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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. NAVY SEALS 1-26; U.S. NAVY SPECIAL WARFARE COMBATANT CRAFT CREWMEN 1-5; U.S. NAVY EXPLOSIVE ORDNANCE DISPOSAL TECHNICIAN 1; U.S. NAVY DIVERS 1-3,
Plaintiffs-Appellees,
v.
JOSEPH R. BIDEN, JR., in his official capacity as President of the United States of America; LLOYD AUSTIN, SECRETARY, U.S. DEPARTMENT OF DEFENSE, individually and in his official capacity as United States Secretary of Defense; UNITED STATES DEPARTMENT OF DEFENSE; CARLOS DEL TORO, individually and in his official capacity as United States Secretary of the Navy,
Defendants-Appellants

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

BRIEF OF THE STATES OF MISSISSIPPI, ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

Under this Court's Rule 28.2.1, governmental parties need not furnish a certificate of interested persons.

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INTRODUCTION AND INTEREST OF AMICI CURIAE*

Amici curiae are the States of Mississippi, Alabama, Alaska, Arizona, Arkansas, Florida, Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, New Hampshire, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. Amici regularly confront the challenge presented in this case, where sincere claims of religious freedom compete with powerful government interests. Every day, amici pursue such interests—in managing prisons, maintaining public order, enforcing drug laws, policing, quelling violence, overseeing public property, and more. At the same time, amici are committed to protecting religious freedom. Amici respect the restrictions imposed by the Free Exercise Clause, have enacted statutes analogous to the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* (RFRA), and regularly defend religious liberty in litigation.

Amici know well the challenges that come with these competing commitments, and so amici respect the challenge the federal government faces in this case. In areas of particularly sensitive government interests, amici agree that courts should respect the professional judgments of experienced officials. In military affairs, for example, military officials

* The amici States may file this brief without the parties' consent or leave of the Court. Fed. R. App. P. 29(a)(2).

exercising professional judgment are due respect for their decisions. The same holds true at the state level. The prison-safety decisions of state correctional authorities, for example, deserve respect.

But even when government interests are compelling, religious exercise demands respect too. The amici States have a powerful interest in holding true the balance between pursuing important state interests and protecting sincerely held religious beliefs. Respect for policymakers' judgments should not be permitted to mask abuse of religious freedom.

The amici States have still further experience of special relevance to this case. For years now, amici have managed the COVID-19 pandemic in their own borders. Amici have seen what works in managing COVID-19, what does not work, and how fundamental freedoms—such as religious exercise—can flourish even in a pandemic. And over the past year, amici have challenged many of the federal government's major policies addressing the pandemic. The States know well the federal government's COVID-19 response. That response has been beset by tenuous claims of legal authority, policies adopted despite the evidence undercutting them, and a willingness to override basic liberties. The federal government has often claimed deference in urging courts to let its policies stand. It invokes deference again in this case.

This brief is submitted in light of the amici States' experience defending religious freedom, promoting government interests that may compete with religious exercise, managing COVID-19 within their borders, and successfully challenging the legality of the Administration's response to the pandemic. The brief explains that the Administration's actions over the past year should—even in the sensitive context of military affairs—make this Court skeptical of its claims for deference.

SUMMARY OF ARGUMENT

This Court should discount the Administration's claim to deference for its decisions refusing to accommodate servicemembers' sincerely held religious beliefs in this case.

I. The Supreme Court and this Court have at times afforded deference to military authorities on military matters. The Administration claims that it is due such deference here. Deference to military authorities makes sense when those authorities' judgments reflect trustworthy, non-political assessments of sensitive matters within their unique expertise. But policymakers can, through their actions, erode those assumptions and the deference that might otherwise be due.

II. This Court should discount the Administration's claim to deference in this case. In the past year, courts have recognized the overreaching and flawed claims of legal authority underlying the

Administration's response to the pandemic, the tension between its policies and the facts, and its inconsistent statements and actions that undercut its claims of good faith. These recurring features of the Administration's response undermine its claim to deference here.

ARGUMENT

I. Deference Is Warranted For Military Decisions On Military Matters, But Policymakers' Actions Can Erode The Deference That Policies Governing The Military Might Otherwise Enjoy.

At times, "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). But such deference rests on the presumption that military authorities are making judgments based on trustworthy, non-political assessments within their unique expertise. When policymakers' actions erode that presumption, they erode any claim for deference.

"[M]ilitary interests do not always trump other considerations." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 26 (2008). The deference afforded to military officials stems from a recognition that "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman*, 475 U.S. at 507. The Supreme Court has thus afforded deference to decisions made by "military authorities" concerning a "military interest." *Ibid.* In *Goldman*,

a case decided before RFRA's enactment, the Court upheld Air Force regulations on uniform dress that prevented the petitioner from wearing a yarmulke. *Id.* at 504, 510. In recognizing that deference to the military was warranted, the Court noted that the policy was put in place by "the appropriate military officials" who were exercising "their considered professional judgment." *Id.* at 509. The Court thus did not question the military's stated need for uniformity—though it exercised judgment in concluding that the policies "reasonably and evenhandedly regulate dress" in the interest of that stated need. *Id.* at 510, *superseded by statute*, 10 U.S.C. § 774; *see also Mindes v. Seaman*, 453 F.2d 197, 201-02 (5th Cir. 1971) ("Courts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military functions.").

Cabining deference to military decisions by military authorities makes sense. "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments," even though such judgments are ultimately subject to civilian control through elected leaders. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see id.* at 10-12 (holding that a question on the proper training, equipping, and control of the Ohio National Guard was a non-justiciable political question).

Though civilian leaders may exercise their own judgment based on the expertise and recommendations of their professional military advisors, it is military professionals themselves who can fully appreciate the "complex" and "subtle" decisions that must be made. Policy decisions that apply to the military but are made without that professional advice, however, are like decisions made by policymakers in non-military areas.

Congress recognized the limits of military deference when enacting RFRA. Nothing in RFRA's text or structure relieves the military of the duty to respect religious exercise. RFRA's history reflects that this was no accident. The House Report did recognize that "religious liberty claims in the context of prisons and the military present far different problems for the operation of those institutions than they do in civilian settings." H.R. Rep. No. 103-88 at 8. But, the Report said, even in the military context, "[s]eemingly reasonable regulations" that are based on "speculation," "exaggerated fears," or "thoughtless policies" "cannot stand." *Ibid.* The Senate Report reflects a similar understanding that religious liberty can and should be protected in the military: "The committee is confident that the bill will not adversely impair the ability of the U.S. military to maintain good order, discipline, and security." S. Rep. No. 103-111 at 12.

The Supreme Court has recognized limits on claims of deference in the similarly sensitive, government-interest-laden prison context under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*, RFRA's "sister statute." *Ramirez v. Collier*, 142 S. Ct. 1264, 1277 (2022). In *Ramirez,* the Court recognized that it is "not enough" to simply "defer to [officials'] determination" about when an individual's religious liberties must give way, particularly where history provides good reason to question that determination. *Id.* at 1279; *see also id.* at 1288 (Kavanaugh, J., concurring) ("As the Court explains, experience matters in assessing whether less restrictive alternatives could still satisfy the State's compelling interest."). And in *Holt v. Hobbs,* 574 U.S. 352 (2015), the Court rejected the proposition that "respect" for prison officials' expertise "in running prisons" calls for "unquestioning acceptance" of their claims that prison management requires curbing religious liberty. *Id.* at 364.

The Supreme Court's order in this very case illustrates these points. The district court's original injunction both protected the servicemember plaintiffs from discipline or discharge due to their unvaccinated status and also prevented military professionals from considering plaintiffs' vaccination status when making deployment, assignment, and other operational decisions. *See Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301,

1301 (2022); *U.S. Navy Seals 1-26 v. Biden*, 578 F. Supp. 3d 822, 840 (N.D. Tex. 2022). The Supreme Court granted the federal government's request to stay the latter part of the injunction while leaving in place the first part, which the federal government notably had not asked to be stayed. 142 S. Ct. at 1301; *see* Application for a Partial Stay of the Injunction Issued by the United States District Court for the Northern District of Texas 2-3, *Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301 (2022) (No. 21A477) (explaining that the government was not seeking "to stay the portion of the injunction that protects respondents from discipline or discharge for remaining unvaccinated").

The federal government had a stronger claim to the stay it sought. COVID-19 vaccination status could be more relevant to military decisions—such as operational decisions about Special Forces units whose deployment may require close-quarters operation—than to decisions in some other contexts. *See* 142 S. Ct. at 1402 (Kavanaugh, J., concurring) ("[T]he Navy has an extraordinarily compelling interest in *maintaining strategic and operational control over the assignment and deployment* of all Special Warfare personnel—including control over decisions about military readiness. And no less restrictive means would satisfy that interest *in this context*.") (emphases added).

But different considerations apply to (for example) decisions to discipline or discharge servicemembers because they seek religious exemptions or are unvaccinated. When facing that issue, courts must squarely consider the competing interests without "unquestioning acceptance" of the government's decision. *Holt,* 574 U.S. at 364.

II. The Administration's Actions Over The Past Year Undermine Its Claim To Deference In This Case.

In defending its refusal to afford religious exemptions to the plaintiffs here, the Administration has invoked the deference afforded to military authorities on military matters. It cites the circumstances presented by COVID-19 and the military's "vital interest" in maintaining a capable fighting force. *E.g.*, U.S. Br. 34. Given the Administration's actions in its COVID-19 response, this Court should discount its claims to deference.

1. When President Biden took office in January 2021, his Administration began taking steps to respond to the COVID-19 pandemic. An early step was to direct the Department of Labor's Occupational Safety and Health Administration (OSHA) to consider whether "any emergency temporary standards on COVID-19 ... are necessary" and, if so, to "issue them by March 15, 2021." Executive Order 13999 § 2(b), *Protecting Worker Health and Safety*, 86 Fed. Reg. 7211, 7211 (Jan. 21, 2021). No such action was taken by March 15, but OSHA

issued an emergency temporary standard on June 21, 2021, requiring healthcare providers to develop plans to reduce COVID-19 transmission in the workplace. *Occupational Exposure to COVID-19; Emergency Temporary Standard*, 86 Fed. Reg. 32376 (June 21, 2021) (Healthcare ETS). The Healthcare ETS said that COVID-19 vaccines were "safe and highly effective," yet did not mandate vaccination. *Id.* at 32377.

Days after the Healthcare ETS was issued, the Supreme Court addressed an emergency application seeking relief from the Center for Disease Control's (CDC) nationwide moratorium on evictions. The district court had granted summary judgment—ruling the moratorium unlawful—but it granted the federal government's request to stay that judgment pending appeal. *Alabama Ass'n of Realtors v. HHS*, 539 F. Supp. 3d 211, 218 (D.D.C. 2021). The Supreme Court denied the request to vacate the stay, though four Justices noted that they would have granted the request. *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2320, 2320 (2021). Justice Kavanaugh wrote a concurring opinion, noting that he believed that the CDC "exceeded its existing statutory authority by issuing a nationwide eviction moratorium." *Ibid.* (concurrence). Justice Kavanaugh emphasized that the moratorium was set to expire in a few weeks, at which time "clear and specific congressional

authorization (via new legislation) would be necessary for the CDC to extend the moratorium." *Id.* at 2321.

Despite a strong signal that five Justices believed that the moratorium was unlawful, the Administration reissued it days after it expired. The matter was soon back in the Supreme Court. This time the Court granted relief and ruled that the moratorium was likely unlawful. *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (per curiam). The Court explained that the Administration's "claim of expansive authority" under the relevant statute "is unprecedented. Since that provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium." *Id.* at 2489.

Around the time of the eviction moratorium's defeat, President Biden grew frustrated with the country's vaccination rate. He asked his Administration to develop plans to mandate vaccination, despite prior policies (like the Healthcare ETS) not taking such action. The first such mandate was the one at issue in this case, applicable to the armed forces. On July 29, 2021, the President announced that he was "asking the Defense Department to look into how and when they will add COVID-19 to the list of vaccinations our armed forces must get." The White House, *Remarks by President Biden Laying Out the Next Steps in Our Effort to*

Get More Americans Vaccinated and Combat the Spread of the Delta Variant (July 29, 2021), https://bit.ly/3xeUG39. On August 9, 2021, Secretary of Defense Lloyd Austin sent a memo to Department employees noting that "President Biden asked me to consider how and when we might add the coronavirus disease 2019 (COVID-19) vaccines to the list of those required for all Service members." Secretary of Defense, *Message to the Force* (Aug. 9, 2022), https://bit.ly/3Kpm1Ei. Secretary Austin made the military vaccine mandate official on August 24, in a memo to senior Department leadership. ROA.399-400. This second memo departed from the Secretary's first by stating that the Mandate was being imposed not because the President wanted it, but because Secretary Austin "determined that mandatory vaccination against coronavirus disease 2019 (COVID-19) is necessary to protect the Force and defend the American people." ROA.399.

On September 9, the President addressed the nation to outline further "new steps" that his Administration would take to fight COVID-19. The White House, *Remarks by President Biden on Fighting the COVID-19 Pandemic* (Sept. 9, 2021), https://bit.ly/3Ey4Zj6 (Sept. 9 Remarks). These steps included vaccine mandates for federal employees, federal contractors, private employers employing over 100 workers, and healthcare providers receiving Medicare or Medicaid funds. *Ibid.* These

mandates were issued in the coming months, along with a mandate requiring workers and volunteers in federal Head Start education assistance programs to be vaccinated and children aged two and older in such programs to be masked. *See* Executive Order 14043, *Requiring Coronavirus Disease 2019 Vaccination for Federal Employees*, 86 Fed. Reg. 50989 (Sept. 9, 2021) (Federal Employee Mandate); Executive Order 14042, *Ensuring Adequate COVID Safety Protocols for Federal Contractors*, 86 Fed. Reg. 50985 (Sept. 9, 2021) (Federal Contractor Mandate); *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402 (Nov. 5, 2021) (Private Employer Mandate); *Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination*, 86 Fed. Reg. 61555 (Nov. 5, 2021) (CMS Mandate); *Vaccine and Mask Requirements To Mitigate the Spread of COVID-19 in Head Start Programs*, 86 Fed. Reg. 68052 (Nov. 30, 2021) (Head Start Mandate).

These mandates were issued because the President's patience was "wearing thin" with the unvaccinated, whose "refusal has cost all of us." Sept. 9 Remarks.

2. The President's package of vaccine mandates was beset by clear problems. Litigation followed. And the Administration responded in a way that is now familiar.

Like the eviction moratorium, several mandates rested on unsound claims of legal authority. The best known of these is the Private Employer Mandate that—like the Healthcare ETS—was issued as an emergency temporary standard by OSHA under the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq*. That Act enables OSHA to set workplace "occupational safety or health standard[s]." *Id.* § 655(b). But unlike the Healthcare ETS, which aimed to address the specific occupational danger of COVID-19 transmission to healthcare workers, the Administration used the Private Employer Mandate as a broad public-health measure seeking to reach tens of millions of Americans. The Private Employer Mandate applied to all "employers with a total of 100 or more employees at any time the standard is in effect," requiring employees to be vaccinated or be tested weekly (at their own cost). 86 Fed. Reg. at 61403, 61437. The Mandate applied across all industries and did not account for how COVID-19 transmission may differ by occupation or workplace.

The President's Federal Contractor Mandate and Federal Employee Mandate also rested on strained claims of statutory authority. According to Executive Order 14042, the Federal Contractor Mandate was issued under the Federal Property and Administrative Services Act, 40 U.S.C. § 101 *et seq*. *See* 86 Fed. Reg. at 50985. As its name suggests, the Act is not a public-health statute. Instead, it enables the federal

government's "economical and efficient" system for procuring property and services. 40 U.S.C. § 101. Executive Order 14043 states that the Federal Employee Mandate was based on authority from 5 U.S.C. §§ 3301, 3302, and 7301. *See* 86 Fed. Reg. at 50989. These statutes say that the President "may prescribe regulations for the conduct of employees in the executive branch," 5 U.S.C. § 7301, "may prescribe rules governing the competitive service," *id.* § 3302, and "may ... prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service," *id.* § 3301. The Administration read these general grants to provide a springboard to dictate that millions of federal employees must choose between vaccination or termination.

Lawsuits followed, challenging various mandates based on the absence of statutory authority and other legal flaws. In response, the Administration leaned on claims of deference and the unprecedented nature of the pandemic. In defending the Private Employer Mandate, it pointed to the "substantial deference" due to OSHA in its interpretation of the statute. Respondents' Emergency Motion to Dissolve Stay 17, *In Re: OSHA Rule on COVID-19 Vaccination and Testing*, 21 F.4th 357 (6th Cir. 2021) (No. 21-7000). The Administration argued that the Private Employer Mandate was designed to prevent "thousands of employee

deaths and hundreds of thousands of hospitalizations," *id.* at 32, and that blocking the Mandate would "threaten" deaths and hospitalizations, *id.* at 50. *See also* Response in Opposition to the Applications for a Stay 40, *National Federation of Independent Business v. OSHA*, 142 S. Ct. 661 (2022) (Nos. 21A244 and 21A247) ("Applicants provide no basis for the Court to second-guess OSHA's judgment that the Standard is necessary to protect against a grave danger to younger unvaccinated employees."); *id.* at 17 ("[A]ny further delay in the implementation of the Standard will result in unnecessary illness, hospitalizations, and deaths because of workplace exposure to SARS-CoV-2.").

The Administration made similar arguments for deference in defending the Federal Contractor Mandate. It argued that "courts have respected the President's judgment that policies will enhance economy and efficiency in federal procurement, including by increasing the efficiency and productivity of federal contractor operations." Corrected Brief for Appellants 20, *Kentucky v. Biden*, No. 21-6147 (6th Cir. 2022).

In defending the Head Start Mandate, the Administration again relied on deference. It argued: "Because, at a minimum, nothing in the statute forecloses the agency's interpretation of the statute as including the authority to require masks and vaccinations, that interpretation also warrants deference." Defendants' Response in Opposition to Plaintiffs'

Motion for Temporary Restraining Order and Preliminary Injunction 21-22, *Louisiana v. Becerra*, 577 F. Supp. 3d 483 (W.D. La. 2022).

As the courts considered the legality of the mandates, the Administration stepped up its rhetoric. On December 16, 2021, President Biden told the unvaccinated that "we are looking at a winter of severe illness and death—if you're unvaccinated—for themselves, their families, and the hospitals they'll soon overwhelm." The White House, *Remarks by President Biden After Meeting with Members of the COVID-19 Response Team* (Dec. 16, 2021), https://bit.ly/3reZz8D. The White House reaffirmed that position a day later. The White House, *Press Briefing by White House COVID-19 Response Team and Public Health Officials* (Dec. 17, 2021), https://bit.ly/3v525zj ("For the unvaccinated, you're looking at a winter of severe illness and death for yourselves, your families, and the hospitals you may soon overwhelm.").

3. As litigation progressed, the Administration's package of vaccine mandates began to fall apart. A panel of this Court almost immediately stayed the Private Employer Mandate, ruling that "its promulgation grossly exceeds OSHA's statutory authority." *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 612 (5th Cir. 2021). Soon, the Private Employer Mandate reached the Supreme Court. In language echoing *Alabama Association of Realtors*, the Supreme Court stayed the Private Employer

Mandate, finding it "telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace." *National Federation of Independent Business v. OSHA*, 142 S. Ct. 661, 666 (2022) (per curiam). "This 'lack of historical precedent,' coupled with the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach." *Ibid.* The Private Employer Mandate was withdrawn after that ruling, though OSHA left it in place as a proposed rule for possible future adoption. *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 87 Fed. Reg. 3928 (Jan. 26, 2022).

Courts enjoined the Federal Contractor Mandate, Federal Employee Mandate, and Head Start Mandate, holding each to have been issued without (or likely without) statutory authority.

In *Georgia v. President of the United States*, No. 21-14269, — F.4th —, 2022 WL 3703822 (11th Cir. Aug. 26, 2022), the Eleventh Circuit upheld a decision, based on a likely absence of statutory authority, to award preliminary injunctive relief against the Federal Contractor Mandate. *Id.* at *4-13 (opinion of Grant, J.); *see also id.* at *13-17 (narrowing preliminary injunction's scope); *id.* at *17 (Edmondson, J., concurring in result). And in *Kentucky v. Biden*, 23 F.4th 585 (6th Cir.

2022), the Sixth Circuit declined to stay an injunction of the Federal Contractor Mandate, explaining that, "[b]y its plain text, the [Federal Property and Administrative Services] Act does not authorize the contractor mandate. The government itself offers virtually no textual analysis, which is unsurprising given that the text undermines its position." *Id.* at 604.

The Federal Employee Mandate was enjoined nationwide when a court held that each of the three statutes cited by Executive Order 14043 was inadequate. *Feds for Medical Freedom v. Biden*, 581 F. Supp. 3d —, No. 3:21-CV-356, 2022 WL 188329, at *4-6, *7 (S.D. Tex. Jan. 21, 2022). This Court declined to stay the injunction pending appeal. *Feds for Medical Freedom v. Biden*, 25 F.4th 354, 355 (5th Cir. 2022) (per curiam). A divided panel later vacated the district court's decision on jurisdictional grounds without contesting the lower court's merits ruling that the Mandate was issued without legal authority, *Feds for Medical Freedom v. Biden*, 30 F.4th 503, 511 (5th Cir. 2022), but that decision has itself been vacated after this Court granted rehearing en banc, *Feds for Medical Freedom v. Biden*, 37 F.4th 1093 (5th Cir. 2022) (per curiam).

The Head Start Mandate was enjoined in 25 states. *See Louisiana v. Becerra*, 577 F. Supp. 3d 483, 498 (W.D. La. 2022) ("This Court has no hesitation in finding that the Head Start Mandate is a decision of vast

economic significance and that Congress has not clearly spoken to give Agency Defendants the authority to impose it."); *Texas v. Becerra*, 577 F. Supp. 3d 527, 545 (N.D. Tex. 2021) ("Congress's failure to use 'exceedingly clear language' in any part of the statute further supports what the plain language of 'performance standards' indicates: defendants do not have authority to issue the mask and vaccine mandates at issue here."). *But see Livingston Educ. Serv. Agency v. Becerra*, — F. Supp. 3d —, No. 22-CV-10127, 2022 WL 660793, at *1 (E.D. Mich. Mar. 4, 2022) (declining to enjoin Head Start Mandate in four Michigan school districts). The federal government did not appeal from these injunctions.

4. As the Administration's package of vaccine mandates was falling apart, many recognized that the package was not issued based on considered judgments of facts and circumstances, and was driven instead by political considerations.

The Private Employer Mandate, for example, was ostensibly designed to protect employees from hazards of the workplace. 86 Fed. Reg. at 61403 (contending that the "ETS is necessary to protect unvaccinated workers from the risk of contracting COVID-19 at work"). Yet the Mandate's terms contradicted that purpose. It applied on its face to all industries while simultaneously exempting employers with 99 or fewer employees from the emergency measure. *Ibid.* This inconsistent

reasoning was cleared up by the White House Chief of Staff's decision to retweet a commentator stating that OSHA was using the vaccine mandate as "the ultimate work-around" for the government to mandate vaccinations. Callie Patteson, *Biden chief apparently admits vaccine mandate 'ultimate work-around,'* N.Y. Post (Sept. 10, 2021).

Courts recognized the discrepancy between the Private Employer Mandate's stated workplace nexus and the President's desire to mandate vaccination nationwide. As Justice Gorsuch noted, "[i]t seems, too, that the agency pursued its regulatory initiative only as a legislative 'work-around.'" *National Federation of Independent Business*, 142 S. Ct. at 668 (Gorsuch, J., concurring) (quoting *BST Holdings*, 17 F.4th at 612). At oral argument in the same case, the Chief Justice had similarly observed: "It seems to me that it's that the government is trying to work across the waterfront and it's just going agency by agency. I mean, this has been referred to, the approach, as a workaround." Oral Argument Tr. 79, *National Federation of Independent Business v. OSHA*, 142 S. Ct. 661 (2022) (Nos. 21A244 and 21A247). This Court also recognized that "[a]fter the President voiced his displeasure with the country's vaccination rate in September, the Administration pored over the U.S. Code in search of authority, or a 'work-around,' for imposing a national vaccine mandate." *BST Holdings,* 17 F.4th at 612 (internal footnotes omitted).

The mandates are also inconsistent with prior Administration COVID-19 actions that did not mandate vaccination. As one example, the CMS Mandate is inconsistent with the earlier Healthcare ETS, which also applied to frontline healthcare workers but omitted any vaccination requirement. The Healthcare ETS omitted this requirement despite recognizing that vaccines were "safe and highly effective," 86 Fed. Reg. at 32377, even though vaccines were widely available at the time, and even though many fewer persons were fully vaccinated.

The Administration's own actions also called into question the claimed need for any nationwide mandate. None of the Federal Employee Mandate, Federal Contractor Mandate, CMS Mandate, Head Start Mandate, or Military Mandate provides an option for employees to produce periodic negative tests or mask as an alternative. Yet the Private Employer Mandate—which potentially affected 84 million Americans—said that a test-and-mask alternative provided "roughly equivalent protection" to vaccination. 86 Fed. Reg. at 61515.

These statements and actions, when taken together with the repeated judicial recognition that the Administration exceeded its legal authority, erode claims that the Administration's pandemic response has been motivated by sound, detached judgments based on public-health considerations. The Administration's political motivations explain why,

when it became clear that most Americans were vaccinated and were tiring of COVID-19 restrictions, the President began to claim the benefits of rolling back those restrictions. At his State of the Union Address, he touted that under new CDC guidelines "most Americans in most of the country can now be mask free" and that "based on the projections, more of the country will reach that point across the next couple of weeks." The White House, *Remarks of President Joe Biden—State of the Union Address As Prepared for Delivery* (Mar. 1, 2022), https://bit.ly/3vbb8P0. Yet, despite trying to reap the benefits of a world in which COVID-19 is no longer the threat the Administration once claimed, the Administration still presses forward with its mission to mandate vaccination.

5. Against this backdrop, the Administration again asks for deference in this case based on a stated interest in military readiness. U.S. Br. 33 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986), for the proposition that "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest"); *see also id.* at 33-34, 40, 46.

Even putting aside the Administration's broader COVID-19 response, the facts undermine the Administration's claim to deference for its near-blanket denial of religious exemptions from the Military Mandate. The Military Mandate applies to a population in which only 95

deaths have been reported in 441,138 reported cases, a fatality rate of 0.022%. U.S. Department of Defense, *Coronavirus: DOD Response,* https://www.defense.gov/Spotlights/Coronavirus-DOD-Response/ (last visited Aug. 29, 2022). Only 2,721 of those 441,138 cases have resulted in hospitalization, a rate of 0.617%. *Ibid.* And those numbers drop when one looks only at the U.S. Navy. Of the 105,277 reported cases, only 17 deaths and 1 hospitalization have occurred, 0.016% and 0.001% respectively. U.S. Navy, *U.S. Navy COVID-19 Updates*, https://www.navy.mil/us-navy-covid-19-updates/ (last visited Aug. 29, 2022). These statistics reflect the entire pandemic, do not reflect unreported cases, and do not reflect the fact that cases, hospitalizations, and deaths are likely lower now due to vaccination and natural immunity. Against this backdrop of very low risk to servicemembers, the Navy has approved almost no religious exemptions. Only 47 religious accommodation requests have been approved, and 4,251 requests remain pending. *Ibid.* All 47 approvals occurred well after this case began and after the prior 100% denial rate had been called out at all three levels of the federal judiciary. *See Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301, 1303 (2022) (Alito, J., dissenting); *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 341-42 (5th Cir. 2022) (per curiam) (no religious exemptions granted as of February

28, 2022); *U.S. Navy SEALs 1-26 v. Biden*, 578 F. Supp. 3d 822, 831 (N.D. Tex. 2022) (none granted as of January 3, 2022).

The Administration's near total denial rate for religious exemptions suggests—just standing on its own—that the Administration has cast aside RFRA's demands to pursue a political decision to mandate widespread vaccination. The Administration appears to be using another "work-around"—overstepping statutory limits to achieve a higher vaccination rate, as it did with the eviction moratorium and with its vaccine mandates. *BST Holdings*, 17 F.4th at 612.

When considered within its broader response to the pandemic, the denial rate takes on a different cast. It supports the view that the Administration is again advancing political judgments rather than making sound decisions on health. The amici States speak from experience in concluding that the Administration's near-blanket refusal to grant religious exemptions is not credible and that its denial in this case is not entitled to deference.

Amici regularly must account for and respect religious liberties when pursuing compelling government interests. Those interests include managing prisons, maintaining public order and safety, enforcing drug laws, policing, halting violence, exercising stewardship over public property, and more. Holding the balance true can be challenging. And

some matters warrant particular respect for government assessments, such as maintaining order in prisons or readiness of the military. But that balance can be struck while respecting religious freedom. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1279-80 (2022).

In the pandemic itself, amici have direct experience balancing the need to protect public health while respecting religious exercise. In Mississippi, for example, Governor Reeves issued an executive order early in the pandemic that limited public gatherings of more than ten persons at a time and restricted in-person dining at restaurants and bars. Miss. Executive Order 1463 at 2 (Mar. 24, 2020). But the order also recognized that religious entities, like churches, were essential businesses or operations. *Id.* at 5. The balance allowed Mississippi to manage COVID-19's effects without sacrificing its citizens' religious liberties. Other amici have struck a balance and left religious liberty to flourish even as they combatted the pandemic.

Given the States' experience in addressing COVID-19 in their own borders and in challenging the Administration's COVID-19 policies, the States have seen that the Administration has fallen short in respecting the limitations on its authority. The Administration has acted despite legal limitations and then asked for deference to its judgments. But it is "not enough" to "defer to [an official's] determination" about when an

individual's religious liberties must give way, particularly where history provides good reason to question that determination. *Ramirez*, 142 S. Ct. at 1279. The history detailed above gives good reason to question the United States' decisions here. *Supra* at 9-23.

CONCLUSION

This Court should not afford deference to the federal government in reviewing the decisions below.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Justin L. Matheny, hereby certify that the foregoing brief has been filed with the Clerk of Court using the Court's electronic filing system, which sent notification of such filing to all counsel of record.

Dated: August 29, 2022

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This brief complies with the word limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32, it contains 5,548 words. 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 proportionally spaced typeface, including serifs, using Microsoft Word 2016, in Century Schoolbook 14-point font, except for footnotes, which have been prepared the same way except in 12-point font.

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