

In the  
**Supreme Court of the United States**

---

LT. COL. JONATHAN DUNN  
*Petitioner,*  
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.*

---

**On Emergency Application for Injunction Pending Appeal To the Honorable Elena Kagan, Associate Justice of the United States and Circuit Justice for the Ninth Circuit**

---

**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR AMICI CURIAE RETIRED GENERAL OFFICERS OF THE UNITED STATES ARMED FORCES IN SUPPORT OF APPLICANT**

---

ERIN ELIZABETH MERSINO  
*Counsel of Record*  
RICHARD THOMPSON  
THOMAS MORE LAW CENTER  
24 Frank Lloyd Wright Dr.  
Suite J3200  
Ann Arbor, MI 48106  
(734) 827-2001  
emersino@thomasmore.org

*Counsel for Amici Curiae  
Retired General Officers of the  
United States Armed Forces*

---

## MOTION FOR LEAVE

*Amici curiae* Retired General Officers of the United States Armed Forces respectfully move for leave under Rule 37.2(b) to file the attached brief in support of Petitioner Lt. Col. Jonathan Dunn's Emergency Application for an Injunction Pending Appeal and/or Certiorari. On April 13, 2022, *Amici curiae* notified all counsel of record of this filing and requested consent. Counsel for Respondents did not oppose the filing, but took no position. Counsel for Lt. Col. Jonathan Dunn consented to the filing. While no party has opposed the filing of the attached brief, *Amici curiae* submit this motion out of an abundance of caution.

This case centers around the United States Air Force's denial of Lt. Col. Jonathan Dunn's request for a religious accommodation from their Vaccine Mandate. *Amici Curiae* have served distinguished careers in various branches of the military, serving in leadership roles at some of the highest ranks. *Amici Curiae* are uniquely positioned to know the impact of the Defendants' Vaccine Mandate on matters such as military readiness.

In addition to being able to provide this unique knowledge, *Amici Curiae* are also concerned with the consequences of denying service members the protection of the fundamental freedoms guaranteed by the United States Constitution and federal statutes. *Amici Curiae* believe that the military, and here specifically the Air Force, has lost focus of its duty to follow the Religious Freedom Restoration Act and the Free Exercise Clause of the United States Constitution, and instead has single-mindedly devoted its determinations regarding the Vaccine Mandate to the command

expectation of reaching a 100% COVID-19 inoculation rate. This goal, however, is no substitute for proper constitutional or statutory analysis.

*Amici Curiae* believe that this case presents issues of considerable practical and constitutional importance under RFRA and the First Amendment. This Court should answer the question of whether the federal government may force, on threat of criminal prosecution, discharge from service, and career-ending punishment, a service member, such as Lt. Col. Jonathan Dunn, to receive certain vaccines that violate his sincerely held religious beliefs.

*Amici Curiae* respectfully ask that the motion to file the attached *amici curiae* brief be granted.

**TABLE OF CONTENTS**

MOTION FOR LEAVE ..... i

TABLE OF AUTHORITIES ..... iv

INTERESTS OF *AMICI CURIAE*..... 1

BACKGROUND ..... 3

SUMMARY OF THE ARGUMENT ..... 5

ARGUMENT ..... 6

I. Respondents’ Denial of Lt. Col. Dunn’s Religious Accommodation Violates  
RFRA..... 7

    A. Respondents’ Refusal to Grant Religious Accommodations to the COVID-  
    19 Vaccine Will Undermine Military Readiness, Not Advance It..... 9

    B. Respondents Cannot Show That Vaccinating Lt. Col. Dunn Is the Least  
    Restrictive Means of Preserving Military Readiness ..... 19

CONCLUSION..... 22

## TABLE OF AUTHORITIES

### Cases

<i>Air Force Officer v. Austin</i> , No. 5:22-cv-9, 2022 U.S. Dist. LEXIS 26660 (M.D. Ga. Feb. 15, 2022).....	22
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014) .....	5, 8
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997) .....	8
<i>Gonzales v. Oregon</i> , 546 U.S. 243 (2006) .....	8
<i>Katcoff v. Marsh</i> , 755 F.2d 223 (2d Cir. 1985).....	16
<i>Oklevueha Native Am. Church of Hawaii, Inc. v. Holder</i> , 676 F.3d 829 (9th Cir. 2012) .....	7
<i>Sch. Dist. Abington Twp. v. Schempp</i> , 374 U.S. 203 (1963) .....	17
<i>Singh v. Carter</i> , 168 F. Supp. 3d 216 (D.D.C. 2016) .....	7
<i>Tandon v. Newsom</i> , 141 S. Ct. 1294 (2021) .....	9
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972) .....	8

### Statutes

42 U.S.C. § 2000bb-2.....	5, 7, 8
---------------------------	---------

### Other Authorities

1 Anson Phelps Stokes, <i>Church and State in the United States</i> (1950) .....	16
--	----

<i>Air Force Equal Opportunity (EO) and Non-Discrimination Policy Memorandum</i> (May 14, 2024), <a href="https://tinyurl.com/3ydn62v7">https://tinyurl.com/3ydn62v7</a> .....	2
Nick Andrews, Ph.D., et al., <i>The New England Journal of Medicine</i> , “Covid-19 Vaccine Effectiveness against the Omicron (B.1.1.529) Variant,” available at <a href="https://www.nejm.org/doi/full/10.1056/NEJMoa2119451">https://www.nejm.org/doi/full/10.1056/NEJMoa2119451</a> .....	20
Benjamin Brimelow, <i>In a major war, the US may run out of pilots before it runs out of jets, a top Air Force general says</i> , Business Insider (Apr. 7, 2022), <a href="https://tinyurl.com/yckpcfzr">https://tinyurl.com/yckpcfzr</a> .....	12
Amy M. Burdette, <i>Serving God and Country? Religious Involvement and Military Service Among Young Adult Men</i> , 48 J. Sci. Study Religion 794 (2009) .....	18
DAFI 52-201, <i>Religious Freedom in the Department of the Air Force</i> , dated June 23, 2021 .....	3
DAF COVID-19 Statistics - Apr. 5, 2022, available at <a href="https://www.af.mil/News/Article-Display/Article/2989918/daf-covid-19-statistics-apr-5-2022/">https://www.af.mil/News/Article-Display/Article/2989918/daf-covid-19- statistics-apr-5-2022/</a> .....	4
Defendant Miller’s Tweet available at <a href="https://twitter.com/usairforce/status/1455500274232176641">https://twitter.com/usairforce/status/1455500274232176641</a> .....	3
FDA, <i>Coronavirus (COVID-19) Update: FDA Authorize First Oral Antiviral for Treatment of COVID-19</i> (Dec. 22, 2021), <a href="https://tinyurl.com/4hfxbty8">https://tinyurl.com/4hfxbty8</a> .....	21
Fireside Chat 23: <i>On the Home Front</i> (Oct. 12, 1942).....	16
Joint Publ’n 1-05, <i>Religious Ministry Support for Joint Operations</i> , Joint Chiefs of Staff (Aug. 26, 1996).....	15
Andrew Jose, <i>US Warship Stuck Overseas as Navy Tries to Halt COVID Outbreak Among Fully Vaccinated Crew</i> , The Western Journal (Dec. 28, 2021), <a href="https://tinyurl.com/2p8wx7z3">https://tinyurl.com/2p8wx7z3</a> .....	20
Nancy Lapid, Reuters, “Vaccines appear weak at blocking Omicron, better against severe disease,” Dec. 13, 2021, available at <a href="https://www.reuters.com/business/healthcare-pharmaceuticals/vaccines-appear-weak-blocking-omicron-infection-shots-may-reduce-long-covid-2021-12-13/">https://www.reuters.com/business/healthcare-pharmaceuticals/vaccines- appear-weak-blocking-omicron-infection-shots-may-reduce-long-covid-2021- 12-13/</a> .....	20

John S. McCain, *John McCain, Prisoner of War: A First- Person Account*, U.S. News & World Rep. (Jan. 28, 2008), <https://tinyurl.com/2smtfnp3> ..... 14, 15

Dr. Alondra Nelson, *The White House Briefing Room*, “Let’s Clear The Air On COVID,” March 23, 2022, available at <https://www.whitehouse.gov/ostp/news-updates/2022/03/23/lets-clear-the-air-on-covid/> ..... 21

James H. O’Neill, *The True Story of the Patton Prayer*, 19 The Military Chaplain No. 2 (1948) ..... 15

*Religious Diversity in the U.S. Military*, Military Leadership Diversity Commission, Issue Paper No. 22 (2010) ..... 17

*Return to Mogadishu, Remembering Black Hawk Down*, YouTube, <https://tinyurl.com/43jzd7wr> ..... 14

*Statement by Secretary of Defense Lloyd J. Austin III on COVID Status*, <https://tinyurl.com/44namkm9> ..... 20

Secretary Kendall’s September 3, 2021 Memorandum, available at [https://www.hqrio.afrc.af.mil/Portals/149/Documents/COVID/20210903%20DAF\\_%20SecAF%20Memo%20%20Mandatory%20Coronavirus%20Disease%202019%20Vaccination%20of%20Department%20of%20the%20Air%20Force%20Military%20Members.pdf?ver=YogX1KMirgEUGIvzJtgUSw%3D%3D](https://www.hqrio.afrc.af.mil/Portals/149/Documents/COVID/20210903%20DAF_%20SecAF%20Memo%20%20Mandatory%20Coronavirus%20Disease%202019%20Vaccination%20of%20Department%20of%20the%20Air%20Force%20Military%20Members.pdf?ver=YogX1KMirgEUGIvzJtgUSw%3D%3D) ..... 3

Secretary Kendall’s Supplemental Memorandum available at [https://www.af.mil/Portals/1/documents/2021SAF/12\\_Dec/Supplemental\\_Coronavirus\\_Disease\\_2019\\_Vaccination\\_Policy.pdf](https://www.af.mil/Portals/1/documents/2021SAF/12_Dec/Supplemental_Coronavirus_Disease_2019_Vaccination_Policy.pdf) ..... 3, 4

Secretary Charles Pope, *Space Force News*, “Raymond describes Space Force achievements, plans, challenges ahead,” September 21, 2021, <https://www.spaceforce.mil/News/Article/2783508/raymond-describes-space-force-achievements-plans-challenges-ahead/> ..... 21

Don M. Snider & Alexander P. Shine, *A Soldier’s Morality, Religion, and Our Professional Ethic: Does the Army’s Culture Facilitate Integration, Character Development, and Trust in the Profession?*, 6 U.S. Army War College Professional Military Ethics Monograph Series 3 (James G. Pierce ed., 2014) ... 14, 19

Statement of Secretary John F. Kirby available at <https://www.defense.gov/News/Transcripts/Transcript/Article/2877275/pentagon-press-secretary-john-kirby-holds-an-off-camera-press-briefing/> ..... 4

Paul Taylor et al., *The Military-Civilian Gap: War and Sacrifice in the Post-9/11 Era*, Pew Research Center (Paul Taylor et al. eds., 2011) ..... 17

Mark Thompson, *Here's Why the U.S. Military is a Family Business*, Time (Mar. 10, 2016), <https://tinyurl.com/2p9x2ftv> ..... 18

Brian Wansink & Craig S. Wansink, *Are There Atheists in Foxholes? Combat Intensity and Religious Behavior*, 52 J. Religion & Health 768 (2013) ..... 14



## INTERESTS OF *AMICI CURIAE*<sup>1</sup>

*Amici Curiae* are Retired General Officers of the United States Armed Forces. *Amici* have devoted their lives to protecting the fundamental freedoms guaranteed by the United States Constitution and federal law. *Amici* are deeply interested in this case because their decades of military leadership have led them to conclude that service members' freedom to exercise religion is essential to military success. *Amici* do not believe that Respondents' rigid vaccinate-or-leave policy is in the best interests of national security because it ignores the harm to military readiness that will be caused by the sudden discharge of thousands of experienced and loyal service members who have religious objections to the COVID-19 vaccine. The military currently pays substantial bonuses to retain such highly trained personnel—many of whom could make far more money in the private sector—and discharging these individuals over their religious beliefs makes little sense given the military's inability to replace their experience. After all, the Air Force cannot hire a pilot with 19 years of experience and multiple combat tours to replace Lt. Col. Dunn. If he and others like him are forced out of the military, they will leave a hole that cannot be filled. Respondents' unrelenting war on religious belief will also send a message to potential recruits that the devoutly religious need not apply, thereby harming future recruiting efforts as well.

---

<sup>1</sup> On April 13, 2022, *Amici Curiae* sought consent from the parties and provided notice of this filing in accordance with Supreme Court Rule 37. Petitioner granted consent to *Amici Curiae* for this filing. Respondents took no position; therefore, *Amici Curiae*'s motion for leave precedes this filing. *Amici Curiae* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

*Amici* are disturbed by Respondents' apparent hostility to religious belief. Such discrimination is forbidden both by the Constitution and by military policy. For example, after the repeal of Don't Ask, Don't Tell, the Secretary of the United States Air Force issued an *Air Force Equal Opportunity (EO) and Non-Discrimination Policy Memorandum* (May 14, 2024), <https://tinyurl.com/3ydn62v7>, clarifying that "discrimination is any unlawful action that denies equal opportunity to persons or groups based on their race, color, sex, national origin, or religion." *Id.* The memorandum prohibits "failing or refusing to hire or promote, discharging, or otherwise discriminating against any individual with respect to compensation, terms, conditions, or privileges of employment because of a person's race, sex, color, religion, national origin, age, genetic information, disability, or prior EO activity." *Id.* The memorandum closed with the statement that "The Air Force's greatest asset is our people." *Id.* Yet here Respondents are callously discarding one of those assets, notwithstanding his 19 years of exemplary service, on account of his religious beliefs.

Because Respondents' alleged justifications for this draconian action do not withstand scrutiny, *Amici* encourage this Court to enjoin Respondents from enforcing Defendants' vaccine mandate against Lt. Col. Dunn and to make clear that Respondents do not have a compelling interest in forcing religious objectors to take the COVID-19 vaccine.

## BACKGROUND

On September 3, 2021, Secretary Kendall issued a Memorandum for Department of Air Force Commanders, with the subject: Mandatory Coronavirus Disease 2019 Vaccination of Department of the Air Force Military Members (“Vaccine Mandate”).<sup>2</sup> On October 18, 2021, Lt. Gen. Robert I. Miller issued a memorandum with the subject: COVID-19 Immunization Religious Accommodation Request Appeals. The memorandum states that Airmen who believe the vaccine mandate “substantially burdens their exercise of a sincerely held belief may request exemption from this immunization requirement.” *Id.* The memorandum provides that “[r]equests for religious accommodation from the requirement will follow guidance in DAFI 52-201, *Religious Freedom in the Department of the Air Force*, dated June 23, 2021. *Id.* However, on November 2, 2021, Lt. Gen. Robert I. Miller took to Twitter to announce that the “entire” military would undergo COVID-19 vaccination.<sup>3</sup>

On December 7, 2021, Defendant Kendall issued a memorandum with the subject: Supplemental Coronavirus Disease 2019 Vaccination Policy.<sup>4</sup> The memorandum stated that if a final appeal is denied, the “service member will have five (5) calendar days from the notice of denial to begin the COVID-19 vaccination

---

<sup>2</sup> Secretary Kendall’s September 3, 2021 Memorandum is available at [https://www.hqrio.afrc.af.mil/Portals/149/Documents/COVID/20210903%20DAF %20SecAF%20Memo%20Mandatory%20Coronavirus%20Disease%202019%20Vaccination%20of%20Department%20of%20the%20Air%20Force%20Military%20Members.pdf?ver=YogX1KMirgEUGIvzJtgUSw%3D%3D](https://www.hqrio.afrc.af.mil/Portals/149/Documents/COVID/20210903%20DAF%20SecAF%20Memo%20Mandatory%20Coronavirus%20Disease%202019%20Vaccination%20of%20Department%20of%20the%20Air%20Force%20Military%20Members.pdf?ver=YogX1KMirgEUGIvzJtgUSw%3D%3D).

<sup>3</sup> Defendant Miller’s Tweet is available at <https://twitter.com/usairforce/status/1455500274232176641>.

<sup>4</sup> Defendant Kendall’s Supplemental Memorandum is available at [https://www.af.mil/Portals/1/documents/2021SAF/12\\_Dec/Supplemental\\_Coronavirus\\_Disease\\_2019\\_Vaccination\\_Policy.pdf](https://www.af.mil/Portals/1/documents/2021SAF/12_Dec/Supplemental_Coronavirus_Disease_2019_Vaccination_Policy.pdf).

regimen.” The memorandum stated that “[s]ervice members separated due to refusal of the COVID-19 vaccine will not be eligible for involuntary separation pay and will be subject to recoupment of any unearned special or incentive pays.”

Defendant Kendall’s December 7, 2021, Supplemental Memorandum, outlined three bases for exemptions to the COVID-19 vaccination: medical, religious, and administrative. *Id.* The memorandum also emphasized that service members with pending requests for accommodations, such as Applicant, were temporarily exempt from complying with the mandate. *Id.* However, the memorandum asserted that undergoing COVID-19 vaccination was an “essential military readiness requirement for all components of the Air Force and Space Force,” *id.*—revealing that while a process was provided for service members, Respondents had already determined the outcome: No accommodations would be granted.

To date, more than 98% of active service members in the United States Air Force have received the COVID-19 vaccine. DAF COVID-19 Statistics - Apr. 5, 2022, available at <https://www.af.mil/News/Article-Display/Article/2989918/daf-covid-19-statistics-apr-5-2022/>. However, Pentagon Press Secretary John F. Kirby, when speaking on behalf of Secretary of Defense Lloyd J. Austin, in remarks on December 16, 2021, stated “...what we want is 100 percent vaccination.”<sup>5</sup>

---

<sup>5</sup> Statement of Secretary John F. Kirby is available at <https://www.defense.gov/News/Transcripts/Transcript/Article/2877275/pentagon-press-secretary-john-kirby-holds-an-off-camera-press-briefing/>.

## SUMMARY OF THE ARGUMENT

RFRA protects diversity and pluralism of sincerely held religious beliefs for individuals who serve in our Nation's military. In passing RFRA, Congress designated that its protections extend to all facets of the federal government, including the branches of the military, in full force. 42 U.S.C. § 2000bb-2(1). The nation's military is stronger when the fundamental rights of its members are protected. Respondents' position that punishment and separation of service members is necessary based on their sincerely held religious objections to certain COVID-19 vaccines is untenable.

Respondents' denial of Lt. Col. Dunn's religious accommodation violates RFRA for two reasons. First, Respondents have not established a compelling interest in forcing Lt. Col. Dunn to undergo vaccination that violates his religious beliefs. Respondent must show that its compelling interest is narrowly tailored to the particular religious claimant. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726-27 (2014). Respondent's denial of Lt. Col. Dunn's request for a religious accommodation, however, asserts only a shallow and overly broad answer to the compelling interest question, which is not enough under strict scrutiny review.

Respondents' refusal to grant Lt. Col. Dunn's request for a religious accommodation will undermine military readiness, not advance it. By punishing and separating sincere religious objectors, Respondents are unwisely reducing the nation's military force without regard to (1) technical skillset requirements, (2) combat and service experience, (3) rank and grade, (4) anticipated return on

investment, or (5) potential for continued service. Respondents are substituting their responsibility to follow RFRA with their goal of reaching a 100% vaccination rate. That misguided goal carries with it the consequence of degrading national security. Religious exercise has long motivated soldiers to serve this country with distinction. And today, religious belief is still one of the strongest motivations for those serving. Allowing religious discrimination in the military does not serve a compelling interest.

Second, Respondents have failed to use the least restrictive means. At this point in the COVID-19 pandemic, there are myriad alternatives that mitigate the transmissibility of the virus. Lt. Col. Dunn has natural immunity to COVID-19. The available vaccines show waning effectiveness to newer variants such as Delta and Omicron, and many vaccinated individuals have contracted and transmitted the virus. The availability of therapeutic options has increased and so has effective engineering controls. Respondents have historically made reasonable accommodations for even non-deployable service members. There is no reason to deny any and all accommodations to Lt. Col. Dunn. Granting an injunction is not only required under the proper application of RFRA, but it is in the best interest of national security.

## **ARGUMENT**

America was founded on the principle of pluralism. The idea of forcing service members with sincere religious objections to violate their conscience or suffer a litany of career-ending and draconian measures—such as court-martial (criminal) prosecution, involuntary separation, relief for cause from leadership positions,

removal from promotion lists, inability to attend certain military training and education schools, loss of special pay, placement in a non-deployable status, recoupment of money spent training the service member, and loss of leave and travel privileges for both official and unofficial purposes—runs contrary to our nation’s very identity. And putting Lt. Col. Dunn to that choice here squarely violates the Religious Freedom Restoration Act (RFRA) because Respondents do not have a compelling interest in forcing him to be vaccinated. Nor can Respondents show that forced vaccination is the least restrictive means of maintaining military readiness given the military’s performance over the course of the pandemic.

**I. Respondents’ Denial of Lt. Col. Dunn’s Religious Accommodation Violates RFRA.**

RFRA applies to any “branch, department, agency, instrumentality, and official . . . of the United States,” and thus plainly applies to Defendants. 42 U.S.C. § 2000bb-2(1). Congress, per the language of RFRA, intended for the statute to apply in full force without undue deference to the military. *See Singh v. Carter*, 168 F. Supp. 3d 216, 226 (D.D.C. 2016) (“Congress nowhere inserted any exception for the U.S. Armed Forces from RFRA’s application”); *see also Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012) (“We decline . . . to read an exhaustion requirement into RFRA where the statute contains no such condition, and the Supreme Court has not imposed one.”).

RFRA provides that the government “shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.” 42 U.S.C. § 2000bb-1(a). RFRA protects “any exercise of religion.” *Id.* at §§ 2000bb-2(4),

2000cc-5(7)(A). To justify a substantial burden on the free exercise of religion under RFRA, the government must demonstrate that the challenged action is “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” *Id.* at § 2000bb- 1(b). The government’s burden is a heavy one. Because it must “demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened.” *Hobby Lobby*, 573 U.S. at 726-27 (citation omitted). “[B]roadly formulated” or “sweeping” interests are insufficient. *O Centro*, 546 U.S. at 431; *Yoder*, 406 U.S. at 221. Rather, Defendants must show with “particularity how [even] admittedly strong interest[s]” “would be adversely affected by granting an exemption.” *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972). In other words, a court must “look to the marginal interest in enforcing the [vaccine] mandate in th[is] case[.]” *Hobby Lobby*, 573 U.S. at 726-27.

Here, Respondents seek to punish Applicant for one reason: his sincerely held religious beliefs do not permit him to take the COVID-19 vaccine. Because Respondents’ mandate substantially burdens Applicant’s exercise of religion, the “burden is placed squarely on the Government” to show that its mandate satisfies strict scrutiny, *Gonzales v. Oregon*, 546 U.S. 243, 429 (2006), which is the “most demanding test known to constitutional law.” *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). It “requires the State to further ‘interests of the highest order’ by means ‘narrowly tailored in pursuit of those interests.’ . . . That standard ‘is not watered



down’; it ‘really means what it says.’” *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (internal citation omitted).

Respondents cannot meet that burden here because they do not have a compelling interest in vaccinating Lt. Col. Dunn and the military’s broader interest in the health and safety of the force can be achieved in less restrictive means.

**A. Respondents’ Refusal to Grant Religious Accommodations to the COVID-19 Vaccine Will Undermine Military Readiness, Not Advance It**

Respondents contend that they have a compelling interest in vaccinating service members to protect military readiness. Lt. Gen. Scobee invoked this broad interest when he denied Lt. Col. Dunn’s religious accommodation request, stating “[a]ll immunizations, including those listed above, are an important element of mission accomplishment, as they contribute to the health, safety and readiness of this force.” 3 C.A.E.R. 381. But this case is not about whether the military has a compelling interest in administering vaccines *generally*. All agree that it does. Indeed, Lt. Col. Dunn has received dozens of vaccines during his time in the Air Force and anticipates taking dozens more if allowed to continue serving. Like thousands of other service members, his religious objection is to *this* vaccine.<sup>6</sup>

---

<sup>6</sup> Unlike any vaccine in our lifetime, the COVID-19 vaccine has been used to determine whether citizens can access employment, entertainment, travel, dining, and countless other areas of life. This vaccine was also improved far faster than any previous vaccine and has already generated far more adverse reactions than any of the other vaccines on the military’s list of required vaccines. Given the corners that were cut in the testing and approval of this vaccine and the dogmatic zeal with which the government has pushed it on its citizens, the circumstances surrounding this vaccine are unique, and the many RFRA challenges to it do not call into question the military’s interest in vaccinating service members with other trusted vaccines.

The question under RFRA is thus whether Respondents have a compelling interest in forcing Lt. Col. Dunn to take this specific vaccine. They do not. On the contrary, forcing Lt. Col. Dunn and thousands of other religious objectors to get the COVID-19 vaccine would *compromise military readiness*. In their (approaching religious) zeal to achieve 100% vaccination, Respondents overlook the immense harm to national security that would result from sidelining thousands of experienced veterans who have skills and training that cannot be easily replaced. Respondents also ignore the critical role that religious belief has traditionally played in our military and thus fail to recognize that their war on religious believers will substantially undermine their ability to recruit religious believers in the future. Once the costs of Respondents' unyielding vaccination campaign are considered, it becomes clear that Respondents *do not* have a compelling interest in forcing Lt. Col. Dunn or any other religious objector to take the COVID-19 vaccine as a condition of their continued service.

1. Respondents led the lower courts to believe that denying Lt Col Dunn's religious accommodation will result in him getting vaccinated and continuing to serve. They thus claim that denying the exemption furthers military readiness and national security. But that is not accurate. Lt Col Dunn is a reservist without any further obligation to serve. He is thus unlikely to continue serving if Respondents require him to violate his religious beliefs as a condition of continued service. Indeed, even those with existing service commitments are unlikely to continue serving—even if it means facing a dishonorable discharge or repaying enlistment bonuses—if doing

so would require them to violate their consciences. Because we have an all-volunteer military, Respondents do not have the power to compel anyone to remain in the military contrary to their religious beliefs.

By failing to accommodate nearly any religious objections to the vaccine mandate, Respondents are effectively implementing a dramatic reduction in force without regard to (1) technical skillset requirements, (2) combat and service experience, (3) rank and grade, (4) anticipated return on investment, or (5) potential for continued service.

**Technical skillset requirements:** Lt. Col. Dunn is a trained instructor and evaluator pilot with over 11 years and thousands of hours flight experience in four different Air Force aircraft. 3 C.A.E.R. 366-367. To replace his skill and experience, developed over a decade of service, will take over 15 years when considering recruiting and training requirements, as well as several million dollars in training. It is simply impossible to replace skilled aviators on short notice, and no amount of money can solve the problem Respondents insist on creating.

**Combat and service experience:** Lt. Col. Dunn has deployed three times in support of combat operations and numerous other times supporting training exercises and real-world planning operations. 3 C.A.E.R. 367. These deployments have given him irreplaceable combat and operational experience. As U.S. military operations draw down around the globe, Lt. Col. Dunn represents a dwindling cadre of combat tested aviators that will be relied upon to season younger generations in preparing for future conflicts. The military historically relies on its combat-tested service

members to form the nucleus of combat forces in future conflict. Purging these servicemembers would deprive the Air Force of this irreplaceable commodity, a policy that seems especially nonsensical given the current geopolitical situation.

**Rank and grade requirements:** By selectively separating service members based on vaccination status alone, the Air Force is failing to account for its future needs. Lt. Col. Dunn represents a small cadre of top performing officers identified and selected for command, a cohort that historically has *never* been identified or targeted for reduction in force. Lt. Col. Dunn, and others like him, are thus the *last* people the military can afford to lose.

**Anticipated return on investment:** The Air Force utilizes anticipated return on investment calculations to inform far reaching recruiting and retention policies such as pilot recruiting, pilot selection, pilot training commitments and pilot retention bonuses. As military leaders have recently recognized, the Air Force must “be mindful of its sustainment capacity, particularly when it comes to pilots and the advanced aircraft they fly” because in any large-scale conflict with a major power the Air Force is likely to run out pilots before it runs out planes. Benjamin Brimelow, *In a major war, the US may run out of pilots before it runs out of jets, a top Air Force general says*, Business Insider (Apr. 7, 2022), <https://tinyurl.com/yckpcfzr> (citing Gen. Mark Kelly, head of Air Combat Command). The Air Force’s willingness to remove a 19-year veteran with combat flight experience based on his religious objection to a vaccine that Respondents admit has waning effectiveness makes clear that Respondents have not considered any of these traditional force management impacts.

**Potential for continued service:** Historically, the Air Force has conducted Reductions in Force designed to intelligently shape manpower based on factors such as individual skillset requirements, anticipated future needs, and each individual's past performance and future potential for advancement. These historical discriminators are painfully absent in this current force reduction process, as the military is targeting not just Lt. Col. Dunn but highly trained Navy SEALs, naval commanders, and other officers with strong future potential for future service.

In short, *Amici* are deeply concerned that Respondents' myopic focus on the perceived *benefits* of achieving a 100% vaccination rate have blinded them to the substantial *costs* associated with their dogged pursuit of that goal. *Amici* thus urge the Court not to defer to Respondents' assertion that there is a compelling interest in forcing Lt. Col. Dunn to be vaccinated.

2. Although Respondents contend that granting exemptions to religious objectors would harm military readiness, good order, and discipline, Respondents overlook the important the role that religion plays in *furthering* good order and discipline. Soldiers may be legally obligated to obey their superiors' orders, but they are internally motivated to obey orders by their personal moral frameworks and religious convictions. Good order and discipline are maximized when soldiers' legal obligation and personal motivation combine to foster the good character necessary to secure a strong national defense.

That is because a person’s “system of beliefs defines who a person is, what [a] person stands for, serves as a guide for determining behavior—especially in ambiguous and chaotic situations—and also provides the courage and will to act in accordance with one’s beliefs and values.” Don M. Snider & Alexander P. Shine, *A Soldier’s Morality, Religion, and Our Professional Ethic: Does the Army’s Culture Facilitate Integration, Character Development, and Trust in the Profession?*, 6 U.S. Army War College Professional Military Ethics Monograph Series 3 (James G. Pierce ed., 2014) (quotations omitted). A service member’s religious beliefs also provide support and solace during the difficult times that war and extended deployment often brings. Studies have shown that a combat veteran’s reliance on prayer and religion increases as combat intensifies or as negative experiences arise. See Brian Wansink & Craig S. Wansink, *Are There Atheists in Foxholes? Combat Intensity and Religious Behavior*, 52 *J. Religion & Health* 768, 771, 773 (2013). For example, Jeffrey Struecker was one of the Army Rangers who fought in the battle of Mogadishu, which was memorialized in the movie, *Black Hawk Down*. He credits his faith in God for giving him the courage to return to the firefight to check the status of the downed helicopter. See *Return to Mogadishu, Remembering Black Hawk Down*, YouTube (last viewed, April 14, 2022), <https://tinyurl.com/43jzd7wr>. John McCain similarly relied on his religious faith during his five years of captivity and torture as a prisoner of war in the Hanoi Hilton, explaining that “prayer helped” and that his faith “sustained [him] in many times of trial.” John S. McCain, *John McCain, Prisoner of War: A First-*

*Person Account*, U.S. News & World Rep. (Jan. 28, 2008), <https://tinyurl.com/2smtfpn3>.

Some of our nation's most esteemed generals have similarly recognized the role that religious belief plays in forming soldiers and winning battles. As General George Patton once explained to a chaplain: "A good soldier is not made merely by making him think and work. There is something in every soldier that goes deeper than thinking or working—it's his "guts." It is something that he has built in there: it is a world of truth and power that is higher than himself. Great living is not all output of thought and work. A man has to have intake as well. I don't know what you [call] it, but I call it Religion, Prayer, or God." James H. O'Neill, *The True Story of the Patton Prayer*, 19 *The Military Chaplain* No. 2 at 2 (1948).

General George C. Marshall made a similar point when he said that he "look[ed] upon the spiritual life of the soldier as even more important than his physical equipment. The soldier's heart, the soldier's soul, the soldier's spirit, are everything. Unless the soldier's soul sustains him, he cannot be relied upon and will fail himself and his country in the end. \* \* \* It's morale—and I mean spiritual morale—which wins the victory in the ultimate, and that type of morale can only come out of the religious nature of the soldier who knows God and who has the spirit of religious fervor in his soul. Joint Publ'n 1-05, *Religious Ministry Support for Joint Operations*, Joint Chiefs of Staff, at II-3 (Aug. 26, 1996). In short, as Generals Patton and Marshall recognized, religious belief plays a vital role in our nation's military

and has contributed significantly to the many victories our military has achieved over the past two and a half centuries.

Permitting service members to serve in a manner compatible with their religious beliefs thus promotes military readiness and good order. For this reason, the Nation's military leaders have long sought to facilitate rather than restrict religious exercise in the military. George Washington established regimental chaplaincies for Virginia in 1758, during the French and Indian War. See 1 Anson Phelps Stokes, *Church and State in the United States* 268 (1950). On July 29, 1775, the Continental Congress authorized military chaplains for the Continental Army and provided for their compensation. *Id.* at 271. The following year, General Washington ordered the "Colonels or commanding officers of each regiment to procure Chaplains accordingly; persons of good Characters and exemplary lives." *Ibid.* And in the darkest days of World War II, President Franklin D. Roosevelt assured "every father and every mother who ha[d] a son in the service" that the United States would "never fail to provide for the spiritual needs of our officers and men under the Chaplains of our armed services." Fireside Chat 23: *On the Home Front* (Oct. 12, 1942). Other "top generals of the Army and those presently in the chaplaincy" have found that without access to chaplains, "the motivation, morale and willingness of soldiers to face combat would suffer immeasurable harm and our national defense would be weakened accordingly." *Katcoff v. Marsh*, 755 F.2d 223, 228 (2d Cir. 1985) ("[H]aving uprooted the soldiers from their natural habitats [the military] owes them



a duty to satisfy their Free Exercise rights, especially since the failure to do so would diminish morale, thereby weakening our national defense.”).

Respondents’ response to applicant’s request for a religious exemption here—and their response to thousands of similar requests—flies in the face of this centuries-long commitment to religious exercise and to the longstanding recognition that religious belief is vital to our military and thus to the national defense.

**3. Respondents’ hostility to religious belief will undermine the military’s ability to recruit and retain the best possible fighting force.**

The U.S. military, a microcosm of the Nation itself, is strikingly religious. See *Sch. Dist. Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (“Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings.”); see also Paul Taylor et al., *The Military-Civilian Gap: War and Sacrifice in the Post-9/11 Era*, Pew Research Center 3 (Paul Taylor et al. eds., 2011) (“In their religious affiliation, veterans are roughly comparable to the general population.”). According to the Defense Equal Opportunity Management Institute, nearly 70% of military service members are Christian, Jewish, or Muslim, and over 74% of military members profess some form of religious faith. *Religious Diversity in the U.S. Military*, Military Leadership Diversity Commission, Issue Paper No. 22 at 2 (2010).

Indeed, religion is often one of the strongest motivations for serving in the military. A recent study that examined data from the National Longitudinal Study of Adolescent Health concluded that there are “several notable and robust associations between religious identity and military enlistment.” Amy M. Burdette, *Serving God and Country? Religious Involvement and Military Service Among Young Adult Men*, 48 J. Sci. Study Religion 794, 803 (2009). The study also found that “[t]hose who are ‘nonreligious’ consistently exhibit lower odds of enlistment in comparison to their ‘highly religious evangelical’ counterparts.” *Id.* at 802. Telling those with strongly held religious beliefs that they are not welcome in today’s military would thus devastate military recruiting efforts.

Respondents’ hostility to religious belief is likely to harm recruiting by discouraging the children of current military members to enlist. As researchers have recognized, the military is increasingly a “family business,” and more than “80% of recent troops come from a family where at least one parent, grandparent, aunt or uncle, sibling or cousin has also worn their nation’s uniform.” Mark Thompson, *Here’s Why the U.S. Military is a Family Business*, Time (Mar. 10, 2016), <https://tinyurl.com/2p9x2ftv>. “A Pentagon report detailing 2012-2013 recruits show[ed] that 86% of new Air Force airmen had a close relative (parent, grandparent, sibling aunt, uncle or cousin) who had served. The Navy rate was 82%; Army, 79%; and Marines, 77%.” *Id.* As the military itself has recognized, relatives are “‘influencers’ because of their ability to steer young people into, or away from, the military.” *Id.* If Respondents insist on persecuting current service members who have

faithfully served for decades simply because of their religious objections to the COVID-19 vaccine—a vaccine with questionable efficacy that allegedly protects against a disease posing a nominal risk to young and healthy service members, some of whom (like Lt. Col. Dunn) already have natural immunity to the disease—these “influencers” are likely to steer their relatives away from military service. Respondents’ myopic focus on achieving 100% vaccination will thus continue to harm recruitment efforts for years to come, as the affected service members’ children increasingly decline to enlist. Researchers have already noted “the evolving culture of hostility toward religious presence and expression” in the military, and Respondents’ actions here only compound the impression that sincere religious belief is not compatible with military service. *See Snider et al., supra*, at 10-15 (documenting evidence of in the military from 2011 to 2014).

**B. Respondents Cannot Show That Vaccinating Lt. Col. Dunn Is the Least Restrictive Means of Preserving Military Readiness.**

Respondents contend that vaccinating Lt. Col. Dunn is the least restrictive means of achieving its purported interest in military readiness. But Respondents allowed Applicant to continue serving for six months while his exemption request was processed, and he faithfully served for more than a year before the mandate was issued (and for nine months before any vaccine was available) without incident. It is thus difficult to take seriously Lt. Gen. Miller’s assertion in the appeal denial that Lt. Col. Dunn’s “status as a non-immunized individual in this dynamic environment and aggregated with other non-immunized individuals in steady state operations, would place health and safety,

unit cohesion, and readiness at risk” and thus “have a real adverse impact on military readiness and public health and safety.”

Indeed, there is mounting evidence that the vaccines themselves are ineffective after a few months, especially against the Omicron variant. *See* Nick Andrews, Ph.D., et al., *The New England Journal of Medicine*, “Covid-19 Vaccine Effectiveness against the Omicron (B.1.1.529) Variant,” available at <https://www.nejm.org/doi/full/10.1056/NEJMoa2119451>; Nancy Lapid, Reuters, “Vaccines appear weak at blocking Omicron, better against severe disease,” Dec. 13, 2021, available at <https://www.reuters.com/business/healthcare-pharmaceuticals/vaccines-appear-weak-blocking-omicron-infection-shots-may-reduce-long-covid-2021-12-13/>. Indeed, Defendant Austin himself contracted COVID-19 after being vaccinated and boosted. *Statement by Secretary of Defense Lloyd J. Austin III on COVID Status*, <https://tinyurl.com/44namkm9>. And in December 2021, the fully vaccinated crew aboard the USS Milwaukee was quarantined after contracting COVID during deployment. *See* Andrew Jose, *US Warship Stuck Overseas as Navy Tries to Halt COVID Outbreak Among Fully Vaccinated Crew*, *The Western Journal* (Dec. 28, 2021), <https://tinyurl.com/2p8wx7z3>. It is difficult to see how forced vaccination is the least restrictive means of combatting COVID-19 when the available vaccines are not effective against the current variants.

And while vaccine efficacy continues to wane, there have been significant advances in treatments for COVID-19. In December 2021, the FDA granted

emergency use authorization for Paxlovid, which treats mild to moderate COVID-19 in adults. FDA, *Coronavirus (COVID-19) Update: FDA Authorize First Oral Antiviral for Treatment of COVID-19* (Dec. 22, 2021), <https://tinyurl.com/4hfxbty8>.

Other treatments, including sotrovimab, Veklury (remdesivir), and molnupiravir, have previously been authorized by the FDA to treat COVID-19. Additionally, the White House recently recognized the importance of air filtration and ventilation in preventing the transmissibility of COVID-19. Dr. Alondra Nelson, *The White House Briefing Room*, “Let’s Clear The Air On COVID,” March 23, 2022, available at <https://www.whitehouse.gov/ostp/news-updates/2022/03/23/lets-clear-the-air-on-covid/> (stating that improved ventilation and air quality can reduce COVID-19 transmission by 50%). There are several less restrictive alternatives to Defendant’s vaccine mandate that would have the effect of preventing the transmission of COVID at a similar or a far better success rate.

Moreover, the United States Air Force has utilized non-deployable officers and made reasonable accommodations for them for medical and secular reasons. *See, e.g.*, Secretary Charles Pope, *Space Force News*, “Raymond describes Space Force achievements, plans, challenges ahead,” September 21, 2021, <https://www.spaceforce.mil/News/Article/2783508/raymond-describes-space-force-achievements-plans-challenges-ahead/>. Defendants could easily make an accommodation for Applicant and abstain from punishing him, court-martialing him, or separating him from the military due to his sincerely held religious beliefs.

\* \* \*

Respondents' treatment of Lt. Col. Dunn is beyond shameful. As the district court recently recognized in *Air Force Officer v. Austin*, "All Americans \*\*\* want our country to maintain a military force that is powerful enough to thoroughly destroy any enemy who dares to challenge it. However, we also want a military force strong enough to respect and protect its service members' constitutional and statutory religious rights." No. 5:22-cv-9, 2022 U.S. Dist. LEXIS 26660, at \*34-35 (M.D. Ga. Feb. 15, 2022). Granting an injunction here would ensure that the military will serve both interests going forward.

### CONCLUSION

Lt. Col. Dunn has an exemplary record of service to his county. *See* Pet. App. at 3-4. Our military would be weaker without him. Because Respondents do not have a compelling interest in forcing Lt. Col. Dunn to be vaccinated and cannot show that vaccination is the least restrictive means of maintaining military readiness, Respondents' denial of a religious accommodation violates RFRA and the Free Exercise Clause. This Honorable Court should, therefore, grant Applicant's Motion for Emergency Injunctive Relief.

Respectfully submitted,

THOMAS MORE LAW CENTER

ERIN ELIZABETH MERSINO

*Counsel of Record*

RICHARD THOMPSON

24 Frank Lloyd Wright Dr.

Suite J3200

Ann Arbor, MI 48106

(734) 827-2001

[emersino@thomasmore.org](mailto:emersino@thomasmore.org)

*Counsel for Amici Curiae*

*Retired General Officers of the*

*United States Armed Forces*