APPENDIX

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
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U.S. Navy Seals 1-26; U.S. Navy Special Warfare Combatant Craft Crewmen 1-5; U.S. Navy Explosive Ordnance Disposal Technician 1; U.S. Navy Divers 1-3,

Plaintiffs—Appellees,

versus

Joseph R. Biden, Jr., in his official capacity as President of the United States of America; Lloyd Austin, Secretary, U.S. Department of Defense, individually and in his official capacity as United States Secretary of Defense; United States Department of Defense; Carlos Del Toro, individually and in his official capacity as United States Secretary of the Navy,

Defendants—Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:21-CV-1236

Before Jones, Duncan, and Engelhardt, *Circuit Judges*.

Per Curiam:

The district court preliminarily enjoined the Department of Defense ("DoD"), United States Secretary of Defense Lloyd Austin, and United

States Secretary of the Navy Carlos Del Toro from enforcing certain COVID-19 vaccination requirements against 35 Navy special warfare personnel and prohibited any adverse actions based on their religious accommodation requests.[1] It later declined to stay the injunction. Defendants now seek a partial stay pending appeal insofar as the injunction precludes them from considering Plaintiffs' vaccination statuses "in making deployment, assignment and other operational decisions." The Navy has granted hundreds of medical exemptions from vaccination requirements, allowing those service members to seek medical waivers and become deployable. But it has not accommodated *any* religious objection to *any* vaccine in seven years, preventing those seeking such accommodations from even being considered for medical waivers. We DENY Defendants' motion.

I. Background

A.

President Biden "direct[ed] the [DoD] to look into how and when they [would] add COVID-19 vaccination to the list of required vaccinations for members of the military." Thereafter, the DoD and the Navy issued a serious of orders and directives implementing mandatory COVID-19 vaccine requirements.

Pertinent to this case, Secretary Del Toro issued "ALNAV 062/21," which ordered all "active duty Service Members . . . to be fully vaccinated within 90 days" and "all Reserve Component Service Members . . . to be fully vaccinated within 120 days." Secretary Del Toro's order "exempted

[1] At least two other district courts have recently enjoined the same, or similar, polices with respect to other service members. *See Air Force Officer v. Austin*, ___ F. Supp. 3d _____, No. 5:22-cv-00009-TES, 2022 WL 468799 (M.D. Ga. Feb. 15, 2022); *Seal v. Biden*, No. 8:21-cv-2429-sdm-tgw, 2022 WL 520829 (M.D. Fla. Feb. 18, 2022). Two other courts found similar challenges non-justiciable. *See Church v. Biden*, No. 21-2815 (CKK), 2021 WL 5179215 (D.D.C. Nov. 8, 2021); *Robert v. Austin*, No. 21-cv-02228-RM-STV, 2022 WL 103374 (D. Colo. Jan. 11, 2022).

from mandatory vaccination" service members "actively participating in COVID-19 clinical trials." His order warned that "failure to comply is punishable as a violation of a lawful order" and "may result in punitive or adverse administrative action or both." It also authorized the Chief of Naval Operations and Commandant of the Marine Corps "to exercise the full range of administrative and disciplinary actions to hold non-exempt Service Members appropriately accountable." Such actions "include, but [are] not limited to, removal of qualification for advancement, promotions, reenlistment, or continuation, consistent with existing regulations, or otherwise considering vaccination status in personnel actions as appropriate."

The next day, consistent with Secretary Del Toro's order, the Navy issued "NAVADMIN 190/21," which "provides guidance" on implementing the vaccine mandate within the Navy. NAVADMIN 190/21 states that "COVID-19 vaccination is mandatory for all DoD service members who are not medically or administratively exempt." Religious accommodations fall under administrative exemptions. Again, "service members who are actively participating in COVID-19 clinical trials are exempt from mandatory vaccination against COVID-19." NAVADMIN 190/21 also specifies that the "COVID Consolidated Disposition Authority (CCDA)" will determine "ultimate disposition" of Navy service members who remain unvaccinated. The CCDA "serve[s] as the central authority for adjudication and will have at his or her disposal the full range of administrative and disciplinary actions."

The Navy, moreover, mandated FDA-approved COVID-19 vaccinations under its Manual of the Medical Department ("MANMED"). MANMED § 15-105, covering special operations service members, provides: "[special operations] designated personnel refusing to receive recommended vaccines . . . based solely on personal or religious beliefs are disqualified.

This provision does not pertain to medical contraindications or allergies to vaccine administration." Service members who are "disqualified" under the MANMED have been rendered "non-deployable."

The Commander of Naval Special Warfare Command later issued "Trident Order #12." The order set a deadline of October 17, 2021, for unvaccinated service members to receive their first jab or submit an exemption request. And it provides that "exemptions for medical and/or administrative (including religious) reasons will be adjudicated via service policies." Further, "special operations designated personnel (SEAL and SWCC) refusing to receive recommended vaccines based solely on personal or religious beliefs will still be medically disqualified." But, like MANMED § 15-105(3)(n)(9), Trident Order #12 "does not pertain to medical contraindications or allergies to vaccine administration." Any "waiver from medical requirements for special operations qualification requires a separate waiver that is in addition to waiver of the COVID-19 vaccine requirement for all service members."

The Navy subsequently issued "NAVADMIN 225/21," designating the Chief of Naval Personnel as the CCDA and providing procedural guidance for administrative disposition of unvaccinated Navy service members. NAVADMIN 225/21 mandates "administrative separation" of all "Navy service members refusing the COVID-19 vaccination, absent a pending or approved exemption." It also authorizes commanding officers to "to temporarily reassign Navy service members who refuse the COVID-19 vaccine, regardless of exemption status, based on operational readiness or mission requirements." In addition, "Commands shall not allow those refusing the vaccine to promote/advance, reenlist, or execute orders, with the exception of separation orders, until the CCDA has completed disposition of their case." Commanders "shall delay the promotion of any officer" and "withhold the advancement of any enlisted member" who

refuses the vaccine. Service members separated for refusing the vaccine "will not be eligible for involuntary separation pay and will be subject to recoupment of any unearned special or incentive pays." The CCDA may also "seek recoupment of applicable bonuses, special and incentive pays, and the cost of training and education for service members refusing the vaccine."

The Navy finally issued "NAVADMIN 256/21" to specify that "service members with approved or pending COVID-19 vaccination exemption requests shall not be processed for separation or be subject to . . . other administrative actions . . . due solely to their lack of COVID-19 vaccination." Unvaccinated service members, however, "regardless of exemption status, may be temporarily reassigned . . . based on operational readiness and mission requirements." NAVADMIN 256/21 further requires service members whose COVID-19 vaccination exemption requests are denied to receive the vaccine within five days of the denial, or else they "will be processed for separation and be subject to . . . other administrative actions."

B.

Plaintiffs are 35 Navy service members assigned to Naval Special Warfare Command units. They comprise over two dozen SEALs, plus Special Warfare Combatant Craft Crewmen (SWCC), an Ordnance Disposal Technician (EOD), and three Divers (collectively, "Plaintiffs"). In November 2021, they sued President Biden, Secretary Austin, Secretary Del Toro, and the DoD (collectively, "Defendants"), challenging the Navy's COVID-19 vaccine policies, on their face and as applied, under the Religious

Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.*, and the free exercise clause of the First Amendment.[2]

Shortly thereafter, Plaintiffs moved for a preliminary injunction. The district court held a hearing at which Plaintiffs presented live testimony and other evidence. We describe in detail the relevant evidence in the record and the district court's factual findings.

i.

As of November 2021, 99.4% of active-duty Navy service members had been fully vaccinated against COVID-19. Before and after vaccines became available, several Plaintiffs deployed overseas and completed missions, while others served as instructors in training commands. Operations continued without issue, as many Plaintiffs practiced mitigation techniques—social distancing, testing, quarantining, etc. Defendants identify no instance where a Plaintiff's vaccination status—or any service member's vaccination status—compromised a special warfare mission.

The Navy follows a six-phase, 50-step process to adjudicate religious accommodation requests.[3] During the first 13 steps, staff members verify the required documents submitted with the request. At steps 14 and 15, staff members add the requesting service member's personal information to a "disapproval template" form. There apparently is no approval template. At

[2] Plaintiffs initially brought their claims against Secretaries Austin and Del Toro in both their individual and official capacities. And they also asserted claims under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06. They have, however, since filed an amended complaint against the remaining individual Defendants in their official capacities alone without bringing any APA claims. President Biden is not named in the amended complaint.

[3] *See* Deputy Chief of Naval Operations Standard Operating Procedure for Religious Accommodations (dated Nov. 2021).

step 33, staff members transmit an internal memorandum to Vice Admiral John B. Nowell, requesting that he "sign . . . letters disapproving immunization waiver requests based on sincerely held religious beliefs." At steps 35 to 38, staff members review the accommodation request and list details in a spreadsheet with other requests for Vice Admiral Nowell to review. But by then, the disapproval is fully teed-up: the disapproval letter has been written; the disapproval and religious accommodation request has been packaged with similar requests, and the internal memorandum to Vice Admiral Nowell requesting disapproval has been drafted.

In December 2021, the Navy reported receiving 2,844 requests for religious accommodations. A more recent report suggests that more than 4,000 active duty and Navy Reserve sailors have submitted such requests. The Navy has denied them all. Indeed, during the last seven years, the Navy has not granted a single religious exemption from any vaccination. Yet, with respect to the COVID-19 vaccine, it has approved at least "10 permanent medical exemptions, 259 temporary medical exemptions, and 59 administrative exemptions for active duty sailors, along with seven temporary medical exemptions and 24 administrative exemptions for Navy Reserve sailors." At least 17 of the 259 temporary medical exemptions were granted to service members assigned to Naval Special Warfare.

ii.

Plaintiffs represent various Christian denominations within the Catholic, Eastern Orthodox, and Protestant Churches. They "each object to

receiving a COVID-19 vaccination based on their sincerely held religious beliefs."[4]

Plaintiffs each filed a request for a religious accommodation, which describes his or her sincere religious beliefs and the substantial burden placed on them by the Navy's vaccine mandate. Many are supported by chaplains' memoranda confirming the basis and sincerity of Plaintiffs' beliefs and positions with respect to the COVID-19 vaccine.

For purposes of this litigation, Plaintiffs also filed declarations, confirming their religious beliefs and emphasizing that they do not object to undertaking COVID-19 mitigation measures such as masking, social distancing, and regular testing. and their experiences during the accommodation-request process.

The declarations also describe their experiences during the religious accommodation process. Various commanders told several Plaintiffs that they risked losing their special warfare device, the SEAL Trident, if they requested a religious accommodation. Many were also declared "medically disqualified," or "non-deployable," simply as a result of submitting their requests. Many Plaintiffs have also become ineligible for travel, transfer to other posts including trainings, and advancement in leadership simply because they are unvaccinated and have requested religious accommodations. For example, U.S. Navy SEAL 13 was removed from his leadership position, setting him back at least two years in progressing to the next rank. And U.S. Navy Special Warfare Combatant Craft Crewman 1 was denied training and told by a commander that "the Navy does not want to

[4] Their objections include, *inter alia*, the vaccines' ties to aborted fetal cell lines, divine instruction not to receive the vaccine, and the mRNA vaccines' altering the divine creation of their body by unnaturally inducing production of spike proteins.

spend additional money training someone it is going to lose." Plaintiffs suggest that if the Navy discharges them and seeks recoupment of their training and education costs, those expenses could exceed one million dollars each.

Plaintiffs claim their accommodation requests are futile because denial is a predetermined outcome. U.S. Navy SEAL 2's chain of command advised him that "all religious accommodation requests will be denied," because "senior leadership . . . has no patience or tolerance for service members who refuse COVID-19 vaccination for religious reasons and want them out of the SEAL community," and that "even if a legal challenge is somehow successful, the senior leadership of Naval Special Warfare will remove [his] special warfare designation." U.S. Navy SEAL 5 averred that "[n]umerous comments from [his] chain of command indicate[d] . . . that there [would] be a blanket denial of all religious accommodation requests regarding COVID-19 vaccination." US Navy SEAL 8 averred that his "chain of command . . . made it clear that [his] request [would] not be approved and . . . provided [him] with information on how to prepared for separation from the U.S. Navy." U.S. Navy SEAL 11 declared that during a chief's meeting, his command master chief told him that "anyone not receiving the COVID-19 vaccine is an 'acceptable loss' to the Naval Special Warfare (NSW) community" and the "legal department used language such as 'when they get denied,' not 'if they get denied.'"

iii.

Three Plaintiffs testified at the preliminary injunction hearing. *First*, U.S. Navy SEAL 3 is stationed as an instructor for a medical training course in Mississippi. His missions and duties have been accomplished successfully since 2020 notwithstanding COVID-19. His chaplain supported his request for religious accommodation, and his commanding officer recommended

approval. In doing so, his commanding officer explained that "[t]he training environment [of the command] often requires close quarters contact for prolonged periods of time, however, successful mitigation measures have been implemented since the onset of COVID-19 to ensure the safety of the staff and students." Further, "[t]he cumulative impact of repeated accommodations of religious practices of a similar nature would mean my command *is still able* to safely accomplish its mission and protect the health and safety of its members" (emphasis added). While his request was pending, U.S. Navy SEAL 3 was removed from his duty as an instructor to prepare for separation.

As U.S. Navy SEAL 3's request moved up the chain of command, the Commander of Naval Special Warfare recommended disapproval without explanation. The Deputy Chief of Naval Operations then formally disapproved his request. He explained in generic terms that U.S. Navy SEAL 3 would "inevitably be expected to live and work in close proximity with [his] shipmates," and disapproval was "the least restrictive means available to preserve the [DoD's] compelling interest in military readiness, mission accomplishment and the health and safety of military Service Members." The disapproval offered no explanation specific to U.S. Navy SEAL 3's request.

Second, U.S. Navy SEAL 2 is also stationed as an instructor for a special operations tactical program in Mississippi. He explained that teams around the country have deployed and were "able to successfully accomplish their mission on those deployments through other mitigation tactics with respect to COVID-19 before the vaccine." And his specific training command has successfully accomplished its missions notwithstanding COVID-19.

U.S. Navy SEAL 2's chaplain and two Catholic bishops supported his accommodation request. His commanding officer also recommended approval, for the same reasons stated in U.S. Navy SEAL 3's recommended approval. But the Commander of Naval Special Warfare recommended disapproval without explanation—as he did for U.S. Navy SEAL 3. The Deputy Chief of Naval Operations subsequently disapproved U.S. Navy SEAL 2's request using the same boilerplate disapproval form with no information specific to his request. U.S. Navy SEAL 2 testified that he had "seen a number of these denial letters" and "[e]very one of them [he has] seen [is] identical." His appeal remains pending.

U.S. Navy SEAL 2 testified to adverse actions taken against unvaccinated service members requesting religious accommodations. He explained that "personnel from different commands have been relieved of their milestone positions that, you know, essentially railroad their careers." Further, service members "have been pulled from their commands," which can set their careers back two or three years, and "been made to do menial labor tasks, cleaners, sweeping clean grounds, in a temporary assigned duty from their actual parent command."

Third, U.S. Navy EOD Technician 1 testified that he deployed to South Korea in support of a special operations command in early 2020 during a significant COVID-19 outbreak. His team completed 76 joint service engagements with 21 different U.S. and Korean partner forces, all while maintaining effective COVID-19 mitigation tactics in compliance with CDC guidelines. He even received a deployment joint service accommodation medal from the special operations command in Korea for COVID-19 mitigation.

U.S. Navy EOD Technician 1 met with his superiors to discuss his religious accommodation request and his commanding officer's position,

which was to deny it. They told him that if he received an accommodation, "they probably could not find a place for [him] within the community as a senior enlisted member." He believes he "was being coerced into receiving the vaccine." They asked, "with [his] religious beliefs, if [he] thought that martyrs would be remembered."

The Commanding Officer of the Naval School EOD recommended disapproval of U.S. Navy EOD Technician 1's request, explaining that his "reluctance to obtain vaccination has the potential to create total force health ramifications" due to his "close quarters, hands-on training that cannot be mitigated with COVID-19 protocols." Without a fully vaccinated staff and student population, the recommendation explained, the unit "risk[ed] not being able to fully execute its mission." The Deputy Chief of Naval Operations subsequently disapproved the accommodation request on the same boilerplate form used to disapprove the requests of U.S. Navy SEALs 2 and 3.

iv.

Following the hearing, the district court preliminarily enjoined Secretary Austin, Secretary Del Toro, and the DoD from "applying MANMED § 15-105(3)(n)(9); NAVADMIN 225/21; Trident Order #12; and NAVADMIN 256/21 to Plaintiffs."[5] *U.S. Navy Seals 1–26 v. Biden*, No. 4:21-cv-01236-O, 2022 WL 34443, *14 (N.D. Tex. Jan. 3, 2022) (O'Connor, J.). It further enjoined those Defendants "from taking any adverse action against Plaintiffs on the basis of Plaintiffs' requests for religious accommodation." *Id.* The court excused Plaintiffs' failure to exhaust military remedies as futile, finding the Navy's religious accommodation process is "an empty formality" because "the denial of each request is

[5] The district court also dismissed President Biden from the suit.

predetermined." *Id.* at *4; *see also id.* at *1 (describing process as "theater" and finding the Navy "rubber stamps each denial"); *id.* at *5 ("[T]he Plaintiffs' requests are denied the moment they begin."). As to Plaintiffs' likelihood of success on their RFRA claims,[6] the court found that Defendants could not show a compelling interest in vaccinating Plaintiffs because the religious accommodation process lacks "individualized assessment" and is underinclusive, "includ[ing] carveouts for those participating in clinical trials and those with medical contraindications and allergies to vaccines," but not those with religious objections. *Id.* at *10. Defendants filed a timely interlocutory appeal.

After the preliminary injunction took effect, the Navy formally denied U.S. Navy SEAL 16's appeal of his initially rejected religious accommodation request. The denial appears to be a boilerplate letter, mentioning nothing specific about SEAL 16's request. Plaintiffs submit that "SEAL 24 has yet to receive his denial, but his command informed him that his appeal was denied on February 11."

v.

Defendants moved the district court to stay the preliminary injunction "to the extent the order precludes Defendants from making the assignment and reassignment decisions that the military deems appropriate, taking into account Plaintiffs' vaccination status, including with respect to deployment and training." The court denied the motion, but it clarified that the preliminary injunction:

[6] The district court also concluded that the Defendants' actions violated the Plaintiffs' First Amendment right to free exercise of religion. We need not review that portion of the district court's ruling.

> [does] not require[] Defendants to make any particular personnel assignments. All strategic decisions remain in the hands of the Navy. Rather, the preliminary injunction simply prohibits adverse action against Plaintiffs based on their requests for religious accommodation. This Court will not—and cannot—require the Navy to place a particular SEAL in a particular training program. But it can—and must—prevent the Navy from taking punitive action against that SEAL by blocking him from the training program he would otherwise attend.

Defendants subsequently moved this court to partially stay the preliminary injunction pending appeal "insofar as it precludes the Navy from considering plaintiffs' vaccination status in making deployment, assignment, and other operational decisions."[7] They maintain that "[f]orcing the Navy to deploy plaintiffs while they are unvaccinated threatens the success of critical missions and needlessly endangers the health and safety of other service members."

II. Discussion

"Before addressing the merits, we must be sure that this is a justiciable case or controversy under Article III." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15, 130 S. Ct. 2705, 2717 (2010). If it is not, our inquiry will end. If it is, then we must consider whether Defendants have satisfied the four factors required to grant a stay pending appeal. *See Nken v. Holder*, 556 U.S. 418, 426, 129 S. Ct. 1749, 1756 (2009) (quoting *Hilton v. Braunskill*, 481 U.S.

[7] While the interlocutory appeal and emergency motion have been pending in this court, proceedings in the district court continue. Plaintiffs sought class certification and moved for a class-wide preliminary injunction. They also sought a show cause order, arguing that "Defendants are disregarding and willfully violating [the preliminary injunction] by continuing to apply the same policies and continuing to impose the same injuries on Plaintiffs that initially warranted injunctive relief[.]" Defendants have meanwhile moved to dismiss or, alternatively, transfer venue.

770, 776, 107 S. Ct. 2113, 2119 (1987)). This dispute is justiciable. But Defendants have not carried their burden to warrant the issuance of a stay.

A.

Congress rendered justiciable Plaintiffs' claims under RFRA, which applies to every "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States[.]" 42 U.S.C. § 2000bb-2(1). RFRA, in turn, sets the standards binding every department of the United States to recognize and accommodate sincerely held religious beliefs. It undoubtedly "applies in the military context." *United States v. Sterling*, 75 M.J. 407, 410 (C.A.A.F. 2016), *cert. denied*, 137 S. Ct. 2212 (2017). This makes sense because service members "experience increased needs for religion as the result of being uprooted from their home environments, transported often thousands of miles to territories entirely strange to them, and confronted there with new stresses that would not otherwise have been encountered if they had remained at home." *Katcoff v. Marsh*, 755 F.2d 223, 227 (2nd Cir. 1985). Federal courts are therefore empowered to adjudicate RFRA's application to these Plaintiffs.

Notwithstanding RFRA's broad scope, the district court below, as well as other courts, have believed themselves bound by a judicial abstention doctrine created in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). In that case, the court sought to identify situations in which federal courts, faced with claims implicating internal military affairs, must withhold adjudication in favor of military decision-making. *Mindes* abstention is rooted in the federal common law principle of "comity." *Mindes*, 453 F.2d at 199. But it is likely that, following RFRA's enactment, abstention based on the *Mindes*

test is no longer permissible.[8] RFRA "operates as a kind of super statute, displacing the normal operation of other federal laws[.]" *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020). It would not be a stretch to conclude that RFRA must also displace a judge-created abstention doctrine. "[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *City of Milwaukee v. Illinois*, 451 U.S. 304, 314, 101 S. Ct. 1784, 1791 (1981).

In an abundance of caution and deferring to circuit precedent, however, we consider whether *Mindes* abstention ought to apply here. *Mindes* requires courts to "examine the substance of [a plaintiff's] allegation [implicating internal military affairs] in light of the policy reasons behind nonreview of military matters."[9] 453 F.2d at 201. In doing so, courts must first determine whether "[t]he plaintiff has alleged a deprivation of constitutional rights or that the military violated statutes or its own regulations[.]" *Meister v. Tex. Adjutant Gen.'s Dep't*, 233 F.3d 332, 339 (5th Cir. 2000) (citing *Mindes*, 453 F.2d at 201). Courts must next assess whether the plaintiff has exhausted all available intra-service corrective measures. *Mindes*, 453 F.2d at 201. If the plaintiff satisfies both criteria, then the court considers a series of factors, which amount to a synopsis of pre-*Mendes* case

[8] A respected treatise disagrees with *Mindes* on other grounds, stating that "[t]here is nothing in the power of Congress to make rules for the government and regulation of the land and naval forces, nor in the powers of the President as commander in chief, that ousts the power of courts to protect the constitutional rights of individuals against improper military actions." 13C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2942 n.80 (3d ed. Apr. 2021 update).

[9] Among a number of reasons for imposing an exhaustion requirement, the court stated that "the greatest reluctance to accord judicial review [of internal military affairs] has stemmed from the proper concern that such review might stultify the military in the performance of its vital mission." *Id*. at 199.

law that had adjudicated claims arising from military service: (1) "[t]he nature and strength of the plaintiff's challenge to the military determination[;]" (2) "[t]he potential injury to the plaintiff if review is refused[;]" (3) "[t]he type and degree of anticipated interference with the military function[;]" and (4) "[t]he extent to which the exercise of military expertise or discretion is involved." *Id.* at 201-02.

i.

Plaintiffs satisfy the first threshold *Mendes* inquiry because they allege constitutional violations of the First Amendment and RFRA, which "secures Congress' view of the right to free exercise under the First Amendment[.]" *Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020).

With respect to the second inquiry, this court has held that "[i]n the military context, the exhaustion requirement promotes the efficient operation of the military's judicial and administrative systems, allowing the military an opportunity to fully exercise its own expertise and discretion prior to any civilian court review." *Von Hoffburg v. Alexander*, 615 F.2d 633, 637-38 (5th Cir. 1980) (citing *Hodges v. Callaway*, 499 F.2d 417 (5th Cir. 1974)). Nonetheless, exhaustion is unnecessary if, *inter alia*, the administrative remedy is futile and plaintiffs raise substantial constitutional claims. *Id.* at 638 (citations omitted).

Plaintiffs are exempted from exhausting their administrative remedies for both of these reasons.[10] The Navy has not accommodated any religious request to abstain from any vaccination in seven years, and to date it has denied all religiously based claims for exemption from COVID-19

[10] The two Plaintiffs whose appeals have been finally adjudicated require no such exemption, so this analysis only pertains to the 33 who have not received any final determinations.

vaccination. It is true that futility is not a function of the likely ultimate success of administrative exhaustion. But evidence, recited previously and not meaningfully challenged here, suggests that the Navy has effectively stacked the deck against even those exemptions supported by Plaintiffs' immediate commanding officers and military chaplains. This is sufficiently probative of futility.[11] Further, as explained more fully below, Plaintiffs raise substantial, legally clear-cut questions under RFRA. Courts are specifically equipped to address RFRA claims and, by the same token, the issues are less suitable for administrative adjudication. Plaintiffs have thus satisfied the threshold criteria required by *Mindes*. But a final justiciability determination depends on considering the four additional *Mindes* points.

ii.

The district court determined that each of the four additional *Mindes* considerations favors justiciability. We agree.

The constitutional underpinnings and merit of Plaintiffs' claims weigh in favor of granting judicial review. Constitutional claims are "normally more important than those having only a statutory or regulatory base[.]" *Mindes*, 453 F.2d at 201. Indeed, this court has favorably cited the Ninth Circuit's determination that "[r]esolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board." *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973); *see Von Hoffburg*, 615 F.2d at 638 (citing *Downen*,

[11] Unlike in this case, the Marines in *Church v. Biden* "advanced no argument or evidence demonstrating that obtaining review of any future discipline or removal pursuant to ordinary military review procedures would be futile or inadequate." 2021 WL 5179215, at *11. Similarly, the court in *Robert v. Austin*, found that "Plaintiffs' contention that they may be subject to discipline for refusing to take a vaccine appear[ed] to be based on nothing more than speculation." 2022 WL 103374, at *3. Plaintiffs here have done the exact opposite.

481 F.2d at 643). This is especially so when a plaintiff's claims are "founded on infringement of specific constitutional rights[.]" *NeSmith v. Fulton*, 615 F.2d 196, 201-02 (5th Cir. 1980) (citations omitted). Plaintiffs allege specific, and far from frivolous, violations of their free exercise rights under both the First Amendment and RFRA. Thus, the nature and strength of Plaintiffs' claims weigh in favor of judicial resolution.

Plaintiffs also face irreparable harm if judicial review is denied. "In general, a harm is irreparable where there is no adequate remedy at law, such as monetary damages." *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011) (citation omitted). "The loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury." *Opulent Life Church v. City of Holly Springs Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976) (plurality opinion)). "This principle applies with equal force to the violation of [RFRA] rights because [RFRA] enforces First Amendment freedoms, and the statute requires courts to construe it broadly to protect religious exercise."[12] *Id.* (citations omitted). At base, Plaintiffs are staring down even more than "a choice between their job(s) and their jab(s)." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). By pitting their consciences against their livelihoods, the vaccine requirements would crush Plaintiffs' free exercise of religion.

[12] *Opulent Life Church* involved claims under Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc, *et seq.*, but "[b]oth RFRA and RLUIPA impose essentially the same requirements as *Sherbert* [*v. Verner*, 374 U.S. 398, 83 S. Ct. 1790 (1963)]" *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1922 (2021) (Barrett, J., concurring); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695, 134 S. Ct. 2751, 2761 (2014) (citation omitted) (RLUIPA "imposes the same general test as RFRA but on a more limited category of governmental actions.").

The most problematic of the *Mindes* considerations is whether judicial review of Plaintiffs' claims would seriously impede the Navy's performance of its vital duties. Because "there will always be some interference when review is granted," courts ought to abstain only where "the interference would be such as to seriously impede the military in the performance of vital duties[.]" *Mindes,* 453 F.2d at 201. We are aware of the Navy's general objection that federal court resolution of these claims "cause[s] direct and immediate impact to mission execution."[13] But the Navy acknowledges that it has granted hundreds of medical exemptions from the COVID-19 vaccine, at least 17 of which were temporary medical exemptions for those in Naval Special Warfare.[14] Only 35 Plaintiffs seek religious accommodations here. And "5,035 active component and 2,960 Ready Reserve sailors" remained unvaccinated as of January 27, 2022. It is therefore "illogical . . . that Plaintiff[s'] religious-based refusal to take a COVID-19 vaccine would 'seriously impede' military function when the [Navy] has [over 5,000] service members still on duty who are just as unvaccinated as [the Plaintiffs]."[15] *Air Force Officer*, 2022 WL 468799, at *7. In fact, Vice Admiral

[13] The commanding officer of two Plaintiffs, however, averred that "the cumulative impact of repeated accommodations of religious practices . . . would mean [his] command is still able to safely accomplish its mission and protect the health and safety of its members."

[14] The Navy's willingness to grant hundreds of medical exemptions undermines its reliance on decisions like *Goldman v. Weinberger*, 475 U.S. 503, 106 S. Ct. 1310 (1986), *abrogated by* 10 U.S.C. § 774(a)-(b). The *Goldman* court held that "the First Amendment does not require the military to accommodate [wearing a yarmulke] in the face of its view that they would detract from the uniformity sought by the dress regulations." *Id.* at 475 U.S. at 509-10, 106 S. Ct. at 1314. The Navy is currently 99.4% uniform in its COVID-19 vaccination status. To the extent that the remaining 0.6% are not uniform, the exemptions granted by the Navy belie its insistence on uniformity in this case.

[15] The Navy had formally discharged 45 sailors for refusing the COVID-19 vaccine as of January 27, 2022.

William Merz recently observed that during operations conducted with fully vaccinated personnel, the Omicron variant in particular is "coming and going all the time, [in] very small numbers, and [with] really no operational impact[.]"[16] Significantly, the Navy recently aligned its testing and isolation guidelines with updated, looser CDC protocols, which recommend isolation for those who test positive only "for five days or until symptoms have cleared, depending on which is longer." Such individuals then only have to "wear a mask for an additional five days." Thus, "Navy teams are [] very, very attuned to watching their indications and reacting to [the virus]."[17]

Finally, the extent to which military expertise or discretion is involved does not militate against judicial review. "Courts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military functions." *Mindes*, 453 F.2d at 201-02. To be sure, "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments[.]" *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S. Ct. 2440, 2446 (1973) The Navy may permissibly classify any number of Plaintiffs as deployable or non-deployable for a wide variety of reasons. But if the Navy's plan is to ignore RFRA's protections, as it seems to be on the record before us, courts must intervene because

[16] Defendants insist that this quotation is taken out of context. But the "context" they emphasize is based on the article's summary of Admiral Merz's sentiments, not the words of Admiral Merz himself. We rely on the admiral's quoted words.

[17] Also noteworthy concerning the comparative efficacy of vaccination is that the USS Milwaukee was "sidelined" in December 2021 by a COVID-19 outbreak despite having a fully vaccinated crew; and over 15 members of one Plaintiff's entirely vaccinated detachment contracted, or were exposed to, COVID-19 during a training exercise.

"[g]enerals don't make good judges—especially when it comes to nuanced constitutional issues."[18] *Air Force Officer*, 2022 WL 468799, at *8.

Accordingly, even under *Mindes*, Plaintiffs' claims are justiciable.

B.

When considering whether to grant a stay pending appeal, a court must consider:

- *First*, whether the stay applicants have made a strong showing that they are likely to succeed on the merits;
- *Second*, whether the applicants will be irreparably harmed absent a stay;
- *Third*, whether issuance of the stay will substantially injure the other parties; and
- *Fourth*, where the public interest lies.

Nken, 556 U.S. at 426, 129 S. Ct. 1756 (quoting *Hilton*, 481 U.S. at 776, 107 S. Ct. at 2119). The first two factors "are the most critical." *Id.* at 434.

i.

Defendants argue that they are likely to prevail because Plaintiffs' claims are non-justiciable and otherwise lack merit. But we reject non-justiciability, and the district court painstakingly explained why, at a minimum, their RFRA claims are meritorious. We elaborate on the district court's reasoning.

As the Supreme Court has noted, RFRA affords even "greater protection for religious exercise than is available under the First Amendment[]" and provides that the:

[18] Judge Tilman E. Self III is a former Army artillery officer. *Id.* at *5.

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

Holt v. Hobbs, 574 U.S. 352, 357, 135 S. Ct. 853, 859-60 (2015); 42 U.S.C. § 2000bb-1. "[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts[.]" *Employment Div. v. Smith*, 494 U.S. 872, 877, 110 S. Ct. 1595, 1599 (1990). And "a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violates his religious beliefs." *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (involving RLUIPA). Once a plaintiff demonstrates a substantial burden on his exercise of religion, "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-431, 126 S. Ct. 1211, 1220 (2006) (quoting 42 U.S.C. § 2000bb-1(b)). This is a "high bar." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2392 (2020) (Alito, J., concurring). This already high bar is raised even higher "[w]here a regulation already provides an exception from the law for a particular group[.]" *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014) (citations omitted); *see also Fulton*, 141 S. Ct. at 1878-83.

The Navy does not even dispute that its COVID-19 vaccination requirements substantially burden each Plaintiff's free exercise of religion, but the nature of the injury bears emphasis. Plaintiffs have thoughtfully articulated their sincere religious objections to taking the vaccine itself. Accepting the vaccine would directly burden their respective faiths by forcing

them to inject an unremovable substance at odds with their most profound convictions. This injury would outlast their military service, making the decision whether to acquiesce far more difficult than just choosing between "their job(s) and their jab(s)." *BST Holdings*, 17 F.4th at 618. The vaccine requirements principally compete against their faiths and secondarily against their livelihoods. These circumstances impose a substantial burden on Plaintiffs. *See Little Sisters of the Poor*, 140 S. Ct. at 2391 (contraceptive mandate imposed a substantial burden on employers that had religious objections to contraceptives and believed that complying would make them complicit in the provision of contraceptives); *see also Holt*, 574 U.S. at 361, 135 S. Ct. at 862 (RLUIPA context) (a grooming policy "substantially burden[ed] [a prisoner's] religious exercise[]" where he "face[d] serious disciplinary action[]" for contravening that policy).

In an attempt to subordinate Plaintiffs' protected interest, the Navy focuses instead on its institutional interests. Defendants' position is that:

> The Navy has an extraordinarily compelling interest in requiring that service members generally—and these plaintiffs in particular—be vaccinated against COVID-19, both (1) to reduce the risk that they become seriously ill and jeopardize the success of critical missions and (2) to protect the health of their fellow service members.

The Navy has been extraordinarily successful in vaccinating service members, as at least 99.4% of whom are vaccinated.[19] But that general interest is nevertheless insufficient under RFRA. The Navy must instead "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S., at 431, 126 S. Ct. at 1220. "The

[19] As the district court explained in denying Defendants' stay motion, statistically speaking, "vaccinated servicemembers are far more likely to encounter other unvaccinated individuals off-base among the general public than among their ranks."

question, then, is not whether [the Navy has] a compelling interest in enforcing its [vaccination] policies generally, but whether it has such an interest in denying an exception to [each Plaintiff]." *Fulton*, 141 S. Ct. at 1881. And RFRA "demands much more[]" than deferring to "officials' mere say-so that they could not accommodate [a plaintiff's religious accommodation] request." *Holt*, 574 U.S. at 369, 135 S. Ct. at 866 (RLUIPA context). That is because "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation[]" on the free exercise of religion. *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S. Ct. 1790, 1795 (1963) (internal quotation marks and citations omitted).[20]

Defendants have not demonstrated "paramount interests" that justify vaccinating these 35 Plaintiffs against COVID-19 in violation of their religious beliefs. They insist that "given the small units and remote locations in which special-operations forces typically operate, military commanders have determined that unvaccinated service members are at significantly higher risk of becoming severely ill from COVID-19 and are therefore medically unqualified to deploy." But "[r]outine [Naval Special Warfare] mission risks include everything from gunshot wounds, blast injuries, parachute accidents, dive injuries, aircraft emergencies, and vehicle rollovers to animal bites, swimming or diving in polluted waters, and breathing toxic chemical fumes." There is no evidence that the Navy has evacuated anyone from such missions due to COVID-19 since it instituted the vaccine mandate, but Plaintiffs engage in life-threatening actions that may create risks of equal or greater magnitude than the virus.

[20] *Sherbert*, of course, formed the foundation for RFRA. *See Fulton*, 141 S. Ct. at 1922 (Barrett, J., concurring).

More specifically, multiple Plaintiffs successfully deployed overseas before and after the vaccine became available, and one even received a Joint Service Commendation Medal for "safely navigating restricted movement and distancing requirements" while deployed in South Korea between January and June 2020.[21] Plaintiffs also trained other SEALs preparing for deployments at various points during the pandemic while remaining unvaccinated.

The Navy's alleged compelling interest is further undermined by other salient facts. It has granted temporary medical exemptions to 17 Special Warfare members, yet no reason is given for differentiating those service members from Plaintiffs. That renders the vaccine requirements "underinclusive." *Navy Seals 1–26*, 2022 WL 34443, at *10. And "underinclusiveness . . . is often regarded as a telltale sign that the government's interest in enacting a liberty-restraining pronouncement is not in fact 'compelling.' " *BST Holdings*, 17 F.4th at 616 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542-46, 113 S. Ct. 2217, 2231-34(1993)); *See also Holt*, 574 U.S. at 367, 135 S. Ct. at 865 (RLUIPA context) (a policy was substantially underinclusive where a prison "denied petitioner's request to grow a 1/2-inch beard [for religious reasons] [while permitting] prisoners with a dermatological condition to grow 1/4-inch beards."). Moreover, in none of the letters denying religious accommodations to these Plaintiffs has the Navy articulated Plaintiff-specific reasons for its decisions.[22] Further evidencing that there is a pattern of

[21] During this deployment, Navy EOD Technician 1 completed 76 joint service engagements with 21 U.S. and Korean partner forces, all while maintaining effective COVID-19 mitigation tactics in compliance with CDC guidelines.

[22] On the contrary, some of the remarks uttered by superior officers to Plaintiffs could be regarded as outright hostile to their desire for religious accommodations. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018).

disregard for RFRA rights rather than individualized consideration of Plaintiffs' requests, the Navy admits it has not granted a single religious accommodation. Yet surely, had the Navy been conscientiously adhering to RFRA, it could have adopted least restrictive means to accommodate religious objections against forced vaccinations, for instance, to benefit personnel working from desks, warehouses, or remote locations.

Considering the record as a whole, we agree with the district court that Defendants have not shown a compelling interest to deny religious accommodations to each of these 35 Plaintiffs. Indeed, the "marginal interest" in vaccinating each Plaintiff appears to be negligible; consequently, Defendants lack a sufficiently compelling interest to vaccinate Plaintiffs. *Hobby Lobby*, 573 U.S. at 727, 134 S. Ct. at 2779 (citing *O Centro*, 546 U.S. at 431, 126 S. Ct.at 1220-21).

In the absence of a compelling interest, the first *Nken* factor weighs against granting the requested partial stay.

ii.

Defendants also contend that "[b]y requiring the Navy to disregard plaintiffs' unvaccinated status in making deployment, assignment, and other operational decisions, the preliminary injunction irreparably damages the Navy and the public." We disagree.

Despite their concerns, Defendants do not face irreparable harm in the absence of a stay. "[B]ecause the Government has requested a stay pending completion of appellate proceedings, the relevant question is whether the Government will be irreparably harmed *during the pendency of the appeal*." *State v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021) (emphasis in original). Defendants emphasize that the Navy "must deploy only service members who are at the least risk of becoming severely ill, leaving their units shorthanded and potentially unable to complete missions." In any event, the

district court clarified that the preliminary injunction "simply prohibits adverse action against Plaintiffs based on their requests for religious accommodation." Defendants therefore remain able to make decisions based on other neutral factors. And "[e]ven if [Defendants are] correct that long-term compliance with the district court's injunction would cause irreparable harm, [they] present[] no reason to think that [they] cannot comply with the district court's [injunction] while the appeal proceeds."[23] *Biden*, 10 F.4th at 559.

iii.

Partially staying the preliminary injunction pending appeal would substantially harm Plaintiffs. As we noted, Plaintiffs' First Amendment freedoms are seriously infringed by the Navy's vaccine requirements. *See BST Holdings*, 17 F.4th at 618; *see also Holt*, 574 U.S. at 361, 135 S. Ct. at 862; *Little Sisters of the Poor*, 140 S. Ct. at 2391. These infringements "unquestionably constitute[] irreparable injur[ies]." *Opulent Life Church*, 697 F.3d at 295 (quoting *Elrod*, 427 U.S. at 373, 96 S. Ct. at 2690). No further showing is necessary for Plaintiffs to demonstrate that even partially staying the injunction would irreparably harm them.

iv.

The issuance of Defendants' requested stay would also disserve the public interest. Defendants contend that "[i]n cases involving the government, the harm to the government and the public interest merge."

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[23] Any injury to Defendants is also "outweighed by [Plaintiffs'] strong likelihood of success on the merits." *Freedom From Religion Found., Inc. v. Mack*, 4 F.4th 306, 316 (5th Cir. 2021) (collecting cases). Relatedly, if the vaccine requirements violate Plaintiffs' First Amendment rights—as they have demonstrated is likely at least under RFRA—then the Navy's claimed harm "is really 'no harm at all.'" *McDonald v. Longley*, 4 F.4th 229, 254 (5th Cir. 2021) (quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006)).

That is mistaken. Those factors merge "when the Government is the opposing party[,]" *i.e.*, when the government is not the party applying for a stay. *Nken*, 556 U.S. at 435, 129 S. Ct. 1762. Here the government Defendants are applying for a stay and Plaintiffs are the opposing party. The public interest factor is therefore distinct. At any rate, "injunctions protecting First Amendment freedoms are always in the public interest." *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) (quoting *Christian Legal Soc'y*, 453 F.3d at 859).

III. Conclusion

The motion by Defendants for a partial stay of the preliminary injunction pending appeal is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

February 28, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 22-10077 U.S. Navy SEALs 1-26 v. Biden
USDC No. 4:21-CV-1236

Enclosed is the opinion entered in the case captioned above.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Nancy F. Dolly, Deputy Clerk
504-310-7683

Mr. Michael Berry
Mr. Justin E. Butterfield
Ms. Sarah Wendy Carroll
Ms. Marleigh D. Dover
Mr. David J. Hacker
Ms. Heather Gebelin Hacker
Mr. Jeffrey Carl Mateer
Ms. Karen S. Mitchell
Mr. Jordan E Pratt
Ms. Holly Mischelle Randall
Mr. Casen Ross
Mr. Hiram Stanley Sasser III
Mr. Charles Wylie Scarborough
Mr. Kelly J. Shackelford
Mr. Andrew Bowman Stephens
Mr. Lowell V. Sturgill Jr.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. NAVY SEALs 1-26, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 4:21-cv-01236-O**
	§	
JOSEPH R. BIDEN, JR., et al.,	§	
	§	
	§	
Defendants.	§	

ORDER ON PRELIMINARY INJUNCTION

Our nation asks the men and women in our military to serve, suffer, and sacrifice. But we do not ask them to lay aside their citizenry and give up the very rights they have sworn to protect.[1] Every president since the signing of the Religious Freedom Restoration Act has praised the men and women of the military for their bravery and service in protecting the freedoms this country guarantees.[2]

In this case, members of the military seek protection under those very freedoms. Thirty-five Navy Special Warfare servicemembers allege that the military's mandatory vaccination policy violates their religious freedoms under the First Amendment and Religious Freedom Restoration Act. The Navy provides a religious accommodation process, but by all accounts, it is theater. The Navy has not granted a religious exemption to any vaccine in recent memory. It merely rubber stamps each denial. The Navy servicemembers in this case seek to vindicate the very freedoms

[1] George Washington wrote in 1775 that "When we assumed the Soldier, we did not lay aside the Citizen." Those words are carved into the marble of the Memorial Amphitheater in the Arlington National Cemetery.
[2] See President William Clinton, Remarks at the Veterans Day National Ceremony (Nov. 11, 1999); President George W. Bush, Remarks at the Veterans Day Proclamation (Oct. 30, 2001); President Barack Obama, Remarks at the Veterans Day National Ceremony (Nov. 11, 2009); President Donald Trump, Remarks at the New York City Veterans Day Parade Address (Nov. 11, 2019); President Joseph Biden, Remarks at the National Veterans Day Observance (Nov. 11, 2021).

they have sacrificed so much to protect.[3] The COVID-19 pandemic provides the government no license to abrogate those freedoms. There is no COVID-19 exception to the First Amendment. There is no military exclusion from our Constitution.

Having considered the briefing, oral argument, relevant facts, and applicable law, the Court concludes that Plaintiffs' Motion for Preliminary Injunction should be and is hereby **GRANTED**.

I. BACKGROUND

This case arises from the United States Navy's mandatory COVID-19 vaccination policy. Plaintiffs are thirty-five Navy Special Warfare servicemembers, including SEALs, Special Warfare Combatant Craft Crewmen, Navy Divers, and an Explosive Ordinance Disposal Technician. Compl. 1, 8–9, ECF No. 1. Together, they sue President Biden, Secretary of Defense Austin, Secretary of the Navy Del Toro, and the United States Department of Defense.

A. Factual Background

1. The Navy's Vaccination Policy

In August 2021, the Department of Defense ("DoD") issued a vaccine mandate directing all DoD servicemembers to be vaccinated against COVID-19. Pls.' App. 146–47, ECF No. 17. The Department of the Navy also implemented its own mandate requiring all active-duty Navy servicemembers to be fully vaccinated before November 28 or face the "full range" of disciplinary action. Pls.' App. 149–50, ECF No. 17. For servicemembers assigned to Special Operations duty, the Navy's vaccination policy reads:

> [Special Operations] personnel refusing to receive recommended vaccines . . . based solely on personal or religious beliefs are disqualified. This provision does not pertain to medical contraindications or allergies to vaccine administration.

[3] Before the Court are the Plaintiffs' Motion for Preliminary Injunction (ECF No. 15), filed November 24, 2021; Defendants' Response (ECF No. 43), filed December 10; and Plaintiffs' Reply (ECF No. 58), filed December 17. The Court held a hearing on the matter on December 20. ECF No. 61.

Manual of the Medical Department ("MANMED") § 15-105(3)(n)(9); Pls.' App. 838, ECF No. 17. In addition to those with medical exemptions, "[m]embers who are actively participating in COVID-19 clinical trials are exempted from mandatory vaccination" until the trial concludes. Pls.' App. 149–50, ECF No. 17.

For those with pending religious exemption requests, being "disqualified" means becoming permanently nondeployable.[4] Unlike those with medical exemptions and allergies to the vaccine, an unvaccinated servicemember seeking a religious exemption (the "religious servicemember") continues to be nondeployable, even if he receives the accommodation he requests. Pls.' App. 159, 838 (Trident Order 12 – Mandatory Vaccination for COVID-19), ECF No. 17. To regain his "deployable" status, the religious servicemember must first receive his religious accommodation, *and then* seek a medical waiver under the Navy's MANMED. Defs.' App. 278, ECF No. 44-3.

Each of these steps, by themselves, is monumental. Religious exemptions to the vaccine requirement are virtually non-existent. In the past seven years, the Navy has not granted a religious exemption to any vaccine requirement. Pls.' App. 295, ECF No. 17.

2. Plaintiffs' Religious Accommodations Requests

By early November, 99.4% of active-duty Navy servicemembers had been fully vaccinated against COVID-19. Pls.' App. 284, ECF No. 17. Plaintiffs are part of the remaining 0.6%. Representing the Catholic, Eastern Orthodox, and Protestant branches of Christianity, Plaintiffs object to receiving the COVID-19 vaccine based on their religious beliefs. *Id.* These beliefs fall into the following categories: (1) opposition to abortion and the use of aborted fetal cell lines in

[4] *See* Decl. of SEALs 1–19, 21–26, Pls.' App. 870–980; Decl. of SWCC 1–5, App. 981–1003; Decl. of EOD 1, App. 1016–22; Decl. of ND 1–3, App. 1004–15.

development of the vaccine;[5] (2) belief that modifying one's body is an afront to the Creator;[6] (3) direct, divine instruction not to receive the vaccine;[7] and (4) opposition to injecting trace amounts of animal cells into one's body.[8] Plaintiffs' beliefs about the vaccine are undisputedly sincere, and it is not the role of this Court to determine their truthfulness or accuracy. *See Davis v. Fort Bend Cnty.*, 765 F.3d 480, 478 (5th Cir. 2014) (citing *United States v. Ballard*, 322 U.S. 78, 86 (1944)).

Plaintiffs filed their religious accommodation requests as early as August and as late as December. *See* Supp. Decl. of SEALs, SWCC, EOD, ND, Supp. App. 1023–1134. In many cases, the Plaintiffs' commanding officers recommended their requests be approved. *See* Supp. Decl. of SEAL 18, Supp. App. 1075; Hr'g Test. of SEAL 3. Even so, as of December 17, the Navy has summarily denied at least twenty-nine of the thirty-five accommodations requests, the majority of which have been appealed. Supp. Decl. of SEALs, SWCC, EOD, ND, Supp. App. 1023–1134. The Navy has made no final determinations on appeal.

To adjudicate a religious accommodation request, the Navy uses a six-phase, fifty-step process. *See* Supp. Decl. of Andrew Stephens, Ex. 1, ECF No. 62. Although "all requests for accommodation of religious practices are assessed on a case-by-case basis," Phase 1 of the Navy guidance document instructs an administrator to update a *prepared* disapproval template with the requester's name and rank. *Id.* Based on this boilerplate rejection, Plaintiffs believe that this process is "pre-determined" and sidesteps the individualized review required by law. *Id.*

[5] *See* Decl. of SEALs 1–3, 5, 6, 8–15, 17–19, 21–24, 26, App. 871–84, 890–97, 903–37, 944–72, 978–80; Decl. of SWCC 1–4, App. 981–1003; Decl. of EOD 1, App. 1016–22; Decl. of ND 2, App. 1009–11.
[6] *See* Decl. of SEAL 5, 9–11, 13–15, 18, 22, 25, 26, App. 890–93, 909–20, 926–37, 948–51, 961–64, 974–80; Decl. of SWCC 1, 5, App. 982–85, 1000–03; Decl. of EOD 1, App. 1016–22; Decl. of ND 1, 3, App. 1004–07, 1013–15.
[7] *See* Decl. of SEAL 7 and 19, App. 899–900, 954.
[8] *See* Decl. of SEAL 13, App. 927; Decl. of EOD 1, App. 1018.

B. Procedural History

On November 9, 2021, Plaintiffs filed this lawsuit challenging the Navy's vaccination mandate. *See* Compl. 38, ECF No. 1. In response to the Court's order for a status report, Plaintiffs filed their Motion for Preliminary Injunction (ECF No. 15), on November 24, 2021. Defendants responded on December 10. *See* Defs.' Resp., ECF No. 43. Plaintiffs filed their reply December 17. *See* Pls.' Reply, ECF No. 58. The parties presented evidence and arguments before the Court in a hearing on December 20. *See* ECF No. 61. Accordingly, the Motion is now ripe for the Court's review.

II. LEGAL STANDARD

A preliminary injunction is an "extraordinary remedy" and will be granted only if the movants carry their burden on all four requirements. *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008). The Court may issue a preliminary injunction if the movants establish (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm; (3) that the balance of hardships weighs in the movants' favor; and (4) that the issuance of the preliminary injunction will not disserve the public interest. *See Daniels Health Servs., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 582 (5th Cir. 2013); *see also* Fed. R. Civ. P. 65. "The decision to grant or deny a preliminary injunction is discretionary with the district court." *Miss. Power & Light Co. v. United Gas Pipe Line*, 760 F.2d 618, 621 (5th Cir. 1985).

The movants must make a clear showing that the injunction is warranted, and the issuance of a preliminary injunction "is to be treated as the exception rather than the rule." *Miss. Power & Light*, 760 F.2d at 621. "Only in rare instances is the issuance of a mandatory preliminary injunction proper." *Harris v. Wilters*, 596 F.2d 678, 680 (5th Cir. 1979) (per curiam).

III. ANALYSIS

Plaintiffs ask the Court to enjoin Defendants from enforcing the vaccination policy, which they say violates RFRA and the First Amendment. Mot. 2, ECF No. 15; Pls.' Br. 2, ECF No. 16. They also assert that the Defendants' permanent medical-disqualification policy fails strict scrutiny. Defendants contend that Plaintiffs have not exhausted their intra-military remedies and that their claims are nonjusticiable. Even if these claims are reviewable, Defendants argue, a preliminary injunction would be inappropriate, because Plaintiffs are unlikely to succeed on the merits of their claims.

A. Jurisdiction and Reviewability

There are two threshold questions before the Court. The first is whether this Court has jurisdiction over the parties, and the second is whether Plaintiffs' claims are justiciable under the *Mindes* test.

1. Relief Against President

Citing *Newdow v. Roberts*, Defendants argue this Court lacks jurisdiction to enjoin the President. 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief." (citation omitted)). "[W]e cannot issue a declaratory judgment against the President. It is incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court." *Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992) (Scalia, J., concurring in part). Defendants are correct. This Court has no declaratory or injunctive power against President Biden, and he is therefore **DISMISSED** as party to this case.

2. Justiciability Under *Mindes*

Defendants also argue that this case is nonjusticiable because Plaintiffs have not exhausted military remedies, and because they seek to have the Court intrude on internal military affairs. All

Plaintiffs have submitted religious accommodation requests. The Navy has denied twenty-nine of those requests. It has granted none. Defendants say the Court must wait for the Navy to decide each request.

As explained below, the record indicates the denial of each request is predetermined. As a result, Plaintiffs need not wait for the Navy to engage in an empty formality. In addition, whether the vaccine mandate violates Plaintiffs' First Amendment rights is a legal question well suited for the courts, not the Navy's administrative process. The Court finds that exhaustion is futile and will not provide complete relief, and therefore the case is justiciable.

Generally, courts refrain from reviewing internal military affairs. The rationale is simple: "[J]udges are not given the task of running the Army," or, in this case, the Navy. *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953). Some military issues, however, are appropriate for judicial review. The Fifth Circuit has developed a test to determine whether a given military issue is justiciable, and appropriate for judicial review. That test first requires plaintiffs to pass a two-part threshold test by showing (1) "an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations," and (2) "exhaustion of available intraservice corrective measures." *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971). Then, if both criteria are met, the Court weighs four factors to determine whether the issue is justiciable: (1) the nature and strength of the plaintiffs' challenge; (2) the potential injury to the plaintiffs if review is refused; (3) the type and degree of anticipated interference with the military function; and (4) the extent to which the exercise of military expertise or discretion is involved. *Id.* at 201–02.

Before applying the *Mindes* test, the Court addresses Plaintiffs' argument that *Mindes* does not apply to RFRA. Plaintiffs suggest that applying *Mindes* here effectively reads an exhaustion

requirement into RFRA. *See* Pls.' Reply 7–8, ECF No. 58. Plaintiffs confuse statutory exhaustion and judge-made exhaustion. When a statute imposes an exhaustion requirement, "Congress sets the rules." *Ross v. Blake*, 578 U.S. 632, 639 (2016). Courts simply apply the text. They may not "add unwritten limits" or exceptions to the statute's "rigorous textual requirements." *Id.* If RFRA had an exhaustion requirement, the Court would apply it. But "judge-made exhaustion doctrines," such as *Mindes*, are different. *Id.* The military exhaustion requirement in *Mindes* is a longstanding prudential doctrine that applies to constitutional, statutory, and regulatory claims involving "an 'internal military decision.'" *Meister v. Tex. Adjutant Gen.'s Dep't*, 233 F.3d 332, 340 (5th Cir. 2000). The out-of-circuit cases Plaintiffs cite are unpersuasive. They discuss whether RFRA requires exhaustion,[9] or whether certain RFRA claims satisfy prudential ripeness analysis.[10] They do not analyze whether *Mindes*, a "judicial abstention doctrine" for military issues, applies to RFRA. *Id.* at 339. Plaintiffs challenge internal military decisions, so, in this Circuit, the Court must apply *Mindes*.

a. The Two-Part Threshold Test

Having determined that *Mindes* applies, the Court turns to the two-part threshold test. Defendants agree that Plaintiffs satisfy the first part—they have alleged deprivation of their First Amendment rights and violations under RFRA. *See* Defs.' Resp. 24, ECF No. 43. The parties dispute the second part—whether Plaintiffs have exhausted their military remedies.

The military exhaustion requirement is like other judge-made exhaustion doctrines. "The major purpose of the exhaustion doctrine is to prevent the courts from interfering with the

[9] *Singh v. Carter*, 168 F. Supp. 3d 216, 226 (D.D.C. 2016) ("RFRA certainly provides no textual support for the defendants' position that the plaintiff is required to exhaust administrative remedies . . . .").
[10] *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012) (declining "to read an exhaustion requirement into RFRA" for free exercise claims against the Drug Enforcement Administration).

administrative process until it has reached a conclusion." *Von Hoffburg v. Alexander*, 615 F.2d 633, 637 (5th Cir. 1980). Military exhaustion is a matter of comity between the branches, "to maintain the balance between military authority and the power of federal courts." *Id.* Application of the exhaustion requirement is therefore fact-intensive, requiring "an understanding of its purposes and of the particular administrative scheme involved." *McKart v. United States*, 395 U.S. 185, 193 (1969). In contrast to statutory exhaustion requirements, "judge-made exhaustion doctrines, even if flatly stated at first, remain amenable to judge-made exceptions." *Ross*, 578 U.S. at 639. The Fifth Circuit has identified at least four such exceptions to military exhaustion: futility, inadequacy of administrative remedies, irreparable injury, and a substantial constitutional question. *Von Hoffburg*, 615 F.2d at 638.

First, plaintiffs need not exhaust military remedies "when resort to the administrative reviewing body would be futile." *Hodges v. Callaway*, 499 F.2d 417, 420 (5th Cir. 1974). They are required to exhaust only those remedies that would "provide a real opportunity for adequate relief." *Id.* For example, exhaustion is "obviously" futile when the administrative body does not have the authority to grant the relief sought. *Id.* at 420–21. In that situation, military relief is a legal impossibility. Similarly, exhaustion may be futile when military relief will not "obviate the need for judicial review." *Id.* at 423. Although that "is not usually a reason for bypassing" the exhaustion requirement, *id.*, when the record all but compels the conclusion that the military process will deny relief, "exhaustion is inapposite and unnecessary," *id.* at 420.

The facts overwhelmingly indicate that the Navy will deny the religious accommodations. The Navy has denied twenty-nine of Plaintiffs' thirty-five accommodations requests.[11] Outside of Plaintiffs' requests, the Navy has, to date, never granted a religious accommodation request for the

[11] Supp. Decl. of SEALs, SWCC, EOD, ND, Supp. App. 1023–1134.

COVID-19 vaccine.[12] In fact, in the past seven years, the Navy has never granted a single religious exemption for any vaccine.[13] Several Plaintiffs have been directly told by their chains of command that "the senior leadership of Naval Special Warfare has no patience or tolerance for service members who refuse COVID-19 vaccination for religious reasons and wants them out of the SEAL community."[14]

The Navy's accommodation process confirms those fears. The Navy uses a fifty-step process to adjudicate religious accommodation requests.[15] Under the standard operating procedures for the process, the first fifteen steps require an administrator to update a prepared disapproval template with the requester's name and rank. In essence, the Plaintiffs' requests are denied the moment they begin. That prepared letter is then sent to seven offices for review. After those offices review the disapproval letter, the administrator packages the letter with other religious accommodation requests for final signature. The administrator then prepares an internal memo to Vice Admiral John Nowell, asking him to "sign . . . letters *disapproving* immunization waiver requests based on sincerely held religious beliefs."[16]

Then, at step thirty-five of the process, the administrator is told—for the first time—to read through the religious accommodation request. At that point, the disapproval letter has already been written, the religious accommodation request and related documents has already been reviewed by several offices, the disapproval has already been packaged with similar requests, and an internal memo has already been drafted requesting that Vice Admiral Nowell disapprove the religious accommodation request. The administrator is then tasked with reading the request and recording

[12] *Id.*
[13] Pls.' App. 295, ECF No. 17.
[14] *Id.* at 879.
[15] *See* Supp. Decl. of Andrew Stephens, Ex. 1, ECF No. 62.
[16] *See id.*

any pertinent information in a spreadsheet. At no point in the process is the administrator given the opportunity to recommend anything other than disapproval. The materials are then sent to Vice Admiral Nowell. The entire process belies the manual's assertion that "[e]ach request is evaluated on a case by case basis."[17]

Defendants argue that the process is not futile. They say, "The fact that Plaintiffs may not anticipate a favorable outcome does not render the remedies futile." Defs.' Resp. 25, ECF No. 43. That dramatically understates the record. At the preliminary injunction hearing, counsel for Defendants suggested that exhaustion is not futile so long as the Navy has not denied the request. But that the Navy could hypothetically grant a request does not, on this record, "provide a real opportunity for adequate relief." *Hodges*, 499 F.2d at 420. Plaintiffs need not exhaust military remedies when doing so would be futile.

Second, plaintiffs need not exhaust military remedies when "available administrative remedies are inadequate" to grant him the relief he seeks. *Von Hoffburg*, 615 F.2d at 640. The inadequacy exception and futility exception sometimes overlap. For example, "an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it." *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992). That the Navy has predetermined denial of the religious accommodations may indicate that the administrative process is both inadequate and futile. But the Fifth Circuit has distinguished the two exceptions. *See Von Hoffburg*, 615 F.2d at 640. That distinction is particularly salient here.

Even if the religious accommodations are granted, Plaintiffs will not receive the relief they seek. Again, the record is replete with examples. Those who receive religious accommodations are still "medically disqualified."[18] That means Plaintiffs would be permanently barred from

[17] *See id.*
[18] Pls.' App. 159, 838, ECF No. 17.

deployment, denied the bonuses and incentive pay that accompany deployment, and deprived of the very reason they chose to serve in the Navy.[19] By contrast, those receiving medical accommodations are not medically disqualified—they receive equal status as those who are vaccinated.[20] Some Plaintiffs were told by their chains of command that *if their religious accommodations were approved*, they would lose their SEAL Tridents.[21] Others will lose their Tridents merely for requesting the exemption.[22] Evidently, even successfully exhausting the religious accommodation process would not grant Plaintiffs the relief they seek. In some instances, it may invite more harm. At best, the available remedies would accord Plaintiffs second-class status in a peerless community. Thus, the available administrative remedies are inadequate.

The Fifth Circuit has discussed two more exceptions to the exhaustion requirement. These last two exceptions overlap somewhat with the first and second factors of the *Mindes* test, so the Court merely outlines them here. The third exception is that "exhaustion is not required when the petitioner may suffer irreparable injury if he is compelled to pursue his administrative remedies." *Von Hoffburg*, 615 F.2d at 638. That resembles the second *Mindes* factor, which considers "[t]he potential injury to the plaintiff if review is refused." *Mindes*, 453 F.2d at 201. The fourth exception to exhaustion is when "the plaintiff has raised a substantial constitutional question." *Von Hoffburg*, 615 F.2d at 638. That inquiry raises the same issues as the first *Mindes* factor, the "nature and strength of the plaintiff's challenge to the military determination," which generally favors review of substantial constitutional questions. *Mindes*, 453 F.2d at 201. The Court discusses these issues in greater detail in the next section. Here, the Court simply notes that to the extent the analysis on

[19] *Id.* at 928–29.
[20] *Id.* at 159, 838.
[21] *E.g.*, *id.* at 906, 1021.
[22] *E.g.*, *id.* at 892, 900.

those factors weighs in favor of judicial review, it also favors excusing the military exhaustion requirement.

At least four recognized exceptions to the exhaustion requirement apply. If one is insufficient, the combination of the four readily supports the Court's finding that the traditional justifications for military exhaustion are not served by the Navy's religious accommodation process. Plaintiffs have therefore satisfied parts one and two of the threshold *Mindes* test.

b. The Four *Mindes* Factors

Having passed the threshold test, Plaintiffs must next show that the four *Mindes* factors weigh in favor of justiciability. The factors are (1) the nature and strength of the plaintiff's challenge; (2) the potential injury to the plaintiff if review is refused; (3) the type and degree of anticipated interference with the military function; and (4) the extent to which the exercise of military expertise or discretion is involved. *Mindes*, 453 F.2d at 201–02.

First, the nature and strength of Plaintiffs' claims weigh in favor of judicial review. As to the nature of the claim, "[c]onstitutional claims [are] normally more important than those having only a statutory or regulatory base." *Id.* at 201–02. But "not all constitutional claims are to be weighed equally." *NeSmith v. Fulton*, 615 F.2d 196, 201 (5th Cir. 1980). Courts tend to favor review of constitutional claims "founded on infringement of specific constitutional rights, such as the Fifth Amendment privilege against self-incrimination or the First Amendment freedoms of speech and press," as opposed to constitutional claims that, for example, "a serviceman's due process rights were violated by arbitrary and capricious official action." *Id.* Plaintiffs move for a preliminary injunction based on specific violations of their constitutional rights under the Free

Exercise Clause, plus similar violations of RFRA. Plaintiffs' claims are squarely in the category of claims most favorable to judicial review.[23]

Moreover, Plaintiffs' claims are strong. "An obviously tenuous claim of any sort must be weighted in favor of declining review." *Mindes*, 453 F.2d at 201. The Court discusses the strength of Plaintiffs' claims in Section III.B as part of the preliminary injunction analysis. As a brief preview, the vaccine mandate fails strict scrutiny. The mandate treats comparable secular activity (e.g., medical exemptions) more favorably than religious activity. First, the Navy has granted *only* secular exemptions—it has never granted a religious exemption from the vaccine. Second, even if the Navy were to grant a religious exemption, that exemption would still receive less favorable treatment than its secular counterparts. Those who receive religious exemptions are medically disqualified. Those who receive medical exemptions are not. But the activity itself—forgoing the vaccine—is identical. Given the irrationality of the mandate, "[i]t is unsurprising that such litigants are entitled to relief." *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021) (per curiam). Under the first *Mindes* factor, the Plaintiffs have shown that the nature and strength of their claims weigh strongly in favor judicial review.

Second, the potential injury to Plaintiffs if review is refused weighs in favor of judicial review. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably

[23] As mentioned in the previous section, that Plaintiffs raise substantial constitutional claims also warrants excusing the military exhaustion requirement. *See Von Hoffburg v. Alexander*, 615 F.2d 633, 638 (5th Cir. 1980); *see also, e.g.*, *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973) (excusing administrative exhaustion because "[r]esolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board"); *Roe v. Shanahan*, 359 F. Supp. 3d 382, 403 (E.D. Va. 2019) (excusing military exhaustion of due process and Administrative Procedure Act claims because the Air Force Board for Correction of Military Records "cannot adjudicate a claim that the Air Force's policies and regulations themselves are unconstitutional or otherwise unlawful"), *aff'd sub nom. Roe v. Dep't of Def.*, 947 F.3d 207 (4th Cir. 2020); *Adair v. England*, 183 F. Supp. 2d 31, 55 (D.D.C. 2002) (excusing military exhaustion when "the gravamen of the plaintiffs' claims revolves around constitutional challenges based on the First Amendment's Establishment and Free Exercise Clauses and the Fifth Amendment's Due Process Clause"), *aff'd sub nom. In re Navy Chaplaincy*, No. 19-5204, 2020 WL 11568892 (D.C. Cir. Nov. 6, 2020).

constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). This factor overlaps with the preliminary injunction analysis, so (again) the Court does not discuss it at length here. Two points bear mention. First, Plaintiffs are currently suffering injury while waiting for the Navy to adjudicate their requests. Plaintiffs have been declared nondeployable and suffer withheld promotions and travel.[24] In one egregious example, Navy SEAL 26 was approved for a four-week program in Maryland to treat deployment-related traumatic brain injury.[25] He told his commanding officer that he could travel in his own vehicle to the medical facility, which did not have a vaccine requirement for its patients. His commanding officer told him he was not allowed to travel because he was unvaccinated. SEAL 26 missed the opportunity to receive treatment, despite his pending religious accommodation request. Second, some Plaintiffs have suffered injury *because* they submitted religious accommodation requests. Many Plaintiffs have been told that merely requesting a religious accommodation will result in their removal from the Naval Special Warfare community and loss of their Trident.[26] Withholding judicial review is particularly illogical when participation in the administrative process invites the very harm Plaintiffs seek to avoid.

Third, the type and degree of anticipated interference with the military function weighs in favor of judicial review. "[I]f the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief." *Mindes*, 453 F.2d at 201. Defendants argue that judicial review would interfere with the military's decisions regarding duty assignments and medical fitness. *See* Defs.' Resp. 28–30, ECF No. 43. But "[i]nterference per se is insufficient since there will always be some interference when review is granted." *Mindes*, 453 F.2d at 201. Over 99% of active-duty Navy servicemembers are fully vaccinated against COVID-

[24] Pls.' App. 876–1022, ECF No. 17.
[25] Supp. Decl. of Navy SEAL 26 at 2, ECF No. 63.
[26] *E.g.*, Pls.' App. 878–79, 892, 900, 906, 915, ECF No. 17.

19.[27] Plaintiffs are part of a vanishingly small 0.6%. The Navy already provides secular accommodations. Whether denying religious accommodations violates the First Amendment is a distinct legal question that would not "seriously impede the military in the performance of vital duties." *Id.*

Fourth, the extent to which the exercise of military expertise or discretion is involved weighs in favor of review. "Courts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military functions." *Mindes*, 453 F.2d at 201–02. This is not a suit in which "commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions." *United States v. Shearer*, 473 U.S. 52, 58 (1985). Neither does this case involve "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force." *Chappell v. Wallace*, 462 U.S. 296, 302 (1983) (citation and internal quotation marks omitted). Whether the vaccine mandate passes muster under the First Amendment and RFRA requires neither "military expertise or discretion." *Mindes*, 453 F.2d at 201. It is a purely legal question appropriate for judicial review.

In sum, all four *Mindes* factors favor justiciability. To be sure, "courts must—at least initially—indulge the optimistic presumption that the military will afford its members the protections vouchsafed by the Constitution, by the statutes, and by its own regulations." *Hodges*, 499 F.2d at 424. But they need not indulge that presumption to the point of absurdity. The record overwhelmingly demonstrates that the Navy's religious accommodation process is an exercise in futility. Plaintiffs need not wait for the Navy to rubber stamp a constitutional violation before

[27] *Id.* at 284.

seeking relief in court. And this is precisely the type of legal challenge that *Mindes* contemplates is appropriate for the courts to decide. Plaintiffs' claims are justiciable.

B. Plaintiffs are likely to succeed on the merits.

Having established that Plaintiffs' claims are justiciable, the Court must consider the first of the four requirements under the preliminary injunction standard: whether Plaintiffs have established a "substantial likelihood of success on the merits." *Daniels Health Scis.*, 710 F.3d at 582. In their motion, Plaintiffs make two substantive claims. First, they allege the vaccine mandate violates RFRA and the First Amendment. Second, they allege the mandate's permanent medical-disqualification provision fails strict scrutiny.

The Court concludes Plaintiffs are likely to succeed on both claims. Because the mandate treats those with secular exemptions more favorably than those seeking religious exemptions, strict scrutiny is triggered, and Defendants fail to show a compelling interest with respect to the servicemembers before the Court.

1. Religious Freedom Restoration Act

Plaintiffs allege that the vaccine mandate substantially burdens their religious exercise without satisfying the compelling interest required under RFRA. Defendants respond that even if Plaintiffs' beliefs are substantially burdened, the Navy has a compelling interest in keeping its force fit and responsive to national security threats. And while Defendants assert that vaccination is the least restrictive means to achieve this end, Plaintiffs suggest alternatives exist. The Court concludes that Defendants have not demonstrated a compelling interest justifying the substantial burden imposed on the Plaintiffs' religious beliefs. Therefore, there is no need to discuss narrow tailoring.

The Religious Freedom Restoration Act "was designed to provide very broad protection for religious liberty." *Hobby Lobby*, 573 U.S. 682, 706 (2014). Passed in 1993 with nearly unanimous support, RFRA provides that the:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1. RFRA extends to the military, because under the text of the statute, "government" includes any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." *Id.* § 2000bb-2. Defendants do not dispute this.

Defendants have substantially burdened Plaintiffs' religious beliefs. The government burdens religion when it "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). That is especially true when the government imposes a choice between one's job and one's religious belief. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Here, Plaintiffs must decide whether to lose their livelihoods or violate sincerely held religious beliefs. Because they will not compromise these religious beliefs, Plaintiffs have been threatened with separation from the military and other disciplinary action. Supp. App. 1032, 1096, 1107, 1126, ECF No. 59; Compl., Ex. 3, ECF No. 1-3.

Because the Plaintiffs have demonstrated a substantial burden, Defendants must show that this burden furthers a compelling interest using the least restrictive means.

Plaintiffs claim Defendants cannot demonstrate a compelling interest as to these particular servicemembers. Although they acknowledge that preventing the spread of COVID-19 was, at one time, a compelling interest, Plaintiffs argue that an indefinite state of emergency cannot justify this

compelling interest two years into the pandemic. Pls.' Br. 23–24, ECF No. 16. In response, Defendants argue that the Navy has a vital national security interest in keeping its force healthy and ready to deploy. Because Plaintiffs are members of Special Operations teams, these individuals must stay healthy to carry out highly specialized missions. Defs.' Resp. 33, ECF No. 43.

Although "[s]temming the spread of COVID-19 is unquestionably a compelling interest," its limits are finite. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). Courts must "look beyond broadly formulated interests," and instead consider the "asserted harm of granting specific exemptions to particular religious claimants." *Hobby Lobby*, 573 U.S. at 726–27 (cleaned up) (internal quotations omitted). In other words, Defendants must provide more than a broadly formulated interest in "national security."[28] They must articulate a compelling interest in vaccinating the thirty-five religious servicemembers currently before the Court.

Without individualized assessment, the Navy cannot demonstrate a compelling interest in vaccinating these particular Plaintiffs. By all accounts, Plaintiffs have safely carried out their jobs during the pandemic. Prior to the vaccine mandate, at least six Plaintiffs conducted large-scale trainings and led courses without incident. Supp. Decl. of SEALs 2–3, 7, 15; SWCC 1; EOD 1. Despite Defendants' dismissive remark that Plaintiffs' roles "obviously are not amenable to telework," at least two Plaintiffs have routinely done so. Defs.' Resp. 34, ECF No. 43; Supp. Decl. of SEAL 12, SWCC 5; Supp. Decl. of SEAL 21. Eleven Plaintiffs successfully deployed. Supp. Decl. of SEALs 4–6, 9, 13, 22–23, 26; SWCC 2, 4; EOD 1. The Navy even awarded one Plaintiff

[28] Defendants cite an inapplicable case on the Religious Land Use and Institutionalized Persons Act to assert that "RFRA must be applied 'with particular sensitivity to security concerns.'" Defs.' Resp. 32, ECF No. 43 (quoting *Cutter v. Wilkinson*, 544 U.S. 722, 723 (2005)). Defendants also cite nonbinding dicta for the proposition that courts are "reluctant to interpret statutes in ways that allow litigants to interfere with the mission of our nation's military." *Lebron v. Rumsfeld*, 670 F.3d 540, 557–58 (4th Cir. 2012). But as previously discussed in the *Mindes* analysis, "[i]nterference per se is insufficient since there will always be some interference when review is granted." *Mindes*, 453 F.2d at 201.

the Joint Service Commendation Medal for "safely navigating restricted movement and distancing requirements" under COVID-19 protocol in early 2020. Hr'g Test. of EOD 1, Hr'g Ex. 26.

Even if Defendants have a broad compelling interest in widespread vaccination of its force, they have achieved this goal without the participation of the thirty-five Plaintiffs here. At least 99.4% of all active-duty Navy servicemembers have been vaccinated. Pls.' App. 284, ECF No. 17. The remaining 0.6% is unlikely to undermine the Navy's efforts. Today, Plaintiffs present a lower risk of infection and transmission than in the earlier days of the pandemic. Several Plaintiffs have tested positive for antibodies, showing the presence of natural immunity. *See* Decl. of SEALs 10, 22; SWCC 2, 4; Supp. Decl. of SEAL 12. With a 99.4% vaccination rate, the Navy's herd immunity is at an all-time high. COVID-19 treatments are becoming increasingly effective at reducing hospitalization and death. *See* Pfizer Novel COVID-19 Oral Antiviral Treatment Study, Pls.' App. 310.

Moreover, the Navy is willing to grant exemptions for non-religious reasons. Its mandate includes carveouts for those participating in clinical trials and those with medical contraindications and allergies to vaccines. Pls.' App. 154–59. Because these categories of exempt servicemembers are still deployable, a clinical trial participant who receives a placebo may find himself ill in the high-stakes situation that Defendants fear. Defs.' Resp. 34, 48, ECF No. 43. As a result, the mandate is underinclusive. "Indeed, underinclusiveness . . . is often regarded as a telltale sign that the government's interest in enacting a liberty-restraining pronouncement is not in fact 'compelling.'" *BST Holdings, LLC v. Occupational Safety & Health Admin.*, 17 F.4th 604, 616 (5th Cir. 2021).

For these reasons, the Court finds that Defendants do not demonstrate a compelling interest to overcome the Plaintiffs' substantial burden. Without a compelling interest, the Court need not address whether Defendants have used the least restrictive means.

2. First Amendment

The Court turns now to the Plaintiffs' First Amendment claim. Plaintiffs argue that the Navy's mandate triggers strict scrutiny, because it is not neutral or generally applicable. Defendants insist they have carried their burden to demonstrate their compelling interest and the least restrictive means. The Court finds that for the same reasons Plaintiffs succeed on their RFRA claim, they also prevail on their First Amendment claim.

To assess neutrality and general applicability, courts consider both the structure of the law and any disparate outcomes it creates. "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021) (cleaned up). "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296 (citing *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67–68).

The Navy's mandate is not neutral and generally applicable. First, by accepting individual applications for exemptions, the law invites an individualized assessment of the reasons why a servicemember is not vaccinated. *See* Pls.' App. 153–55 (NAVADMIN 190/21) (describing the exemption process and authority to grant exemption). Consequently, favoritism is built into the mandate.

Second, the "comparable secular activity" includes refusing the vaccine for medical reasons or participation in a clinical trial. These medically exempt, unvaccinated servicemembers

are immediately deployable while unvaccinated servicemembers with religious objections are not. *See* MANMED § 15-105(3)(n)(9); Pls.' App. 838. Defendants justify this discrepancy by contrasting the number of requests: "Whereas there are only seven permanent medical exemptions for all Navy and Reserve personnel from the COVID-19 immunization duty, there are more than three thousand pending requests for a religious exemption . . . ." Defs.' Resp. 35 (citation omitted). But an influx of religious accommodation requests is not a valid reason to deny First Amendment rights. No matter how small the number of secular exemptions by comparison, *any* favorable treatment—in this case, deployability without medical disqualification—defeats neutrality. For these reasons, the mandate triggers strict scrutiny under the First Amendment.

As discussed in Section III.B.1, Defendants fail to satisfy the compelling interest requirement, so there is no need to consider least restrictive means. The Court will not repeat its strict scrutiny analysis here. Plaintiffs have established a substantial likelihood of success on the merits of their RFRA and First Amendment claims, satisfying the first requirement of the preliminary injunction standard.

3. Medical-Disqualification Provision

The parties' briefing on the medical-disqualification issue echoes the RFRA and First Amendment analysis discussed at length in Sections III.B.1 and III.B.2 above. In short, the Court finds that, for the same reasons Plaintiffs' RFRA and First Amendment challenges to the mandate itself succeed, Plaintiffs' challenge to the medical-disqualification provision follows.

A servicemember with a religious accommodation is permanently medically disqualified while a servicemember with a medical exemption is not. *See* MANMED § 15-105(3)(n)(9); Pls.' App. 838. In other words, Plaintiffs—even if they were all to be granted religious accommodations immediately—would remain nondeployable and would be forced to seek a medical waiver to have this penalty removed. In short, this disparate treatment triggers strict scrutiny.

Defendants are unable to overcome strict scrutiny because they have not presented a compelling interest, as explained in previous sections. Thus, Plaintiffs are substantially likely to succeed on the merits of their medical-disqualification challenge.

C. Plaintiffs face a substantial threat of irreparable harm.

Under the second prong of the preliminary injunction standard, the movants must establish a substantial threat of irreparable harm. Here, Plaintiffs argue they have suffered irreparable injury based on (1) infringement of religious liberties; (2) their nondeployable status, which reduces pay and advancement opportunities; and (3) the threat of court-martial and dishonor accompanying it. Defendants claim that Plaintiffs' harm is merely speculative because the religious exemption requests have not been finally adjudicated. Defendants also argue that Plaintiffs have improperly relied on *BST Holdings*, which applies only to civilian employment.

It is incorrect to say that Plaintiffs' harm is merely speculative at this stage. Plaintiffs are already suffering injury while waiting for the Navy to adjudicate their requests. In some cases, Plaintiffs have suffered injury *because* they seek religious accommodation. Plaintiffs testify that they have been barred from official and unofficial travel, including for training[29] and treatment for traumatic brain injuries;[30] denied access to non-work activities, like family day;[31] assigned unpleasant schedules and low-level work like cleaning;[32] relieved of leadership duties and denied opportunities for advancement;[33] kicked out of their platoons;[34] and threatened with immediate

[29] Supp. Decl. of SEAL 16, Supp. App. 1069; Supp. Decl. of SWCC 5, Supp. App. 1121.
[30] Supp. Decl. of SEAL 3, Supp. App. 1032; Supp. Decl. of SEAL 26, ECF No. 63.
[31] Supp. Decl. of SEAL 26, Supp. App. 1103.
[32] Supp. Decl. of SEAL 21, Supp. App. 1084; Supp. Decl. of SEAL 25, Supp. App. 1100.
[33] Supp. Decl. of SEAL 22, Supp. App. 1088; Supp. Decl. of SEAL 3, Supp. App. 1032; Supp. Decl. of SWCC 4, Supp. App. 1118; Supp. Decl. of EOD 1, Supp. App. 1126.
[34] Supp. Decl. of SEAL 21, Supp. App. 1084; Supp. Decl. of SEAL 25, Supp. App. 1100.

separation.[35] At least one Plaintiff has received an email for enrollment in the TAP course, a prerequisite for separation from the Navy.[36]

While significant and life-altering, these harms do not, by themselves, rise to the level of irreparable injury. "In general, a harm is irreparable where there is no adequate remedy at law, such as monetary damages." *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011). As Defendants note, even a general discharge from the military—the ultimate threat here—is not an irreparable harm. *See McCurdy v. Zuckert*, 359 F.2d 491, 494 (5th Cir. 1966). No matter how remote the possibility, Plaintiffs could be compensated for their losses. They could be reinstated with backpay, retroactively promoted, or reimbursed for lost benefits like medical insurance and the GI Bill.

But because these injuries are inextricably intertwined with Plaintiffs' loss of constitutional rights, this Court must conclude that Plaintiffs have suffered irreparable harm. Plaintiffs have suffered the more serious injury of "infringement of their religious liberty rights under RFRA and the First Amendment . . . ." Pls.' Br. 28, ECF No. 16. The crisis of conscience imposed by the mandate is itself an irreparable harm. *See BST Holdings*, 17 F.4th at 618; *Sambrano v. United Airlines*, 19 F.4th 839, 842 (5th Cir. 2021) (Ho, J., dissenting) (citing *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974)). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373 (plurality opinion). The same is true of RFRA. *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012). Thus, any losses the Plaintiffs have suffered in connection with their religious accommodation requests sufficiently demonstrate irreparable injury.

[35] Supp. Decl. of SEAL 24, Supp. App. 1096; Supp. Decl. of SEAL 3, Supp. App. 1032; Supp. Decl. of SWCC 1, Supp. App. 1107; Supp. Decl. of EOD 1, Supp. App. 1126.
[36] Test. of SEAL 3, Hr'g Ex. 9.

Finally, Defendants allege that Plaintiffs' reliance on *BST Holdings* is improper "as the OSHA requirement at issue in that case applies to civilian employers, not service members." Defs.' Resp. 45, ECF No. 43. But the principle the Supreme Court articulated in *Elrod v. Burns* applies broadly, and the Fifth Circuit has acknowledged that any loss of First Amendment freedom satisfies the irreparable injury requirement, even in the national security context. *See Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451, 457 (5th Cir. 2016).

Thus, the second requirement for injunctive relief has been satisfied.

D. The balance of hardships weighs in Plaintiffs' favor, and the issuance of the preliminary injunction will not disserve the public interest.

The final two elements of the preliminary injunction standard—the balance of the harms and whether an injunction will disserve the public interest—must be considered together. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). When balancing the harms, courts must consider whether the movant's injury outweighs the threatened harm to the party whom they seek to enjoin. The public interest element is broader in scope.

Plaintiffs seek to preserve the status quo. They argue the balance of harms tips in Plaintiffs' favor, and an injunction is always in the public interest when it prevents deprivation of constitutional rights. Pls. Br. 29, ECF No. 16; *see Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014). By contrast, Defendants claim that an injunction will cause the Navy significant harm, including illness, hospitalization, and death among its ranks. Given the public interest in military readiness and national defense, they argue, the injunction should be denied.

This Court does not make light of COVID-19's impact on the military. Collectively, our armed forces have lost 80 lives to COVID-19 over the course of the pandemic. Defs.' App. 263,

ECF No. 44-3. But the question before the Court is not whether a public interest exists. Rather, this Court must address whether an injunction will disserve the public interest. An injunction does not disserve the public interest when it prevents constitutional deprivations. *Jackson Women's Health*, 760 F.3d at 458 n.9.

The Plaintiffs' loss of religious liberties outweighs any forthcoming harm to the Navy. Even the direst circumstances cannot justify the loss of constitutional rights. Fortunately, the future does not look so dire. Nearly 100% of the Navy has been vaccinated. Hospitalizations are rising at a much slower rate than COVID-19 cases. COVID-19 treatments are becoming more effective and widely available.

Thus, Plaintiffs have satisfied the final two requirements for preliminary injunction.

IV. CONCLUSION

For the reasons stated, the Motion for Preliminary Injunction is **GRANTED**. Defendants are enjoined from applying MANMED § 15-105(3)(n)(9); NAVADMIN 225/21; Trident Order #12; and NAVADMIN 256/21 to Plaintiffs. Defendants are also enjoined from taking any adverse action against Plaintiffs on the basis of Plaintiffs' requests for religious accommodation. Mot. 2–3, ECF No. 15.

SO ORDERED on this **3rd day** of **January, 2022.**

Reed O'Connor
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. NAVY SEALs 1-26, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 4:21-cv-01236-O**
	§	
JOSEPH R. BIDEN, JR., et al.,	§	
	§	
	§	
Defendants.	§	

ORDER

Before the Court are Defendants' Motion for Stay (ECF No. 85), filed January 24, 2022; Defendants' Brief in Support (ECF No. 86), filed January 24; Plaintiffs' Response (ECF No. 99), filed January 31; and Defendants' Reply (ECF No. 102), filed February 2. For the following reasons, the Court **DENIES** the Motion for Stay.

I. BACKGROUND

Because the parties are well-acquainted with the facts of this case, the Court will not repeat them at length here. On January 3, 2022, the Court granted Plaintiffs' Motion for Preliminary Injunction, enjoining enforcement of the Navy's COVID vaccination policies against the thirty-five Plaintiffs, who object to the vaccine on religious grounds. *See* ECF No. 66. Since then, Plaintiffs have alleged that Defendants are violating the injunction by preventing some Plaintiffs from attending training, receiving medical treatment, or returning to their job duties. *See* Mot. for Order to Show Cause, ECF No. 95. Defendants claim that Plaintiffs' allegations are meritless and

that Plaintiffs' feared outcomes are speculative.[1] *See* Defs.' Resp. 6–12, ECF No. 110. Defendants filed a Motion for Stay on January 24, 2022. ECF No. 85.

II. LEGAL STANDARD

Just as the preliminary injunction itself is an "extraordinary remedy," staying a preliminary injunction is similarly exceptional. "A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks omitted). Maintaining the status quo is "an important consideration in granting a stay." *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (quoting *Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1358, 1359 (1978)). Courts must consider four factors in determining whether to stay a preliminary injunction pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken, 556 U.S. at 426. Like the preliminary injunction factors, "[t]he first two factors of the traditional [stay] standard are the most critical." *Id.* at 434.

III. ANALYSIS

Defendants seek to stay the preliminary injunction "to the extent the order precludes Defendants from making the assignment and reassignment decisions that the military deems appropriate, taking into account Plaintiffs' vaccination status, including with respect to deployment and training." Defs.' Br. 5, ECF No. 86. Having considered the law and the parties' briefing, the Court concludes that (1) Defendants have not successfully shown they are likely to

[1] The Court does not address the merits of the Motion for Order to Show Cause (ECF No. 95) here but mentions these developing facts as context for the following analysis.

succeed on the merits, and (2) Defendants are not likely to be irreparably injured without a stay. Indeed, were the Court to grant the stay, Plaintiffs have shown they will face irreparable harm. Finally, the public interest weighs in favor of preserving the constitutional rights of the Plaintiffs and maintaining the status quo. For these reasons, the Court **DENIES** Defendants' Motion for Stay.

A. Likelihood of Success on the Merits

Defendants argue they are likely to succeed on the merits for two primary reasons: first, because this case is not justiciable, and second, because this Court's preliminary injunction relied on a mistaken understanding of medical disqualification and the waiver process.

1. Justiciability of Plaintiffs' Claims[2]

Defendants insist this case is not justiciable because decisions regarding assignment and deployment are strictly within the scope of the Commander in Chief's authority—not civilian courts. Defs.' Br. 12, ECF No. 86. In essence, the Court should not encroach on the decision-making power of the military, even when servicemembers' claims involve constitutional challenges. *Id.* Finally, Defendants argue that "the Court erred in substituting its 'own evaluation of evidence for a reasonable evaluation' by the military regarding the necessity of [the COVID vaccination policy]." Defs.' Br. 14, ECF No. 86 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981)).

As to justiciability, Plaintiffs point to the Court's *Mindes* analysis. Plaintiffs argue they need not exhaust military remedies because the Navy's "case-by-case" analysis is predetermined and invariably results in a denial letter. In response to Defendants' claim that the Court must not

[2] The Court's *Mindes* analysis in the preliminary injunction covers this topic at length. *See* Order on Prelim. Inj. 6–17, ECF No. 66. Nothing presented in the parties' briefing on this Motion alters that analysis.

venture into military decisions, Plaintiffs insist that the Court's order was a legal determination, not a military policy. Pls.' Resp. 8–9, ECF No. 99.

Military decisions involve complex and strategic factors. As a matter of practicality, "courts are generally reluctant to review claims involving military duty assignments," because civilian judges lack military expertise. *Harkness v. Sec'y of Navy*, 858 F.3d 437, 443 (6th Cir. 2017); *see Antonellis v. United States*, 723 F.3d 1328, 1332 (Fed. Cir. 2013). Defendants accurately state that civilian courts are unqualified to review "[t]he complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see* Defs.' Reply 4, ECF No. 102.

But this case does not present a question of military strategy or personnel placement. "Whether the vaccine mandate passes muster under the First Amendment and RFRA requires neither 'military expertise or discretion.' It is a purely legal question appropriate for judicial review." Order on Prelim. Inj. 16, ECF No. 66 (quoting *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971)). Defendants do not dispute that RFRA applies to the military. This Court has not required Defendants to make any particular personnel assignments. All strategic decisions remain in the hands of the Navy. Rather, the preliminary injunction simply prohibits adverse action against Plaintiffs based on their requests for religious accommodation. This Court will not—and cannot—require the Navy to place a particular SEAL in a particular training program. But it can—and must—prevent the Navy from taking punitive action against that SEAL by blocking him from the training program he would otherwise attend.

Even the *Gilligan* Court noted that "there is nothing in our Nation's history or in [the Supreme] Court's decided cases . . . that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied." *Gilligan*, 413 U.S. at 12 n.16 (quoting *Laird*

v. Tatum, 408 U.S. 1, 15–16 (1972)). The distinction between lawful and unlawful military activities also appears in *Orloff v. Willoughby*, 345 U.S. 83, 93–95 (1953). There, the Supreme Court declined to review a servicemember's lawfully issued duty assignment. But it also hypothesized that, had the servicemember been unlawfully diverted into a duty assignment for which he was not conscripted, the Court may have had reason to review for bad faith and unlawful discrimination. *Id.* at 87–88.

Defendants also briefly discuss *Goldman v. Weinberger*, in which a Jewish servicemember challenged an Air Force regulation that prohibited him from wearing his yarmulke while on duty. 475 U.S. 503, 504–07 (1986). The Supreme Court deferred to the professional judgment of military authorities regarding the unity of the force and concluded that the First Amendment did not afford the servicemember an exception to the dress code. *Id.* at 510.

But in the vaccination context, courts have deviated from *Goldman.* When servicemembers challenged mandatory anthrax vaccines, one court found the plaintiffs' claims justiciable in civilian court, even when vaccine refusal could "threaten the uniformity of the military." *Doe v. Rumsfeld*, 297 F. Supp. 2d 119, 126–29 (D.D.C. 2003) ("[H]ere there will be no visible differences between persons who choose to receive the vaccine and those who choose not to receive the vaccine. Thus, concerns about uniformity diminish and a judgment in this case would not affect the uniformity of military personnel to any substantial degree."). Moreover, unlike a yarmulke, a vaccine cannot be added or removed at each shift change. For Plaintiffs, there is no way to partially comply with their sincerely held religious beliefs. The choice to be vaccinated is both binary and irreversible.

2. Medical Disqualification and Neutrality

Defendants also argue "the Court based its injunction, at least in part, on a mistaken finding that 'those receiving medical accommodations are not medically disqualified—they receive equal status as those who are vaccinated.'" Defs.' Br. 13, ECF No. 86 (quoting Order on Prelim. Inj. 11–12, 14, ECF No. 66). Defendants submitted a declaration by Force Medical Officer Littlejohn explaining that "a service member who receives an exemption or accommodation from the COVID-19 vaccine requirement, whether for religious or secular reasons, is not [physically qualified] unless he or she obtains a separate medical clearance." Decl. of Littlejohn, Ex. 2, ECF No. 87. In other words, Defendants claim the policies are neutral as to the reason behind the servicemember's objection such that the regulations do not trigger strict scrutiny.[3]

The core question under the First Amendment claim is whether the Defendants treat all unvaccinated servicemembers neutrally. This issue then is only relevant to Plaintiffs' First Amendment claim, not the RFRA claim. Neutrality matters in this context because strict scrutiny is triggered under the First Amendment when a regulation treats comparable secular activity more

[3] Here is a brief summary of the conflicting interpretations: The text of Trident Order #12 "does not pertain to medical contraindications or allergies to vaccine administration." App. 99, ECF No. 44-1. Thus, the provision applies only to those refusing the vaccine "based solely on personal or religious beliefs." These individuals "will still be medically disqualified." Therefore, the "separate waiver" process that Trident Order #12 describes appears to only apply to those with religious and personal, not medical, reasons. Likewise, MANMED § 15-105 disqualifies unvaccinated special warfare servicemembers who base their refusal on personal or religious beliefs. App. 229, ECF No. 44-2. And once again, the provision does not apply to those with medical reasons for refusal. Based on this reading, someone with a medical exemption would not need a separate medical waiver.

But according to the Force Medical Officer's declaration, a medically exempt servicemember is deemed NPQ: not physically qualified. Decl. of Littlejohn, Ex. 2, ECF No. 87. To return to PQ (physically qualified) status, the servicemember must seek a waiver, just as someone with a religious accommodation would. But besides general requirements for Special Operations in MANMED, the Force Medical Officer has not cited direct language medically disqualifying (NPQ) an unvaccinated, but medically exempt, servicemember. The Force Medical Officer notes, however, that "all requests for permanent medical exemptions from COVID-19 vaccination for personnel falling under NSWC authority have been denied." Decl. of Littlejohn, Ex. 2, App. 37, ECF No. 87.

favorably than religious practice—in other words, the regulation is not neutral and generally applicable. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). But because strict scrutiny is required under RFRA, the Court need not resolve the neutrality issue to conclude that the Plaintiffs are likely to succeed on the merits of the RFRA claim. Thus, Defendants' Motion will be denied as to the RFRA claim, and resolution of this issue and its impact on neutrality under the First Amendment will be resolved at the merits stage.

For these reasons, the Court concludes that the case is justiciable and the Plaintiffs are likely to succeed on the merits.

B. Irreparable Injury

Defendants warn of significant harm if the Court denies the stay. First, if forced to deploy unvaccinated servicemembers, the Navy would face an elevated risk of COVID spread and "catastrophic" results if a servicemember requires medical attention where healthcare resources are scarce. Defs.' Br. 7–9, ECF No. 86. Second, Defendants contend that the preliminary injunction undermines discipline by allowing servicemembers "to define the terms of their own military service." Defs.' Br. 11, ECF No. 86. Neither is sufficient evidence of irreparable harm to Defendants.

1. Risk to the Mission

"Requiring the Navy to allow Plaintiffs to deploy while unvaccinated would pose serious and specific threats to mission success." Defs.' Br. 7, ECF No. 86. Defendants explain that unvaccinated servicemembers present a higher risk of contracting and transmitting COVID. Because "[e]very member of a SEAL team is vital," the Navy cannot afford to lose someone during a critical mission. Defs.' Br. 8, ECF No. 86 (quoting Decl. of Lescher, Ex. 1 ¶ 21, ECF No. 87).

Plaintiffs point to Defendants' delay in requesting a stay, alleging "there is no apparent urgency to the request for injunctive relief." Pls.' Resp. 13, ECF No. 99 (quoting *Gonannnies, Inc. v. Goupair.Com, Inc.*, 464 F. Supp. 2d 603, 609 (N.D. Tex. 2006)). Further, Plaintiffs allege that Defendants are not even complying with the Injunction and thus cannot be experiencing harm. They claim that any harm to the Navy is outweighed by harm to Plaintiffs.

Defendants have not provided sufficient evidence that the Navy will be irreparably injured absent a stay. Vice Admiral Merz, deputy chief of naval operations, describes a highly effective force despite the spread of the Omicron variant. Pls.' App. 3–4, ECF No. 100. Even fully vaccinated ships have experienced outbreaks, but "Omicron has a quick turn around and isn't causing severe illness in sailors." Pls.' App. 4, ECF No. 100. In short, "[Omicron] is coming and going all the time, very small numbers, and really no operational impact." *Id.* Defendants' briefing presents a much grimmer version of the facts. They argue that unvaccinated servicemembers will derail missions, require medical attention where healthcare is limited, and jeopardize the health of other servicemembers. Defs.' Br. 7–9, ECF No. 86.

This Court is unconvinced that thirty-five unvaccinated Plaintiffs present an intolerably high risk to their vaccinated peers who *themselves* continue to contract and transmit COVID. Defendants provide an example that "unvaccinated instructors can spread COVID-19 to dozens of candidates in training," who will return to their units, further spreading the virus. Defs.' Br. 10, ECF No. 86. But suppose Plaintiffs were to agree to be vaccinated tomorrow. There is no guarantee they will remain healthy and ready to deploy. A vaccinated instructor may still infect his students. Regardless, vaccinated servicemembers are far more likely to encounter unvaccinated individuals off-base among the general public than among their ranks.[4]

[4] Only 64.3% of the U.S. population is fully vaccinated. CDC COVID Data Tracker, https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-people-onedose-pop-5yr (last visited Feb. 12,

In short, Defendants have not provided sufficient evidence of risk rising to the level of irreparable harm.

2. Discipline in the Ranks

Defendants also allege that the Court's preliminary injunction "undercut[s] the maintenance of military good order and discipline." Defs.' Br. 10, ECF No. 86. In his declaration, Lieutenant Commander Andrew Petralia explains that Plaintiff Navy Diver 2 is a student assigned to his command. Decl. of Petralia, Ex. 3, ECF No. 87. Diver 2 has "refused to submit to weekly COVID-19 testing and claims that he will soon submit a separate religious accommodation request to be excused from this requirement." Defs.' Br. 10, ECF No. 86 (citing Decl. of Petralia, Ex. 3 ¶ 5, ECF No. 87).

The preliminary injunction is limited in scope. It enjoined the Defendants from applying the vaccine mandate to the thirty-five Plaintiffs here and prohibited adverse action on the basis of their religious accommodation requests. To be clear, if true, the behavior of Diver 2 is not within the scope of the Order. In his declaration, Diver 2 asserted that he "view[s] his own life and the lives of [his] fellow service members as sacred." Decl. of U.S. Navy Diver 2, Supp. App. 1011, ECF No. 59. He has consented to "mitigation measures consistent with [his] religious beliefs." *Id.* Diver 2, and Plaintiffs like him, are welcome to submit additional religious accommodation requests, but they may not defy mitigation measures under the guise of following this Court's Order.

C. Other Factors

Finally, the Court considers the two remaining factors: (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest

2022). By contrast, at least 99.4% of active-duty Navy servicemembers are fully vaccinated. Pls.' App. 284, ECF No. 17.

lies. Having discussed the substantial injury to the Plaintiffs in the preliminary injunction, the Court now briefly addresses the public interest question.

"When the Government is a party, its interests and the public interest overlap in the balancing of harms." *Nken*, 556 U.S. at 420. Plaintiffs seek to preserve the status quo. They argue that protecting constitutional rights is always in the public interest. Pls. Resp. 15, ECF No. 99; *see Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014). Here, preserving the status quo means maintaining the preliminary injunction—in other words, preventing Plaintiffs from being deprived of pay, training, medical treatment, travel opportunities, and more. The Court finds that the public interest supports a denial of the Motion for Stay.

IV. CONCLUSION

For the reasons stated, the Court **DENIES** Defendants' Motion for Stay.

SO ORDERED on this **13th day** of **February, 2022**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

AUG 24 2021

MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP
COMMANDERS OF THE COMBATANT COMMANDS
DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS

SUBJECT: Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members

To defend this Nation, we need a healthy and ready force. After careful consultation with medical experts and military leadership, and with the support of the President, I have determined that mandatory vaccination against coronavirus disease 2019 (COVID-19) is necessary to protect the Force and defend the American people.

Mandatory vaccinations are familiar to all of our Service members, and mission-critical inoculation is almost as old as the U.S. military itself. Our administration of safe, effective COVID-19 vaccines has produced admirable results to date, and I know the Department of Defense will come together to finish the job, with urgency, professionalism, and compassion.

I therefore direct the Secretaries of the Military Departments to immediately begin full vaccination of all members of the Armed Forces under DoD authority on active duty or in the Ready Reserve, including the National Guard, who are not fully vaccinated against COVID-19.

Service members are considered fully vaccinated two weeks after completing the second dose of a two-dose COVID-19 vaccine or two weeks after receiving a single dose of a one-dose vaccine. Those with previous COVID-19 infection are not considered fully vaccinated.

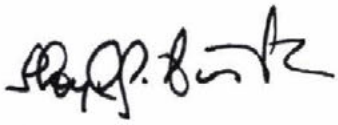
Mandatory vaccination against COVID-19 will only use COVID-19 vaccines that receive full licensure from the Food and Drug Administration (FDA), in accordance with FDA-approved labeling and guidance. Service members voluntarily immunized with a COVID-19 vaccine under FDA Emergency Use Authorization or World Health Organization Emergency Use Listing in accordance with applicable dose requirements prior to, or after, the establishment of this policy are considered fully vaccinated. Service members who are actively participating in COVID-19 clinical trials are exempted from mandatory vaccination against COVID-19 until the trial is complete in order to avoid invalidating such clinical trial results.

Mandatory vaccination requirements will be implemented consistent with DoD Instruction 6205.02, "DoD Immunization Program," July 23, 2019. The Military Departments should use existing policies and procedures to manage mandatory vaccination of Service members to the extent practicable. Mandatory vaccination of Service members will be subject to any identified contraindications and any administrative or other exemptions established in Military Department policy. The Military Departments may promulgate appropriate guidance to carry out the requirements set out above. The Under Secretary of Defense for Personnel and

Readiness may provide additional guidance to implement and comply with FDA requirements or Centers for Disease Control and Prevention recommendations.

The Secretaries of the Military Departments should impose ambitious timelines for implementation. Military Departments will report regularly on vaccination completion using established systems for other mandatory vaccine reporting.

Our vaccination of the Force will save lives. Thank you for your focus on this critical mission.



consultations, followed by an explicit recommendation of "waiver recommended" or "waiver not recommended" with supporting rationale. Any ongoing aftercare must be identified.

(2) DD Form 2807-1/2808, annotated to reflect individual's pertinent findings. This may either be a new nuclear field duty examination, a current nuclear field duty examination, annotated as necessary, or a focused examination documenting pertinent positives and negatives. Circumstances will dictate which format is most appropriate.

(3) Copies of other, pertinent studies supporting the waiver or disqualification.

(4) Copies of pertinent, specialty consultation clinical notes supporting the waiver or disqualification.

(5) Endorsement by the member's commanding officer or sponsoring unit. This endorsement should be substantive and address whether the condition or diagnosis/current condition impairs the member's performance of nuclear field duty and is compatible with the operational environment.

Note: *Office codes, titles and contact numbers are current as of the time of document release. It should be anticipated that these can and will change prior to the next revision of this article.*

15-104 Occupational Exposure to Ionizing Radiation

(1) ***General.*** NAVMED P-5055, Radiation Health Protection Manual, is the governing document for the Navy's Radiation Health Protection Program. To ensure that the requirements of NAVMED P-5055 are met and to eliminate any potential for conflicting guidance, the specific standards and examination procedures for occupational exposure to ionizing radiation are found only in NAVMED P-5055, Chapter 2. The current version of NAVMED P-5055 is available on the Navy Medicine Web site at http://www.med.navy.mil/directives/Pages/Publications.aspx.

15-105 Special Operations Duty

(1) ***Characteristics***. Special operations (SO) duty takes place in every part of the world under harsh conditions at the extremes of human physical capabilities. Medical austerity and the presence of armed opposition are common. SO personnel, depending on service and warfare community, routinely engage in high-risk operations including parachuting, high angle activities, high-speed boat and unconventional vehicle operation, weapons operation, demolitions employment, and waterborne activities, to include SCUBA diving. As such, SO duty is among the most physically and mentally demanding assignments in the U.S. military. Only the most physically and mentally qualified personnel should be selected, and those who are or may be reasonably expected to become unfit or unreliable must be excluded.

(2) ***Applicability***. Current and prospective members of the following communities (whether Navy, U.S. non-Navy, or foreign national):

(a) Navy sea, air, and land personnel (SEAL).

(b) Special warfare combatant craft crewmen (SWCC).

(c) USMC Reconnaissance Marine (RECON).

(d) USMC Forces Special Operations Command (MARSOC); special operations officer (SOO), critical skills operators (CSO), and Special Amphibious Reconnaissance Corpsman (SARC).

(e) Explosive ordnance disposal (EOD) personnel.

Note: *To be physically qualified for military parachuting (including basic, military free-fall, and high altitude low opening), Army Regulation 40-501 (AR40-501), applies. Article 15-105 standards are presumed to encompass AR40-501/5 standards; therefore, an individual meeting physical standards or possessing a valid waiver for special operations duty from BUPERS-3 or PERS-416 is medically qualified to participate in military parachuting.*

Note: *SEAL, Navy EOD, and other SO personnel whose duties involve military diving or maintaining diving duty status must also be qualified under MANMED Chapter 15, article 15-102 (diving duty). Personnel who are SO qualified but do not dive or require dive qualification are not required to be qualified under MANMED Chapter 15, article 15-102.*

(3) ***Examinations***

(a) ***Periodicity***. Within 1 year of application for initial training. Periodicity between examinations will not exceed 5 years up to age 50. After age 50, periodicity will not exceed 2 years, e.g., an individual examined at age 46 would be re-examined at age 51, an individual examined at age 47, 48, 49, or 50 would be re-examined at age 52. Beginning at age 60, the examination is required annually. Special operations duty examinations must be performed no later than 1 month following the anniversary date (month and year) of the previous physical examination date. For example, for an examination performed on a 20-year old on 15 February 2018, the next examination must be completed by 31 March 2023. A complete physical examination is also required prior to returning to special operations duty after a period of disqualification.

(b) ***Scope***

(1) The examination must consist of a completed, comprehensive DD Form 2807-1, Report of Medical History and DD Form 2808, Report of Medical Examination with special attention to organ systems which affect the member's ability to function safely and effectively in the SO environment. The examiner must comment specifically on presence or absence of tympanic membrane movement with the Valsalva maneuver. The neurologic exam must be fully documented, with deep tendon reflexes noted on a standard stick figure.

(2) Within 3 months prior to the exam date the following must be accomplished (unless otherwise specified):

(a) Chest x-ray (PA and lateral) (candidates only, upon program entry, and then as clinically indicated).

(b) Electrocardiogram.

(c) Audiogram (current within last 12 months).

(d) DoD Type 2 Dental Exam (current within last 12 months).

(e) Refraction, by autorefraction or manifest, if uncorrected visual acuity (near and far) is not 20/20 or better.

(f) Color vision (per article 15-36(1)(d)) (candidates only, upon program entry).

(g) Depth perception (per MANMED Chapter 15, article 15-85(1)(d)) (candidates only, upon program entry).

(h) Complete Blood Count.

(i) Fasting blood glucose.

(j) Urinalysis with microscopic examination.

(k) Hepatitis C screening (current per SECNAVINST 5300.30 series).

(2) In addition to any applicable BUMEDINST 6230.15 series (Immunization and Chemoprophylaxis) requirements, all special operations candidates and current operators must be immunized against both Hepatitis A and B. Special Operations candidates must have completed the Hepatitis A and Hepatitis B series prior to the start of training. If documentation of completed immunization is lacking or in doubt, demonstration of serological immunity is sufficient to meet this requirement.

(c) ***Examiners***. Examinations may be performed by any physician, physician assistant, or nurse practitioner with appropriate DoD clinical privileges. Examinations not performed by an undersea medical officer (UMO) must be reviewed and co-signed by a UMO. All reviewing authority signatures must be accompanied by the "UMO" designation. A UMO is defined as a medical officer (or physician employed by DoD who previously served as a UMO) who has successfully completed the entire UMO course conducted by the Naval Undersea Medical Institute (NUMI), which includes the diving medical officer (DMO) course conducted at the Naval Diving and Salvage Training Center (NDSTC), and who is currently privileged in undersea medicine. For the purposes of this article, "mental health professional/provider" refers to a doctoral-level provider (psychiatrist/psychologist) unless otherwise indicated.

(4) ***Standards***. The standards delineated in this article define the conditions which are considered disqualifying for SO duty. The standards delineated in MANMED Chapter 15, Section III (General Standards, some of which are restated below for emphasis) are universally applicable to all SO duty candidates, unless specifically addressed in this article. UMOs, based on their specialty training and subject matter expertise, are charged with applying the General Standards to qualified SO personnel when appropriate to ensure that they are physically and mentally ready to perform their duties without limitation.

(a) ***General.*** Any condition or combination of conditions which may be exacerbated by SO duty, impair the ability to safely and effectively work in the SO environment, or increase potential for medical evacuation (MEDEVAC) is disqualifying. Any disease or condition causing chronic or recurrent disability or frequent health care encounters, increasing the hazards of isolation, or having the potential for significant exacerbation by extreme weather, stress, hypobaric or hyperbaric environments, or fatigue is disqualifying. Conditions and treatments causing a significant potential for disruption of operations are disqualifying. Further, any condition, combination of conditions, or treatment which may confound the diagnosis of a heat, cold, or brain injury is disqualifying.

Note: *SO personnel reporting for duty following an absence of greater than 14 days due to illness or injury, hospitalization for any reason, or reported on by a medical board must have a properly documented UMO evaluation to determine fitness for continued SO duty.*

(b) ***Ear, Nose, and Throat***

(1) Sleep apnea with cognitive impairment or daytime hypersomnolence is disqualifying.

(2) History of inner ear pathology or surgery, including but not limited to vertigo, Meniere's disease or syndrome, endolymphatic hydrops, or tinnitus of sufficient severity to interfere with satisfactory performance of duties is disqualifying.

(3) Chronic or recurrent motion sickness is disqualifying.

(4) External auditory canal exostosis or atresia that results in recurrent external otitis is disqualifying.

(5) Abnormalities precluding the comfortable use of required equipment, including headgear and earphones, are disqualifying.

(6) Any laryngeal or tracheal framework surgery is disqualifying.

(7) Hearing in the better ear must meet accession standards as specified in MANMED article 15-38(2).

(c) ***Dental***

(1) All SO personnel must be DoD dental classification 1 or 2.

(2) Any chronic condition that necessitates frequent episodes of dental care is disqualifying.

(3) Need for any prosthesis or appliance the loss of which could pose a threat to hydration or nutrition is disqualifying.

(d) ***Eyes and Vision***

(1) Corrected visual acuity worse than 20/25 in either eye is disqualifying.

(2) Uncorrected visual acuity worse than 20/40 in the better eye is disqualifying for SEAL and SWCC.

(3) Uncorrected visual acuity worse than 20/70 in either eye is disqualifying for SEAL and SWCC.

(4) Uncorrected visual acuity worse than 20/200 in either eye is disqualifying for EOD, USMC RECON, and MARSOC.

(5) Visual acuity standards are not waiverable for SEAL and SWCC candidates.

(6) Deficient color vision, as defined by MANMED article 15-36(1)(d), is disqualifying. Waiver requests for color vision deficiency will not be considered for EOD personnel or candidates. Other special operation communities will consider waivers. Waiver requests must include a statement from the member's supervisor stating that the member is able to perform his job accurately and without difficulty, and provide evidence that primary and secondary colors can be discerned.

(7) Symptomatic or functional night vision deficiency is disqualifying.

(8) Lack of depth perception (i.e., not meeting article 15-85, paragraph 1(d) standards) is disqualifying.

(9) Photorefractive keratectomy, laser-assisted in-situ keratomileusis (LASIK), LASEK, or intraocular lens implants (including Intraocular Collamer Lens Implants) within the preceding 3 months are disqualifying for SO candidates only. Stable results from appliance or surgery must meet the applicable (paragraph 4(d)(1)-(4) of this article) corrected visual acuity standards and the patient must be discharged from ophthalmology follow-up with a disposition of "fit for full duty" and requiring no ongoing treatment. Qualified SO Service members may return to duty 1 month after refractive corneal or intraocular lens implant surgery if they are fully recovered from surgery and have an acceptable visual outcome per paragraph 4(d)(1)-(4) of this article. No waiver is required in these cases.

(10) Glaucoma is disqualifying. Preglaucoma requiring no treatment and follow-up intervals of 1 year or more is not disqualifying.

(11) Presence of a hollow orbital implant is disqualifying.

(12) Any acute or chronic recurrent ocular disorder which may interfere with or be aggravated by blast exposure or repetitive deceleration such as parachute opening or small boat maritime operations is disqualifying.

(13) Radial keratotomy is disqualifying.

(14) Keratoconus is disqualifying.

(e) ***Pulmonary.*** Any chronic or recurring condition which limits capacity for extremely strenuous aerobic exercise in extremes of temperature and humidity including, but not limited to, pulmonary fibrosis, fibrous pleuritis, lobectomy, neoplasia, or infectious disease process, including coccidioidomycosis is disqualifying.

(1) Reactive airway disease or asthma after age 13, chronic obstructive or restrictive pulmonary disease, active tuberculosis, sarcoidosis, and spontaneous pneumothorax are disqualifying.

(2) Traumatic pneumothorax is disqualifying. Waiver may be considered for candidates or designated SO personnel under the following conditions:

(a) Normal pulmonary function testing.

(b) Normal standard non-contrast chest CT.

(c) Favorable recommendation from a pulmonologist with a disposition of "fit for full duty."

(d) Final evaluation and approval by attending UMO.

(3) Individuals with either positive tuberculin skin test (TST) or positive Interferon Gamma Release Assay (IGRA) (e.g., QuantiFERON-TB Gold test) must be removed from SO Duty pending further clinical investigation.

(a) Active tuberculosis is disqualifying; however, a waiver request will be considered upon completion of all treatments resulting in sterilization of the infectious lesion, and demonstration of normal pulmonary function. Individuals diagnosed with latent tuberculosis infection (LTBI) are non-infectious, but have the potential to progress to active disease.

(b) LTBI is disqualifying for candidates. A waiver request will be considered upon completion of all indicated LTBI therapy.

(c) Designated SO personnel diagnosed with LTBI will be evaluated by their attending UMO. The UMO may return the individual to SO Duty, without waiver, 8 weeks after initiating LTBI antibiotic therapy, provided the individual remains asymptomatic, is compliant with therapy and has no adverse reaction to the medication(s). Completion of treatment must be documented in the medical record.

(d) Foreign nationals participating in U.S. Navy SO training programs must be screened for tuberculosis, and if indicated, receive documented treatment to the same standard as that of U.S. nationals, prior to acceptance into training.

(f) ***Cardiovascular.*** Any condition that chronically, intermittently, or potentially impairs exercise capacity or causes debilitating symptoms is disqualifying. Specific disqualifying conditions include, but are not limited to:

(1) Cardiac dysrhythmia (single episode, recurrent, or chronic) other than 1st degree heart block. Sinus bradycardia attributable to aerobic conditioning is a normal variant and is not disqualifying.

(2) Atherosclerotic heart disease.

(3) Pericarditis, chronic or recurrent.

(4) Myocardial injury or hypertrophy of any cause.

(5) Chronic anticoagulant use.

(6) Intermittent claudication or other peripheral vascular disease.

(7) Thrombophlebitis. Localized, superficial thrombophlebitis related to intravenous (IV) catheter placement is not disqualifying once asymptomatic.

(8) Uncontrolled hypertension, due either to the refractory nature of the condition or patient noncompliance, and persisting greater than 6 months, is disqualifying. Hypertension, which requires complex management or is associated with end organ damage, is disqualifying.

(9) History of cardiac surgery, including ablations for Wolff-Parkinson-White and other accessory pathways, other than closure of patent ductus arteriosus in infancy.

(g) ***Abdominal Organs and Gastrointestinal System***

(1) A history of gastrointestinal tract disease of any kind is disqualifying, if any of the following conditions are met:

(a) Current or history of gastrointestinal bleeding, including positive occult blood testing, if the cause has not been corrected. Minor rectal bleeding from an obvious source (e.g., anal fissure or external hemorrhoid) is not disqualifying if it responds to appropriate therapy and resolves within 6 weeks.

(b) Any history of organ perforation.

(c) Current or history of chronic or recurrent diarrhea, abdominal pain, incontinence, or emesis.

(2) Asplenia is disqualifying. Waiver may be considered 1 year after splenectomy if the member has received the appropriate immunizations and has had no serious infections.

(3) History of bariatric surgery is disqualifying and waiver will not be considered.

(4) History of diverticulitis is disqualifying. Personnel with diverticulosis require counseling regarding preventive measures and monitoring for development of diverticulitis.

(5) History of small bowel obstruction is disqualifying.

(6) Presence of gallstones, whether or not they are symptomatic, is disqualifying until the member is stone-free.

(7) History of gastric or duodenal ulcer is disqualifying.

(8) History of pancreatitis is disqualifying.

(9) Chronic active hepatitis is disqualifying.

(10) Inflammatory bowel disease and malabsorption syndromes are disqualifying.

(11) History of abdominal surgery is not disqualifying once healed, provided there are no sequelae including, but not limited to, adhesions.

(12) Uncontrolled gastroesophageal reflux disease (GERD) is disqualifying.

(13) History of food impaction or esophageal stricture is disqualifying.

(h) ***Genitourinary***

(1) Urinary incontinence, renal insufficiency, recurrent urinary tract infections, and chronic or recurrent scrotal pain are disqualifying.

(2) History of urolithiasis:

(a) Is disqualifying for candidates.

(b) A first episode of uncomplicated urolithiasis is not disqualifying for SO designated personnel provided that there is no predisposing metabolic or anatomic abnormality and there are no retained stones. The attending UMO may return the member to full duty after a thorough evaluation to include urology consultation and 24-hour urine studies.

(c) A first episode of urolithiasis associated with a metabolic or anatomic abnormality is disqualifying. Waiver may be considered based upon evidence of correction of the associated abnormality.

(d) Recurrent urolithiasis, regardless of cause, is disqualifying.

(e) Randall's plaques are not disqualifying.

(i) ***Endocrine and Metabolic.*** Any condition requiring chronic medication or dietary modification is disqualifying for candidates but may be waived for qualified SO personnel. Specifically:

(1) Any history of heat stroke is disqualifying for SO candidates. Recurrent heat stroke (two or more episodes) is disqualifying for designated SO personnel.

(2) Diabetes mellitus is disqualifying.

(a) Diabetes mellitus requiring insulin or long-acting sulfonylurea hypoglycemic medication (such as chlorpropamide or glyburide) must not be considered for a waiver.

(b) Diabetes mellitus controlled without the use of insulin or long-acting sulfonylurea medication may be considered for a waiver. Waiver requests must include documentation of current medications, current hemoglobin A1C level, and documentation of the presence or absence of any end organ damage.

(3) Gout that does not respond to treatment is disqualifying.

(4) Symptomatic hypoglycemia is disqualifying for candidates. Recurrent episodes are disqualifying for designated SO personnel.

(5) Chronic use of corticosteroids, or other medications which suppress or modulate the immune system, is disqualifying. Nasal corticosteroids used to treat allergic rhinitis are not disqualifying.

(6) Hypogonadism or other conditions requiring ongoing use of exogenous testosterone or testosterone analogs are disqualifying.

(j) ***Musculoskeletal.*** Any musculoskeletal condition which is chronic or recurrent, predisposes to injury, or limits the performance of extremely strenuous activities (weight-bearing and otherwise) for protracted periods is disqualifying.

(1) Requirement for any medication, brace, prosthesis, or other appliance to achieve normal function is disqualifying. Orthotic shoe inserts are permitted.

(2) Any injury or condition which results in limitations despite full medical and/or surgical treatment is disqualifying.

(3) Any condition which necessitates frequent absences or periods of light duty is disqualifying.

(4) Back pain, regardless of etiology, that is chronically or recurrently debilitating or is exacerbated by performance of duty is disqualifying.

(5) Radiculopathy of any region or cause is disqualifying.

(6) Any history of spine surgery is disqualifying.

(7) Chronic myopathic processes causing pain, atrophy, or weakness are disqualifying.

(8) Special operations personnel with a history of uncomplicated fractures may return to SO Duty after 3 months (or SO candidates after 12 months) if without residual symptoms or physical limitations, after evaluation by the attending orthopedic surgeon and at the discretion of the UMO

without a waiver. Those with residual symptoms or physical limitations, or those seeking to return to SO duty sooner than 3 months (12 if candidate) require a waiver.

(9) SO personnel with a history of bone (e.g., open reduction, internal fixation) or major joint surgery may return to SO Duty after 6 months (or SO candidates after 12 months) if without residual symptoms or physical limitations, after evaluation by the attending orthopedic surgeon and at the discretion of the UMO without a waiver. Those with residual symptoms or physical limitations, or those seeking to return to SO Duty sooner than 6 months (12 if SO candidate) require a waiver. Retained hardware, after the afore-mentioned time intervals, is not disqualifying unless it results in limited range of motion.

(10) Any amputation, partial or complete, is disqualifying.

(k) ***Psychological and cognitive***

(1) Any diagnosis, from the current version of the DSM, which affects the Service member's ability to perform their duties is disqualifying. This determination for disqualification can be made by either the Service member's treating medical provider or licensed mental health professional. Waiver may be considered when the individual's symptoms no longer affect their ability to perform their duties and must include a favorable recommendation from the attending mental health provider and UMO.

(2) Substance Use Disorders

(a) Alcohol use disorders are disqualifying. If characterized as MILD or MODERATE, a waiver request may be submitted after completion of all recommended treatment. Waiver requests should detail any prescribed or recommended continuing care or aftercare plan. If the alcohol use disorder is characterized as SEVERE, waiver requests will only be considered after the individual demonstrates sustained sobriety (typically 12 months) and has completed any recommended continuing care and aftercare programs.

(b) Other Substance Use Disorders

1. Medically disqualifying for all SO Duty candidates. Waiver requests must include documentation of successful completion of treatment and aftercare (if applicable).

2. Designated SO personnel with substance use disorder will be managed administratively per OPNAVINST 5355.3 series and do not require medical disqualification unless a medically disqualifying diagnosis is present in addition to the substance use disorder (e.g., substance-induced psychosis).

3. Current or history of illicit drug use (including use in religious rituals) should be managed administratively per OPNAVINST 5355.3 series, SECNAVINST 5300.28 series, and any other applicable directives.

(3) Use of psychotropic medication is temporarily disqualifying until the Service member has become stable on the medication and they are able to perform their duties, as judged by the attending UMO and doctoral-level mental health professional. No waiver is required to return to SO Duty for short-term use (less than 6 months) of a psychotropic medication. Long-term use (longer than 6 months) of a psychotropic medication is disqualifying and will require a waiver to return to SO Duty.

Note: *ASD(HA) Guidelines for Deployment-Limiting Psychiatric Conditions and Medications states that a member may not be deployed within 3 months of starting a psychotropic medication.*

Note: *OPNAVINST 3591.1, Small Arms Training and Qualification, states that a member may not be issued a weapon while on psychotropic medications unless a waiver is obtained; personnel must be limited to administrative duties unless waiver has been granted.*

(4) Waiver is not required for short-term use (2 weeks or less) of a sleep aid (e.g., zolpidem for induction of sleep).

(l) ***Neurologic.*** Any chronic or recurrent condition resulting in abnormal motor, sensory, or autonomic function or in abnormalities in mental status, intellectual capacity, mood, judgment, reality testing, tenacity, or adaptability is disqualifying.

(1) Migraine (or other recurrent headache syndrome) which is frequent and debilitating, or is associated with changes in motor, sensory, autonomic, or cognitive function, is disqualifying.

(2) A history of seizure disorder, with the exception of febrile convulsion before age 6 years, is considered disqualifying. A minimum of 2 seizure-free years after cessation of anti-convulsant medication with a normal EEG and neurological evaluation

is necessary before a waiver will be considered. Isolated seizures attributed to known causes (e.g., blunt trauma, intoxications) may be waived sooner.

(3) Peripheral neuropathy due to systemic disease is disqualifying. Impingement neuropathy (e.g., carpal tunnel syndrome) is not disqualifying if a surgical cure is achieved. Small, isolated patches of diminished sensory function are not disqualifying if not due to a systemic or central process, but must be thoroughly documented in the health record.

(4) Speech impediments (stammering, stuttering, etc.) that impair communication are disqualifying.

(5) Any history of surgery involving the central nervous system is disqualifying.

(6) Cerebrovascular disease including stroke, transient ischemic attack, and vascular malformation, is disqualifying.

(7) Closed head injury is disqualifying if there is:

(a) Cerebrospinal fluid leak.

(b) Intracranial bleeding.

(c) Depressed skull fracture with dural laceration.

(d) Post-traumatic amnesia (PTA) per the following schedule:

1. PTA less than 1 hour is disqualifying for at least 1 month. A normal brain MRI and normal examination by a neurologist or neurosurgeon is required before return to duty. If more than 2 years have elapsed since the injury, a normal MRI and a normal neurologic examination by the UMO are sufficient. Further specialty consultation is only indicated in the event of abnormal findings.

2. PTA greater than 1 hour is permanently disqualifying for candidates. Waiver may be entertained for designated SO personnel after 1 year if brain MRI and neurologic and neuropsychological evaluations are normal.

(8) History of penetrating head injury is disqualifying.

(m) ***Skin.*** Any chronic condition which requires frequent health care encounters, is unresponsive to topical treatment, causes long-term compromise of skin integrity, interferes with the wearing of required equipment, clothing, or camouflage paint, or which may be exacerbated by sun exposure is disqualifying.

(n) ***Miscellaneous***

(1) Chronic viral illnesses (except those with manifestations limited to the skin) are disqualifying.

(2) Cancer treatment (except excision of skin cancer) within the preceding year is disqualifying.

(3) Chronic immune insufficiency of any cause, chronic anemia, abnormal hemoglobin (including sickle cell trait), and defects of platelet function or coagulability are disqualifying.

(4) Allergic or atopic conditions which require allergy immunotherapy are disqualifying until completion of desensitization therapy.

(5) Current history of severe allergic reaction or anaphylaxis to environmental substances or any foods is disqualifying. Any allergy with life threatening manifestations is disqualifying.

(6) Chronic or recurrent pain syndromes that may mimic serious disease (e.g., abdominal pain, chest pain, and headache) are disqualifying.

(7) Recurrent syncope is disqualifying. Waiver will be considered only after demonstration of a definitive diagnosis and effective prophylactic treatment.

(8) ***Medications***

(a) For candidates, daily or frequent use of any medication is disqualifying.

(b) For designated SO personnel, use of any medication that may compromise mental or behavioral function, limit aerobic endurance, or

pose a significant risk of mentally or physically impairing side effects is disqualifying. Any requirement for a medication that necessitates close monitoring, regular tests, refrigeration, or parenteral administration on a biweekly (every 2 weeks) or more frequent basis is disqualifying. Requirement for medication which would pose a significant health risk if suddenly stopped for 1 month or more is disqualifying.

(c) SO designated personnel taking medicines prescribed by a non-DoD provider are disqualified until reviewed and approved by the Service member's UMO.

(9) ***Vaccinations.*** Candidate or SO designated personnel refusing to receive recommended vaccines (preventive health or theatre specific vaccines recommended by the Combatant Command (COCOM)) based solely on personal or religious beliefs are disqualified. This provision does not pertain to medical contraindications or allergies to vaccine administration.

(4) ***Waiver and Disqualification Requests.*** Waiver and disqualification requests are essentially the same personnel action. The distinction between the two lies with whether the originator is requesting that one or more physical standards be waived or not. The outcome of either request is a determination by the responsible waiver authority as to whether the physical standard(s) is waived or not. BUMED-M95 serves as the senior medical reviewer for the waiver authority. (Certain waiver authorities have delegated adjudication of disqualification cases only to lower echelon commanders).

(a) Requests for a waiver of physical standards for SO personnel and candidates must be sent from the member's commander, commanding officer, or officer in charge, via any applicable immediate superior in command (ISIC) or type commander (TYCOM) and BUMED-M95, to the appropriate Bureau of Naval Personnel code (enlisted – BUPERS-3; officers – PERS-416); or Headquarters, USMC (POG-40).

(b) Originators must use the WEBWAVE 2 system to securely transmit cases (which contain HIPAA and PII-protected information). WEBWAVE 2 expedites case adjudication, allows tracking of cases under review and provides an accessible archive of closed cases. The system's business rules are designed to ensure that all necessary components of a request are submitted and requests are directed electronically via the proper routing sequence. BUMED-M95's guideline for timely internal review of routine waiver requests is 10 business days; Urgent cases are acted upon with 24 hours of receipt. Access to WEBWAVE 2 is controlled by BUMED-M95. Commands needing to submit requests via WEBWAVE 2 but currently without access may contact BUMED-M95 directly to validate their requirement and obtain access/training.

(c) For SO personnel, interim waivers may be granted by BUMED-M95 for periods of up to 6 months.

(1) Interim waivers will not normally be considered for SO candidates, in as much as their suitability must be established before the Navy incurs the expense of TAD orders and training.

(2) Because interim waivers are not reviewed by the relevant Waiver Authority, BUMED-M95 will only grant interim waivers for relatively routine, frequently encountered conditions for which it is confident of the waiver authority's eventual disposition. In any case, interim waivers should be requested sparingly.

(3) BUMED-M95 must receive the final waiver request prior to the expiration of any interim waiver which has been granted (typically 6 months). The final waiver request must include a substantive interval history pertinent to the condition under review.

(4) Individuals with lapsed interim waivers are not physically qualified to parachute or deploy until the final waiver request has been adjudicated.

(5) BUMED-M95's final recommendation will be based on the member's condition at the time the final waiver request is made and may differ from the interim determination, if there has been a change in the member's condition or if information presented in the final request dictates a change in recommendation.

(d) BUMED-M95 will perform 'courtesy screening' for SO candidates, who are potential Navy accessions, referred by their local Navy Recruiting Districts (NRD); however, these screens are not waivers.

(e) The required elements of a waiver or disqualification request are:

(1) A special SF 600, prepared by the UMO, requesting the waiver (or disqualification), referencing the specific standard for which the member is NPQ, a clinical synopsis including brief history, focused examination, clinical course, appropriate ancillary studies and appropriate specialty

consultations, followed by an explicit recommendation of "waiver recommended" or "waiver not recommended" with supporting rationale. Any ongoing aftercare must be identified.

(2) DD Form 2807-1/2808, annotated to reflect individual's pertinent findings. This may either be a new SO duty examination, a current SO duty examination, annotated as necessary, or a focused examination documenting pertinent positives and negatives. Circumstances will dictate which format is most appropriate.

(3) Copies of other, pertinent studies supporting the waiver/disqualification.

(4) Copies of pertinent, specialty consultation clinical notes supporting the waiver or disqualification.

(5) Endorsement by the member's commanding officer or sponsoring unit. This endorsement should be substantive and address whether the condition, diagnosis, or current condition impairs the member's performance of SO duty and is compatible with the operational environment.

Note: *Office codes, titles and contact numbers are current as of the time of document release. It should be anticipated that these can and will change prior to the next revision of this article.*

Note: *An individual who does not meet Article 15-105 physical standards and is denied a waiver by BUPERS- 3/PERS-416, and still wishes to participate in military parachuting, must be examined and meet standards per AR40-501. Waiver authority for the Airborne School is the Commandant, U.S. Army Infantry School in coordination with U.S. Total Army Personnel Command (PERSCOM).*

15-106 Submarine Duty

(1) ***Characteristics.*** Submarine duty is characterized by geographic isolation, austere medical support, need for personnel reliability, prolonged habitation of enclosed spaces, continuous exposure to low level atmospheric contaminants, and psychological stress. The purpose of submarine duty standards is to maximize mission capability by optimizing mental and physical readiness of members of the submarine force.

(2) ***Applicability.*** Current and prospective submariners and UMOs. Non-submarine designated personnel embarked on submarines ("riders") will comply with OPNAVINST 6420.1 series.

(3) ***Examinations***

(a) ***Periodicity.*** For candidates, no more than 1 year prior to reporting for initial submarine training. Periodicity between examinations will not exceed 5 years up to age 50. After age 50, periodicity will not exceed 2 years, e.g., an individual examined at age 46 would be re-examined at age 51, an individual examined at age 47, 48, 49, or 50 would be re-examined at age 52. Beginning at age 60, the examination is required annually. Submarine duty examinations must be performed no later than 1 month following the anniversary date (month and year) of the previous physical examination date. For example, for an examination performed on a 20-year old on 15 February 2010, the next examination must be completed by 31 March 2015. A complete physical examination is also required prior to returning to submarine duty after a period of disqualification.

(b) ***Scope.*** The examiner will pay special attention to the mental status, psychiatric, and neurologic components of the examination, and will review the entire health record for evidence of past impairment. Specifically, the individual will be questioned about difficulty getting along with other personnel, history of suicidal or homicidal ideation, and anxiety related to tight or closed spaces, nuclear power, or nuclear weapons. The examination must be recorded on the DD Form 2807-1 and DD Form 2808. For female examinees, the NAVMED 6420/2 (Health and Reproductive Risk Counseling for Female Submariners and Submarine Candidates) is also required. If within required periodicity, portions of the examination typically performed in conjunction with the annual women's health exam (e.g., breast, genitalia, pelvic, anus and rectum) may be transcribed with proper attribution rather than repeated, and need not be performed by the examiner performing the submarine duty exam. The following studies are required within 3 months prior to the exam unless otherwise specified:

(1) PA and lateral x-rays of the chest (candidates only, upon program entry).

(2) LTBI screening (current per BUMEDINST 6224.8 series for persons embarking on a Commissioned Vessel).

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TRIDENT ORDER #12 - MANDATORY VACCINATION FOR COVID-19

Originator: COMNAVSPECWARCOM CORONADO CA
TOR: 09/24/2021 19:02:56
DTG: 241857Z Sep 21
Prec: Routine
DAC: General
To: AIG 11370, COMNAVSPECWARGRU EIGHT
CC: COMNAVSPECWARCOM CORONADO CA

RAAUZYUW RUIEAAA4294 2671902-UUUU--RUIEAAA.
ZNR UUUUU ZDH ZUI RUEOMCI0016 2671902
R 241857Z SEP 21
FM COMNAVSPECWARCOM CORONADO CA
TO AIG 11370
RUIEAAA/COMNAVSPECWARGRU EIGHT
INFO RUIEAAA/COMNAVSPECWARCOM CORONADO CA
BT
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SUBJ/TRIDENT ORDER #12 - MANDATORY VACCINATION FOR COVID-19
REF (A) SECRETARY OF DEFENSE MEMORANDUM, MANDATORY CORONAVIRUS DISEASE
2019 VACCINATION OF DEPARTMENT OF DEFENSE SERVICE MEMBERS, DATED 24 AUG 21
REF (B) DEPARTMENT OF DEFENSE INSTRUCTION 6205.02, DEPARTMENT OF DEFENSE IMMUNIZATION PROGRAM, DATED 23 JUL 19
REF (C) ALNAV 062/21, 2021-2022 DEPARTMENT OF THE NAVY MANDATORY COVID-19 VACCINATION POLICY
REF (D) NAVADMIN 190/21, 2021-2022 NAVY MANDATORY COVID-19 VACCINATION
AND REPORTING POLICY
REF (F) BUMEDINST 6230.15B, IMMUNIZATIONS AND CHEMOPROPHYLAXIS FOR THE
PREVENTION OF INFECTIOUS DISEASES
REF (G) DODI 1300.7, RELIGIOUS LIBERTY IN THE MILITARY SERVICES
REF (H) BUPERSINST 1730.11A, STANDARDS AND PROCEDURES GOVERNING THE ACCOMODATION OF RELIGIOUS PRACTICES
REF (I) MILPERSMAN 1730-020, IMMUNIZATION EXEMPTIONS FOR RELIGIOUS BELIEFS
REF (J) NAVMED P-117, MANUAL OF THE MEDICAL DEPARTMENT, CHAPTER 15, SECTION 105
REF (K) USD (P&R) FORCE HEALTH PROTECTION GUIDANCE (SUPPLEMENT 23) - DEPARTMENT OF DEFENSE GUIDANCE FOR CORONAVIRUS 2019 VACCINATION ATTESTATION AND SCREENING TESTING FOR UNVACCINATED PERSONNEL, DATED 07
SEP 21.
REF (L) USSOCOM FRAGO 32 TO USSOCOM OPORD FOR CORONAVIRUS DISEASE (COVID-19), DATED 10 SEP 21.

1. THE SECRETARY OF DEFENSE DETERMINED THAT MANDATORY VACCINATION AGAINST COVID-19 IS NECESSARY TO PROTECT THE FORCE AND DEFEND THE AMERICAN PEOPLE PER REF (A). THE COVID-19 VACCINE IS MANDATED FOR ALL
SERVICE MEMBERS.
2. SERVICE MEMBERS ARE CONSIDERED FULLY VACCINATED TWO WEEKS AFTER COMPLETING THE SECOND DOSE OF A TWO-DOSE COVID-19 VACCINE OR TWO WEEKS
AFTER RECEIVING A SINGLE DOSE OF A ONE-DOSE VACCINE. SERVICE MEMBERS

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WITH PREVIOUS COVID-19 INFECTION ARE NOT CONSIDERED FULLY VACCINATED.
3. SERVICE MEMBERS VOLUNTARILY IMMUNIZED WITH A COVID-19 VACCINE UNDER
EMERGENCY USE AUTHORIZATION (EUA) PRIOR TO, OR AFTER, THIS MANDATE WILL BE CONSIDERED FULLY VACCINATED. THEREFORE, SERVICE MEMBERS MAY VOLUNTEER TO RECEIVE AN EUA APPROVED VACCINE TO SATISFY THE VACCINE MANDATE.
4. MANDATORY VACCINATION REQUIREMENTS WILL BE IMPLEMENTED IN ACCORDANCE WITH REF (A) THROUGH REF (J). PERSONNEL SUBJECT TO THIS MANDATE MUST RECEIVE THEIR FIRST VACCINE DOSE OR INITIATE A MEDICAL OR
ADMINISTRATIVE (INCLUDING RELIGIOUS) EXEMPTION NLT 17 OCT 21, PER REF (L).
A. COMMANDS WILL ENSURE SERVICE MEMBERS REPORT FOR COVID-19 VACCINATION OR RECEIVE COVID-19 VACCINATION ADMINISTRATIVE COUNSELING/WARNING NLT 7 OCT 21 TO COMPLY WITH THE TIMELINES IN THIS ORDER AND REF (D).
B. SERVICE MEMBERS WHO HAVE PENDING EXEMPTION REQUESTS WILL NOT RECEIVE ADMINISTRATIVE COUNSELING/WARNING DUE TO THEIR PENDING REQUESTS BUT SHALL RECEIVE ADMINISTRATIVE COUNSELING/WARNING IF THEIR REQUEST IS DENIED.
6. EXEMPTIONS
A. EXEMPTIONS FOR MEDICAL AND/OR ADMINISTRATIVE (INCLUDING RELIGIOUS) REASONS WILL BE ADJUDICATED VIA SERVICE POLICIES.
B. SERVICE MEMBERS SHOULD CONTACT THEIR HEALTH CARE PROVIDER FOR QUESTIONS ABOUT MEDICAL EXEMPTIONS.
C. SERVICE MEMBERS SHOULD CONTACT THEIR CHAPLAIN OFFICE FOR ASSISTANCE WITH A RELIGIOUS ACCOMMODATION REQUEST.
D. PER REF (J), SPECIAL OPERATIONS DESIGNATED PERSONNEL (SEAL AND SWCC) REFUSING TO RECEIVE RECOMMENDED VACCINES BASED SOLELY ON PERSONAL OR RELIGIOUS BELIEFS WILL STILL BE MEDICALLY DISQUALIFIED. THIS PROVISION DOES NOT PERTAIN TO MEDICAL CONTRAINDICATIONS OR ALLERGIES TO VACCINE ADMINISTRATION. WAIVER FROM MEDICAL REQUIREMENTS
FOR SPECIAL OPERATIONS QUALIFICATION REQUIRES A SEPARATE WAIVER THAT IS IN ADDITION TO WAIVER OF THE COVID-19 VACCINE REQUIREMENT FOR ALL SERVICE MEMBERS.
E. ECHELON III COMMANDS WILL COPY COMNAVSPECWARCOM FORCE MEDICAL (N04)
ON EXEMPTION ENDORSEMENTS ON THEIR REPORTING TO CHIEF OF NAVAL PERSONNEL N1.
7. AUTHORITY TO DISPOSE OF CASES FOR SERVICE MEMBERS WHO REMAIN UNVACCINATED AFTER 28 NOV 21 IS WITHHELD PER REF (D). REPORTING PROCEDURES AND INFORMATION CONCERNING DISPOSITION OF THESE CASES WILL BE PROMULGATED IN THE FUTURE AFTER THE DESIGNATED COVID CONSOLIDATED DISPOSITION AUTHORITY IS APPOINTED FOR THE NAVY.

BT
#4294
C316

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Received from AUTODIN 241902Z Sep 21

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UNCLASSIFIED//
ROUTINE
R 132050Z OCT 21 MID600051034536U
FM CNO WASHINGTON DC
TO NAVADMIN
INFO SECNAV WASHINGTON DC
BT
UNCLAS

NAVADMIN 225/21

MSGID/NAVADMIN/CNO WASHINGTON DC/CNO/OCT//

SUBJ/COVID-19 CONSOLIDATED DISPOSITION AUTHORITY (CCDA)//

REF/A/DOC/SD/24AUG21/
REF/B/MSG/SECNAV/302126ZAUG21/
REF/C/MSG/CNO/311913ZAUG21/
REF/D/DOC/BUMED/7OCT13//
REF/E/DOC/BUPERS/16MAR20//
REF/F/DOC/OPNAV/15AUG20//
NARR/REF A IS THE SECRETARY OF DEFENSE MEMO MANDATING CORONAVIRUS DISEASE 2019 VACCINATION FOR DEPARTMENT OF DEFENSE SERVICE MEMBERS.
REF B IS ALNAV 062/21, 2021-2022 DEPARTMENT OF NAVY MANDATORY COVID-19 VACCINATION POLICY.
REF C IS NAVADMIN 190/21, 2021-2022 NAVY MANDATORY COVID-19 VACCINATION AND REPORTING POLICY.
REF D IS BUMEDINST 6230.15B, IMMUNIZATIONS AND CHEMOPROPHYLAXIS FOR THE PREVENTION OF INFECTIOUS DISEASE.
REF E IS BUPERSINST 1730.11A, STANDARDS AND PROCEDURES GOVERNING THE ACCOMMODATION OF RELIGIOUS PRACTICES.
REF F IS MILPERSMAN 1730-020, IMMUNIZATION EXEMPTIONS FOR RELIGIOUS BELIEFS.//
POC/OPNAV/CAPT STEVEN TARR III, (703) 614-9250//EMAIL: STEVEN.TARR1.MIL(AT)US.NAVY.MIL

RMKS/1. Purpose. This NAVADMIN announces the assignment of the Chief of Naval Personnel as the COVID Consolidated Disposition Authority (CCDA), and provides procedural guidance and reporting requirements for administrative disposition of individual Navy service members, active duty and Selected Reserve, who are not fully vaccinated per references (a) through (c).

2. Policy. In order to maximize readiness, it is the policy goal of the U.S. Navy to achieve a fully vaccinated force against the persistent and lethal threat of COVID-19.
2.a. In support of the above stated policy, and as directed by the Secretary of the Navys lawful order, the Navy has commenced a mandatory vaccination campaign per references (a) through (c). Navy service members refusing the COVID-19 vaccination, absent a pending or approved exemption, shall be processed for administrative separation per this NAVADMIN and supporting references. To ensure a fair and consistent process, separation determinations will be centralized under the CCDA as outlined in the paragraphs below.
2.b. To date, over 98 percent of active duty U.S. Navy service members have met their readiness responsibility by completing or initiating a COVID-19 vaccination series. We applaud your commitment to ensuring the continued readiness of our worldwide deployable Navy. Tragically, there have been 164

deaths within the Navy family due to COVID-19, far exceeding the combined total of all other health or mishap related injuries and deaths over the same time period. 144 of these were not immunized and 20 had an undisclosed immunization status.

3. Definitions. For the purposes of this NAVADMIN, the following terms are defined.
3.a. Navy Service Members. Active-duty service members and service members in the Selected Reserve only. Service members in the Individual Ready Reserve and U.S. Naval Academy and Naval Reserve Officers Training Corps midshipmen remain subject to the vaccine mandates in references (a) and (b), but will be adjudicated per their governing instructions rather than this NAVADMIN.
3.b. Active-Duty Navy Service Members. Active-duty Navy service members includes members of the Active Component and members of the Reserve Component on active duty in full time support (FTS).
3.c. Refusing the Vaccine. A Navy service member refusing the vaccine is one who has: (1) received a lawful order to be fully vaccinated against COVID-19; (2) is not or will not be fully vaccinated on the date required by the order; and (3) does not have a pending or approved exemption request per references (d) through (f).
3.d. Fully Vaccinated. Service members are considered fully vaccinated two weeks after completing an approved COVID-19 vaccination series per reference (c).
3.e. Senior Leader. A Navy senior leader is a flag officer or flag officer select, regardless of assignment; an officer serving as a commander, deputy commander, commanding officer, executive officer, chief of staff, chief staff officer, or officer in charge; or an enlisted member serving as a command master chief, chief of the boat, senior enlisted advisor, or command senior enlisted leader.

4. Deadlines. Per references (a) through (c), active duty Navy service members must be fully vaccinated against COVID-19 NLT 28 November 2021, and Ready Reserve Navy service members NLT 28 December 2021. New accessions must be vaccinated as soon as practicable following service entry.
4.a. For requested exemptions that are denied, specific instructions regarding the follow-on vaccination timeline or separation adjudication process will be included in the denial letter.
4.b. Administrative actions per this NAVADMIN may begin as soon as a Navy service member meets the definition of refusing the vaccine in paragraph 3.c.

5. Disposition Authority
5.a. Designation of the CCDA. The Chief of Naval Personnel (CNP) is the CCDA. The Chief of Navy Reserve (CNR) will provide support to the CCDA for cases involving Navy service members in the Selected Reserve.
5.b. Authorities for Vaccination Refusal. The CCDA is the officer show cause authority and enlisted separation authority for Navy service members who refuse the COVID-19 vaccine, except Entry Level Separation (ELS). For ELS, commanders and commanding officers are separation authorities per paragraph 6.b. Commanders and commanding officers will initiate administrative separation processing per paragraphs
7.a. and 7.b. The Vice Chief of Naval Operations retains authority for non-judicial punishment and courts-martial. Involuntary extension of enlistments is not authorized on the basis of administrative or disciplinary action for vaccination refusal. The CCDA may seek recoupment of applicable bonuses, special and incentive pays, and the cost of training and education for service members refusing the vaccine.

5.c. Other Misconduct. The withholding of disposition authority in reference (c) and this NAVADMIN does not extend to other misconduct, which may include misconduct related to vaccine refusal such as failing to wear a mask when required, falsifying vaccination records, or not complying with COVID testing requirements. If in doubt, commanders, commanding officers, and officers in charge should consult with their servicing staff judge advocate in determining disposition authority.
5.d. Separation Authority for Vaccine Refusal That Includes Other Misconduct. If a Navy service member is processed for administrative separation because of vaccine refusal that includes other misconduct, the CCDA will serve as the officer show cause authority or enlisted separation authority in accordance with paragraph 5.b.
5.e. Professional Qualifications. For Navy service members refusing the vaccine, the CCDA retains the authority for administrative processes regarding removal of warfare qualifications, additional qualification designations (AQD), Navy Enlisted Classifications (NEC), or sub-specialties, except in cases where removal authority is otherwise authorized by law or Executive Order (e.g. Director, Naval Nuclear Propulsion Program regarding nuclear qualifications).
5.f. Other Armed Forces Members Assigned to Navy Commands. For vaccine refusal cases involving Soldiers, Airmen, Guardians, Marines, or Coast Guardsmen assigned to Navy commands, the Navy commander, commanding officer, or officer-in-charge will report the case to the CCDA.
5.g. Navy Service Members in Non-Navy Billets. The CCDA will be responsible for identifying, coordinating, and adjudicating Navy service members refusing the vaccine while serving in non-Navy billets (e.g., Joint, NATO).

6. Administrative Disposition Guidance; Immediate Actions.
6.a. Unvaccinated Senior Leaders. An unvaccinated senior leader without a pending or approved exemption calls into question the Navy's trust and confidence regarding their ability to ensure unit readiness or to maintain good order and discipline. These senior leaders must begin vaccination immediately. This constitutes a lawful order. The immediate superior in command (ISIC), commander, or commanding officer, as applicable, will notify in writing senior leaders refusing the vaccine that they have five (5) calendar days to initiate corrective action. If the senior leader does not begin a vaccination series or request an exemption within that five-day period, the ISIC, commander, or commanding officer will relieve the senior leader and initiate detachment for cause (DFC) per MILPERSMAN 1611-010, MILPERSMAN 1611-020, and MILPERSMAN 1616-010, as applicable.
6.a.(1). A sample report of misconduct is available at: https://www.mnp.navy.mil/group/navy-covid-19-reporting. The report will note that authority for disciplinary action is withheld by reference (c) and this NAVADMIN, and as such no disciplinary action was taken.
6.a.(2). Established notification procedures for relief of command triad members apply. The relief of any flag officer or officer selected for promotion to O-7 under this paragraph will be reported to the Naval Inspector General for review per DoDI 1320.04 and SECNAVINST 5800.12C.
6.b. Entry Level Separation (ELS). ELS processing is authorized per paragraph 5.b above per MILPERSMAN 1910-154 for Navy service members in an entry level status refusing the vaccine. ELS shall be reported per paragraph 9.
6.c. Because COVID-19 vaccination is now mandatory, commanders, commanding officers, or officers in charge, with the concurrence of the first flag officer in the chain of command, are authorized to temporarily reassign Navy service members who refuse the COVID-19 vaccine, regardless of exemption status, based on operational readiness or mission requirements.

6.d. Promotion, Transfer and Reenlistment. Commands shall not allow those refusing the vaccine to promote/advance, reenlist, or execute orders, with the exception of separation orders, until the CCDA has completed disposition of their case. Transfer orders may be cancelled by Navy Personnel Command.

7. Administrative Disposition Guidance; Future Actions. The actions in this paragraph shall be executed per paragraph 4.
7.a. Officer Administrative Separation. In the case of any officer, including any officer senior leader, who is refusing the vaccine, the cognizant commander or commanding officer shall submit a report of misconduct to Commander, Navy Personnel Command (PERS-834) per MILPERSMAN 1611-010. A template report is available at: https://www.mnp.navy.mil/group/navy-covid-19-reporting.
Per SECNAVINST 1920.6D, the CCDA, as the show cause authority, has directed mandatory show cause processing for all officers on the bases of Misconduct, Moral or Professional Dereliction, and Substandard Performance, with the least favorable characterization of service as GENERAL (under honorable conditions), unless inclusion of another basis for separation warrants other than honorable. Additionally, report flag officers or officers selected for promotion to O-7 who are refusing the vaccine to the Naval Inspector General for review per DoDI 1320.04 and SECNAVINST 5800.12C. Officers separated under this subparagraph will not be eligible for involuntary separation pay and will be subject to recoupment of any unearned special or incentive pays.
7.b. Enlisted Administrative Separation. In the case of any enlisted service member, including any enlisted senior leader, who is refusing the vaccine, the cognizant commander or commanding officer shall initiate the process for administrative separation under MILPERSMAN 1910-142, Commission of a Serious Offense, plus any additional basis known at the time of processing. The provisions of MILPERSMAN 1910 (series) apply; treat vaccine refusal cases as though they were listed in MILPERSMAN 1910-233. The CCDA is the separation authority unless a higher separation authority is required by MILPERSMAN 1910-704. The least favorable characterization of service shall be GENERAL (under honorable conditions), unless inclusion of another basis for separation warrants other than honorable. Enlisted service members separated under this subparagraph will not be eligible for involuntary separation pay and will be subject to recoupment of any unearned special or incentive pays.
7.c. Officer Promotion Delay. Per SECNAVINST 1420.3 or SECNAVINST 1412.6M, commanders and commanding officers shall delay the promotion of any officer refusing the vaccine. Delays shall be based upon pending administrative action and physical qualification. PERS-833 will make formal written notice to the officer following written notice by the commanding officer.
7.d. Enlisted Advancement Withhold. Per BUPERSINST 1430.16G, commanding officers shall withhold the advancement of any enlisted member refusing the vaccine. Advancement withholds shall be based upon pending administrative action and physical qualification.
7.e. Documentation in Fitness Reports and Enlisted Evaluations.
Per MILPERSMAN 1610-015, failure to comply with individual medical readiness responsibilities will be documented in fitness reports and evaluations. Failure to be fully vaccinated against COVID-19 is a medical readiness failure.
7.e.(1). Commanding officers shall identify those refusing the vaccine and verify that the members have an initial counseling NAVPERS 1070/13 per MILPERSMAN 1610-015 in their local file (Page 13). If necessary, the initial NAVPERS 1070/13 directed in MILPERSMAN 1610-015 shall be issued.
The NAVPERS 1070/13 counseling and warning ordering vaccination per NAVADMIN 190/21 may serve as the subsequent formal counseling required in MILPERSMAN

1610-015.
7.e.(2). Within 30 days of a Navy service member refusing the vaccine, reporting seniors shall issue a Special Fitness Report/Evaluation per MILPERSMAN 1610-015 and BUPERSINST 1610.10E. In addition to documenting failure to comply with individual medical readiness responsibilities, the report shall document other facts as appropriate, including any misconduct related to UCMJ Art. 92.
7.f. Terminal Leave. Navy service members who commence terminal leave on or before the applicable deadline in paragraph 4 are administratively exempted from vaccine requirements per BUMEDNOTE 6150 of 21 Sep 21 and BUMEDINST 6230.15B.
7.g. The authority for commanding officers in MILPERSMAN 1730-020 to revoke an approved religious accommodation exemption from COVID-19 vaccination is withheld.

8. Reporting
8.a. Officers and E-6 through E-9. Per MILPERSMAN 1611-010 and MILPERSMAN 1616-040, commands are required to inform PERS-834 (officers) and PERS-832 (enlisted) of incidents that could result in adverse action. This applies to vaccine refusal. Reports should flag whether the service member is pending transfer or promotion/advancement.
8.b. E-5 and Below. Per MILPERSMAN 1616-050, misconduct not yet finally adjudicated need not be reported to Navy Personnel Command.

9. Data Collection and Record Retention
9.a. Navy echelon one and two commanders will forward information regarding those refusing the vaccine within their administrative chains of command to CNP for active duty Navy service members and CNR for Ready Reserve service members per CCDA guidance.
9.b. All commands must retain all records, materials and written communications, including emails, pertaining to vaccine refusals per SECNAV M-5210.1.

10. Points of contact. OPNAV POC: CAPT Steven Tarr III, comm (703) 614-9250, e-mail: steven.tarr1.mil(at)us.navy.mil. BUMED POC: BUMED COVID-19 CRISIS ACTION TEAM / (703) 681-1125 /e-mail: USN.NCR.BUMEDFCHVA.MBX.BUMED---2019-NCOV-RESPONSE-CELL(AT)MAIL.MIL OJAG POC: CDR Justin Pilling, comm (703) 614-5757, e-mail: justin.d.pilling@navy.mil.

11. Released by ADM William Lescher, Vice Chief of Naval Operations, and VADM John B. Nowell, Jr., Chief of Naval Personnel.//

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NARR/REF A IS THE SECRETARY OF DEFENSE MEMO MANDATING CORONAVIRUS DISEASE 2019 VACCINATION FOR DEPARTMENT OF DEFENSE SERVICE MEMBERS.
REF B IS ALNAV 062/21, 2021-2022 DEPARTMENT OF THE NAVY MANDATORY COVID-19 VACCINATION POLICY.
REF C IS NAVADMIN 190/21, 2021-2022 NAVY MANDATORY COVID-19 VACCINATION AND REPORTING POLICY.
REF D IS NAVADMIN 225/21, COVID-19 CONSOLIDATED DISPOSITION AUTHORITY (CCDA).
REF E IS BUMEDINST 6230.15B, IMMUNIZATIONS AND CHEMOPROPHYLAXIS FOR THE PREVENTION OF INFECTIOUS DISEASE.
REF F IS BUPERSINST 1730.11A, STANDARDS AND PROCEDURES GOVERNING THE ACCOMMODATION OF RELIGIOUS PRACTICES.

REF G IS MILPERSMAN 1730-020, IMMUNIZATION EXEMPTIONS FOR RELIGIOUS BELIEFS.
REF H IS BUMEDNOTE 6300, NAVY CORONAVIRUS DISEASE 2019 VACCINE MEDICAL TEMPORARY, AND MEDICAL PERMANENT EXEMPTION FOR MEDICAL CONTRAINDICATION APPROVAL PROCESS.
REF I IS MILPERSMAN 1910-154, SEPARATION BY REASON OF ENTRY LEVEL PERFORMANCE AND CONDUCT.
REF J IS MILPERSMAN 1910-600, FORWARDING CASES TO THE SEPARATION AUTHORITY (SA).
REF K IS NAVADMIN 249/21, CCDA REPORTING REQUIREMENTS.
REF L IS MILPERSMAN 1611-010, OFFICER PERFORMANCE AND SEPARATIONS FOR CAUSE.
REF M IS MILPERSMAN 1616-040, ENLISTED PERFORMANCE (E-6/7/8/9).
REF N IS MILPERSMAN 1610-015, DOCUMENTATION ON FITNESS REPORTS AND PERFORMANCE EVALUATIONS FOR FAILURE TO MAINTAIN DEPLOYABILITY OR INDIVIDUAL MEDICAL READINESS.
REF O IS BUPERSINST 1610.10E, NAVY PERFORMANCE EVALUATION SYSTEM.
REF P IS MILPERSMAN 1616-050, ENLISTED PERFORMANCE (E-5 AND BELOW).
REF Q IS MILPERSMAN 1320-308, PERMANENT CHANGE OF STATION (PCS) TRANSFER ORDER EXECUTION.
REF R IS POLICY DECISION MEMORANDUM 003-06, ASSIGNMENT INCENTIVE PAY PROGRAM.
REF S IS POLICY DECISION MEMORANDUM 002-21, SEA DUTY INCENTIVE PAY PROGRAM.
REF T IS OPNAVINST 1160.6C, SPECIAL DUTY ASSIGNMENT PAY PROGRAM.
REF U IS OPNAVINST 1160.8B, SELECTIVE REENLISTMENT BONUS PROGRAM.
REF V IS OPNAVINST 1520.23C, GRADUATE EDUCATION.
REF W IS MILPERSMAN 1160-040, EXTENSION OF ENLISTMENTS.
REF X IS SECNAVINST 1420.2B, FROCKING OF COMMISSIONED OFFICERS.
REF Y IS BUPERSINST 1430.16G, ADVANCEMENT MANUAL FOR ENLISTED PERSONNEL OF THE U.S. NAVY AND U.S. NAVY RESERVE.
REF Z IS SECNAVINST 1420.3, DEPARTMENT OF THE NAVY COMMISSIONED OFFICER PROMOTION PROGRAM.
REF AA IS SECNAVINST 1412.6M, PROMOTION OF OFFICERS TO THE GRADE OF LIEUTENANT (JUNIOR GRADE) IN THE NAVY AND TO THE GRADE OF FIRST LIEUTENANT IN THE MARINE CORPS.

RMKS/1. Purpose. This NAVADMIN provides guidance to Commanders regarding Navy service members who fail to obey a lawful order by refusing the COVID-19 vaccine directed in references (a) through (c).

2. Policy. In order to ensure a fully vaccinated force, U.S. Navy policy is to process for separation all Navy service members who refuse the lawful order to receive the COVID-19 vaccination and do not have an approved exemption. Specific administrative actions are directed herein, however, additional administrative actions and any punitive actions based solely on vaccine refusal continue to be withheld.

2.a. The least favorable characterization of service for Navy service members refusing the vaccine, without extenuating circumstances, will be GENERAL (under honorable conditions). A general discharge will, at the discretion of the Department of Veterans Affairs (VA), result in the loss of eligibility for some VA benefits such as the GI Bill, to include the transfer of GI Bill benefits to dependents.

2.b. Navy service members with approved or pending COVID-19 vaccination exemption requests shall not be processed for separation or be subject to the other administrative actions described in this NAVADMIN due solely to their lack of COVID-19 vaccination. However, in line with reference (d), Navy service members who are not vaccinated, regardless of exemption status, may

be temporarily reassigned with concurrence of the first flag officer in the administrative chain of command based on operational readiness and mission requirements. Where applicable, the first flag officer in the operational chain of command should be notified regarding temporary reassignments.

2.c. Navy service members whose COVID-19 vaccination exemption request is denied are required to receive the COVID-19 vaccine as directed by the exemption adjudicating authority or commence vaccination within 5 days of being notified of the denial, if the exemption adjudicating authority does not specify. Navy service members who refuse the COVID-19 vaccine after expiration of the specified time to commence vaccination, will be processed for separation and be subject to the other administrative actions described in this NAVADMIN and reference (d).

2.d. Navy service members who initiate vaccination such that they cannot meet the deadline described in references (b) and (c) or the applicable deadline established by receipt of an exemption denial, should notify their chain of command as soon as possible. The Navy service members command must expeditiously report the case to the COVID Consolidated Disposition Authority via *PERS-834(at)navy.mil* for officers and *PERS832COVIDVAXADSEPS(at)us.navy.mil* for enlisted, in order to expedite determination regarding whether to initiate or suspend administrative separation and the other actions directed by this NAVADMIN.

2.e. Notwithstanding the policy to separate Navy service members refusing the vaccine, each and every Navy service member shall be treated with dignity and respect at all times throughout the execution of the policies described herein.

3. Definitions.

3.a. Navy Service Members. Active-duty service members and service members in the Selected Reserve only. Service members in the Individual Ready Reserve and U.S. Naval Academy (USNA) and Naval Reserve Officers Training Corps (ROTC) midshipmen remain subject to the vaccine mandates in references (a) through (c), but will be adjudicated per their governing instructions.

3.b. Active-Duty Navy Service Members. Active-duty Navy service members include members of the Active Component and members of the Reserve Component on active duty in a full time support (FTS) status (also known as Training and Administration of the Reserve (TAR)).

3.c. Refusing the Vaccine. A Navy service member refusing the vaccine is one who has: (1) received a lawful order to be fully vaccinated against COVID-19, (2) is not or will not be fully vaccinated on the date required by the order, and (3) does not have a pending or approved exemption request per references (e) through (h).

3.d. Fully Vaccinated. Service members are considered fully vaccinated two weeks after completing an approved COVID-19 vaccination series per reference (c).

3.e. Commanders. Commanders, Commanding Officers and Officers-in-Charge of naval units or organizations.

4. General Guidance.

4.a. Continue to hold submission of administrative separation (ADSEP) cases or convening administrative separation boards until directed by the CCDA.

4.a.(1). Final directions for submission of misconduct and ADSEP requests based solely on vaccine refusal are expected to be promulgated during the first week of December 2021. In preparation for submission, Commanders shall prepare Reports of Misconduct, applicable NAVPERS 1070/613s and any other supporting documents. Templates and additional information can be found at

https://www.mynavyhr.navy.mil/Career-Management/Personnel-Conduct-Sep/Officer-Performance-Separation/ and *https://www.mynavyhr.navy.mil/Career-Management/Personnel-Conduct-Sep/Enlisted-Separations/*. A NAVPERS 1070/613 specifically written for Navy service members who refuse the COVID-19 vaccine is located at *https://www.mnp.navy.mil/group/navy-covid-19-reporting* for Commanders use.

4.a.(2). Entry Level Separation (ELS). Commanders will continue separation of Navy enlisted service members refusing the vaccine who meet ELS criteria per MILPERSMAN (MPM) 1910-154. In accordance with MPM 1910-600, forward completed administrative separation records to PERS-832 via email at *PERS832COVIDVAXADSEPS(at)us.navy.mil* for filing in members official military personnel file (OMPF).

4.b. Commanders will notify those Navy service members refusing the vaccine who are executing funded or no-cost TAD orders for training, or any other official purpose, to halt their assigned activity and return to their command within five working days.

4.c. Generally, Navy service members refusing the vaccine will continue in their assigned duties pending adjudication of separation processing and other applicable administrative actions described within this NAVADMIN. Commanders shall ensure appropriate risk mitigations remain in place to prevent the spread of COVID-19. If, in the Commanders judgment, a local reassignment becomes necessary, Commanders should coordinate disposition and timing with their Immediate Superior in Command (ISIC).

5. Administrative Disposition Guidance.

5.a. The data reporting required by NAVADMIN 249/21, reference (k), meets the requirements of MPM 1611-010 (officers) and MPM 1616-040 (enlisted) to inform PERS-834 (officers) and PERS-832 (enlisted) of incidents that could result in adverse action for officers and enlisted (E-6 through E-9). However, if a Navy service member refusing the vaccine (including those E5 and below) has a pending transfer, promotion or advancement: submit the additional information, as described below, as soon as feasible to ensure appropriate preemptive action is taken. Include *COVID-19 Vaccine Refusal* in the subject line of the email.

5.a.(1). Officers. Email *PERS-834(at)navy.mil* with members name, rank, brief description of the offense (e.g. COVID-19 Vaccine Refusal), pending promotion/advancement status, and the commands POC (Name, rank/rate, email and phone number).

5.a.(2). Enlisted. Email *PERS832COVIDVAXADSEPS(at)us.navy.mil* with members name, rank and rate, brief description of the offense (e.g. COVID-19 Vaccine Refusal), pending promotion/advancement status, and the commands POC

(Name, rank/rate, email and phone number).

6. Documentation in Fitness Reports and Enlisted Evaluations.

6.a. Officers.

6.a.(1). In accordance with reference (d), within 30 days of a Navy service member refusing the vaccine, the reporting senior shall issue an adverse special Fitness Report (FITREP) per MPM 1610-015 and BUPERSINST 1610.10E. These reports should be submitted no earlier than the *to* date described below.

6.a.(2). The adverse special FITREP will document failure of the member to comply with Individual Medical Readiness responsibilities as outlined below. The adverse special FITREP shall document other facts as appropriate, including any additional misconduct associated with vaccine refusal, as described in BUPERSINST 1610.10E. The *to* date in block 15 of this adverse special FITREP will be as follows: 2021Nov28 (active duty service members and FTS/TAR), 2021Dec28 (SELRES). For Navy service members who requested an exemption which was denied and subsequently refuse the vaccine, the *to* date in block 15 shall be 14 days after expiration of the specified time to commence vaccination as discussed in para 2.c. or the applicable date specified in the previous sentence, whichever is later.

6.a.(3). The adverse special FITREP will contain no greater than a 2.0 in block 35 (Military Bearing/Character) and no greater than a 2.0 in block 38 (Leadership). Block 42 (Promotion Recommendation) will be marked as *Significant Problems*. The following sentence must be the opening statement in block 41: *Member failed to maintain deployability or individual readiness standards by refusing the order to receive the COVID-19 vaccine.* A report without these marks and this statement will be rejected and returned for correction.

6.b. Enlisted members.

6.b.(1). In accordance with reference (d), within 30 days of a Navy service member refusing the vaccine, the reporting senior shall issue an adverse special evaluation per MPM 1610-015 and BUPERSINST 1610.10E. The adverse special evaluation will document failure of the member to comply with Individual Medical Readiness responsibilities as outlined below. The adverse special evaluation shall document other facts as appropriate, including any additional misconduct associated with vaccine refusal, as described in BUPERSINST 1610.10E. The *to* date in block 15 of this adverse special evaluation will be as follows: 2021Nov28 (active duty service members and FTS/TAR), 2021Dec28 (SELRES). For Navy service members who requested an exemption which was denied and subsequently refuse the vaccine, the *to* date in block 15 shall be 14 days after expiration of the specified time to commence vaccination as discussed in para 2.c. or the applicable date specified in the previous sentence, whichever is later. These reports should be submitted no earlier than the *to* date described above.

6.b.(2). E-1 to E-6 Evaluations. The adverse special evaluation will contain no greater than a 2.0 in block 36 (Military Bearing/Character) and no greater than a 2.0 in block 39 (Leadership). Block 45 (Promotion Recommendation) will be marked as *Significant Problems* and block 47 (Retention) will be marked as *Not Recommended*. The following sentence must be the opening statement in block 43: *Member failed to maintain

deployability or individual readiness standards by refusing the order to receive the COVID-19 vaccine.* A report without these marks and this statement will be rejected and returned for correction.

6.b.(3). E-7 to E-9 Evaluations. The adverse special evaluation will contain no greater than a 2.0 in block 37 (Character) and no greater than a 2.0 in block 33 (Deckplate Leadership). Block 42 (Promotion Recommendation) will be marked as *Significant Problems*. The following sentence must be the opening statement in block 41: *Member failed to maintain deployability or individual readiness standards by refusing the order to receive the COVID-19 vaccine.* A report without these marks and this statement will be rejected and returned for correction.

7. Permanent Change of Station (PCS) orders execution guidance. Navy service members refusing the vaccine who are under PCS orders will adhere to the following guidance.

7.a. Navy service members and dependents who have not yet initiated PCS travel shall not execute orders. Commands are directed to contact Navy Personnel Command (NPC) for follow-on guidance per MPM 1611-010, MPM 1616-040, and MPM 1616-050. NPC is standing by to address each specific case and will authorize entitlements based on current location and situation.

7.b. For Navy service members and/or dependents who have already initiated PCS travel, detaching and gaining commands shall make every effort to contact those service members to advise them of the requirements of this message. The service member should contact their detailer directly and each case will be evaluated by NPC on a case by case basis. Commands are directed to contact NPC for follow-on guidance per MPM 1611-010, MPM 1616-040 and MPM 1616-050. Per MPM 1320-308, members traveling under orders are considered to be attached to the gaining command.

7.c. Commanders should contact their ISIC to discuss impacts on manning resulting from this PCS orders execution guidance. ISICs should discuss manning impacts with their respective Type Commander N1, officer and enlisted community detailers, and placement coordinator (PERS 4013).

7.d. For new accession Navy service members in the accession training pipeline, (e.g. Recruit Training Command and A and C Schools) who refuse the vaccine and do not have a pending exemption request, Commanders will immediately interrupt their training, place them in an Interrupted Instruction (II) status and hold them at current activity.

7.e. For new accession Navy service members in the accession training pipeline, (e.g. Recruit Training Command and A and C Schools) who have a pending exemption request, Commanders will continue their accession level training (including transfer between schools), but will not transfer them to their ultimate assignment until adjudication of their exemption request. Once complete with all available accession level training, Commanders will place the service member in an Interrupted Instruction (II) status and hold them at current activity until the exemption request is adjudicated.

8. Bonuses, Special Pays and Incentive Pays. Navy service members refusing the vaccine may not enter into any new agreements for bonuses, special pays, or incentive pays and any unearned portion of current bonuses, special pays and incentive pays will be recouped in accordance with references (r) through

(u). Examples include, but are not limited to, the following: career retention bonuses, enlistment bonuses and incentive pays (such as flight pay). Bonuses, special pays and incentive pays become unearned when a Navy service member refusing the vaccine is no longer performing duties for which they are receiving such a bonus, special pay, or incentive pay (i.e. removed from assignment).

8.a. Bonuses, special pays and incentive pays become unearned as soon as one of the following criteria is met:

8.a.(1). Removed from the assignment.

8.a.(2). Associated NEC/AQD/warfare qualification is removed.

8.a.(3). Separated.

8.b. Actions required by Commanders with regard to special and incentive pays.

8.b.(1). For assignment or incentive pays, if a Navy service member is removed from an assignment, the Commander shall notify the office responsible for any special and incentive pays of the change of assignment. For Assignment Incentive Pay (AIP), notify PERS-40DD via email at *Mill_aip(at)navy.mil*. For Special Duty Incentive Pay notify PERS-40DD via email at *Mill_sdip(at)navy.mil*. For Special Duty Assignment Pay, notify the servicing Personnel Support Detachment/Transaction Support Center and the rating detailer.

8.b.(2). For bonuses, if a Navy service member is removed from an assignment and is no longer eligible for a bonus, notify the office responsible for that bonus. For Selective Reenlistment Bonuses, notify OPNAV (N130) via email at *nxag_N130D(at)navy.mil*.

8.b.(3). Upon removal from an assignment, Commanders will ensure the NAVPERS 1070/613 specifically written for Navy service members refusing the vaccine is completed and saved in the service members electronic service record. This NAVPERs 1070/613 can be found at *https://www.mnp.navy.mil/group/navy-covid-19-reporting*.

9. Education. Navy service members refusing the vaccine are not eligible to continue Navy education opportunities and those who fail to complete a service obligation incurred for participating in Navy funded full-time, part-time, or off-duty education programs per OPNAVINST 1520.23C will be required to reimburse the cost of the education received, prorated for the obligated time served.

9.a. Institutional Education. Navy service members refusing the vaccine who incurred a service obligation for an education benefit (e.g. USNA, ROTC, Naval Postgraduate School, Health Professional Scholarship Program or in-residence Professional Military Education), will have any unearned portion of that education benefit recouped if separated before completing the service obligation. Navy service members refusing the vaccine (as defined in para. 3) currently enrolled in such an education program will be dis-enrolled from their program as soon as feasible and held at their institution or command pending administrative separation. Note: Current USNA and ROTC Midshipmen will be adjudicated by governing instructions as discussed in para. 3.a.

9.b. Tuition Assistance (TA). Navy service members refusing the vaccine are ineligible to receive TA. Commanders must withdraw command approval for any TA courses not yet convened. Commanders will direct withdrawal from TA courses which have convened and require proof of withdrawal. Navy service members will be responsible for reimbursing the Navy for the amount listed on the TA Authorization Voucher. Officers administratively separated prior to completing the statutory two year obligation for receipt of TA will incur a debt.

9.c. SkillBridge. Navy service members refusing the vaccine are not eligible to participate in the SkillBridge program. Commanders will immediately remove SkillBridge approval and recall Navy service members refusing the vaccine as indicated below.

9.c.(1). Navy service members assigned to commands in the Continental United States (CONUS) will return to their permanent duty station at their own cost within five days of recall order. If the command is deployed or underway, Sailors will report to the Transient Personnel Detachment in their home port.

9.c.(2). Navy service members assigned to commands outside the Continental United States (OCONUS) will report to the nearest CONUS Transient Personnel Detachment at their own cost as directed by their command within five days of recall order.

9.d. Navy Credentialing Opportunities Online (COOL). Navy service members refusing the vaccine are not eligible for Navy COOL funding for examinations or related credentialing fees. Commanders will withdraw approval of unexecuted vouchers and withhold future voucher approval for Navy service members refusing the vaccine.

10. Navy Training. In cases where there is a clearly defined service obligation that is not met, the cost of Navy training will be recouped, prorated to the obligated time served. Additionally, each case of a Navy service member refusing the vaccine will be evaluated for recoupment of training costs based on individual circumstances such as total cost, service obligation, and the Navy's realized return on investment for training received.

11. Reenlistments and Extensions. Navy service members refusing the vaccine are not eligible for re-enlistment, and may not extend their enlistment. If a Navy service member refusing the vaccine has entered into an extension agreement that is not yet operative (has not yet taken effect), Commanders must cancel these agreements to extend enlistment. The inoperative extension can be cancelled by the personnel office by completing the cancellation section of NAVPERS 1070/621 or NAVPERS 1070/622 and processing the corresponding NSIPS event per MPM 1160-040.

12. Promotion and Advancement. Navy service members refusing the vaccine who are in a frocked status should be defrocked as soon as feasible (officers per SECNAVINST 1420.2B, enlisted per BUPERSINST 1430.16G). Spot promoted officers refusing the vaccine should be replaced as soon as feasible. Once removed from the applicable spot promote billet, the command should contact the members detailer and PERS-806 to remove the spot promotion.

12.a. Officer Promotion Delay. Commanders shall delay the promotion of any officer refusing the vaccine and shall submit a NAVPERS 1070/13 to

NPC_promotionwithholds.fct(at)navy.mil stating the members promotion is delayed due to COVID-19 vaccine refusal (per SECNAVINST 1420.3 or SECNAVINST 1412.6M). Delays shall be based upon pending administrative action and physical qualification. Navy Personnel Command will make formal written notice to the officer following notification from the Commander. A NAVPERS 1070/613 specifically written for Navy service members who refuse the COVID-19 vaccine is located at *https://www.mnp.navy.mil/group/navy-covid-19-reporting* for Commanders use.

12.b. Enlisted Advancement Withhold. Commanders shall withhold the advancements of any enlisted member refusing the vaccine, to include preventing automatic Time-In-Rate advancements for E-2/E-3 and advancement for any Sailors in a frocked status for paygrades E-3 through E-9.

12.c. Enlisted Advancement Withdrawal. The date of the special adverse evaluation from paragraph 6.b. above constitutes a permanent withdrawal of advancement recommendation effective as of the date of the reporting seniors signature. An example NAVPERS 1070/13 for enlisted members pending advancement is available in BUPERSINST 1430.16G, Chapter 7.

13. Community sponsor flag officers are authorized to make determinations within their communities regarding removal of warfare qualifications, additional qualification designations (AQD), Navy Enlisted Classifications (NEC), or sub-specialties for Navy service members refusing the vaccine. Any decision to remove warfare qualifications, AQDs, NECs, or sub-specialties shall be consistent with current community policies and normal practices for Navy service members who do not maintain deployability or individual readiness through their own actions. These decisions, when based solely on refusing the vaccine, must be administrative in nature rather than punitive.

14. If in doubt as to how to adjudicate issues related to a Navy service member refusing the vaccine, Commanders should seek guidance from their chain of command, their staff judge advocate, and/or the CCDA before acting. In all cases, Commanders are accountable to ensure the health and safety of their command while treating every Navy service member with dignity and respect.

15. Points of contact.
My Navy Career Center: 833-330-6622, *askmncc(at)navy.mil*.
Retirements and Separations (PERS-8): *MILL_Pers-8(at)navy.mil*, (901) 874-3264.
Bonus Programs, Special and Incentive Pays (OPNAV N130D): *nxag_n130d(at)navy.mil*.
Enlisted Force Plans and Policy (OPNAV N132): *NXAG_N132C(AT)navy.mil*.
OPNAV POC: CAPT Jason Grizzle, *ALTN_N1_NAVY_SCR.FCT(AT)NAVY.MIL*.

16. Released by VADM John B. Nowell, Jr, COVID Consolidated Disposition Authority.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

U.S. NAVY SEALs 1-26; U.S. NAVY SPECIAL WARFARE COMBATANT CRAFT CREWMEN 1-5; U.S. NAVY EXPLOSIVE ORDNANCE DISPOSAL TECHNICIAN 1; and U.S. NAVY DIVERS 1-3, Plaintiffs, v. **LLOYD J. AUSTIN, III,** individually and in his official capacity as United States Secretary of Defense; **UNITED STATES DEPARTMENT OF DEFENSE; CARLOS DEL TORO,** individually and in his official capacity as United States Secretary of the Navy, Defendants.	Case No. 4:21-CV-01236-O

SUPPLEMENTAL DECLARATION OF LANNY F. LITTLEJOHN

I, Lanny F. Littlejohn, hereby state and declare as follows:

1. I am a Captain in the United States Navy, currently serving as the Force Medical Officer of U.S. Naval Special Warfare Command (NSWC), located in Coronado, California, whose mission is to provide maritime special operations forces (SOF) to conduct full spectrum operations, unilaterally or with partners, to support national objectives. As the Force Medical Officer, I am the senior ranking medical professional at NSWC and have ultimate responsibility for medical readiness, combat casualty care, quality healthcare delivery, medical research oversight, medical waivers to physical standards, and am the credentialing and privileging authority for all providers within the NSW claimancy. I make this declaration in my official

capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I have been assigned to my current position since January 10, 2020. Prior to my current assignment, I served as Command Surgeon, Naval Special Warfare Development Group; Chair of Emergency Medicine, Naval Medical Center Camp Lejeune; Diving Medical Officer, EOD Group TWO; and Flight Surgeon, VMAQ-4. I am also a board certified Emergency Physician, Assistant Professor of Military and Emergency Medicine at the Uniformed Services University, and Chair of the Technology Subcommittee for the Committee on Tactical Combat Casualty Care for the Defense Health Agency. In my current duties, I am responsible for setting policy and procedures relevant to the health, medical readiness, and medical capabilities of Naval Special Warfare operationally and in garrison.

3. I have reviewed the preliminary injunction order issued in the above captioned case on January 3, 2022. The order misinterprets Navy Instructions MANMED[1] § 15-105(3)(n)(9) and Trident Order[2] #12 and draws incorrect conclusions regarding applicable Navy policies. Citing to MANMED § 15-105(3)(n)(9) and Trident Order #12, the order determines, "[t]hose who receive religious accommodations are still 'medically disqualified.' That means Plaintiffs would be permanently barred from deployment, denied the bonuses and incentive pay

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[1] Navy's Manual of the Medical Department ("MANMED"), Chapter 15, *Physical Examinations and Standards for Enlistment, Commission, and Special Duty.*

[2] Trident Order #12 was issued on September 24, 2021. The directive does not set forth new policies concerning vaccination requirements or processes by which members request medical or administrative exemptions, though it does set forth deadlines for Naval Special Warfare (NSW) personnel (like for the 33 of the 35 Plaintiffs within the NSW claimancy in the above-referenced case) to submit such requests. Service members with questions related to medical exemptions were advised to consult with their medical provider. Trident Order #12 ¶ 6.b. Service members were advised to contact their chaplain for assistance with religious accommodation requests. *Id.* ¶ 6.c.

that accompany deployment, and deprived of the very reason they chose to serve in the Navy. By contrast, those receiving medical accommodations are not medically disqualified—they receive equal status as those who are vaccinated." Op. 11-12. The order also concludes, "even if the Navy were to grant a religious exemption, that exemption would still receive less favorable treatment than its secular counterparts. Those who receive religious exemptions are medically disqualified. Those who receive medical exemptions are not. But the activity itself—forgoing the vaccine—is identical." *Id.* at 14. These findings incorrectly conflate the COVID-19 exemption process with military medical readiness and deployability requirements.

4. A service member that meets all medical requirements for special operations (SO) duty is termed "Physically Qualified" (PQ). A service member that does not meet these medical requirements is termed "Not Physically Qualified" (NPQ). The MANMED provides that "[o]nly the most physically and mentally qualified personnel should be selected, and those who are or may be reasonably expected to become unfit or unreliable must be excluded." MANMED § 15-105(1). Special operations personnel are subject to stringent medical requirements by virtue of the nature of their military duties:

> Special operations (SO) duty takes place in every part of the world under harsh conditions at the extremes of human physical capabilities. Medical austerity and the presence of armed opposition are common. SO personnel, depending on service and warfare community, routinely engage in high-risk operations including parachuting, high angle activities, high-speed boat and unconventional vehicle operation, weapons operation, demolitions employment, and waterborne activities, to include SCUBA diving. As such, SO duty is among the most physically and mentally demanding assignments in the U.S. military.

Id.

5. MANMED § 15-105(4)(a) further describes the circumstances under which a Service member might become medically disqualified from special operations duty:

> Any disease or condition causing chronic or recurrent disability or frequent health care encounters, increasing the hazards of isolation, or having the potential for significant exacerbation by extreme weather, stress, hypobaric or hyperbaric environments, or fatigue is disqualifying. Conditions and treatments causing a significant potential for disruption of operations are disqualifying.

Anyone that is NPQ must have a "Waiver to Physical Standards" recommended by the Navy Bureau of Medicine (BUMED) and approved by the Navy Bureau of Personnel (PERS). A PQ finding, or a waiver to the physical standards if NPQ, is required to be medically fit for special operations and deployable.

6. A medical waiver to the physical standards is a separate determination that would come *after* a medical exemption *or* administrative exemption, such as religious accommodation, for the COVID-19 vaccine. Accordingly, if a service member receives an exemption/accommodation to the COVID-19 vaccine for any reason they would have to engage in this subsequent process to be cleared for full duty by the Navy. That is, a service member who receives an exemption or accommodation from the COVID-19 vaccination requirement, whether for religious or secular reasons, is not PQ unless he or she obtains separate medical clearance. Moreover, the service member may also need a separate medical waiver from the Combatant Command (CCMD) to enter that commander's geographic area of responsibility. Different CCMDs may have specific requirements for vaccination based on the endemic biomedical threats that naturally exist in their geographic area as well as any biowarfare threats from adversaries. An unvaccinated member who deployed to a geographic region where there is an endemic infectious disease would put not only his health at risk, but also the health of any other service member, any partner forces with which SOF work regularly, and other host nation personnel. Thus, a determination that a member is not deployable takes into account the risk to other personnel, the risk to mission as well as the unvaccinated member. These

deployability determinations do not take into account whether a member is unvaccinated for secular or religious reasons; all unvaccinated service members are treated the same for purposes of determining whether they should receive a medical waiver that would render them fit for special operations duty.

7. Receiving a medical exemption for the COVID-19 vaccine does not automatically render a service member deployable; he or she must undergo the process described in the prior paragraph. Indeed, many of the common reasons that a service member may receive a medical exemption from an immunization requirement may also make the service-= member NPQ and nondeployable. For example, BUMEDINST 6230.15B ¶ 2.6 lists immune competence, pharmacologic or radiation therapy, pregnancy and/or previous adverse response to immunization as common reasons for a medical exemption from an immunization.[3] The first three conditions would almost certainly lead to a NPQ finding for NSW and an inability for the service member to get underway on conventional Navy units. The remaining example—previous adverse response to immunization—may provide the basis for a permanent medical exemption request, but as I explained in my prior declaration, ECF 44, Ex. 14 (Decl. of Lanny Littlejohn) ¶ 10 (App 278–79), all requests for permanent medical exemptions from COVID-19 vaccination for personnel falling under NSWC authority have been denied. Moreover, MANMED § 15-105(4)(a) specifically states that "SO personnel reporting for duty following an absence of greater than 14 days due to illness or injury, hospitalization for any reason, or reported on by a medical board must have a properly documented UMO [undersea medical

[3] BUMEDINST 6230.15B ¶ 2.6 also lists evidence of immunity based on serologic tests, documented infection, or similar circumstances as a possible basis for a medical exemption for an immunization. However, pursuant to DoD policy a prior COVID-19 infection, by itself, is not grounds for a medical exemption to the COVID-19 vaccination requirement.

officer] evaluation to determine fitness for continued SO duty." Again many of the reasons a service member might receive a medical exemption for an immunization would fall into this category. This is why a service member who cannot receive the COVID-19 vaccine for medical reasons (or any other reason) will still be NPQ from SO duty until a separate medical waiver is granted by BUMED and PERS. This requirement is specifically delineated in Trident Order #12[4] which states:

> For Special Operations qualification requires a separate waiver that is in addition to waiver of the COVID-19 vaccine requirement for all service members.
> *Id.* ¶ 6.d.

8. Clinical Trials. I am not aware of any NSW personnel participating in clinical research trials concerning COVID-19 vaccines or other COVID-19 medications or treatments. Furthermore, I am not aware of DoD or the Navy conducting or sponsoring any such trials or studies. *See DoDI 3612.02 and SECNAVINST* 3900.39E CH-1 (promulgating standards for human research and clinical studies conducted or sponsored by DoD and the Navy). Choosing to participate in a clinical trial outside the DoD health care system or sponsorship is participating in an elective medical procedure. Navy personnel are required to receive counseling from a military health care provider prior to receiving or engaging in elective medical care outside the military health care system. BUMEDINST 6320.103, Encl. 2 ¶4.a. Personnel who do not receive counseling prior to receiving or engaging in elective medical care will be

[4] Trident Order #12 was issued on September 24, 2021. The directive does not set forth new policies concerning vaccination requirements or processes by which members request medical or administrative exemptions, though it does set forth deadlines for Naval Special Warfare (NSW) personnel (like for the 33 of the 35 Plaintiffs within the NSW claimancy in the above-referenced case) to submit such requests. Service members with questions related to medical exemptions were advised to consult with their medical provider. Trident Order #12 ¶ 6.b. Service members were advised to contact their chaplain for assistance with religious accommodation requests. *Id.* ¶ 6.c.

counseled and could undergo a fitness for duty determination. *Id.* at ¶4.e. If NSW personnel were to participate in such a study or trial that required him to remain unvaccinated, he would very likely be found NPQ as discussed in the preceding paragraphs.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of January, 2022.

LANNY F. LITTLEJOHN

Captain, Medical Corps, U.S. Navy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

U.S. NAVY SEALs 1-26;
U.S. NAVY SPECIAL WARFARE COMBATANT CRAFT CREWMEN 1-5;
U.S. NAVY EXPLOSIVE ORDNANCE DISPOSAL TECHNICIAN 1; and
U.S. NAVY DIVERS 1-3,
Plaintiffs,

v.

LLOYD J. AUSTIN, III, individually and in his official capacity as United States Secretary of Defense; **UNITED STATES DEPARTMENT OF DEFENSE**; **CARLOS DEL TORO**, individually and in his official capacity as United States Secretary of the Navy,
Defendants.

Case No. 4:21-CV-01236-O

DECLARATION OF WILLIAM K. LESCHER

I, William K. Lescher, hereby state and declare as follows:

1. I am an admiral[1] in the United States Navy, currently serving as the Vice Chief of Naval Operations (VCNO), located in Arlington, Virginia at the Pentagon. The position of VCNO is appointed by the President, with the advice and consent of the Senate, and is the second highest uniformed Officer in the Navy. I have served in this position since May 29, 2020. I make this declaration in support of the Government's motion for a stay of this Court's preliminary injunction pending appeal. The statements made in this declaration are based on my

[1] The rank of "admiral" is the highest military rank in the Navy. The term "admirals" is also frequently referred to as "flag officers." Flag officers include the ranks of rear admiral (lower half), rear admiral (upper half), vice admiral and admiral. Flag officers comprise the most senior levels of uniformed leadership in the Navy.

personal knowledge, my military judgment and experience, and on information that has been provided to me in the course of my official duties.

Preliminary Statement

2. I have reviewed the preliminary injunction order issued by this Court on January 3, 2022. I believe the Court's injunction will cause immediate harm to the Navy, and in particular to the operations of Naval Special Warfare (NSW) and Special Operations Forces (SOF), and to the national security of the United States. Operationally, in 2021, the Navy executed more than 30,000 steaming days and one million flying hours to protect America, deter conflict and keep the sea lanes open and free. The Court's injunction directly impacts the Navy's ability to carry out its responsibilities to protect and maintain the health and safety of our Force, in particular our ability to halt the spread of COVID-19 through a mandatory vaccination requirement. Unvaccinated or partially vaccinated service members are at higher risk to contract COVID-19, and to develop severe symptoms requiring hospitalizations that remove them from their units and impact mission execution. Vaccination against COVID-19 has proven to be essential in keeping Navy units on mission by mitigating the impact of COVID-19. Fully vaccinated naval forces are required to ensure readiness to carry out Navy missions throughout the world and, if required, to engage in combat operations. Restriction of the Navy's ability to reassign unvaccinated personnel in order to mitigate COVID-19 related risks to units preparing to deploy, or that are deployed, will cause direct and immediate impact to mission execution. Further, the harm caused by this injunction is not limited to 35 unvaccinated Plaintiffs. The heath, readiness, and mission execution of broader conventional Navy units and personnel who support these personnel are threatened as well.

Naval Background and Experience

3. As the Vice Chief of Naval Operations,[2] I work in coordination with the Chief of Naval Operations (CNO), the senior admiral in the U.S. Navy, [3] in the execution of his statutory duties and responsibilities as they pertain to the employment of the Navy. Those duties include recruiting, organizing, supplying, equipping, training, servicing, mobilizing, demobilizing, administering, and maintaining the Navy, as will assist in the execution of any power, duty, or function of the Secretary of the Navy or the Chief of Naval Operations. Additionally, the CNO delegated several specific responsibilities to me. I oversee programs and policies that impact Sailors and their families, including health affairs, and monitor and enact polices that promote good order and discipline in the Navy.

4. I have served in the United States Navy for nearly 42 years. A 1980 graduate of the United States Naval Academy, my experience includes command of the Vipers of Helicopter Anti-Submarine Light (HSL) Squadron-48, the Airwolves of HSL-40 and the Maritime Strike Wing Atlantic. As Commanding Officer, HSL-48, my responsibilities included training, preparing, and executing Seahawk helicopter detachment deployments on Navy ships deploying worldwide. As Commanding Officer, HSL-40, I was responsible for the training, evaluation, and maintenance of the Seahawk helicopter squadron that trains all East Coast Seahawk pilots in employment of this weapon system. As Commander, Maritime Strike Wing Atlantic, I was responsible for the material readiness and training of eight Helicopter Maritime Strike (HSM)

[2] "The [VCNO] has such authority and duties with respect to the Department of the Navy as the Chief of Naval Operations, with the approval of the Secretary of the Navy, may delegate to or prescribe for him. Orders issued by the [VCNO] in performing such duties have the same effect as those issued by the Chief of Naval Operations." 10 U.S.C. § 8035(c).

[3] The CNO is the senior uniformed officer in the United States Navy. *See* 10 U.S.C. § 8033(b) ("The Chief of Naval Operations, while so serving, has the grade of admiral without vacating his permanent grade. In the performance of his duties within the Department of the Navy, the Chief of Naval Operations takes precedence above all other officers of the naval service.").

squadrons, the Weapons School, Fleet Replacement Squadron, and a total of 42 detachments deploying on Atlantic Fleet aircraft carriers and air capable ships, encompassing 68 aircraft and 1,900 personnel. Between command of the Vipers and Airwolves, I was the executive officer of Mine Countermeasures Command and Control Ship USS Inchon (MCS 12), a 20,000 ton vessel with a crew of 700. As the second in command, I was responsible for the supervision, training and development of the crew and the daily execution of the command mission, which included training and preparing the crew for deployment, maintaining and improving operational readiness and material condition of the ship. As a flag officer, I commanded Expeditionary Strike Group 5 (ESG-5) and Task Forces 51/59 (CTF 51/59) in Bahrain, leading multiple Amphibious Ready Groups, Marine Expeditionary Units and the afloat forward staging base USS Ponce (AFSB(I)-15) in execution of theater security events, combat operations, and emergent national taskings spanning the Middle East/Central Command region. My responsibilities as ESG-5 and CTF 51/59 included multiple events working with NSW forces embarked on my ships and interoperability exercises with partner countries. I also served as Joint Staff deputy director for resources and acquisition, deputy assistant Secretary of the Navy for budget, and Deputy Chief of Naval Operations for integration of capabilities and resources.

Specific Functions of the United States Navy

5. The United States Navy and Marine Corps comprise the Nation's principal maritime forces. Their missions are to provide globally deployable forces in order to "secure the Nation from direct attack; secure strategic access and retain global freedom of action; strengthen existing and emerging alliances and partnerships; establish favorable security conditions; deter aggression and violence by state, non-state, and individual actors and, should deterrence fail, prosecute the full range of military operations in support of U.S. national interests." *See*

Department of Defense Directive (DoDD) 5100.01, Change 1, 09/17/2020, Encl. 6, ¶ 5.a. –b (attached hereto). Effective execution of all of these discrete functions is vital to the national security of the United States, and is accomplished by providing fully trained and qualified naval forces to joint commanders[4] to deter aggression and, if required, engage in combat operations and win decisively.

Naval Special Warfare (NSW) and Special Operations Forces (SOF)

6. Naval Special Warfare (NSW) and Special Operations Forces (SOF) are composed of Navy SEALs[5] and Special Warfare Combatant-Craft Crewmen (SWCC). The NSW team is a multipurpose combat force organized and trained to conduct a variety of special operations missions in all environments. Navy SEALs conduct clandestine missions infiltrating their objective areas by fixed and rotary-wing aircraft, Navy surface ships, combatant craft, submarines and ground mobility vehicles. Service members designated as Navy SEALs consist of officers and enlisted members who have been designated pursuant to Navy and NSW policies. SWCC focus on infiltration and exfiltration of SEALs and other SOF to include from other Services, and they provide dedicated rapid mobility in maritime environments, as well as the ability to deliver combat craft via parachute drop. SWCC operate and maintain state-of-the-art surface craft to conduct special operations.

7. In addition to SEALs and SWCC, combat support (CS) and combat service support (CSS) personnel are assigned to NSW units to support the mission. CS/CSS personnel

[4] Joint commanders are the combatant vested with authority and responsibility for military operations within their area of responsibility. The Navy and other branches of the Armed Forces provide forces to the combatant commanders to execute those responsibilities and functions. The combatant commanders exercise authority, direction and control over the commands and forces assigned to them and employ those forces to accomplish missions assigned to the combatant commander. Department of Defense Directive (DoDD) 5100.01, Change 1, 09/17/2020, Encl. 1, ¶1.a through d.

[5] The term "SEAL" refers to "Sea, Air, Land."

include officers and enlisted service members identified in Plaintiffs' complaint (i.e., Explosive Ordinance Disposal (EOD) personnel and Navy Divers), in addition to other officers and enlisted service members performing a variety of military functions (e.g., chaplains, medical personnel, mobile communications teams, tactical cryptologic support, etc.). Navy EOD personnel perform missions neutralizing explosive weapons, including various weapons of mass destruction. Their duties include detonating or demolishing hazardous munitions, neutralizing various ordnance, including sea mines, torpedoes or depth charges, performing parachute or helicopter insertion operations, and clearing waterways of mines in support of our military operations. Navy Divers perform a variety of military functions, including wreckage salvage operations and underwater repairs, harbor and waterway clearance operations, assisting in construction and demolition projects, executing search and rescue missions, performing deep submergence operations, and serving as technical experts for diving operations for numerous military special operations units.

8. Service members in the NSW force are responsible for performing special operations. Special operations require unique tactics, techniques, procedures and equipment. They are often conducted in hostile, austere or diplomatically sensitive environments, and are characterized by one or more of the following: time-sensitivity, clandestine nature, low visibility, working with or through host-nation forces, greater requirements for regional orientation and cultural expertise, and a higher degree of risk. These missions often require members of the NSW force to work in close quarters where social distancing is not possible. Small NSW teams may travel for an extended duration on boats, submersibles, helicopters, aircraft, or other vehicles that are less than six feet across, and/or which have limited ventilation. Service members may be in such close quarters while traveling that they must sit shoulder-to-shoulder.

Additionally, members may be required to operate in subsea environments and may have to share diving rebreather devices and inhale one another's exhalation.

Mandatory Vaccination Requirements in Response to COVID-19 Pandemic

9. On August 24, 2021, the Secretary of Defense directed the Secretaries of the Military Departments to immediately begin full vaccination of all members of the Armed Forces on active duty or in the Ready Reserve. The Secretary of Defense determined that mandatory COVID-19 vaccinations are necessary to protect the health and military readiness of the force. The Secretary of the Navy directed implementation of Secretary of Defense's COVID-19 vaccination mandate[6] via a Department-wide administrative message (ALNAV) on August 30, 2021. The ALNAV applies to both Services within the Department of the Navy (DON), the United States Navy and the United States Marine Corps. The ALNAV required all active duty DON Service members, who were not already vaccinated, exempted, or currently seeking an exemption, to be fully vaccinated with an FDA-approved COVID-19 vaccine within 90 days of the ALNAV, and all Reserve Component personnel to be fully vaccinated within 120 days. ALNAV 062/21 ¶ 4. Active duty Sailors and Marines were required to become fully vaccinated[7] by November 28, 2021, and Reserve Component Sailors and Marines by December 28, 2021. The requirement to obtain full vaccination constitutes a lawful order under Article 92 of the Uniform Code of Military Justice (UCMJ), and failure to comply may result in punitive or adverse administrative action, or both. ALNAV 062/21 ¶ 5.

[6] Secretary of Defense Memorandum, "Memorandum for Senior Pentagon Leadership, Commanders of the Combatant Commands, Defense Agency, and DoD Field Activity Directors," (August 24, 2021).
[7] Although refusal to receive the vaccine may subject a member to adverse administrative or disciplinary action, the vaccine will not be forcibly administered to any member who refuses.

10. The United States Navy issued service-specific guidance via a separate administrative message ("NAVADMIN") on September 1, 2021. NAVADMIN 190/21 outlines Navy policy concerning the mandatory vaccination of Navy service members, vaccination administration and reporting requirements, and general guidance related to logistics and distribution of vaccines. The policy reiterates that COVID-19 vaccination "is mandatory for all DoD service members who are not medically or administratively exempt" under existing Navy policy. NAVADMIN 190/21 ¶ 2, 3.a. Refusal to become fully vaccinated against COVID-19 without an approved or pending exemption constitutes a failure to obey a lawful order and is punishable under Article 92, UCMJ.

The COVID-19 Pandemic Threat to Naval Forces

11. The judgment of each of the Military Services is that vaccines are the most effective tool the Armed Forces have to keep our personnel safe, fully mission capable and prepared to execute the Commander-in-Chief's orders to protect vital United States' national interests. As of January 5, 2022, 261,504 members of the Armed Forces have contracted the COVID-19 virus, resulting in 2,320 hospitalizations and 82 deaths. Eighty of 82 members who have died were unvaccinated. Of all active duty personnel who were required to be hospitalized because of COVID-19, 0.8% received a booster shot prior to hospitalization. Separately, there have only been six active duty personnel who have received a booster and had a breakthrough COVID-19 infection that required hospitalization. Among the active duty force, 12% of those required to be hospitalized have received a primary COVID-19 vaccine without the booster. Among Reserve and National Guard service members, 97% of those hospitalized with COVID were unvaccinated or partially vaccinated; 3% of hospitalized members received primary vaccination but no booster shot; 0.2% hospitalized members had received a booster shot.

Sending ships into combat without maximizing the crew's odds of success, such as would be the case with ship deficiencies in ordnance, radar, working weapons or the means to reliably accomplish the mission, is dereliction of duty. The same applies to ordering unvaccinated personnel into an environment in which they endanger their lives, the lives of others and compromise accomplishment of essential missions.

12. The environment in which Navy personnel operate -- in close quarters for extended periods of time -- make them particularly susceptible to contagious respiratory diseases such as COVID-19 and renders mitigation measures such as social distancing unrealistic. In mid-March 2020, the aircraft carrier USS THEODORE ROOSEVELT (CVN 71) was deployed to the Western Pacific Ocean, a vital geo-political center of gravity encompassing several of the world's largest militaries and five nations allied with the U.S. through mutual defense treaties. The leadership of USS THEODORE ROOSEVELT began to see several COVID-19 cases among the crew. By April 1, 2020, USS THEODORE ROOSEVELT had been pulled off mission and into Guam with approximately 1,000 crew removed from the ship, with a reduced crew remaining to maintain the nuclear reactor and other essential systems. By April 20, 2020, 4,069 Sailors had been removed from the ship out of a crew of approximately 4,800. The ship was unavailable for 51 days to maintain presence in a strategically important area which includes the world's busiest sea lanes, creating a national security vulnerability in an area vital to our national interests. When USS THEODORE ROOSEVELT finally got underway on May 21, 2020, approximately 1,800 Sailors remained in Guam. Tragically, one Sailor succumbed to the COVID-19 virus and died.

13. Even with approximately 97% of the Navy vaccinated, the COVID-19 virus can degrade units and impact mission. Last month, USS MILWAUKEE (LCS 5), with a 100%

vaccinated 100-person crew, remained in port one week beyond its schedule because several members tested positive for COVID-19. Because the full crew was vaccinated, infected personnel were asymptomatic or had mild symptoms and the impact to mission accomplishment was substantially mitigated compared to the USS THEODORE ROOSEVELT's experience of more than 4,000 crew removed from the ship and a 51-day loss of mission. Given the hospitalizations and death statistics cited above, the MILWAUKEE's minor deployment delay would likely have been far worse with unvaccinated personnel. The MILWAUKEE is one example of a Navy manning model where each individual crew member has a high level of responsibility with little redundancy. The medical staff of the MILWAUKEE consists of only two Navy Hospital Corpsman, comparable to an Emergency Medical Technician in the civilian setting. There is little ability on ship to care for a service member with severe COVID symptoms. If a service member were to develop severe symptoms on this type of ship, it would require a return to port or an emergency medical evacuation by helicopter. Helicopter medical evacuation is not always viable due to the location of the ship and the limited range of helicopters. At the deployable unit level, NSW, EOD, and diver personnel operate in units that can be as small as a squad of four personnel. Medical evacuations in these small units can be even less practical and significantly more damaging than the loss of an equal number of crew on a ship the size of the MILWAUKEE.

14. The types of missions conducted by SEALs, SWCC, EOD and divers cannot be conducted remotely. A SEAL assigned to perform a counterterrorism mission in a foreign country cannot perform that task from home; a SWCC cannot drive a combatant craft and transport SEALs in a telework status; an explosive ordnance disposal technician—whose job it is to disarm and dispose of explosives—cannot perform that task remotely. Similarly, the arduous

training necessary to prepare NSW personnel for these missions cannot be performed remotely. It is not possible for a Navy Diver to remotely prepare compressed air and oxygen tanks for personnel to complete their training dives. A safety diver must be physically present during a high-risk training evolution that may require rescue divers or oxygen technicians. In particular, Navy Divers assigned to NSW must be able to operate a diving recompression chamber – a small confined space where the Navy Diver must be in the chamber to assist with the personnel casualty – which cannot be done remotely. SEAL trainers cannot oversee dangerous swim or survival training from a physically distanced location. NSW personnel also routinely interact with the greater Navy population, on ships and aircraft, and in dining facilities and office environments across the globe. They are required to deploy with no-notice. NSW, EOD and diver training and operations necessitate our service members interact in close-quarters, confined spaces, and under conditions where telework, social distancing, and mask-wearing are not reliable mitigation options.

Immediate Harm to Readiness and Mission Accomplishment

15. The preliminary injunction forbids the Navy from applying MANMED § 15-105(3)(n)(9), NAVADMIN 225/21, NAVADMIN 256/21 and Trident Order #12. Order 26, ECF No. 66. MANMED § 15-105(3)(n)(9) states that personnel who choose not to receive required vaccinations will be disqualified from special operations duty. NAVADMIN 225/21 provides guidance for disposition of offenses involving Navy service members who are not fully vaccinated by the required deadlines. Navy Service members who refuse the COVID-19 vaccine, absent a pending or approved exemption, are required to be processed for administrative separation.[8] NAVADMIN 225/21 ¶ 2. A Navy Service member is considered to be "refusing the

[8] Although processing for separation is required, this does not automatically result in a member actually being separated. Members processed for separation may ultimately be retained in the service.

vaccine, if: (1) the individual has received a lawful order to be fully vaccinated, (2) is not or will not be fully vaccinated by the date required, and (3) does not have a pending or approved exemption request." *Id.* ¶ 3.c. The policy designates the Chief of Navy Personnel, a 3-star admiral, as the COVID-19 Consolidated Disposition Authority to ensure fair and consistent administrative processing across the service. *Id.* at ¶ 5.b. For disciplinary matters, authority to initiate disciplinary proceedings, either non-judicial punishment or court-martial, is withheld to the Vice Chief of Naval Operations. *Id.* NAVADMIN 256/21 provides additional guidance on administrative separation processing for those refusing the vaccine, as well as guidance on other applicable administrative actions. These other applicable administrative actions include: cancellation of government travel for training or other official purposes; temporary reassignment within the local area for unvaccinated personnel (with or without a medical exemption or religious accommodation); adverse fitness reports and evaluations; prohibition on executing permanent change of station orders; potential termination of special duty and incentive pays; potential recoupment of unearned bonuses; termination of and potential reimbursement for Navy-funded education and training; promotion and advancement delays; and removal of additional qualification designations or Navy Enlisted Classifications.[9] *See* NAVADMIN 256/21 ¶¶ 4.b.through 13. Trident Order # 12, which is directed to the NSW force, does not create any new requirements or adverse administrative actions. It consolidates and restates previously promulgated Navy implementing guidance.

16. The preliminary injunction forbids the Navy from "[t]aking any adverse

[9] Navy Enlisted Classifications define the work performed by Navy enlisted members and the requirements to perform specific "ratings" (i.e., occupations). *See generally*, MANUAL OF NAVY ENLISTED MANPOWER AND PERSONNEL CLASSIFICATIONS AND OCCUPATIONAL STANDARDS, VOL II NAVY ENLISTED CLASSIFICATIONS (NAVPERS 18068F), April 21, 2021 (supplementing the enlisted rating structure in identifying personnel and billets [i.e., jobs] and skills, knowledge, aptitude, or qualifications that must be documented to identify both people and billets for management purposes).

action against Plaintiffs on the basis of Plaintiffs' requests for religious accommodation." Order 26, ECF No. 66. The order specifically references actions that Plaintiffs allege are being taken against them while they await a decision on their religious accommodation requests, actions such as restrictions on travel, access to non-work activities, unpleasant assignments, and being relieved of leadership duties. Order 26, ECF No. 66. This aspect of the order is intrusive and harmful to Navy operations, including deployment decisions. In the Navy, "adverse action" refers to an action that is punitive or the action itself has a direct adverse impact on one's career such as a court martial or discharge. The Court's order, however, indicates that routine personnel actions, such as assignment, official travel and specific duties, are adverse decisions. Contrary to the Court's apparent understanding, temporarily reassigning personnel to other units because they are unvaccinated, regardless of the reason they are unvaccinated (e.g., medical exemption, religious accommodation, or pending exemption request) is not an adverse action but a step to protect the health of the whole unit and maintain mission readiness. The Court's injunction appears to require the Navy to leave unvaccinated NSW, EOD, and diver personnel in their units, performing their same duties and deploying on missions regardless of the known risk to personnel and mission. Such an injunction will degrade NSW, EOD, and diver mission readiness, breakdown good order and discipline within the NSW force, unnecessarily limit the Navy's ability to conduct daily operations and operational missions, and could clearly result in mission failure in contingencies and crises that cause harm to national security.

17. NSW personnel must be fully medically ready and at peak fitness given that their training and missions are physically demanding and arduous. It is vital that all members of the NSW force be medically fit to perform daily operations and to train or deploy on short notice. Regardless of their current assignment, all naval forces, NSW in particular, must be ready to

respond to contingencies and crises around the world. All NSW personnel are expected to meet this requirement, whether in a training status, on instructional duty, or at a headquarters, as the mission of NSW is to be ready to provide maritime SOF to conduct full spectrum operations to support national objectives. The Navy could easily require Navy Special Warfare Command to mobilize personnel outside from any unit, regardless of the planned deployment cycles of a unit or the currently assigned duties of NSW personnel to respond to the full range of contingencies and crises. Medical conditions or illness create risk, both medical and operational, not only for the service member afflicted, but for other members of the unit. As a result, unvaccinated personnel in a unit degrade the force health protection conditions in the unit, placing personnel in the unit at risk and degrading the unit's ability to safely conduct operations, regardless of the scope of the operation. The following publicly available mission event illustrates how rapidly a NSW unit can go from steady state in the United States to deploying forward on a mission of the highest difficulty, requiring peak medical, physical and mental readiness. This example illustrates the rapid manner in which a contingency or crisis could unfold, and although more than a decade old, is used due to the unclassified classification of my declaration.

18. On April 8, 2009, armed Somali pirates boarded the U.S.-flagged container ship, *Maersk Alabama* in the Indian Ocean, taking the crew, composed of U.S. citizens, hostage and making ransom demands. USS BAINBRIDGE (DDG-96) was the first ship of the international counter-piracy task force to respond. BAINBRIDGE's commanding officer realized he needed additional capabilities beyond what he had available on the ship. In response, on short notice, a SEAL team flew 8,000 miles from the United States to USS BAINBRIDGE and were recovered onboard. By the evening of April 12, 2009, the situation escalated and SEALs on BAINBRIDGE eliminated the threat to the remaining hostage, *Maersk Alabama* Captain

Phillips, who was subsequently rescued. This is but one example, using a well-publicized mission, that illustrates how an unvaccinated member would put himself, his teammates, the conventional forces and the mission at great risk. While NSW personnel may be assigned to various units with various mission-sets, all naval forces must be ready to respond to global contingencies and crises on short notice.

19. If this type of crisis or contingency occurred today, with the Court's preliminary injunction in place, the Navy could be required to deploy a SEAL team with one or more unvaccinated members, risking a COVID-19 outbreak within that unit or on the host Navy destroyer. Destroyer crews, and others embarked aboard, sleep in confined shared berthing spaces, are in close proximity in passageways, and eat meals in a communal galley. An unvaccinated service member is not only more likely to contract COVID-19, but to experience significant disease symptoms, impact the mission and spread the disease to others.

20. Navy ships have limited health care facilities. A Sailor experiencing severe COVID symptoms would require the ship to pull into port instead of executing its mission. NSW forces often deploy in countries with little or no healthcare support structure and in remote areas where healthcare is scarce. This is why there has been a long-standing requirement for all members of the NSW force to be fully medically ready to deploy. A small number of SOF medical personnel provide limited medical support and patient movement; therefore, any encumbrance placed on that limited capability unnecessarily puts the mission and the force at-risk. While some SEALs are trained to perform emergency, life-saving procedures in remote and hostile environments, those personnel are not physicians or nurses. Unlike doctors and nurses, formal civilian medical licenses are not required for them. They do not generally have the capability, capacity or training to use a ventilator. Additionally, they do not have access to this

equipment in the types of austere environments in which the NSW units operate. If a deployed team member contracts COVID-19, there is a strong possibility that the necessary equipment or treatment would not be readily available. Further, if medical evacuation is necessary for a member of the unit, this creates additional risk not only to the mission, but places those service members executing medical evacuation at a risk of harm to themselves such as when the member requires transport from a hostile, remote or diplomatically sensitive areas.

21. Redirecting these assets and their crew to perform preventable evacuations results in a degradation of the Navy's ability to accomplish its primary missions and incurs collateral impacts. Medical evacuations often require one or more member from the service member's unit to accompany the evacuated service member. The loss of even one member can degrade the effectiveness of small NSW units and may compromise the mission. This is similarly the case for SWCC personnel, who routinely operate with a crew of as little as four personnel on a combatant craft. Every member of a SEAL team is vital.

22. Unvaccinated NSW personnel put conventional Navy forces at risk as well. Navy SEALs are one of the most versatile elements of the SOF across all branches of the military services, in part, because the Navy can deliver them to their mission locations through a variety of conventional means (*e.g.*, fixed-wing aircraft, helicopters, surface ships and submarines). All of these means of delivery are confined spaces in which social distancing is impractical. Because NSW personnel rely on conventional Navy forces to support their missions, any unvaccinated NSW personnel will put the crew of those conventional forces at unnecessary risk as well. The Navy must balance the risk to unvaccinated individuals and vaccinated personnel alike. That risk calculation led to the mandatory vaccination mandate and associated personnel policies pertaining to the COVID-19 pandemic. It is imperative for the entire force, including

every member of NSW, to be vaccinated and ready to deploy and execute assigned missions on short notice.

23. The capabilities NSW personnel provide include crisis response, support to forward presence operations, support to conventional Naval forces at sea and in training, support to Law Enforcement agencies and clandestine insertion operations. EOD personnel provide critical safety and response to units using live ordnance; Navy divers, EOD and SEALs support underwater surveys and route clearances. SEALs conduct insertions and extractions by sea, air or land; they capture high-value enemy personnel and terrorists around the world, carry out small-unit direct-action missions against military targets and perform underwater reconnaissance and strategic sabotage. SEALs, SWCC, EOD and divers frequently deploy to foreign countries to train partners and allies and participate in exercises. Reducing the Navy's ability to apply long-standing, proven medical readiness principles to this small, elite community will clearly negatively impact the NSW force's ability to conduct their operations and could have significant negative effects to the NSW force's ability to respond to large-scale contingencies or crises. This would damage the national security interests of the United States and our foreign allies and partners.

24. These concerns apply if the injunction requires the Navy to maintain these 35 Plaintiffs in their current status while an appeal is pending. Of the 35 Plaintiffs, 18 are assigned to nine different parent commands and may deploy anywhere in the world in the immediate future to perform the type of missions described. 15 Plaintiffs are assigned to the NSW Center or a NSW Center subordinate command, with 14 of them assigned to NSW Advanced Training

Command (ATC);[10] some as instructors who necessarily have close contact with ATC students in courses to prepare them for NSW operations and some as students attending an advanced training course before returning to their current or prospective assignment. Two Plaintiffs are currently assigned to non-NSW training commands. Because the court's order prohibits them from being temporarily reassigned, the 14 unvaccinated personnel at NSW ATC have close contact with fellow instructors and students. These students then circulate among the larger NSW community as soon as their courses at ATC end. Simply put, close quarters contact during training creates the opportunity to contract COVID-19 from the unvaccinated instructors at ATC detachments. The unvaccinated instructors can spread COVID-19 to dozens of candidates in training, and qualified SEALs, SWCCs, and other personnel, including fellow instructors, at NSW ATC training courses who will promptly return to their primary units or interact with additional training classes.

25. In summary, the Navy's judgment is that COVID-19 vaccines are a critical defense against COVID-19 and mitigate risk both to our force and to our mission. This judgment takes into account the environments our service members operate in, the operations the Navy conducts, and the absence of other effective COVID-19 mitigation measures in the environments in which we operate. The COVID-19 virus has had a proven substantial impact on Navy unit readiness. The Court's order, which bars implementation of the vaccine requirement and requires the Navy to keep service members it has determined are not medically fit for deployment in a ready to deploy status, will undermine military readiness through the spread of disease and cause

[10] ATC's mission is to provide standardized and accredited individual training and education for qualified NSW and support personnel, U.S. SOF (i.e., from other Services), partner nation SOF and other personnel, as required for NSW Operations. There are several ATC detachments. The largest detachment in Coronado, California provides a course of instruction to candidates (i.e., those seeking to obtain their SEAL or SWCC designation). It also provides training to those already designated as SEALs, SWCC or combat support personnel. Other ATC detachments provide training in specialized areas to NSW personnel, other SOF and partner nation SOF.

significant harm to military operations by allowing unvaccinated service members to remain in an unvaccinated status.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of January, 2022.

W. K. LESCHER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

U.S. NAVY SEALs 1-26; U.S. NAVY SPECIAL WARFARE COMBATANT CRAFT CREWMEN 1-5; U.S. NAVY EXPLOSIVE ORDNANCE DISPOSAL TECHNICIAN 1; and U.S. NAVY DIVERS 1-3, Plaintiffs, v. **JOSEPH R. BIDEN, JR.,** in his official capacity as President of the United States of America; **LLOYD J. AUSTIN, III,** individually and in his official capacity as United States Secretary of Defense; **UNITED STATES DEPARTMENT OF DEFENSE; CARLOS DEL TORO,** individually and in his official capacity as United States Secretary of the Navy, Defendants.	Case No. 4:21-CV-01236-O

DECLARATION OF LANNY F. LITTLEJOHN

I, Lanny F. Littlejohn, hereby state and declare as follows:

1. I am a Captain in the United States Navy, currently serving as the Force Medical Officer of U.S. Naval Special Warfare Command (NSWC), located in Coronado, California, whose mission is to provide maritime special operations forces (SOF) to conduct full spectrum operations, unilaterally or with partners, to support national objectives. I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I have been assigned to my current position since January 10, 2020. Prior to my current assignment, I served as Command Surgeon, Naval Special Warfare Development Group;

Chair of Emergency Medicine, Naval Medical Center Camp Lejeune; Diving Medical Officer, EOD Group TWO; and Flight Surgeon, VMAQ-4. I am also a board-certified Emergency Physician, Assistant Professor of Military and Emergency Medicine at the Uniformed Services University, and Chair of the Technology Subcommittee for the Committee on Tactical Combat Casualty Care for the Defense Health Agency. As part of my duties currently, I am responsible for the health, medical readiness, and medical capabilities to support members of Naval Special Warfare operationally and in garrison.

3. Trident Order #12 was issued on September 24, 2021. The directive does not set forth new policies concerning vaccination requirements or processes by which members request medical or administrative exemptions, though it does set forth deadlines for Naval Special Warfare (NSW) personnel (like for the 33 of the 35 Plaintiffs within the NSW claimancy in the above-referenced case) to submit such requests. Service members with questions related to medical exemptions were advised to consult with their medical provider. Trident Order #12 ¶ 6.b. Service members were advised to contact their chaplain for assistance with religious accommodation requests. *Id.* ¶ 6.c.

4. Trident Order #12 also advised special operations personnel (i.e. SEALs, SWCC, EOD) of a pre-existing policy outlined in the Navy's Manual of the Medical Department ("MANMED"), Chapter 15, *Physical Examinations and Standards for Enlistment, Commission, and Special Duty.* [1] Medical requirements for NSW and special operations duty are outlined in MANMED § 15-105.[2] The MANMED provides that "[o]nly the most physically and mentally

[1] Trident Order #12 only applies to persons assigned to units under NSWC. Navy sea, are, and land personnel (SEAL); Special warfare combatant craft crewmen (SWCC); and Explosive ordnance disposal (EOD) personnel fall under the MANMED § 15-105 provisions applicable to special operations duty. Navy Divers are not subject to MANMED § 15-105, and are instead subject to the provisions in the MANMED § 15-102, "Diving Duty."
[2] Section 15-105 was first issued on August 12, 2005. MANMED Change 126, ¶ 2.d. The purpose of the new section related to special warfare personnel was "to define the physical standards that will support the physical demands and hazardous duty experienced by the NSW/SO service member." *Id.* ¶ 2.d.(1). The new standards

qualified personnel should be selected, and those who are or may be reasonably expected to become unfit or unreliable must be excluded." MANMED § 15-105(1). Special operations personnel are subject to stringent medical requirements by virtue of the nature of their military duties:

> Special operations (SO) duty takes place in every part of the world under harsh conditions at the extremes of human physical capabilities. Medical austerity and the presence of armed opposition are common. SO personnel, depending on service and warfare community, routinely engage in high-risk operations including parachuting, high angle activities, high-speed boat and unconventional vehicle operation, weapons operation, demolitions employment, and waterborne activities, to include SCUBA diving. As such, SO duty is among the most physically and mentally demanding assignments in the U.S. military.

Id.

5. Special operations personnel frequently perform their duties in austere environments and locations in which medical capabilities are lacking. If special operations personnel are not fully medically ready or are at increased vulnerability for disease and injury, there is an unnecessary increased risk to the mission, to the individual, to their teammates, and to partner forces in the event of infectious disease such as SARS-CoV-2. In other words, SEALs, one of the subsets of special operations personnel, often operate in small units (e.g., while SEALs frequently deploy in platoons of 25 personnel, the platoons will use squads as maneuver elements as small 4 personnel and may even send SEALs to operate alone or with a partner for certain mission sets – such as liaising, operating with, or training partner forces) and the incapacitation of one member can significantly degrade the effectiveness of the unit and may

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reflected the "necessity for freedom from chronic diseases that might deteriorate when in isolated non-medically supported environments." *Id.* ¶ 2.d.(2). MANMED § 15-105 was revised on January 24, 2012 to provide greater detail and to reflect changes in the special operations command structure. MANMED Change 139, ¶ 2. The article was last revised on May 22, 2018, to update: (1) exam periodicity; (2) authorized examiners; (3) eyes, pulmonary, endocrine, musculoskeletal, and psychological and cognitive guidance; and (4) guidance on the submission of waivers. MANMED Change 164, ¶ 1.d.(1)-(8).

ultimately compromise the mission. This is similarly the case for Special Warfare Combatant-Craft Crewmen (SWCC), another subset of special operations personnel, who routinely operate with a crew of as little as four personnel on a combatant craft. It also puts the incapacitated member and his teammates at increased risk of harm or death. Finally, SEALs often perform duties in hostile areas in which a timely medical evacuation is not possible.

6. Because of the unique features of their duty, special operations personnel are required to receive vaccinations in addition to those required for all Service members. *See, e.g.* MANMED § 15-105(3)(b)(3) (requiring all special operations candidates and current operators must be immunized against both Hepatitis A and B). Additionally, theater requirements may necessitate additional vaccines such as rabies or Japanese Encephalitis, or SOF-specific biowarfare vaccination against anthrax and Smallpox. Therefore, fully vaccinated individuals are required due to the nature of special operations duty.

7. MANMED § 15-105(4)(a) describes the circumstances under which a Service member might become medically disqualified from special operations duty:

> Any disease or condition causing chronic or recurrent disability or frequent health care encounters, increasing the hazards of isolation, or having the potential for significant exacerbation by extreme weather, stress, hypobaric or hyperbaric environments, or fatigue is disqualifying. Conditions and treatments causing a significant potential for disruption of operations are disqualifying.

Under MANMED §§ 15-105(4)(b)-(n), various conditions which may affect a Service member's medical condition (e.g., vision, dental, musculoskeletal, pulmonary, cardiovascular, etc.) are potentially disqualifying. Additionally, conditions necessitating the use of medications on a daily or frequent basis, or conditions which require medication which would pose a significant health risk if stopped for one month or more, are disqualifying. *Id.* § 15-105(4)(n)(8)(b). Finally, MANMED § 15-105(4)(n)(9) provides that "Candidate or SO designated personnel refusing to

receive recommended vaccines … based solely on personal or religious beliefs are disqualified. This provision does not pertain to medical contraindications or allergies to vaccine administration."

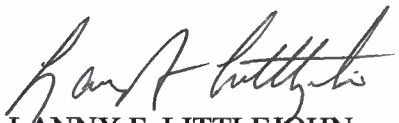
8. Specific to COVID-19, there are multiple risks that an unvaccinated member may face while in a deployed location. Individual risk of COVID-19 is not necessarily lower for SOF than the general population. We are currently tracking several instances of "long COVID" syndrome in operators and one case, in particular, of a member who had a life-threatening experience resulting from COVID-19. If a member were to contract the infection while deployed, there would be a minimum two-week quarantine requirement, along with all close contacts, that would decrease operational availability, even if asymptomatic. Since COVID-19 is highly infectious it risks not only the individual, but all teammates and all partner forces that would come into contact with an infected individual. Many countries to which NSW forces deploy are developing nations, or even fragile/failing states, with minimal medical capabilities. A force not fully immunized in this context carries with an unacceptable high risk of adverse medical outcomes, which further entail adverse operational outcomes.

9. Requests for a waiver of physical standards required by MANMED § 15-105 are forwarded from the Service member's commanding officer, via the immediate superior in command, then the Navy Bureau of Medicine ("BUMED"), and ultimately to the cognizant Bureau of Naval Personnel ("BUPERS") office. *Id.* § 15-105(5). Trident Order #12 advised Service members that this waiver request was a separate requirement, in addition to any medical or administrative exemption request. Trident Order #12 ¶ 6.d.

10. Since the issuance of Trident Order #12, I know of six permanent medical exemption requests for personnel falling under NSWC authority that have been denied. Since

BUMED Notice 6300, *Navy Coronavirus Disease 2019 Vaccine Medical, Temporary, and Medical Permanent Exemption for Medical Contraindication Approval Process* (Sep. 3, 2021), provides that these may be denied by medical providers at lower levels,[3] I have not seen all of the denials although I have been consulted on many. However, because all exemption requests forwarded to BUMED must be routed through me (as the Force Medical Officer) to the Deputy Surgeon General for approval, I know that three permanent medical exemption requests were routed through NSWC. I denied one of these myself and the other two were denied by the Deputy Surgeon General. In addition, I am aware that at least three plaintiffs (Navy SEAL 3, Navy SEAL 22 and Navy SEAL 26) asked for a permanent medical exemption at a lower level, and both of these were denied due to lack of medical basis for a contraindication to vaccination.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of December, 2021.



LANNY F. LITTLEJOHN

Captain, Medical Corps, U.S. Navy

[3] Navy medical providers function as the disapproval authority for temporary or permanent medical exemption requests that do not meet clinical contraindications for the COVID-19 vaccine. BUMED Notice 6300 ¶ 6.c. A Navy medical provider is defined as any uniformed, Navy-employed civilian, or contract licensed independent medical practitioner whose scope of practice encompasses immunization healthcare delivery, and Independent Duty Corpsmen. *Id.* ¶ 7.b.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

U.S. NAVY SEALs 1-26; **U.S. NAVY SPECIAL WARFARE COMBATANT CRAFT CREWMEN 1-5;** **U.S. NAVY EXPLOSIVE ORDNANCE DISPOSAL TECHNICIAN 1; and** **U.S. NAVY DIVERS 1-3**, Plaintiffs, v. **JOSEPH R. BIDEN, JR.**, in his official capacity as President of the United States of America; **LLOYD J. AUSTIN, III**, individually and in his official capacity as United States Secretary of Defense; **UNITED STATES DEPARTMENT OF DEFENSE**; **CARLOS DEL TORO**, individually and in his official capacity as United States Secretary of the Navy, Defendants.	Case No. 4:21-CV-01236-O

DECLARATION OF CHRISTOPHER D. BROWN

I, Christopher D. Brown, hereby state and declare as follows:

1. I am a Captain in the United States Navy, currently serving as the Chief of Staff of U.S. Naval Special Warfare Command (NSWC), located in Coronado, California, whose mission is to provide maritime special operations forces (SOF) to conduct full spectrum operations, unilaterally or with partners, to support national objectives. I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I have been assigned to my current position since September 24, 2021. Prior to my current assignment, I served as the Commander of Naval Special Warfare Group ONE;

Director of Operations at Special Operations Command-Central; Commanding Officer of SEAL Team ONE; Commander of Special Operations Task Force-Iraq; and Deputy Commander of Joint Special Operations Task Force-Philippines. As part of my duties currently, I am responsible for supervising and coordinating the work of the staff of U.S. Naval Special Warfare Command.

3. Naval Special Warfare (NSW) SOF are composed of Navy SEALs[1] and Special Warfare Combatant-Craft Crewmen (SWCC). The NSW team is a multipurpose combat force organized and trained to conduct a variety of special operations missions in all environments.

a. Navy SEALs conduct clandestine missions infiltrating their objective areas by fixed- and rotary-wing aircraft, Navy surface ships, combatant craft, submarines and ground mobility vehicles. Service members designated as Navy SEALs consists of officers and enlisted members who have been designated pursuant to Navy and NSW policies.

b. SWCC focus on infiltration and exfiltration of SEALs and other SOF, and they provide dedicated rapid mobility in maritime environments, as well as the ability to deliver combat craft via parachute drop. SWCC operate and maintain state-of-the-art surface craft to conduct special operations.

c. In addition to SEALs and SWCC, combat support (CS) and combat service support (CSS) personnel are assigned to NSW units to support the mission. CS personnel include officers and enlisted Service members who routinely infiltrate to a target area with the SEAL or SWCC combat force, such as those identified in Plaintiffs' complaint (i.e., Explosive Ordinance Disposal (EOD) personnel), as well as CSS officers and enlisted Service members performing a variety of other military functions (e.g.,

[1] The term "SEAL" refers to "Sea, Air, Land."

chaplains, medical personnel, mobile communications teams, tactical cryptologic support, etc.).

d. Navy EOD perform missions neutralizing explosive weapons in almost every environment. Their duties include detonating or demolishing hazardous munitions, neutralizing various ordnance, including sea mines, torpedoes or depth charges, performing parachute or helicopter insertion operations, and clearing mines in support of our military operations.

e. Navy Divers perform a variety of military functions, including wreckage salvage operations and underwater repairs, harbor and waterway clearance operations, assisting in construction and demolition projects, executing search and rescue missions, performing deep submergence operations, and serving as mission critical experts for diving operations for numerous military special operations units.

4. NSW personnel routinely deploy around the globe and may be assigned to units throughout the United States or in foreign countries; however, NSW personnel are assigned predominantly to commands located in three cities: Coronado, CA, Virginia Beach, VA, and Pearl Harbor, HI.[2] There are no NSW commands located in Fort Worth, TX.

Trident Order #12

5. Service members in the NSW community are subject to Department of Defense and Department of the Navy policies. Following the Secretary of Defense directive of August 24, 2021, and the issuances of ALNAV 062/21 and NAVADMIN 190/21, Trident Order[3] #12 was

[2] *See* Naval Special Warfare Command, *Components*, https://www.nsw.navy.mil/CONTACT/Components/ (last accessed Dec. 1, 2021).

[3] NSWC promulgates community-wide policies and communications to subordinate units through "Trident Orders," similar to Department of the Navy administrative messages ("ALNAVs") or Service-wide administrative messages ("NAVADMINs").

issued on September 24, 2021. Trident Order #12 was issued to provide NSW personnel a consolidated reference to several policies relevant to the mandatory vaccination requirement, and to implement specific timelines for personnel to comply with the requirement. Specifically, NSW personnel were directed to report for vaccination or to receive an administrative counseling to comply with NAVADMIN 190/21 by October 7, 2021. Personnel were also directed to receive their first shot (if planning to become fully vaccinated using a two-dose series) or initiate a request for either a medical or administrative exemption by October 17, 2021. These dates were established to ensure the vaccine requirement was efficiently executed, while also affording NSW members both time and guidance to submit exemption requests, if applicable.

6. Trident Order #12 also stated that Service members with pending medical or administrative exemption requests would not receive the administrative counseling unless the request was denied. Exemption requests for either medical or administrative (including religious) reasons are adjudicated in accordance with the applicable Navy policy. Trident Order #12 directed Service members to contact their medical provider for questions about medical exemptions, or to contact the cognizant chaplain's office for assistance with their religious accommodation request.

7. Trident Order #12 also reminded SOF of a pre-existing policy outlined in the Navy's Manual of the Medical Department ("MANMED"), Chapter 15, *Physical Examinations and Standards for Enlistment, Commission, and Special Duty.* MANMED § 15-105 relates to the medical disqualification of special operations personnel (also known as SOF) refusing to receive recommended vaccines based solely on their personal or religious beliefs. MANMED § 15-105(4)(n)(9). Additionally, SOF were advised that a waiver from medical requirements under MANMED § 15-105 for special operations personnel requires a separate waiver, *in addition* to

any medical or administrative exemption request from the COVID-19 vaccine requirement. This advisory was included in Trident Order #12 to ensure that all special operations personnel understood the unique medical requirements applicable to them, because these unique requirements for SOF were not addressed in ALNAV 062/21 or NAVADMIN 190/21.

8. Since the issuance of Trident Order #12, no adverse administrative or disciplinary actions have been taken against NSW personnel based on that order.

Religious Accommodation Requests

9. Navy Service members requesting a religious accommodation from vaccine requirements must comply with BUPERSINST 1730.1A and MILPERSMAN 1730-020. With the exception of the MANMED waiver referenced above, there are no additional requirements or procedures imposed on members within the NSW force. Requests for religious accommodation are initiated by the member and forwarded via the first commanding officer (if an O-6)[4] or immediate superior in command (ISIC) to Deputy Chief of Naval Operations (Manpower, Personnel, Training and Education) ("DCNO N1").[5] Trident Order #12 reiterates the Navy policy commands with commanders in the grade of O-6 route exemption requests directly to DCNO N1, and only has direct subordinate commanders (i.e., Echelon III commands) copy NSWC Force Medical on exemption endorsements for awareness of requests from the force.

Administrative Actions

10. I am aware of the adverse actions Plaintiffs claim they may face if they choose not to comply with the Navy's COVID-19 vaccine directive. Pls.' Compl. ¶ 110. The potential adverse actions Plaintiffs recite are almost entirely outside the authority or discretion of NSWC.

[4] In the Navy, an officer in the grade of O-6 is a captain.
[5] DCNO N1 is identified by the alternate designation of CNP (Chief of Naval Personnel) in MILPERSMAN 1730-020). DCNO N1 and CNP interchangeable acronyms and refer to the same position and official. The current DCNO N1 is Vice Admiral John Nowell, Jr.

Specifically, authority to refer criminal charges to a court-martial or for disposition at non-judicial punishment is withheld to the Vice Chief of Naval Operations. *See* NAVADMIN 225/21 ¶ 5.b. Furthermore, the policy outlined in NAVADMIN 225/21 – that members who do not comply with the vaccine requirement are required to be processed for administrative separation – is not a policy requirement imposed on NSW personnel by NSWC. This is a Navy-wide policy, and each Service member's case ultimately falls under the cognizance of the Chief of Naval Personnel as the show cause authority (for officers) and separation authority (for enlisted). *See id.* ¶ 5.d. Similarly, NAVADMIN 225/21 and NAVADMIN 226/21 outline other administrative actions, such as relief for cause for command leaders and promotion or advancement delays, that are mandatory administrative actions for those refusing the vaccine.

11. Navy Service members with specialized training or assignments may qualify for Special Duty Assignment Pay (SDAP) as outlined in Chief of Naval Operations Instruction ("OPNAVINST") 1160.6C and the implementing NAVADMIN.[6] Within the NSW force, members occupying specific billets[7] may be entitled to SDAP. In the event the Service member is removed from the billet, the member may no longer qualify for SDAP. *See* NAVADMIN 256/21. Similarly, certain Navy Enlisted Classifications[8] (NECs) across the Navy can qualify for enlistment bonuses and other financial incentives, which generally require additional obligated service. In the event a Service member fails to fulfill his or her required obligated service, the Service member may be subject to recoupment of the bonus or special pay that he or she

[6] The NAVADMIN announcing SDAP recertification is revised annually. The current NAVADMIN 146/21 was released on July 2, 2021, and can be found at https://www.mynavyhr.navy.mil/Portals/55/Messages/NAVADMIN/NAV2021/NAV21146.txt.
[7] A billet is a military term for the title of job or position.
[8] The Navy Enlisted Classification (NEC) system supplements the enlisted personnel structure in identifying personnel on active or inactive duty and billets in manpower authorizations. NEC codes identify a non-rating (occupation) wide skill, knowledge, aptitude, or qualification that must be documented to identify both people and billets for management purposes

received. These are not NSWC policies, but Service policies that are generally applicable to members of the Navy. *See* NAVADMIN 256/21 ¶ 8.a. (directing that bonuses, special pays and incentive pays become unearned as soon as the member is removed from the assignment or his or her associated NEC is removed). I am aware Plaintiffs claim that they may be subject to recoupment for costs of training as a Navy SEAL, SWCC, EOD technician, or Diver, which can be substantial. In my 27 years of experience, serving across various NSW commands and leading personnel, I am not familiar with any policy that would subject personnel to recoupment for costs associated with training, even where the service member is separated prior to fulfilling his obligated service under adverse circumstances. I am familiar with instances where the Service has required recoupment for higher education at universities or colleges where the member has not completed obligated service requirements, but that is different that Department of Defense military training.

12. Additionally, I am aware that Plaintiffs have alleged that they may be subject to the administrative removal of their NEC. Pls.' Mem. in Support of Mot. for Prelim. Inj. at 28–29, ECF No. 16. Removal of a member's NEC may also impact the member's eligibility for SDAP and their eligibility to wear the SEAL or SWCC insignia (i.e., the Trident pin for Navy SEALs). Authority to wear the SEAL or SWCC insignia is governed by MILPERSMAN articles 1220-085 and 1220-090, respectively. Achievement of the SEAL or SWCC qualification entitles the member to wear the applicable insignia. If a member's NEC is removed for disciplinary or administrative action, however, the member is no longer authorized to wear the insignia. For NSW personnel, the process for the administrative removal of a Service member's NEC is outlined in Commander, Naval Special Warfare Command Instruction ("COMNAVSPECWARCOMINST") 1221.1A, *Enlisted Special Warfare Operator/Special*

Warfare Boat Operator Navy Enlisted Classification Review Guidance.[9] A commander may initiate revocation of the Service Member's NEC for the following reasons:

> (a) Non-performance of duties. Failure or unwillingness to perform duties required of the rating.
> (b) Failure to maintain rating eligibility such as:
> (1) Permanent revocation of a member's security clearance.
> (2) Permanent physical disability.
> (c) Professional performance failure such as:
> (1) Willful dereliction of duty.
> (2) Breaches of Ammunition, Arms, and Explosive, diving, parachute, or ordinance safety regulations, or Operations Security violations.
> (3) Loss of CO's faith and confidence in the member's ability to exercise sound judgment, reliability, and personal conduct.
> (d) SEAL or SWCC Qualification. Failure to attain SO (SEAL) or SB (SWCC) qualification as specified in references (e) and (f).
> (e) Alcohol Abuse.
> (f) Drug Abuse.

Id. ¶ 3.a.

13. However, the administrative removal of a Service member's NEC is not to be used as a punitive measure or as an alternative to disciplinary or administrative action. *Id.* ¶ 3.b. Moreover, COMNAVSPECWARCOMINST 1221.1A provides that "[i]f a Sailor is unsuitable for continued naval service, appropriate administrative separation procedures shall be followed." Because NAVADMIN 225/21 directs mandatory separation processing for Service members who refuse the vaccine and who do not have a pending or an authorized exemption, removal of the member's NEC under COMNAVSPECWARCOMINST 1221.1A is neither warranted nor necessary. Therefore, it is not anticipated, nor desired, that this procedure would be used in addition to the various required administrative actions for Service members refusing the vaccine.

Deployability and Training

[9] The board procedures outlined are commonly referred to as a "Trident Review Board."

14. Service members in the NSW community are responsible for performing special operations. Special operations require unique tactics, techniques, procedures, and equipment. They are often conducted in hostile or diplomatically sensitive environments, and are characterized by one or more of the following: time-sensitivity, clandestine or covert nature, low visibility, working with or through host-nation forces, greater requirements for regional orientation and cultural expertise, and a higher degree of risk. These missions often require members of the NSW community to work in close quarters where social distancing is not possible. For example, a team may travel on boats, submersibles, helicopters, aircraft, or other vehicles that are not even six feet across, and/or which have limited ventilation. Service members may be in such close quarters that they are literally sitting shoulder-to-shoulder or chest-to-back. Additionally, NSW personnel may be required to operate in subsea environments and may even have to share closed-circuit diving rebreathers, where COVID-19 could imperil one another because members are forced to share breathing devices, and literally inhale one another's exhalation. Moreover, the types of missions outlined above cannot be conducted remotely. For example, a SEAL assigned to perform a counterterrorism mission in a foreign country cannot perform that task from home; nor could a SWCC drive a combatant craft and transport SEALs in a telework status; just like an explosive ordnance disposal technician—whose job it is to disarm and dispose of explosives—cannot perform that task remotely. Similarly, the arduous training necessary to prepare NSW personnel for these missions cannot be performed remotely. Training and operations necessitate our Service members interact in close-quarters, confined spaces, and under extreme conditions where telework, social distancing, and mask-wearing are not realistic options; specifically, mask wearing is not mission appropriate for select missions.

15. SOF often operate in countries with little or no healthcare support structure and in remote areas exposed to health threats. Proactive force health protection measures are often essential to minimize health risks to special operations personnel. When deployed, health support available to special operations forces is limited to a small number of medical personnel with enhanced medical skills, to include emergency treatment, preventive medicine, and limited dental care. SOF medical personnel can plan and conduct specialized medical support and patient movement; however, special operations forces may require support from conventional forces in the event a medical situation is beyond the limited capacity of the deployed medical personnel. Hospitalization capabilities are generally not available and special operations forces must rely on either available theater health services assets or local host nation capabilities if hospitalization becomes an urgent necessity. In many instances, the capabilities of the local or host nation are far lesser than those available in the United States, therefore the risk of serious illness may be greater. If a team member contracts COVID-19, there is a possibility that the necessary equipment (e.g., oxygen, ventilators) or treatments would not be readily available. Additionally, quarantine or self-isolation are generally not going to be an option, and impact to the mission would be unavoidable. Further, if it became necessary to medically evacuate ("medevac") a member of the unit, this creates additional risk both to the mission (i.e., it encumbers the entire force and medevac structure), and places those Service members executing the medivac at a significant risk of harm or death themselves (i.e., if the member requires transport in a remote or diplomatically sensitive area, or under hostile fire). Every member of a NSW formation is vital, therefore, in the event any one of them were to contract COVID-19, it would necessarily have an adverse impact to the mission and to his fellow team members.

16. Risk of harm or death are inherent to the training and missions performed by NSW personnel. Given the missions performed by SOF, it is vital that a member of the NSW community be medically fit to train or deploy on short notice. Medical conditions can create additional risk, both medical and operational, not only for the Service member afflicted, but for other members of the unit. Consequently, unvaccinated NSW personnel are subject to limitations on their deployment eligibility or training eligibility by virtue of necessity. Additionally, a member's vaccination status may preclude travel or attendance for training courses depending on current theater and Service travel policies and any requirements specific to the training course itself. For example, if a mission is to take place in a partner nation, those nations may have their own vaccination requirements that preclude participation by unvaccinated individuals. Commands are also obligated to assess the cost, both financially and administratively, associated with restriction of movement that the member may incur by virtue of being unvaccinated.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of December, 2021.

/s/
CHRISTOPHER D. BROWN
Captain, U.S. Navy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

U.S. NAVY SEALs 1-26; **U.S. NAVY SPECIAL WARFARE COMBATANT CRAFT CREWMEN 1-5;** **U.S. NAVY EXPLOSIVE ORDNANCE DISPOSAL TECHNICIAN 1; and** **U.S. NAVY DIVERS 1-3**, Plaintiffs, v. **JOSEPH R. BIDEN, JR.**, in his official capacity as President of the United States of America; **LLOYD J. AUSTIN, III**, individually and in his official capacity as United States Secretary of Defense; **UNITED STATES DEPARTMENT OF DEFENSE**; **CARLOS DEL TORO**, individually and in his official capacity as United States Secretary of the Navy, Defendants.	Case No. 4:21-CV-01236-O

DECLARATION OF CAPTAIN MERY-ANGELA SANABRIA KATSON, U.S. NAVY

I, Captain Mery-Angela Sanabria Katson, U.S. Navy, hereby state and declare as follows:

1. I am a captain in the United States Navy, currently serving as the Acting Deputy Director, Military Personnel Plans and Policy Division (OPNAV N13B), located in Arlington, Virginia. I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I have been assigned to this position since September 2021. My permanent assignment is as Branch Head, Enlisted Plans and Policy (OPNAV N132). Prior to my current assignment, I served as Deputy Director and Comptroller, Field Support Activity (BSO-11) at the Washington Navy Yard.

(a) I have been a member of the U.S. Navy since 1982, beginning my career as a Deck Seaman onboard USS Point Loma (AGDS-2) in San Diego, CA, before becoming an enlisted Disbursing Clerk. I was commissioned in 1991 after earning a bachelor's degree from the University of San Diego through the Navy's former Broadened Opportunity for Officer Selection and Training (BOOST). Since then, I have served as the Communications Officer aboard USS Acadia (AD-42); Company Officer and adjunct professor at the U.S. Naval Academy; Administrative and Manpower Officer for U.S. Naval Support Activity, Naples, Italy;. Flag Secretary for Commander, Fleet Air Mediterranean and Commander, Navy Region Europe; Commander, San Antonio Military Entrance Processing Station, San Antonio, TX; Executive Officer and Commanding Officer, Navy Recruiting District, San Antonio; Diversity and Inclusion Officer for the Office of the Chief of Naval Operations (OPNAV); and Education Strategy and Policy Branch Head for OPNAV.

(b) My professional military education includes a Master's Degree in Manpower Systems Analysis from the Naval Postgraduate School in Monterey, CA, and a Master's Degree in National Security and Strategic Studies from the U.S. Naval War College in Newport, RI.

(c) As part of my duties currently, I am responsible for overseeing the processing of religious accommodation requests from Navy service members throughout the Fleet.

3. Number of religious accommodation requests seeking exemption from COVID-19 vaccination. As of December 9, 2021, Navy personnel have submitted 3,259 religious accommodation requests seeking to be administratively exempted from the COVID-19 vaccination. There are 300 appeals of denials of religious accommodation requests pending. No appeals have been fully adjudicated as of December 9, 2021. Members with pending exemption requests or appeals are not subject to adverse administrative action while requests are pending.

4. All but two of the Plaintiffs submitted requests for religious accommodations. Exhibit A to this declaration and the following describes the status of each Plaintiff, according to Navy records as of December 9, 2021:

(a) Navy SEAL 22 and SWCC 3 have not submitted requests for religious accommodations.

(b) Navy SEALs 1, 10, 11, 18, 21, 25, and SWCC 2 submitted requests for religious accommodations. Decisions are pending for those requests.

(c) Navy SEALs 2 through 9, 12 through 15, 17, 19, 20, 23, 26, Navy Divers 1 through 3, and SWCCs 1, 4, and 5 submitted requests for religious accommodations which were denied. Appeals of the denials have not been received as of December 9, 2021.

(d) Navy SEALs 16, 24, and EOD 1 submitted requests for religious accommodations which were denied. These Plaintiffs appealed the denials of their requests. As of December 9, 2021, those appeals are pending adjudication.

5. Number of religious accommodation requests from any vaccination adjudicated since 2015. For context on the unprecedented increase in the number of religious accommodation requests, the United States Navy received and adjudicated 83 religious accommodation requests for exemption from *any* required vaccination except COVID-19 between the beginning of 2015 and the summer of 2021. One of those requests was granted.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of December, 2021.

Mery Angela Sanabria Katson

Captain, U.S. Navy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

U.S. NAVY SEALs 1-26; **U.S. NAVY SPECIAL WARFARE COMBATANT CRAFT CREWMEN 1-5;** **U.S. NAVY EXPLOSIVE ORDNANCE DISPOSAL TECHNICIAN 1; and** **U.S. NAVY DIVERS 1-3**, Plaintiffs, v. **JOSEPH R. BIDEN, JR.**, in his official capacity as President of the United States of America; **LLOYD J. AUSTIN, III**, individually and in his official capacity as United States Secretary of Defense; **UNITED STATES DEPARTMENT OF DEFENSE**; **CARLOS DEL TORO**, individually and in his official capacity as United States Secretary of the Navy, Defendants.	Case No. 4:21-CV-01236-O

DECLARATION OF WILLIAM MERZ

I, William Merz, hereby state and declare as follows:

1. I am a Vice Admiral in the United States Navy, currently serving as the Deputy Chief of Naval Operations, Operations, Plans and Strategy (OPNAV N3/N5), located in Arlington, Virginia at the Pentagon. I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I have been assigned to my current position since August 6, 2021. Prior to my current assignment, I served as Commander, U.S. SEVENTH Fleet; the Deputy Chief of Naval Operations for Warfighting Requirements; the Director, Undersea Warfare Division; and

Commander, Naval Mine & Anti-Submarine Warfare Command. I graduated from the U.S. Naval Academy in 1986, and earned master's degrees from Catholic University and the Naval War College. As part of my duties currently, I am responsible for serving as the principal advisor to the Chief of Naval Operations[1] (CNO) on operational matters, strategy, policy, and plans; international politico-military matters; and the current operational status of naval forces. As part of my responsibility for the current operational status of naval forces, CNO delegated responsibility to me for the Navy's COVID-19 policies. Those responsibilities include tracking the number of COVID-19 cases across the Navy, implementing Secretary of the Navy COVID-19 plans and policies, planning for and ensuring the appropriate initial distribution of COVID-19 vaccines, coordination across the Navy and with the other services on COVID-19 plans and policy, and providing input to the Secretary of the Navy on proposed COVID-19 plans and policy.

3. On August 24, 2021, the Secretary of Defense directed the Secretaries of the Military Departments to immediately begin full vaccination of all members of the Armed Forces under DoD authority on active duty or in the Ready Reserve. The Secretary of the Navy directed implementation of Secretary of Defense's COVID-19 vaccination mandate[2] via a Department-wide administrative message (ALNAV) on August 30, 2021. The ALNAV applies to both Services within the Department of the Navy (DON), the United States Navy and the United States Marine Corps. The ALNAV requires all active duty DON Service members, who are not already vaccinated, exempted, or currently seeking an exemption, to be fully vaccinated with an

[1] The CNO is the senior uniformed officer in the United States Navy. *See* 10 U.S.C. § 8033(b) ("The Chief of Naval Operations, while so serving, has the grade of admiral without vacating his permanent grade. In the performance of his duties within the Department of the Navy, the Chief of Naval Operations takes precedence above all other officers of the naval service.").

[2] Secretary of Defense Memorandum, "Memorandum for Senior Pentagon Leadership, Commanders of the Combatant Commands, Defense Agency, and DoD Field Activity Directors," (August 24, 2021).

FDA-approved COVID-19 vaccine within 90 days, and all Reserve Component personnel to be fully vaccinated within 120 days. ALNAV 062/21 ¶ 4. Active duty Sailors and Marines were required to become fully vaccinated by November 28, 2021, and Reserve Component Sailors and Marines must become fully vaccinated[3] by December 28, 2021. The requirement to obtain full vaccination constitutes a lawful order under Article 92 of the Uniform Code of Military Justice (UCMJ), and failure to comply may result in punitive or adverse administrative action, or both. ALNAV 062/21 ¶ 5.

4. The United States Navy issued service-specific guidance via a separate administrative message ("NAVADMIN") on September 1, 2021. NAVADMIN 190/21 outlines Navy policy concerning the mandatory vaccination of Navy service members, vaccination administration and reporting requirements, and general guidance related to logistics and distribution of vaccines. The policy reiterates that COVID-19 vaccination "is mandatory for all DoD service members who are not medically or administratively exempt" under existing Navy policy. NAVADMIN 190/21 ¶ 2, 3.a. Refusal to become fully vaccinated against COVID-19 without an approved or pending exemption constitutes a failure to obey a lawful order and is punishable under Article 92, UCMJ. Ordinarily, any officer with authority to convene courts-martial or administer nonjudicial punishment under Article 15 of the UCMJ may dispose of alleged violations of the UCMJ. Manual for Courts-Martial ("MCM"), Part II, Rules for Court Martial, 401. However, authority to initiate courts-martial, non-judicial punishment, or administrative separation processing for failure to become fully vaccinated is withheld to a designated COVID Consolidated Disposition Authority (CCDA). NAVADMIN 190/21 ¶ 3.c., 3.e.(5). Withholding this authority from Service members' commanders precludes

[3] Although refusal to receive the vaccine may subject a member to adverse administrative or disciplinary action, the vaccine will not be forcibly administered to any member who refuses.

administrative separation or disciplinary action without elevated review and direction by the CCDA. On October 13, 2021, the Chief of Naval Personnel (CNP) was designated as the CCDA. NAVADMIN 225/21 ¶ 1.

5. NAVADMIN 190/21 ¶ 3.d. provides that service members may seek two types of exemptions, medical and administrative. Medical exemptions are governed by Army Regulation (AR) 40-562, which is a consolidated Military Services regulation implemented by the Navy and Marine Corps via Bureau of Medicine (BUMED) Instruction 6230.15B (hereinafter BUMEDINST 6230.15B). Medical personnel are responsible for reviewing and granting medical exemptions, whereas non-medical personnel (sometimes with the assistance of advising medical personnel) are responsible for reviewing and granting administrative exemptions. BUMEDINST 6230.15B, 2-6.

6. The policy provides the following with respect to medical exemptions:

> a. Medical exemptions. A medical exemption includes any medical contraindication relevant to a specific vaccine or other medication. Health care providers will determine a medical exemption based on the health of the vaccine candidate and the nature of the immunization under consideration. Medical exemptions may be temporary (up to 365 days) or permanent. Standard exemption codes appear in appendix C.
>
> (1) *General examples* of medical exemptions include the following—
>
> (a) Underlying health condition of the vaccine candidate (for example, based on immune competence, pharmacologic or radiation therapy, pregnancy and/or previous adverse response to immunization).
>
> (b) *Evidence of immunity* based on serologic tests, documented infection, or similar circumstances.
>
> (c) An individual's clinical case is not readily definable. In such cases, consult appropriate medical specialists, including specialists in immunization health care.

AR 40-562, 2-6a.(1), (emphasis added).

As the policy reflects, these are just examples of situations when health care providers may determine a medical exemption is warranted, but each exemption request is an individual determination based on the health of the individual and the disease at issue. Additionally, although there are some diseases for which serologic or other tests may be used to identify pre-existing immunity, there are some diseases for which these tests may not be used in such manner.[4]

7. Service members who seek a medical exemption first submit their request to Navy medical providers who follow BUMED policy when processing those requests. A Navy medical provider is defined as any uniformed, Navy-employed civilian, or contract-licensed independent medical practitioner whose scope of practice encompasses immunization healthcare delivery, and Independent Duty Corpsmen. BUMEDNOTE 6300, ¶ 7.b. Navy medical providers have the authority to grant temporary medical exemptions for pregnancy or other temporary medical contraindications. BUMED Notice 6150 (Sept. 21, 2021). For requests for permanent exemptions, Navy medical providers have authority to disapprove temporary or permanent medical exemption requests that do not meet clinical contraindications for the COVID-19 vaccine. BUMEDNOTE 6300, ¶ 6.c. Service members who are actively participating in COVID-19 clinical trials are exempt from mandatory vaccination until the trial is complete. NAVADMIN 190/21 ¶ 3.d.(2).

8. For either a temporary or permanent medical exemption request, medical providers evaluate the patient for medical contraindications based on documented medical history and/or clinical evaluation, and an assessment of the benefits and risks to the patient.

[4] The AR states, *"Screening for immunity.* For *some* vaccine-preventable diseases, serologic or other tests can be used to identify pre-existing immunity from prior infections or immunizations that may eliminate unnecessary immunizations." AR 40-562, 2-1.g (emphasis added).

BUMEDNOTE 6300 of September 3, 2021, *Clinical Consultation Guidance for COVID 19 Vaccine Permanent Exemption* (published September 3, 2021). Additionally, medical providers are encouraged to request expert consultation by an immunizations specialist, when necessary. Medical contraindications for the COVID-19 vaccine include:

(a) Anaphylaxis from a previous COVID-19 vaccine or COVID-19 vaccine ingredient;

(b) Myocarditis or pericarditis after COVID-19 vaccine administration or infection;

(c) Temporary association of Stevens-Johnson Syndrome or Guillain-Barré Syndrome that cannot be attributed to another underlying cause within 6 weeks of COVID-19 vaccine administration or infection;

(d) Thrombosis with Thrombocytopenia Syndrome (TTS) after COVID-19 vaccine administration;

(e) Persistent clinical symptoms lasting 4 or more weeks following a COVID-19 infection that cannot be attributed to another underlying cause after evaluation and focused workup ("Long COVID"). *Id.*

In the *Clinical Consultation Guidance*, providers are also encouraged to consult CDC guidance.[5]

[5] An example of CDC clinical considerations includes:

> If you were treated for COVID-19 with monoclonal antibodies or convalescent plasma, you should wait 90 days before getting a COVID-19 vaccine. Talk to your doctor if you are unsure what treatments you received or if you have more questions about getting a COVID-19 vaccine.
>
> If you or your child has a history of multisystem inflammatory syndrome in adults or children (MIS-A or MIS-C), consider delaying vaccination until you or your child have recovered from being sick and for 90 days after the date of diagnosis of MIS-A or MIS-C. Learn more about the clinical considerations for people with a history of multisystem MIS-C or MIS-A.

9. Medical rationale for disapproval based on serology: Serological test results that shows the presence of antibodies from a prior COVID-19 infection, standing alone, will not be a basis for a permanent medical exemption. Serologic testing, as a means to determine immunity, has not been scientifically validated, and evidence suggests that prior infection does not prevent later infection.[6] Although AR 40-562 indicates that serology screening tests for immunity may be warranted, it applies to diseases or conditions where it has been established that serologic tests are able to determine one's immunological status.[7] AR 40-562 contemplates that serologic or other tests might be appropriate to determine immunity for some diseases, but not all vaccine-preventable diseases. AR 40-562 ¶ 2-1.g. In contrast to a disease such as varicella ("chicken pox"), where prior infection usually provides "immunity for life" and a second occurrence is uncommon, prior COVID-19 infection does not provide similar immunity. *See* CDC, "Chicken Pox for Healthcare Professionals, *available at* https://www.cdc.gov/chickenpox/hcp/index.html; Alyson M. Cavanaugh, et al., *Reduced Risk of Reinfection with SARS-CoV-2 After COVID-19 Vaccination*, Morbidity and Mortality Weekly Report, Vol. 70, No. 32 (Aug. 13, 2021).

10. In addition to the procedures in BUMEDINST 6230.15B, authority to approve a permanent medical exemption for COVID-19 vaccination is the first Navy Medical Department

See https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html

[6] One study found the following: "[A]mong Kentucky residents who were previously infected with SARS-CoV-2 in 2020, those who were unvaccinated against COVID-19 had significantly higher likelihood of reinfection during May and June 2021. This finding supports the CDC recommendation that all eligible persons be offered COVID-19 vaccination, regardless of previous SARS-CoV-2 infection status." Further, the authors noted limited available evidence to determine the extent and duration of immunity from natural infection, and cited the emergence of new variants might affect infection-acquired immunity. Alyson M. Cavanaugh, et al., *Reduced Risk of Reinfection with SARS-CoV-2 After COVID-19 Vaccination*, Morbidity and Mortality Weekly Report, Vol. 70, No. 32 (Aug. 13, 2021), *available at* https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7032e1-H.pdf.

[7] "g. *Screening for immunity*. For *some* vaccine-preventable diseases, serologic or other tests can be used to identify pre-existing immunity from prior infections or immunizations that may eliminate unnecessary immunizations." AR 40-562, 2-1.g (emphasis added).

Flag Officer[8] in the medical provider's chain of command. NAVADMIN 190/21 ¶ 3.d. BUMEDNOTE 6300 outlines the process for Navy medical providers recommending approval for a permanent medical exemption for COVID 19 vaccination. Where a provider recommends such an exemption, the provider drafts an initial permanent exemption letter and routes the letter to the appropriate flag officer as well as the member's commanding officer. BUMED Notice 6300, ¶ 6.c. A temporary medical exemption is granted pending the approval or disapproval decision of a permanent medical exemption.[9] BUMED Notice 6300, ¶ 7.b. If the permanent medical exemption is approved, a formal letter of approval is forwarded to the initial recommending Navy provider. BUMED Notice 6300, ¶ 7.j. Vaccinations and vaccine exemptions are entered into the member's Electronic Health Record (EHR), or the Medical Readiness Reporting System (MRRS) where entry in the EHR is impracticable. BUMED Note 6150, ¶ 5.b. During the pendency of a temporary exemption or once a permanent exemption is approved, a member will not be subject to disciplinary action.

11. The Navy Reserves is comprised of several categories of Reservist, including: (1) Ready Reserve; (2) Standby Reserve, consisting of the Standby Reserve-Active (USNR-S1) and Standby Reserve-Inactive (USNR-S2); or (3) Retired Reserve (USNR-Retired). *See* Bureau of Personnel Instruction (hereinafter BUPERSINST) 1001.39F, Ch. 1, ¶ 101. A Reservist's administrative requirements, entitlements, pay, or benefits eligibility is dependent on the status of the Reservist. *See generally id.*, Figure 1-2. Navy Reservists are required to meet physical qualifications for retention in the Reserve, and all members of the Navy and Marine Corps Reserve annually complete a periodic health assessment. *Id.*, Ch. 2 ¶ 201; U.S. Navy Manual of

[8] "Flag Officers" comprise the highest ranks in the military. Officer ranks range from O-1 to O-10, with flag officers occupying the ranks between O-7 to O-10. In the Navy, a flag officer is any officer serving in the rank of Rear Admiral (Lower Half) or higher.
[9] No disciplinary or administrative action will be initiated while a permanent medical exemption request is pending.

the Medical Department, Ch. 15, Art. 15-23(2) (hereinafter "MANMED"). Drilling Reservists have additional requirements with respect to notifying the chain of command of any physical or dental problem that may delay or preclude their performance of drills, Annual Training (AT), or mobilization eligibility, including their vaccination status. BUPERSINST 1001.39F, Ch. 2, ¶ 201. Unlike active duty Service members, Reservists are not automatically covered under TRICARE, the military's health care program, unless called to active duty for greater than 30 days. Reservists do have the option to obtain health insurance through TRICARE Reserve Select, a low-cost premium-based version of TRICARE. *See* TRICARE Reserve Select, https://tricare.mil/TRS, (last visited Dec. 7, 2021).

12. For the annual physical evaluation, the Reservist's unit Medical Department Representative (MDR) reviews the Service member's periodic health assessment to evaluate all new or materially changed medical conditions. MANMED 15-23(3). The MDR is encouraged to obtain additional information from reservists via outpatient medical records or other sources as appropriate to develop as complete an understanding as possible of the condition(s). *Id.* If a potentially disqualifying physical condition is discovered, such as the lack of a required vaccination, the supporting commanding officer will place the member in a Medical Retention Review (MRR) status. In this status, the medical officer or MDR will recommend that either the member be allowed or denied the opportunity to remain in a drill status. BUPERSINST 1001.39F, Ch. 2 ¶ 203.2. The commanding officer has the option to retain the member in the unit with or without drill authorization or reassignment of the member to a temporary unit in an authorized absence status. *Id.*, ¶ 203.2.a.

13. Like active duty Service members, Reservists are subject to immunization requirements as outlined in BUMEDINST 6230.15B, but must be in a duty status to receive

required immunizations. *See* BUMEDINST 6230.15B ¶ 3-2.a.-b. Reservists recalled to active duty are subject to screening requirements for activation, which includes an assessment of the member's medical condition, including the need for requirement vaccinations. *Id.* Ch. 21 ¶ 2105; Figure 21-1. Reservists may seek a medical exemption for a vaccination from a DoD medical provider. In the event a non-DoD provider recommends a vaccine contraindication, the Reservist must request assistance from a Navy medical provider in order to request a permanent medical exemption. BUMED Notice 6300, ¶ 7.f.-g. If a Reservist is not exempted from the vaccination requirement and is determined to be physically disqualified, that Reservist may be subject to discharge or retirement. *Id.* Ch. 2 ¶ 203.2.f.

14. Administrative exemptions for an active duty or reserve service member may be granted for various reasons, including pending separation or retirement, permanent change of station, emergency leave, and religious accommodation. BUMEDINST ¶ 6230.15B, 2-6.b. Navy policy concerning requests for the accommodation of religious practices generally, including immunizations, is outlined in BUPERSINST 1730.11A (attached as Exhibit A to this declaration), while specific guidance related to immunization exemptions for religious beliefs is found in the Naval Military Personnel Manual (MILPERSMAN), Article 1730-020 (attached as Exhibit B to this declaration).

a. An active duty or reserve service member[10] seeking an exemption of immunization for religious reasons must submit the request in in accordance with BUPERSINST 1730.11A, ¶ 5.e. The requirements include: (1) a written request via his or her commander stating the waiver sought; and (2) an interview with a Navy Chaplain,

[10] "This instruction applies to all active and reserve members of the Navy, including applicants for entry into the Navy and Navy Reserve, as well as midshipmen at the U.S. Naval Academy (USNA) and in the Naval Reserve Officers Training Corps (NROTC), and officers and officer candidates in Navy officer accession program." BUPERSINST 1730.11A ¶ 3.a

who assesses whether the requestor's beliefs appear sincerely held for recommendation to the commander. BUPERSINST 1730.11A, ¶ 5.e. Templates for the member's request and Chaplain's assessment and recommendation are found in enclosures (1) through (3) of the instruction. The Service member must also include a NAVPERS 1070/613, "Administrative Remarks" form (commonly known as a "Page 13"), which documents the member has been advised of potential health, travel, and administrative consequences of their immunization waiver request. MILPERSMAN 1730-020 ¶ 4.c. The consequences of an approved request are not adverse, but may limit the member's assignments and international travel due to international health regulations or host nation laws or regulations. MILPERSMAN 1730-020, ¶ 4.c.

b. The approval authority for requests for immunization exemptions is the Deputy Chief of Naval Operations (Manpower, Personnel, Training and Education) (hereinafter CNO N1).[11] BUPERSINST 1730.11A, ¶ 5.a.(4). Commanders routing requests to CNO N1 must forward the matter within 7 days from the date of the member's request in accordance with BUPERSINST 1730.11A, ¶ 5.c. The commander's endorsement must include information as required under MILPERSMAN 1730-020 ¶ 5, including: (1) the negative effect (if any) of the requested accommodation on the unit's military readiness, health, or safety; (2) the number of service members in the command that have been granted a similar exemption; and (3) when recommending denial, a determination that the denial furthers a compelling government interest and there is no less restrictive means of accommodating the request. MILPERSMAN 1730-020 ¶ 5. a.-b.

[11] CNO N1 is identified by the alternate designation of CNP (Chief of Naval Personnel) in MILPERSMAN 1730-020). CNO N1 and CNP interchangeable acronyms and refer to the same position and official.

Commanders are required to ensure the applicant receives counseling related to the potential health and travel impacts they may incur as a consequence of their waiver, and the possibility that their waiver may be revoked in the event they are at imminent risk of disease. MILPERSMAN 1730-020 ¶ 6.[12] Action on a service member's written request for accommodation must be in a timely manner, generally no later than 60 days from receipt by the Office of the Secretary concerned.[13] DoD Instruction 1300.17, ¶ 3.2.c., Table 1. A member may appeal CNO N1 decisions to the Chief of Naval Operations (CNO). BUPERSINST 1730.11A, ¶ 5.f. Template letters for approvals and approval recommendations are found in enclosure (4) of the instruction.

c. Requests for religious accommodation are evaluated using criteria outlined in paragraph 5 of the instruction. Specifically, each request is evaluated on a case-by-case basis considering the following factors:

(1) applicable operational or regional policies,

(2) importance of the military policy, practice or duty in terms of mission accomplishment, including military readiness, unit cohesion, good order, discipline, health, or safety,

(3) importance of the practice to the requestor,

(4) cumulative impact of repeated accommodations of a similar nature and

(5) alternate means to fulfill the request.

[12] The authority to revoke approved religious accommodation exemptions has been withheld from commanding officers per NAVADMIN 225/21 ¶ 7.g. In other words, commanding officers are not authorized to revoke an approved religious accommodation exemption from COVID-19 vaccination.

[13] No disciplinary or administrative action will be initiated while a request for an exemption for religious accommodations is pending.

d. Commanders will not deny or recommend denial of a religious accommodation unless the denial or partial denial furthers a compelling governmental interest and is the least restrictive means of furthering that compelling government interest. Factors for commanders to consider include (but are not limited to) whether approving the accommodation would pose a health or safety hazard, or otherwise impair mission accomplishment, good order, discipline, morale or unit cohesion. BUPERSINST 1730.11A ¶ 5.a.(2).

15. NAVADMIN 225/21 provides guidance for disposition of offenses involving Navy service members who are not fully vaccinated as required by NAVADMIN 190/21. Navy Service members who refuse the COVID-19 vaccine, absent a pending or approved exemption, are required to be processed for administrative separation.[14] NAVADMIN 225 ¶ 2. A Navy Service member is considered to be "refusing the vaccine, if: (1) the individual has received a lawful order to be fully vaccinated, (2) is not or will not be fully vaccinated by the date required, and (3) does not have a pending or approved exemption request." NAVADMIN 225/21 ¶ 3.c. The policy designates CNP as the CCDA to ensure fair and consistent administrative processing across the service. NAVADMIN 225/21 ¶ 5.b. For disciplinary matters, authority to initiate disciplinary proceedings, either non-judicial punishment or court-martial, is withheld to the Vice Chief of Naval Operations. *Id*. NAVADMIN 256/21 provides additional guidance on administrative separation processing for those refusing the vaccine, as well as guidance on other applicable administrative actions. These other applicable administrative actions include: cancellation of government travel for training or other official purposes; potential reassignment within the local area; adverse fitness reports and an evaluations; prohibition on executing permanent change of station orders; potential termination of special duty and incentive pays;

[14] Although processing for separation is required, this does not automatically result in a member actually being separated. Members processed for separation may ultimately be retained in the service.

potential recoupment of unearned bonuses; termination of and potential reimbursement for Navy-funded education and training;[15] promotion delays; and removal of additional qualification designations or Navy Enlisted Classifications.[16] *See* NAVADMIN 256/21 ¶¶ 4.b.through 13.

16. Prior to the initiation of administrative or disciplinary action, Navy service members are formally advised of the order to be fully vaccinated using a NAVPERS 1070/613, "Administrative Remarks" form (commonly known as a "Page 13"). NAVADMIN 225/21 ¶ 7.e.(1). A Page 13 is not a punitive action, but is a manner to document formal counseling of a Navy Service member. The inclusion of this Page 13, by itself, is not considered to be an adverse matter and will not affect a member's career. The Page 13 provides guidance to the Navy service member and serves to document that the member has been advised of his or her acknowledgement of the lawful order to be vaccinated against COVID-19. It also provides the service member with an opportunity to notify his or her commander of the member's intent to seek a medical or religious exemption.

17. Officer administrative separation is initiated by a formal report of misconduct to Navy Personnel Command (NAVPERS), as required by MILPERSMAN 1611-010, and governed by the procedures in SECNAV Instruction 1920.6D (hereinafter SECNAVINST 1920.6D). The CCDA serves as the "show cause authority" under SECNAVINST 1920.6D, and

[15] "A member, who enters into a written agreement with specified service conditions *for receipt of a bonus, special or incentive pay, educational benefits, stipend, or similar payment* (hereinafter referred to as "pay or benefit") is entitled to the full amount of the pay or benefit if the member fulfills the required conditions. Failure to fulfill the conditions specified in the written agreement may result in termination of the agreement and the member may be required to repay the unearned portion of the pay or benefit." DoD 7000.14-R, Vol VII, Ch. 2, ¶ 020101 ("DoD Financial Management Regulation") (emphasis added). Service members are subject to recoupment if they have entered into a contract agreeing to serve for a specified period of time in exchange for special pay or educational benefits. "Training" is not included in the scope of pay and benefits subject to recoupment.

[16] Navy Enlisted Classifications define the work performed by Navy enlisted members and the requirements to perform specific "ratings" (i.e., occupations). *See generally*, MANUAL OF NAVY ENLISTED MANPOWER AND PERSONNEL CLASSIFICATIONS AND OCCUPATIONAL STANDARDS, VOL II NAVY ENLISTED CLASSIFICATIONS (NAVPERS 18068F), April 21, 2021 (supplementing the enlisted rating structure in identifying personnel and billets [i.e., jobs] and skills, knowledge, aptitude, or qualifications that must be documented to identify both people and billets for management purposes).

requires mandatory show cause proceedings for all officers who refuse the vaccine. Specifically, officers are processed for separation on the bases of Misconduct, Moral or Professional Dereliction, and Substandard Performance. NAVADMIN 225/21 ¶ 7.a. Officers are processed with the least favorable characterization of service[17] as General (Under Honorable Conditions), unless inclusion of another basis for separation warrants a characterization of Other Than Honorable. *Id.*; NAVADMIN 256/21 ¶ 2.a. Final direction regarding administrative separation processing, including basis for separation for vaccine refusals, is expected to be promulgated in December 2021. *Id*. ¶ 4.a.(1).

a. The specific procedures involved with processing an officer for misconduct are outlined in SECNAVINST 1920.6D, Enclosure (6), "Policy Governing Involuntary Separation for Cause or Parenthood", and Enclosure (7), "Guidelines on Separations for Cause." The applicable procedures may vary in certain respects depending on the officer's type of appointment, years of service, and record of performance, amongst other factors.

b. Probationary officers may be processed without a Board of Inquiry (BOI) when the show cause authority determines that an Honorable, or General (under honorable conditions) characterization of service is appropriate. SECNAVINST 1920.6D, Encl (2), ¶ 25; Encl (7), ¶ 3.a. Non-probationary officers must be processed using BOI procedures, which entails a formal administrative hearing over which a panel of no fewer

[17] A characterization of service is assigned to a Service member upon separation from the military and generally reflects the quality of an individual's military service. The highest characterization of service is Honorable, followed by General (Under Honorable Conditions), Other Than Honorable, Bad-Conduct, and Dishonorable. Officers may be awarded a Dismissal, which is akin to a Dishonorable discharge. The first three types of characterization may be awarded using administrative procedures, whereas Bad Conduct and Dishonorable discharges, as well as an officer's Dismissal, are considered "punitive discharges." These types of discharges may only be awarded by a court-martial sentence and imposed after appellate review is complete.

than three senior officers preside in order to make findings with respect to the bases for separation, and recommendations with respect to retention or separation, and character of service. *Id.*, Encl (7) ¶ 4; Encl (11).

18. Administrative separation of enlisted service members is processed under MILPERSMAN 1910-142, "Commission of a Serious Offense." NAVADMIN 225/21 ¶ 7.b. A "serious offense" is one that would warrant a punitive discharge in accordance with the Manual for Courts-Martial (MCM), which includes violations of Article 92, UCMJ. MILPERSMAN 1910-142 ¶ 2.a. The CCDA directs processing with the least favorable characterization of General (Under Honorable Conditions), unless inclusion of another basis for separation warrants other than honorable. NAVADMIN 225/21 ¶ 7.b; NAVADMIN 256/21 ¶ 2.a.

a. Similar to officer administrative separation processing, the applicable procedures may vary in certain respects depending on the service member's specific community (*e.g.*, nuclear-trained Sailors), their years of service, and record of performance, amongst other factors. Processing of enlisted Navy service members is initiated using a NAVPERS form 1910/31, "Administrative Separation Processing Notice," and those service members may be processed using either notification procedures or administrative board procedures under MILPERSMAN 1910-402.

b. Notification procedures are appropriate where the least favorable characterization is General (Under Honorable Conditions). *Id.* ¶ 1.a. For Navy service members with fewer years of service, notification procedures permit an opportunity to consult with counsel and submit matters for consideration to the separation authority. The CCDA serves as the separation authority for cases involving vaccine refusal, unless a higher separation authority is required by MILPERSMAN 1910-704. NAVADMIN

225/21 ¶ 7.b. Navy service members with more than 6 years of service may elect an administrative separation board, which is a formal administrative hearing similar to a BOI except with regards to the composition of board membership and post-hearing administrative processing. *See generally* MILPERSMAN 1910-010 through 1910-710.

19. Timelines to complete administrative processing vary depending on whether the Navy service member is an officer or enlisted Sailor, the efficiency of administrative processing within any given command or unit, and what specific procedures apply to the member's case. For cases involving a Navy service member's vaccine refusal and no other misconduct or basis for separation, the following timelines offer a rough estimate for administrative separation processing:

a. For officers, it generally takes between 6 to 12 months from the time the officer is notified to show cause to the officer's approved separation. It takes approximately 86 days from notification of officer misconduct to NAVPERS before the officer is notified to show cause. The officer ("respondent") normally has 10 working days to respond to the notice, and an extension of time may be granted for good cause. The commanding officer must forward the case to the Secretary of the Navy via NAVPERS and the Chief of Naval Personnel (CNP). Review of the case at each level of review takes approximately 50 to 75 days. In cases where a BOI is required, it typically takes another 120 days to complete all phases of the BOI process. The respondent is afforded a minimum 30 days' notice prior to the board convenes, and may request a continuance not to exceed 30 days for good cause. After review is completed and the officer's separation is approved, the decision is communicated to the command via naval

message. The officer is generally required to complete separation requirements within 60 days of the approved separation notice.

b. Administrative separation of enlisted service members often takes several months, although the range of processing timelines varies more so than with officer processing. Following the notice of administrative separation, the service member generally has two working days to consult with counsel. For probationary service members, the individual may elect to submit matters to the separation authority and is given a reasonable time to do so, typically 5 working days. The commander must then route the case file to the CCDA for action as the separation authority. The approved separation is then forwarded to the command to complete separation processing requirements locally. Where a service member is entitled to, and thereafter elects an administrative separation board, the command must request qualified counsel be assigned to the member. The command and the member's counsel then coordinate to set a date for the administrative hearing. There is no required timeline, but generally the board should occur within 30 days of defense counsel appointment. Following the board, the command must generate a record of the board's proceedings and forward the case file to the CCDA using a formal letter format, which typically takes between 5-10 working days. Where a higher separation authority is required by MILPERSMAN 1910-704, such as for members with greater than 18 years of service or who are pending a Physical Evaluation Board (PEB), the review timelines inherent to officer administrative separation processing apply.

20. While NAVADMIN 225/21 withholds authority to initiate disciplinary either non-judicial punishment or courts-martial for cases involving vaccine refusal, commanders generally

possess a wide array of administrative and disciplinary options with which to dispose of service members' offenses under the UCMJ. Subject to the limits of the commander's authority, the commander's administrative corrective measures include formal or informal counseling, non-punitive letters of caution or censure,[18] withholding of privileges, and extra-military instruction, as governed by the relevant service policy. Disciplinary options include non-judicial punishment under Part V of the MCM, disposition of the charges by court-martial where the commander has the authority to do so, or forwarding of charges for trial by court-martial where the commander does not.

a. Nonjudicial punishment is a forum generally reserved for minor offenses, or those offenses which the maximum sentence would not include a Dishonorable Discharge or confinement for greater than one year if tried by a general court-martial. MCM, Part V ¶ 1.e. Punishments are limited by the rank and position of the cognizant commander, as well as the rank of the person accused of misconduct. *Id.* ¶ 2, 5. Punishments and service limitations are outlined in MCM Part V and the Manual of the Judge Advocate General (JAGMAN), but commonly include some combination of the following: admonishment or reprimand, extra duties, restriction, reduction in rank, or forfeiture of pay. MCM, Part V ¶ 5; JAGMAN, 0111. Commanders are encouraged to permit the accused to speak with counsel subject to the immediate availability of counsel, the delay involved, and operational commitments or military exigencies. JAGMAN 0108 ¶ a.(1). Service members not attached to a vessel have the right to refuse non-judicial punishment and request trial by court-martial. MCM, Part V ¶ 3; JAGMAN 0108 ¶ a. Following

[18] Non-punitive letters of caution or censure are matters between the issuing authority and the counseled member and do not become part of the member's official service record. Manual of the Judge Advocate General (JAGMAN) 105 ¶b.(2).

imposition of non-judicial punishment, the service member has five working days to submit an appeal, and may request additional time for good cause. MCM, Part V ¶ 7. The member's appeal is forwarded, along with the commander's endorsement, to the cognizant general court-martial convening authority for action. MCM, Part V ¶ 7; JAGMAN, 0117.

b. More serious offenses under the UCMJ may be subject to trial by court-martial. There are three types of courts-martial: summary court-martial, special court-martial, and general court-martial. Depending on the rank and position of the commander, he or she may or may not be authorized to convene certain types of courts-martial. UCMJ, 10 U.S.C. § 821-24. Further, the nature of the proceedings and punishments available are limited depending on the forum and rank of the accused. *See* UCMJ, 10 U.S.C. Chapter 47, Subchapters IV, VIII. The most severe punishments, such as the death penalty, a Dishonorable Discharge, Dismissal, or extended periods of confinement, are only available at general courts-martial, and certain offenses are only permitted to be tried by general courts-martial. *Id.* Summary courts-martial are less formal than either special or general courts-martial, which are equivalent in formality and procedure to civilian criminal courts; however, each court-martial forum is governed by the procedures outlined in the MCM, Part II, Rules for Court Martial. Special courts-martial and general courts-martial, in particular, have substantial legal and procedural requirements with respect to pre-trial, trial, and post-trial judicial proceedings.[19] The adjudication of trials by court-martial generally take months before the court is convened,

[19] Relevant to a charge of violation of Article 92 (disobeying a lawful order) for refusal to receive the COVID-19 vaccination, an accused member could choose to raise all available affirmative defenses, including the lawfulness of the order, at court-martial.

and may take several months, depending on the matters involved in the case and the court's docket, prior to the trial date. Upon conclusion of the trial, the member may appeal the findings or sentence as provided in Chapter XI and XII of the MCM.

21. The administrative and disciplinary options available to commanders are the same for both active duty and reserve component Service members; however, the application of such options with respect to Reservists is subject to unique jurisdictional and practical considerations. A member of a Reserve Component on active duty or inactive-duty training is subject to the UCMJ and they may be ordered to active duty for disciplinary proceedings. UCMJ Art. 2, 10 U.S.C. §802; JAGMAN, 0107. Punishments awarded at non-judicial punishment are limited to the duration of the Service member's period of active duty or inactive-duty training. *Id.*, 0112. Special procedures apply to recall members of the reserve component to activity duty for purposes of a court-martial, and such members may be retained on active duty to serve a punishment of confinement or restraint on liberty. *Id.*, 0123. Administrative separation procedures are largely the same as those used with active duty Service members, with minor variations related to composition of the board and post-board administrative processing. *See, e.g.*, SECNAVINST 1920.6D, Encl. 11, ¶ 3.b., and MILPERSMAN 1910-704 (requiring a Reservist member on officer and enlisted administrative separation boards).

22. Any service member who believes he or she has been wronged by his or her commanding officer may seek redress from the commanding officer's immediate superior in command under UCMJ, Article 138, Complaints of wrongs. 10 U.S.C. § 938. Discharged service members may seek a review of his or her discharge through the cognizant Discharge Review Board (DRB). 10 U.S.C. § 1553. The DRB is empowered to change and issue a new discharge on grounds of equity or propriety. 32 C.F.R. § 70.9. DRBs may consider factors such

as the applicant's service history, awards and decorations, letters of commendation or reprimand, wounds received in action, acts of merit, length of service, convictions by court-martial or civilian convictions, non-judicial punishments, records of unauthorized absence, or records relating to the member's discharge. *Id.* Discharged service members may also seek an upgraded discharge from the appropriate Board for Correction of Military Records (BCMR), which is the Board for Correction of Naval Records (BCNR) for the Navy and Marine Corps personnel. 10 U.S.C. § 1552. The BCNR has more extensive authority than DRBs to upgrade discharges, void discharges, alter reenlistment codes, and remove otherwise inaccurate or adverse documents from a service member's record. The removal of inaccurate or wrongfully adverse documents from the service member's record may result in restoration of additional qualification designations, Navy Enlisted Classifications and associated designations and insignia. Additionally, Navy and Marine Corps personnel who have not yet been discharged may petition the BCNR for relief. The BCNR may correct any military record when it is necessary to correct an error or remove an injustice. *Id.* The BCNR's action may result in a member being reinstated in the Navy, which may also result in back pay, including any special duty or incentive pays wrongfully withheld, and retroactive advancement or promotion. If a service member is unable to obtain relief through the appropriate DRB or BCMR, the service member may elect to challenge the agency's decision and administrative proceedings in federal court under applicable federal law.

23. In summary, the Navy is providing its personnel opportunities to seek medical and religious exemptions from the requirement to be vaccinated. For those service members who do not wish to pursue an exemption or have their exemption requests denied after full adjudication including appeals and still refuse to be immunized, the Navy's interest in good order and

discipline is best served by adjudicating each refusal on a case-by-case basis. Each service member will be afforded all due process to which he or she is entitled while fully exhausting intra-service administrative and disciplinary processes that result in a final agency action.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 8th day of December, 2021.

W. R. MERZ

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TE AS

U.S. NAVY SEALs 1-26, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 4:21-cv-01236-O
JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, et al.,	)	
Defendants.	)	

DECLARATION OF COLONEL TONYA RANS

I, Colonel Tonya Rans, hereby state and declare as follows:

1. I am currently employed by the U.S. Air Force as the Chief, Immunization Healthcare Division, Defense Health Agency – Public Health Directorate, located in Falls Church, Virginia. I have held the position since June 2017. I am a medical doctor and have been board certified in Allergy/Immunology since 2008 and was a board certified Pediatrician from 2001-2015.

2. In my current role, my responsibilities include directing a responsive, evidence-based, patient-centered organization promoting optimal immunization healthcare for all DoD beneficiaries and those authorized to receive immunization from DoD. This includes assisting in policy development, providing implementation guidance and education, and engaging in clinical studies and research through clinical collaboration. The Defense Health Agency-Immunization Healthcare Division (DHA-IHD) routinely engages with the medical representatives from the military departments, U.S. Coast Guard, Joint Staff, Combatant Commands, and others to develop

standardized immunization implementation guidance in accordance with published policy for consistency across DoD where possible.

3. I am aware of the allegations set forth in the pleadings filed in this matter. This declaration is based on my personal knowledge, as well as knowledge made available to me during the routine execution of my official duties.

Coronavirus Disease 2019 (COVID-19)

4. As part of my official duties, I served as a member of the COVID-19 Vaccine Distribution Operational Planning Team (OPT), which was directed to develop and implement DoD's COVID-19 Vaccine Distribution plan. The Coronavirus Task Force (CVTF) provided overarching guidance to the OPT. The OPT provided routine and ad hoc updates on COVID-19 vaccine deliveries, administration, and adverse events to the CVTF.

5. The virus that causes COVID-19 disease is SARS-CoV-2, a ribonucleic acid (RNA) virus from the Coronavirus family. Like any RNA virus, the SARS-CoV-2 virus mutates and evolves constantly and regularly as it infects and replicates in host cells. Mutations that are beneficial to the virus (i.e., make the virus more easily spread between hosts, evade the immune system) are integrated into the viral genome, thereby increasing "survival" and replication opportunity. This has been seen with the SARS-CoV-2 "Delta" variant, which is twice as contagious as previous variants.[1] However, not all mutations are beneficial to the virus – some can result in virus death and therefore do not infect the host. This is part of the normal biology cycle of all viruses.

[1] https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html, last accessed December 8, 2021.

6. The latest reports from the U.S. Centers for Disease Control and Prevention (CDC) indicate that the SARS-CoV-2 virus spreads when an infected person breathes out droplets and very small particles that contain the virus.[2] These droplets and particles can be inhaled by other people or land on their eyes, noses, or mouth. In some circumstances, viral particles may contaminate surfaces. People who are closer than 6 feet from the infected person are most likely to get infected, especially in areas where there is poor ventilation.

7. COVID-19 disease can cause acute symptoms such as fever/chills, cough, shortness of breath, fatigue, muscle aches, headache, loss of sense of smell or taste and/or sore throat. Symptoms appear 2-14 days (usually within 4-5 days) after viral exposure.[3] The infection can affect people in different ways: from asymptomatic, to limited and mild (for 2-3 days) to more severe (such as trouble breathing, chest pain, inability to think straight and inability to stay awake). Even with the availability of aggressive medical management and ventilator support in an intensive care setting for those with severe symptoms, hundreds of thousands with COVID-19 disease have died. As of December 1, 2021, CDC reports that over 48 million individuals in the U.S. have been diagnosed with COVID-19 disease, over 3.4 million have been hospitalized, and over 781,000 have died (approximately 1 in 500 in the total U.S. population of 330 million).[4] Per the CDC, the elderly and those with underlying medical conditions like cardiovascular disease, diabetes, chronic

[2] https://www.cdc.gov/coronavirus/2019-ncov/faq.html, last accessed December 7, 2021.

[3] https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html, last accessed December 7, 2021.

[4] https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html, last accessed December 7, 2021.

respiratory disease, obesity, pregnancy, immunocompromising conditions, or cancer are more likely to develop serious illness.[5]

8. Although most people with COVID-19 get better within weeks of illness, some people experience post-COVID-19 conditions (aka long/long-haul COVID, Postacute Sequelae of COVID-19 (PASC), long-term effects of COVID, or chronic COVID). Post-COVID-19 conditions include a wide range of new, returning, or ongoing health problems four or more weeks after infection. Those who were asymptomatic during their COVID-19 infection may still develop post-COVID-19 conditions. One systematic review assessing short and long-term rates of long-COVID in more than 250,000 COVID-19 survivors from 57 studies with an average age of 54 years demonstrated that more than 50 of these COVID-19 survivors continued to have a broad range of symptoms six months after resolution of the acute COVID-19 infection, of which the most common were functional mobility impairments, respiratory abnormalities, and mental health disorders.[6] Another study comparing outcomes in patients referred to outpatient rehabilitation clinics after COVID-19 reported poorer general, mental, and physical health and functioning compared with patients with no previous diagnosis of COVID-19 referred for cancer rehabilitation. Those referred for rehabilitation following COVID-19 were more likely to be male, younger, and employed.[7] A study assessing clinical patterns and recovery time from COVID-19 illness in 147 international-level Paralympic and Olympic athletes showed that 86% had symptoms lasting ≤ 28

[5] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html, last accessed December 7, 2021.

[6] Groff, et al, *M e r e* , Short-term and Long-term Rates of Postacute Sequelae of SARS-CoV-2 Infection, https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2784918.

[7] Rogers-Brown JS, et al. CDC Morbidity and Mortality Weekly Report, Vol 70(27) 9 July 2021 https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7027a2-H.pdf.

days, whereas 14 had symptoms of longer duration. In both groups, fatigue, dry cough, and headache were the predominant symptoms.[8] As described further below, myocarditis associated with COVID-19 disease or mRNA COVID-19 vaccine is rare. However, the risk of myocarditis associated with COVID-19 disease is consistently higher than the risk of myocarditis associated mRNA COVID-19 vaccine. Hence, the risk to benefit ratio continues to be in favor of vaccination.

COVID-19 Impacts on the Force

9. Infectious diseases have been the single greatest threat to the health of those involved in military operations. As the standard military unit shrinks and becomes more mobile to rapidly respond to global threats, any decrease in personal or unit readiness can significantly decrease operational efficiency and result in military ineffectiveness. Similar to other viruses, SARS-CoV-2 virus can be easily transmitted to others prior to symptom development and therefore may infect significant numbers before being identified. DoD personnel, including service members, especially those in an operational setting (such as those working on ships, submarines, or engaged in the operation of aircraft and vehicles; those deployed to austere environments; or those engaged in routine field training and airborne exercises), work in environments where duties may limit the ability to strictly comply with mitigation measures such as wearing a face mask, avoiding crowded areas, maintaining physical distancing of at least 6 feet, increasing indoor ventilation, maintaining good hand hygiene, and quarantining if in close contact with a COVID-19 case. Therefore, upon exposure, these individuals may be at higher risk to be diagnosed with COVID-19 compared to those who can robustly maintain all recommended mitigation strategies. Further, although the elderly population and those with medical conditions

[8] Hull JH, et al. Clinical patterns, recovery time and prolonged impact of COVID-19 illness in international athletes: the UK experience. *r S r Med* 2021;0:1-8. Doi 10.1136/bjsports-2021-104392.

are more likely to have severe disease, otherwise healthy Service members have developed "long-haul" COVID-19, potentially impacting their ability to perform their missions. Data presented from DoD's COVID-19 registry has demonstrated that of 111,767 active duty service members who had COVID-19 disease between February 1, 2020 to August 12, 2021, 37,838 (33.9) had diagnoses for conditions requiring a healthcare visit 30-180 days following their illness, the most common being joint/muscle pain (15,614 or 14) followed by chest pain/cough (7,887 or 7.1). In comparison, only 8.3 and 1.81 , respectively, of active duty service members had a healthcare visit for those diagnoses 30-180 days after vaccination. All diagnoses associated with "Long-COVID-19 Syndrome" were found to be more common after COVID-19 disease than after COVID-19 vaccination. Some service members have unfortunately succumbed to the disease, as described further below. Service members and federal civilian employees are the military's most valuable asset; without a medically ready force and ready medical force, the military mission is at high risk of failure. Recommendations from evidence-based medicine must remain the core approach to medical readiness. These evidence-based recommendations will continue to be updated as our understanding of the disease, complications, and impact from vaccination continues to evolve.

10. Between February 2020 and November 2021, there were 209,133 new and repeat cases of COVID-19 among active duty service members (see "Table" below). The largest monthly peak in cases occurred in January 2021, with 28,345 cases identified (see "Figure" below). Other peaks occurred in August 2021 with 22,042 cases and in July 2020 with 11,610 cases. The percentage of cases that were hospitalized was highest at the start of the pandemic and trended downward through January 2021. The percentage of hospitalized cases then increased from 0.9 in January 2021 to 2.1 in May 2021, and decreased to 1.5 in September 2021. The

percentage of hospitalized cases decreased to 0.8 in November 2021, but this trend should be interpreted with caution due to data lags. In total, 30 active duty service members have died from COVID-19 as of the end of November 2021. The number of active duty service members who died from COVID-19 remained very low throughout the first year of the pandemic, with a slight increase in the numbers of deaths occurring between December 2020 and February 2021, and a greater increase occurring between August and October 2021, coinciding with the increased spread of the Delta variant. More than one-half of the 30 deaths in active duty service members occurred between August and October 2021 (n=17). One active duty service member died from COVID-19 in November 2021.

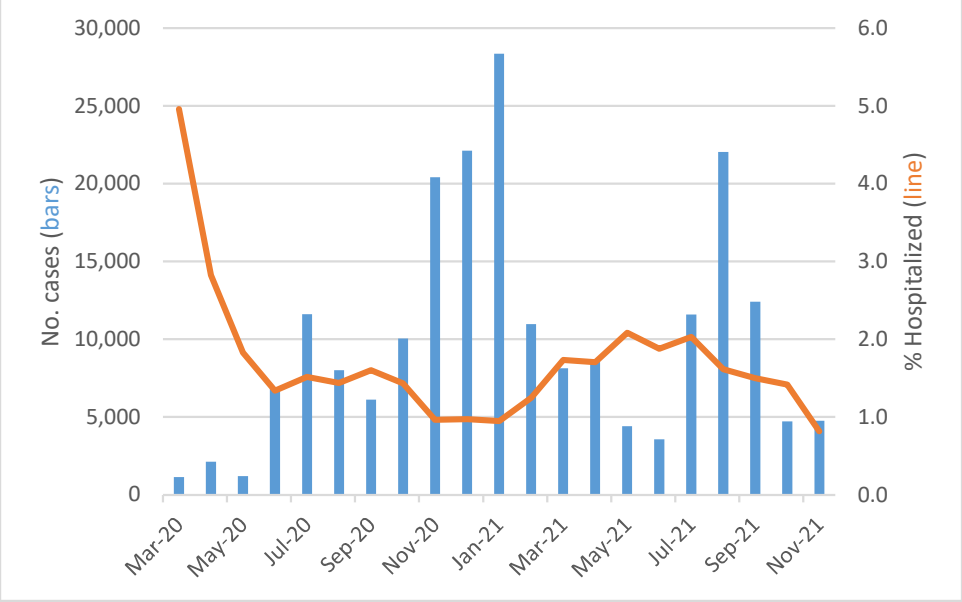
Table. COVID-19 cases, hospitalizations, and deaths among active duty service members, February 2020 - November 2021

	No. cases	No. hospitalizations	hospitalizations	No. deaths
Feb-20	7	2	28.6	0
Mar-20	1,150	57	5.0	0
Apr-20	2,126	60	2.8	1
May-20	1,204	22	1.8	0
Jun-20	6,789	91	1.3	0
Jul-20	11,610	176	1.5	0
Aug-20	8,010	115	1.4	0
Sep-20	6,118	98	1.6	0
Oct-20	10,047	144	1.4	1
Nov-20	20,419	197	1.0	0
Dec-20	22,115	215	1.0	2

Jan-21	28,345	269	0.9	2
Feb-21	10,981	137	1.2	4
Mar-21	8,132	141	1.7	0
Apr-21	8,571	146	1.7	1
May-21	4,417	92	2.1	0
Jun-21	3,569	67	1.9	0
Jul-21	11,583	235	2.0	1
Aug-21	22,042	356	1.6	5
Sep-21	12,406	186	1.5	6
*Oct-21	4,723	67	1.4	6
*Nov-21	4,769	39	0.8	1

*Hospitalization data not complete due to data lags

Figure. COVID-19 cases among active duty service members and percentage of cases that were hospitalized, March 2020 – November 2021



Note: February 2020 is not shown due to the very small number of cases. Hospitalization data for October-November 2021 not complete due to data lags

11. The DoD has provided information on its website concerning the number of vaccinations provided by DoD, the vaccination of the force, and health impact of those who developed COVID-19 infections.[9] As depicted below, December 1, 2021 data, demonstrated that of the 393,671 COVID-19 cases within the DoD, 5,544 individuals were hospitalized and 612 have died, including 77 military service members (service members include Active Duty, Reserves, and National Guard personnel). In both the civilian sector and in the military, the overwhelming majority of individuals hospitalized or who died were not vaccinated or not fully vaccinated.

DOD COVID-19 CUMULATIVE TOTALS

	Cases	Hospitalized	Recovered	Deaths
Military	254,805	2,291	251,305	77
Civilian	73,029	2,073	65,123	376
Dependent	41,060	494	40,059	33
Contractor	24,777	686	23,404	126
Total	393,671	5,544	379,891	612

12. The bed capacity at DoD's military medical treatment facilities (MTFs) has generally followed local civilian hospital utilization, with some MTFs having high admission rates and a need to temporarily curtail medical services. The National Guard has been called on extensively to provide medical support to the civilian population throughout the pandemic and Services have also provided "manning assist" to other DoD MTFs and civilian hospitals.

[9] https://www.defense.gov/Spotlights/Coronavirus-DOD-Response/, last accessed December 7, 2021.

Vaccine Impacts

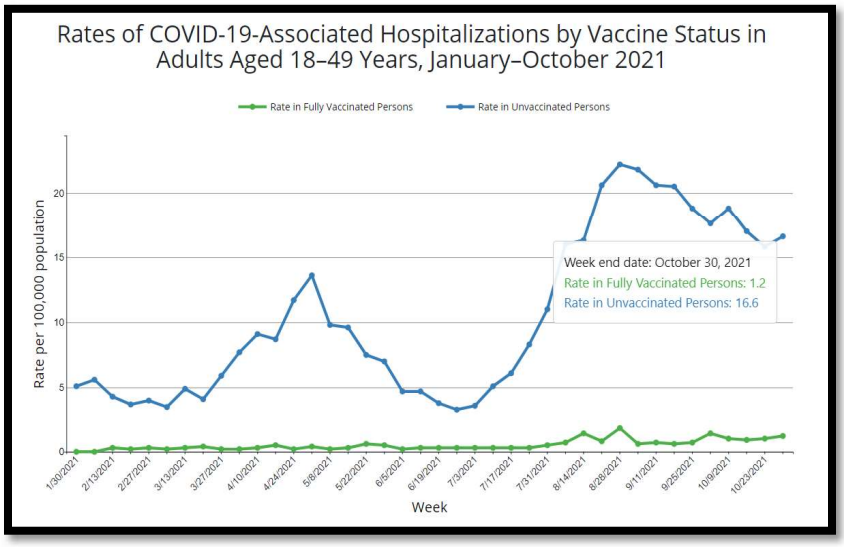
13. Immunization is a global health and development success story, saving millions of lives across the age spectrum annually from illness, chronic conditions, and potentially death. Immunizations provide benefit at both the individual and community level. First, by stimulating an active immune response, vaccinated individuals are largely protected from the disease of concern. Second, when a high proportion of individuals are immune (i.e., herd immunity) human-to-human transmission is disrupted, thereby protecting those who remain susceptible (i.e., those who may not be able to receive a vaccine or do not mount an adequate antibody response). Disease prevention through immunization also mitigates the need for pharmacologic treatment (antibiotics, etc.), reducing the risk of drug-resistant pathogen development.

14. As a key component of primary health care, the U.S. Food and Drug Administration (FDA), which provides regulatory allowance for immunizations, has licensed vaccines for over 20 different infectious diseases. The Advisory Committee on Immunization Practices (ACIP), an advisory committee of the CDC, develops recommendations on how to use vaccines to control diseases in the United States. The military also maintains awareness, surveillance, and provides guidance to DoD personnel and beneficiaries on vaccine-preventable diseases in the global setting.

15. According to the CDC, over 471 million doses of COVID-19 vaccine have been given in the United States from December 14, 2020, through December 6, 2021.[10] Evidence continues to show that the incidence of SARS-CoV-2 infection, hospitalization, and death is higher in unvaccinated than vaccinated persons. Although weekly rates can vary, the cumulative rate of

[10] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html, last accessed December 7, 2021.

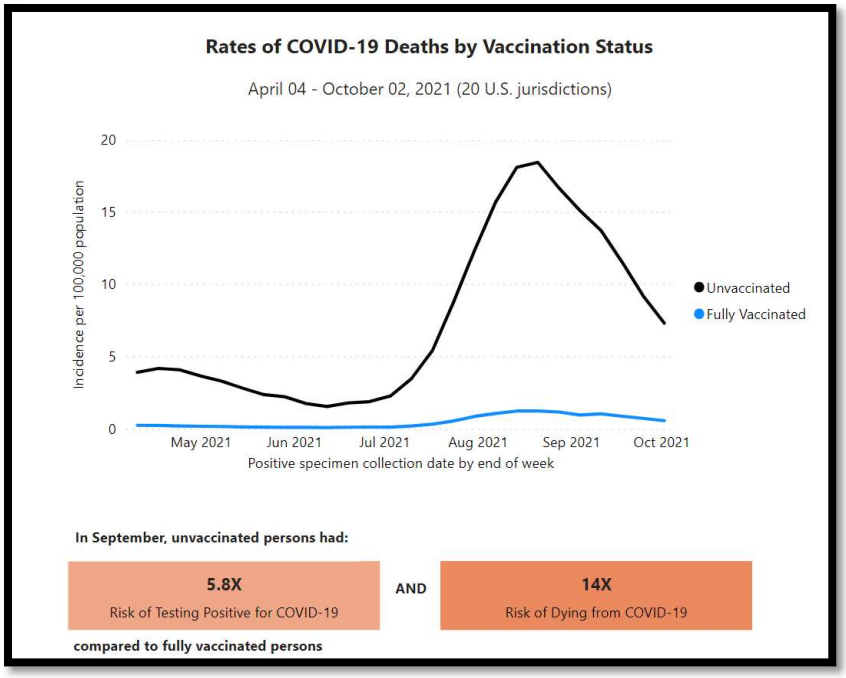
COVID-19 associated hospitalizations in unvaccinated adults ages 18-49 years was about 13 times higher than fully vaccinated adults aged 18-49 years.[11]

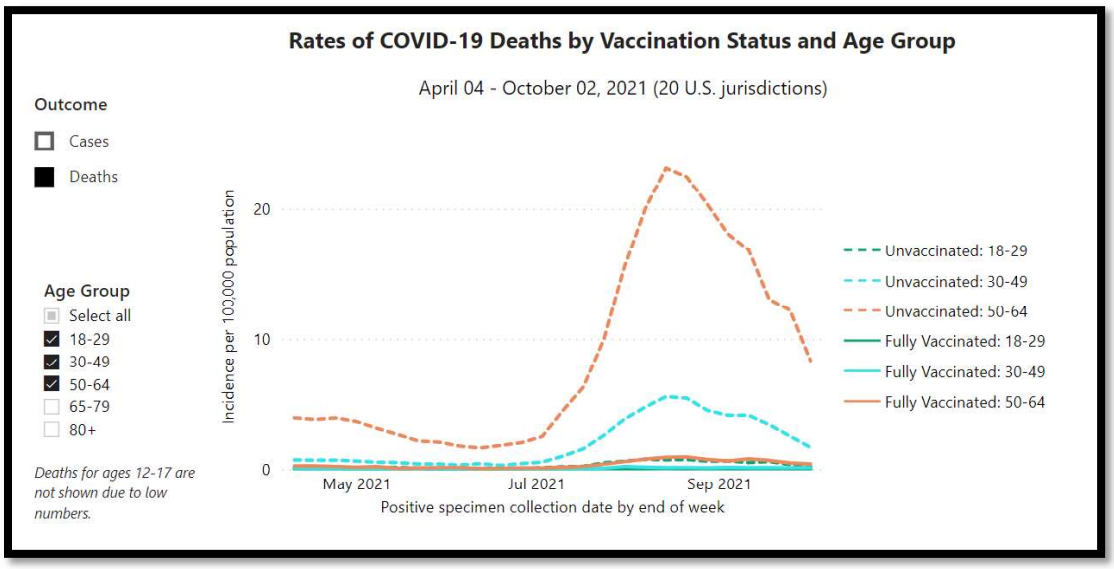


Also, according to CDC data, deaths by vaccination status from April 4, 2021-October 2, 2021 showed that unvaccinated persons had a 5.8 times greater risk of testing positive for COVID-19 and a 14 times greater risk of dying from COVID-19.[12]

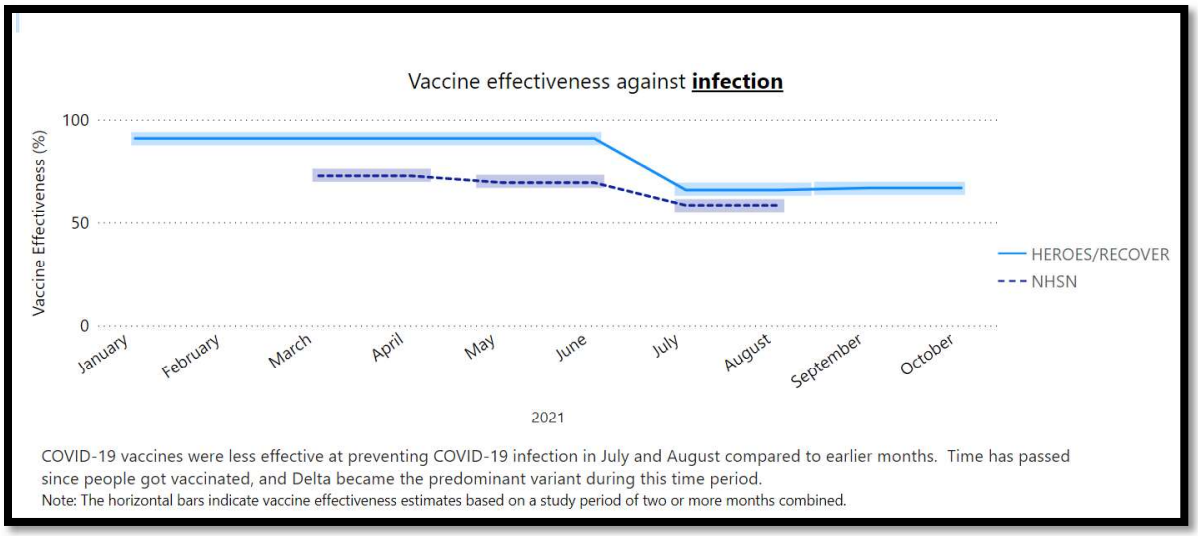
[11] https://covid.cdc.gov/covid-data-tracker/ covidnet-hospitalizations-vaccination, last accessed December 7, 2021.

[12] https://covid.cdc.gov/covid-data-tracker/ rates-by-vaccine-status, last accessed November 18, 2021.

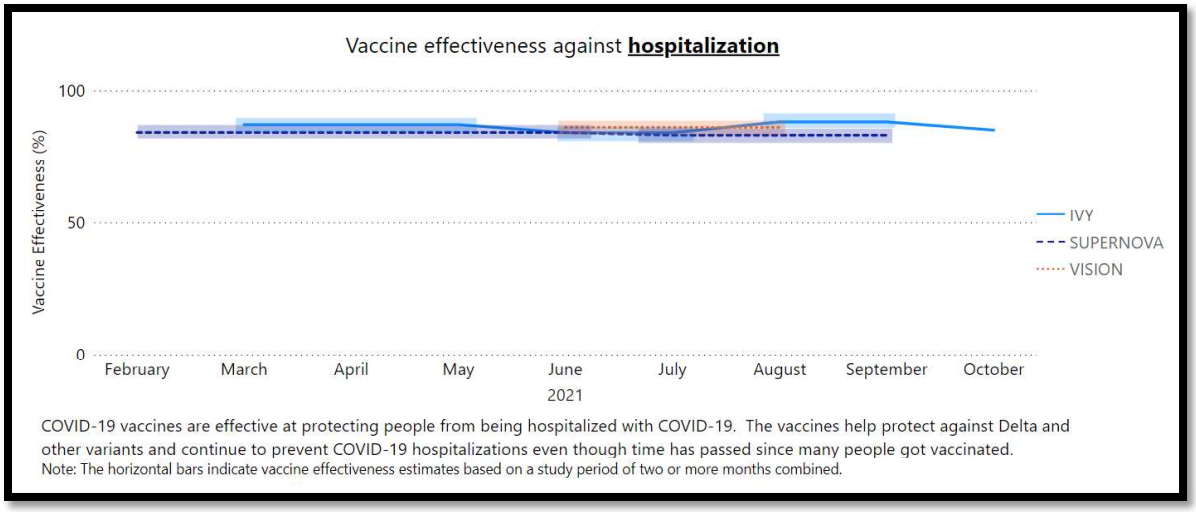

Rates of COVID-19 Deaths by Vaccination Status
April 04 - October 02, 2021 (20 U.S. jurisdictions)
Incidence per 100,000 population
20
15
10
5
0
May 2021
Jun 2021
Jul 2021
Aug 2021
Sep 2021
Oct 2021
Positive specimen collection date by end of week
Unvaccinated
Fully Vaccinated
In September, unvaccinated persons had:
5.8X
Risk of Testing Positive for COVID-19
AND
14X
Risk of Dying from COVID-19
compared to fully vaccinated persons


Rates of COVID-19 Deaths by Vaccination Status and Age Group
April 04 - October 02, 2021 (20 U.S. jurisdictions)
Outcome
Cases
Deaths
Age Group
Select all
18-29
30-49
50-64
65-79
80+
Deaths for ages 12-17 are not shown due to low numbers.
Incidence per 100,000 population
20
10
0
May 2021
Jul 2021
Sep 2021
Positive specimen collection date by end of week
Unvaccinated: 18-29
Unvaccinated: 30-49
Unvaccinated: 50-64
Fully Vaccinated: 18-29
Fully Vaccinated: 30-49
Fully Vaccinated: 50-64

16. Although COVID-19 vaccine effectiveness against **infection** has decreased over time, this is seen more significantly in individuals 65 years of age and older. COVID-19 vaccine effectiveness against severe disease (hospitalization and death) remains high.[13]



[13] https://covid.cdc.gov/covid-data-tracker/ vaccine-effectiveness, last accessed December 7, 2021.



17. As of December 7, 2021, DoD immunization sites have administered over 6.4 million doses of COVID-19 vaccine. Vaccine adverse events that are potentially related to vaccination are centrally captured through the Vaccine Adverse Event Reporting System (VAERS) through passive surveillance, meaning that information is voluntarily reported by health care providers and the public. As of November 23, 2021, a total of 7,369 unique VAERS reports (approximately 11 VAERS reports/10,000 doses administered) were submitted by DoD beneficiaries or those authorized to receive vaccine from DoD. Note that the number of VAERS reports/10,000 doses administered for DoD beneficiaries is likely to be lower, as the denominator does not take into account beneficiaries who receive vaccine in the civilian sector though DoD would still receive their VAERS report if the submitter indicated military affiliation. Additionally, individuals who had an adverse event but did not submit a VAERS would not be known and therefore would not be counted. Of note, a VAERS submission to the CDC does not mean that the vaccine of concern caused or contributed to the medical issue reported.

18. As of December 2021, the DoD has received hundreds of thousands of BLA-manufactured, EUA-labeled vaccine doses and is using them.

19. Approach to immunizations within DoD are outlined in DoD Instruction 6205.02, "DoD Immunization Program" dated June 19, 2019, which states that it is DoD policy that all DoD personnel and other beneficiaries required or eligible to receive immunizations will be offered immunizations in accordance with recommendations from the CDC and its ACIP. Army Regulation 40-562, Navy Bureau of Medicine and Surgery Instruction 6230.15B, Air Force Instruction 48-110_IP, Coast Guard Commandants Instruction M6230.4G, "Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases," October 7, 2013, further states the Military Service policy concerning immunizations follows the recommendations of the CDC, ACIP, and the prescribing information on the manufacturer's package inserts, unless there is a military-relevant reason to do otherwise. This document does also describe general examples of medical exemptions, which include "evidence of immunity based on serologic tests, documented infection, or similar circumstances." Some interpret this as a diagnosis of COVID-19 disease and/or results of a COVID-19 serologic test means that a medical exemption should be granted. However, of significance is the phrase "evidence of immunity." CDC defines immunity as "protection from an infectious disease. If you are immune to a disease, you can be exposed to it without becoming infected."[14] There are two major types of testing available for COVID-19: diagnostic tests, which assess for current infection, and antibody tests, which assesses for antibody production, indicative of either past infection and (in some tests) a history of vaccination. The FDA states, "We do not know how long antibodies stay in the body following infection with the virus that causes COVID-19. We do not know if antibodies give you protective immunity against the virus, so results from a serology test should not be used to find out if you have immunity from

[14] https://www.cdc.gov/healthyschools/bam/diseases/vaccine-basics.htm, accessed December 9, 2021.

the virus. The FDA cautions patients against using the results from any serology test as an indication that they can stop taking steps to protect themselves and others, such as stopping social distancing or discontinuing wearing masks."[15] As described below, lab test results also state that it is unclear at this time if a positive IgG infers immunity against future COVID-19 infection. Therefore, given the scientific evidence available at this time, a medical exemption based on the history of COVID-19 disease or serology results does not meet "evidence of immunity". The presence of antibodies is not the same thing as being immune.

20. The CDC states that "COVID-19 vaccination is recommended for everyone aged 5 years and older, regardless of a history of symptomatic or asymptomatic SARS-CoV-2 infection; this includes people with prolonged post-COVID-19 symptoms and applies to primary series doses, additional primary doses, and booster doses. Viral testing to assess for acute SARS-CoV-2 infection or serologic testing to assess for prior infection is not recommended for the purpose of vaccine decision-making. Present data are insufficient to determine an antibody titer threshold that indicates when an individual is protected from SARS-CoV-2 infection. There is neither any FDA-authorized or FDA-approved test nor any other scientifically validated strategy that vaccination providers or the public can use to reliably determine whether a person is protected from infection. Data from multiple studies indicate that the currently approved or authorized COVID-19 vaccines can be given safely to people with evidence of a prior SARS-CoV-2 infection."[16]

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[15] https://www.fda.gov/consumers/consumer-updates/coronavirus-disease-2019-testing-basics, accessed December 9, 2021.

[16] https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html?CDC_AA_refVal=https 3A 2F 2Fwww.cdc.gov 2Fvaccines 2Fcovid-19 2Finfo-by-product 2Fclinical-considerations.html, accessed December 9, 2021.

21. Further, CDC states "current evidence suggests that the risk of SARS-CoV-2 reinfection is low after a previous infection but may increase with time due to waning immunity. Among individuals infected with SARS-CoV-2, substantial heterogeneity exists in their immune response. (The term "heterogeneity" means that those individuals have diverse or varying immune responses which, when compared to the subsequent response of those receiving the COVID-19 vaccine, are not as reliable or consistent.) Conversely, the immune response following COVID-19 vaccination is more reliable, consistent, and predictable. A primary vaccination series decreases the risk of future infections in people with prior SARS-CoV-2 infection. Numerous immunologic studies have consistently shown that vaccination of individuals who were previously infected enhances their immune response, and growing epidemiologic evidence indicates that vaccination following infection further reduces the risk of subsequent infection, including in the setting of increased circulation of more infectious variants".[17]

22. Although natural infection for some diseases, in some cases, can result in long-standing immunity (e.g., measles), there is risk of untoward outcomes from the disease itself, which can be chronic or even fatal. Examples of harmful outcomes outside of COVID-19 include Pneumonia or invasive group B Strep from chickenpox, meningitis or epiglottitis from *e* *e* type B, birth defects from rubella, liver cancer from Hepatitis B, and death from measles.

23. Other examples of natural infections that do not mount long-standing immunity include Influenza, Respiratory Syncytial Virus, Malaria, Whooping cough, and rotavirus;

[17] https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html?CDC_AA_refVal=https 3A 2F 2Fwww.cdc.gov 2Fvaccines 2Fcovid-19 2Finfo-by-product 2Fclinical-considerations.html, accessed December 9, 2021.

therefore, re-infection is possible. Multiple serotypes of some pathogen like influenza, pneumococcus, and possibly with the SARS-CoV-2 variants also makes determination of a protective serologic level more difficult, especially to say there is lifelong immunity.

24. In October 2021, prior to the presentation of the Omicron variant, the newest SARS-CoV2 variant of concern, CDC summarized a review of 96 peer-reviewed and preprint publications, providing an overview of current scientific evidence regarding infection-induced immunity.[18] Key findings include the following:

- Available evidence shows that fully vaccinated individuals and those previously infected with SARS-CoV-2 each have a low risk of subsequent infection for at least 6 months. Data are presently insufficient to determine an antibody titer threshold that indicates when an individual is protected from infection. At this time, there is no FDA-authorized or approved test that providers or the public can use to reliably determine whether a person is protected from infection.
    - The immunity provided by vaccine and prior infection are both high but not complete (i.e., not 100).
    - Multiple studies have shown that antibody titers correlate with protection at a population level, but protective titers at the individual level remain unknown.
    - Whereas there is a wide range in antibody titers in response to infection with SARS-CoV-2, completion of a primary vaccine series, especially with mRNA vaccines, typically leads to a more consistent and higher-titer initial antibody response.

[18] https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/vaccine-induced-immunity.html, accessed December 9, 2021.

- For certain populations, such as the elderly and immunocompromised, the levels of protection may be decreased following both vaccination and infection.
- Current evidence indicates that the level of protection may not be the same for all viral variants.
- The body of evidence for infection-induced immunity is more limited than that for vaccine-induced immunity in terms of the quality of evidence (e.g., probable bias towards symptomatic or medically-attended infections) and types of studies (e.g., observational cohort studies, mostly retrospective versus a mix of randomized controlled trials, case-control studies, and cohort studies for vaccine-induced immunity). There are insufficient data to extend the findings related to infection-induced immunity at this time to persons with very mild or asymptomatic infection or children.

25. Debate continues about whether natural immunity versus vaccine-induced immunity is more protective against breakthrough infections (a reinfection in someone who was previously infected versus an infection in a previously not infected individual who was fully immunized). A frequently cited, though not peer reviewed, retrospective study from Israel found that the rates of SARS-CoV-2 breakthrough infections in vaccinated individuals, while very low (highest rate = 1.5), were 13 times higher than the rates of reinfection and hospitalization in previously infected individuals[19]. These findings have not been reproduced in a peer-reviewed publication. However, an observational study,[20] also out of Israel,

[19] https://www.medrxiv.org/content/10.1101/2021.08.24.21262415v1, last accessed December 9, 2021

[20] Barda N, et al. Safety of the BNT162b2 mRNA COVID-19 Vaccine in a Nationwide Setting N Engl J Med 2021; 385:1078-1090

compared adverse events in Pfizer-BioNTech vaccinated versus unvaccinated individuals in addition to those who had a history of COVID-19 disease versus those who did not. As previously identified in multiple studies, vaccination with a mRNA vaccine like Pfizer-BioNTech was associated with an elevated risk of myocarditis compared to those unvaccinated (risk difference 2.7 events/100,000 people). However, when assessing the relative risk in those with a history of COVID-19 disease with those who did not have disease, the risk of myocarditis was substantially higher in those who had COVID-19 disease (risk difference of 11 events/100,000 persons). The risk difference is calculated as the difference between the observed risks in the two groups.

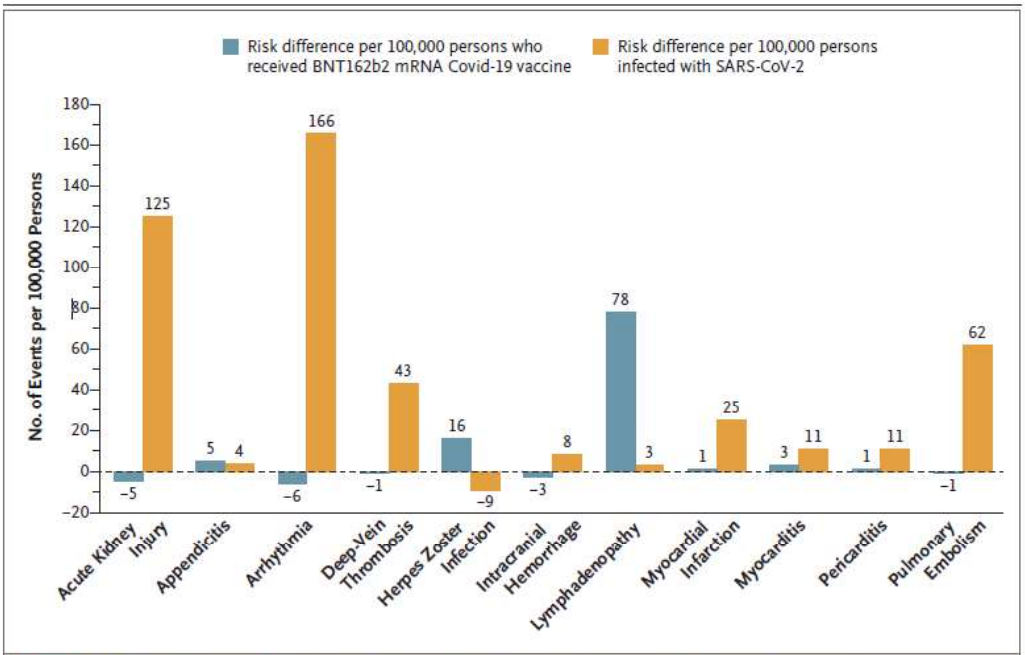

Figure 4. Absolute Excess Risk of Various Adverse Events after Vaccination or SARS-CoV-2 Infection.
Point estimates of the risk differences for selected adverse events are shown. Estimates were derived 42 days after vaccination or SARS-CoV-2 infection with the use of the Kaplan–Meier estimator. Risk differences are shown per 100,000 persons and rounded to the nearest integer. Negative differences (decreased risk) are represented as negative values on the y axis, and positive differences (increased risk) are represented as positive values on the y axis. The abbreviation mRNA denotes messenger RNA.

The Omicron variant

26. On November 26, 2021, the World Health Organization (WHO) designated the Omicron variant a "variant of concern", upon recommendations of the Technical Advisory Group on SARS-CoV-2 Virus Evolution, which assesses if specific mutations and combinations of mutations alter the behavior of the virus.[21] The United States designated Omicron as a variant of concern on November 30, 2021 and following first detection in the United States on December 1, 2021, it has rapidly spread throughout the United States.[22] Very preliminary data suggests that the omicron variant may spread more easily than the original SARS-CoV-2 virus, and it is unknown how transmission compares to the Delta variant. Severity of disease caused by Omicron in those who are unvaccinated, had a previous history of disease, and in the unvaccinated population is unknown. Protection against the Omicron variant in those previously infected with COVID-19 is not yet understood. Vaccine effectiveness of current FDA-approved/authorized and WHO-Emergency Use List COVID-19 vaccines is also unclear, but preliminary data is expected in the next few weeks. Nevertheless, the CDC has stated that "vaccination is anticipated to continue to offer protection against hospitalization and death, and vaccines continue to play a critical role in controlling the COVID-19 pandemic."[23]

Risks from COVID-19 Vaccination

[21] https://www.who.int/news/item/26-11-2021-classification-of-omicron-(b.1.1.529)-sars-cov-2-variant-of-concern, last accessed December 9, 2021.

[22] https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html, last accessed December 9, 2021.

[23] https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/scientific-brief-omicron-variant.html, last accessed December 9, 2021.

27. Risks from immunization, including COVID-19 vaccines are rare. CDC provides routine updates on specific adverse events temporally associated with COVID-19 vaccines.[24] CDC updates as of November 30, 2021, include the following:

A. **Anaphylaxis after COVID-19 vaccination is rare** and has occurred in approximately 2 to 5 people per million vaccinated in the United States.

B. **Thrombosis with thrombocytopenia syndrome (TTS) after Johnson Johnson s Janssen (J J Janssen) COVID-19 vaccination is rare.** As of November 24, 2021, more than 16.4 million doses of the J&J/Janssen COVID-19 Vaccine have been given in the United States. CDC and FDA identified 54 confirmed reports of people who got the J&J/Janssen COVID-19 Vaccine and later developed TTS. Women younger than 50 years old especially should be aware of the rare but increased risk of this adverse event.

C. Guillain-Barre Syndrome - CDC and FDA are monitoring reports of Guillain-Barr Syndrome (GBS) in people who have received the J&J/Janssen COVID-19 Vaccine. GBS is a rare disorder where the body's immune system damages nerve cells, causing muscle weakness and sometimes paralysis. Most people fully recover from GBS, but some have permanent nerve damage. After more than 16.4 million J&J/Janssen COVID-19 Vaccine doses administered, there have been around 268 preliminary reports of GBS identified in VAERS as of November 24, 2021. These cases have largely been reported about 2 weeks after vaccination and mostly in men, many 50 years and older. CDC will continue to monitor for and evaluate reports of GBS

[24] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html, last accessed December 9, 2021.

occurring after COVID-19 vaccination and will share more information as it becomes available.

D. **Myocarditis and pericarditis after COVID-19 vaccination are rare.** As of November 24, 2021, VAERS has received 1,949 reports of myocarditis or pericarditis among people ages 30 and younger who received COVID-19 vaccines. Most cases have been reported after mRNA COVID-19 vaccination (Pfizer-BioNTech or Moderna), particularly in male adolescents and young adults.. Through follow-up, including medical record reviews, CDC and FDA have confirmed 1,071reports of myocarditis or pericarditis.

E. **Reports of death after COVID-19 vaccination are rare**. More than 459 million doses of COVID-19 vaccines were administered in the United States from December 14, 2020, through November 29, 2021. During this time, VAERS received 10,128 reports of death (0.0022) among people who received a COVID-19 vaccine. FDA requires healthcare providers to report any death after COVID-19 vaccination to VAERS, even if it's unclear whether the vaccine was the cause. **Reports of adverse events to VAERS following vaccination, including deaths, do not necessarily mean that a vaccine caused a health problem.** A review of available clinical information, including death certificates, autopsy, and medical records, has not established a causal link to COVID-19 vaccines. However, recent reports indicate a plausible causal relationship between the J&J/Janssen COVID-19 Vaccine and TTS, a rare and serious adverse event that causes blood clots with low platelets, which has caused 6 deaths.

28. Additionally, on October 27 2021, the COVID-19 subcommittee of the WHO Global Advisory Committee on Vaccine Safety (GACVS) provided an updated statement regarding

myocarditis and pericarditis reported with COVID-19 mRNA vaccines, stating, in part: The GACVS COVID-19 subcommittee notes that myocarditis can occur following SARS-CoV-2 infection (COVID-19 disease) and that mRNA vaccines have clear benefit in preventing hospitalisation and death from COVID-19. Countries should continue to monitor reports of myocarditis and pericarditis following vaccination by age, sex, dose and vaccine brand. Countries should consider the individual and population benefits of immunization relevant to their epidemiological and social context when developing their COVID-19 immunisation policies and programs.[25]

COVID-19 Antibody Tests

29. As described above, testing to assess for acute SARS-CoV-2 infection or serologic testing to assess for prior infection is not recommended for the purposes of vaccine decision-making. As of December 9, 2021, the FDA's EUA Authorized Serology Test Performances[26] lists approximately 90 products, of which all of them had one of the following three statements about immunity interpretation:

A. "You should not interpret the results of this test as an indication or degree of immunity or protection from reinfection."[27]

[25] https://www.who.int/news/item/27-10-2021-gacvs-statement-myocarditis-pericarditis-covid-19-mrna-vaccines-updated, last accessed December 9, 2021.

[26] https://www.fda.gov/medical-devices/coronavirus-disease-2019-covid-19-emergency-use-authorizations-medical-devices/eua-authorized-serology-test-performance, last accessed December 9, 2021.

[27] https://www.fda.gov/media/146369/download, last accessed December 9, 2021.

B. "It is unknown how long antibodies to SARS-CoV-2 will remain present in the body after infection and if they confer immunity to infection. Incorrect assumptions of immunity may lead to premature discontinuation of physical distancing requirements and increase the risk of infection for individuals, their households and the public."[28]

C. "It is unknown how long (IgA, IgM or IgG) antibodies to SARS-CoV-2 will remain present in the body after infection and if they confer immunity to infection. A positive result for test may not mean that an individual's current or past symptoms were due to COVID-19 infection."[29]

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on December 10, 2021, in Falls Church, Virginia

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[28] https://www.fda.gov/media/138627/download, last accessed December 9, 2021.

[29] https://www.fda.gov/media/137542/download, last accessed December 9, 2021.