**No. 22-10645**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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NAVY SEAL 1, et al.,

Plaintiffs-Appellees,

v.

PRESIDENT OF THE UNITED STATES, et al.,

Defendants-Appellants.

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On Appeal from the United States District Court
for the Middle District of Florida

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# TIME-SENSITIVE MOTION FOR STAY PENDING APPEAL

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## INTRODUCTION AND SUMMARY

The district court has issued a preliminary injunction requiring the U.S. Navy and the Marine Corps to keep or place two senior officers in command of combat units after the military has lost confidence in their ability to command. By countermanding the Navy's military judgment in that way, the court has sidelined a $1.8 billion warship and substantially interfered with the deployment of roughly 300 Marines. The court has also usurped the military's authority to decide which service members are fit for command, what precautions must be taken to reduce the risk that service members will compromise military readiness, and how best to maintain good order and discipline. Because there is no basis for the district court's extraordinary intrusion into core military affairs, the preliminary injunction should be stayed pending appeal. Allowing the preliminary injunction to remain in effect during the appeal will do irreparable damage to national security and military readiness during a global crisis. Given the grave and ongoing harm caused by the preliminary injunction, defendants request an immediate administrative stay, or a stay as soon as possible.

The preliminary injunction covers two officers, proceeding under pseudonyms: a Commander Surface Warfare Officer in the Navy (Navy Commander) who is currently the commanding officer of a guided-missile destroyer and its crew of over 300 sailors, and a Lieutenant Colonel in the Marine Corps (Lieutenant Colonel) who had been selected to command a forward-deploying battalion of over 300 Marines embarked within the confined spaces of an amphibious ship for six to ten months and

on-call for rapid crisis response. Both individuals' duties require them to be ready to deploy around the world at any time. But both individuals have refused to be vaccinated against COVID-19 even after their requests for religious exception were denied. The Navy and Marine Corps have concluded that neither can effectively or safely hold command positions under those circumstances. The Navy and Marine Corps have further concluded that, for these plaintiffs, vaccination against COVID-19 is the least-restrictive means of advancing compelling interests in military readiness and in the health and discipline of the force. The district court's preliminary injunction prevents the military from acting on these determinations—or even taking the intermediate step of preventing the plaintiffs from occupying command posts while unvaccinated—overriding the military's professional judgment that keeping plaintiffs in command creates an intolerable threat to military readiness and to good order and discipline.

The harms flowing from the district court's order are immediate, grave, and ongoing. The Navy has concluded that it cannot deploy Navy Commander's $1.8 billion guided-missile destroyer while he remains in command, taking one of the Navy's most versatile warships out of commission during an international crisis. And the Marine Corps must continue to usher Lieutenant Colonel through the rigorous process required for her to assume command of a deploying unit, even though she would not be permitted to enter some of the countries to which her unit may be deployed. As long as the preliminary injunction is in effect, the Marine Corps cannot assign another officer to fill this command role.

Moreover, the military's appeal is likely to succeed on the merits. First, challenges to military-assignment decisions are not reviewable in civilian courts, so plaintiffs' claims are not justiciable insofar as they challenge their assignments. Second, the Navy and Marine Corps' application of their COVID-19 vaccination requirements is fully consistent with the Religious Freedom Restoration Act (RFRA) and the First Amendment. The military has a compelling interest in maintaining military readiness, including by ensuring that all of its service members are healthy and ready to deploy at a moment's notice. This interest is vital to the national security of the United States, and requiring that these plaintiffs be vaccinated is the least-restrictive means of vindicating it. As long as these plaintiffs remain unvaccinated, they cannot deploy worldwide, severely hampering their ability to carry out their missions. Moreover, plaintiffs remain at greater risk of serious illness and pose a greater risk of spreading COVID-19 to the hundreds of men and women under their command, further jeopardizing their ability to perform core military functions.

The military has made an expert judgment that, for these plaintiffs, vaccination is by far the best way to avoid these harms. The district court erred in rejecting that judgment and ignoring the military's individualized determinations that these plaintiffs cannot safely and effectively serve in command positions while they refuse to obey the lawful order to become vaccinated against COVID-19.

## STATEMENT

### A. The Military and COVID-19

COVID-19 has taken a severe toll on the military. As of late January 2022, 355,099 service members had contracted COVID-19, resulting in 92 deaths. A224 (Dkt. 74-5 ¶ 3).[1] Only 3% of those deaths were from individuals with any level of vaccination. A224, A230 (Dkt. 74-5 ¶¶ 3, 18). Moreover, of all active-duty personnel hospitalized with COVID-19 from December 2020 to January 2022, only 0.012% were vaccinated. A230 (Dkt. 74-5 ¶ 18).

On August 24, 2021, once the Pfizer COVID-19 vaccine received full approval, the Secretary of Defense directed the Secretaries of the military departments to immediately ensure that all service members were fully vaccinated against COVID-19. A71 (Dkt. 1-4). Shortly thereafter, the Secretary of the Navy directed active-duty service members in the U.S. Navy and the Marine Corps to be fully vaccinated by November 28, 2021. A73 (Dkt. 23-8).

The COVID-19 vaccination requirement joined the military's nine existing vaccination requirements used to maintain the readiness of its force, along with eight other vaccines required in specific situations. As with other vaccination requirements, a service member's doctor can provide or recommend a medical exception to the COVID-19 vaccination requirement. A77-78 (Dkt. 23-18 ¶ 5); A122-26 (Dkt. 23-19

[1] Citations to A__ are to the addendum to this motion.

¶¶ 6-11). In addition, a service member can seek a religious exception and may administratively appeal the denial of a religious exception request. A84-86 (Dkt. 23-18 ¶ 14); A126 (Dkt. 23-19 ¶ 12). If a service member refuses vaccination without an approved exception or a pending administrative appeal, he or she is required to be processed for administrative separation. A86-87 (Dkt. 23-18 ¶ 15); A130-31 (Dkt. 23-19 ¶ 15).

### B. Prior Proceedings

In October 2021, a group of military service members filed this lawsuit on behalf of a putative class, challenging the Department of Defense and Navy COVID-19 vaccination requirement under RFRA and the First Amendment. Dkt. 1. Plaintiffs first sought a temporary restraining order (TRO) and preliminary injunction barring enforcement of the COVID-19 vaccination requirement as to all United States military service members. Dkt. 2. The district court declined, but permitted plaintiffs to move for individualized relief in exigent circumstances. Dkt. 9; Dkt. 40.

On February 1, 2022, plaintiffs sought a TRO as to two officers—Navy Commander and Lieutenant Colonel. Dkt. 60. Plaintiffs alleged that Navy Commander faced imminent removal from command and Lieutenant Colonel faced rescission of her command selection because they had been denied a religious exception to the COVID-19 vaccine requirement. The court granted a TRO, barring the military "from diminishing or altering in any manner and for any reason the current status of Navy Commander and [Lieutenant Colonel]" through February 11. Dkt. 67 at 10. The district

court held a preliminary injunction hearing, and, on February 11, extended the TRO through February 18. Dkt. 85.

On February 18, the district court issued a preliminary injunction, enjoining the defendants "from enforcing against Navy Commander and [Lieutenant Colonel] any order or regulation requiring COVID-19 vaccination" and "from any adverse or retaliatory action against Navy Commander or [Lieutenant Colonel] as a result of, arising from, or in conjunction with Navy Commander's or [Lieutenant Colonel's] requesting a religious exemption, appealing the denial of a request for a religious exemption, requesting reconsideration of the denial of a religious exemption, or pursuing this action or any other action for relief under RFRA or the First Amendment." A49-50 (Dkt. 111 at 47-48).

The district court first concluded that plaintiffs' claims were justiciable because RFRA "expressly creates a remedy in district court" and "includes no administrative exhaustion requirement." A32 (Dkt. 111 at 30).

The district court next concluded that plaintiffs' RFRA claims were likely to succeed on the merits, reasoning that the military had failed to establish that requiring plaintiffs to be vaccinated was the least-restrictive means to achieve a compelling government interest. The district court believed the Navy and Marine Corps' analysis of the relevant interests was insufficiently individualized, concluding that the Navy and Marine Corps had failed to establish that plaintiffs could not use other COVID-19

mitigation measures or continue "under altered conditions including remote work and isolation protocol" and "under altered duties." A43 (Dkt. 111 at 41).[2]

The district court went on to conclude that plaintiffs would suffer irreparable harm absent a preliminary injunction, as they would be forced to choose between "follow[ing] a direct order contrary to a sincerely held religious belief or . . . fac[ing] immediate processing for separation or other punishment." A47 (Dkt. 111 at 45).

Finally, the district court determined that the balance of the equities and the public interest weighed in favor of a preliminary injunction. According to the district court, "the public has no interest in tolerating even a minimal infringement on Free Exercise," which RFRA protects. A47 (Dkt. 111 at 45). Moreover, the district court suggested, "to the extent a 'substantial disruption' results from the defendants' systemic failure to assess a religious exemption request 'to the person,' the 'harm' suffered by defendants results only from the defendants' own failure to comply with RFRA." A48 (Dkt. 111 at 46). Declaring that plaintiffs had "ably discharged their duties" throughout the pandemic despite being unvaccinated, the district court asserted that it saw no "meaningful increment of harm to national defense likely to result because [plaintiffs] continue to serve unvaccinated but in accord with other, proven, rigorous, and successful safety protocols." A48-49 (Dkt. 111 at 46-47).

[2] The court did not separately analyze plaintiffs' First Amendment claims on the logic that RFRA provides greater protection for a service member than the First Amendment. A31 (Dkt. 111 at 29).

Defendants filed a notice of appeal on February 25 and on February 28 asked the district court to grant an administrative stay and to stay its order pending appeal. Dkt. 115; Dkt. 118. Defendants asked for a ruling on its administrative stay request by March 2, explaining that, if denied, they would seek relief in this Court. Dkt. 118 at 2. The district court denied defendants' administrative stay request on March 2 and set a hearing on defendants' stay motion. Dkt. 122.

## ARGUMENT

In determining whether to grant a stay pending appeal, this Court considers (1) likelihood of success on appeal; (2) whether the applicant will suffer irreparable injury; (3) the balance of hardships to other parties interested in the proceeding; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Hand v. Scott*, 888 F.3d 1206, 1207 (11th Cir. 2018). In cases involving the government, the harm to the government and the public interest merge. *Nken*, 556 U.S. at 435. Moreover, where "the balance of the equities . . . weighs heavily in favor of granting the stay," a stay may be "granted upon a lesser showing of a substantial case on the merits." *LabMD, Inc. v. Federal Trade Comm'n*, 678 F. App'x 816, 819 (11th Cir. 2016) (quoting *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)); *see also Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1232 (11th Cir. 2005). Here, every factor strongly favors staying the preliminary injunction pending appeal.

## I. Equitable factors overwhelmingly favor a stay.

**A.** By requiring the military to keep Navy Commander in command and allow Lieutenant Colonel to assume command, despite their refusal to comply with the military's COVID-19 vaccination requirement, the preliminary injunction irreparably damages the military and the public interest.

The Supreme Court has repeatedly emphasized that professional military commanders are best situated to decide what is necessary for military readiness, explaining that "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see also Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) ("[J]udges are not given the task of running the Army. . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian."). Here, however, the district court has directly countermanded military commanders' professional judgment that plaintiffs cannot safely and effectively hold command roles. The loss of discretion vested under the Constitution and federal law to determine assignment and resource decisions is *per se* irreparable harm. *See Swain v. Junior*, 958 F.3d 1081, 1090 (11th Cir. 2020).

**1.** The preliminary injunction creates an unacceptable risk to military readiness and national security. While Navy Commander and Lieutenant Colonel are unvaccinated, they place themselves and their units at higher risk of illness, hospitalization, and death and thus create a greater risk of mission failure. *See* A156 (Dkt. 66-4 ¶ 2); A233-34 (Dkt. 74-10 ¶ 5); A196-208 (Dkt. 74-4 ¶¶ 14-30). As Admiral

William Lescher—the second-highest commissioned officer in the Navy—explains, restricting the Navy's ability to reassign unvaccinated personnel "to mitigate COVID-19 related risks to units preparing to deploy, or that are deployed, will cause direct and immediate impact to mission execution," as well as to "[t]he hea[l]th, readiness, and mission execution of broader conventional Navy units." A156 (Dkt. 66-4 ¶ 2). Admiral Daryl Caudle, who commands the United States Fleet Forces Command, likewise explains that serious illness from COVID-19 threatens the Navy's "mission if unvaccinated Sailors remain in deployable units." A286-87 (Dkt. 118-3 ¶ 16) (emphasis omitted). Based on experience with past outbreaks, "fully vaccinated units withstand COVID outbreaks with significantly less impact to the mission." A283-87 (Dkt. 118-3 ¶¶ 14-16).

The Navy has determined that Navy Commander's unvaccinated status poses an unacceptable risk to the Navy's ability to carry out its mission and to the health and safety of his crew; accordingly, the Navy will not deploy the destroyer under his command. Navy Commander's "vaccination status creates a risk that the most critical member of the command, i.e., the commander, may suffer adverse health effects due to COVID-19," and it also "creates a risk to his Sailors, all of which ultimately translate into operational risks for the ship." A317 (Dkt. 118-6 ¶¶ 15-16); *see also* A294 (Dkt. 118-4 ¶ 7) (describing risks posed by unvaccinated personnel, including medical evacuation, issues with foreign country requirements, and mission failure); A249-51 (Dkt. 74-12 ¶¶ 12-13) (describing additional risks Navy Commander poses to the destroyer, its crew,

and its mission and explaining that the Navy is unwilling to deploy the destroyer with a commander "who could compromise the health and effectiveness of the ship"). The risks of an unvaccinated commander "reverberate throughout the force" because "complex operational plans are impacted when ships are unavailable to deploy as planned or when a ship is taken off mission for reasons such as a COVID-19 outbreak." A317 (Dkt. 118-6 ¶ 16). Vaccination status also affects "pre-deployment quarantine requirements" and "port entry requirements," A317 (Dkt. 118-6 ¶ 16)—indeed, because of foreign country vaccination requirements, the presence of a single unvaccinated crew member could keep a ship from entering port. And in the event of a COVID-19 outbreak, "the unavailability of a vessel can have negative implications at the strategic level by removing U.S. naval presence from key areas." A317 (Dkt. 118-6 ¶ 16).

Similarly, the Marine Corps has determined that Lieutenant Colonel's unvaccinated status poses an unacceptable risk to her prospective command and to the Marine Corps' mission. *See* A335-37 (Dkt. 118-7 ¶¶ 9-11); A302-05 (Dkt. 118-5 ¶¶ 10-11); A241-42 (Dkt. 74-11 ¶¶ 8-9). "[I]t is imperative that a [logistics battalion] commander be worldwide deployable and ready to lead Marines at all times." A333-34 (Dkt. 118-7 ¶ 6). The "fundamental goal" of the Marine Corps "is the maintenance of a force that is ready, responsive, and capable of fighting whenever and wherever called upon," which requires the Corps "to maintain a high degree of readiness to deploy responsively, engage quickly, and sustain itself in combat for whatever period is required." A238-39 (Dkt. 74-11 ¶ 4). Marine Expeditionary Units in particular are

organized and equipped to be "capable of responding rapidly to a broad range of crises and conflict situations." A337 (Dkt. 118-7 ¶ 12). Lieutenant Colonel cannot meet those standards and would not be able to effectively deploy as the commanding officer of the combat logistics battalion of the Marine Expeditionary Unit to which she is assigned. A333-37 (Dkt. 118-7 ¶¶ 6, 9-13); A240-43 (Dkt. 74-11 ¶¶ 7-10).

While Lieutenant Colonel is unvaccinated, she is at increased risk of infection, severe illness, and death. If Lieutenant Colonel were to fall "seriously ill before or during the deployment," for example, it would "necessitat[e] a change of command at an inopportune moment" and compromise the effectiveness of the unit. A336 (Dkt. 118-7 ¶ 10). In addition, she would be unable to disembark with her battalion at certain ports due to foreign countries' vaccination requirements, undermining her battalion's ability to complete its mission, her the unit's operations, and the Marines' operations more broadly. A335-36 (Dkt. 118-7 ¶¶ 9-10); A241-43 (Dkt. 74-11 ¶¶ 9-10); A303-05 (Dkt. 118-5 ¶ 11). Despite these risks, the district court's order prevents the Navy from giving that command position to a vaccinated Marine and reassigning Lieutenant Colonel. Although Lieutenant Colonel is not expected to take command of the unit until fall 2022, it is necessary to select, train and prepare a battalion commander now, as battalion commanders must be selected many months in advance to permit time for adequate training and preparation. A333-34 (Dkt. 118-7 ¶¶ 5, 7).

**2.** The preliminary injunction also undermines military good order and discipline and causes irreparable harm to the military's effectiveness by forcing the military to

keep or to place persons in command positions despite the military's determination that they are unfit. The military's mission demands a culture of obedience to lawful orders. A283-85, A287-88 (Dkt. 118-3 ¶¶ 14, 17). As the Supreme Court has explained, "[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection." *Chappell v. Wallace*, 462 U.S. 296, 300 (1983); *accord* A283-85 (Dkt. 118-3 ¶ 14) (explaining that military success depends on a culture of compliance with orders). A contrary culture "ultimately degrades mission effectiveness and the ability of the strike group to perform its mission in the interest of U.S. national security." A316-17 (Dkt. 118-6 ¶ 14).

The preliminary injunction allows two officers who have refused to obey military orders—issued after careful deliberation from senior military authorities—to continue to serve in assignments over the Navy and Marine Corps' objection. Preventing the military from removing Navy Commander from command "creates a manifest good order and discipline concern because it shields Navy Commander from the responsibility and accountability upon which his command authority rests, and leaves him in charge of enforcing policies from which he is immunized." A317-18 (Dkt. 118-6 ¶ 17); A249, 252 (Dkt. 74-12 ¶¶ 11, 15). The same is true for Lieutenant Colonel. Notably, her inability to disembark with her unit "is antithetical to her ability to command." A337 (Dkt. 118-7 ¶ 13). And no military can successfully function where courts allow service members to define the terms of their own military service, including

which orders they will choose to follow. Given that Lieutenant Colonel will herself be tasked with enforcing the vaccination requirement, her own unvaccinated status will undermine her authority as a commanding officer, both on that issue and more broadly. A337-38 (Dkt. 118-7 ¶ 14); A240, A242-43 (Dkt. 74-11 ¶¶ 7, 10).

With respect to Navy Commander, the Navy has lost confidence in his ability to lead and will not deploy the warship with him in command. A316-18 (Dkt. 118-6 ¶¶ 14, 17); A246 (Dkt. 74-12 ¶ 6). Not only has Navy Commander disobeyed an order that he is expected to enforce, A315-17 (Dkt. 118-6 ¶¶ 13-14); A252 (Dkt. 74-12 ¶ 15), he has compromised his trustworthiness by misleading his commanding officer about a recent leave request. A265-70 (Dkt. 81-1 ¶¶ 8-18); A271-72 (Dkt. 83-1). He also exposed dozens of his crew to COVID-19 in December 2021, failing to test himself for the virus or quarantine after experiencing symptoms. A263-65 (Dkt. 81-1 ¶¶ 4-7). The Navy has determined that it cannot, in its judgment, leave Navy Commander in his role given these breaches of trust with his commanding officer and with his subordinates. As a result, the preliminary injunction effectively takes the $1.8 billion guided-missile destroyer that he currently commands out of commission, with obvious and grave consequences. A317-18 (Dkt. 118-6 ¶ 17); A246 (Dkt. 74-12 ¶ 6). The preliminary injunction thus poses a serious and ongoing threat to Navy operations and national security.

**B.** Plaintiffs cannot show that they are likely to suffer irreparable harm if the injunction is stayed. Staying the preliminary injunction will result in plaintiffs being

reassigned to non-command roles. If the military initiates separation proceedings against either plaintiff, those proceedings would take place over many months, during which time plaintiffs would not have to undergo vaccination and would have further opportunity to argue that they should be retained in their respective services. In any event, reassignment—and even separation—are not irreparable harms, as a service member could always be reinstated and provided back pay if the member prevails. *See Hartikka v. United States*, 754 F.2d 1516, 1518 (9th Cir. 1985); *Chilcott v. Orr*, 747 F.2d 29, 34 (1st Cir. 1984); *see also Guitard v. U.S. Sec'y of the Navy*, 967 F.2d 737, 742 (2d Cir. 1992).

The district court reasoned that, absent an injunction, plaintiffs would face "substantial pressure" to violate their sincerely held religious beliefs. A46-47 (Dkt. 111 at 44-45). But that does not constitute irreparable injury. As this Court and the Supreme Court have repeatedly explained, employment-related harms, including those alleged by plaintiffs here, do not constitute irreparable injury, absent a "genuinely extraordinary situation." *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974); *see also Northeast Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). The district court's suggestion that irreparable harm exists whenever there is religious pressure in the workplace, *see* A46 (Dkt. 111 at 44), is irreconcilable with the high bar set by *Sampson* and this Court's precedent.

## II. The military is likely to succeed on the merits of its appeal.

A stay is also warranted because the military is likely to succeed on the merits of its appeal, both because the district court's preliminary injunction exceeded the court's authority and because plaintiffs' claims lack merit.

### A. The preliminary injunction exceeds the district court's authority.

The district court's decision contravenes precedent of this Court and the Supreme Court holding that civilian courts may not review challenges to military assignment decisions—especially with respect to decisions concerning plaintiffs' fitness for command—even if they involve a constitutional challenge.

The "Constitution vests '[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force' exclusively in the legislative and executive branches," *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1511, (D.C. Cir. 1989) (quoting *Gilligan*, 413 U.S. at 10). Accordingly, courts have consistently held that decisions as to who is placed in command of our troops are beyond the judiciary's competence and are constitutionally entrusted to the military and political branches. *See, e.g.*, *Orloff*, 345 U.S. at 93-94; *accord Speigner v. Alexander*, 248 F.3d 1292, 1298 (11th Cir. 2001); *see also Antonellis v. United States*, 723 F.3d 1328, 1336 (Fed. Cir. 2013) ("Courts are in no position to determine the 'best qualified Officer' or the 'best match' for a particular billet."); *Bryant v. Gates*, 532 F.3d 888, 899 (D.C. Cir. 2008) (Kavanaugh, J., concurring) ("[T]he Supreme Court has indicated" that "military decisions and assessments of morale, discipline, and unit cohesion . . . are well beyond

the competence of judges."). Consistent with this precedent, courts routinely find challenges to military assignment decisions to be non-justiciable. *See, e.g.*, *Harkness v. Secretary of the Navy*, 858 F.3d 437, 443-45 (6th Cir. 2017) (collecting cases).

It is difficult to conceive of an order that would interfere more directly with core military prerogatives than the injunction here: the district court has directly ordered the Navy and Marine Corps to keep or place plaintiffs in command positions notwithstanding military leaders' assessment that neither is fit for command. In so doing, the district court stepped beyond its constitutional limits and into a role reserved for military leaders and the political branches.

**B. Plaintiffs' claims lack merit.**

Even assuming plaintiffs' claims were justiciable, the district court erred in concluding that the Navy's COVID-19 vaccination requirement likely violates RFRA. The military is likely to prevail on the merits of plaintiffs' RFRA and First Amendment claims and, at a minimum, has presented a substantial question for purposes of appeal. *See Schiavo*, 403 F.3d at 1232.

The military has a compelling interest in mitigating the impact of COVID-19 on its missions, units, and personnel; vaccination of Navy Commander and Lieutenant Colonel is the least-restrictive means to advance that interest. Senior military leaders, exercising their professional judgment, have determined that COVID-19 vaccination is necessary for Navy Commander and Lieutenant Colonel to carry out their duties safely and effectively. Both may be required to deploy on short notice, and immunizations

play an essential role in ensuring that they are ready to do so. Not only are unvaccinated service members at heightened risk of contracting and spreading COVID-19, the consequences of infection in even one deployed service member are severe. *See, e.g.*, A301-03 (Dkt. 118-5 ¶¶ 8, 10); A293-95 (Dkt. 118-4 ¶¶ 6-8); *see also supra* 9-14. Indeed, one unvaccinated service member can derail an entire mission—for that reason, the district court's reference to the military's vaccination rates does not overcome the harm of unvaccinated individuals, particularly commanding officers. *See* A12 (Dkt. 111 at 10).[3]

Admiral Michael M. Gilday, the highest-ranking uniformed officer in the Navy and a member of the Joint Chiefs of Staff, personally assessed and denied Navy Commander's appeal. A290-91, A295-96 (Dkt. 118-4 ¶¶ 1-2, 9). In doing so, Admiral Gilday considered "the service member's initial request and appeal, all enclosed matters submitted by the service member, [the] command endorsement, and the requester's specific duties" in light of the Navy's compelling interests in military readiness, unit cohesion, good order and discipline, and health and safety. A291 (Dkt. 118-4 ¶ 2). General Eric M. Smith—the second-highest ranking uniformed officer in the Marine Corps—likewise personally assessed and denied Lieutenant Colonel's appeal based on her specific circumstances, including her likely need to travel to countries that require

[3] The district court relied on plaintiffs' testimony that they had conducted successful missions during the pandemic despite being unvaccinated. *See* A12 (Dkt. 111 at 10). But the military does not need to establish that all of its missions would fail without vaccination—it must show that vaccination is the least-restrictive method of vindicating its compelling interest in mission success and in military readiness. Defendants have done so.

COVID-19 vaccination as a condition of entry. A298-99, A303-05 (Dkt. 118-5 ¶¶ 2, 11). These assessments necessarily involved a weighing of the value of plaintiffs' experience against the military's interest in their vaccination. Contrary to the district court's suggestion, A41-43 (Dkt. 111 at 39-40), plaintiffs' relative seniority *enhances* the military's interest in their vaccination, as the consequences for military readiness if plaintiffs were to get seriously ill or be barred from entering a country on a deployment would be even more severe than for lower-ranking service members.

The military is also likely to prevail on its argument that, for Navy Commander and Lieutenant Colonel, vaccination is the least-restrictive means of ensuring military readiness. Plaintiffs cannot carry out their duties effectively and safely if they are not vaccinated. Not only is vaccination superior to measures like masking, social distancing, and teleworking—some of which are unavailable on a destroyer or in a forward-deploying unit aboard an amphibious ship (both of which have many confined, unventilated spaces)—vaccination is the only way to ensure that plaintiffs can enter a country with a COVID-19 vaccination requirement while deployed. *See* A274-75 (Dkt. 118-3 ¶ 2); *see generally* A155 (Dkt. 66-4); A232 (Dkt. 74-9); A185 (Dkt. 74-4).

The district court erred in supplanting the military's reasonable, expert evaluation of the evidence regarding the necessity of COVID-19 vaccination. *See Rostker v. Goldberg*, 453 U.S. 57, 68 (1981). The district court imposed its own judgments about the "comparative effectiveness" of vaccines vis-à-vis "natural immunity" in maintaining a ready military force, A39 n.10 (Dkt. 111 at 37 n.10), discounted the effect of vaccine

refusal on good order and discipline in the military, A45 (Dkt. 111 at 43), and ignored the declarations addressing the military's particularized compelling interest in vaccinating Navy Commander and Lieutenant Colonel. In substituting its own evaluation for the military's, the district court far exceeded its authority. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2421-22 (2018) (declining in matters of national security to "substitute" the Court's own "predictive judgments," or its own "evaluation of the underlying facts," for those of the President). The Navy and Marine Corps have determined that vaccination is the most effective means of mitigating the risk to their missions, units, and personnel from COVID-19. The assessment of such operational risks is within the military's purview, not the judiciary's.[4]

In particular, the district court misconstrued the record in concluding that the military failed to conduct a case-by-case assessment of plaintiffs' religious exception requests. A46 (Dkt. 111 at 44). Although the court noted similarities between the appeal denial letters in the record, A39-46 (Dkt. 111 at 37-44), many of the Navy's reasons for requiring vaccination are generally applicable—for example, the fact that unvaccinated service members cannot deploy worldwide. The court also ignored that each letter contains individualized analysis and ignored the voluminous record materials filed

[4] The Fifth Circuit made a similar error in denying the military's request for a stay pending appeal in *U.S. Navy Seals 1-26 v. Biden*, No. 22-10077, 2022 WL 594375 (5th Cir. Feb. 28, 2022) (per curiam), wrongly rejecting the Navy's assessment that certain members of the Navy special warfare community must be vaccinated to effectively carry out their duties, *see id.* at *11-12.

under seal that further elaborate on why there are no less restrictive means for promoting defendants' compelling interests with respect to Navy Commander and Lieutenant Colonel based on their roles, their responsibilities, and the requirements for deployment. *See, e.g.*, Dkts. 81, 87, 90, 103.

## CONCLUSION

The district court's preliminary injunction should be stayed pending appeal. Defendants respectfully request that the Court immediately issue an administrative stay while it considers this stay motion or issue a stay as soon as is practicable, given the grave and ongoing harm to military readiness posed by the preliminary injunction.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,184 words. This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6)because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 3, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. Plaintiffs' counsel was also notified of this motion by email.

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