No. 22-10645

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NAVY SEAL 1, et al.,

Plaintiffs-Appellees,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF DEFENSE, et al.

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida
In Case No. 8:21-cv-02429-SDM-TGW before the Honorable Steven D. Merryday

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BRIEF OF AMICI CURIAE AMERICAN CONSTITUTIONAL RIGHTS UNION AND ALABAMA CENTER FOR LAW AND LIBERTY IN SUPPORT OF PLAINTIFFS-APPELLEES SEEKING AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for *Amicus Curiae* Alabama Center for Law and Liberty, represents that this organizations does not issue stock but has one parent company, the Alabama Policy Institute. *Amicus Curiae* American Constitutional Rights Union does not issue stock. Counsel further certifies that, to the best of his knowledge, the following persons and entities have an interest in this appeal who have not yet appeared in a certificate of interested persons:

Alabama Center for Law and Liberty – *Amicus Curiae*;

American Constitutional Rights Union – *Amicus Curiae*;

Alabama Policy Institute – Parent corporation of *Amicus Curiae* Alabama Center for Law and Liberty;

Clark, Matthew J. – Counsel for *Amici Curiae*; and

Park, Jack – Co-counsel for *Amici Curiae.*[1]

Beyond that, in addition to the pseudonymous plaintiffs listed in Plaintiffs-Appellees' brief at C2-C3, the following people have an interest in the outcome of this case:

Avallone, Zachary A.

[1] Park co-authored the brief with Clark, but he is currently having issues renewing his membership with the bar of this court. Thus, he is not listed as a counsel of record out of an abundance of caution for complying with 11th Cir. R. 46-6.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Constitutions and Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICUS CURIAE*[2]

The American Constitutional Rights Union and the Alabama Center for Law and Liberty ("Amici") submit this brief in support of the Plaintiffs-Appellees, who are challenging the imposition and application of the Biden Administration's vaccine-mandate for the military. They contend that: (1) the statutory criteria for mandating the vaccination of service members with an unapproved vaccine have not been met; and (2) the imposition of the vaccine mandate runs afoul of the service members' rights under the Religious Freedom Restoration Act and the Free Exercise Clause of the First Amendment.

SUMMARY OF THE ARGUMENT

Amici agrees with the Plaintiffs-Appellees' views on the importance of a religious exemption and the concomitant need for individualized evaluation of those requests.[3] There are other problems with the military mandate that support the Plaintiffs' position, though, and Amici will address them.

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[2] All parties have consented to the filing of this brief. Rule 29, Fed. R. App. P. Counsel for a party did not author this brief in whole or in part, and no such counsel or party made any monetary contribution to fund the preparation or submission of this brief. No person or entity other than *Amici Curiae* and their counsel made a monetary contribution to fund the preparation or submission of this brief.

[3] Kristina Wong writes, "Marine Corps commanders across different commands are using the same form letter to deny religious accommodation requests for the coronavirus vaccine, despite a legal requirement to consider each request on an individual basis." Kristina Wong, *Exclusive: Marine Corps Commanders Using Form Letters to Deny Religious Exemptions* (Nov. 2, 2021),

At the outset, Amici note that, on November 12, 2021, the Fifth Circuit Court of Appeals stayed the Occupational Safety and Heath Administration's (OSHA) imposition of a nationwide COVID-19 vaccine mandate applicable to all employers with more than 99 employees, directing OSHA to take no further steps to enforce the mandate. *See BST Holdings, LLC v. OSHA*, 17 F. 4th 604 (5th Cir. 2021). The court characterized the OSHA mandate as "the rare government pronouncement that is both overinclusive . . . *and* underinclusive." *Id.* at 611 (emphasis in original).[4] Amici recognize that the military vaccine mandate has been issued under different auspices but, as discussed herein, it is likewise simultaneously overinclusive and underinclusive.

In this brief, Amici will first discuss the process for the approval of drugs. That process, which typically requires animal and human testing before approval, has not been followed with respect to the vaccines at issue. The law does not allow the government to force people to receive a vaccine that has been approved on an emergency use basis only, and there are substantial questions as to whether the Pfizer

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www.breitbart.com/politics/2021/11/02/marine-corps-commanders-using-form-letter-religious-exemptions.

[4] The Fifth Circuit's decision was dissolved after the petitions for review were consolidated in the Sixth Circuit. *In re MCP No. 165*, 21 F. 4th 357 (6th Cir. 2021). However, after multiple parties petitioned the Supreme Court for a stay (two of which were represented by Amicus Curiae Alabama Center for Law and Liberty), the Court granted their request. *NFIB v. Dep't of Labor*, 142 S. Ct. 661(2022).

and Moderna vaccines have received such approval. Amici will then discuss the fact that vaccines, including those involved in this case, have both side effects and limitations on their effectiveness. The reality of side-effects undermines the argument that the vaccines are necessary for every person. Finally, Amici will note how COVID-related readiness concerns are both over- and under-inclusive.

ARGUMENT

I. Background

"[T]he United States cannot demand that members of the armed forces also serve as guinea pigs for experimental drugs." *Doe v. Rumsfeld*, 297 F. Supp. 2d 119, 135 (D.D.C. 2003). In *Doe*, the District Court for the District of Columbia preliminarily enjoined the Department of Defense from proceeding with a mass inoculation program directed at members of the military and military contractors. The military members and contractor personnel were directed to be vaccinated against anthrax without their consent with an experimental drug.

In an August 24, 2021, Memorandum for senior Pentagon leadership, Secretary of Defense Lloyd Austin, III, directed "the Secretaries of the Military Departments to immediately begin full vaccination of all members of the Armed Forces under DoD authority on active duty or in the Ready Reserve, including the National Guard, who are not fully vaccinated against COVID-19." See Secretary of Defense Lloyd Austin, III, *Memorandum for Senior Pentagon Leadership,*

Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members, United States Department of Defense (Aug. 24, 2021) ("DOD Mandate"). [5] The Memorandum further directs that service members will be considered "fully vaccinated two weeks after completing the second dose of a two-dose COVID-19 vaccine or one week after receiving a single dose of a one-dose vaccine." *Id*. Significantly, "[t]hose with previous COVID-19 infections are not considered fully vaccinated." *Id*. In addition, the Memorandum does not provide an exception for female service members who are pregnant, nursing, or wish to become pregnant.

When the Secretaries of the Military Departments issued their Guidance, none of them provided an exemption for those previously infected. *See* Secretary of the Air Force Public Affairs, *DAF Announces Mandatory COVID Vaccine Implementation Guidelines for Airmen, Guardians*, United States Air Force (Sept. 3, 2021);[6] U.S. Army Public Affairs, *Army announces implementation of mandatory vaccines for Soldiers*, United States Army (Sept. 14, 2021) ("Soldiers with previous

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[5] *Available at* https://media.defense.gov/2021/Aug/25/2002838826/-1/-1/0/MEMORANDUM-FOR-MANDATORY-CORONAVIRUS-DISEASE-2019-VACCINATION-OF-DEPARTMENT-OF-DEFENSE-SERVICE-MEMBERS.PDF

[6] *Available at* https://www.af.mil/News/Article-Display/Article/2765008/daf-announces-mandatory-covid-vaccine-implementation-guidelines-for-airmen-guar/ (last viewed June 6, 2022).

COVID-19 infections are not automatically exempt from full vaccination."); [7] Secretary of the Navy, *2021-2022 Department of Navy Mandatory COVID-19 Vaccination Policy*, ALNAV 062/21 (Aug. 30, 2021);[8] United States Marine Corps, *Mandatory COVID-19 Vaccination of Marine Corps Active and Reserve Components*, MARADMINS 462/21 (Sep. 1, 2021), at ¶ 3.j.5 ("A history of COVID-19 disease and/or positive serology is not a valid exemption from COVID-19 vaccination.");[9] *see also* United States Navy Reserves, *Mandatory Vaccination Coronavirus Disease 2019 for Navy Reserve Force Personnel*, 2021 ALNAVRESFOR 010 at ¶ 4 ("Navy Reserve personnel with previous COVID-19 infection are not considered fully vaccinated."), ¶ 5.B ("A history of COVID-19 disease and/or positive serology does not exempt a Navy Reserve member from receiving a COVID-19 vaccine.")[10]; *but cf.* United States Army, *Army Regulation 40-562*, AR 40-562, ch. 2-6(a)(1)(b) (identifies general examples of legitimate medical exemptions including "[e]vidence of immunity based on serologic tests,

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[7] *Available at* https://www.usar.army.mil/News/News-Display/Article/2775701/army-announces-implementation-of-mandatory-vaccines-for-soldiers (last viewed June 16, 2022).

[8] *Available at* https://www.mynavyhr.navy.mil/Portals/55/Messages/ALNAV/ALN2021/ALN21062.txt?ver=Vbl_3soAE1K4DhYwqjSGLw%3d%3d.

[9] *Available at* https://www.marines.mil/News/Messages/Messages-Display/Article/2761259/mandatory-covid-19-vaccination-of-marinecorps-active-and-reserve-components/ (last viewed June 16, 2022).

[10] *Available at* https://www.navyreserve.navy.mil/Resources/Official-RESFOR-Guidance/ALNAVRESFOR-Message-Traffic (last visited June 16, 2022).

documented infection, or similar circumstances.").[11] None of the Guidance issued by the Air Force, Army, or the Navy Guidance addresses the applicability of the mandate to women who are pregnant, nursing, or who wish to become pregnant. Rather, all of the Service note that service members have the opportunity to apply for a medical or administrative, including religious, exemption. In addition, while stating, "Per CDC, COVID-19 vaccination is strongly recommended for pregnant women," the Marine Corps Guidance provides, "At this time, a temporary medical exemption may be granted by a licensed DoD healthcare provider for pregnant service members, after individual consultation with that provider." *See* MARADMINS at ¶ 3.j.4.

The Memorandum was issued notwithstanding minimal hospitalization and mortality rates for service members infected with COVID-19. As of November 3, 2021 (when Amicus ACRU first took notice of these statistics), the cumulative total of military cases was 250,902, of whom 245,954 recovered, and only 2,269 were hospitalized and 73 died.[12] Significantly, these remarkable results were achieved with limited COVID-19 treatment and no mandate (at least until the mandates went

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[11] *Available at* https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r40_562.pdf.

[12] *See* U.S. Department of Defense, "Coronavirus-DoD-Response," Table "DOD COVID-19 Cumulative Totals", https://www.defense.gov/Spotlights/Coronavirus-DoD-Response (as of November 6, 2021).

into effect, which was not long before November 3). The statistics between now and then are not much different. As of June 16, 2022, the military reports a total of 415,956 cases, 405,432 recoveries, 2,602 hospitalizations, and 95 deaths.[13] More to the point, the Centers for Disease Control's best estimate of the infection fatality rate for people 18-49 years is less than 0.08% (60,355 deaths out of 75,179,070 cases), meaning that young adults like the Plaintiffs have a 99.92% survivability rate.[14]

While the Services point to the possibility of administrative exemptions, the test will come when the Government responds to the judicial orders arising from this case. If the Services are grudging in their disposition of requests for religious exemption, the availability of such an exemption will become illusory. As the Plaintiffs contend, the Religious Freedom Restoration Act requires much more than an illusory accommodation of their sincerely held religious beliefs. Moreover, as the Supreme Court recently held, if the government has the power to grant individualized exemptions, then the law infringing on religious exercise is subject to strict scrutiny, not rational-basis review. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021).

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[13] *See id.* (last visited June 16, 2022).

[14] *See CDC Estimated COVID-19 Burden*, Table 1: Preliminary Estimated COVID-19 cumulative incidence, by age group — United States, February 2020-September 2021, *available at* https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/burden.html (last viewed June 16, 2022). The CDC's estimated survival rate for 50–64-year-olds is 95.81%. *Id.*

II. The COVID-19 vaccines have been approved on an expedited basis.

The Food and Drug Administration ("FDA") generally prohibits anyone from introducing or delivering for introduction into interstate commerce any "new drug" or "biological product" unless and until the FDA has approved the drug or biological product as safe and effective for its intended use. 21 U.S.C. §§ 331(a), 355(a); 42 U.S.C. § 262(a). A vaccine is both a drug and a biological product and is therefore subject to regulation by both the Food Drug and Cosmetic Act and the Public Health Service Act. *See* 21 U.S.C. § 321(g); 42 U.S.C. § 262(i)(1).

The Food Drug and Cosmetic Act authorizes the FDA to issue an Emergency Use Authorization ("EUA") allowing the use of a medical drug, device, or biologic agent when certain conditions have been met. The Secretary of Health & Human Services must have declared a public emergency, and the FDA must have found that "there is no [1] adequate, [2] approved, *and* [3] available alternative to the product for diagnosing, preventing, or treating" the disease in question. 21 U.S.C. § 360bbb-3(c)(3) (emphasis added). The requirements for EUA products are less rigorous than for licensed products. An EUA product requires only a showing that, based on scientific evidence "if available," "it is reasonable to believe" that the product "may be effective" in treating the disease. 21 U.S.C. § 360bbb-3(c)(2)(A). The safety requirements are also relaxed in that the FDA need only conclude that the "known

and potential benefits . . .outweigh the known and potential risks" of the product, considering the risks of the disease. 21 U.S.C. § 360bbb-3(c)(2)(B). Finally, EUA products are exempt from certain manufacturing and marketing standards, enjoy broader product liability protections, and cannot ordinarily be mandated due to informed consent laws and regulations. *See, e.g.*, *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 19 (D.D.C. 2004) (granting injunction against DOD anthrax vaccine mandate for EUA vaccine).

Non-EUA medical drugs, devices, and biologics go through a far more rigorous and time-consuming process before the FDA will approve them. In general, that process requires testing on animals, then humans, to make sure the drug is effective and safe. Those test results are sent to the FDA, where its Center for Drug Evaluation and Research reviews them. If that review shows that the drug's health benefits outweigh its known risks, the drug will be approved for sale.

It is claimed that the Pfizer and Moderna vaccines have received full FDA approval and are therefore no longer subject to the EUA statute. *See* Press Release, *FDA Approves First COVID-19 Vaccine*, U.S. Food and Drug Administration (Aug. 23, 2021);[15] *Spikevax and Moderna COVID-19 Vaccine*, U.S. Food and Drug

[15] *Available at* https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine.

Administration (last updated May 16, 2022).[16] However, the Plaintiffs' attorneys have repeatedly contended that the shots approved by the FDA are not available in the United States, meaning that a "bait and switch" has occurred. *See, e.g.*, Press Release, *Pfizer's "FDA Approved" COVID Shot Will Never Be Available*, Liberty Counsel (June 10, 2022) (quoting from FDA, CDC, and Pfizer statements);[17] Press Release, *No FDA-Approved COVID Shot Is Available*, Liberty Counsel (Jan. 31, 2022) (addressing the claim that Moderna's shot had received full approval by the FDA and showing that the FDA-approved Moderna vaccine had not been distributed in the United States).[18] Since the distinction between the vaccines approved only on an EUA basis and those that are fully approved is of monumental legal importance, this Court should not allow Defendants to get away with a vaccine mandate unless they prove that the Pfizer and Moderna vaccines available now have been fully approved by the FDA.

III. Vaccines have side effects, and the COVID vaccines are no exception.

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[16] *Available at* https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/spikevax-and-moderna-covid-19-vaccine#:~:text=On%20January%2031%2C%202022%2C%20the,years%20of%20age%20and%20older.

[17] *Available at* https://lc.org/newsroom/details/061022-pfizers-fda-approved-covid-shot-will-never-be-available-1.

[18] *Available at* https://lc.org/newsroom/details/013122-no-fdaapproved-covid19-shot-is-available?__cf_chl_tk=v73sFk8VRcXWbcEjW70_bk6yaCXGP9nNSuNLen61qg8-1655404520-0-gaNycGzNCKU.

The presence of a national vaccine-injury compensation program speaks to the fact that vaccines come with side-effects. In 1986, Congress enacted the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1, et seq., in response to product liability litigation that exposed vaccine manufacturers to great risk and costs without regard to whether the manufacturer prevailed. That litigation and its daunting risks led vaccine manufacturers to exit the market, causing shortages of crucial vaccines. Those vaccines included childhood vaccines that had almost completely eradicated many diseases that have crippled or killed children for centuries. In fact, by the time Congress acted in 1986, "there [was] only one manufacturer of the polio vaccine, one manufacturer of the measles, mumps, and rubella vaccine (MMR) vaccine, and two manufacturers of the [diphtheria, pertussis, and tetanus] DPT vaccine" left in the United States. See H.R. Rep. No. 99-908 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, at 6348.

The Act establishes a National Vaccine Injury Compensation program that diverts claims arising from the use of vaccines to a "Vaccine Court," composed of eight special masters sitting under the supervision of the United States Court of Federal Claims. Claims of vaccine-related injuries go to that Vaccine Court instead of to state or federal trial courts because, no matter how safely a vaccine may be designed or manufactured, a percentage of the population will always have an adverse reaction, and those adverse reactions should not be treated like a product

defect. Congress provided that "[n]o vaccine manufacturer shall be liable in a civil action" if the injury "resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings." 42 U.S.C. § 300aa-22(b)(1). The National Vaccine Injury Compensation program offers compensation to individuals who suffer vaccine-related injuries on a "no-fault" basis.

That said, the claimant must prove causation. In 2009, a special master rejected the contention that the MMR vaccine, which contained a preservative known as thimerosal, caused autism. The special master's decision was affirmed by the United States Court of Federal Claims and, subsequently, by the Federal Circuit Court of Appeals. *Hazlehurst v. Sec'y of Health & Human Servs*., 88 Fed. Cl. 473 (2009), *affd*., 604 F. 3d 1343 (Fed. Cir. 2010). As the Court of Federal Claims noted, because the injury complained of was not on the Vaccine Injury Table, the claimants had to "demonstrate by a preponderance of the evidence that the MMR vaccine caused [their son's] condition." 604 F. 3d at 1349. In response to one of the claimant's arguments, the court pointed to "the undisputed lack of a sufficient control group of non-autistic children with which to compare the positive findings in autistic children." *Id*. at 1453.

The Centers for Disease Control provides a Vaccine Adverse Event Reporting System ("VAERS"), which keeps track of deaths, crippling disease, and adverse

events attributable to vaccines. For the COVID-19 vaccines, more than 28,000 Americans are reported to have died, mostly from strokes, heart attacks, and blood clots.[19] More than 1,000,000 are reported injured, with more than 160,000 of them reported hospitalized.[20] More than 32,000 life-threatening events were reported, and more than 53,000 people are permanently disabled.[21] As Wayne Allyn Root notes, "The number of deaths and significant injuries reported to VAERS is now dramatically higher than in the past 30 + years combined. This has happened in only 10 months."[22]

As noteworthy as those numbers are, it is well known that VAERS captures only a fraction of the actual injuries caused by vaccines. This is only logical in that the reporting system relies on individuals to report adverse events. A 2010 study commissioned by the Department of Health & Human Service and performed by Harvard consultants on behalf of the Agency for Healthcare Research and Quality confirms this inference. That study found that "fewer than 1% of vaccine adverse

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[19] See *VAERS Summary for COVID-19 Vaccines Through 6/3/2022*, VAERS Analysis, https://vaersanalysis.info/2022/06/10/vaers-summary-for-covid-19-vaccines-through-6-3-2022 (last viewed June 16, 2022).
[20] *Id.*
[21] *Id.*
[22] *See* Wayne Allyn Root, *What I told the New York Times About the Complete Failure and Disaster of the COVID-19 Vaccine*, Creators (Nov. 1, 2021), *available at* https://www.creators.com/read/wayne-allyn-root/10/21/what-i-just-told-the-new-york-times-about-the-complete-failure-and-disaster-of-the-covid-19-vaccine.

events" are ever reported to VAERS.[23] As a result, the COVID vaccines are likely more dangerous – and more deadly – than reported.[24]

Moreover, the lack of consideration for prior COVID-19 infections and the resulting immunity cannot satisfy even rational basis scrutiny. Substantial evidence establishes that a COVID-19 infection creates immunity to the virus at least as robust, durable, and long-lasting as that achieved by vaccine. An Israeli study, with data collected through August 14, 2021, concluded that "natural immunity confers longer lasting and stronger protection against infection, symptomatic disease and hospitalization caused by the Delta variant of COVID-19."[25] The study reports,

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[23] *See* Ross Lazarus, *Electronic Support for Public Health—Vaccine Adverse Event Reporting System* at 6, Harvard Pilgrim Health Care, Inc., *available at* https://www.rickjaffeesq.com/wp-content/uploads/2021/02/r18hs017045-lazarus-final-report-20116.pdf (last viewed June 16, 2022).

[24] Another factor that could depress the number of adverse reports is OSHA, which suspended a regulatory requirement that employers report work-related adverse reactions that are "new, and cause missed or restricted work, transfers, or 'medical treatment beyond first aid.'" OSHA's suspension of the reporting requirement was supposed to run until May 2022. Greg Piper, *As "emergency" workplace vax mandate looms, OSHA guidance suspends flow of adverse reaction reports*, Just the News (Nov. 2, 2021), *available at* https://justthenews.com/government/federal-agencies/feds-suspend-requirement-report-covid-vaccine-side-effects-employer.

[25] Sivan Gazit, MD, MA, *et al*., *Comparing SARS-CoV-2 Natural Immunity to Vaccine-Induced Immunity: Reinfections versus Breakthrough Infections*, at 3, medRxiv preprint (Aug. 25, 2021), *available at* https://medrxiv.org/content/10.1101/2021.08.24.21262415v1.full.pdf (last viewed June 16, 2022). MedRxiv is affiliated with Yale University. *See* https://www.medrxiv.org/content/10.1101/2021.08.24.21262415v1 (noting its affiliation with Yale).

“”Our analysis demonstrates that SARS-CoV-2 naïve vaccinees had a 13.06-fold increased risk of breakthrough infection with the Delta variant compared to those previously infected.”[26] An earlier Cleveland study, which included 1,359 previously infected individuals who did not take any COVID-19 vaccine, found that “[n]ot one of the 1,359 previously infected subjects who remained unvaccinated had a SARS-CoV-2 infection over the duration of the study.”[27] That study concluded the previously infected individuals are “unlikely to benefit from COVID-19 vaccination.”[28]

A letter that appeared on the website of The New England Journal of Medicine on November 24, 2021 provides further support for the proposition that those previously infected have greater immunity. Laith J. Abu-Raddad, Ph.D. et al., *Severity of SARS CoV-2 Reinfections as Compared with Primary Infections*, New England Journal of Medicine (Nov. 24, 2021),[29] The authors explained that, using Qatar’s national, federated databases, they compared reinfections to primary

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[26] *Id*. at 15. (“The increased risk was significant for a symptomatic disease as well.”).

[27] *See* Nabin K. Shrestha, MD, MPH, et al., *Necessity of COVID-19 Vaccination in Previously Vaccinated Individuals*, at 2, medRxiv preprint (June 19, 2021), *available at* www.medrxiv.org/content/10.1101/2021.06.21258176v3.full.pdf.

[28] *Id*.

[29] *Available at* https://www.nejm.org/doi/full/10.1056/NEJMc2108120 (last viewed June 16, 2022).

infections after excluding persons with a vaccination record. They concluded, "reinfections had 90% lower odds of resulting in hospitalizations or death than primary infections. Four reinfections were severe enough to lead to acute care hospitalization. None led to hospitalization in an ICU, and none ended in death. Reinfections were rare and were generally mild, perhaps because of the primed immune system after primary infection." *Id*. Thus, "for a person who has already had a primary infection. The risk of having a severe reinfection is only approximately 1% of the risk of a previously uninfected person having a severe primary infection." *Id*.

IV. In light of the foregoing, military vaccine mandate cannot be justified by the invocation of military readiness.

Readiness is not a sufficient justification for imposing an obligation on all military personnel to be vaccinated against COVID-19 for four reasons. First, the order is both overbroad and under-inclusive. Second, the vaccines' side effects contribute to readiness issues. Third, vaccinated soldiers can still spread COVID-19. Finally, the efficacy of the vaccines declines with time.

The overbreadth of the vaccine order is obvious. Its application to those who have previously been infected, who as noted above are "unlikely to benefit from COVID-19 vaccination," is unnecessary and, therefore, overbroad.

The administration of the vaccine also produces its own readiness issues. First, there are the immediate aftereffects an Army aviation safety officer and Army flight

surgeon stationed at Fort Rucker testified that, one morning, she had to ground three out of three pilots who were suffering from vaccine injuries.[30] More generally, "increased cases of myocarditis and pericarditis have been reported in the United States after rMNA COVID-19 vaccination (Pfizer-BioNTech and Moderna) … [particularly] in adolescents and young adults."[31] Even if the majority of the cases are said to be mild, some of those affected "can develop temporary or permanent cardiac dysfunction, including severe arrythmia or acute cardiomyopathy.[32] A mild case may delay availability for deployment, while a permanent case may prevent it altogether.

Moreover, the vaccines have been shown to have waning effectiveness.[33] That follows logically from the current push for booster shots. A Pfizer study showed that

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[30] *See* Leade Gore, *Whistleblower: Army flight surgeon sidelined for grounding pilots with heart conditions related to COVID vaccines* (Nov. 5, 2021), *available at* https://popularmilitary.com/whistleblower-army-flight-surgeon-sidelined-for-grounding-pilots-with-heart-conditions-related-to-covid-vaccines/

[31] *Clinical Considerations: Myocarditis and Pericarditis after Receipt of rMNA COVID-19 Vaccines Among Adolescents and Young Men*, Centers for Disease Control, *available at* https://www.cdc.gov/vaccines/covid-19/clinical-considerations/myocarditis.html (last viewed June 16, 2022).

[32] *US Military Confirms Heart Inflammation After COVID Vaccine*, Nia Pure Nature (July 15, 2021), *available at* https://niapurenaturecom.wordpress.com/2021/07/15/us-military-confirms-heart-inflammation-after-covid-vaccine/.

[33] It is worth noting that Dr. Anthony Fauci, the foremost champion of pushing for vaccinations, caught COVID after having two shots and two boosters. Evan

its vaccine, which was 88% effective in the first month after full vaccination, was only 47% effective at six months.[34] A similar result showed up with respect to the Delta variant, a drop from initial effectiveness of 90% to 53% after just four months. *Id*. Moreover, "[i]n nursing homes, the effectiveness of the Pfizer and Moderna vaccines dropped to 53.1% during the surge in Delta variant cases this summer, the CDC calculated, down from 74.7%."[35]

Finally, vaccination does not prevent reinfection. The CDC explains, "[S]ince vaccines are not 100% effective at preventing infection, some people who are fully vaccinated will still get COVID-19.[36]" Moreover, people who get a so-called breakthrough infection are contagious.[37] In fact, "[m]ost of the 43 COVID-19 cases

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Simko-Bednarski and Steven Nelson, *Quadruple-Vaxxed Dr. Fauci Tests Positive for COVID-19*, New York Post (June 15, 2022), https://nypost.com/2022/06/15/dr-anthony-fauci-tests-positive-for-covid-19.

[34] Frank Webster, *Pfizer COVID-19 vaccine effectiveness falls significantly after six months, new study shows*, BizPac Review (Oct. 5, 2021), https://www.bizpacreview.com/2021/10/05/pfizer-covid-19-vaccine-effectiveness-falls-significantly-after-six-months-new-study-shows-1144469.

[35] Tim Alexander, *CDC warns of a "significant decline" in vaccine effectiveness for some, prompting booster shot decision*, CBS News (Aug. 18, 2021), https://www.cbsnews.com/news/covid-vaccine-booster-shot-cdc-effectivess.

[36] *See The Possibility of COVID-19 After Vaccination: Breakthrough Infections*, Centers for Disease Control, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthrough-cases.html (updated Dec. 17, 2021).

[37] *Id*.

caused by the Omicron variant identified in the United States so far were in people who were fully vaccinated, and a third of them had received a booster dose, according to a U.S. report published on Friday" December 10, 2021.[38] Thus, even if the reinfections are generally mild, they present problems that will inevitably affect readiness.

CONCLUSION

For the foregoing reasons, the injunction issued in favor of Plaintiffs-Appellees below should be affirmed.

Respectfully submitted,

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June 16, 2022

[38] Mrinalika Roy, *Most reported U.S. omicron cases have hit the fully vaccinated – CDC*, Yahoo News (Dec. 10, 2021), *available at* https://tinyurl.com/m9x43mrn.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. Rule 32-4, this brief contains 4,020 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on June 17, 2022, I electronically filed this document using the Court's CM/ECF system, which will serve notice of such filing on the following:

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