No. 22-10077 consolidated with No. 22-10534

In the United States Court of Appeals for the Fifth Circuit

U.S. Navy SEALs 1-26; U.S. Navy Special Warfare Combatant Craft Crewmen 1-5; U.S. Navy Explosive Ordnance Disposal Technician 1; U.S. Navy Divers 1-3,
Plaintiffs-Appellees,

v.

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

On Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division
No. 4:21-cv-01236

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR MORAL LAW, IN SUPPORT OF PLAINTIFFS/APPELLEES

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PLAINTIFFS

COMES NOW *Amicus* Foundation for Moral Law, a 501(c)(3) nonprofit corporation located in Montgomery, Alabama, dedicated to religious liberty and to the strict construction of the Constitution as intended by its Framers, and hereby respectfully moves that this Court grant *Amicus* permission to file an *amicus* brief in support of Plaintiff Air Force Officer.

Amicus believes this brief will be helpful to the Court in deciding this case because of the Foundation's dedication to religious liberty and because the brief's primary author, Foundation Senior Counsel John Eidsmoe, is a retired U.S. Air Force Judge Advocate and Professor of Constitutional Law at the Oak Brook College of Law and Government Policy.

The brief explores Navy directives pertaining to religious liberty, Navy policies concerning vaccination, religious vs. secular medical and administrative exemption practices, the Religious Freedom Restoration Act and less restrictive means by which the Navy's interest in vaccination can be accomplished, case law concerning religious liberty, the constitutional rights of military personnel in light of the need for military discipline, and the applicability of the *Jacobson v. Massachusetts* precedent.

WHEREFORE *Amicus* respectfully moves and requests this Court's permission to file this brief.

Respectfully submitted,

/s/ John Eidsmoe
Counsel for Amicus Curiae

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INTEREST OF THE *AMICUS*[1]

The Foundation for Moral Law ("Foundation") is a 501(c)(3) non-profit, non-partisan organization dedicated to religious liberty and to the strict interpretation of the Constitution as intended by its Framers. The Foundation is especially concerned about religious freedom for military personnel. The founder of the Foundation, Judge Roy Moore, is a graduate of the U.S. Military Academy and a Vietnam veteran. The Foundation's Senior Counsel and primary author of this brief, John Eidsmoe, served twenty-three years as a U.S. Air Force Judge Advocate retiring at the rank of Lt. Colonel, and subsequently served as a Chaplain with the Mississippi State Guard, retiring at the rank of Colonel (MS). He is also Professor of Constitutional Law with the Oak Brook College of Law and Government Policy.

The Foundation has received more requests for assistance on the issue of religious exemptions from COVID vaccination requirements than on any other issue since we were founded in 2004. During the past year, most of

[1] No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

these requests have come from military personnel and/or civilian employees of the military. These include a guardsman who has served nineteen years with an unblemished record and is now uncertain whether he will be allowed to retire, cadets and midshipmen at military academies who are uncertain whether they will be allowed to graduate, a military academy instructor who may not be allowed to retire in lieu of court-martial even though he has given outstanding service for well over twenty years, and many others who serve in the Air Force, Army, Navy, Marines, Coast Guard, and various guard and reserve units. These fine patriotic personnel desire nothing but to serve their country honorably, but now they and their families face career disruption, loss of salary and benefits, disciplinary action, disparagement of their reputations, and untold emotional distress.

The Foundation believes these and countless other military personnel should not have to sacrifice their careers because of a religious conviction that in no way prevents them from being good soldiers and sailors. The Foundation further believes the United States military and the people of the United States should not lose the services of such outstanding military personnel.

ARGUMENT

The Foundation fully supports the arguments of Plaintiffs/Appellees in their Complaint and will not duplicate those arguments. Rather, the Foundation raises the following points:

I. The Constitution, including the First Amendment, clearly applies to military personnel.

The courts have given no credence to the notion that soldiers and sailors give up their constitutional rights when they join the military. Rather, the courts have recognized that military personnel who swear an oath to support and defend the Constitution of the United States are entitled to the protection the Constitution provides to all. A marble monument at the amphitheater of Arlington National Cemetery displays the engraved words of George Washington, Commander of the Continental Army and President when the Bill of Rights was adopted: "When we assumed the Soldier, we did not lay aside the Citizen." (Order, p. 1).

Servicemen and women are entitled to protection of free speech and free exercise of religion under the First Amendment, which states,

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

> peaceably to assemble, and to petition the Government for a redress of grievances.

Servicemen and women are also entitled to exercise these rights; they are not stripped away when they serve in the United States military. "The military enclave is kept free of partisan influence, but individual servicemen are not isolated from participation as citizens in our democratic process." *Greer v. Spock,* 424 U.S. 828, (1976). As the Supreme Court unanimously stated, "Our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." *Chappell v. Wallace,* 462 U.S. 296, 304, 103 S.Ct. 2362, 2367, 76 L.Ed.2d 586 (1983) (quoting Warren, The Bill of Rights and the Military, 37 N.Y.U.L.Rev. 181, 188 [1962]). *See also*, *Adkins v. Rumsfeld,* 389 F.Supp.2d 579 (2005); *Carlson v. Schlesinger*, 511F. 2d 1327 (D.C. Cir. 1975). The First Amendment applies to all servicemen and servicewomen without exception. And the District Court below cited *Elrod v. Burns,* 427 U.S. 347, 373 (1976), "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."

Furthermore, on May 4, 2017, the President of the United States issued Executive Order 13798, "Promoting Free Speech and Religious Liberty," which states in part:

> *Section 1*. *Policy*. It shall be the policy of the executive branch to vigorously enforce Federal law's robust protections for religious freedom. The Founders envisioned a Nation in which religious voices and views were integral to a vibrant public square, and in which religious people and institutions were free to practice their faith without fear of discrimination or retaliation by the Federal Government. For that reason, the United States Constitution enshrines and protects the fundamental right to religious liberty as Americans' first freedom. Federal law protects the freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government. The executive branch will honor and enforce those protections.
>
> *Sec. 2*. *Respecting Religious and Political Speech*. All executive departments and agencies (agencies) shall, to the greatest extent practicable and to the extent permitted by law, respect and protect the freedom of persons and organizations to engage in religious and political speech.

"All executive departments and agencies" clearly includes the Department of Defense.

In keeping with the President's Executive Order, on 1 September 2020 the Department of Defense issued DODD 1300.17, "Religious Liberty in the Military Services." This Directive provides in part in 1.2:

> a. Pursuant to the Free Exercise Clause of the First Amendment to the United States Constitution, Service members have the right to observe the tenets of their religion or to observe no religion at all, as provided in this issuance.
>
> b. In accordance with Section 533(a)(1) of Public Law 112-239, as amended, the DoD Components will accommodate individual expressions of sincerely held beliefs (conscience, moral principles, or religious beliefs) which do not have an adverse impact on military readiness, unit cohesion, good order and discipline, or health and safety. A Service member's expression of such beliefs may not, in so far as practicable, be used as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment.

The various branches of the armed forces issued similar directives. See, for example, SECNAV 1730.8B CH-1.

Also, the Religious Freedom Restoration Act of 1993, Public Law No. 103-141, 107 Stat. 1488, 42 U.S.C. § 2000bb, applies to the Department of Defense (see DODI 1300.17 and SECNAVINST 1730.8B) and provides that government may not substantially burden one's free exercise of religion without a compelling interest that cannot be achieved by less restrictive means.

II. Religious exemption requests should be liberally construed in favor of the persons making the requests.

A government official may not refuse to honor a person's religious beliefs and practices simply because he disagrees with them, finds them

unpersuasive, or even finds them inconsistent and therefore indefensible. Rather, government officials and courts may consider whether or not beliefs are religious and sincere. As the Supreme Court said in *United States v. Ballard*, 322 U.S. 78 at 87 (1944), a case involving a man convicted of mail fraud because he claimed to be in communication with angels,

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mere mortals does not mean they can be made suspect before the law.

Nor must one's religious beliefs be part of the official doctrine of a church or shared by all members of a denomination. As the Court said in *Thomas v. Review Board*, 450 U.S. 707 at 715-16 (1980),

> In reaching its conclusion, the Indiana court seems to have placed considerable reliance on the facts that Thomas was "struggling" with his beliefs and that he was not able to "articulate" his belief precisely. It noted, for example, that Thomas admitted before the referee that he would not object to "working for United States Steel or Inland Steel . . . produc[ing] the raw product necessary for the production of any kind of tank . . . [because I] would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience. . . ." Ind., 391 N.E.2d, at 1131.

> The court found this position inconsistent with Thomas' stated opposition to participation in the production of armaments. But Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.
>
> The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

The *Thomas* Court further stated, citing *Sherbert v. Verner*, 374 U.S. 398 (1963), that forcing a person into a "Hobson's choice" dilemma of having to either (1) compromise a sincerely-held religious belief or (2) give up a

substantial government benefit, is a Free Exercise violation. *See also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.A. 682, 724, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014), recognizing religious liberty exemption rights rooted in sincerely held religious beliefs, as well as First Amendment-anchored analysis within *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 207 L.Ed.2d 819 (2020), recognizing the propriety of, if not also the need for, a religious exemption to federal healthcare-regulating statutes.

Religious beliefs raised by persons who have sought assistance from *Amicus* Foundation include the following:

(1) That the body is the temple of the Holy Spirit and therefore should not be defiled with an experimental drug that could be dangerous. Some Roman Catholic theologians have articulated an ethical position called "therapeutic proportionality" which means that because the human body is God's creation (Genesis 2:7) and the temple of the Holy Spirit (1st Corinthians 6:19-20), a person has a duty to God to weigh the possible benefits of medicine against possible risks and adverse consequences, and to refuse medical treatment if risks and adverse consequences outweigh the benefits. See https://catholic-factchecking.com/2021/07/vaccine-exemption-resource-for-individuals/; https://academic.oup.com/jlb/article/7/1/lsaa058/5878809.

(2) That some COVID vaccines are made from, or were developed from, cells or cell lines from aborted human fetuses, and taking the vaccine makes the recipient an accessory to abortion, which many believe to be against God's laws. *See Whole Woman's Health v. Paxton*, 10 F.4th 430 (5th Cir. 2021), illustrating tragic aspects of abortion. Thus, those servicemen and servicewomen who sincerely hold pro-life Bible-based beliefs that abortion is wrong and sinful (*see* Genesis 9:1-7; Exodus 21:22-25; Acts 15:20,29 & 21:25; etc. – see also, accord, Romans 14:23; Matthew 27:1-10; Exodus 20:13; Leviticus 24:17; Deuteronomy 23:18; Jeremiah 32:35; etc.), should be exempted from being required or coerced to accept any such COVID-19 vaccines.

(3) That when the COVID-19 vaccine is imposed so strongly that a vaccination passport or the equivalent becomes necessary for being allowed to fly, enter stores, obtain food or other necessities, or participate in public events, it becomes what some believe is the "mark of the beast" of Revelation 13 (or that it serves as a prototype thereof, such that accepting it is aiding and abetting the anticipated Revelation 13's "mark of the beast").

(4) That God has established civil government and has given civil government certain limited authority (Romans 13:1-7), but that when

government exceeds its God-given (i.e., legitimate) authority, it becomes tyrannical, and the individual has a duty before God to resist the unlawful mandates of a tyrannical government.

Although the military has utilized vaccinations in the past, none has involved the complex and controversial medical, scientific, religious, sociological, and religious issues triggered by the COVID-19 vaccine. None has involved such serious and divisive questions as to the vaccine's origin, its effectiveness, or its likelihood to produce adverse reactions, and none has engendered the serious religious and other objections that have arisen from the COVID vaccines. Many who had previously not thought about the religious implications of vaccines, did so when the COVID vaccine was released. The fact that a soldier or sailor had received other vaccines is not a reason to question the sincerity of an objection to the COVID vaccine.

Plaintiffs' religious exemption requests should be construed liberally in their favor. The First Amendment protects not just belief, but "free exercise" of religion. Whether one agrees with them or not, Plaintiffs' beliefs are religious and they sincerely hold them. The very fact that Plaintiffs are willing to jeopardize their livelihoods, their reputations, and career that they dearly love because of their beliefs, is of itself proof of her sincerity. *Res ipsa*

loquitur; the thing speaks for itself. As the Supreme Court recognized in *United States v. Macintosh,* 283 U.S. 605,633-634 (1931):

> ...in the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens.
> ...
> The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law, and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience.

Religious liberty values, in many legal contexts, are respected by adjusting standard operating procedures to accommodations—including legal concepts such as "reasonable accommodation" and "least restrictive burden" criteria. In federal jurisprudence this is not new. If a Congress-authorized law (e.g., statute, agency rule, or military regulation) fails to fairly accommodate sincerely held religious beliefs as it restricts religious freedoms, that law is illegitimate – because the First Amendment doesn't just favor the "exercise" of religious freedom, it bans interferences with the "free exercise" of religion. *See*, *accord, Rector, etc., Holy Trinity Church v. United States,* 143 U.S. 457,

12 S.Ct. 511, 36 L.Ed. 226 (1892). In fact, according to *Holy Trinity Church* (and the Free Exercise Clause), religious freedom, *ab initio*, has not just an equal-priority status, but a superior place in our constitutional system.

III. Offering exemptions but categorically denying them is bad faith.

The Navy and other branches of the armed forces have established forms and policies for the granting of religious exemptions from the vaccination requirement. However, as Plaintiffs state in paragraph 96 (page 17) of their Complaint, "No Plaintiff has received an approved religious accommodation request, and they are unaware of any similarly situated Service Member who has." As of July 27, 2022, 4,244 Navy personnel, active duty and reserve, had requested religious exemptions from the vaccination requirement. The number granted to active duty Navy personnel as of that date was precisely zero. Although the Navy has conditionally granted 13 religious exemptions to Individual Ready Reserve members, this is meaningless because they face no consequences for noncompliance with the COVID mandate unless they return to active duty or reserve service.[2] It is

[2] Navy COVID-19 Update, Jul. 27, 2022, https://www.navy.mil/us-navy-covid-19-updates/ (last accessed Aug. 22, 2022).

likely that if any of these 13 members return to active duty or reserve service, their conditional exemptions will be revoked.

Service-wide, as of February 4, 2022, the various branches of the military had received 24,818 religious exemption requests. Only four of these were granted, and three of these were granted to services members who were already scheduled to leave the military. However, 4,146 medical exemptions have been granted.[3]

It is wrong to deny exemptions to those who have sincere religious objections to vaccination. But to offer religious exemptions and create forms and procedures to apply for and process exemption requests, and then routinely deny all exemption requests, is more than wrong; it is duplicitous and evidence of bad faith.

In the *Navy SEAL 1 v. Austin* case, 8:21-cv-02429-SDM-TGW, Lt. Col. Peter Chambers (Ret.), a former Flight Surgeon attached to Special Operations, testified by deposition (p. 111) on March 10, 2022, that even though he and other military doctors were required to obtained informed

[3] https://www.breakingchristiannews.com/articles/display_art.html?ID=3469

consents before giving vaccinations, in fact they were told to pressure soldiers to receive the vaccination:

> A. ... They're still doing informed consents to the soldiers on the border when I left, and the new surgeon that took over is telling them they are safe and effective.
> Q. And they're still telling them that their job is to get every soldier vaccinated?
> A. Yes, sir.

The District Court below confirmed this: "The Navy provides a religious accommodation process, but by all accounts, it is theater. The Navy has not granted a religious exemption to any vaccine in recent memory. It merely rubber stamps each denial." (Order, p. 1).[4] The Court further stated, "There is no COVID-19 exception to the First Amendment. There is no military exclusion from our Constitution," citing George Washington's words carved into the marble of the memorial Amphitheater of Arlington National Cemetery, "When we assumed the Soldier, we did not lay aside the Citizen." (Order, p. 1).

The Court also observed that the Navy had refused to grant religious exemptions from the vaccination requirement but had rather freely granted

[4] The Court added on p. 7, "...the record indicates the denial of each request is predetermined. As a result, Plaintiffs need not wait for the Navy to engage in an empty formality," meaning Plaintiffs need not exhaust administrative remedies.

medical exemptions from the requirement. As of July 27, 2022, in contrast to zero religious exemptions, the Navy has granted 19 permanent medical exemptions and 189 temporary medical exemptions to active duty Navy personnel, and 3 permanent medical exemptions and 65 temporary medical exemptions for Navy Ready Reserve service members.[5] By granting medical exemptions, the Court said, the Navy had effectively forfeited the argument that military necessity prohibited the granting of religious exemptions.

> The mandate treats comparable secular activity (e.g., medical exemptions) more favorably than religious activity. First, the Navy has granted *only* secular exemptions -- it has never granted a religious exemption from the vaccine. Second, even if the Navy were to grant a religious exemption, that exemption would still receive less favorable treatment than its secular counterparts. those who receive religious exemptions are medically disqualified. Those who receive medical exemptions are not. But the activity itself -- foregoing the vaccine -- is identical. Given the irrationality of the mandate, "[i]t is unsurprising that such litigants are entitled to relief." *Tandon v. Newsom,* 141 S. Sct. 1294, 1298 (2021) (per curiam).

Order, p. 14 (emphasis original).

The Court also noted that the Navy had achieved its goal of herd immunity, and the few with religious objections were "unlikely to undermine

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[5] Navy COVID-19 Update, Jul. 27, 2022, https://www.navy.mil/us-navy-covid-19-updates/ (last accessed Aug. 22, 2022)

the Navy's efforts." (Order, p. 20). Moreover, the Navy is willing to grant exemptions for non-religious reasons. As a result, the mandate is underinclusive. "Indeed, underinclusiveness . . . is often regarded as a telltale sign that the government's interest in enacting a liberty-restraining pronouncement is not in fact 'compelling.'" *BST Holdings, LLC v. Occupational Safety & Health Admin*, 17 F.4th 604, 616 (5th Cir. 2021).

The Navy may argue that that they cannot grant any exemptions because of military necessity. However, Defendants have granted medical exemptions from the vaccination. In fact, as of January 24, 2022, the Air Force has granted a total of 1,570 medical exemptions, 2,211 administrative exemptions, and zero (0) religious exemptions (2,683 religious accommodation requests have been disapproved and 2,119 are pending; 282 appeals have been disapproved, and 222 are pending; none have been granted),[6] There appears to be no reason the military must deny religious exemptions but may grant medical exemptions. There appears to be no reason

[6] DAF (Department of the Air Force) COVID-19 Statistics -- Jan. 24, 2022, published January 25, 2022 by Secretary of the Air Force Public Affairs, https://www.af.mil/News/Article-Display/Article/2831845/daf-covid-19-statistics-jan-25-2022/

why granting religious exemptions would pose a danger to the overall health and fitness of military personnel but granting medical and administrative exemptions would pose no such danger.

By granting medical exemptions, the Navy has in effect forfeited any argument that they must deny all exemptions for the health and safety of military personnel.

IV. The Navy has no compelling interest in requiring Plaintiffs to submit to the COVID-19 vaccinations.

Both the First Amendment and the Religious Freedom Restoration Act prohibit federal agencies from substantially burdening sincere religious beliefs without a compelling interest for doing so.

The Navy's claim that it has a compelling interest in vaccinating all Navy personnel because unvaccinated persons would spread COVID to other personnel, is without merit. *Amicus* invites the Court's attention to the *amicus* brief filed by Frontline Doctors in *In Re: MCP No. 165, Occupational Safety and Health Administration*, U.S. Supreme Court Case No. 21A243, filed December 30, 2021, in which Frontline Doctors provide voluminous evidence that the vaccines, at most, only reduce the symptoms of COVID. They provide very little if any protection against contracting COVID or spreading

COVID to others. Therefore, this evidence demonstrates that unvaccinated persons are, at most, a threat only to themselves and not to anyone else. For this reason, the interest of the Navy in forcing all personnel to be vaccinated is far less than compelling.

Furthermore, the testimony of Dr. (Lt. Col. Ret.) Peter Chambers, Dr. (Lt. Col.) Theresa Long, and Dr. (Col. Ret.) Stuart Tankersley in the record establishes that the vaccine can have serious adverse effects upon military and other personnel.

V. Any government interest in requiring COVID vaccination can be achieved by less restrictive means.

The Religious Freedom Restoration Act requires that, even if a government interest is compelling, the government may infringe religious liberty only if no less restrictive means are available. Many less restrictive means are available, and the burden is upon the government to prove that these less restrictive means will not satisfy the government's interest.

(1) The Navy could exempt those who have had COVID and have therefore tested negative for antibodies.

An Israeli study of 46,036 persons by the Maccabi Healthcare Service found that those who tested positive for antibodies were twenty-seven times

less likely to contract COVID than persons who had received two injections of the Pfizer vaccine.[7]

As Dr. (Lt. Col.) Chambers testified,

> There are research controlled trials that are out that show that these shots don't last as long as they -- as natural immunity does, by far outweighs -- natural immunity outweighs the shots. Sometimes -- it depends, really, on the individual, but we've seen it where two, three months, and then -- well, now we're having to go to boosters, when a typical vaccine -- I haven't seen that in the military --

SEALs I Transcript, op. cit., p. 112.

(2) The Navy could allow those who are not vaccinated to wear masks and/or be tested periodically. Although the CDC and others have vacillated on the effectiveness of masks, for purposes of RFRA the burden is on the Navy to prove this would not be an effective alternative.

(3) The Navy could limit the vaccine requirement to those whose NECs require them to deploy or who have to work in close quarters with others such on submarines, and not apply the requirement to those who are not subject to deployment or other such conditions. This would not ease the burden on

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[7] *Study: COVID recovery gave Israelis longer-lasting Delta defense than vaccines;* Nathan Jeffay, *The Times of Israel*, September 2, 2021, https://www.timesofisrael.com/study-covid-recovery-gave-israelis-longer-lasting-delta-defense-than-vaccines/

religious freedom for everyone, but it would help some, and it therefore constitutes a less restrictive means.

(4) The Navy could provide other forms of treatment for those who contract COVID. Dr. (Colonel) Tankersley testified that the website of the American Association of Physicians and Surgeons is a "repository of all agents that are being looked at for treating COVID (p. 230), about 30 agents (medications) including Paxlovid (p. 231), ivermectin (pp. 231-36), remdesivir (pp. 232-36), saline nasal rinse with Betadine (p. 240), and others.

(5) With 98% of all service members vaccinated, the Navy could rely upon "herd immunity" to protect the force. Again, the burden is on the Navy to prove that herd immunity is not a less restrictive means.

(6) A combination of these less restrictive means, or other means, may be employed, and the burden is on the Navy to demonstrate that these less restrictive means would not achieve the compelling interest.

Stanley v. Illinois, 405 U.S. 645 (1972), invalidated an Illinois law that established a conclusive presumption that fathers of illegitimate children are unfit to have custody of their children. The Court held that when fundamental rights are at stake, government must make an individualized determination

before infringing a person's fundamental rights.[8] The Navy has made no individualized determinations concerning religious exemptions from the vaccination requirement; they have only gone through the motions of individualized hearings with pre-determined results. Had individualized determinations taken place, out of more than 4,000 exemption requests, at least one would have been granted. But the Navy has granted exactly zero (0) religious exemptions. This supports the District Court's conclusion that evaluators simply rubber-stamped the applications with the word "Denied" (possibly because they were instructed to do so) rather than giving any of the applications objective individualized consideration.

As noted earlier, the Navy might respond that military necessity requires universal vaccination and can allow for no exceptions. But the Navy has forfeited that argument by granting medical exemptions and administrative exemptions. The Navy has utterly failed to demonstrate any reason, let alone a compelling reason, to suggest that military necessity allows

[8] *Stanley* involved the father of an illegitimate child whose parental rights had been terminated without notice because Illinois law conclusively presumed that the father of an illegitimate child was unfit. The Supreme Court held that, although some such fathers are unfit, not all are unfit, and Stanley was therefore entitled to an individualized determination as to whether he was unfit.

medical and administrative exemptions but not religious exemptions. Absent any such demonstration, the Navy policy must give way to Navy personnel's constitutional rights.

VI. *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), does not support Defendants' position.

Defendants may rely upon *Jacobson v Massachusetts* to support their authority to require vaccination. However, the juristic logic of *Jacobson* does not support their position, for the following reasons:

(1) *Jacobson* involved a state law that empowered health departments to compel vaccinations to prevent the spread of smallpox, based on the State's inherent police power. However, under constitutional federalism, the federal government does not have such a police power.

(2) Mr. Jacobson simply argued that the law violated his right to decline vaccination; he did not raise a religious objection to vaccination.[9]

[9] A subsequent case, *Prince v. Massachusetts,* 321 U.S. 158 (1944), said that "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." But that was dicta, not holding. *Prince* involved a Jehovah's Witness who had her child with her while preaching in public, and no issue of disease or epidemic was present in the case. And as the Court expressly said in *Prince,* "Our ruling does not extend beyond the facts the case presents."

Plaintiffs herein raise First Amendment-protected rights that were not raised in *Jacobson*, so *Jacobson* is thus distinguishable beyond relevance herein.

(3) *Jacobson* did restrict state authority to regulate in ways that are "beyond all question, a plain, palpable invasion of rights secured by the fundamental law," e.g., constitutional guarantees in our Bill of Rights.

(4) *Jacobson* was a 1905 case, decided before the courts developed the "strict scrutiny" doctrine that government can infringe fundamental rights only by demonstrating a compelling state interest that cannot be achieved by less restrictive means, and before the enactment of RFRA.

Furthermore, in three recent decisions the Supreme Court has upheld religious liberty against state COVID restrictions: *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, 141 S.Ct. 63 (2020) (note concurring opinion by Gorsuch, J., re application of *Jacobson*); *South Bay United Pentecostal Church v. Newsom*, 592 U.S.___, 141 S.Ct. 716 (2021); *Gateway City Church v. Newsom*, ___ U.S. ___, 141 S.Ct. 1460 (2021). Though these cases don't address vaccination, the Court clarified that our basic civil liberties, especially our religious liberties, are not suspended during a pandemic.

VII. Other military cases deserve this Court's consideration.

In *Air Force Officer v. Austin,* (Middle District of Georgia, Civil Action No. 5:22-cv-00009-TES, February 15, 2022, ___ F. Supp. 3d ___, 2022 WL 468799), Judge Tilman E. Self, III, Judge of the United States District Court for the Middle District of Georgia, January 3, 2022, enjoined the United States Air Force from discharging or otherwise disciplining an Air Force Officer because of her religious objection to COVID vaccination. In a ruling that in many ways paralleled that of the District Court below, the Court cited *Fulton v. City of Philadelphia,* ___ U.S. ___, 141 S.Ct. 1868, 1877 (2021), for the proposition that if a law allows other exemptions, it must afford strict scrutiny to religious restrictions. The Court further concluded that the Air Force had rejected 99.76% of all religious exemptions, but had granted exemptions for secular reasons: "No matter whether one service member is unvaccinated for a medical reason and another unvaccinated for a religious reason, one thing remains the same for both of these service members -- they're both unvaccinated." (p. 27). Furthermore, the Air Force had not shown that vaccination is actually necessary by comparison to alternative measures, specifically referring to natural immunity. Judge Self – a former Army field artillery officer – also reviewed *Mindes v. Seaman*, 453 F.2d 197 (5th Cir.

1971), and concluded that the *Mindes* factors did not preclude review of that case.

Judge O'Connor and Judge Self are not alone in reaching this conclusion. In *Doster v. Kendall,* 1:22-cv-84 (S.D. Ohio March 31, 2022), Judge Matthew W. MacFarland granted a preliminary injunction prohibiting the Air Force from discharging or otherwise disciplining 2/Lt. Doster and others for their refusal on religious grounds to undergo vaccination. And on July 28, 2022, Judge MacFarland issued a temporary restraining order prohibiting the Air Force from enforcing the vaccine mandate against any class member, including active duty and active reserve members of the United States Air Force and the Space Force, including but not limited to Air Force Academy Cadets, Air Force ROTC cadets, and members of the Air Force Reserve Command. *Id.*

In *Navy SEAL 1 et al. v. Biden*, 8:21-cv-2429-SDM-TGW (M.D. Fla., November 22, 2021, Judge Steven D. Merryday ordered all branches of the military to file regular reports, every 14 days, concerning "the aggregate number of religious exemption requests from COVID-19 vaccination, the number of those denials in which the chaplain determined that the asserted belief is sincere, the aggregate number of appeals pending, the number of

successful appeals ..., and the total number of religious exemptions finally granted and finally denied." On February 14, 2022, Judge Merryday extended a temporary restraining order protecting two of the plaintiffs in the above action from discharge proceedings.

In the case below, *Austin v. U.S. Navy SEALs 1-26,* 595 U.S. ___ (2022), the Supreme Court on March 25, 2022 granted the Navy a partial stay of Judge O'Conner's order, but only insofar as it precluded the Navy from considering the SEALs vaccination status in making deployment, assignment, and other operational decisions, and only until this Court (the Fifth Circuit) decides the case. Justices Thomas, Alito, and Gorsuch dissented, saying in effect that they would enjoin the Navy from making even those decisions.

Most recently, on August 18, 2022, in Case No. 8:22-cv-1275-SDM-TGW, Judge Merryday of the U.S. District Court Middle District of Florida issued an order certifying class status and issuing a class wide preliminary injunction protecting all U.S. Marines who have religious objections to vaccination.[10] After careful analysis, the Court concluded that the case is justiciable under RFRA and that plaintiffs had met the requirements for class

[10] https://lc.org/081922MarineOrderGrantingClassandGrantingClasswidePI.pdf

certification. Paraphrasing *Davila v. Gladstone*, 777 F.3d 1198, 1206-07 (11th Cir. 2015) (a prison case), the Court said "[military] officials cannot simply utter the magic words ['military readiness and health of the force'] and as a result receive unlimited deference from those of us charged with resolving the dispute." He further said (p. 39) the Marine Corps had failed to demonstrate why they cannot "accommodate a Marine, when 95% of the Marine Corps is vaccinated (and 98% of the whole United States military is vaccinated) and a relatively weak and transient COVID-19 variant is dominant, even though these same marines served entirely without vaccination in 2020 during the height of the pandemic."

The Court further observed (p. 41) that "the government undoubtedly has some considerable interest in maintaining the services of skilled, experienced, highly trained, patriotic, courageous, and esteemed Marines (and service members in other branches) in whom the public has an immense financial investment and who are not typically readily replaceable." Judge Merryday added, "the public has no interest in tolerating an unnecessary infringement on Free Exercise" (p. 43), and quoted *League of Women Voters of Florida v. Browning,* 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012): "The vindication of constitutional rights and the enforcement of a federal statute [in

this case, RFRA] serve the public interest almost by definition." Judge Merryday noted on p. 46 that the Marine Corps has "systematically and uniformly denied and will deny imminently several thousand of, in fact, each and every one of, the applications for a RFRA accommodation from the COVID-19 vaccination requirement and has or imminently will subject those Marines to expulsion (and gratuitously rude and demeaning treatment in the interim)." He therefore concluded, "The record fails to demonstrate any meaningful increment of harm to national defense likely to result because these Marines continue to serve – as they have served – unvaccinated but in accord with other, proven, rigorous, and successful safety protocols." (p. 45).

CONCLUSION

With great discipline and at great sacrifice, Plaintiffs/Appellees have pledged their lives to the service of their country. And now the leadership of their country appears to be making war upon them, threatening their livelihood, their careers, and their reputations, simply for obeying God in a land dedicated to religious liberty.

In their defense, they place their trust in the Constitution they have taken an oath to support and defend, and in the courts who have the duty of enforcing the Constitution.

They have never failed us. We pray the courts will not fail them in their hour of need.

This Court should uphold the rulings of the District Court below.

August 26, A.D. 2022.

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CERTIFICATE REGARDING SERVICE

I certify that on August 26, A.D. 2022, a true copy of this document is being filed electronically (via CM/ECF) and will thereby be served on all counsel of record.

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Rule 32(a)(7), Fed. R. App. P., because, excluding the parts of the document exempted by Rule 32(f), Fed. R. App. P., and 5th Cir. R. 32.3, this document contains 6095 words.

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