IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MICHAEL BAZZREA, *et al.,*

Plaintiffs,

v.

ALEJANDRO MAYORKAS, *et al.*,

Defendants.

Case No. 3:22-cv-00265

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

In warfare, disease has historically accounted for more service member deaths than battlefield injuries, and a healthy fighting force has long been a key part of America's military readiness. Prior to the COVID-19 pandemic, the Department of Defense's ("DoD") decades-old immunization program required that all service members obtain at least nine immunizations, and up to an additional eight depending on circumstances. In the midst of a deadly pandemic that has killed over one million Americans, and seeking to protect the health and readiness of the Armed Forces by reducing the risk of hospitalizations and deaths among service members, DoD added vaccination against COVID-19 to this long list of immunizations required for service members.

Plaintiffs, are five members of the Coast Guard, allege that the military's COVID-19 vaccination requirement is unconstitutional, violates various federal statutes, and is arbitrary and capricious under the Administrative Procedure Act ("APA"). *See* Class Action Compl. for Decl. & Inj. Relief ("Compl.") ¶¶ 112–83, ECF No. 1. Plaintiffs seek a preliminary injunction to prevent Defendants from enforcing the COVID-19 vaccination requirement against Plaintiffs or taking adverse action against them for noncompliance. *See* ECF No. 17 ("Mot."). But Plaintiffs fail to establish any of the grounds required for such extraordinary relief.

First, Plaintiffs' claims are not likely to succeed on the merits. As an initial matter, Plaintiffs' claims are not justiciable. Two Plaintiffs have already fully complied with the vaccination requirement, and their claims are therefore moot. Plaintiffs' statutory challenges to a purported requirement to receive an "unlicensed" COVID-19 vaccine are also moot because the FDA-approved Comirnaty vaccine is now available in the United States and has been offered to these Plaintiffs. Additionally, Plaintiffs lack standing to assert their statutory claims against the U.S. Food and Drug Administrative ("FDA") because Plaintiffs allege injury based on DoD's conduct, not based on any FDA action. Plaintiffs also lack ripe claims because

they have not received a final decision concerning any discipline or adverse action based on their failure to obey their vaccination orders. And Plaintiffs may still avail themselves of extensive administrative procedures for challenging disciplinary actions that have been or may yet be taken in connection with the COVID-19 vaccination requirement. Moreover, judicial review in this case would require this Court to improperly oversee and manage discretionary decisions about military personnel matters.

Even if the Court could reach the substance of Plaintiffs' claims, those claims still fail on the merits. The vaccination requirement satisfies RFRA and the First Amendment because the Coast Guard has extraordinarily compelling interests in military readiness and the health and readiness of its forces—Plaintiffs included—and no less restrictive measure serves those interests equally well as vaccination. Plaintiffs' Fifth Amendment claims fail because Plaintiffs identify no constitutionally protected interest, nor establish that the Coast Guard's existing processes are insufficient. Nor is the requirement to receive a COVID-19 vaccine contrary to law or arbitrary and capricious. Indeed, the military's vaccine requirement furthers a compelling government interest—an even higher standard than rational-basis or arbitrary-and-capricious review. And Plaintiffs also fail to establish likely success on the merits of their statutory claims related to the use of an "unlicensed" vaccine because only FDA-approved vaccines are required under the relevant policies.

Finally, Plaintiffs have neither demonstrated irreparable injury nor shown that the balance of equities and public interest weigh in their favor.

In short, there is no cause to award Plaintiffs any injunctive relief, let alone on an emergency basis. The Court should deny Plaintiffs' motion.

BACKGROUND

I. The COVID-19 Pandemic and Federal Regulation of COVID-19 Vaccines

The virus SARS-CoV-2 causes a respiratory disease known as COVID-19 that can

result in severe symptoms and death.[1] SARS-CoV-2 has infected more than 93 million Americans and has killed over one million.[2] To date, 96 service members have died from COVID-19, and over 400,000 have become ill with the disease. Ex. 1, Decl. of Maj. Scott Stanley ¶ 3. Of those 96 service members, only two were fully vaccinated. *Id.* Many otherwise healthy service members who have been infected have also suffered severe illness, required hospitalization, or have developed "long-haul" COVID-19, potentially affecting their long-term ability to perform their missions. Ex. 2, Decl. of Col. Tanya Rans ¶¶ 9–11.

In March 2020, the Secretary of Health and Human Services ("HHS") determined that "circumstances exist justifying the authorization of emergency use of drugs and biological products during the COVID-19 pandemic." EUA Declaration, 85 Fed. Reg. 18,250, 18,250 (Apr. 1, 2020). Based on that determination, and pursuant to its authority under 21 U.S.C. § 360bbb-3, FDA issued an emergency-use authorization ("EUA") for a COVID-19 vaccine developed by Pfizer, Inc., as well as EUAs for three other COVID-19 vaccines.[3] On August 23, 2021, Pfizer's COVID-19 vaccine, "Comirnaty," obtained FDA approval for intended use by people aged 16 years and older even outside the "emergency" context pertinent to the EUA.[4] FDA determined that the vaccine was 91.1% effective in preventing COVID-19 disease and between 95% and 100% effective in preventing severe COVID-19 symptoms, based on an analysis of effectiveness data from approximately 20,000 vaccine and 20,000 placebo

[1] Centers for Disease Control and Prevention ("CDC"), *COVID-19*, https://perma.cc/A9D5-AUHV. The Court may take judicial notice of factual information available on government websites. *See Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322–23 (2007).

[2] CDC, *COVID Data Tracker* (updated Aug. 25, 2022), https://perma.cc/JXK2-GGKD.

[3] FDA, *Emergency Use Authorization* (July 13, 2022), https://perma.cc/UYH2-GHE7; FDA, *Novavax COVID-19 Vaccine, Adjuvanted* (July 13, 2022), https://perma.cc/4DBA-DE5E. FDA has since reissued the Pfizer EUA multiple times to update the authorized labeling with information on any safety issues and to incorporate EUA amendments. FDA, *Comirnaty and Pfizer-BioNTech COVID-19 Vaccine* (July 11, 2022), https://perma.cc/5TU7-SMY7.

[4] FDA, *BLA Approval* (Aug. 23, 201), https://perma.cc/G4PD-GAW5; FDA, *News Release – FDA Approves First COVID-19 Vaccine* (Aug. 23, 2021), https://perma.cc/C4DD-PWE5.

recipients.[5] On January 31, 2022, the FDA approved a second COVID-19 vaccine, Spikevax, manufactured by ModernaTX, Inc., concluding it "meets the FDA's rigorous standards for safety, effectiveness and manufacturing quality required for approval."[6]

II. Department of Defense Vaccination Directives

Vaccines have played a longstanding and important role in America's military readiness. Military deaths due to infectious diseases outnumbered those due to direct combat injuries until World War II, when vaccines became widespread. Stanley Lemon, et al., *Protecting Our Forces: Improving Vaccine Acquisition and Availability in the U.S. Military* at 3, Nat'l Acad. Press, 2002, https://perma.cc/E545-TQ9G. Even more recently, disease accounted for nearly 70% of U.S. Army hospital admissions during the Persian Gulf War. *Id.* at 10, Fig. 1-1. Military-mandated vaccines mitigate this threat and reduce infectious disease morbidity and mortality among military personnel. *Id.* at 10–11 (highlighting historical use of vaccines in armed conflict). The U.S. military instituted its first immunization program in 1777 when General Washington directed the inoculation of the Continental Army for smallpox. *Id.* at 12, Table 1-1. And for the past several decades, it has implemented various enduring or situational inoculation measures to maintain the readiness of its force. Cong. Rsch. Serv., *Defense Health Primer: Military Vaccinations*, https://crsreports.congress.gov/product/pdf/IF/IF11816/2.

DoD's current immunization program is governed by DoD Instruction ("DoDI") 6205.02 (July 23, 2019), https://perma.cc/8HLA-AXQB. Prior to COVID-19, nine vaccines were required for all service members, including the annual influenza vaccine, and eight other vaccinations are required when certain elevated risk factors are present, such as deployment to certain parts of the world. *See* Army Regulation ("AR") 40–562, Table D-1 (Feb. 16, 2018),

[5] FDA, *Comirnaty Approved Prescribing Information*, at 15–18, https://perma.cc/P87N-YGX2. The FDA also allowed the Pfizer/BioNTech EUA license to remain in place because the brand-name Comirnaty was not yet available in sufficient quantities and the emergency underlying the EUA was still ongoing. FDA, Letter of July 8, 2022, at 12 n.23, https://perma.cc/AJU6-8WUW.

[6] FDA, *Coronavirus (COVID-19) Update: FDA Takes Key Action by Approving Second COVID-19 Vaccine* (Jan. 31, 2022), https://perma.cc/L5LJ-SYYA.

https://perma.cc/82YE-EA3U. It is part of DoD's overarching requirement that each service member be medically ready for service and mobilization. *See* DoDI 6025.19, https://perma.cc/TR75-JRVD. DoD has determined that "[t]o maximize the lethality and readiness of the joint force, all Service members are expected to be deployable." DoDI 1332.45 ¶ 1.2, https://perma.cc/9FNU-ZR89. DoD generally aligns its immunization requirements and eligibility determinations for service members with recommendations from the CDC and its Advisory Committee on Immunization Practices. DoDI 6205.02 ¶ 1.2 (July 23, 2019), https://perma.cc/8HLA-AXQB.

On August 9, 2021, the Secretary of Defense, noting the impact of COVID-19 on military readiness and concluding that vaccination "will ensure we remain the most lethal and ready force in the world," announced that he would add the COVID-19 vaccine to the list of vaccines required for all service members by the earlier of mid-September 2021 or upon approval by FDA. Sec'y of Def. Mem. (Aug. 9, 2021), https://perma.cc/S4R3-2VZW. On August 24, 2021, one day after FDA announced the approval of the Pfizer vaccine, the Secretary directed the Secretaries of the Military Departments to immediately ensure that all members of the Armed Forces were fully vaccinated against COVID-19. Sec'y of Def. Mem. (Aug. 24, 2021), https://perma.cc/N759-S758. Only vaccines that have received full licensure from the FDA are required, but service members can satisfy the requirement by voluntarily receiving a vaccine under FDA EUA or World Health Organization Emergency Use Listing. *Id.* Those with a previous SARS-CoV-2 infection who have not received a COVID-19 vaccine are not considered fully vaccinated. *Id.*

III. The Coast Guard's Implementation of the COVID-19 Vaccination Directive

Shortly after the Secretary of Defense issued his vaccine directive, the Coast Guard issued its initial implementing guidance, directing all active-duty and Ready Reserve members to become fully vaccinated against COVID-19 and including processes for seeking

exemptions. *See* CG COMDTINST M6230.4G, ch. 2-6, https://perma.cc/82YE-EA3U; Ex. 3, Decl. of Rear Admiral Eric C. Jones ¶ 4.

Exemptions. As with other vaccination requirements, Coast Guard guidance establishes processes for granting medical, administrative, and religious exemptions from its COVID-19 vaccination requirement. Service members are not required to receive a COVID-19 vaccine if they have been granted an exemption or have an exemption request or appeal pending. *Id.* ¶ 44. Service members may be granted a medical exemption if, for example, they currently have COVID-19, are pregnant, or are allergic to an ingredient in the vaccine. *Id.* ¶¶ 14, 17. Service members who are retiring or separating from military service no later than October 1, 2022, may be granted an administrative exemption. *Id.* ¶ 20. Service members also may seek a religious accommodation by submitting a written request to the appropriate high-level approval authority. *Id.* ¶ 21. Religious accommodation requests (or "RARs") undergo a multi-stage review process before the approval authority makes a final decision whether to approve or deny the request. *Id.* ¶¶ 22–34. If a request is denied, the service member may appeal to the Coast Guard's final appellate authority, who renders a final decision on the RAR. *Id.* ¶ 35.[7]

Refusal to vaccinate. If an exemption request is ultimately disapproved and the service member refuses to comply with his or her command's order to receive the COVID-19 vaccine, commanders may take a variety of administrative and disciplinary actions. *Id.* ¶¶ 38–39. Active-duty service members who refuse to comply with the COVID-19 vaccination requirement, absent an exemption, will be subject to initiation of administrative discharge proceedings. *Id.* ¶ 39. The administrative discharge process takes at least six to nine months and may result in the service member being retained. *Id.* ¶ 42. The decision to discharge a service member is not

[7] The approval authority must make a decision on a religious accommodation request within 30 business days of the date the service member submitted the request, and the Deputy for Personnel Readiness must reach a final decision on any appeal within 30 business days from the date the service member provided notice of intent to appeal. Ex. 3 ¶ 36. These timelines may not be met if there is a large influx of religious accommodation requests. *Id.* Even if the timelines are not met, a service member faces no harm, as he or she is temporarily exempted from the immunization requirement while the request or appeal is pending. *Id.* ¶ 37.

final until the final discharge order is issued—until that point, the separation authority is not required to follow any discharge recommendation. *See Roberts v. Roth*, --- F. Supp. 3d ---, 2022 WL 834148, at *4 (D.D.C. Mar. 21, 2022). In addition, under the National Defense Authorization Act—and absent other misconduct—a service member who is discharged for refusing to receive the COVID-19 vaccine will receive either an Honorable Discharge or Under Honorable Conditions (General) Discharge. Pub. L. No. 117-81 § 736(a), 135 Stat. 1541, 1800 (2021).

Even if a service member is discharged at the conclusion of the administrative proceedings, further military remedies remain available to them. The member may, for instance, appeal the characterization of his discharge to a Discharge Review Board, which has the authority to review administrative discharges. COMDTINST M1000.4 § 1.B.36.h (Aug 2018), https://perma.cc/PQW4-K38G. The member may also request correction of his military record through the Board for Correction of Military Records. *Id.*

IV. Other Litigation Regarding the Military's Vaccination Requirement

In addition to this case, there have been numerous other challenges to the military's vaccination requirement brought in district courts across the country. At least fifteen other courts have either rejected similar arguments for preliminary injunctive relief against the military or dismissed the service members' claims entirely.[8] Moreover, in *Dunn*, where the

[8] *See Miller v. Austin*, --- F. Supp. 3d ---, 2022 WL 3584666 (D. Wyo. Aug. 22, 2022); *Knick v. Austin*, No. 22-1267, 2022 WL 2157066 (D.D.C. June 15, 2022); *Robert v. Austin*, No. 21-cv-2228, 2022 WL 103374 (D. Colo. Jan. 11, 2022), *appeal filed*, No. 22-1032 (10th Cir. Feb. 2, 2022); *Church v. Biden*, 573 F. Supp. 3d 118 (D.D.C. 2021); *Navy SEAL 1 v. Austin*, --- F. Supp. 3d ----, 2022 WL 1294486 (D.D.C. Apr. 29, 2022), *appeal filed*, No. 22-5114 (D.C. Cir. May 5, 2022); *Creaghan v. Austin*, --- F. Supp. 3d ---, 2022 WL 1500544 (D.D.C. May 12, 2022), *appeal filed,* No. 22-5135 (D.C. Cir. May 20, 2022); *Thomas Short v. Berger*, --- F. Supp. 3d ---, 2022 WL 1203876 (D. Ariz. Apr. 22, 2022), *appeal filed*, No. 22-15755 (9th Cir. May 18, 2022); *Vance v. Wormuth*, No. 3:21-cv-730, 2022 WL 1094665 (W.D. Ky. Apr. 12, 2022); *Mark Short v. Berger*, No. 22-cv-1151, 2022 WL 1051852 (C.D. Cal. Mar. 3, 2022); *Roth v. Austin*, --- F. Supp. 3d ---, 2022 WL 1568830, at *31 (D. Neb. May 18, 2022), *appeal filed*, No. 22-2058 (8th Cir. May 20, 2022); Ex. 9, *Dunn v. Austin*, No. 22-cv-288 (E.D. Cal. Feb. 22, 2022) ("*Dunn* Op."); *Doe #1-#14 v. Austin*, 572 F. Supp. 3d 1224 (N.D. Fla. 2021); *Abbott v. Biden*, --- F. Supp. 3d ---, 2022 WL 2287547, at *7 (E.D. Tex. June 24, 2022), *appeal filed*, No. 22-40399 (5th Cir. June 29, 2022);

district court denied the preliminary-injunction motion, the Supreme Court denied the member's application for an injunction pending appeal. *Dunn v. Austin*, 142 S. Ct. 1707 (2022).

Six courts have preliminary enjoined DoD and the respective service from applying COVID-19 vaccination requirements or taking adverse action against plaintiffs in those cases.[9] The government strongly disagrees with those decisions and has taken an appeal from four of them.[10] In *Navy SEALs 1–26*, the Supreme Court granted the government's application for a partial stay of the district court's injunction. 142 S. Ct. 1301, 1301 (2022). Similarly, in *Navy SEAL 1*, the Eleventh Circuit stayed the district court's injunction pending appeal "insofar as it precludes the Navy from considering the plaintiffs' vaccination status in making deployment, assignment, and other operational decisions." No. 22-10645 (11th Cir. Mar. 30, 2022).

V. This Action

On July 25, 2022, five Coast Guard members sued—on behalf of themselves and a yet-uncertified class—the Secretary of Defense, the Secretary of Homeland Security, the Commandant of the Coast Guard, and the Acting Commissioner of the FDA. They allege that that the Coast Guard's COVID-19 vaccination requirement is unconstitutional, violates various federal statutes, and is arbitrary and capricious under the APA. *See* Compl. ¶¶ 112–83.

According to materials submitted with the complaint, each Plaintiff has refused to comply with his or her commander's orders to become vaccinated against COVID-19, alleging

Oklahoma v. Biden, 577 F. Supp. 3d 1245 (W.D. Okla. 2021); *Guettlein v. U.S. Merch. Marine Acad.*, 577 F. Supp. 3d 96 (E.D.N.Y. 2021).

[9] *See Navy SEALs 1–26 v. Biden*, 578 F. Supp. 3d 822 (N.D. Tex. 2022); *Navy SEAL 1 v. Biden*, No. 8:21-cv-2429, 2022 WL 483832 (M.D. Fla. Feb. 2, 2022) (Merryday, J.); *Air Force Off. v. Austin*, --- F. Supp. 3d ---, 2022 WL 468799 (M.D. Ga. Feb. 15, 2022); *Poffenbarger v. Kendall*, --- F. Supp. 3d ----, 2022 WL 594810 (S.D. Ohio Feb. 28, 2022); *Doster v. Kendall*, ---F. Supp. 3d ---, 2022 WL 982299 (S.D. Ohio Mar. 31, 2022); *Col. Fin. Mgmt. Off. v. Austin*, No. 8:22-cv-01275 (M.D. Fla. Aug. 18, 2022) (Merryday, J.) (enjoining the Marine Corps after separating the case from *Navy SEAL 1* and creating a new case number).

[10] The district courts in *Navy SEALs 1-26* and *Doster* subsequently entered class-wide preliminary injunctions against the Navy and the Air Force, respectively, which the government has also appealed. *Navy SEALs 1–26*, 2022 WL 1025144, at *9 (N.D. Tex. Mar. 28, 2022), *appeal filed* No. 22-10534 (5th Cir. May 31, 2022); *Doster v. Kendall*, No. 1:22-cv-84, 2022 WL 2974733, at *1 (S.D. Ohio July 27, 2022), *appeal filed* No. 22-3702 (6th Cir. Aug. 15, 2022).

that vaccination conflicts with his or her religious beliefs. *Id.* ¶¶ 11–25. Soon after the complaint was filed, however, two Plaintiffs—Michael Bazzrea and Courtney Cheatum—became fully vaccinated in compliance with the Coast Guard's vaccination requirement. Ex. 5, Decl. of Capt. Jason E. Smith ¶¶ 21–22, 26–28. And although the other three Plaintiffs remain unvaccinated, they do not allege that the Coast Guard has concluded involuntary separation proceedings for any of them based on their refusal to vaccinate.

Two weeks after Plaintiffs filed their complaint, a group of 125 individuals who purportedly serve in the Coast Guard sought leave to file a motion to intervene. *See* ECF No. 13. These putative intervenors—who are represented by Plaintiffs' counsel—appended to their motion a proposed complaint that is virtually identical to Plaintiffs' complaint. *See* ECF No. 13-2. But they did not file any separate "motion to intervene" to demonstrate that they satisfy the requirements for either intervention as of right or permissive intervention under Federal Rule of Civil Procedure 24.[11]

On August 16, 2022, Plaintiffs filed a motion for a preliminary injunction,[12] seeking to enjoin DoD, the Department of Homeland Security, and the Coast Guard (i) from enforcing the military's vaccination requirement "or administering any COVID-19 vaccine" "with respect to . . . Plaintiffs" or the putative intervenors, and (ii) "from taking any adverse or retaliatory action against any Plaintiff" or putative intervenors for seeking a religious accommodation from the military's vaccination requirement. ECF No. 17-1 at 1.[13]

[11] Because the putative intervenors' motion for leave to seek intervention has not been granted, the period in which to respond to the so-called motion to intervene has yet to begin.

[12] The preliminary-injunction motion states that it is submitted by Plaintiffs and "125 USCG members" seeking leave to file a motion to intervene in this lawsuit. *See* Mot. at 1 (citing ECF No. 13). But aside from this brief introductory comment, the motion raises no arguments, cites no evidence, and makes no reference regarding the putative intervenors. They have thus not even attempted to carry their burden to show that they are each individually entitled to preliminary relief. On that basis alone, the putative intervenors' request for a preliminary injunction should be denied.

[13] A few days later, Plaintiffs filed an emergency motion asking this Court, among other things, to "immediately grant" the 125 putative intervenors' request to intervene and to enter a temporary restraining order barring the Coast Guard from discharging some of them. *See* ECF No. 18. That same day, without requiring Defendants to respond, the Court denied Plaintiffs' motion. ECF No. 19.

LEGAL STANDARDS

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); *see also Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985). To justify this "drastic remedy," a plaintiff must make a "*clear showing*" that (1) they have a substantial likelihood of success on the merits; (2) they will suffer irreparable harm without the requested injunction; (3) the balance of equities tips in their favor; and (4) preliminary relief serves the public interest. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). Failure to demonstrate any one of these elements requires denial of preliminary relief. *Allied Mktg. Grp., Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 809 (5th Cir. 1989).

Additionally, courts extend great deference to the military in reviewing the "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force," which are "essentially professional military judgments." *Winter*, 555 U.S. at 24 (citation omitted); *accord Farmer v. Mabus*, 940 F.2d 921, 923 (5th Cir. 1991) ("[J]udicial intrusion into military matters is to be most cautiously . . . approached."). As the Supreme Court has repeatedly emphasized, "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 Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975) ("[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise," and the "responsibility for determining how best our Armed Forces shall attend to that business rests with Congress" and "the President."); *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). Such deference extends to constitutional claims and military decisions about the health and welfare of the troops. *See, e.g.*, *Solorio v. United States*, 483 U.S. 435, 448 (1987); *Lindenau v. Alexander*, 663 F.2d 68, 70–74 (10th Cir. 1981); *Thomas Short*, 2022 WL 1203876, at *13; *Mark Short*, 2022 WL 1051852, at *7–8; *Dunn* Op. at 36, 46–48.

ARGUMENT

I. Plaintiffs are unlikely to succeed on the merits of their claims.

A. Plaintiffs' claims are not justiciable.

Plaintiffs face a host of preclusive threshold issues, including mootness, standing, ripeness, exhaustion, and the justiciability of claims implicating military personnel decisions. Plaintiffs are unlikely to succeed on any one of these issues, and thus are unlikely to succeed on the merits. *See Anderson v. Oakley*, 77 F.3d 475 (5th Cir. 1995) (per curiam).

i. Bazzrea's and Cheatum's claims are moot because they are fully vaccinated.

Bazzrea and Cheatum have both received two doses of a COVID-19 vaccine. Ex. 5 ¶ 21–22, 26–28. Plaintiffs face no retrospective discipline for failure to comply with a lawful order to vaccinate because they have complied in full: they both received their vaccines within the required timeframe set out in their respective orders to vaccinate.[14] This Court's resolution of their claims would thus have no effect upon them. Accordingly, Bazzrea and Cheatum "lack a legally cognizable interest" in the resolution of any of their claims. *See Env't Conservation Org. v. City of Dallas*, 529 F.3d 519, 527 (5th Cir. 2008) (citation omitted); *accord Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). This Court should therefore dismiss Bazzrea and Cheatum's claims as moot. *See In re Scruggs*, 392 F.3d 124, 128 (5th Cir. 2004).

ii. Plaintiffs' statutory claims are moot because Plaintiffs have been offered the Comirnaty vaccine.

Plaintiffs assert various statutory claims challenging the vaccination directive. Compl. ¶¶ 160–73; Mot. at 35–40. These claims all center on Plaintiffs' allegation that DoD is "mandat[ing]" Plaintiffs to receive an "unlicensed EUA vaccine" or face "disciplinary

[14] Both Bazzrea and Cheatum received their orders to vaccinate on July 6, 2022, directing them to either report to a location of their choice within ten days or to call the Sector Houston-Galveston clinic within three days to schedule an appointment. Ex. 5 ¶¶ 20, 26. Bazzrea received a first dose of a COVID-19 vaccine on July 6 and a second dose on July 28, 2022. *Id.* ¶¶ 26–27. Cheatum received a first dose of a COVID-19 vaccine on July 14 and a second dose on August 12, 2022. *Id.* ¶ 21.

consequences." Compl. ¶¶ 162, 169; *see also* Mot. at 35. Setting aside the fact that the DoD vaccination directive does not require service members to take a vaccine authorized only for emergency use, *supra* p. 5, Plaintiffs' statutory claims are moot: Plaintiffs may comply with the vaccination requirement by receiving doses of Comirnaty, a BLA-approved COVID-19 vaccine that the Coast Guard has made available to Plaintiffs. *See In re Scruggs*, 392 F.3d at 128.

Both before and after this lawsuit was filed, the Coast Guard offered to administer for all willing Plaintiffs doses of the BLA-approved Comirnaty (in Comirnaty-labeled vials). *See* Ex. 5 ¶ 13; Ex. 6, Decl. of Capt. Hans C. Govertsen ¶ 13; Ex. 7, Decl. of Lt. Pantelis N. Vasilarakis ¶ 7; Ex. 2 ¶ 19 (explaining that DoD has obtained over 42,000 doses of Comirnaty-labeled vaccines). Whether vaccinated or unvaccinated, Plaintiffs now "lack a legally cognizable interest" in the resolution of their statutory claims. *See Env't Conservation Org.*, 529 F.3d at 527 (citation omitted); *accord Already, LLC*, 568 U.S. at 91; *see also Norris v. Stanley*, 558 F. Supp. 3d 556, 559 (W.D. Mich. 2021) (no likelihood of success on EUA claim because it "would be moot" if offered the BLA-approved Pfizer vaccine); *cf. Coal. for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275 (D.C. Cir. 2012) (Kavanaugh, J.) (explaining that availability of vaccines other than the ones to which plaintiffs objected eliminated plaintiffs' standing). Accordingly, this Court's resolution of Plaintiffs' statutory claims—all of which rest on a purported mandate to receive an "EUA vaccine"—would have no practical impact on Plaintiffs. *See Prison Legal News v. FBI*, 944 F.3d 868, 880 (10th Cir. 2019). Nor is there "any effectual relief" that the Court could grant to Plaintiffs based on their statutory claims that they have not already been obtained from the Coast Guard. *See Dierlam v. Trump*, 977 F.3d 471, 476 (5th Cir. 2020) (citation omitted); *accord Honig v. Students of Cal. Sch. for the Blind,* 471 U.S. 148, 149 (1985). Thus, all of Plaintiffs' statutory claims are moot.[15]

[15] The mootness doctrine concerns developments *after* the complaint has been filed, *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160–61 (2016), so it does not matter whether Comirnaty was "not available when the DoD Mandate was issued" or at the time of Plaintiffs' "vaccination deadlines," Mot. at 35 & n.29.

iii. Plaintiffs lack standing to assert their statutory claims against FDA.

Plaintiffs also lack Article III standing to assert their statutory claims against FDA, for reasons discussed in a recent Sixth Circuit decision. *See Children's Health Def. v. FDA*, No. 21-6203, 2022 WL 2704554 (6th Cir. July 12, 2022). There, the Sixth Circuit held that an organization lacked associational standing to challenge, on behalf of a group of military servicemembers, "FDA's licensure of Pfizer's Comirnaty and simultaneous extension of the Pfizer-BioNTech EUA." *Id.* at *2, 3–4. The court found that, even assuming the organization had shown that a member suffered or imminently would suffer an injury in fact, the "plaintiffs' alleged injuries" were not "fairly traceable to FDA's actions," nor were they redressable, because "[t]he military's vaccination requirements, and the alleged possible consequences from failing to comply, stem from DOD decisionmakers." *Id.* at *3–4. The same general analysis applies here. Plaintiffs challenge FDA's exercise of enforcement authority, *see* Mot. at 38–40, but Plaintiffs have alleged no injury that would be fairly traceable to FDA's actions, nor any injury that could be redressed by an order entered against the agency. Accordingly, Plaintiffs lack standing to assert their statutory claims against FDA.

iv. Plaintiffs' claims are not ripe for review.

Plaintiffs' claims are neither constitutionally nor prudentially ripe. The ripeness doctrine "ensures that federal courts do not decide disputes that are 'premature or speculative,'" and reflects both "'Article III limitations on judicial power,' as well as 'prudential reasons for refusing to exercise jurisdiction.'" *DM Arbor Ct., Ltd. v. City of Houston*, 988 F.3d 215, 218 (5th Cir. 2021) (citation omitted). This doctrine is "designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005)

(citation omitted); *accord Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 434 (5th Cir. 2021).

Constitutional ripeness. "[T]he doctrine of constitutional ripeness overlaps with the standing doctrine, most notably in the shared requirement that the plaintiff's injury be imminent rather than conjectural or hypothetical." *Lacewell v. Off. of Comptroller of Currency*, 999 F.3d 130, 149 (2d Cir. 2021) (citation omitted); *accord Ass'n of Irritated Residents v. EPA*, 10 F.4th 937, 944 (9th Cir. 2021). Thus, if a "purported injury is 'contingent [on] future events that may not occur as anticipated, or indeed may not occur at all,' the claim is not ripe for adjudication." *Lopez v. City of Houston*, 617 F.3d 336, 342 (5th Cir. 2010) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)); *accord, e.g.*, *Sample*, 406 F.3d at 312.

For this reason, several courts have declined to review challenges brought by service members who—like Plaintiffs—challenged the military's vaccination requirement to avoid the *possibility* of separation for their refusal to comply, including on RFRA and Free Exercise grounds. *See Knick*, 2022 WL 2157066, at *3; *Vance*, 2022 WL 1094665, at *4–7; *Robert*, 2022 WL 103374, at *2–3; *Church*, 573 F. Supp. 3d at 136–37; *Miller*, 2022 WL 3584666, at *4; *Standage v. Braithwaite*, 526 F. Supp. 3d 56, 94 (D. Md. 2021); *Diraffael v. Cal. Mil. Dep't*, No. 10-cv-7240, 2011 WL 13274364, at *3 (C.D. Cal. Mar. 21, 2011) ("[T]he commencement of discharge proceedings" is not sufficient injury when those "proceedings are still underway and to date no final determination has been reached."). Courts have also rejected contentions that plaintiffs' claims are ripe because the separation processes have a likely result. *See, e.g.*, *Roberts*, 2022 WL 834148, at *6 (explaining that the court was "in no position to make predictions as to what other entities might conclude," and nothing could "change[] the fact that [the plaintiff] ha[d] yet to be discharged"); *see also Shaw v. Austin*, 539 F. Supp. 3d 169, 183 (D.D.C. 2021) ("[T]he Court cannot so easily dismiss the possibility that he will have a fair opportunity to make his case to a Board of Inquiry."). The plaintiff's alleged injuries therefore remained "theoretical, rather than certain and impending." *Roberts*, 2022 WL 834148, at *4.

So too here. Plaintiffs seek to avoid the *possibility* of involuntary separation (and a series of adverse consequences that they believe would follow) or other disciplinary action for refusing to comply with DoD's vaccination directive. *See* Compl. ¶ 96; Wilder Decl. ¶ 12, ECF No. 1-2; Wadsworth Decl. ¶ 18, ECF No. 1-5. But no matter how confident they are that these events will someday come to pass, claims seeking relief from military-discharge decisions "are not ripe at the commencement of discharge proceedings; they are ripe only after a plaintiff has been discharged." *See Roberts*, 2022 WL 834148, at *6. As outlined above, two Plaintiffs are not facing separation because they have complied with the Coast Guard's order to become vaccinated. *Supra* p. 11. And separation proceedings have not been completed for the other three Plaintiffs—and may never be. Indeed, these Plaintiffs still have the opportunity to be heard before any discharge decision could be made. *Supra* pp. 6–7. And even if the separation authority were to decide to discharge a Plaintiff, he or she would still be able to seek adequate administrative relief from that decision before coming to federal court. *Supra* p. 7.

Plaintiffs thus seek to invoke this Court's jurisdiction to remedy injuries that are merely theoretical and "based on nothing more than speculation" about events "that might never come to pass." *See Roberts*, 2022 WL 103374, at *2–3; *accord Church*, 573 F. Supp. 3d at 137; *Miller*, 2022 WL 3584666, at *4. As a constitutional matter, these claims are not ripe for review.

Prudential ripeness. For similar reasons, Plaintiffs' claims are also not ripe as a prudential matter. In evaluating prudential ripeness, a court considers "(1) the fitness of the issues for judicial resolution, and (2) the potential hardship to the parties caused by declining court consideration." *Lopez*, 617 F.3d at 341; *see also DM Arbor Ct.*, 988 F.3d at 219 (noting these are prudential considerations); *accord Ass'n of Irritated Residents*, 10 F.4th at 944. Plaintiffs must satisfy both these prongs, *Huawei Techs.*, 2 F.4th at 435 n.30, yet they satisfy neither.

First, Plaintiffs' claims are not fit for judicial resolution, because "matters 'still pending before'" an agency are "not yet ripe for judicial review." *Shrimpers & Fisherman of the RGV v.*

U.S. Army Corps of Eng'rs, 849 F. App'x 459, 462 (5th Cir. 2021) (quoting *La. Power & Light Co. v. Fed. Power Comm'n*, 526 F.2d 898, 910 (5th Cir. 1976)). As explained, *supra* pp. 6–7, 14–15, proceeding now would require the Court "to adjudicate internal military affairs before the military chain of command has had full opportunity to consider" them. *Church*, 573 F. Supp. 3d at 137; *accord Roberts*, 2022 WL 834148, at *5–6; *Miller*, 2022 WL 3584666 at *3–5 ("Courts must not interfere . . . until the separation decision is final and can no longer be adjudicated within the military chain of command."). Ripeness poses the question not whether it is "possible" to resolve a claim, but "whether it is appropriate for the court to undertake the task." *Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City*, 861 F.3d 1052, 1060–61 (10th Cir. 2017) (citation omitted). Here, "'judicial intervention' at this stage would 'inappropriately interfere with further administrative action' on the matter before the Court." *Miller*, 2022 WL 3584666 at *4 (quoting *Wyoming v. Zinke*, 871 F.3d 1133, 1141–42 (10th Cir. 2017)).

The fact that, at some point in the future, the Coast Guard "*may* separate or otherwise discipline a Plaintiff for refusing to comply with its COVID-19 vaccination requirement cannot ripen this case." *Miller*, 2022 WL 3584666 at *4. "Whether to separate or discipline a service member is a discretionary decision that is left, in the first instance, to the" Coast Guard. *Id.*; *see also*, *e.g.*, *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 163–64 (1967). The "initiation of separation proceedings is [thus] a tentative action not fit for judicial review," because "one can only speculate as to the final outcome of any proceedings." *Smith v. Harvey*, 541 F. Supp. 2d 8, 13 (D.D.C. 2008). As explained, any Plaintiffs currently in separation proceedings "still have multiple opportunities" to be heard by decision-making bodies that have the authority to retain their service. *Miller*, 2022 WL 3584666, at *5; *see also supra* p. 6–7. Therefore, at this point, it is entirely "possible that something" raised by a Plaintiff during his or her separation or post-separation proceedings "will compel [the Coast Guard] to drop the [separation]," obviating the need for any judicial involvement. *See TOTAL Gas & Power N. Am., Inc. v. FERC*, 859 F.3d

325, 336 (5th Cir. 2017); *accord Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012).

Separately, it appears Plaintiffs are asking this Court also to enjoin the Coast Guard from taking any other "adverse," non-disciplinary actions based on their refusal to be vaccinated. Those claims for relief are also unfit for judicial resolution. Such relief could not be squared with the Supreme Court's order in *Navy SEALs 1-26*, which stayed a lower court injunction to the extent that it "preclude[d] the Navy from considering [service members'] vaccination status in making deployment, assignment, and other operational decisions." 142 S. Ct. at 1301. Moreover, Plaintiffs offer no evidence that they are facing or will soon face any adverse employment actions for their refusal to vaccinate, and thus these claims are based purely on speculation about what *might* happen in the future. *See Thomas,* 473 U.S. at 580–581.

But even assuming that a Plaintiff will be, for example, restricted in their duties or training opportunities, those supposed "harms" would not be redressable through the federal courts. "The Constitution vests [such] 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. Sec'y of Air Force*, 866 F.2d 1508, 1511 (D.C. Cir. 1989) (cleaned up) (quoting *Gilligan*, 413 U.S. at 10). The Supreme Court has long made clear that "judges are not given the task of running the Army. The responsibility for setting up channels through which" complaints regarding internal military affairs "can be considered and fairly settled rests upon" Congress, the President, and his subordinates. *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953). "The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Id.* at 94; *accord Noyd v. McNamara*, 378 F.2d 538, 540 (10th Cir. 1967). Therefore, if Plaintiffs are asking the Court to enjoin the Coast Guard from taking any non-disciplinary employment action against Plaintiffs based on their refusal to be vaccinated, this

would not only conflict with the partial stay granted by the Supreme Court in *Navy SEALs 1-26,* but with long-standing and binding principles of inter-branch comity and judicial restraint in the military context. *See Navy SEALs 1-26*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring).[16]

Second, Plaintiff have not established that delaying resolution of their claims would cause them any hardship. As discussed above, *supra* p. 15, and below, *infra* pp. 42–45, Plaintiffs have not shown that they will likely suffer irreparable harm as a result of Defendants' challenged actions, and all claims to the contrary rest on layers of speculation.

In sum, under either a constitutional or prudential rubric, Plaintiffs' claims are not ripe.

v. Plaintiffs have failed to exhaust all available intra-service remedies.

Setting aside the ripeness issue, Plaintiffs' claims are not justiciable for another reason: They have not properly exhausted available intra-service remedies. "The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson*, 405 U.S. 34, 37 (1972). Requiring exhaustion in the military context is particularly appropriate, "given the judiciary's lack of expertise in areas of military judgment and its long-standing policy of non-intervention in internal military affairs." *Heidman v. United States*, 414 F. Supp. 47, 48 (N.D. Ohio 1976) (citing *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Parker v. Levy*, 417 U.S. 733 (1974); *Gilligan*, 413 U.S. at 10). The Fifth Circuit has thus long required that a plaintiff first exhaust all "available intraservice corrective measures" before bringing to federal court claims implicating "internal military affairs." *Hodges v. Callaway*, 499 F.2d 417, 419–20 (5th Cir. 1974) (quoting *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971)); *accord Von Hoffburg v. Alexander*, 615 F.2d 633, 637

[16] Plaintiffs' requested injunction—preventing Defendants "from taking any adverse or retaliatory action against any Plaintiff . . . as a result of, arising from, or in conjunction with" the COVID-19 vaccination requirement, ECF No. 17-1—would also violate the requirement that an injunction "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d). The terms "adverse . . . action," "arising from," and "in conjunction with" are (even when read in context) "hopelessly vague." *See PMC, Inc. v. Sherwin-Williams*, Co., 151 F.3d 610, 619 (7th Cir. 1998); *accord Scott v. Schedler*, 826 F.3d 207, 211–14 (5th Cir. 2016).

(5th Cir. 1980) (collecting cases); *see also Cargill v. Marsh*, 902 F.2d 1006, 1007–08 (D.C. Cir. 1990) (per curiam). And even when a plaintiff meets this threshold exhaustion requirement, a court still must weigh several factors to determine the propriety of reviewing a claim challenging internal military matters: (i) the nature and strength of the plaintiffs' challenge; (ii) the potential injury to the plaintiffs if review is refused; (iii) the type and degree of anticipated interference with the military function; and (iv) the extent to which the exercise of military expertise or discretion is involved. *Mindes*, 453 F.2d at 201.[17]

Exhaustion. Although Plaintiffs assert that they have sought various exemptions from the Coast Guard's vaccination requirement, they have not pursued their claims through all available administrative procedures, *supra* pp. 15–17, during which the Coast Guard can build a factual record and determine in the first instance whether a Plaintiff should be granted relief. For that reason, courts have recently denied relief to service members who similarly failed to exhaust available separation remedies before pursuing RFRA and Free Exercise challenges relating to DoD's vaccination directive. *See, e.g., Church*, 573 F. Supp. 3d at 36–38; *Robert*, 2022 WL 103374, at *3; *Knick*, 2022 WL 2157066, at *3; *Mark Short*, 2022 WL 1051852, at *4; *Miller*, 2022 WL 3584666, at *5.[18]

But Plaintiffs argue that they "qualify for one or more exemptions from exhaustion." Mot. at 17. They principally suggest that exhausting these remedies would be futile because the military's religious-accommodation process is mere "theater" with a "pre-determined" outcome. *Id.* (citation omitted). As an initial matter, Plaintiffs do not raise similar concerns

[17] Plaintiffs cite no case holding that their APA claims are not subject to the Fifth Circuit's exhaustion rule, Mot. at 16 n.19, and a number of courts have applied this rule in reviewing APA challenges to military matters, *see, e.g.*, *Roe v. U.S. Dep't of Def.*, 947 F.3d 207, 218–19 (4th Cir. 2020); *Jiahao Kuang v. Dep't of Def.*, 778 F. App'x 418, 420–21 (9th Cir. 2019); *Daugherty v. United States*, 73 F. App'x 326, 331–32 (10th Cir. 2003).

[18] Courts routinely require service members to exhaust claims before the Board for Correction of Military Records before filing suit. *Crawford v. Tex. Army Nat'l Guard*, 794 F.2d 1034, 1036 (5th Cir. 1986); *Rucker v. Sec'y of the Army*, 702 F.2d 966, 970 (11th Cir. 1983); *Von Hoffburg*, 615 F.2d at 638, 641; *Mindes*, 453 F.2d at 198; *McCurdy v. Zuckert*, 359 F.2d 491, 495 (5th Cir. 1966).

about the Coast Guard's separation or post-separation processes, which they must exhaust before bringing their claims to federal court. *See, e.g.*, *Church*, 573 F. Supp. 3d at 136–38. Regardless, Plaintiffs' argument runs counter to the presumption that "[m]ilitary officers . . . 'discharge their duties correctly, lawfully, and in good faith,'" *Hoffman v. United States*, 894 F.2d 380, 385 (Fed. Cir. 1990) (citation omitted); *accord Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997), and "will afford [service] members" the constitutional and statutory protections to which they are entitled, *Hodges*, 499 F.2d at 424. And Plaintiffs come nowhere close to offering the "well-nigh irrefragable proof," *Marine Shale Processors, Inc. v. EPA*, 81 F.3d 1371, 1385 (5th Cir. 1996) (citation omitted), "of bad faith or improper behavior" necessary to overcome this presumption of good faith and regularity, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *accord Adair v. England*, 183 F. Supp. 2d 31, 60 (D.D.C. 2002). In support of their futility claim, Plaintiffs allege incorrectly that the Coast Guard has granted "no RARs," Mot. at 17, when in fact the Coast Guard has granted 12 religious accommodations from the COVID-19 vaccination requirement, Ex. 8, Decl. of Brooke Grant, Ex. 1.[19] And as explained below, neither Plaintiffs' unsupported allegations of irreparable harm nor their meritless constitutional claims are sufficient to exempt them from exhausting available administrative remedies. *Contra* Mot. at 17.

Mindes factors. Even if Plaintiffs had properly exhausted all available administrative remedies before bringing this action, their claims would still be unreviewable because each of the *Mindes* factors weighs against judicial review. *First*, Plaintiffs' constitutional, statutory, and APA claims are all exceedingly weak and are unlikely to succeed on the merits (as discussed below). *Second*, as explained above, *supra* pp. 15–17, and below, *infra* pp. 42–45, Plaintiffs offer

[19] One Plaintiff alleges that she received an email from an officer stating that he had "got word" from an unknown source that members who were granted a religious or medical exemption from the vaccination requirement will still be discharged. Wilder Decl. ¶ 7. But this allegation is hearsay upon hearsay. *See Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998). It is also incorrect: service members who have been granted an exemption from the Coast Guard's vaccination requirement will not be discharged for refusing to become vaccinated unless and until the exemption expires or is revoked. *See supra* p. 6; *see also* Ex. 5 ¶ 16.

no evidence on which to find that they will likely suffer harm absent this Court's review.

Finally, the third and fourth *Mindes* factors weigh decidedly against reviewing Plaintiffs' claims. *See West v. Brown*, 558 F.2d 757, 760–61 (5th Cir. 1977) (explaining that these factors "present a single inquiry, focusing on disruption of military functions."). "[M]ilitary readiness and unit cohesion would be unacceptably harmed should the Court" issue the prayed-for declaratory or injunctive relief implicating the "DoD Vaccine Mandate." *Church*, 573 F. Supp. 3d at 146–47; *see also, e.g.*, Ex. 1 ¶ 21. "[F]orcing the [Army] to adjust to the risks of including unvaccinated [soldiers] in its ranks is a substantial interference." *Thomas Short*, 2022 WL 1203876, at *15 (quoting *Mark Short*, 2022 WL 1051852, at *5). Even the risk of a single Plaintiff going unvaccinated is a serious concern because, *inter alia*, unvaccinated individuals have many times the risk of suffering severe illness from SARS-CoV-2 infection and requiring hospitalization as a result. Ex. 1 ¶¶ 16–18. To review Plaintiffs' claims, the Court would need to "involve itself in 'complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force.'" *Thomas Short*, 2022 WL 1203876, at *15 (citation omitted). And by requiring the Coast Guard to retain, deploy, or assign each Plaintiff without regard for his or her vaccination status, the Court would improperly insert itself into a Plaintiff's chain of command, overriding military commanders' judgments about operational needs, including Plaintiffs' fitness to serve and carry out their duties. "[T]he public's interest in military readiness and the military's interest in Plaintiff[s'] health outweigh" Plaintiffs' alleged interests in the resolution of their claims. *See Navy SEAL 1*, 2022 WL 1294486, at *16.

B. Plaintiffs are unlikely to succeed on the merits of their RFRA claims.

None of the three Plaintiffs who remain unvaccinated can establish likely success on the merits of their respective RFRA or First Amendment claims.[20] Military orders to vaccinate

[20] As Plaintiffs acknowledge, *see* Mot. at 25 n.26, there is no need for the Court to address the First Amendment claim separately. If the Government prevails on the RFRA claim, then the Government necessarily prevails under the First Amendment claim—regardless of the standard of review for the Free Exercise claim. Conversely, if Plaintiffs prevail under RFRA, the Court could grant relief without considering Plaintiff's First Amendment claim.

do not violate RFRA if the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Requiring Plaintiffs to be vaccinated furthers the compelling interests in military readiness and health and safety of service members and is the least restrictive means of advancing those interests. "[A] majority of the Supreme Court has already held . . . that the Government is likely to succeed on the merits on the same claims brought by Navy SEALs," and although this decision may not be formally binding, "it is the most persuasive authority on which a District Court may rely." *Navy SEAL 1*, 2022 WL 1294486, at *4 (citing *Navy SEALs 1–26*, 142 S. Ct. at 1301).[21]

i. Vaccinating Plaintiffs against COVID-19 furthers Defendants' compelling interests.

Requiring Plaintiffs to be vaccinated against COVID-19 furthers the compelling military interests in force health and readiness, especially when evaluated under the substantial deference that courts afford military operational decision-making. "[N]o court has ever held that the military does not have a compelling interest in the health of its troops" or "that vaccination against harmful diseases does not serve a compelling government interest," *Navy SEAL 1*, 2022 WL 1294486, at *9; *accord Creaghan*, 2022 WL 1500544, at *9 ("[T]here can be no greater military interest than in keeping each servicemember fit and healthy enough to accomplish their duties."). The Supreme Court has instead repeatedly emphasized that the

[21] Plaintiffs contend that the COVID-19 vaccination requirement substantially burdens their sincerely held religious beliefs because the Pfizer, Moderna, and Johnson & Johnson vaccines were produced using fetal cell lines that Plaintiffs believe derived from prior elective abortions. *See* Ex. 10 29; Ex. 11 at 24. But even if Plaintiffs were correct, they do not contend that a fourth COVID-19 vaccine produced by Novavax—which satisfies the Coast Guard's vaccination requirement, *supra* p. 5—substantially burdens their religious beliefs. According to the Chief Scientist at Novavax, "[a]nimal or fetal-derived cell lines/tissue are not used in the manufacturing, testing, or production of the Novavax COVID-19 vaccine." Ex. 13. Because Wilder and Wadsworth have indicated a willingness to receive the Novavax vaccine, Ex. 10 at 32; Ex. 11 at 564, and have alleged no other burden on their religious beliefs, they are even more unlikely to succeed on their RFRA claims. *See, e.g.*, *New Doe Child #1 v. Congress of the United States*, 891 F.3d 578, 590–91 (6th Cir. 2018).

government's interest in "maximum efficiency" of military operations is paramount, *cf. United States v. O'Brien*, 391 U.S. 367, 381 (1968), and that "[f]ew interests can be more compelling than a nation's need to ensure its own security," *Wayte v. United States*, 470 U.S. 598, 611 (1985). And "[w]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Mark Short*, 2022 WL 1051852, at *7 (quoting *Goldman*, 475 U.S. at 507); *supra* pp. 10–11. Congress recognized these long-standing principles of military deference in enacting RFRA. S. Rep. No. 103-111, at 12 (1993) ("The courts have always recognized the compelling nature of the military's interest in [good order, discipline, and security] in the regulations of our armed services," and "have always extended to military authorities significant deference in effectuating these interests. The committee intends and expects that such deference will continue under this bill."); *Navy SEAL 1*, 2022 WL 1294486, at *8.

After consulting with "medical experts and military leadership," including the "Chairman of the Joint Chiefs of Staff, the Secretaries of the Military Departments, [and] the Service Chiefs," the Secretary of Defense "determined that mandatory vaccination against [COVID-19] is necessary to protect the Force and defend the American people." Sec'y of Def. Mem. (Aug. 24, 2021), https://perma.cc/N759-S758; Sec'y of Def. Mem. (Aug. 9, 2021), https://perma.cc/S4R3-2VZW. The Commandant of the Coast Guard likewise found that COVID-19 vaccination of each service member is necessary to ensure military readiness and the health and safety of service members. Ex. 3 ¶¶ 4, 28. And "logic alone" dictates that "the military's general compelling interest in ensuring the health of its servicemembers . . . distill[s] to a compelling interest in ensuring that [each individual service member] remains healthy enough to accomplish [his] duties." *Creaghan*, 2022 WL 1500544, at *9; *see also Roth*, 2022 WL 1568830, at *17. The Court must "give great deference" to the "professional military

judgments" of these leaders when it comes to what is needed to ensure military readiness and the welfare of service members. *Winter*, 555 U.S. at 24–25 (collecting cases). And "when executive officials 'undertake to act in areas fraught with medical and scientific uncertainties' their judgments 'should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health.'" *Mark Short*, 2022 WL 1051852, at *5 (quoting *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring)); *accord Creaghan*, 2022 WL 1500544, at *8.

Here, the Coast Guard conducted the individualized, "to the person" analysis that RFRA requires, 42 U.S.C. § 2000bb-1(b), considering each of the Plaintiffs' particular job duties and concluding that allowing each of them to remain unvaccinated would undermine the military's compelling interest in ensuring they can carry out their military duties effectively, *see* Ex. 3 ¶¶ 22–25; *see also, e.g.*, *Roth*, 2022 WL 1568830, at *15.

Plaintiff Sabrina Wilder is a Vessel Traffic System (VTS) watch stander. Ex. 5 ¶ 3. In that role she monitors vessel Automatic Identification System data and port cameras during a 12-hour shift on the VTS watch floor in order to prevent groundings and collisions of commercial vessels. *Id.* The VTS watch has had several COVID-19 outbreaks, including one which caused an entire section to be quarantined, forcing other service members to work longer hours and presented impediments to mission-readiness. *Id.* ¶ 6.

Plaintiff Caleb Wadsworth is an MH65 Aircraft Commander who leads aircrews of a multi-mission aircraft on 24-hour alert duty. Ex. 6 ¶¶ 3–4. The MH65 is the Coast Guard's primary search-and-rescue helicopter. *Id.* ¶ 4. Wadsworth also has responsibility for planning and directing all maintenance and logistics for MH65 aircraft and support equipment. *Id.* ¶ 3. In that role, he inspects aircraft and equipment, directs the activities of 39 subordinate service members, and provides maintenance release authority to confirm that an aircraft or piece of equipment is ready to be released back into regular use rotation. *Id.* ¶ 5.

Plaintiff Timothy Jorden is a Maritime Law Enforcement Specialist who splits his time evenly between office and field. Ex. 7 ¶¶ 3–4. He works as part of a small boat crew to enforce safety and security zones by intercepting and boarding other vessels. *Id.* ¶ 4. He is a qualified emergency medical technician responsible for providing emergency care to crewmembers and members of the public in the course of his duties. *Id.* ¶ 3. He is also an IONSCAN operator who maintains radiation detection and atmospheric testing equipment. *Id.*

The military's decision to deny religious accommodation requests in this case are amply supported by evidence showing COVID-19's harmful impact on military readiness. COVID-19 has "impacted all elements of DoD simultaneously," including exercises, deployments, redeployments, and other global force management activities, Ex. 1 ¶¶ 4, 6–8; caused the cancellation of numerous significant preparedness and readiness events, *id.* ¶ 9; suspended operations and resulted in inoperability of aircraft carriers for months in strategically significant areas, *id.* ¶ 7–8; and infected hundreds of thousands of service members, hospitalized thousands, and tragically caused the loss of 96 service members, *id.* ¶ 3. In the Coast Guard alone, COVID-19 has taken multiple entire units out of operation for weeks at a time. Ex. 4, Decl. of Lt. Comm. Joel A. Aber ¶¶ 7–10. Over 8,153 Coast Guard service members (out of a total of 46,997 active duty and reserve members) have been infected, resulting in significant lost days of time and readiness. *Id.* ¶ 7.

The military's judgment is also supported by the positive effects that COVID-19 vaccination has had on force readiness and health. Vaccinations have reduced the risk of serious illness, hospitalizations, and deaths of service members. *See, e.g.*, Ex. 1 ¶¶ 16–18; Ex. 2 ¶ 8, 11–12; *see also Church*, 573 F. Supp. 3d at 147 (requiring vaccination is "supported by a lengthy record replete with data demonstrating the necessity of a general vaccine mandate"); *Mark Short*, 2022 WL 1051852, at *7 (noting "the empirical evidence in the record of the vaccine's efficacy" and the military's "evidence-based approach in its reliance on vaccination");

Oklahoma, 577 F. Supp. 3d at 1265 (stressing that the vaccine "has been shown to be remarkably effective in mitigating the effects of the pandemic which has affected . . . thousands of service members"). The overwhelming percentage of the service members who have died from COVID-19 were unvaccinated. *See* Ex. 1 ¶ 3; Ex. 2 ¶ 12. Likewise, "[b]etween July and November of 2021, non-fully-vaccinated active-duty service members had a 14.6-fold increased risk of being hospitalized when compared to fully vaccinated active-duty service members," and "[i]n December 2021 unvaccinated adults were 16-times more likely to be hospitalized than vaccinated adults." Ex. 1 ¶ 18. A recent study published by the CDC confirmed mRNA vaccine effectiveness against invasive mechanical ventilation or death during the Omicron-predominant period. *See* CDC, Morbidity and Mortality Weekly Report (Mar. 18, 2022), https://perma.cc/HJH3-PEN4. Vaccinations also reduced the number of service members required to quarantine, permitted the military to return to higher levels of occupancy in DoD facilities and hold in-person training, and allowed service members to participate in joint training exercises with countries that have vaccination requirements. *See* Ex. 1 ¶ 14. In short, "[g]iven the tangible protection the vaccines afford service members against serious illness, hospitalization, and death, it is clear that COVID-19 vaccines improve readiness and preserve the DoD's ability to accomplish its mission." *Id.* ¶ 22.

Vaccination also furthers the Coast Guard's "mission-critical" interest in ensuring that service members can respond to domestic emergencies or deploy on only a few days' or even a few hours' notice. Ex. 4 ¶¶ 5–6.[22] Because it takes individuals about one month following their first dose of the FDA-approved COVID-19 to become fully vaccinated, service members cannot put off vaccination until they are ordered to respond to an emergency. *Id.* ¶ 6. The vaccine is necessary for members to stay deployment-ready because a member's illness or an

[22] In 2021, the Coast Guard deployed 4,461 members in response to surge staffing operations, including Hurricane Ida, the California Pipeline oil spill, the M/V *Golden Ray* capsizing, the Haitian earthquake, and Southwest Border migrant operations. Ex. 4 ¶ 5. The majority of personnel assigned to respond to domestic emergencies are from non-operational billets, because personnel assigned to operational assets are deemed critical to the execution of that asset's mission. *Id.*

outbreak in a deployed environment "create an unacceptable risk to personnel and substantially increase the risk of mission failure." Ex. 6 ¶ 7. Deployed environments frequently do not have extensive medical facilities, such that a critically ill service member may not receive the same level of care they would receive in the United States and caring for that ill member may take away the unit's medical capacity to treat battle injuries. *See id.* Moreover, because deployments are "by design, minimally manned," "[i]f one service member were to get sick, contract long-COVID, get hospitalized, or die, that aircrew would be at risk of being unable to support the mission." *Id.*

Plaintiffs attempt to dispel the Coast Guard's compelling interest in requiring their vaccination, but none of their arguments have merit. First, Plaintiffs cannot rely on medical and administrative exemptions to undermine the government's compelling interest in vaccinating Plaintiffs. Medical and administrative exemptions are not comparable to religious accommodations and therefore have no bearing on whether vaccinating Plaintiffs furthers the Coast Guard's compelling interests in military readiness. *Cf. Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) ("Comparability is concerned with the risks various activities pose."). In contrast to religious accommodations, medical exemptions serve the interest in military readiness: vaccinating a service member who has medical contraindications to the vaccine would harm the member's health, *detracting* from the military's interests in ensuring readiness and the health and safety of members. Ex. 3 ¶¶ 10–11, 14–15, 17; *see also Navy SEAL 1*, 2022 WL 1294486, at *12; *Mark Short*, 2022 WL 1051852, at *8; *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1178 (9th Cir. 2021), *cert. and application for injunction denied*, 142 S. Ct. 1099 (2022); *Does 1–6 v. Mills*, 16 F.4th 20, 31 (1st Cir. 2021), *cert. denied sub nom. Does 1-3 v. Mills,* 142 S. Ct. 1112 (2022).[23] Likewise, administrative exemptions—which are only granted to service members with an approved separation or retirement date no later than October 1, 2022—are appropriate

[23] Medical exemptions are also authorized for service members actively participating in COVID-19 vaccine clinical trials to further the efficacy of the vaccine itself. Ex. 3 ¶ 14.

because requiring vaccination of individuals who will no longer be part of the force does not further the military's interest in ensuring readiness. Ex. 3 ¶ 20.[24] Moreover, medical and administrative exemptions are generally temporary—in contrast to the presumptive permanence of a religious belief opposing COVID-19 vaccination.[25] *Id.* ¶ 6–8.

Nor do medical and administrative exemptions allow the recipient to continue in their job duties as if they were vaccinated, as Plaintiffs here seek to do. Rather, "contrary to Plaintiffs' contentions, service members with medical, administrative, or religious exemptions to the COVID-19 vaccination mandate do not operate within the [military] as if they were vaccinated." *Roth*, 2022 WL 1568830, at *20. All unvaccinated service members are subject to the travel, leave, deployment, assignment, and duty restrictions and limitations that Plaintiffs seek to avoid. Ex. 3 ¶ 37. Medical exemptions render a service member non-deployable and subject to additional restrictions, *see id.*, and service members who remain non-deployable for more than 12 consecutive months are reevaluated for retention in service, *see* DoDI 1332.45 ¶ 1.2(b), https://perma.cc/9FNU-ZR89.[26] Thus, medical and administrative exemptions are not comparable to religious accommodations because they serve opposite purposes and yield opposite results. Accordingly, the fact that the Services grant medical and administrative exemptions has no relevance on whether the Services have a compelling interest in vaccinating Plaintiffs.

Plaintiffs' citation to the CDC's updated guidance only confirms that vaccination

[24] This effectuates the stated intent of Congress. *See* Joint Explanatory Statement to Accompany the [NDAA] for Fiscal Year 2022 at 151, https://perma.cc/FL8K-PFUU ("We also expect the Department to include . . . exemptions [from mandatory COVID-19 vaccination] for servicemembers nearing separation and retirement in the development of uniform procedures relating to administrative exemptions.").

[25] Permanent medical exemptions are only granted to service members who are allergic to a previous dose of the COVID-19 vaccine or to a component or the COVID-19 vaccines. Ex. 3 ¶ 17.

[26] Plaintiffs argue that Jorden's frequent deployments undermine the Coast Guard's policy that vaccination is required to deploy. Not so. Vaccination is required to remain *worldwide* deployable. Ex. 7 ¶ 5. Although Jorden's unit is designed to be deployed, *id.*, Jorden's deployments since the Coast Guard instituted the COVID-19 vaccine requirement have all been domestic temporary duty assignments, not foreign deployments.

remains essential to preventing against serious illness, hospitalization, and death from COVID-19 infection. On August 11, 2022, the Centers for Disease Control and Prevention issued a Summary of Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems. *See* CDC, *Summary of Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems—United States* (Aug. 2022), https://perma.cc/Y7XV-4R3Q (hereinafter "CDC, Summary of Guidance"); *see also* CDC, *Benefits of Getting a COVID-19 Vaccine* (Aug. 17, 2022), https://perma.cc/W66Y-3GU7. As the CDC explains, "COVID-19 vaccines are highly protective against severe illness and death," although they "provide a lesser degree of protection against asymptomatic and mild infection." CDC, Summary of Guidance (Aug. 2022), https://perma.cc/Y7XV-4R3Q. Indeed, "[t]he rates the rates of COVID-19–associated hospitalizations and deaths are substantially higher among unvaccinated adults than among those who have received a primary series and those who are up to date with recommended COVID-19 vaccination, particularly among adults aged ≥65 years." *Id.*

Accordingly, the Coast Guard correctly determined that vaccinating these three remaining unvaccinated Plaintiffs furthers the Coast Guard's compelling interest in military readiness.

ii. Vaccination is the least restrictive means of furthering Defendants' compelling interest in military readiness.

As other courts have found in non-military settings, a uniform practice of vaccination is the least restrictive means for accomplishing the government's interest in preventing the spread of infectious diseases in the workforce.[27] This reasoning has even greater force in the military setting, where health of service members is paramount to military readiness, and

[27] *See, e.g.*, *Does 1–6*, 16 F.4th 20 (health-care workers); *Doe*, 19 F.4th 1173 (students); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021) (health-care workers), , *opinion clarified*, 17 F.4th 368 (2d Cir. 2021), *and cert. denied sub. nom.*, *Dr. A. v. Hochul*, 142 S. Ct. 552 (2021); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) (recognizing that vaccines "may be supported by" the government's compelling interest in "the need to combat the spread of infectious diseases")

where the acceptable level of risk to the mission must be a military, not judicial, judgment. *See Navy SEALs 1–26*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring) (cautioning that a court may not "insert[] itself into the [military's] chain of command, overriding military commanders' professional military judgments"); *Mark Short*, 2022 WL 1051852, at *7 (emphasizing deference to military judgments and adding that "[t]his deference is layered on top of the deference that courts must give to expert policymakers on matters involving complex medical or scientific uncertainties"); *Dunn* Op. at 37–42 (finding vaccination of an Air Force officer to be the least restrictive means, including because of the necessary deference afforded to military assessments and because "judges aren't scientists").

After careful consideration of Plaintiffs' requests for a religious accommodation and their appeals, the final decision authority concluded that no lesser restrictive means sufficiently serve the Coast Guard's compelling interests in readiness and ensuring the health and safety of all service members equally well. Notably, the Coast Guard is not required to use an alternative that does not serve its compelling interests "equally well" relative to vaccination. *See Burwell*, 573 U.S. at 731 (examining whether alternative served stated interest "equally well"); *Kaemmerling v. Lappin*, 553 F.3d 669, 684–85 (D.C. Cir. 2008) (rejecting RFRA and constitutional challenges against DNA Act, where "[a]ny alternative method of identification would be *less effective*" in accomplishing the government's compelling interests (emphasis added)).

For instance, the Coast Guard considered whether telework or remote work could provide a less restrictive alternative, but concluded that none of the three remaining unvaccinated Plaintiffs can complete their duties remotely. Wilder cannot remotely monitor data systems and port cameras and communicate with vessels in her role as VTS watch stander. Ex. 5 ¶¶ 3, 8. Wadsworth cannot remotely lead aircrews or direct maintenance. Ex. 6 ¶¶ 3–5. Jorden cannot remotely intercept and board vessels, provide emergency care, or maintain radiation detection and atmospheric testing equipment. Ex. 7 ¶¶ 3–4.

Likewise, the Coast Guard evaluated the feasibility and effectiveness of masking and distancing but concluded that those measures are not as effective as vaccination. For example, social distancing is simply not possible on VTS watch, aircraft, or boats. *See* Ex. 5 ¶ 4; Ex. 6 ¶ 4, 8; Ex. 7 ¶ 4; *see also* Ex. 2 ¶ 10; Ex. 3 ¶ 27; Ex. 4 ¶ 4. Nor is masking possible on VTS watch or aircraft, as they present a hindrance to clear communication. Ex. 5 ¶ 4; Ex. 6 ¶ 4. And regardless, unlike vaccination, masking and distancing do not provide any protection to an infected individual from severe illness or death. *See Roth*, 2022 WL 1568830, at *23. Also, unlike vaccination, the effectiveness of masking and distancing fluctuates based on human behavior. *See* Ex. 2 ¶ 10; *see also United States v. Elder*, ---F. Supp. 3d---, 2022 WL 836923, at *9 (E.D.N.Y. Mar. 21, 2022) ("By themselves, face masks, social distancing, and similar measures may be effective for small groups over short periods of time, but fail to ensure the safety of large groups in close contact for sustained periods.")

Similarly, serial testing and temperature checks do not prevent a service member who tests positive from suffering serious health outcomes, such as long COVID, hospitalization, and death. Moreover, the "virus can be easily transmitted to others prior to symptom development and therefore may infect significant numbers before being identified." Ex. 2 ¶ 10. Indeed, the military experienced multiple COVID-19 outbreaks when it merely required service members to undergo routine testing requirements, rather than requiring vaccination. Ex. 1 ¶¶ 7–8; *see also Does 1-6*, 16 F.4th at 33 (noting same was true of Maine).

Plaintiffs fail to discuss any alternative means, much less any that are equally as effective as vaccination. Plaintiffs also fail to explain why the Coast Guard improperly determined that masking, social distancing, remote work, and other alternatives were less effective than vaccination. Instead, Plaintiffs rely on the mistaken notion that the Coast Guard should simply rely on "the cumulative impact of natural and herd immunity." Mot. at 29.

Plaintiffs' contention that some of them have recovered from COVID-19 and

therefore have "natural immunity," Mot. at 29, is unpersuasive. While a prior infection can provide some protection against another infection for some amount of time, the available medical evidence leaves much unknown about the strength, consistency and duration of that protection. Ex. 2 ¶¶ 20–22, 24, 29; *Dunn* Op. at 39–40 ("[I]t's not well established that a natural immunity is effective, more effective or as effective as the vaccine."); CDC, *Benefits of Getting a COVID-19 Vaccine* (Aug. 17, 2022), https://perma.cc/W66Y-3GU7 ("While people can get some protection from having COVID-19, the level and length of that protection varies, especially as COVID-19 variants continue to emerge."). And while Plaintiffs declare themselves immune based solely on the existence of antibodies from prior infection, there is no scientific consensus on the amount of antibodies that would indicate protection from reinfection, or for how long or to what degree such protection would exist. Ex. 2 ¶¶ 20–22, 30.[28] Moreover, evidence shows that protection from a prior infection increases following vaccination. Ex. 2 ¶ 21; CDC, *Benefits of Getting a COVID-19 Vaccine* (Aug. 17, 2022), https://perma.cc/W66Y-3GU7 ("[P]eople can get added protection by getting vaccinated after having been infected with . . . COVID-19."). The Coast Guard has therefore determined, consistent with guidance from the CDC, that vaccination is the best way to minimize the risk posed by COVID-19 to military readiness. *See also* DoDI 6205.02 ¶ 1.2, https://perma.cc/8HLA-AXQB (mandating vaccination in accordance with the CDC's recommendations); CDC, *Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Approved or Authorized in the United States* (last updated Aug. 22, 2022), https://perma.cc/Y7CQ-5HTZ (recommending COVID-19 vaccination for individuals five

[28] *See also* FDA, *Antibody Testing Is Not Currently Recommended to Assess Immunity After COVID-19 Vaccination: FDA Safety Communication* (May 19, 2021), https://perma.cc/X8GQ-TNHQ ("Be aware that a positive result from an antibody test does not mean you have a specific amount of immunity or protection from SARS-CoV-2 infection."); FDA, *Antibody (Serology) Testing for COVID-19: Information for Patients and Consumers* (Feb. 24, 2022), https://perma.cc/WY9T-6LSG ("Antibody tests do not tell you whether or not you can infect other people with SARS-CoV-2."); CDC, *Benefits of Getting a COVID-19 Vaccine* (Aug. 17, 2022), https://perma.cc/W66Y-3GU7 ("[T]here is still no antibody test available that can reliably determine if a person is protected from further infection.").

and over "regardless of a history of symptomatic or asymptomatic [COVID-19] infection," and "serologic testing to assess for prior infection is not recommended for the purpose of vaccine decision-making").[29]

Plaintiffs' claim that the Coast Guard has achieved "herd immunity," Mot. at 29, is similarly mistaken. There is no known threshold for COVID-19 herd immunity. Ex. 2 ¶¶ 26–27. And even if the Coast Guard were able to reach that unknown threshold, the Coast Guard does not operate in isolation. Plaintiffs' job duties require them to interact with members of the community and community partners on a regular basis. Ex. 5 ¶ 8; Ex. 6 ¶ 4; Ex. 7 ¶¶ 3–4; Ex. 4 ¶ 4. Plaintiffs also live in communities surrounding military bases. Ex. 2 ¶ 44 (noting the vaccination rate for the country as a whole is only 66.7%); Ex. 7 ¶ 6. In any event, herd immunity simply is not as effective as vaccination at protecting against infection and serious illness. Ex. 2 ¶ 25. For these reasons, the military has not set any benchmark to cease any of its immunization requirements based on herd immunity. *Id.* ¶¶ 23–27. The Court should defer to the military's assessment of the acceptable level of risk. *See Gilligan*, 413 U.S. at 10.

Plaintiffs also baselessly allege that the Services have rejected less restrictive alternatives as part of a general policy of illegally denying religious accommodations. *See* Mot. at 27–29; Compl. ¶¶ 9, 61–62. Plaintiffs may disagree with the Coast Guard's assessment of least restrictive means to protect the military's mission, but such disagreement does not mean that military leaders are operating unlawfully. Indeed, Plaintiffs' suggestion that the religious accommodation request process does not take requests seriously, *see* Mot. at 27, lacks any foundation.[30] *Cf. Dodson v. U.S. Gov't, Dep't of the Army*, 988 F.2d 1199, 1204 (Fed. Cir. 1993)

[29] *Cf. Biden v. Missouri*, 142 S. Ct. 647, 653–54 (2022) (concluding that it was rational for an agency to rely on CDC guidance in requiring vaccination even for individuals with "natural immunity" from prior COVID-19 illness); *Norris v. Stanley*, No. 1:21-cv-756, 2022 WL 557306, at *4 (W.D. Mich. Feb. 22, 2022) (similar), *appeal filed*, No. 22-1200 (6th Cir. Mar. 14, 2022); *Valdez v. Grisham*, 559 F. Supp. 3d 1161, 1177 (D.N.M. 2021)(similar), *aff'd*, 2020 WL 2129071 (10th Cir. June 14, 2022).

[30] Indeed, the process for initially adjudicating a single Coast Guard service member's religious accommodation request involves review by: a chaplain; a medical officer; the service member's unit

("[M]ilitary administrators are presumed to act lawfully and in good faith like other public officers, and the military is entitled to substantial deference in the governance of its affairs."); *Doe 2 v. Shanahan*, 917 F.3d 694, 731 (D.C. Cir. 2019) (Williams, J., concurring) (noting that "the plausibility of such a scheme tends to unravel as we try to imagine the dozens of participants," including "Cabinet members and other officials," "who would have been needed for its realization" (citation omitted)).

In sum, the Coast Guard's considered judgment is reasonable and supported by the record. RFRA does not compel the Coast Guard to adopt any measure that is inferior in the military context to the use of vaccines. Plaintiffs have thus failed to show likely success on their RFRA claims so as to warrant the extraordinary preliminary injunctive relief they seek.

C. Plaintiffs' Fifth Amendment claims are unlikely to succeed on the merits.

Plaintiffs' claim that DoD's COVID-19 vaccination directive violates substantive and procedural due process, Mot. 29–34, is similarly unavailing.

Substantive due process. By "default," the Fifth Circuit will typically review government action challenged on substantive due process grounds under rational-basis scrutiny. *Reyes v. N. Tex. Tollway Auth.*, 861 F.3d 558, 561–62 (5th Cir. 2017). Only if a plaintiff shows that he has been deprived of a fundamental right—*i.e.*, one that is "deeply rooted in this Nation's history and tradition"—will a court apply a "more exacting standard[] of review," *Cantu-Delgadillo v. Holder*, 584 F.3d 682, 687 (5th Cir. 2009) (citation omitted). Courts have consistently rejected the notion that vaccination requirements implicate a "fundamental right ingrained in the American legal tradition." *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)); *accord, e.g.*, *Doe v. Zucker*, 520 F. Supp. 3d 217, 249–53 (N.D.N.Y. 2021), *aff'd sub. nom.*, *Goe v. Zucker*, 43 F.4th 19 (2d Cir. 2022); *see also Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944); *Zucht v. King*, 260 U.S. 174, 177 (1922).

commander; multiple personnel in the Office of Health Services; multiple personnel in the Office of Military Personnel Policy's Military Policy Development Division; the approval authority; and the Office of General Law. *See* Ex. 3 ¶¶ 30–34.

"[V]accination requirements, like other public-health measures, have been common in this nation['s]" history. *Klaassen*, 7 F.4th at 593. And in the military context, they have played a critical and longstanding role in ensuring the readiness of the Armed Forces. *See Abbott*, 2022 WL 2287547, at *2; *see also supra* p. 4. Courts have thus routinely applied rational-basis review in resolving substantive due process challenges to COVID-19 vaccination requirements.[31]

Plaintiffs rely on *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), for the proposition that DoD's vaccination directive violates their fundamental "right . . . to refuse treatment." Mot. at 31 (citation omitted). But *Cruzan* only assumed that the Constitution granted "competent persons a constitutionally protected right to refuse lifesaving hydration and nutrition" should they later become terminally ill and non-responsive. 497 U.S. at 279. Obviously, requiring service members to become vaccinated is nothing like forcing a hospital patient in a vegetative state to undergo intrusive, years-long treatment against their will. Among the more obvious differences is that service members are and have been free "to refuse" vaccination. *Contra* Mot. at 31; *see also, e.g.*, *We The Patriots USA*, 17 F.4th at 294 (rejecting reliance on *Cruzan* where "[v]accination is a condition of employment" and the government "is not forcibly vaccinating" workers). The refusal to become vaccinated may simply subject a service member to separation or other employment actions.[32]

Accordingly, Plaintiffs' substantive due process claim is subject only to rational-basis review. Under this "notoriously deferential standard," *Reyes*, 861 F.3d at 561–62, the Court must uphold DoD's vaccination directive unless Plaintiffs can demonstrate that there is no

[31] *E.g.*, *Klaassen*, 7 F.4th at 593; *We The Patriots*, 17 F.4th at 293–94 (finding a COVID-19 vaccine requirement did not offend any "fundamental rights to privacy, medical freedom, and bodily autonomy"); *Johnson v. Brown*, 567 F. Supp. 3d 1230, 1251 (D. Or. 2021); *Williams v. Brown*, 567 F. Supp. 3d 1213, 1226 (D. Or. 2021); *Norris v. Stanley*, 567 F. Supp. 3d 818, 820 (W.D. Mich. 2021); *Valdez*, 559 F. Supp. 3d at 1173; *Harris v. Univ. of Mass., Lowell*, 557 F. Supp. 3d 304, 313 (D. Mass. 2021); *see also Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (Gorsuch, J., concurring).

[32] Plaintiffs' theory that certain COVID-19 vaccines are "medical treatments" rather than "vaccines," *see* Mot. at 30, is thus irrelevant to the analysis. Regardless of how they wish to describe COVID-19 vaccines, Plaintiffs have failed to demonstrate that DoD's vaccination directive implicates their alleged right "to refuse treatment." *See* Mot. at 31 (citation omitted).

"rational relationship between the disparity of treatment and some legitimate governmental purpose," *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320 (1993). Under rational-basis review, "[a] statute is presumed constitutional, and 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." *See id.* at 320–21 (citation omitted). "Given the standard of review, it should come as no surprise that [courts] hardly ever strike[] down a policy as illegitimate under rational basis scrutiny." *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018).

DoD's COVID-19 vaccination directive readily satisfies rational-basis review. For reasons already explained, requiring service members to become vaccinated against COVID-19 reasonably furthers the military's compelling interest in the health and readiness of the Armed Forces. *Supra* pp. 22–35.

Procedural due process. Procedural due process claims are evaluated under a familiar two-step inquiry: A court must first determine whether the plaintiff has been deprived of a constitutionally protected liberty or property interest, and if so, whether the plaintiff was denied constitutionally sufficient process. *Ky. Dep't of Corrs. v. Thompson*, 490 U.S. 454, 460 (1989). Plaintiffs cannot satisfy either step.

As an initial matter, Plaintiffs identify no liberty or property interest at issue here. As explained, DoD's vaccination requirement does not implicate Plaintiffs' alleged right to refuse medical treatment. *Contra* Mot. at 34. And contrary to what they suggest, *see id.*, Plaintiffs do not have "a constitutionally-protected property interest in continued military service or the employment benefits that come with military service," *Smith*, 541 F. Supp. 2d at 15. It is instead well-established "that military officers serve at the pleasure of the President and have no constitutional right to be promoted or retained in service."[33] *Brown v. McHugh*, 972 F. Supp. 2d

[33] *Accord Guerra v. Scruggs*, 942 F.2d 270, 278 (4th Cir. 1991); *Doe v. Garrett*, 903 F.2d 1455, 1462 (11th Cir. 1990); *Wilhelm v. Caldera*, 90 F. Supp. 2d 3, 8 (D.D.C. 2000), *aff'd*, 6 F. App'x 3 (D.C. Cir. 2001); *Navas v. Gonzalez Vales*, 752 F.2d 765 (1st Cir. 1985); *Rich v. Sec'y of the Army*, 735 F.2d 1220 (10th Cir. 1984); *Woodard v. Marsh*, 658 F.2d 989 (5th Cir. 1981); *Ampleman v. Schlesinger*, 534 F.2d 825 (8th Cir. 1976); *cf. Sims v. Fox*, 505 F.2d 857, 862–64 (5th Cir. 1974).

58, 66 (D.D.C. 2013) (quoting *Pauls v. Sec'y of the Air Force*, 457 F.2d 294, 297 (1st Cir. 1972)).

In any event, Plaintiffs do not argue that the intra-service processes to which they are entitled are insufficient as a matter of due process. Nor could they. The hallmark of due process "is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (cleaned up with citation omitted). As explained, the Coast Guard provides its members significant process with multiple layers of review and opportunities to be heard, *see supra* pp. 6–7, and Plaintiffs offer no argument to the contrary.

D. Plaintiffs are unlikely to succeed on the merits of their APA claims.

Plaintiffs' claim that DoD's vaccination directive is arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A), also fails. Judicial review under the APA's arbitrary-and-capricious standard is highly "deferential," requiring only "that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Proj.* (*Prometheus*), 141 S. Ct. 1150, 1158 (2021). A court must presume the validity of the challenged action, *Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010), "may not substitute its own policy judgment for that of the agency," *Prometheus*, 141 S. Ct. at 1158, and "should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14 (2009) (citations omitted). And military judgments subject to APA challenges deserve even greater deference, *see Goldberg*, 453 U.S. at 66, as they involve "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force," *Gilligan*, 413 U.S. at 10; *see also, e.g.*, *Oklahoma*, 577 F. Supp. 3d at 1262 n.29.

Plaintiffs' APA claims cannot succeed under this highly deferential standard of review. *First*, Plaintiffs argue that DoD and the Coast Guard violated the APA by adopting a "categorical ban" on religious accommodations and natural-immunity medical exemptions to the COVID-19 vaccination requirement rather than conducting individualized assessments in processing exemption requests. Mot. at 41. But the record rebuts this claim. The Coast Guard

alone has granted 12 religious accommodations and numerous medical exemptions (including 8 permanent medical exemptions), Ex. 8, Ex. A, belying the suggestion that it (or DoD generally) has adopted a "categorical ban" on exemptions. Furthermore, contrary to Plaintiffs' unsupported assertion, the Coast Guard resolves all RARs and medical-exemption requests based on an evaluation of each service member's individual circumstances, as it did here in reviewing Plaintiffs' RARs, *supra* pp. 22–35.

Second, Plaintiffs suggest that DoD's vaccination directive lacks an "evidentiary basis." Mot. at 41–42 (font modified). But Plaintiffs cannot succeed on the merits of their APA claim by simply ignoring the extraordinary impact that COVID-19 has had on the military. As described above, *supra* p. 25, the military leadership's judgment that vaccination is necessary for medical readiness is supported by significant evidence of COVID-19's toll on the Armed Forces, *see, e.g.*, Ex. 1 ¶¶ 3–13; Ex. 2 ¶¶ 10–13; *accord Church*, 573 F. Supp. 3d at 147 (finding DoD's vaccination directive "supported by a lengthy record replete with data demonstrating the necessity of a general vaccine mandate").[34]

Third, Plaintiffs suggest that DoD's vaccination directive is an "unexplained departure" from a "prior policy." *See* Mot. at 42. It is not clear what "policy" Plaintiffs are referencing, but they appear to base this claim on several disjointed references in their complaint to a series of decades-old cases and agency actions pertaining to DoD's anthrax vaccine program. *See* Compl. ¶¶ 176–80. There, Plaintiffs suggest that DoD and FDA interpreted the requirements

[34] Plaintiffs' suggestion that the timing of DoD's vaccination directive is suspect because it was issued "the very next day" after FDA approved Comirnaty, Mot. at 42, is easily dispatched. When put into context with the Secretary's August 9, 2021 memorandum, noting the rise in SARS-CoV-2 infection rates, and his previously announced intention to institute a vaccination requirement "immediately upon the [FDA] licensure[,]" an order issued the day after Comirnaty's licensure (the timing of which was widely publicly anticipated) is no surprise, much less a cause for suspicion.

Plaintiffs also allege that DoD *under*-relied on CDC's recommendations because CDC recommends boosters, which DoD does not currently require. *See* Mot. at 42. But a policy is neither arbitrary nor capricious even if it is "'significantly over-inclusive or under-inclusive,' so long as [it] bear[s] some rational connection to the policy's goal." *Doe #1-#14*, 2021 WL 5816632, at *11; *see also Hines v. Quillivan*, 982 F.3d 266, 275 (5th Cir. 2020).

of 10 U.S.C. § 1107a and 21 U.S.C. § 360bbb-3 (discussed *infra* pp. 40–42) with respect to an anthrax vaccine's EUA and the military's anthrax vaccine program differently than they do here. *See* Compl. ¶¶ 176–80. But Plaintiffs point to no contradictory interpretation from either agency. Instead, they point to an EUA from 2005, which included various conditions on the anthrax vaccine's emergency use, including that no adverse or disciplinary action could be taken against a service member who refused to receive the vaccine. Compl. ¶ 178 (citing 70 Fed. Reg. 5452, 5455 (Feb. 2, 2005)). And contrary to what they seem to suggest, Plaintiffs point to nothing in that EUA stating that those conditions were statutorily required. Nor do Plaintiffs point to any DoD or FDA statements to that effect. At any rate, Plaintiffs offer no explanation why conditions placed on an EUA for a different vaccine, or a decades-old, dissolved injunction of a different vaccination program at issue in a different case, would have any relevance here. *See Doe v. Rumsfeld*, 172 F. App'x 327, 328 (D.C. Cir. 2006).

Finally, Plaintiffs contend that Defendants failed "to consider any alternatives" to requiring service members to become vaccinated against COVID-19 or to explain why any alternatives would be inadequate. Mot. at 42–43. But as explained, the Coast Guard did consider several alternatives to requiring vaccination (*e.g.*, masking, remote work, testing, social distancing) and determined that none of these alternatives serve the military's compelling interests in the readiness and health of service members equally well. *Supra* pp. 29–34.

E. Plaintiffs cannot succeed on the merits of their statutory claims.

Finally, Plaintiffs contend that Defendants have violated various federal statutes that Plaintiffs mistakenly believe are pertinent to DoD's vaccine directive. Mot. at 35–40. As explained, *supra* pp. 11–13, these claims are moot, and Plaintiffs lack standing to assert them. But even so, these claims are wrong on both the facts and the law, and thus fail on the merits.

Plaintiffs principally contend that DoD's vaccine directive violates 10 U.S.C. § 1107a because it "mandate[s]" that service members receive an "unlicensed EUA vaccine[]" "without

Presidential waiver" of the requirement to provide certain information. Mot. at 35. But DoD's vaccination directive does not implicate § 1107a. Congress has given the Secretary of Defense and the Armed Services wide latitude to establish a vaccination program for the welfare and readiness of troops. *See* 10 U.S.C. §§ 113(b), 7013(b)(9), 8013(b)(9), 9013(b)(9). Section 1107a places a narrow condition on that authority by requiring a presidential "waiver" of a notification requirement when the military seeks to require service members to take products authorized only for "emergency use" without providing certain information. *Id.* § 1107a(a).

DoD's directive does not implicate that provision because it does not require service members to take an EUA-authorized vaccine. *See* Sec'y of Def. Mem. (Aug. 24, 2021), https://perma.cc/N759-S758 ("Mandatory vaccination against COVID-19 will only use COVID-19 vaccines that receive full licensure . . . in accordance with FDA-approved labeling and guidance.").[35] And as discussed, the FDA-licensed vaccine is available to Plaintiffs. On August 23, 2021, FDA approved the Pfizer-BioNTech COVID-19 vaccine under the name "COMIRNATY" for its intended use by people aged 16 years and older. *See* FDA, BLA Approval (Aug. 23, 2021), https://perma.cc/2QGR-7B8B. And the Coast Guard has offered each unvaccinated Plaintiff doses of Comirnaty to satisfy the vaccination requirement. Ex. 5 ¶ 13; Ex. 6 ¶ 13; Ex. 7 ¶ 7. Plaintiffs thus have no basis to claim that DoD is requiring them to receive a vaccine authorized only for "emergency use." *See* 10 U.S.C. § 1107a(a); *see also Doe #1–#14*, 572 F. Supp. 3d at 1234 ("If the DoD is . . . administering Comirnaty . . . plaintiffs' § 1107a issue disappears."); *accord Crosby v. Austin*, No. 8:21-cv-2730, 2022 WL

[35] While DoD's vaccine directive does not implicate § 1107a, it is worth noting that a judge in this District recently rejected Plaintiffs' understanding of what that statutory provision requires. *See Miller v. Austin*, No. 4:22-cv-1739 (S.D. Tex. June 1, 2022), ECF No. 9. In *Miller*, like here, the plaintiff argued that § 1107a and 21 U.S.C. § 360bbb-3 "prohibit[] the military from requiring members to receive an EUA product" absent a presidential waiver under § 1107a. *Id.* at 1–2 (citation omitted). The court held, however, that federal law "only requires that [a service member] have been *informed* that he has a choice whether to get the vaccine or not and to be told of what consequences may follow if he decides to not get the vaccine." *Id.* at 3. Where a plaintiff has been informed of that choice, and the consequences of refusing to vaccinate, neither § 1107a nor § 360bbb-3 had been violated. *Id.*

603784, at *2 (M.D. Fla. Mar. 1, 2022).[36]

Plaintiffs also suggest that FDA has violated 21 U.S.C § 360bbb-3. But even assuming Plaintiffs have standing, *see supra*, they have no private right of action to challenge FDA's compliance with this statutory provision. *See, e.g.*, *Navy SEAL 1 v. Biden*, 574 F. Supp. 3d 1124, 1130 (M.D. Fla. 2021) ("[Section 360bbb-3] confers no private right of action, creates no 'opportunity to sue the government,' and permits enforcement by the United States and by the states in specific circumstances only." (cleaned up with citations omitted)); *accord Crosby*, 2022 WL 603784, at *1–2. Congress instead reserved exclusive enforcement authority to the United States—*not* individual plaintiffs—with one exception for state enforcement. 21 U.S.C. § 337(a); *Guilfoyle v. Beutner*, No. 2:21-cv-05009, 2021 WL 4594780, at *26–27 (C.D. Cal. Sept. 14, 2021). That limitation, in turn, precludes Plaintiffs' attempt to assert their § 360bbb-3 claim under the APA. 5 U.S.C. § 701(a)(1) ("[The APA] applies" except to the extent that a statute "preclude[s] judicial review."); *see also Overton Power Dist. No 5 v. O'Leary*, 73 F.3d 253, 257–58 (9th Cir. 1996). Moreover, actions taken under the authority of § 360bbb-3 are expressly committed to FDA's discretion. 21 U.S.C. § 360bbb-3(i); *Ass'n of Am. Physicians & Surgeons v. FDA*, No. 20-1784, 2020 WL 5745974, at *3 (6th Cir. Sept. 24, 2020). For that reason as well, Plaintiffs' allegations against FDA are not reviewable under the APA. 5 U.S.C. § 701(a)(2).

II. Plaintiffs are not likely to suffer irreparable harm absent preliminary relief.

Plaintiffs must show that, in the absence of an injunction, they are "likely to suffer irreparable harm." *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 585 (5th Cir. 2013) (citation omitted). It is not enough simply to "show[ ] some possibility of irreparable injury." *Nken v. Holder*, 556 U.S. 418, 434–35 (2009); *accord Winter*, 555 U.S. at 22. "Speculative injury is not sufficient" to "make a clear showing of irreparable harm." *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985). Moreover, "the irreparable

[36] Plaintiffs make much of FDA's "interchangeability" determination. Mot. at 36, 40. But their arguments on this score are irrelevant to whether DoD's vaccination directive violates § 1107a, because Plaintiffs are not required to receive an "EUA vaccine" to comply with that directive. *See supra* p. 12.

harm element must be satisfied by independent proof, or no injunction may issue." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989). "In general, a harm is irreparable where there is no adequate remedy at law, such as monetary damages." *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011). Conversely, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 90 (1974). And "[i]n the context of 'military personnel decisions, . . . courts have held that the showing of irreparable harm must be *especially strong* before an injunction is warranted, given the national security interests weighing against judicial intervention in military affairs." *Church*, 573 F. Supp. 3d at 145 (citation omitted). Plaintiffs make no such showing.

Plaintiffs claim that they face irreparable harm because they are being deprived of their constitutionally and statutorily protected religious rights. Mot. at 43. But as discussed, *supra* pp. 22–37, Plaintiffs have not demonstrated that Defendants' challenged actions implicate their constitutional or statutory rights, let alone imminently threaten them, *Elrod v. Burns*, 427 U.S. 347, 374 (1976); *see also, e.g.*, *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 334 (D.C. Cir. 2018) (explaining that, to show irreparable harm based on loss of constitutional rights, a movant must show likely success on the merits); *Mark Short*, 2022 WL 1051852, at *9; *Bellinger v. Bowser*, 288 F. Supp. 3d 71, 88–89 (D.D.C 2017); *Thomas Short*, 2022 WL 1203876, at *7–8. A preliminary injunction is inappropriate "unless the party seeking it can demonstrate that '[constitutional] interests are either threatened or in fact being impaired at the time relief is sought.'" *Google, Inc. v. Hood*, 822 F.3d 212, 227–28 (5th Cir. 2016) (citation omitted). And even if Plaintiffs could show likely success on the merits of their claims, the irreparable-harm requirement is not excised any time a plaintiff asserts a colorable constitutional claim. The mere "invocation of the [Constitution] cannot substitute for" a plaintiff's obligation to show "the presence of an *imminent*, *non-speculative* irreparable injury"

that will occur absent preliminary relief. *Id.* at 228.

Plaintiffs further allege that they will suffer imminent, irreparable harm if they are discharged. Mot. at 43–44. As explained, Plaintiffs' fears of future separation and its alleged consequences are, at best, theoretical. It is still uncertain that any Plaintiff will be discharged based on refusal to vaccinate, *see supra* pp. 15–17, let alone that any separation would occur before this Court is able to issue a decision on the merits, *see Winter*, 555 U.S. at 22; *see White*, 862 F.2d at 1211. But even if Plaintiffs did face "imminent discharge," *see* Mot. at 43, such action would not cause them *irreparable* injury. *See Sampson*, 415 U.S. at 92 n.68; *Air Force Officer*, 2022 WL 468799, at *12. Courts routinely find that military administrative and disciplinary actions, including separation and a-less-than-honorable discharge, are not irreparable injuries because the service member could later be reinstated and provided back pay if he prevailed on his claim. *See, e.g.*, *McCurdy*, 359 F.2d at 493; *Hartikka v. United States*, 754 F.2d 1516 (9th Cir. 1985); *Chilcott v. Orr*, 747 F.2d 29, 34 (1st Cir. 1984); *Guitard v. Sec'y of Navy*, 967 F.2d 737, 742 (2d Cir. 1992); *Church*, 573 F. Supp. 3d at 145–46; *Thomas Short*, 2022 WL 1203876, at *7–8.

Plaintiffs' reliance on *Roe* is misplaced. There, the court affirmed that "a general discharge [is] insufficient to demonstrate irreparable injury." 947 F.3d at 229. It held simply that it was not clear error for the district court to find that two exceptional circumstances "surrounding" the discharges in that case would create irreparable injury. *Id.* at 229–30. Neither of those exception circumstances are present here: (1) discharge "based on outmoded policies related to HIV that bears no relationship to [the plaintiffs'] ability to perform their jobs," and (2) discharge that would force the plaintiffs "to reveal" their stigmatized condition to others. *Id.* (cleaned up with citation omitted). The same cannot be said of a discharge for failure to comply with the Coast Guard's COVID-19 vaccination requirement for reasons already explained above and amply supported in the record, and because Plaintiffs do not contend that being unvaccinated is stigmatizing or comparable to the circumstances at issue

in *Roe* (and, also, Plaintiffs themselves are the ones who revealed their unvaccinated status).

Finally, Plaintiffs contend that they would be irreparably harmed if they were "forc[ed] . . . to accept unwanted medical treatment." Mot. at 44. But neither DoD nor the Coast Guard are "forcing" Plaintiffs to take the COVID-19 vaccine "involuntar[ily]." *Contra* Mot. at 24, 44; *see also, e.g.*, Compl. ¶ 143. Thus, while Plaintiffs may be subject to discipline for refusing to follow a lawful order to be vaccinated, they cannot claim that they will ever be forcibly vaccinated as a result of the Coast Guard's vaccination requirement. *Supra* p. 35.

III. The equities and the public interest weigh against a preliminary injunction.

The third and fourth requirements for issuance of a preliminary injunction—the balance of harms and whether the requested injunction will disserve the public interest—"merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). These factors tilt decidedly against the issuance of a preliminary injunction here.

The public has an exceptionally strong interest in national defense, *see Winter*, 555 U.S. at 24–26, and the military has a compelling interest in requiring its forces to be vaccinated, healthy, and ready to accomplish any and every military mission, *see North Dakota v. United States*, 495 U.S. 423, 443 (1990); *Navy SEALs 1–26*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring). An injunction allowing Plaintiffs to continue serving without being vaccinated against COVID-19 would threaten harm not only to Plaintiffs and the other service members serving alongside them, but would also compromise their units' collective abilities to execute their military and intelligence duties, maintain their necessary readiness, and accomplish their missions. *See* Ex. 4 ¶ 7 ("Coast Guard units are often small in size such that even a small number of cases can render a unit incapable of performing its mission."); Ex. 3 ¶ 28; Ex. 1 ¶ 21.[37] And unlike service members with medical and administrative exemptions, Plaintiffs seek to remain in their posts without any changes to their duties. The Coast Guard's judgment that

[37] *See, e.g.*, *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 286 (D.D.C. 2005) ("In evaluating the harm to the [military], the court must consider the aggregate harm of all these possible claims."); *accord Bors v. Allen*, 607 F. Supp. 2d 204, 212 (D.D.C. 2009); *Guerra*, 942 F.2d at 275.

it cannot accept avoidable risk to the health and readiness of its fighting forces serves the public interest, outweighs any interests Plaintiffs may have in premature preliminary relief, and deserves this Court's deference. *See, e.g.*, *Navy SEAL 1*, 2022 WL 1294486, at *16–17; *Church*, 573 F. Supp. 3d at 146–48. Moreover, the national defense depends on service members' compliance with lawful orders. *Chappell v. Wallace*, 462 U.S. 296, 300 (1983). No military can successfully function where members feel free to define the terms of their own service and which orders they will choose to follow.[38] Plaintiffs' requested injunction would interfere with the military's discretion to handle matters of order and discipline, to the detriment of effectiveness and trust between commanding officer and subordinate. *Orloff*, 345 U.S. at 95.

Finally, Plaintiffs mistakenly assert that "[t]he threat from COVID is fast receding." Mot. at 45. "To the contrary," continued vaccination "remains essential to protecting against serious illness, hospitalization, and death; is key to limiting the opportunities for the virus to mutate (thus causing new variants); and is necessary in reducing public risks that could require future safety measures such as travel restrictions and reinstituting public health measures." Ex. 2 ¶ 43. The United States is still averaging nearly 400 deaths per day from COVID-19. *See* CDC, *COVID Data Tracker* (updated Aug. 25, 2022), https://perma.cc/JXK2-GGKD. Indeed, the newly updated CDC guidance confirms that "COVID-19 remains an ongoing public health threat" and "[i]ncorporating actions to mitigate the impact of COVID-19 into long-term sustainable routine practices is imperative for society and public health." CDC, Summary of Guidance (Aug. 2022), https://perma.cc/Y7XV-4R3Q; *see also* Ex. 3 ¶ 28.

CONCLUSION

Accordingly, the Court should deny Plaintiffs' motion for a preliminary injunction.

[38] *E.g.*, *Stein v. Mabus*, No. 3:12-cv-00816, 2013 WL 12092058, at *7–8 (S.D. Cal. Feb. 14, 2013) ("Military officers are better suited than civilian courts to determine" whether a service member's refusal to "follow all orders from" the Commander-in-Chief "disrupted good order and discipline").

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2022, I electronically filed the foregoing document with the Clerk of Court using this Court's CM/ECF system, which will notify all counsel of record of such filing.

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