whether those technical and scientific judgments are *in fact* the least restrictive means to accomplish the military interest at issue as to a particular military claimant. *Id.* This very tentative conclusion is also rooted in other Supreme Court decisions generally cautioning that the judicial power is relatively ill-equipped to resolve highly technical conclusions of fact where their resolution is textually committed to a coordinate branch in the first instance. *See id.*

The Government appears to agree with this approach whole-heartedly. Defs.' Supp. Br. at 1-2. Plaintiff, however, cautions that such an approach "[a]pplies different levels of deference to RFRA claims, according to the subject of the sincerely held religious belief, would result in treating religious practice unequally." Pl.'s Supp. Br. at 7. The Court sees nothing in *Navy SEAL* even remotely suggesting such a test.

Rather, the Court suggested that the military's technical, *scientific* findings supporting the wisdom of a particular, generally applicable military order may be due some regard greater than those resting on no such findings. *See Navy SEAL*, 2022 WL 1294468, at *10. In other words, the military receives *no* degree of deference based on the *exercise regulated*, but on the scientific and strategic conclusions on which the regulation is based. Beyond a citation to *Katcoff v. Marsh*, 755 F.2d 223, 234 (2d Cir. 1985), which stands for the unremarkable proposition that soldiers enjoy *some* First Amendment protections as a matter of constitutional law, Plaintiff offers no authority suggesting that the Court should take a different tack. Plaintiff will undoubtedly have an opportunity to do so

as this case progresses, but at this early stage of the case where Plaintiff must show likelihood of success on the merits (among other things), the Court is not inclined to change tack just yet.

That brings the Court to the most important aspect of Plaintiff's request for preliminary relief: applying *her* situation to the law set out in *Navy SEAL*. Doing so, and assuming this case is justiciable in the first place, Plaintiff makes a much stronger showing of likelihood of success on the merits on her RFRA claim than the plaintiff in *Navy SEAL*.

As to whether the military has a compelling government interest in mandating various vaccines, and COVID-19 vaccination in general, "the [Space Force] has a compelling interest in preventing COVID-19 from impairing its ability to carry out its vital responsibilities, as well as a compelling interest in minimizing any serious health risk to [Space Force] personnel." *See Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301, 1305 (2022) (Alito, J., dissenting). Facing the same orders at issue in this case, another district court that granted preliminary relief nevertheless agreed that the Air Force undoubtedly shares that compelling government interest. *Air Force Officer v. Austin*, --- F. Supp. 3d ---, 2022 WL 468799, at *9 (M.D. Ga. Feb. 16, 2022) ("It would be a waste of time and wrong to state that '[s]temming the spread of COVID-19' isn't a compelling interest—the Supreme Court has already decided it is."). The Court is again inclined to conclude that "the *sine qua non* of military interests is keeping an individual servicemember fit enough to

accomplish their tasks in furtherance of national security." *Navy SEAL*, 2022 WL 1294486, at *9.

In a RFRA case, however, the more important question is whether the military has a compelling government interest in vaccinating the particular servicemember at issue. Plaintiff, like the plaintiff in *Navy SEAL*, seems to suggest that the military's general compelling interest in ensuring the health of its servicemembers does not distill to a compelling interest in ensuring that Plaintiff remains healthy enough to accomplish her duties. As the Court explained in *Navy SEAL*, it likely does by logic alone, but the Court nevertheless must look to Captain Creaghan's duties specifically.

As Captain Creaghan argues at length in her supplemental briefing, her role is quite different from a Navy SEAL. Unlike a Navy SEAL, who must be deployable at a moment's notice and whose sickness on a mission could doom an entire team, it appears Captain Creaghan does not deploy and works solely in an office setting. ECF No. 22-10 at 2. Captain Creaghan argues that this difference alone means the military does not have a compelling interest in *her* vaccination. Pl.'s Supp. Br. at 1-2.

To the extent that the main benefit of vaccination against the most prevalent SARS-CoV-2 variants and subvariants at the moment is reducing the severity and duration of disease, the inquiry centers on the military consequences of Captain Creaghan's heightened risk of severe COVID absent vaccination. *See Navy SEAL*, 2022 WL 1294486 at *10. The question is both actuarial, to the extent that Plaintiff presents a factual

question about the degree of risk, and tactical, to the extent to which Plaintiff challenges Defendants' insistence that Plaintiff's vaccination is necessary to safeguard the military tasks with which she has been entrusted. As the Court explained in *Navy SEAL*, assuming such a question is justiciable, there may well be some roles in the military that are entirely fungible and servicemembers who are entirely replaceable with little to no adverse effects on military interests. Plaintiff argues that this is such a case, relying on her direct commanding officer's initial recommendation that Plaintiff's request for an exemption be approved. Pl.'s Supp. Br. at 4.

As the Court explained above, Col. Andrea found that "[t]he projected impact to [Plaintiff's] unit is low" if she remains "unvaccinated." ECF No. 22-13 at 89. He suggested that Plaintiff's unit "has backup personnel available to provide positional coverage in the event of any operations personnel requiring quarantine." *Id.* The "backup personnel" appear to come, at least in part, from the fact that Plaintiff works in shifts such that there are other officers nearby who execute the same job. ECF No. 23-1 at 8. Part of his opinion, however, also relied on the fact that Plaintiff had previously contracted COVID. ECF No. 22-13 at 89.

To be sure, Col. Andrea's recommendation, ratified by his commanding officer, is entitled to its own due regard as an exercise of military expertise and judgment. As Plaintiff's commanding officer, he understands her role better than anyone else, and his view is certainly due even more regard if, as Plaintiff alleges, the RRT that recommended denial of Plaintiff's

request neither "talked with [Plaintiff]" or visited her command. ECF No. 23-1 at 4. That various officers within Plaintiff's chain of command came to different conclusion when exercising their military expertise and that at least two of them consider Plaintiff fairly fungible is strong support for Plaintiff's RFRA claim.

Ultimately, however, not strong enough for a preliminary injunction. First and foremost, a religious exemption from a medical requirement always starts from a disadvantaged position relative to other requests because, as the previously explained, there can be no greater military interest than in keeping each servicemember fit and healthy enough to accomplish their duties. *See Navy SEAL*, 2022 WL 1294486, at *10. Plaintiff argues that *Navy SEAL* and this case are distinguishable on the facts. The Court disagrees. As an officer, the military likely has a greater interest in her health than enlisted personnel. *See Short*, 2022 WL 1051852, at *6. Additionally, Plaintiff's specific duties strike the Court as relatively more important to national security. She has "operational control and on-line decision-making responsibilities for all aspects of NRO operations," which evidently includes maintaining the integrity of military spacecraft while executing highly sensitive and important missions. ECF No. 22-10 at 2. Major General Shipton relied on these facts in recommending denial, ECF No. 22-13 at 92, and her argument, ratified by Lieutenant Generals Whiting and Miller, is compelling. Although a close call, the Court is inclined to find—on this record and at this early stage of the case—a compelling government interest in Plaintiff's vaccination.

As for whether vaccination is the least restrictive means, the Court already concluded on a similar record that "the military's scientific and medical conclusion [that nothing less than vaccination sufficiently protects a servicemember from the consequences of COVID-19], which rest[s] on the great weight of scientific authority," should not be rejected, and the Court is not inclined to depart from that tentative position. *See Navy SEAL*, 2022 WL 1294486, at *11. In addition to arguments the Court addressed in *Navy SEAL*, Plaintiff also argues that vaccination cannot be the least restrictive means because "Defendants do not prohibit contact outside of work."[8] On this record, like in *Church*, that is all the more reason vaccination may be necessary. *See* 2021 WL 5179215, at * 19 ("Civilian employees who continue to telework do not live in a vacuum.")

Plaintiff also asserts, relying on *Air Force Officer*, that the Air Force is "rubber stamping" exemption denials. Repl. at 15 (citing 2022 WL 468799, at *11 ("the Court easily finds that the Air Force's process to protect [RFRA] rights is both illusory and insincere")). On this record, such a finding is much more difficult. Defendants represent, and Plaintiff does not contest, that the Air Force has approved forty-one religious

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[8] Plaintiff also argues that "Defendants choose not to extend its [vaccination] mandate to contractors [who] work in the same space, on the same matters." Repl. at 14. That seems to be incorrect. The Executive promulgated a regulation requiring all federal contractors to be vaccinated against COVID-19, but that regulation has been preliminarily enjoined nationwide. *Georgia v. Biden*, --- F. Supp. 3d ---, 2021 WL 5779939 (S.D. Ga. Dec. 7, 2021), *appeal pending*, No. 21-14269 (11th Cir.).

exemption requests. Opp. at 9. Plaintiff evidently thinks this number too low, but a low approval rate is not itself evidence of cursory review of exemption requests. The review process here was also much lengthier and more involved than in *Navy SEAL*. Defendants' Exhibit 12, "Captain Creaghan Religious Accommodation Request Package," is 111 pages. Aside from the RRT, Captain Creaghan's request was reviewed by five officers, including the Surgeon General of the Air Force, who each issued individual, specific findings. The RRT report also made specific findings based on its characterization of Plaintiff's duties. It found that Captain Creaghan was "responsible for directing daily operations and maintenance for NRO space and ground systems and assuring overall spacecraft health and mission success." ECF No. 22-13 at 63. It concluded that Plaintiff is "a practicing Catholic who believes she would be a willing participant and beneficiary of abortion" and thereby holds a sincere religious belief. *Id.* at 65. It found a "compelling government interest in ensuring military mission success" through vaccination. *Id.* at 66. It further found that "[t]elework is not a viable less restrictive means, because [Plaintiff's] duties require physical presence on an operations floor with 110 personnel." *Id.* at 67. On the Court's reading, Lieutenant General Whiting had a full record with findings specific to Plaintiff's beliefs and duties when he denied Plaintiff's request.

As such, and on the whole, there remain a number of questions as to whether Plaintiff can carry her burden to show that she is likely to succeed on her RFRA claim on the record at this time.

C. Irreparable Harm

The Court next considers whether Plaintiff has demonstrated "irreparable harm." *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995). To constitute "irreparable harm," the injury alleged must be both "certain and great, actual and not theoretical, beyond remediation, and of such imminence that there is a clear and present need for equitable relief." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 55 (D.C. Cir. 2015) (cleaned up). A mere "possibility of irreparable harm" is not enough; a plaintiff must demonstrate that the alleged injury is "*likely* in the absence of a injunction." *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (cleaned up). Plaintiff has not carried her burden.

First, it is somewhat unclear whether separation proceedings are actually certain to proceed. Although Plaintiff's direct commanding officer warned that "if the initial dose is not completed by [a] deadline, initiation of administrative discharge *will* be pursued," ECF No. 8-5 at 4 (emphasis added), the applicable form letter provides that "[f]ailure to comply with this lawful order *may* result in administrative and/or punitive action," *id.* at 2 (emphasis added). Were separation proceedings, or any other adverse action, certain to occur, Plaintiff has not shown that those actions would be irreparable. *See Navy SEAL*, 2022 WL 1294486, at *15 ("[a]n adverse fitness report may be purged from Plaintiff's files, adverse separation proceedings may be dissolved," and military records can be corrected in subsequent proceedings). Nor has Plaintiff demonstrated how the financial consequences of

discharge are the sorts of loss of employment benefits that, as the Court held in *Church*, is not irreparable harm absent a "genuinely extraordinary situation." 2021 WL 5179215, at *15 (citing *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974); *see also Short*, 2022 WL 1051852, at *9 (citing *Hartikka v. United States*, 754 1516, 1518 (9th Cir. 1985) ("loss of income, loss of retirement and relocation pay, and damage to [the plaintiff's] reputation resulting from the stigma attaching to less than honorable discharge" are not irreparable injuries)). Finally, as the Court explained in *Navy SEAL*, because Plaintiff likely only faces the deprivation of a *statutory* right, Plaintiff has not shown irreparable injury predicated on the loss of a *constitutional* right. *See* 2022 WL 1294486, at *16.

D. Public Interest

"The final two factors the Court must consider when deciding whether to grant a preliminary injunction are the balance of harms and the public interest." *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 41 (D.D.C. 2013). Where, as here, the government is a party to the litigation, these two factors merge and are "one and the same, because the government's interest is the public's interest." *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016). "Although allowing challenged conduct to persist certainly may be harmful to a plaintiff and the public, harm can also flow from enjoining an activity, and the public may benefit most from permitting it to continue." *Sierra Club*, 990 F. Supp. 2d at 41. Therefore, when "balanc[ing] the competing claims of injury," the Court must "consider the effect on each party of the granting

or withholding of the requested relief." *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

On the present record, as in *Navy SEAL*, the public's interest in military readiness and the military's interest in Plaintiff's health outweigh Plaintiff's religious liberty interest. *See* 2022 WL 1294486 *17. As the Court explained in *Church*, the military has concluded, based on a long and detailed scientific record, that vaccination is necessary to protect its servicemembers individually and to further national security more broadly. 2021 WL 5179215, at *19. At the very least, without a lengthier record, the Court would not be inclined to "disturb th[o]se well-found military judgments." *Id.* Nor has Plaintiff offered any reason in this case for the Court to depart from *Navy SEAL* and *Church*.

IV. CONCLUSION

An appropriate order accompanies this memorandum opinion.

Dated: May 12, 2022

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 22-0981 (CKK)

[Filed May 12, 2022]

MARIELLA CREAGHAN,
Plaintiff

v.

LLOYD AUSTIN, in his official capacity as Secretary of the United States Department of Defense, *et al.*,
Defendants.

ORDER
(May 12, 2022)

For the reasons discussed in the accompanying Memorandum Opinion, it is hereby

ORDERED, that Plaintiff's [11] Motion for a Temporary Restraining Order and/or Preliminary Injunction is **DENIED**. It is further

ORDERED, that the parties shall file, on or before **June 2, 2022**, a joint status report explaining how they intend to proceed in this matter.

SO ORDERED.

Dated: May 12, 2022

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:22-cv-00981
Hon. Colleen Kollar-Kotelly

[Filed January 24, 2023]

CAPTAIN MARIELLA CREAGHAN Plaintiff, v. LLOYD J. AUSTIN III, FRANK KENDALL, LT. GEN. STEPHEN N. WHITING, and LT. GEN. ROBERT I. MILLER, Defendants.	)

DECLARATION OF
CAPTAIN MARIELLA CREAGHAN

I, Captain Mariella Creaghan, make this supplemental declaration pursuant to 28 U.S.C. § 1746 and based on my personal knowledge:

1. I continue to undergo harm for following my sincerely held religious beliefs instead of following the Defendants' mandate by participating in vaccination that conflicted with my faith.

2. The Secretary of Defense's Memorandum dated 10 January 2023 states that "[o]ther standing Departmental policies, procedures, and processes regarding immunizations remain in effect. These include the ability of commanders to consider, as appropriate, the individual immunization status of personnel in making deployment, assignment, and other operational decisions, including when vaccination is required for travel to, or entry into, a foreign nation."

3. This means that while the 24 August 2021 Memorandum was rescinded, the DoD is still making decisions based on whether servicemembers received or did not receive the COVID-19 vaccination, without providing a religious accommodation to servicemembers who abstained due to compliance with their sincerely held religious beliefs.

4. For example, my Individual Medical Readiness (IMR) status still indicates that I am not medically ready. Because of my religious abstention from the COVID-19 vaccine, my IMR indicates that I am not currently up to date with required IMR standards.

5. If a servicemember was granted a religious exemption, an administrative exemption, or a medical exemption, or if the status of a servicemember's exemption was pending, the IMR reflected that the servicemember was up to date with their vaccinations and medically ready.

6. The DoD's current policy regarding IMR is available at https://www.esd.whs.mil/portals/54/documents/dd/issuances/dodi/602519p.pdf, last visited Jan. 24, 2022.

7. While IMR status is not only factor considered for deployment and assignment deicisions, it is heavily weighted.

8. The controlling policy regarding both official and personal travel "Consolidated Department of Defense Coronavirus Disease 2019 Force Health Protection Guidance", first implemented on August 29, 2022, is still in place. Available at https://media.defense.gov/2022/Aug/30/2003067565/-1/-1/0/CONSOLIDATED-DEPARTMENT-OF-DEFENSE-CORONAVIRUS-DISEASE-2019-FORCE-HEALTH-PROTECTION-GUIDANCE-REVISION-3.PDF, last visited Jan. 24, 2023; *see also* https://www.airforcemedicine.af.mil/Portals/1/Documents/COVID-19/TAB%202%20-%20DAF%20Supplement%20to%20DoD%20Consolidated%20FHPG%20R3%20%2031Aug22%20Final.pdf, last visited Jan. 24, 2023, last visited Jan. 24, 2023 (adopting the Department of Defense (DoD) policies to the U.S. Air Force) (herein after "DoD Policies").

9. The policies specifically require travel approval, both official and personal, to be based on the vaccination status of a servicemember.

10. The DoD policies do not apply to DoD contractors.

11. The DoD policies do not provide consideration for a religious accommodation.

12. Presently, DoD policies are restricting my travel, trainings, future promotions, etc. due to my abstention from the COVID-19 vaccine on religious grounds.

13. I was scheduled to attend a required training for Active Duty Space Force Captains in April 2022 called Squadron Officer School (SOS). I was originally allowed to attend the training, even though I was unvaccinated, because my application for a religious exemption was considered pending. When my appeal was denied, however, the denial changed my status and I was no longer allowed to travel to complete the training. I am still waiting to complete this required training. The training is required to be completed by an Active Duty Captain before the end of seven years with the U.S. Air Force or U.S. Space Force.

14. The current policies allow for Defendants to disallow me from attending the required training due to my religious abstention from the COVID-19 vaccine. Without completing the training, I will not be considered for promotion.

15. I am attaching a Memoradum dated 18 January 2023, where I request a Travel Waiver to attend SOS. Attachment A.

16. While my immediate Commander and Delta Commander both concur with my Travel Waiver, they also originally approved my application for a religious exemption from the COVID-19 vaccine, so it is no

consolation as their approval could be overridden, as it previously has been.

17. Defendants' continuation with "[o]ther standing Departmental policies, procedures, and processes" allows for continued consequences and punishment based on the status of a servicemember's religious abstention from the COVID-19 vaccine.

18. Even though the 24 August 2021 Memorandum has been rescinded, Defendants continue to substantially burden my decision to abstain from the COVID-19 vaccination due to my sincerely held religious beliefs through their ongoing policies, procedures, and processes.

19. Defendants continue to negatively discriminate against me without being required to justify their decisions and without concern for the consequences their continued policies, procedures, processes, and decisions.

20. Defendants continue to favor individuals who do not have a sincerely held religious belief that requires them to abstain from COVID-19 vaccination without following the legal standard required in the Religious Freedom Restoration Act.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 24th day of January 2023.

CREAGHAN.MARIELLA.
THERESA.1404914614
Digitally signed by
CREAGHAN.MARIELLA.THERESA.1404914614
Date: 2023.01.24 20:50:05 -05'00'

_____

Captain Mariella Creaghan

ATTACHMENT A

UNCLASSIFIED

[SEAL]

DEPARTMENT OF THE AIR FORCE
UNITED STATES SPACE FORCE

18 January 2023

MEMORANDUM FOR ADF-E SOPS/CC

FROM: CAPTAIN MARIELLA CREAGHAN, ADF-E SOPS, USSF

SUBJECT: Temporary Duty Mission Critical Travel Waiver Request

References: (a) Department of the Air Force, 31 Aug 22, *DAF Supplement to DoD Consolidated Force Protection Health Guidance*

(b) Undersecretary of Defense for Personnel and Readiness Memorandum, 30 Aug 22, *DoD Consolidated Force Protection Health Guidance (Rev 3)*

(c) Secretary of Defense Memorandum, 10 Jan 23, *Rescission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces*

1. In accordance with the Department of Defense guidance outlined in Ref (b), and the Department of the Air Force guidance outlined in Ref (a), personnel not vaccinated against Coronavirus 2019 (COVID-19) are limited to mission-critical official travel, both domestic and international. The Department of the Air Force Guidance further stipulates that travel not explicitly stated to be mission-critical in the DoD guidance must receive a "mission-critical" determination from the Secretary of the Air Force, delegated to the Under Secretary of the Air Force.

2. Although Ref (c) rescinded the requirement for all members of the Armed Forces to be vaccinated against COVID-19, it specifically states "Other standing Departmental policies, procedures, and processes regarding immunizations remain in effect." At this time, guidance in Ref (a) and Ref (b) has not been rescinded nor superseded.

3. Temporary duty travel to Professional Military Education (PME) is not currently authorized as "mission-critical" travel. PME is required for career advancement, and in-residence Squadron Officer School (SOS) is required for all Active Duty Space Force Captains. I am fully eligible for SOS.

4. I request a waiver or mission-critical determination authorizing travel to SOS at Maxwell AFB, AL for class 23D (17 April 2023 – 19 May 2023).

5. I agree to comply by the DoD Force Health Protection travel guidance in effect at the time of travel, and will complete a risk assessment, testing and/or Restriction of Movement (ROM) as required.

6. If you have any questions, please contact Capt Mariella Creaghan at [redacted] or [redacted].

/s/ Mariella T. Creaghan
MARIELLA T. CREAGHAN, Capt, USSF
Mission Director

2 Attachments
1. Mission Critical Travel Justification Memorandum
2. Mission Critical Travel Authorization – Capt Mariella Creaghan

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:22-cv-00981
Hon. Colleen Kollar-Kotelly

[Filed May 2, 2022]

CAPTAIN MARIELLA CREAGHAN Plaintiff, v. LLOYD J. AUSTIN III, FRANK KENDALL, LT. GEN. STEPHEN N. WHITING, and LT. GEN. ROBERT I. MILLER, Defendants.	)

DECLARATION OF
CAPTAIN MARIELLA CREAGHAN

I, Captain Mariella Creaghan, make this supplemental declaration pursuant to 28 U.S.C. § 1746 and based on my personal knowledge:

1. In addition to the Verified Complaint, I previously submitted to this Court, this Declaration provides further details to address matters raised in the Defendants' Memorandum in Opposition and attached exhibits.

2. Since the Defendants filed their opposition on the evening of 29 April 2022, the Unites States Space Force has scheduled me to work three consecutive twelve hours shifts, on 30 April, 1 May and 2 May 2022. It is an honor to work in this capacity.

3. I have been working under a temporary exemption from the COVID-19 vaccine mandate since 2 November 2021, without issue.

4. I work primarily with a few military personnel and many contractors, who enter the building and conduct work without a vaccination requirement.

5. I am familiar with other individuals, not in my unit, who received administrative exemptions, but not a religious accommodation.

6. My workspace is well-ventilated. I have been inside the air handlers as part of my training. The air handlers are massive with redundant systems. Every office building has air flow and HVAC systems. My office, of course, does as well. Aerospace Data Facility-East increased the turnover rate of outside air by three-fold in response to COVID-19, and it has remained this way. The ventilation is remarkably good.

7. As an example of the above, one night while working, I thought I smelled a skunk on the operations floor along with one of my teammates. The smell became stronger, so I called the facilities team. It turned out that a skunk had sprayed into the air intake and the air handlers were already at their highest air turnover setting (due to the COVID protocol) so there was not much the team could do to reduce the smell

more quickly. The air completely refreshed in a short period of time and the smell was gone.

8. Where my desk is positioned, is somewhat near a set of doors that remain open (improving ventilation), but there are signs on the doors asking visitors and co-workers to go around the doors and not through.

9. There is no regulation limiting contact with unvaccinated individuals outside of work hours.

10. The Defendants' vaccine mandate required, unless accommodated, servicemembers to be "fully vaccinated" (i.e., 2 weeks after second dose) by 2 November 2021. The first dose of the Pfizer vaccine was due 28 Sep 2021. There is no booster requirement. Many individuals under Defendants' command were vaccinated in February and March of 2021. It has been over a year, and those individuals have not been required to obtain a booster. I know other servicemembers who underwent vaccination in May and June of 2021.

11. General Shipton works on a different site approximately forty-five minutes away from where I work. We have virtual meetings daily. All of my meetings are virtual except for one weekly meeting that is an in-person, virtual hybrid meeting. There are no plans to change those meetings to in person.

12. I requested to see the Commander's Evaluation that is attached to the Defendants' Memorandum in Opposition at page 89 of Exhibit 12 upon notice of my denial on 15 February 2022. Defendants would not provide me with a copy.

13. I filed a Freedom of Information Act Request for the document on 17 February 2022. Defendants requested an extension to produce the document until 26 April 2022. On 26 April 2022, Defendants did not produce the document or respond with any update.

14. My counsel for this case contacted the Defendants' attorneys, who then produced the document by filing it in Exhibit 12.

15. I had been requesting this document for over two months, and it was produced for the first time on Friday. This request is mentioned in the 5 April 2022 order.

16. During my initial Religious Accommodation Request, I and my commander, Lt Col Andera, both believed that the NRO would be hosting the Religious Resolution Team (RRT) and that the Deputy Director of the NRO (Maj Gen Donna Shipton), would be making the decision on my package, as her position is considered to be equivalent to that of a MAJCOM commander. My original package submitted on 30 September 2021 is directed to her.

17. On 25 October 2021, I was notified that the RRT would be taking place outside of my chain of command and would instead be run by Air Force leadership at Joint-Base Anacostia-Bolling. My commander requested the ability for him or my Delta[1] Commander (Col Frankino) to participate in the board and speak to my position and duties, but was denied.

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[1] A Space Force Delta is the equivalent of an Air Force Group or Wing

This means the board was entirely Air Force-run, with no representation from the Space Force or my chain of command.

18. I do not know and have never met anyone on the Religious Resolution Team (RRT). The RRT was supposed to be conducted at a local level, but instead it was sent to a different base. No one on the RRT has ties to my unit or knowledge of my job duties. No one on the RRT is part of the Space Force. No one on the RRT talked with me or conducted an inquiry of lesser restrictive alternatives for my particular unit.

19. My commander, Lt Col Andera, has observed my job duties first hand and knows the operations of the NRO Aerospace Data Facility-East. He knows that my position is non-deploying and understands the requirements of my duties.

20. On 3 November 2021, my commander told me that my package had met the RRT, the RRT had given their recommendation and that it was going to go to Lt Gen Whiting for a decision.

21. It is understandable that there was confusion on the Religious Accommodation process, as the Air Force Instruction outlining the RRT process (DAFI 52-201) was recently published on 23 June 2021, as a new AFI, not superseding any previous publications, but implementing this new process for resolving religious accommodation requests which had previously been

governed solely by DAFPD 52-2, Accommodation of Religious Practices in the Air Force.[2]

22. On 5 April 2022, I was notified that my religious accommodation appeal was denied.

23. I am under extreme stress, placed on me by the Defendants, to violate my sincerely held religious beliefs.

24. Defendants are coercing me to change my sincerely held religious beliefs pertaining to benefiting from the use of aborted fetal cell lines and obtain a morally objectionable vaccine.

25. Defendants have promised that if I do not violate my religious beliefs, I am going to receive a letter of reprimand and I will be written up for misconduct, starting after 13 May 2022.

26. The reason for this action is the denial of a religious accommodation, and there is no further way for me to challenge this denial within the military.

27. I have exhausted all administrative remedies to try to obtain a religious accommodation. There is no further administrative process that would allow me to appeal further and/or change Defendants' decision regarding my religious accommodation.

28. Administrative discharge would be for "Misconduct". While technically an administrative action, it is not related to the religious accommodation

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[2] https://static.e-publishing.af.mil/production/1/af_hc/publication/afpd52-2/afpd52-2.pdf

being approved or disapproved. It is for the failure to obey the order to receive the vaccine.

29. I am presently undergoing discrimination due to my sincerely held religious beliefs.

30. I have been passed up for training twice because of my vaccination status to my sincerely held religious beliefs. A person who held religious beliefs that did not oppose the use of aborted fetal cell lines attended in my place.

31. Absent injunctive relief, I will either have to act contrary to my sincerely held religious beliefs and obtain an available COVID-19 vaccination by 13 May 2022 or the 5 April 2022 order will be enforced, as promised, and I will be punished for my faith.

32. My commander stated to me on 11 April that, absent relief, I will receive a Letter of Reprimand (LOR) for violating his 5 April order to receive the COVID-19 vaccination. This LOR would be issued for "Failure to follow a lawful order". My commander also indicated that this would be followed by a second order to receive the COVID-19 vaccination and additional disciplinary action (either a second LOR or an Article 15) should I fail to comply with the second order.

33. LORs are mandated for inclusion in Officer Selection Record (OSR), which is the record viewed by a promotion board when members are eligible for a

promotion board. See DAFI36-2907_DAFGM2022-01, 27 April 2022, Figure A9.2[3]

34. For an Officer, a LOR automatically establishes an Unfavorable Information File (UIF) which is maintained for at least two years. A record of a member with a UIF is flagged, meaning that anyone viewing the record is aware that the member has a UIF and derogatory information in their record. Existence of a UIF is considered a negative quality force indicator and makes the member ineligible for many programs or career opportunities necessary for advancement.

35. Existence of a UIF and receipt of a LOR constitute grounds for a referral Officer Performance Report (OPR). Referral reports are indicated when officers are considered to have not met standards during the reporting period and/or if the report contains negative performance statements. Guidance in DAFI 36-2406 shows bias towards issuing referral reports: "When doubt arises as to whether a comment is a referral comment or not, refer the evaluation." DAFI 36-2406 paragraph 1.10.2.1[4]

36. Referral reports are kept in an officer's permanent record and are visible at all promotion boards, developmental education boards and other competitive selection processes. Existence of referral reports within the past 5 years frequently makes

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[3] https://static.e-publishing.af.mil/production/1/af_a1/publication/dafi36-2907/dafi36-2907.pdf

[4] https://static.e-publishing.af.mil/production/1/af_a1/publication/dafi36-2406/dafi36-2406.pdf

members ineligible for many career opportunities, education programs or positions needed for advancement. For example, PSDM 22-18 outlining an upcoming Space Force selection board for leadership positions states that basic eligibility criteria includes: "3.1.2 No open UIF or referral OPR within the last five years".

37. Having a referral report in my record would cause me to be ineligible for boards such as this one which have limited periods of eligibility (usually 2-3 years), causing my career to be permanently stifled.

38. My next officer performance report closes out on 31 May 2022, meaning any disciplinary action received before then will likely drive a referral report and be included in my permanent record at that time.

39. Even if ultimately rescinded, a report such as this would render me ineligible for competitive positions or exercise opportunities I would ordinarily be a great candidate for and stifle my career during the lifetime of the adverse actions. The compounded effects of stifled opportunities become extremely apparent during promotion, developmental education and leadership selection boards, where members with these competitive opportunities on their resumes are ranked above those without.

40. During my work as an executive officer at the 21st Operations Group, I reviewed records and prepared promotion recommendations for over 30 Captains eligible for promotion to Major. I also reviewed and processed over 250 Officer Performance Reports. I have seen records of members with referral

reports who, despite subsequent good performance, have this derogatory information in their records and are thus ranked at or near the bottom when up for promotion. I also prepared selection records for two Colonels participating in leadership selection boards and have insight into how members are competitively ranked for such boards.

41. I have been consistently ranked at the top of my peers throughout my career. In Summer 2021, my record, along with all other officers in my year group and career field, was presented to a board consisting of eleven senior Space Force officers and I was ranked in the top 30%. I was selected as Company Grade Officer of the Year for 2019 in my squadron and was ranked in the top 10% of 195 Lieutenants in 2019 and 2020. Disciplinary action such as what is described above would instantly mar my very competitive record.

42. In addition to the disciplinary action stated above, my commander has counseled me that administrative discharge proceedings would commence commensurate with my failure to receive the COVID-19 vaccine. As administrative discharge proceedings can begin concurrent with disciplinary action, I may or may not be entitled to a board of inquiry (BOI) and formal hearing regarding my potential discharge. I am considered to be a "probationary officer" until I finish 6 years of service, which I will have on 14 June 2022. Probationary officers are not entitled to the BOI process.

43. My religious accommodation would not be re-reviewed during this process nor would it provide a legal defense. I received the Defendants' final decision

pertaining to my religious accommodation on 5 April 2022.

44. Currently, I continue to serve in my position as a Mission Director with few restrictions despite my unvaccinated status. In alignment with current DoD policies, I am not required to wear a mask, nor receive weekly COVID testing at this time. I continue to work my 12-hour shifts and have been able to continue my job of running the day-to-day operations of a ground station. Meetings are still primarily virtual.

45. Receipt of disciplinary action, regardless of whether it is eventually rescinded, will likely prompt my leadership to remove me from my position, and therefore harm my reputation within my unit and within the Space Force. The Space Force is a very small community, and positions, rankings and assignments are heavily influenced by "who you know" and your reputation. Irreversible damage to my reputation has the potential to affect the remainder of my career, regardless of the outcome of this case. I received my current assignment through a recommendation of someone I previously worked with who spoke highly of me and propelled me to this selectively manned assignment. This is not uncommon.

46. My current position within the NRO is considered non-deployable, meaning I am not subject to deployment requirements unless I were to volunteer. Having already deployed twice, I already have more deployments than most Space Force officers at this point in their careers. As most Space Force missions are stateside, it is plausible that I could continue to have a full career irrespective of whether I would

ultimately be considered "non-deployable" due to not receiving the COVID-19 vaccination.

47. As opposed to the remainder of the military, the Space Force has indicated they would be willing to take "non-deployable" members. General Jay Raymond, when speaking about a Lieutenant rendered non-deployable due to diabetes stated, "…we'd love to take him. He's a fighter. He's a grappler. He's smart. … He will have a full career."[5]

48. Vaccination is an irrevocable decision, and I do not take this decision lightly. I firmly believe that receiving a vaccine produced with or tested on aborted fetal cell lines is immoral because it promotes the commercialization and utilization of aborted fetal cell lines, while also tying these vaccinations back to the original abortions which produced these cell lines. Many vaccinations are produced and tested without aborted fetal cell lines – in fact, all vaccinations I received for my deployments (including Yellow Fever, Typhoid, Anthrax and Polio vaccinations) did not utilize aborted fetal cell lines in production or testing. Since discerning my sincerely held religious beliefs on the issue of the use of aborted fetal cell lines in the manufacturing and testing of vaccinations in late 2016, I have not been required by the military to receive an immorally produced vaccine until now.

49. I came to the decision to not receive the COVID-19 vaccination following much prayer, discernment and after listening to the advice of priests

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[5] https://www.spaceforce.mil/News/Article/2783508/raymond-describes-space-force-achievements-plans-challenges-ahead/

and study of church doctrine. My conscience is clear on the fact that I cannot receive this vaccination without violating my conscience. If a morally acceptable vaccination becomes available, I am willing to take it.

50. The Archbishop for Military Services, Archbishop Timothy P. Broglio, stated on 12 October 2021: "The denial of religious accommodations, or punitive or adverse personnel actions taken against those who raise earnest, conscience-based objections, would be contrary to federal law and morally reprehensible."

51. In *Evangelium Vitae*, Saint John Paul II stated that refusing to cooperate with an injustice "is a human right. Were this not so, the human person would be forced to perform an action intrinsically incompatible with human dignity . . . Those who have recourse to conscience objection must be protected not only from legal penalties but also from any negative effects on the legal disciplinary, financial and professional plane."

[signature page to follow]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 2nd day of May 2022.

/s/ Mariella Creaghan
Captain Mariella Creaghan

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Case No. 1:22-cv-00981
Hon. Colleen Kollar-Kotelly

[Filed May 2, 2022]

CAPTAIN MARIELLA CREAGHAN Plaintiff, v. LLOYD J. AUSTIN III, FRANK KENDALL, LT. GEN. STEPHEN N. WHITING, and LT. GEN. ROBERT I. MILLER, Defendants.	)

DECLARATION OF MARCUS WILLIAMS

I, Marcus Williams, make this supplemental declaration pursuant to 28 U.S.C. § 1746 and based on my personal knowledge:

1. My name is Marcus Williams. I am a Major in the Unites States military currently serving as a Joint Planner and I have personal knowledge and experience of the effects administrative reprimands will have on a military career. My experience includes five years as supervisor or Flight Commander; in these positions I was authorized to use administrative actions to

improve and correct subordinates' actions that degraded the mission or themselves.

2. The effects of a Letter of Reprimand (LOR) will cause immediate, irreparable damage to Captain Mariella Creaghan's military career.

3. A military career is built of hard work and excellence, but is defined by reputation. A LOR regardless of the reason will be apparent in her Record of Performance and will tarnish her standing irrespective of her demonstrated capability.

4. Another damaging aspect of a LOR is that Capt Creaghan will be ineligible to compete for any promotion, selective opportunities, or boarded leadership positions while she has an Unfavorable Information File (UIF). AFI 36-2907 states, the UIF is an official record of unfavorable information about an individual. It documents administrative, judicial, or non-judicial censures concerning the member's performance, responsibility and behavior. LORs are mandatory for file in the UIF for officer personnel.

5. The aggregated effects of this LOR will place her behind her peers and is incongruent with her documented record of sustained superior performance.

6. There is no administrative process that would prevent an LOR from being entered into her file absent injunctive relief from this Court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 2nd day of May 2022.

/s/ Marcus L. Williams Jr.
MARCUS L. WILLIAMS JR.