United States District Court
Middle District of Florida
Tampa Division

HOWARD CROSBY, *et al.,*

Plaintiffs,

v. **NO. 8:21-CV-02730-TPB-CPT**

LLOYD AUSTIN, III, *et al.*

Defendants.

Plaintiffs' Motion for Stay, Temporary Restraining Order and Preliminary Injunction and Memorandum in Support

Plaintiffs, Howard Crosby, et al., pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, file this motion for temporary restraining order (TRO) and preliminary injunction, and memorandum in support thereof, and would respectfully show the Court as follows.

INTRODUCTION

Plaintiffs are a group of military service members who are subject to the August 24, 2021 Department of Defense ("DOD") COVID-19 vaccine mandate ("DOD Mandate"). *See* ECF No. 1-2. The facts in support of Plaintiffs' causes of action, including the issuance and implementation of the DOD Mandate, the requirements each Plaintiff faces to comply with the DOD Mandate and implementation thereof by Air Force, Army, Coast Guard, Marine Corps, Navy

(collectively, the "Armed Services"), and the religious objections and religious retaliation by Defendants are more fully set furth in Plaintiffs' Complaint. *See* ECF No. 1. This motion and corresponding memorandum incorporate by reference the facts in Plaintiffs' Complaint.

Plaintiffs file this motion for relief, requesting the Court: (1) enjoin the implementation of the DOD Mandate and the Armed Services implementation thereof; (2) enjoin Defendants' administration of COVID-19 vaccines with emergency use authorization ("EUA") that have not received full licensure by the Food and Drug Administration ("FDA"); (3) prohibit Defendants from targeting Plaintiffs for their religious beliefs; and (4) prohibit Defendants from taking any administrative or punitive action against Plaintiffs pending the resolution of this litigation.

MEMORANDUM: ARGUMENT & AUTHORITY

A. Justiciability & Standing

1. Plaintiffs' Claims are Justiciable and Ripe.

Plaintiffs' claims against Defendants DOD and Armed Services are justiciable. In the Eleventh Circuit, claims by service members against the armed services are normally non-justiciable, except for where, as here, Plaintiffs make "facial challenges to military regulations." *Speigner v. Alexander*, 248 F.3d 1292, 1296 (11th Cir. 2001).

In *Navy Seal 1 v. Biden*, No. 8:21-cv-02429-SDM-TGW (M.D. Fla. Nov.

22, 2021) ("*Navy Seal 1*"), this Court specifically rejected assertions by the DOD and Armed Services that largely identical claims that the DOD Mandate violates the Free Exercise Clause and the Religious Freedom Restoration Act ("RFRA") are non-justiciable and not ripe where, as here, Plaintiffs' religious accommodation requests had been denied. *See* ECF No. 1, Compl., ¶ 105 (seven Plaintiffs had had their RA requests denied or recommended for disapproval).

2. Plaintiffs Have Article III Standing.

A plaintiff establishes standing by demonstrating (1) a "concrete and particularized" injury that is "actual or imminent"; (2) "fairly traceable to the challenged conduct"; and (3) "likely to be redressed by a favorable judicial decision." *Banks v. HHS.*, --- Fed.Appx. ---, 2021 WL 3138562 (11th Cir. July 26, 2021) (*quoting Spokeo, Inc. v. Robbins*, 578 U.S. 856, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016)).

Each of these requirements are easily met. Plaintiffs will suffer a "concrete and particularized" injury that is "actual and imminent" due to the unlawful and unconstitutional DOD Mandate, and the resulting disciplinary actions for non-compliance. Moreover, the vaccine administered will be an EUA vaccine that cannot lawfully be mandated or administered without Plaintiffs' informed consent. *See infra* Section C.1.B.

The latter two elements, traceability and redressability, normally "overlap as two sides of the causation coin." *Dynalantic Corp. v. Dep't of Def.*, 115 F.3d 1012, 1017 (D.C. Cir. 1997). Where, as here, the plaintiff or "petitioner is the object of the challenged agency action, there is usually little doubt of causation." *Teva Pharmaceuticals USA, Inc. v. FDA*, 514 F.Supp.3d 66, 91 (D.D.C. 2020) ("*Teva*") (*citing Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62, 112 S. Ct. 1230, 119 L.Ed.2d 351 (1992) ("*Lujan*")).

3. Plaintiffs Have Standing for Statutory Claims.

As explained above, Plaintiffs' claims are facial challenges to military regulations based on allegations that the DOD and Armed Services Defendants "acted arbitrarily and capriciously by failing to adhere to statutes and regulations." *John Doe No. 1 v. Rumsfeld*, 297 F.Supp.2d 119, 128 (D.D.C. 2003) ("*Rumsfeld I*"). Under the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Lujan,* 497 U.S. 871 at 882 (*quoting* 5 U.S.C. § 702). Plaintiffs also have standing as the subject of the challenged agency action. *Teva*, 514 Supp.3d at 91.

Courts have routinely granted standing to service members challenging a new vaccine mandate applicable to them. *See generally Rumsfeld I* and *John*

Doe No. 1 v Rumsfeld, 341 F. Supp. 2d 1 (D.D.C. 2004) ("*Rumsfeld II*"). *See also* ECF No. 1-21, *Doe v. Austin* Order at 14-15 (characterizing plaintiffs' claims regarding violations of 10 U.S.C. § 1107a as APA claims). Plaintiffs' injury is directly traceable to the actions of the DOD in adopting the DOD Mandate, and to the Armed Services Guidance and implementation thereof. Their injury can be redressed by this Court's grant of the stay and the declaratory and injunctive relief requested in this Motion.

B. Legal Standard

1. Preliminary Injunction and Temporary Restraining Order

A district court may grant a preliminary injunction or a temporary restraining order where the moving party demonstrates:

> (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.

Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000).

"In this Circuit, [a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion as to the four requisites." *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1307 (11th Cir. 1998) (citations omitted). In a case involving the First Amendment and the free exercise of religion, however, there is a presumption of irreparable injury. As the Supreme Court has observed, "[t]he

loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct 63, 67, 208 L.Ed.2d 206 (2020) ("*Cuomo*"). With respect to the relief Plaintiffs seek, "it is always in the public interest to protect First Amendment liberties." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998),

2. Administrative Stay

The Administrative Procedures Act (APA) states a court may "issue all necessary and appropriate process to postpone the effective date of agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C § 705. The standard for an administrative stay, which stays a proceeding, is the same as the factors discussed above. *See Nken v. Holder*, 556 U.S. 418 432-33 (2009). Plaintiffs seek to stay the Armed Services implementation of the DOD Mandate.

C. Plaintiffs Meet the Standard for Relief

1. Plaintiffs Have a Substantial Likelihood of Success on the Merits.

a. Plaintiffs Have a Substantial Likelihood of Success on the Merits of Their Religious Claims.

The First Amendment's Free Exercise Clause states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. CONST. AMEND. I. This Constitutional right is

strengthened and expanded upon by RFRA, which provides that "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 was enacted to "to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014). In fact, its protections go "far beyond" what the Supreme Court "has held is constitutionally required" in cases of religious freedom. *Burwell*, 134 S. Ct. at 2767.

RFRA defines the term "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Burwell*, 134 S. Ct. at 2761-62 citing 42 § 2000cc-5(7)(A). "Congress mandated that this concept be 'construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.'" *Id*. citing § 2000cc-3(g). RFRA's protections extend to those in the military. 42 § 2000bb-2(1).

Plaintiffs Jessica Caldwell, Paul Dee, Brian Duffy, Allen Hall, Michael Jacobellis, Emily Nankivell, Krystle Kageyama, and Jeremy Severson have sincerely held religious beliefs that compel them to abstain from being administered the COVID-19 vaccine required by the DOD mandate. Severson, for example, states "allowing morally objectionable and/or unsafe substances,

including vaccines which utilize cell lines from murdered babies in the development, production, and/or testing processes, is counter to my spiritual convictions." ECF 1-1, Kageyama Decl. at 1. A Christian since the fourth grade, states her sincerely held religious beliefs cause her to "not support any product that uses fetal cells or tissues in any way, shape, or form, including to perform research, produce vaccines, medication, or any other related use. These practices are conducted through the support, promotion, and execution of abortion." *Id.* at 2. Defendants have denied or recommended for disapproval for several of Plaintiffs' religious accommodation requests. *See* ECF No. 1, Compl., ¶ 105.

As Plaintiffs' declarations make clear, Defendants' actions are a substantial burden on Plaintiffs' right to freely exercise their religion. As stated by the Supreme Court, RFRA asks whether the government "imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs." *Burwell*, 573 U.S. at 724. Like the *Burwell* plaintiffs, the Plaintiffs in the present matter have chosen to conduct their lives in accordance with their religious beliefs. In response, Defendants have threatened punishment, forcing Plaintiffs to live under the threat of professional retaliation for living in accordance with their values.

Evidence provided by Defendants in a related case in this District demonstrate Defendants have undertaken a scheme to systemically deny religious accommodation requests of military service members, in violation of the First Amendment's Free Exercise Clause and RFRA – and in violation of the Constitution's No Religious Test Clause. *See* ECF No. 1 at ¶¶ 159-173. While representing that they will accept and thus purportedly approve at least some religious accommodations, records show Defendants have granted zero religious accommodation requests while denying thousands:[1]

Table 1: Statistics on Religious Accommodation Requests as of November 12

Branch	Total	Pending	Denied	Granted
Air Force	11,007	10,319	688	0
Army	114	114	0	0
Coast Guard	818	818	0	0
Marines	2,266	1,202	1,053	0
Navy	2,375	1,897	478	0

[1] See ECF No. 1-19, Defendants Compliance Notice in Navy Seal 1 v. Biden, ECF No. 34, Case No. 8:21-cv-2429 (M.D. Fla.). "Denied" requests includes both "Denied Requests Pending Appeal" and "Initial Requests Denied and Are Not Currently Subject to Appeal." "Pending" includes "Initial Requests Under Review" for Navy and Marine Corps. The filing by the Army (including Army Reserves and presumably Army National Guard), the largest branch by far with over one million soldiers and nearly 50% of total armed services personnel, indicate that only 114 requests have been received by the Surgeon General for the Army ("TSG"); this is presumably a small fraction of the total submitted by Army soldiers.

Defendants' failure to grant *any* religious exemptions, in comparison to the granting of medical exemptions, proves Defendants have targeted the religious. Defendants' regulations and the execution of those regulations are therefore "not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause," because they "treat any comparable secular activity more favorable than religious exercise. *Tandon v. Newsom*, 141 S.Ct. 1294, 1296 (2021). "[T]he minimum requirement of neutrality is that a law not discriminate on its face." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 553 (1993). This disparate treatment violates the "minimum requirement of neutrality" to the religious, as it singles out the religious for "especially harsh treatment." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct 63, 66 (2020) (observing that "the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment"). This disparate treatment and the violations of the First Amendment's Free Exercise Clause and RFRA, by themselves, support the granting of the preliminary injunction. *Joelner v. Village of Washington Park, Ill.*, 378 F.3d 613 (7th Cir. 2004) ("When a party seeks a preliminary injunction on the basis of a potential First Amendment violation, the likelihood of success on the merits will often be the determinative factor.").

Furthermore, there is no compelling governmental interest to require these Plaintiffs receive a COVID-19 vaccine. And even if there were a compelling governmental interest, the denial of Plaintiffs' accommodation requests is not the least restrictive means of furthering that interest. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430-31 (2006) ("RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.") For example, Plaintiffs could, as they have been, be subject to regular COVID-19 testing. Disallowing such a proposal – a step Defendants allowed until the DOD Mandate – is itself evidence that Defendants' hostility to religion. *Hialeah*, 508 U.S. at 534 ("The Free Exercise Clause protects against government hostility which is masked as well as overt.").

b. Plaintiffs Have a Substantial Likelihood of Success on the Merits of Their Informed Consent Claims.

The DOD Mandate and the Armed Services Guidance and implementation of the mandate violate federal laws, as well as rules and regulations governing informed consent insofar as they mandate or permit the administration of the EUA Pfizer-BioNTech Vaccine pursuant to the mandate.

i. Armed Services Guidance & Implementation Violates Express Terms of DOD Mandate.

While the DOD Mandate itself states that only FDA-licensed vaccines may be mandated, *see* ECF No. 1-2, DOD Mandate at 1, the Air Force Guidance and DOD Surgeons General Guidance expressly state that the EUA BioNTech Vaccine should be administered "interchangeably" with, and/or "as if" it were, the unavailable licensed Comirnaty Vaccine pursuant to the DOD Mandate. *See, e.g.,* ECF No. 1-7, Air Force Guidance, § 3.1.1; ECF No. 1-11, DOD Surgeon Generals Guidance, at 1.

Thus, if this Court were to accept the DOD's counterfactual assertion that it is not mandating unlicensed products—in which case Defendants should suspend the mandate until licensed Comirnaty product is actually available—the Court would still have to find that the Armed Services Guidance and implementation violates the DOD Mandate's express directive that only the (unavailable) licensed Comirnaty may be mandated and federal laws governing informed consent. *See* 10 U.S.C. § 1107a & 21 U.S.C. § 360bbb-3.

ii. DOD Mandate and Armed Services Violate Informed Consent Laws by Mandating Administration of EUA Product.

It is undisputed that Comirnaty is not currently available, and that the Defendants do not have any Comirnaty, the only FDA-licensed vaccine. *See* ECF No. 1-24, November 8 Comirnaty SBRA at 5; ECF No.1-22, NIH-Pfizer

Announce Comirnaty Unavailability; ECF No. 1-21, *Doe v. Austin* Order at 13-14. Further, DOD has acknowledged that an EUA product may not be mandated.[2]

The EUA and the licensed product are "legally distinct" in that the EUA BioNTech Vaccine is subject to the laws governing EUA products, including the right to informed consent, while Comirnaty is subject to the heightened safety and efficacy requirements governing FDA-licensed products, as well as FDA regulation of manufacturing facilities and process. The two products are also chemically distinct because the EUA and licensed products do not have "same formulation." *Compare* ECF No. 1-4, August 23 Comirnaty SBRA at 9 (11 components, including redacted excipient), *with* ECF No. 1-5, BioNTech EUA Expansion Letter, at 7 (listing 10 components) *and* ECF No. 1-24, November 8 Comirnaty SBRA at 7-8 (listing 11 components, but removing redacted excipient).

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[2] *See* ECF No. 1-23, Memorandum Opinion for the Deputy Counsel to the President, *Whether Section 564 for the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization* (July 6, 2021) ("OLC EUA Opinion"). There, the DOJ stated that DOD interpreted the informed consent requirements in 10 U.S.C. § 1107a "to mean that DOD may not require service members to take an EUA [vaccine]" without first obtaining a Presidential Waiver under 10 U.S.C. § 1107a. *Id.* at 16 (citations omitted). DOD has not obtained a Presidential Waiver. *See also* ECF No. 1-21, *Doe v. Austin* Order, at 12 ("The DOD acknowledges that the President has not executed a waiver under [10 U.S.C. § 1107a] …, so as things now stand, the DOD cannot mandate vaccines that only have an EUA.").

Defendants' compliance deadlines will necessarily require Plaintiffs to receive an unlicensed EUA product, which is both legally and chemically distinct from the licensed product, in violation of federal informed consent laws. Plaintiffs have objected to the mandate based on the unavailability of Comirnaty, but their concerns have been rejected. Further, certain Plaintiffs have been disciplined for their refusal to take an unlicensed experimental treatment. *See* ECF No. 1-1, Dee Decl., ¶ 8; Hallmark Decl., ¶ 12; Hyatt Decl., ¶ 8; Jacobellis Decl., ¶ 10; Nankivell Decl., RA Appeal ¶¶ 10-12.

The DOD "cannot demand that members of the armed forces also serve as guinea pigs for experimental drugs." *Rumsfeld I*, 297 F. Supp. 2d at 135. *See also Rumsfeld II*, 341 F. Supp. 2d at 19 (D.D.C. 2004) (granting injunction against DOD anthrax vaccine mandate for EUA vaccine). This Court must enjoin the DOD and the Armed Services from doing so here, as well as any disciplinary proceedings for Plaintiffs' refusal of this unlawful demand.

c. Plaintiffs Have a Substantial Likelihood of Success on the Merits of Their Claims of Violations of Due Process & Procedural Rights.

The DOD Mandate and the Armed Services implementation thereof violates Plaintiffs' constitutional rights to procedural due process and fair notice under the Fifth Amendment of the U.S. Constitution; their statutory

rights under the Administrative Procedures Act; and other rules and regulations specifically applicable to the DOD and the Armed Services.

i. Procedural Due Process Violations.

The DOD Mandate "threatens to substantially burden the liberty interests" of Plaintiffs "put to a choice between their job(s) and their jab(s)." *BST Holdings, L.L.C. v. OSHA*, --- F.4th --- , 2021 WL 5279381, at *8 (5th Cir. Nov. 12, 2021) ("*OSHA*") (staying vaccine mandate issued by the Occupational Safety & Health Administration ("OSHA Mandate")). *See also Missouri v. Biden*, --- F.Supp.3d ---, 2021 WL 5564501, at *13 n.31 (E.D. Mo. Nov. 29, 2021) ("*Missouri*") (same) (staying Centers for Medicare and Medicaid Services vaccine mandate ("CMS Mandate")). Plaintiffs face not only the loss of the current employment, but also will be barred from other federal or private employment due to their vaccination and discharge status, as well as the loss other fundamental rights, in particular, the free exercise of religion protected by the First Amendment. *See OSHA*, 2021 WL 5279381, at *8 n.21 (citations omitted).

The Defendants have also violated the Due Process Clause insofar as they have modified or amended AR 40-562, the currently effective regulation governing immunization and exemptions—by imposing an entirely new vaccination requirement and categorically eliminated existing exemptions—

without any legal authorization or following procedures required by law. By changing the currently effective regulation governing Plaintiffs' vaccination obligations and rights to medical exemption, which remains on the books unchanged, Defendants have failed to provide "fair notice" of the rules to which they are subject. *See, e.g., FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253, 132 S. Ct. 2307, 183 L.Ed.2d (2012). Even if Plaintiffs were to become "fully vaccinated," they would be threatened with the loss of this status at any time and without fair notice, due to changes in the CDC or FDA approval of booster shots and change to the definition of "fully vaccinated."[3]

ii. APA Violations

The DOD Mandate and the Armed Services' guidance must be set aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(A), insofar as they impose a sweeping vaccine mandate without any explanation or justification for their action or the

[3] So would the majority of service members who are currently deemed "fully vaccinated." The rapid decline in efficacy and need for booster shots demonstrates that there is no scientific consensus on Comirnaty's efficacy, protection provided, or even dosage. *See* ECF No. 1, Compl. Section V.E.2 ("Equal or Greater Risk of Infection by "Fully Vaccinated" Compared to Unvaccinated."); *see also Louisiana v. Becerra*, --- F.Supp.3d ---, 2021 WL 5609846, at *13 (W.D. La. Nov. 30, 2021) (noting that CDC recommendation for booster shot calls into question efficacy of vaccines and need for mandates). Accordingly, the term "fully vaccinated" is unconstitutionally void for vagueness, and this fluid and changing classification cannot be used as the benchmark for determining who may serve in the military, or alternatively, for depriving Plaintiffs of their life, liberty, property and other fundamental constitutional rights, including the free exercise of their religion

underlying legal basis or authority; any findings of facts or analysis supporting their determination; and are based on patent misrepresentations of the law (in particular, that an EUA-labeled product may be administered "as if" it were the licensed product, which is not available). The DOD Mandate's sole justification or explanation is a conclusory statement in a two-page memorandum that the Secretary has "determined that mandatory vaccination against [COVID-19] is necessary to protect the Force and defend the American people." ECF No. 1-2, DOD Mandate, at 1. Given that the DOD Mandate was issued on the very next day after FDA Comirnaty Approval, it is apparent the DOD blindly relied on the FDA approval; there is no indication that the DOD and the Secretary of Defense engaged in reasoned decision-making that the APA requires or that the mandate is based on the DOD's independent judgment or expertise.

The Defendants' elimination of the exemption for natural immunity is also arbitrary and capricious. "[A] naturally immune unvaccinated [service member] is presumably at less risk than an unvaccinated" service member, but the DOD's elimination of this exemption "fails almost completely to address, or even respond to, much of this reality and common sense." *OSHA*, 2021 WL 5279381, at *6; *see also Missouri*, 2021 WL 5564501, at *20 (questioning CMS refusal to consider natural immunity).

The DOD Mandate is arbitrary and capricious because it constitutes an unannounced and unexplained departure from a prior policy insofar as it mandates EUA vaccines. The July 6 OLC Memo stated that DOD interpreted the informed consent requirements in 10 U.S.C. § 1107a "to mean that DOD may not require service members to take an EUA [vaccine]" without first obtaining a Presidential Waiver under 10 U.S.C. § 1107a." ECF No. 1-23, OLC Memo, at 16; *see also* ECF No. 1-21 *Doe v. Austin* Order at 12 (same). There has been no Presidential Waiver, yet the Defendants are mandating use of EUA vaccines. "[A]gencies must typically provide a 'detailed explanation' for contradicting a prior policy;" they may not, as DOD has done here, "depart from a prior policy *sub silentio*." *OSHA*, 2021 WL 5279381, at *5 (*quoting FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800, 173 L.Ed.2d 738 (2009) ("*Fox*")).

iii. Violations of DOD Rules & Procedures.

The DOD Mandate modifies AR 40-562 insofar as it: (1) imposes an entirely new vaccine requirement not found in AR 40-562 or any other statute, MSR, DOD instruction or directive regulation; and (2) eliminates medical exemptions to which service members would otherwise be entitled, including those with previous documented infections. There are nearly 250,000 service members with previous COVID-19 infections that are affected by the

elimination of this exemption alone, and several Plaintiffs were either denied medical exemption for previous infections or did not request one because they were informed that this exemption had been eliminated. *See, e.g.,* ECF No. 1-1, Hallmark Decl., ¶ 11; Severson Decl., ¶ 10; Schwartz Decl., ¶ 10; *see also* Caldwell Decl., ¶ 10 (no exemption for cancer).

The amendment, modification or repeal of currently effective regulations like AR 40-562 must be performed in accordance with the DOD's procedural requirements for multi-service regulations ("MSR"), including separate review and approval by the Secretaries of each of the Armed Services, as well as the requirements of DOD Instruction 6205.02 "DOD Immunization Program" (July 23, 2019) and other applicable DOD rules and procedures. The Secretary of Defense and DOD are not permitted to unilaterally change an existing MSR—by adding an entirely new vaccination requirement and categorically eliminating existing classes of exemptions—and DOD has cited no authority that would allow them to do so. While the DOD may have the authority to adopt new requirements and eliminate exemptions, it must do so according to the applicable statutes and DOD rules and procedures; failure to follow these procedures, or to identify any legal basis, renders the DOD Mandate void *ab initio*. *See, e.g., Georgia v. Biden*, --- F.Supp.3d ---, 2021 WL 5779939, at *9-10

(S.D. Ga. Dec. 7, 2021) ("*Georgia*") (staying federal contractor mandate due to failure to follow required procedures or to identify legal basis).

Further, if the DOD intends to change the currently effective governing regulation, it must actually change the regulation; it may not just ignore it, read it out of the regulation, or amend it *sub silentio* as it appears to do have done with respect to its elimination of existing exemptions for COVID-19 only. Finally, the Armed Services' guidance is just that, guidance; guidance documents, or interpretive rules, cannot modify legislative rules like AR 40-562. Further, by failing to follow the required procedures for amending MSRs, the DOD Mandate, and amendments to AR 40-562, were made "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

2. Plaintiffs Will Suffer Irreparable Injury Unless the Injunction Issues.

Plaintiffs will suffer irreparable injury unless the injunction is issued. "The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Cuomo*, 141 S.Ct. at 67 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). As the Supreme Court observed in *Cuomo*, there can be "no question" that these types of restrictions on religious exercise "will cause irreparable harm." *Cuomo*, 141 S.Ct. at 67.

Likewise, there is no question that this irreparable injury is imminent. Some of Plaintiffs' religious accommodations have been denied. Others are supposedly "pending." When considering that Defendants have granted zero religious accommodations out of thousands of applications, there it is a certainty that all Plaintiffs' religious accommodations will be denied.

Yet the government denial of Plaintiffs' right to live in accordance with their religious beliefs is not the only irreparable injury Plaintiffs face. They will also be irreparably harmed by the implementation of the DOD Mandate. Defendants have threatened Plaintiffs with professional retaliation – including court martial, termination, and possible imprisonment – for the grave sin of living in accordance with their sincerely held religious beliefs. The proposed relief is necessary to avoid this injury and the ongoing injuries against Plaintiffs' religious freedoms.

This District has considered a similar request for relief in *Navy Seal 1*. In that case, the district court deferred the request for a temporary restraining order on behalf of military service members for their Free Exercise Clause and RFRA causes of action. While Plaintiffs recognize the similarity of the cases and the causes of actions, Plaintiffs note that they face imminent injury, thus necessitating the filing of this motion and the requested relief. *See* ECF No. 1, Compl., Sections VI. & VII.

3. The Threatened Injury to Plaintiffs outweighs the damage the proposed injunction may cause Defendants.

These ongoing injuries to Plaintiffs, and the threatened life altering injuries—professional retaliation, duty and promotion restrictions, termination, administrative separation, less than honorable discharge, loss of benefits, and loss of fundamental rights—outweigh the damage the proposed injunction might cause Defendants. This is because there is no damage to Defendants where they are required to refrain from violating Plaintiffs' religious liberties and prohibited from punishing Plaintiffs. *See, e.g., Georgia*, 2021 WL 5779939, at *12 (staying mandate does "nothing more than maintain the status quo" while not granting injunction imposes "life altering" consequences). "[A]ny abstract 'harm' a stay might cause the Agency pales in comparison and importance to the harms the absence of a stay threatens to cause countless individuals." *OSHA*, 2021 WL WL 5279381, at *8. If injunctive relief is granted, Plaintiffs may continue to serve as they have since the COVID-19 pandemic began: with honor and distinction, careful to keep themselves and others safe, and willing to continue to take COVID-19 tests and abide by reasonable social-distancing protocols.

4. The Issuance of an Injunction Would Not Be Adverse to the Public Interest.

Finally, the injunction would not be adverse to the public interest. In fact, the public would be benefited by the relief Plaintiffs request: "it is always

in the public interest to protect First Amendment liberties." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), citing *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see Homans v. City of Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001) (stating "we believe that the public interest is better served by following binding Supreme Court precedent and protecting the core First Amendment right of political expression"). As the Eleventh Circuit has observed, "[t]he public has no interest in enforcing an unconstitutional ordinance." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006).

Moreover, the injunction would not be adverse to the public interest because the government "is in no way harmed by the issuance of an injunction that prevents the state from enforcing constitutional restrictions." *Legend Night Club v. Miller*, 637 F.3d 291, 302-03 (4th Cir. 2011). "The public interest is also served by … maintaining the liberty of individuals to make intensely personal decisions according to their own convictions—even or perhaps *particularly*, when those decisions frustrate government officials." *OSHA*, 2021 WL 5279381, at *8. The only harm Defendants could allege is minimal if not non-existent, considering that the relief this court would grant on the religious claims would preserve the status quo. Strengthening Plaintiffs' argument under this factor is Plaintiffs' strong likelihood of success on the merits of their

First Amendment and RFRA challenge. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (noting "the determination of where the public interest lies also is dependent on a determination of the likelihood of success on the merits of the First Amendment challenge").

CONCLUSION

In conclusion, and for these reasons, Plaintiffs respectfully request the court grant the relief sought herein.

Respectfully submitted,

/s/ Brandon Johnson
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CERTIFICATE OF SERVICE

This is to certify that I have on this day e-filed the foregoing Plaintiffs' Complaint for Declaratory and Injunctive Relief using the CM/ECF system, and that I have delivered the filing to the Defendants, as well as the United States Attorney General and the United States Attorney for the Middle District of Florida, by certified mail at the following addresses:

This 13th day of December, 2021.

Respectfully Submitted,

/s/ Brandon Johnson
Brandon Johnson

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