No. 21A_____

# In the Supreme Court of the United States

LT. COL. JONATHAN DUNN, *Applicant*,

*v.*

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

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

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

**RELIEF REQUESTED BEFORE APRIL 26, 2022**


GENE C. SCHAERR
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street NW
Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
gschaerr@schaerr-jaffe.com

DONALD M. FALK
*Counsel of Record*
SCHAERR | JAFFE LLP
Four Embarcadero Center
Suite 1400
San Francisco, CA 94111
Telephone: (415) 562-4942
dfalk@schaerr-jaffe.com

*Counsel for Applicant Lt. Col. Jonathan Dunn*

## QUESTION PRESENTED

Applicant, a lieutenant colonel in the Air Force Reserve, has served since 2003, with more than a decade on active duty. He contracted COVID-19 in summer 2021 and acquired natural immunity to the disease. Shortly afterward, the Air Force instituted a COVID-19 vaccine mandate. 98% of all airmen have now been vaccinated; more than 2000 airmen are subject to medical and administrative exemptions. Applicant has sincere religious objections to the COVID-19 vaccine. Respondents nonetheless denied his request for a religious exemption to the vaccine mandate, and the district court denied a preliminary injunction and an injunction pending appeal. While the motion for a preliminary injunction was pending, respondents removed applicant from his command; he does not seek reinstatement to that post, but seeks only protection against further punishment, including a discharge, because of his religious beliefs. After entering interim relief, the United States Court of Appeals for the Ninth Circuit denied an injunction pending appeal in a one-page order over a dissent by Judge Bade.

The question presented is whether the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause of the First Amendment allow military authorities to permit secular exceptions to challenged conduct while categorically denying all religious accommodations based on a broad asserted interest rather than an individualized assessment of the efficacy of less restrictive measures to serve the interest as properly defined in terms of the particular claimant.

## PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption.

## RELATED PROCEEDINGS

Applicant's interlocutory appeal is pending in the United States Court of Appeals for the Ninth Circuit, *Dunn* v. *Austin*, No. 22-15286. That court denied an injunction pending appeal on April 1, 2022.

Applicant's action for injunctive relief and damages is pending in the United States District Court for the Eastern District of California, *Dunn* v. *Austin*, No. 22-cv-288-JAM-KJN.

## DECISIONS BELOW

The order of the court of appeals is unreported and is attached as App. 1a. The order of the district court denying an injunction pending appeal is unreported and is attached as App. 2a. The order of the district court denying a preliminary injunction is unreported and is attached as App. 3a. The transcript of the hearing at which the district court stated its reasons denying a preliminary injunction is attached as App. 4a-53a.

## JURISDICTION

Applicant has a pending appeal in the United States Court of Appeals for the Ninth Circuit, which has jurisdiction under 28 U.S.C. § 1292(a)(1). The court of appeals denied an injunction pending appeal on April 1, 2022. This Court has jurisdiction over this request for interim injunctive relief under the All Writs Act, 28 U.S.C. § 1651(a). The Court will have jurisdiction over applicant's petition for certiorari under 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

### U.S. Const., amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]

### 42 U.S.C. § 2000bb-1

**(a) In general**

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

**(b) Exception**

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.

**(c) Judicial relief**

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

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## INTRODUCTION

Is the military immune from the accommodation requirements of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*., and the Free Exercise Clause, as a practical matter, when COVID-19 vaccination mandates are involved? This case will give the lower courts and, ultimately, this Court an opportunity to answer that important question.

Applicant Lt. Col. Jonathan Dunn repeatedly put his life on the line to defend his country, flying combat missions over hostile territory during three deployments to Afghanistan. Yet after nearly two decades of faithful service as a pilot, trainer, and commander—and although he has already recovered from a COVID-19 infection—respondents relieved him of his command because of his religious objections to the vaccine. They now seek to reprimand him and send him to the Individual Ready Reserve ("IRR"), where he could not serve in any unit or be eligible for training opportunities.

Applicant does not ask this Court (and did not ask the courts below) to reinstate his command, and the relief sought here would not prevent the Air Force from "considering" his "vaccination status in making deployment, assignment, and other operational decisions." *Austin* v. *U.S. Navy Seals 1–26*, 595 U.S. __, No. 21A477, slip op. 1 (Mar. 25, 2022). The Navy's administrative response to the recent order by the district court in *Austin* granting class-wide preliminary injunctive relief shows the feasibility of compliance with an injunction within the limits this Court prescribed there. And such an injunction would provide applicant meaningful relief. But although applicant's case involves a single officer with natural immunity, rather than

dozens of members of special warfare units, a divided Ninth Circuit panel denied the narrow relief that the Fifth Circuit left in place in *U.S. Navy Seals 1–26* v. *Biden*, 27 F.4th 336 (5th Cir. 2022), and that this Court left in place in *Austin*.

Applicant does not challenge respondents' authority to mandate the COVID-19 vaccine. Nor does he challenge their ability to "consider[ his] vaccination status in making deployment, assignment, and other operational decisions." *Austin*, slip op. 1. He seeks only to enjoin respondents from inflicting punishments that deprive him of his First Amendment freedoms and irreparably harm his career, including by categorically precluding him from serving in *any* unit, even where a potential commander may not object to his unvaccinated status.

Applicant should have been granted a preliminary injunction in the district court and an injunction pending appeal in the court of appeals. Now, only a writ of injunction from this Court can prevent respondents from taking further and irreparable actions to destroy his career because of his religious beliefs.

## STATEMENT OF THE CASE

### A. Factual Background

#### 1. Applicant's service record

Applicant is a Lieutenant Colonel in the United States Air Force Reserve Command who was commissioned in 2003. 3 C.A.E.R. 366-367.[1] In addition to one combat tour flying the B-1B strategic bomber and two combat tours flying MC-12W reconnaissance aircraft in missions over Afghanistan, he has served as an instructor

[1] Citations to the Excerpts of Record below (C.A. ECF 20–3) are listed as [vol] C.A.E.R. [page]. Citations to the Ninth Circuit's docket are listed as C.A. ECF [document number].

in the T-6 primary trainer and as an evaluator for the MC-12W Tactical Intelligence Surveillance and Reconnaissance aircraft. *Id.* at 367. Applicant left active duty for the Air Force Reserve in 2014, where he has participated in numerous real-world joint planning operations and combatant command-level exercises. *Ibid.* He took command of the 452d Contingency Response Squadron on August 21, 2021, and—as of now—is on track to qualify for a military pension in just over 12 months. *Ibid.*

Applicant earned 100% on his Air Force Physical Fitness Test in November 2021 and has no preexisting medical conditions associated with adverse outcomes from COVID-19. *Ibid.* Indeed, he already had the disease without complications. He tested positive for COVID-19 in summer 2021, experiencing symptoms typical of the Delta variant—fever, headache, loss of taste and smell—which lasted for a few days and did not require any treatment. *Id.* at 367-368. Since then, a COVID-19 antigen test confirmed the presence of antibodies. *Id.* at 368.

**2. Respondents' policies and vaccine mandate**

Consistent with RFRA and the First Amendment, respondents' policies and regulations require individualized assessment of religious accommodation requests, placing the burden on the government to demonstrate that a denial furthers a compelling interest and uses the least restrictive means to do so. See 3 C.A.E.R. 430-466, 480-481, 497-505. In particular, the "Air Force will approve an individual request for accommodation unless the request would have a real (not theoretical) adverse impact on military readiness, unit cohesion, good order, discipline, or public health and safety." *Id.* at 502. "Using the least restrictive means necessary may

include partial approval, approval with specified conditions, or other means that are less burdensome on the member's religious beliefs." *Id.* at 432.

On August 24, 2021, respondent Austin ordered vaccination of all active-duty and reserve service members against COVID-19. 3 C.A.E.R. 399-400. Under that order, service members who have contracted and recovered from COVID-19 must be vaccinated, but service members participating in a COVID-19 clinical trial are exempted. *Id.* at 399. Respondent Kendall then required airmen in the Ready Reserve to "be fully vaccinated by 2 December 2021." *Id.* at 424. He later directed that a "service member will have five (5) calendar days from notice of denial [of an appeal] to begin the COVID-19 vaccination regimen." *Id.* at 471.

**3. Applicant's request for a religious exemption and respondents' response**

Although applicant has received many vaccines, he has a religious objection to receiving the COVID-19 vaccine. 3 C.A.E.R. 368. Because government leaders have described the vaccine as a moral obligation and have relegated the unvaccinated to lower social status with reduced civil rights, he believes this particular vaccine has taken on a "symbolic" and "sacramental quality." *Ibid.* That makes COVID-19 vaccination a religious ritual required as a condition of participating fully in civil society—like ancient Roman laws requiring sacrifices to Caesar, or Nebuchadnezzar's "edict requiring worship of the golden statue" (see *Daniel* 3:1-30). 3 C.A.E.R. 368. Cf. *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 628-629 (1943) (Jehovah's Witnesses viewed the Pledge of Allegiance as a form of idolatry). As in the past,

today's government officials threaten severe punishments for those who refuse to participate. 3 C.A.E.R. 368

After much prayer, applicant concluded that he "cannot participate in such a religious ritual"—and thus cannot take the vaccine—because, as a Christian, he "must render worship to God only." *Ibid.* On September 11, 2021, applicant notified his commanding officer that he intended to seek a religious exemption. *Id.* at 368-369. The base's chaplain interviewed applicant and concluded that his exemption request was "an individual expression of his sincerely-held beliefs founded on a matter of religious conviction, conscience, and moral principle." *Id.* at 372.

Applicant's formal request for a religious exemption nonetheless was denied on November 16, 2021, *id.* at 381, as was his appeal to the Surgeon General of the Air Force on February 8, 2022. 2 C.A.E.R. 73; 3 C.A.E.R. 389. After the appeal was denied, applicant was ordered to indicate within five days whether he would "(1) receive the COVID-19 vaccine; (2) submit a retirement request, if eligible; or (3) refuse the COVID-19 vaccine in writing." 2 C.A.E.R. 75, 245. He responded: "NUTS!" *Id.* at 91; 3 C.A.E.R. 393.

Applicant discussed his situation with his commander, respondent Haynes. 3 C.A.E.R. 369-370. But Haynes made clear that there would be no relief from punishment. *Id.* at 369-370, 391.

The day after applicant filed this action—and four hours after he moved for a TRO—respondent Haynes relieved applicant from command by telephone. 2 C.A.E.R. 76. Haynes's formal memorandum relieving applicant "for cause" did not describe the basis for the decision. *Id.* at 81. In a declaration below, Haynes stated that he

relieved applicant from command because he lost confidence based on applicant's "conduct and lack of judgment following the denial of his religious accommodation request appeal," specifically by responding, "NUTS!," to the five-day notice and by seeking to obtain a document related to his accommodation request from a junior officer rather than through a FOIA request. *Id.* at 251-252.

As respondent Haynes knew, "NUTS!" echoed Brig. Gen. McAuliffe's famous answer to the Germans demanding that the 101st Airborne surrender at the Battle of the Bulge. *Ibid.* Applicant intended his response to demonstrate resolve, not disrespect. *Id.* at 75-76. He believed it was an appropriate response because he did not believe that any of the three options provided in his five-day notice was tenable. *Id.* at 75. Taking the vaccine would violate his religious beliefs; he is ineligible to retire and desires to continue serving his country; and putting in writing his decision to violate an order would instantly doom his career. *Id.* at 75-76. Applicant hoped his succinct reply would communicate to respondents Pennington and Haynes—both well versed in military history—that the Air Force's ultimatum was unlawful and that they should defend his religious rights. *Ibid.* And the document applicant sought from the 452d Operations Group Executive Officer did not require a FOIA request; applicant asked only for a signed copy of his own religious accommodation request because he could not locate a signed version in his files. *Id.* at 74-75, 83-84.

**B. Procedural History**

Seeking to protect his federal constitutional and statutory rights, applicant filed this action in the Eastern District of California on February 14, 2022. The district court had jurisdiction under 28 U.S.C. § 1331.

In a February 22 hearing, the district court denied applicant's motion for a preliminary injunction. "[G]iv[ing] great deference to the professional judgment of military authorities," the district court concluded that, "[i]f the military can eliminate almost all risk through this policy," respondents had a compelling interest in refusing a religious exemption to applicant. App. 39a-40a. The court believed that, because applicant is unvaccinated, he is "not medically ready to deploy to certain areas of the world," which raised "a possibility that this could impact both military readiness and the need to adequately deploy." App. 40a.

The district court also concluded that "the government is likely to show that the vaccination is the least restrictive means of achieving a compelling interest." App. 45a. The court "agree[d] with the government that . . . there is a lack of consensus" on whether "natural immunity is effective." App. 42a-43a. The court also found "that it's not always feasible to get the testing done . . . within the time period required" for deployment. App. 43a. As a result, the court held that applicant was not likely to succeed on his RFRA claim. App. 45a.

The district court considered the mandate a neutral law of general applicability, and thus did not apply strict scrutiny to applicant's Free Exercise claim. App. 45a-47a. The court also concluded that the refusal to provide a religious exemption would survive strict scrutiny. App. 47a-48a.

The district court believed that, because applicant might recover backpay, the threatened career harm and disciplinary actions, including discharge, did not amount to irreparable harm. App. 49a. The court again deferred to "military authorities" on the balance of hardships and public interest. App. 49a-50a.

After noticing his appeal to the United States Court of Appeals for the Ninth Circuit and receiving the hearing transcript, applicant moved the district court for a preliminary injunction pending appeal on March 4. The district court denied that motion on March 8, for the reasons stated at the February 22 hearing. App. 2a.

On March 9, applicant moved the court of appeals for an injunction pending appeal, also seeking immediate interim relief. See C.A. ECF 11-1. That court entered interim relief on March 11, C.A. ECF 12, but on April 1 denied the motion for an injunction and vacated the interim relief. App. 1a. Judge Bade dissented. *Ibid.* She would have granted the injunction pending appeal and, in the alternative, would have left the interim relief in place to allow applicant to seek relief from this Court. *Ibid.*

## SUMMARY OF ARGUMENT

This case warrants a writ of injunction under the All Writs Act, 28 U.S.C. § 1651(a), to foreclose further irreparable harm while applicant's case is adjudicated. The injunction pending appeal sought here complies with the limits this Court established in *Austin*. Applicant has been removed from command, but he does not seek judicially ordered reinstatement. Nor does applicant seek an order that would prevent the Air Force from "considering" his "vaccination status in making deployment, assignment, and other operational decisions." *Austin*, slip op. 1. Applicant wants only the opportunity to serve that is accorded the thousands of airmen who hold medical or administrative exemptions from the COVID-19 vaccine (and other vaccines). And the Navy's reaction to the injunction entered by the district court in *Austin* makes clear that the military can both suspend the imposition of

adverse consequences for refusing the vaccine, and reassign any servicemember whose unvaccinated status may present an impediment to operations.

Applicant satisfies the standards for injunctive relief in this Court. To begin, he is likely to succeed on the merits on an issue of substantial importance that has divided the courts of appeals, and on which this Court is likely to grant certiorari. Although the Fifth Circuit recognized that relief under RFRA and the Free Exercise Clause is available to a member of the military in applicant's situation (albeit approving overbroad relief), see *U.S. Navy Seals 1–26* v. *Biden*, 27 F.4th 336 (5th Cir. 2022), stayed in part, *Austin*, *supra*, No. 21A477, a divided Ninth Circuit denied *all* relief in this case—even though applicant here is naturally immune and sought relief that is consistent with the limits this Court set in *Austin*.

The Air Force's denial of a religious exemption is subject to strict scrutiny under RFRA because respondents' vaccine mandate substantially and undisputedly burdens applicant's religious exercise. Strict scrutiny also applies under the Free Exercise Clause because the mandate's exemptions render it not generally applicable. Respondents thus bear the burden to show that forcing applicant to get vaccinated is the least restrictive means of serving a compelling government interest.

The district court gave respondents the near-total deference they sought—not only to the Air Force's general interest in military health and readiness, but to respondents' specific decision to deny applicant a religious exemption. Deference so broad would make RFRA a dead letter as applied to the military. Just as a demand for deference is "not enough" to prevail under RFRA's "sister statute," the Religious

Liberty and Institutionalized Persons Act (RLUIPA), *Ramirez* v. *Collier*, 595 U.S. __, No. 21-5592, slip op. 9, 14-15 (Mar. 24, 2022), it is not enough here.

Nor may a RFRA defendant frame its compelling interest at a high level of generality. Instead, the analysis must focus on the particular exemption sought by the particular individual—here, a young, healthy officer who has already recovered from COVID-19. Thousands of secular exemptions show that respondents have no compelling interest in vaccinating one additional officer. Further undercutting respondents' asserted interest in slowing the spread of COVID-19 is growing evidence that the vaccines do not prevent infection or transmission. Yet applicant's natural immunity puts him at minimal risk of illness or transmitting the disease to others.

Nor is forcing applicant either to be vaccinated or leave the Air Force the least restrictive means of furthering respondents' interest. Given the overwhelming data showing that natural immunity is at least on par with vaccine-induced immunity, respondents could allow him to provide an antibody test confirming his natural immunity. Respondents could also allow him to use the protocols that permitted the military to function before vaccines: regular testing, careful hygiene, and continually improving therapeutics. In combination, these alternatives would promote military health and readiness at least as effectively as forced vaccination.

The violation of applicant's religious freedom itself constitutes irreparable harm. In addition, no legal remedies can compensate him for the reputational and career harms he faces. Only prompt action by this Court can forestall those harms, some of which have only begun, but will be completed well before the Ninth Circuit can hear argument, let alone decide applicant's appeal.

Finally, the public interest and balance of hardships tip sharply toward maintaining the status quo. It is always in the public interest to vindicate First Amendment rights. And respondents will not be harmed by an immediate injunction because applicant no longer serves in a unit subject to rapid deployment. Indeed, moving applicant to the IRR will deprive the Nation of the services of a dedicated officer with specialized training.

Applicant served without vaccination for two years after COVID-19 struck the United States. That service should continue while he proves his strong case for a permanent injunction. A writ of injunction pending appeal from this Court or, in the alternative, a writ of certiorari before judgment is therefore warranted.

## ARGUMENT

An injunction "pending appellate review" is warranted when the applicant shows that his claims "are likely to prevail, that denying . . . relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam) (citing *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The otherwise separate balance-of-equities factor merges with the public interest when the government is a defendant. See *Nken* v. *Holder*, 556 U.S. 418, 435 (2009).

### A. This Case Presents An Appropriate Vehicle For Further Review By This Court.

Applicant is likely not only to succeed on the merits of his claims but, if necessary, to obtain further review by this Court. A conflict between the circuits is developing on a question where national uniformity is critical.

Applicant here is similarly situated to the plaintiffs in *U.S. Navy Seals* v.

*Austin*, whose challenge to the Navy's meaningfully identical practice the Fifth Circuit found sufficiently strong to warrant leaving the district court's injunction in place. See 27 F.4th at 349-353. Applicant's case, if anything, is both simpler and stronger. He is one servicemember, rather than 35, and he has natural immunity to COVID-19, which not all the *Seals* plaintiffs have. See *U.S. Navy Seals 1-26* v. *Biden*, __ F. Supp. 3d __, 2022 WL 34443, at *10 (N.D. Tex. Jan. 3, 2022), stay denied, 27 F.4th 336 (5th Cir. Feb. 28, 2022), partial stay granted, *Austin*, *supra*. The Navy has granted far fewer secular exemptions than the Air Force, for a force of nearly the same size. Compare 27 F.4th at 341-342 with pp. 16, 24, *infra*. And applicant is not in a special warfare unit, let alone trying to stay in one. In addition to the likely conflict with *Seals*, the district court in the present case relied on the Ninth Circuit's decision in *Doe* v. *San Diego Unified School District*, 19 F.4th 1173, 1176 (9th Cir. 2021), *reh'g en banc denied,* 22 F.4th 1099 (9th Cir. 2022). As explained below (and in Judge Bumatay's dissent from denial of rehearing en banc, 22 F.4th at 1100-1108), *Doe* conflicts with this Court's Free Exercise precedents.

This Court's review on the merits is likely. And applicant is likely to prevail.

## B. Applicant Is Likely To Succeed On The Merits.

### 1. Applicant is likely to succeed on his RFRA claim

The Government has "concede[d] that" RFRA "applies to the military." *Austin*, dis. op. 4. Respondents' own regulations recognize as much, using the same statutory standards that govern all other federal government conduct. See 3 C.A.E.R. 477-481. Under RFRA, the federal 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." *Burwell* v. *Hobby Lobby*

*Stores, Inc.,* 573 U.S. 682, 705 (2014) (quoting and adding emphasis to 42 U.S.C. § 2000bb-1(a), (b)).

**a. Substantial burden is undisputed.**

Respondents have not disputed that forced COVID-19 vaccination would substantially burden applicant's religious exercise. 3 C.A.E.R. 373 (chaplain); *id.* at 381 (appeal). Respondents have "[f]orced [him] to choose between violating [his] religious beliefs and the punishment" they have "threatened." *Austin*, dis. op. 3; see *U.S. Navy Seals*, 27 F.4th at 350.

**b. Forced vaccination of applicant serves no compelling government interest.**

Because RFRA applies and the vaccine would substantially burden applicant's religious beliefs, respondents bear the burden to demonstrate that forcing *him* to be vaccinated furthers a compelling governmental interest using the least restrictive means available. 42 U.S.C. §§ 2000bb-1(b), -2(3). Respondents must go beyond establishing a *general* interest in vaccinating military personnel. They instead must "demonstrate that the compelling interest test is satisfied through application of the . . . law to the . . . particular claimant whose sincere exercise of religion is being substantially burdened." *Burwell,* 573 U.S. at 726. (cleaned up) (quoting *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-431 (2006)).

**i. Respondents' arguments are not entitled to uncritical deference.**

Respondents persuaded the district court to defer to their judgment "concerning the relative importance of a particular military interest." App. 39a. But RFRA concededly applies to the military, and its text brooks no exceptions. In

addition, Congress indicated that the "courts must review the claims of prisoners and military personnel under the compelling governmental interest test." H.R. Rep. No. 103-88, at 8 (1993); see also S. Rep. No. 103-111, at 12 (1993) (courts "will review the free exercise claims of military personnel under the compelling governmental interest test"). The legislative history notes that the military has a compelling interest in "good order, discipline, and security," and might still receive deference "in effectuating those interests." S. Rep. 103-111, at 12. But "legislative history can never defeat unambiguous statutory text" like RFRA's. *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1750 (2020). And this Court has made clear that "RFRA operates as a kind of super statute, displacing the normal operation of other federal laws," *id.* at 1754, which necessarily includes judge-made principles of deference. While some deference to the military's assessments of its own interests is inevitable, see *Austin*, conc. op. 2, "[d]eference, though broad, has its limits." *South Bay United Pentecostal Church* v. *Newsom*, 141 S. Ct. 716, 717 (2021) (Roberts, C.J., concurring).

RFRA's legislative history equated the amount of deference due the military with that due prison authorities. See S. Rep. 103-111, at 9-12; see also H.R. Rep. 103-88, at 8. And, when applying RLUIPA, RFRA's "sister statute," *Ramirez*, slip op. 9, which "mirrors RFRA" in the prison context, this Court in *Holt v. Hobbs* unanimously rejected a similar request for "a degree of deference . . . tantamount to unquestioning acceptance." 574 U.S. 352, 357, 364 (2015). The Court declined to "import[]" deferential reasoning from other contexts because the governing statute, here RFRA, provides "greater protection" for free exercise rights. *Id.* at 361. Instead, the Court applied strict scrutiny and held that the prison's failure to provide a religious

accommodation to the claimant in that case violated the statute. *Id*. at 367-370. *Holt* provides the proper framework for resolving RFRA claims against the military. *E.g.*, *U.S. Navy Seals*, 27 F.4th at 350-352.

Under *Holt* and *Ramirez*, respondents' mere request that Court "defer to their determination" "is not enough" to carry their burden here. *Ramirez*, slip. op. 14-15. In any event, as explained below, there is no reason to believe respondents made a reasoned "determination" as to applicant himself, as RFRA requires.

**ii. As indicated by their denying 99.3% of religious accommodation requests, respondents' identified interests are too broad and generic to satisfy RFRA.**

Any analysis of respondents' interests must "start[] with a heavy presumption against a . . . law that infringes the constitutional or statutory right in question." *Ramirez*, conc. op. 3 (Kavanaugh, J.). To determine whether respondents have carried their burden, the Court must "look beyond broadly formulated interests," *Burwell*, 573 U.S. at 726 (cleaned up), such as a general interest in having a vaccinated military. Yet that was the justification offered for denying his request, 3 C.A.E.R. 381 ("All immunizations . . . are an important element of mission accomplishment[.]"), and his appeal, *id.* at 389 ("[P]reventing the spread of disease among the force is vital to mission accomplishment.").

To prevail under the statutory requirement to show a compelling interest in "application of the burden *to the person*," *Burwell*, 573 U.S. at 705 (emphasis in original), respondents must articulate a compelling interest in vaccinating a healthy 40-year-old (1) whose prior bout with COVID-19 gave him natural immunity, (2) in

an active duty Force that is more than 98% vaccinated (with the total Force at 96.6%) (3) where roughly 2300 medical and administrative exemptions have been granted as opposed to 35 religious accommodations (all to airmen near separation from the Force), and (4) more than 90,000 airmen have recovered from COVID-19, out of a total active and Reserve force of nearly 400,000. See Sec'y of the Air Force Pub. Affs., *DAF COVID-19 Statistics – Apr. 5 2022* (Apr. 5, 2022), https://tinyurl.com/2z8cfuay ("*DAF COVID-19 Statistics*"). And that asserted interest must withstand scrutiny even though (5) respondents admit that the required vaccines do not prevent either infection or transmission, 2 C.A.E.R. 116, and (6) the dominant strain of COVID-19 produces mild cold-like symptoms in the vast majority of healthy individuals. Put simply, respondents must show that accommodating applicant's "religious-based refusal to take a COVID-19 vaccine" is "going to halt a nearly fully vaccinated Air Force's mission to provide a ready national defense." *Air Force Officer* v. *Austin*, __ F. Supp. 3d ___, 2022 WL 468799, at *12 (M.D. Ga. Feb. 15, 2022).

Respondents cannot carry their burden under the necessary "case-specific consideration of the particular circumstances and claims." *Ramirez*, slip op. 21. Although respondents have maintained that applicant was denied an accommodation based on his particular job duties, the record does not support that claim. As other courts have recognized, "the Air Force is systematically denying religious exemptions," *Poffenbarger* v. *Kendall*, __ F. Supp. 3d __, 2022 WL 594810, at *13 (S.D. Ohio Feb. 28, 2022), using an "illusory and insincere" process, *ibid.* (quoting *Air Force Officer*, 2022 WL 468799, at *10), and (as the 100:1 grant ratio indicates) "there has been a double standard between" secular "and religious accommodation requests,"

*ibid.* In short, the Air Force's system, like the Navy's, is "largely 'theater' designed to result in the denial of almost all requests" *Austin*, dis. op. 2 (quoting *U.S. Navy Seals 1-26* v. *Biden*, 2022 WL 34443, at *1).

The Air Force's public statistics confirm that it systematically disfavors religious accommodations. Only 32 of 4866 requests for religious exemption have been granted, and only 3 of 1,505 appeals have succeeded. *DAF COVID-19 Statistics*, *supra*. That is a 99.3% rejection rate with an affirmance rate of 99.8% on appeal. And the Air Force respondents effectively conceded in another case that the few religious exemptions "were only given to members who were at the end of their terms of service with the military." *Poffenbarger*, 2022 WL 594810, at *13 n.6. That is, the Air Force has granted *no* exemptions to service members who want to continue serving without being vaccinated. At best, this is rubber-stamp adjudication, not the kind of individualized assessment that RFRA requires.

Further undercutting respondents' efforts to root their denial of an accommodation (and later adverse actions) in applicant's particular circumstances, they have not shown that any members of applicant's former unit are especially susceptible to COVID-19, or even unvaccinated. See 2 C.A.E.R. 311 (noting Air Force policy to "mitigate[]" risk from secular exemptions "by maximizing the number of people around the service member that are vaccinated"). Respondents cannot explain how—although applicant's presence did not impede military operations when no airmen were vaccinated and fewer had natural immunity—grave impairment would now result to a force with a 98% vaccination rate and natural immunity rate of 20% or better. And respondents admit that all unvaccinated airmen, regardless of their

current post, will be placed on Individual Ready Reserve where they cannot command any unit. App. 34a; 2 C.A.E.R. 108; 3 C.A.E.R. 329, 335. Accordingly, both the denial of applicant's exemption request and relief from command were inevitable the moment he refused to take the vaccine.

For good reason, a district court rejected the Navy's use of a supposed "loss of confidence" to justify its "sudden eagerness to remove . . . from command" an officer who had declined vaccination on religious grounds, after "tense exchanges with his superior officer about vaccination and about his RFRA claim." *Navy Seal 1* v. *Austin*, __ F. Supp. 3d __, 2022 WL 710321, at *1, *5 (M.D. Fla. Mar. 2, 2022). There, as here, respondents' actions reflect "retaliatory animus toward" applicant's "legally protected pursuit" of RFRA relief, *id.* at *1, not the individualized analysis that RFRA requires.

### iii. Respondents did not and cannot tie any legitimate compelling interest to the "particular claimant" here.

Moreover, as the district court observed, the exemption denial appeared to be a form letter, App. 21a-22a, further demonstrating that respondents did not individually assess applicant's request. Respondents reinforced that impression at the hearing. When asked about applicant's natural immunity to COVID-19, respondents admitted they did not know "what variant plaintiff had," "how many antibodies he has," "what level of antibodies is even necessary to give someone immunity," or "what his level of protection might be against a reinfection." App. 27a.

Yet any consideration of applicant as a "particular claimant," *Burwell*, 573 U.S. at 726, would have to take into account his "physical characteristics," *Austin*, dis. op. 6, including his natural immunity. Nothing in the record suggests that respondents

undertook RFRA's "more focused inquiry," *Burwell*, 573 U.S. at 726 (cleaned up), into whether they had a compelling interest in vaccinating airmen who have recovered from COVID-19, let alone applicant himself. The record evidence shows that they do not. Although available vaccines provide some protection against serious illness and death, respondents cannot claim a compelling interest in vaccinating applicant for his own sake because his natural immunity provides equivalent protection.

For the special purpose of litigating their COVID-19 vaccine policy, respondents shut their eyes to the existence and protections of natural immunity. But the Third Circuit has recognized that a person "[p]rotected by natural immunity" cannot show that "continued exposure to COVID-19 still puts him at imminent risk of serious physical injury." *Garrett* v. *Murphy*, 17 F.4th 419, 433 (3d Cir. 2021) (citing multiple studies). Indeed, "[t]here is no scientific dispute that natural immunity exposes the human body to the entire virus and not just the spike protein used by the COVID-19 vaccines to mitigate symptoms[.]" *Halgren* v. *City of Naperville*, __ F. Supp. 3d __, 2021 WL 5998583, at *29 (N.D. Ill. Dec. 19, 2021). The whole point of vaccines is to "trigger the same biological mechanism of natural immunity." *Ibid.*

But when COVID-19 is involved, basic science and common knowledge fall by the wayside—as do respondents' contrary policies toward natural immunity and other vaccines. For example, one directive in their general vaccine policy requires responsible officers to "[e]nsure patients are evaluated for preexisting immunity, screened for administrative and medical exemptions, and/or evaluated for the need for medical exemptions to immunizations or chemoprophylaxis medications," 2 C.A.E.R. 171 ¶ 1–4(c)(4). The same document identifies as a basis for an exemption

"[e]vidence of immunity based on serologic tests, documented infection, or similar circumstances." *Id*. at 176 ¶ 2–6(a)(1)(*b*). The military even has a code for exemptions based on medical immunity—"MI," for "Medical, immune"—exemptions that can be "[i]ndefinite," and that can be based on evidence including a "serologic antibody test" like the one that confirmed applicant's natural immunity. *Id.* at 198, Table C–1. See also *id.* at 176 ¶ 2–6(a) (noting that medical exemptions can be permanent).

Respondents claim that the data regarding immunity are inconclusive, but inconclusive data cannot carry a burden that respondents bear. And the data in fact weigh heavily the other way. As Drs. Jayanta Bhattacharya (Stanford) and Martin Kulldorff (Harvard) have explained, "[m]ultiple extensive, peer-reviewed studies" now "overwhelmingly conclude that natural immunity provides equivalent or greater protection against severe infection than immunity generated by mRNA vaccines (Pfizer and Moderna)." 3 C.A.E.R. 533; see also *id.* at 532-536 & nn. 11-21; see also Brief of Drs. Jay Bhattacharya and R. Scott French as *Amici Curiae* in Support of Petitioners at 20-21, *Dr. A.* v. *Hochul*, No. 21-1143 (filed Mar. 17, 2022) ("[T]he clear weight of scientific evidence confirm[s] that natural immunity is at least as good as, if not superior to, vaccine-based immunity."); see also *id.* at 21-27 (collecting studies). A peer-reviewed "pooled analysis of clinical studies" published on the NIH's website similarly reported that "[a]ll of the included studies found at least statistical equivalence between the protection of full vaccination and natural immunity; and three studies found superiority of natural immunity."[2] Moreover, a CDC analysis of

[2] Mahesh B. Shenai, Ralph Rahme, and Hooman Noorchashm, *Equivalency of Protection From Natural Immunity in COVID-19 Recovered Versus Fully Vaccinated Persons: A Systematic Review and Pooled Analysis*, NCBI (Oct. 28, 2021), https://tinyurl.com/2p838c7a ; see also 3 C.A.E.R. 532-535 (collecting studies).

"recent international studies" concluded that, as early as October 2021, previous infection conferred "increased protection" compared "to vaccination alone," while also protecting "against severe outcomes in the event of reinfection."[3]

In the court of appeals (C.A. ECF 13, at 16), respondents deleted the last three words from the CDC's FAQ regarding vaccination for those with natural immunity: "People who already had COVID-19 and do not get vaccinated after their recovery are more likely to get COVID-19 again than those who get vaccinated *after their recovery*."[4] The deletion changed the meaning of the sentence to suggest that natural immunity is not sufficient. As those last three words make clear, however, the CDC claims only that there is some slight increase in protection for those *with natural immunity* who also vaccinate over those with natural immunity alone—not, as respondents have suggested, that the vaccinated have greater resistance to disease than those with natural immunity, which is the pertinent issue here.[5]

In any event, the only supporting data offered in the quoted FAQ section is a study published in August 2021,[6] long before the recent CDC studies concluding that natural immunity provides better protection than vaccination.[7]

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[3] Tomás M. León, et al., *COVID-19 Cases and Hospitalizations by COVID-19 Vaccination Status and Previous COVID-19 Diagnosis—California and New York, May-November 2021*, CDC (Jan. 28, 2022), https://tinyurl.com/2786wzun.

[4] CDC, *Frequently Asked Questions about COVID-19 Vaccination* (updated Apr. 7, 2022), https://go.usa.gov/xzUSk (emphasis added).

[5] Those who already had COVID-19 but nonetheless receive the COVID-19 vaccine are also at greater risk of side effects. 3 C.A.E.R. 554-555.

[6] CDC*, Frequently Asked Questions, supra* note 4 (data obtained by clicking the hyperlink on the words "more likely to get COVID-19 again" in the text under the question "If I already had COVID-19 and recovered, do I still need to get a COVID-19 vaccine?").

[7] *See* Tomás León, *supra* note 3, https://tinyurl.com/2786wzun; *Navy Seal 1* v. *Austin*, __ F. Supp. 3d __, 2022 WL 534459, at *16 n.10 (M.D. Fla. Feb. 18, 2022) (citing León study).

Tellingly, neither respondents nor the CDC documents they cite have suggested any differential in serious (or even symptomatic) COVID-19 illness between persons with natural immunity and persons who are vaccinated, much less between those with natural immunity who are vaccinated and those with natural immunity who are not. With a mismatch between their assertions and their support, respondents cannot carry their burden here.

**iv. The military's track record refutes any compelling interest in a 100% vaccinated force.**

Nor have respondents established a compelling interest in a 100% vaccinated force. Applicant has ably discharged his duties throughout the two years of the pandemic, including the 18 months before respondents imposed a vaccine mandate. His service has continued through a parade of variants, including the variant from which he recovered. Clearly, he can serve his country without being vaccinated.

In addition, COVID-19 does not present a significant risk to the Air Force's ability to operate. Although the Air Force has recorded 92,924 COVID-19 cases over the past two years, only 53 resulted in hospitalization, with 15 deaths. *DAF COVID-19 Statistics*, *supra*. As a point of comparison, more than 100 airmen committed suicide in 2019 alone. See Stephen Losey, *Air Force deaths by suicide spiked by one-third in 2019*, A.F. Times (Jan. 31, 2020), https://tinyurl.com/5n646fvv. With few isolated exceptions, military operations have been uninterrupted. See *U.S. Navy Seals*, 2022 WL 34443, at *10.

Respondents have suggested that not all airmen are young and healthy, yet their own statistics show that, among airmen, well under one COVID-19 case in a

thousand has required hospitalization—including cases before vaccines were available. *DAF COVID-19 Statistics*, *supra*. Compared even to civilian Air Force employees, airmen's overall resistance to serious COVID-19 is striking: airmen are hospitalized less than half as often, and their death rate (16 thousandths of one percent) is less than one-*thirtieth* the death rate for civilian employees. *Ibid.* See also 2 C.A.E.R. 267 (showing analogous comparative rates throughout military).

With 98% of the Air Force now vaccinated, it is extremely unlikely that applicant would be in sustained close contact with an unvaccinated airman, let alone one who also lacked natural immunity. And it is still less likely that applicant or any member of his unit who happened to suffer a breakthrough infection would become seriously ill or require hospitalization.

In addition, it is now clear that vaccinated individuals can both contract and transmit COVID-19. See *BST Holdings, LLC* v. *OSHA*, 17 F.4th 604, 616 n.19 (5th Cir. 2021).[8] Respondents have no compelling interest in forcing 100% vaccination to prevent transmission of COVID-19 when the vaccines do not work for that purpose.

[8] See also CDC, *Omicron Variant: What You Need to Know* (updated Mar. 29, 2022), https://tinyurl.com/44udfzw5 ("[A]nyone with Omicron infection, regardless of vaccination status or whether or not they have symptoms, can spread the virus to others."); Eric Sykes, *CDC Director: Covid vaccines can't prevent transmission anymore*, MSN (Jan. 10, 2022), https://tinyurl.com/uu3h9bs4; Shirley Collie, et al., *Effectiveness of BNT162b2 Vaccine against Omicron Variant in South Africa*, New Eng. J. Med. (Feb. 3, 2022), https://tinyurl.com/jkuc988f (reporting that "omicron was shown to escape antibody neutralization by the BNT162b2 messenger RNA vaccine (Pfizer-BioNTech)," but that "during the proxy omicron period, we saw a maintenance of effectiveness of the BNT 162b2 vaccine (albeit at a reduced level) against hospital admission for COVID-19 . . . as compared with the rate associated with the delta variant earlier in the year"); Elie Dolgin, *Omicron thwarts some of the world's most-used COVID vaccines*, Nature (Jan. 13, 2022), https://tinyurl.com/2p9h4z9f .

### v. The underinclusiveness of respondents' vaccine mandate further demonstrates that their interest here is not compelling.

In any event, the government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 803 n.9 (2011). And respondents' willingness to grant medical and administrative exemptions confirms that they have no compelling interest in achieving 100 percent vaccination. See 3 C.A.E.R. 509. As of April 5, the Air Force had in effect 1045 medical exemptions and 1275 administrative exemptions. *DAF COVID-19 Statistics*, *supra*. Such underinclusiveness shows that "the interest given in justification of the restriction is not compelling." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546-547 (1993); see *Holt*, 574 U.S. at 367.

Respondents have contended that the medical exemptions further their interest in military readiness because those with adverse reactions to the vaccines would be rendered undeployable if forced to take the vaccine. But that argument is a red herring: The Air Force Respondents admitted in *Poffenbarger* that medical exemptions are "overwhelmingly pregnancy"-related, not based on medical contraindications to the vaccine. Transcript, *Poffenbarger v. Kendall*, No. 3:22-cv-00001, ECF 33, at 67:2-5 (S.D. Ohio Feb. 22, 2022); see also 2 C.A.E.R. 106 (acknowledging that pregnancy is a basis for a medical exemption). If unvaccinated airmen with contraindications are deployable, and unvaccinated pregnant service members can serve for nine months, without harming a compelling interest, applicant can serve.

### vi. Applicant can perform his duties without receiving the vaccine.

Respondents also tried to justify their denial on the ground that applicant needs to be able to deploy quickly. 2 C.A.E.R. 113-114; see App. 19a-20a. Respondents mooted that justification by removing applicant from command.[9] Moreover, to justify the denial, respondents have relied on sustained speculation through a series of unlikely events: that applicant might be deployed on short notice, might become infected with COVID-19 just before or during deployment, possibly resulting in severe illness, possibly without antivirals or other treatments on hand, possibly making him unable to perform his duties, and possibly infecting enough other (98% vaccinated) airmen to require emergency evacuation of sick airmen, thereby rendering his unit unable to achieve its mission. See 2 C.A.E.R. 114-115.

But it is not "enough for the Government to posit that sending" applicant "on such a mission *might* produce such consequences," *Austin*, dis op. 6 (emphasis in original), and each event is unlikelier than the last. First, applicant's natural immunity makes it unlikely that he will become infected with COVID-19 at all, see 3 C.A.E.R. 532-35, let alone at a critical time for deployment. Second, given his youth and health, any new infection is much less likely to disable him. *Ibid.* Third, oral antivirals—which can be taken without access to medical facilities—should be available to a deployed unit, especially because vaccinated airmen can contract COVID-19. See *Seals*, 2022 WL 34443, at *10.[10] Fourth, applicant's immunity and

[9] Since applicant is no longer assigned to the 452d Contingency Response Squadron—and is not asking this Court to reinstate him—he no longer needs to be available for immediate deployment.

[10] See FDA, *Coronavirus (COVID-19) Update: FDA Authorizes First Oral Antiviral for Treatment of COVID-19* (Dec. 22, 2021), https://tinyurl.com/25r3p7n2; FDA, *Coronavirus (COVID-19)*

the Air Force's 98% vaccination rate make infection of other members of his unit unlikely. Fifth, it is still less likely that a vaccinated or naturally immune member of his unit would experience more than mild symptoms, much less require hospitalization or evacuation. And sixth, the military's track record before the vaccine mandate makes it far-fetched that the unit would fail to complete its mission. This compound "conjecture" and "speculation" cannot carry respondents' burden. *Ramirez*, slip op. 15 (citing *Fulton* v. *Philadelphia*, 141 S. Ct. 1868, 1882 (2021)).

Indeed, thousands of asymptomatic service members have deployed and served domestically over the past two years. See *Seals*, 37 F.4th at 351-352. And that was before the Air Force achieved its 98% vaccination rate. The Navy treats unvaccinated persons with medical exemptions as "deployable," *Austin*, dis. op. 9, and thousands of exempt Air Force members are carrying out their duties unvaccinated. Not every deployed service member who tests positive but is asymptomatic—or has the mild symptoms characteristic of infection in those with natural immunity or vaccination—would have to be recalled stateside to quarantine.

Moreover, respondents' stated fear (App. 19a-20a) that applicant would pose a grave risk to his team suggests that they do not believe that the required vaccinations are effective in preventing transmission. That further indicates that less restrictive measures in combination sufficiently serve respondents' asserted interests.

Further, while respondents maintain that applicant could not be deployed to countries that require vaccination but reject natural immunity, those restrictions are

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*Update: FDA Authorizes Additional Oral Antiviral for Treatment of COVID-19 in Certain Adults* (Dec. 23, 2021), https://tinyurl.com/j6badvmz.

becoming less common as time goes on and case counts subside.[11] In addition, any such restrictions would be subject to a Status of Forces Agreement; those agreements are negotiated and renegotiated as conditions change. See generally U.S. Dep't of State, Int'l Sec. Advisory Bd., *Report on Status of Forces Agreements* (Jan. 16, 2015), https://tinyurl.com/2ptcs32m. Those agreements cover a variety of criminal, civil and regulatory requirements such as "special entry and exit arrangements," "driving and other licenses," and "applicability of local labor and environmental laws." *Id.* at 20. The United States could and should ensure religious protections for the service members it deploys. *Id.* at 8 ("The United States has leverage in SOFA negotiations, and should be prepared to use it."). The speculation that applicant would be deployed to a country where his rights could not be protected at most would provide a reason to assign him to a different unit, not to drum him out of the Air Force.

Respondents also have contended that applicant must be vaccinated to prevent an "outbreak at March Air Force Base." 2 C.A.E.R. 115. This speculation underscores respondents' lack of confidence in the mandated vaccines to prevent infection or minimize symptoms for the 98% of airmen who are vaccinated. Moreover, the risk of getting infected off base, where reservists spend the vast majority of their time, far exceeds any risk they face from applicant on base. See 3 C.A.E.R. 355-356; see also *Seals*, 37 F.4th at 351 n.19.

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[11] See Elise Schoening & Lizzie Wilcox, *The Latest Updates on International Gathering and Travel Restrictions*, Northstar Meetings Grp. (Apr. 4, 2022), https://tinyurl.com/472h2ud7 (showing countries such as Switzerland, Israel, Japan, Vietnam, and many others easing travel restrictions).

In short, looking beyond respondents' "broadly formulated interests" to their "marginal interest" in vaccinating *applicant* despite his natural immunity, the claimed interest is not compelling. *Burwell*, 573 U.S. at 726-727.

**c. Forcing applicant to take the vaccine is not the least restrictive means of advancing respondents' claimed interest.**

In any event, respondents' interest in further protecting (and protecting others from) a young airman with natural immunity can be furthered by less restrictive means. And respondents "bear the burden of showing that mandatory vaccination is the least restrictive means of furthering the interest it asserts in light of the present nature of the pandemic, what is known about the spread of the virus and the effectiveness of the vaccines, prevalent practices, and the physical characteristics of" the applicant. *Austin*, dis. op. 6; see *Ramirez*, slip op. 17-18.

One less restrictive alternative is to treat applicant and others with acquired natural immunity the same as the fully vaccinated. Air Force regulations recognize that "evidence of immunity (for example, by serologic antibody test)" and "documented previous infection" can provide a basis for a medical exemption to other vaccines. 3 C.A.E.R. 570. But respondents have departed from those principles here, *id.* at 399-400, 424, contending instead that accepting proof of prior immunity does not sufficiently further their interests. See 2 C.A.E.R. 119.

Though respondents claim they cannot quantify how much protection natural immunity affords, they likewise cannot quantify the incremental protection, if any, afforded by the vaccine. That failure strongly suggests that the less restrictive means of relying on natural immunity, protective conduct measures, and antiviral

treatments would sufficiently serve respondents' interest, just as treatments adequately serve the government's interest in reducing the severity of other diseases. Because even "the European Union (among other authorities) considers proof of recovery from infection as the functional equivalent to vaccination," *Halgren*, 2021 WL 5998583, at *30, respondents' "rejection of natural immunity as an alternative is puzzling," *Louisiana* v. *Becerra*, __ F. Supp. 3d __, 2021 WL 5609846, at *13 (W.D. La. Nov. 30, 2021).

Moreover, other "precautions that suffice for" those with medical exemptions—such as testing, masking, and social distancing—"suffice for religious exercise too." *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1297 (2021). Assuming the vaccine impedes transmission, distancing and testing—measures the military implemented effectively for the first eighteen months of the pandemic—would sufficiently reduce transmission to vaccinated colleagues. The Navy even now allows testing for those in its ranks that are unvaccinated.[12] Indeed, because the vaccine has proven ineffective in preventing transmission, respondents have no interest in insisting upon vaccination for that purpose.[13] For that reason, the less restrictive alternatives that respondents used for the first eighteen months are sufficiently effective at stopping the spread of COVID-19 where religious exercise or natural immunity is at issue.

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[12] U.S. Navy, *NAVADMIN 07/22, U.S. Navy COVID-19 Standardized Operational Guidance 5.0*, https://tinyurl.com/2f4a2ceu ("Unvaccinated personnel"—which the Navy explains earlier are those "with an approved waiver" and "those awaiting waiver disposition"—"shall follow the testing requirements.").

[13] CDC, *Omicron Variant: What You Need to Know* (updated Mar. 29, 2022), https://tinyurl.com/44udfzw5 ("CDC expects that anyone with Omicron infection, regardless of vaccination status . . . can spread the virus to others."); *ibid.* ("[B]reakthrough infections in people who are vaccinated can occur.").

Less restrictive measures—such as requiring a negative test before reporting for duty—are especially appropriate for a reservist like applicant who is on base one weekend a month and two weeks a year unless deployed. Respondents do not dispute that testing could eliminate any risk that applicant might infect others on base, but contend that "[t]esting prior to deployment is not an effective alternative to vaccination." 2 C.A.E.R. 121. Yet rapid antigen tests are effective for that purpose.[14]

Nor would a positive test necessarily render applicant unable to accompany any unit he might join; millions of asymptomatic people have continued to work throughout the pandemic. Unless applicant were severely ill, he could perform his duties with a few added precautions, such as wearing an N95 mask and face shield when indoors and social distancing when possible.[15] Respondent's own witness testified that masks could extend the time needed in close contact to transmit an effective dose of the virus up to six hours. See 3 C.A.E.R. 347-348. Improving COVID-19 treatments further reduce the risk.[16]

The question is not whether any mitigation measure is sufficient when considered alone, but whether less restrictive measures in combination sufficiently further the government's asserted interests in health and readiness. The Air Force's track record during the pandemic shows that they do.

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[14] See FDA, *Coronavirus (COVID-19) Update: FDA Authorizes Additional OTC Home Test to Increase Access to Rapid Testing for Consumers* (Oct. 4, 2021), https://tinyurl.com/mr3v5d7c.

[15] See CDC, *Types of Masks and Respirators—Summary of Recent Changes* (updated Jan. 28, 2022), https://tinyurl.com/re3kh6h7 ("Masks and respirators are effective at reducing transmission of SARS-CoV-2 . . . when worn consistently and correctly").

[16] FDA, *Coronavirus (COVID-19) Update: FDA Authorizes New Monocolonal Antibody for Treatment of COVID-19 that Retains Activity Against Omicron Variant* (Feb 11, 2022), https://tinyurl.com/y9fmn5v7; U.S. Dep't of Health & Human Servs., *Possible Treatment Options for COVID-19*, https://tinyurl.com/39weytea; FDA, *Know Your Treatment Options for COVID-19*, https://tinyurl.com/2p9bx9kj.

Under strict scrutiny, the curtailment of protected rights "must be actually necessary to the solution." *Brown*, 564 U.S. at 799. Otherwise the curtailment cannot satisfy RFRA's "exceptionally demanding" least-restrictive-means standard. *Burwell,* 573 U.S. at 728-732 (citing 42 U.S.C. § 2000bb-1(b)(1)). Respondents' imposition of their vaccine mandate on applicant "in these circumstances doesn't just fail the least restrictive means test, it borders on the irrational." *Does 1-3 v. Mills*, 142 S. Ct. 17, 22 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief).

**2. Applicant's First Amendment Free Exercise claim is also likely to succeed.**

Respondents' vaccine mandates also trigger strict scrutiny under the Free Exercise Clause because they are not neutral and generally applicable. See *Employment Division* v. *Smith*, 494 U.S. 872, 879 (1990).

First, the mandates provide "a mechanism for individualized exemptions" that "invites the government to consider the particular reasons for a person's conduct." *Fulton*, 141 S. Ct. at 1877 (cleaned up). "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Ibid.* (cleaned up).

Second, respondents have granted thousands of medical exemptions (mostly due to pregnancy), 3 C.A.E.R. 509, yet allow unvaccinated pregnant women and others to serve. Thus, respondents "prohibit[] religious conduct" (abstaining from a vaccine due to religious convictions) "while permitting secular conduct" (abstaining

for medical or administrative reasons) "that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877; see 3 C.A.E.R. 399-400, 424.[17]

Third, the mandates treat "comparable secular activity"—not receiving the vaccine for medical or administrative reasons—more favorably than not receiving it for religious reasons. *Tandon*, 141 S. Ct. at 1296. "Comparability is concerned with the risks various activities pose, not the reasons why" people engage in them. *Ibid.* "[P]recautions that suffice for" those with medical exemptions—such as testing, masking, social distancing—"suffice for religious exercise too." *Id*. at 1297.

Moreover, the district court departed from this Court's precedents in concluding (App. 46a-47a) that *Doe* v. *San Diego Unified School District*, 19 F.4th 1173, 1176 (9th Cir. 2021), reh'g en banc denied, 22 F.4th 1099 (9th Cir. 2022), precludes strict scrutiny. In that case, the Ninth Circuit held that a school district's COVID-19 vaccination requirement was generally applicable even though the district exempted students with medical contraindications but not religious objectors, was generally applicable. *Id.* at 1176. Yet a person who is unvaccinated for medical reasons is as likely to spread COVID-19 as one who is unvaccinated for religious reasons. As Judge Bumatay explained for seven judges, this Court's precedents show that such mandates are not generally applicable. See 22 F.4th at 1100-1108 (Bumatay, J., dissenting from denial of rehearing en banc). See also *Does 1–3* v. *Mills*, 142 S. Ct. at 20 (Gorsuch, J., dissenting). When persons unvaccinated for religious

[17] It is no answer to say that medical exemptions are temporary because the risk posed by a person while medically exempt from vaccination is no different from the risk posed by a person with a religious exemption. "Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied." *Tandon*, 141 S. Ct. at 1297. "Otherwise, precautions that suffice for other activities suffice for religious exercise too." *Ibid.*

reasons cannot serve at all, but those not vaccinated for secular reasons may remain at their posts, there is no neutrality under *Tandon* or *Roman Catholic Diocese*.

Accordingly, strict scrutiny applies, and respondents cannot carry their burden for the constitutional claim any more than for the statutory one.

### C. Applicant Will Be Irreparably Harmed If Relief Is Denied.

#### 1. Applicant is irreparably harmed by the loss of his protected religious freedom.

Respondents' denial of an exemption, and the continuing and threatened discipline that have followed, have irreparably harmed applicant. As this Court has previously held, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm." *Roman Cath. Diocese*, 141 S. Ct. at 67 (quoting *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality op.)). The loss of statutory religious freedoms is equally irreparable. See *Ramirez*, slip op. 18.

Respondents contended below that *Sampson* v. *Murray*, 415 U.S. 61 (1974), imposes a higher-than-usual standard of irreparable harm in the military context. But *Sampson* merely responded to the court of appeals' suggestion that a district court could issue an injunction without a finding "that there was actually irreparable injury." *Id.* at 88. *Winter* has since made clear that a showing of actual irreparable harm is necessary in every case.

The harm from the denial of accommodation here is actual, and no less real because it "is spiritual rather than pecuniary." *Ramirez*, slip op. 19. And it is exacerbated by respondents' active coercion to force applicant to abandon either his military career or his religious convictions. If applicant "acquiesces to [the vaccine]

mandate despite his faith," he won't "lose any pay. But he will have to wrestle with self-doubt—questioning whether he has lived up to the calling of his faith." *Sambrano* v. *United Airlines, Inc.*, 19 F.4th 839, 842 (5th Cir. 2021) (Ho, J., dissenting)). On the other hand, if he continues to follow his faith and refuse the vaccine, he must also "wrestle with self-doubt" as his distinguished military career is sidetracked and soon ended. *Ibid.*

**2. Applicant's military career and reputation face continuing irreparable harm.**

In addition, the harm to applicant's career and reputation from discharge, placement on the IRR, or other discipline if this Court does not act would be irreversible. 3 C.A.E.R. 366. Respondents indicated that they intend to place applicant on "no points/no pay" status, which will prevent him from participating in military service while he is processed to the IRR. 2 C.A.E.R. 108-111. And while this appeal was pending, they carried out that threat. C.A. ECF 14-2. The process was paused while the court of appeals' interim relief was in effect, but that relief has been vacated. Without relief from this Court, applicant will likely be processed to the IRR within weeks—yet briefing in the Ninth Circuit is not set to finish until May 12, with argument and decision unlikely for weeks, if not months, after that.

Even if applicant is later reinstated, time on IRR would inflict harm beyond the loss of income because he is up for promotion in October; any gap in service would severely undermine his chances for advancement even if he is reinstated before his review board. See 2 C.A.E.R. 77-78; C.A. ECF 14-2, at 1-2. "No points/no pay" status also keeps him from Temporary Duty Assignments (TDY), irretrievably depriving

him of valuable experience. 2 C.A.E.R. 78. Training and drill exercises build rapport between applicant and his fellow servicemen, prepare him for more advanced roles within the Air Force, and ready him for future combat. No amount of backpay, reinstatement, or other legal remedy can provide a retroactive substitute. That loss of training opportunities constitutes additional irreparable harm. Respondents' further contemplated actions (C.A.ECF 14-2, at 1-2) will further and irreparably damage his reputation and career.

**D. The Balance Of Equities And Public Interest Favor An Injunction.**

Both the balance of the equities and the public interest—which merge here, *Nken*, 556 U.S. at 435—strongly support relief. There is always a public interest in enforcing constitutional protections: "[E]ven in a pandemic, the Constitution cannot be put away and forgotten." *Roman Cath. Diocese*, 141 S. Ct. at 68. Moreover, the district court failed to consider the public interest in retaining a former squadron commander with 18 years' experience. The Air Force faces at most a trivial prospect of injury from permitting applicant's continued service, especially while it permits thousands of unvaccinated airmen to serve under medical exemptions. Any broader public interest in maximum vaccination rates has diminished given COVID's retreat across the world and the dominance of the milder Omicron variant. See CDC, *COVID Data Tracker*, https://tinyurl.com/2p8unxsm.

What is more, respondents' hardships are largely speculative—and thus cannot weigh in the balance. *See Winter*, 555 U.S. at 27. They have advanced no example where an unvaccinated airman caused greater disruption based on COVID-19 than his or her vaccinated colleagues, cf. *U.S. Navy Seals*, 27 F.4th at 349 n.17

(recounting December 2021 sidelining of USS Milwaukee "despite having a fully vaccinated crew")—let alone an example where one refusing vaccination for religious reasons has caused greater harm than one serving under a medical exemption, or where an unvaccinated airman who has natural immunity has caused greater harm than his vaccinated comrades. Just as the plaintiffs in *Winter* failed because they could not identify a "documented episode of harm to a marine mammal," 555 U.S. at 33, respondents here rely on speculation and a plea for the near-total deference they received below on this point.

In contrast, applicant has served without vaccination and without incident through two years of the pandemic. He now has natural immunity, and the Air Force is now 98% vaccinated—and many of the 7,000 or so unvaccinated airmen are likely among the more than 90,000 who have recovered from COVID-19 and thus have natural immunity to further infection. See *DAF COVID-19 Statistics*, *supra.* Thus, the risk of infection among other service members is both speculative and minuscule.

Respondents ultimately seek deference to what they characterize as a justified response to applicant's violation of a "lawful order." C.A. ECF 13, at 1, 20. But the order applicant resisted—the vaccine requirement forced upon him—is not lawful because it violates his rights under RFRA and the First Amendment. If that legal conclusion is correct, respondents' claimed harm is no harm at all.

### E. The Injunction Sought Here Accords With *Austin* Yet Provides Applicant Meaningful Relief.

The relief applicant seeks here falls within the limits set in this Court's order in *Austin*. Applicant has already been removed from command and does not seek an

order from this Court directing reinstatement or any other "deployment, assignment, [or] other operational decision." *Austin*, slip op. 1. He seeks only an order that would forestall further retaliation for his religious beliefs, including further efforts to process him into the IRR or (the next step) to separate him from the Air Force.

The Navy's response to the injunction recently entered by the *Austin* district court after this Court's order shows that compliance with an injunction within the bounds set by *Austin* is practicable. The district court entered a class-wide preliminary injunction that it immediately stayed "insofar as it precludes the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions." *U.S. Navy Seals 1–26* v. *Austin*, __ F. Supp. 3d __, 2022 WL 1025144, at *1 (N.D. Tex. Mar. 28, 2022) (quoting *Austin*, slip op. 1).

In response, the Navy issued an administrative order that "suspends separation processing and adverse administrative consequences of COVID-19 vaccine refusal for Navy service members who submitted requests for religious accommodation from the COVID-19 vaccine requirement." C.A. ECF 29–3 ¶ 2.[18] See also *id.* ¶ 4. The order notes that, in accordance with *Austin*, "the Navy may continue to consider the unvaccinated status of Navy service members when making deployment, assignment, and other operational decisions." *Id.* ¶ 2; see also *id.* ¶ 5. That limit is satisfied because "Navy service members who are not vaccinated, regardless of exemption status, may be temporarily or permanently reassigned based

[18] Attaching U.S. Navy, *NAVADMIN 083/22, Interim Guidance Regarding Members Requesting Religious Accommodation From COVID-19 Vaccination Requirements*, https://tinyurl.com/2tkmcfn7.

on mission requirements [in accordance with] previous guidance . . . regarding the assignment of unvaccinated personnel to operational or deployable units[.]" *Id.* ¶ 5.

In suspending "[a]ll adverse administrative consequences of refusing the vaccine, . . . including involuntary administrative separation," *id.* ¶ 4, the Navy stopped in-process involuntary separations in their tracks and ordered that affected "members are directed to remain on active duty, pending additional guidance." *Id.* ¶ 4(a). Applying less restrictive means of preventing COVID-19 transmission, the order notes that "[a]ll unvaccinated Navy service members remain subject to screening testing against COVID-19, where required." *Id.* ¶ 6.

The relief that the Navy recognizes as compliant with *Austin* would provide applicant adequate relief against the Air Force here. He does not seek court-ordered reinstatement to his recent command or court-ordered assignment to any other post. Instead, he seeks suspension of any punishment, including involuntary assignment to the IRR, which is a discharge in all but name. Assignment to the IRR prevents the service member from drawing a salary, incurring points toward retirement, reporting for duty, or being attached to a unit. C.A. ECF 11-1, at 23-24; C.A. ECF 14-1, at 11-12. The requested injunction barring respondents from preventing or delaying permanent change of station would not preclude them from taking his vaccine status into account. The injunction would only bar them from categorically denying applicant the opportunity to apply for a new position within the Air Force or applying to attend training.

The difference matters. If not placed on the IRR, applicant can seek attachment to a unit that is willing to hire him. Since he was removed from his former

command, he has been seeking and believes he has found an appropriate unit. The requested injunction pending appeal would allow him to serve in a unit where rapid deployment is not expected and the commander sees a benefit to applicant's service despite his vaccination status. Only if this Court enters an injunction will applicant be able both to live his religious beliefs and serve his country—as the First Amendment and RFRA require.

## CONCLUSION

A writ of injunction pending appeal should therefore issue restraining and enjoining respondents:

1. From enforcing, attempting to enforce, or threatening to enforce the COVID-19 vaccine mandate against applicant or otherwise requiring him to receive the COVID-19 vaccine, and

2. From taking any further adverse action against applicant based on his refusal to take the COVID-19 vaccine, including but not limited to imposing non-punitive disciplinary measures, denying training or temporary duty assignment opportunities available to other unvaccinated service members, preventing or delaying Permanent Change of Station, or discharging him from the Air Force.

3. To restore the *status quo* as it existed when applicant filed his notice of appeal by requiring respondents to restore his status immediately before he was relegated to no points/no pay.

The injunction should remain in place until this Court resolves any petition for a writ of certiorari with respect to the Ninth Circuit's decision. Alternatively, this

Court should issue the requested injunction and grant certiorari before judgment to decide the important issues presented by the application.

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Respectfully submitted,

GENE C. SCHAERR
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
*gschaerr@schaerr-jaffe.com*

DONALD M. FALK
*Counsel of Record*
SCHAERR | JAFFE LLP
Four Embarcadero Center
Suite 1400
San Francisco, CA 94111
Telephone: (415) 562-4942
*dfalk@schaerr-jaffe.com*

*Attorneys for Applicant*