UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

COLONEL FINANCIAL MANAGEMENT OFFICER, United States Marine Corps, *et al.*, for themselves and all others similarly situated,	)	
Plaintiffs,	)	No. 8:22-cv-01275 SDM-TGW
v.	)	
LLOYD AUSTIN, in his official capacity as Secretary of the United States Department of Defense, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' VERIFIED EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER PENDING CLASSWIDE PRELIMINARY INJUNCTIVE RELIEF
Relief Requested by 5:00 PM, August 4, 2022

Plaintiffs, pursuant to Fed. R. Civ. P. 65(b)(1) and the Court's Order of October 18, 2021 (Doc. 9), move the Court for an emergency temporary restraining order (TRO) to preserve the status quo ante for Plaintiff First Lieutenant, United States Marine Corps (V.Compl., Doc. 198, ¶¶ 31, 105), pending the Court's decision on classwide preliminary injunctive relief. In support thereof, Plaintiffs show unto the Court as follows:

INTRODUCTION

Pursuant to the Court's Order of June 2, 2022 (Doc. 194, the "Severance Order"), Plaintiffs' Third Amended Verified Class Action Complaint (Doc. 198), and Plaintiffs' Supplemental Memorandum on Plaintiffs' Representation of Putative Class (Doc. 201), Plaintiffs' preliminary injunction and class certification motions (Docs. 2,

35) now pend in this action. Plaintiff First Lieutenant, however, needs immediate relief from the Court to avoid irreparable harm to his free exercise rights and military career due to the Marines' having given him **2-days' notice** of his **separation** from the Marine Corps and **eviction** of his family from on-base housing for his refusal of COVID vaccination according to his sincerely held religious beliefs. In its first Order in this action, the Court invited Plaintiffs to "move on behalf of any individual member of the alleged class" who "imminently will suffer serious and irreparable injury before a preliminary injunction, if any, issues . . . and whose circumstances are for some singular reason markedly more acute than other members of the putative class." (Doc. 9 at 4.). Plaintiffs conferred in good faith with Defendants in an attempt to ameliorate First Lieutenant's emergency and avoid returning to the Court for emergency relief, but Defendants, as of this filing, have not offered any pause of the imminent separation and eviction of First Lieutenant. Thus, Plaintiffs move for immediate relief for First Lieutenant.

The Marines initially denied First Lieutenant's religious accommodation request (RAR) on September 20, 2021, and denied his appeal on December 27, 2021. (Doc. 198, ¶ 105.) A true and correct (but redacted) copy of First Lieutenant's RAR packet containing the denials is attached hereto as EXHIBIT A and incorporated herein. Seven months after denying First Lieutenant's RAR appeal, the Marines notified First Lieutenant of his discharge and issued him Discharge Orders on August 3, 2022, giving him only 2 days to remove himself and his family from the Marine Corps installation at Camp Pendleton. A true and correct (but redacted) copy of the

Marines' Recommendation for Administrative Separation and Report of Misconduct (the "ADSEP Recommendation") is attached hereto as EXHIBIT B and incorporated herein, and a true and correct (but redacted) copy of First Lieutenant's Discharge Orders is attached hereto as EXHIBIT C and incorporated herein. First Lieutenant's first notice of both the ADSEP Recommendation and Discharge Orders was on August 3, 2022.

Despite First Lieutenant's honorable and admirable service, the Marines see fit to cast him aside and evict him, his wife, and their 2 minor daughters with 2-days' notice. (Discharge Orders, Ex. C.) Adding insult to injury, the Marine Corps Deputy Commandant for Manpower and Reserve Affairs, Lt. Gen. David Ottignon, decreed that First Lieutenant's refusal of COVID vaccination based on his sincerely held religious beliefs "demonstrates he has no potential for future service and outweighs any positive aspects of his career." (ADSEP Recommendation, Ex. B.) **First Lieutenant needs emergency relief by 5:00 PM today, August 4, 2022 to prevent the immediate and irreparable injury the Marine Corps will impose**.

ARGUMENT

I. FIRST LIEUTENANT NEEDS A TRO TO PRESERVE THE STATUS QUO AND PREVENT IRREPARABLE INJURY PENDING THE COURT'S DECISION ON CLASSWIDE INJUNCTIVE RELIEF.

"A Rule 65 TRO often functions to preserve the status quo until a court can enter a decision on a preliminary injunction application." *United States v. DBB, Inc.*, 1282 n.5 (1999); *see also Grasso v. Dudek*, No. 6:130cv01536-Orl-28GK, 2014 WL

12621193, at *2 (M.D. Fla. Jan. 6, 2014) ("In the Eleventh Circuit, TRO's are intended to protect against irreparable harm and to preserve the status quo until a decision on the merits can be made."); *Talib v. SkyWay Comms. Holding Corp.*, No. 8:05-cv-282-T-17TBM, 2005 WL 8160176, at *5 (M.D. Fla. Apr. 5, 2005) (same). (*See also* Doc. 67 at 8 (granting TRO for the "preservation of the status quo" while a decision on the preliminary injunction is pending).) Here, a TRO pending preliminary injunction is necessary to preserve the status quo.

II. FIRST LIEUTENANT HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF HIS RFRA CLAIMS AGAINST DEFENDANTS' VACCINE MANDATE.

A. Defendants' Vaccine Mandate Substantially Burdens First Lieutenant's Sincerely Held Religious Beliefs.

To determine whether Defendants' vaccine mandate on First Lieutenant and all Marines imposes a substantial burden on Plaintiffs' sincere religious beliefs, "the question that RFRA presents [is] whether the [vaccine] mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014). As the Court has already held, "[g]overnmental action coercing a direct violation of a religious belief imposes a substantial burden." (Doc. 111 at 32.)

First Lieutenant received the initial denial of his RAR on September 30, 2021, and timely appealed on October 7. (Doc. 198, ¶ 31; Ex. A.) The Marine Corps' denial did not address First Lieutenant's specific request, and he found out later that other Marines had received the same exact, rubber-stamp denial letter in response to their

RARs. (Doc. 198, ¶ 31; Ex. A; *cf.* Doc. 150 at 1–2.) The Marine Corps' Religious Accommodation Review Board unanimously agreed First Lieutenant's religious objections were sincere, but still denied his RAR. (Doc. 198, ¶ 31, Ex. A.) First Lieutenant received the final denial of his RAR appeal on December 27, 2021. (Doc. 198, ¶ 31; Ex. A.) He received the vaccination order on December 28, stating he would be subject to discipline and separation if he did not comply within two calendar days. (Doc. 198, ¶ 31.) On December 30, 2021, the Marine Corps required First Lieutenant to sign a Form 3005 written counseling, stating he was in violation of Article 92—failure to obey a lawful order—by not receiving a COVID shot. The Form 3005, which went into his personnel file, did not reflect his RAR or appeal,.

As the Court held with respect to Navy Commander and Marine Lieutenant Colonel 2, "[t]he fact of, and the consequences of, disobeying a direct order doubtlessly pressure [First Lieutenant] to alter [his] religious practice." (Doc. 111 at 33.) Indeed, the Marine Corps' COVID-19 vaccination requirement "puts [First Lieutenant] to this choice," and, as a result, "the requirement to vaccinate substantially burdens religious exercise." (Doc. 111 at 33; *see also* Doc. 173 at 11 ("And because the Marine Corps' order—on threat of separation or other punitive action—to receive COVID-19 vaccination puts [First Lieutenant] to the choice of accepting vaccination or violating his sincerely held religious beliefs, the order substantially burdens [First Lieutenant's] sincere religious exercise." (cleaned up)).) Here, the Marine Corps put First Lieutenant to the choice: accept COVID-19 vaccination or face discipline and administrative separation, and then fulfilled its threat with a mere 2 days' notice of discharge and

eviction. The Marines have unquestionably and substantially burdened First Lieutenant's sincerely held religious beliefs.

B. Because Defendants' Vaccine Mandate Substantially Burdens First Lieutenant's Sincerely Held Religious Beliefs, the Mandate Must—but Fails—to Satisfy Strict Scrutiny.

As the Court has held numerous times, Defendants are required to demonstrate a compelling government interest and the least restrictive means as it relates directly to First Lieutenant. Indeed, "RFRA's focus on 'the burden to the person' demands more than dismissive, encompassing, and inflexible generalizations about the government's interest and about the absence of a less restrictive alternative." (Doc. 111 at 34.) And Defendants "must discharge both of RFRA's burdens through application of the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened." (Doc. 111 at 34 (cleaned up).) Moreover, "[t]hat the military must demonstrate 'to the person' analysis is no mere formality." (Doc. 173 at 13.) "RFRA requires that a district court 'scrutinize the asserted harm of granting specific exemptions to the particular religious claimants'—in other words, to look to the marginal interest in enforcing the mandate." (Doc. 173 at 13 (quoting *Hobby Lobby*, 573 U.S. at 726).) Defendants utterly fail to discharge either of those burdens.

In fact, ignoring what the Court has ordered multiple times and what RFRA plainly demands of them, Defendants continue to "persistently and resolutely cling to the belief that their accustomed and unfettered command discretion need not yield—on the narrow and specific question of the free exercise of religion—to the statutory command of RFRA." (Doc. 122 at 9.) Defendants continue on their charted course

"as if RFRA does not exist or has no application to the military or is a matter subject to the command discretion of the military." (Doc. 122 at 10.) "The military designs to avoid the 'to the person' test, but the statute is unflinching" (Doc. 122 at 14), and Defendants fail to yield to its commands or discharge the burden it places upon them. Indeed, whether Defendants can satisfy the 'to the person' test for a compelling government interest and the least restrictive means is "the question that RFRA burdens the defendants to answer. They have not." (Doc. 122 at 17.) And they have not because they cannot. The TRO should issue to prevent immediate and irreparable harm to First Lieutenant.

1. Defendants' fail to discharge their burden under RFRA to demonstrate that forcing First Lieutenant to comply with the vaccine mandate is supported by a compelling interest.

"[T]he government must proffer 'specific and reliable evidence (not formulaic commands, policies, and conclusions demonstrating that the marginal benefit flowing from a specific denial . . . furthers a compelling governmental interest." (Doc. 111 at 34 (quoting *Gonzales*, 546 U.S. at 430-31).) Put simply, as the Court has held, "a district court must not defer to an official's 'mere say-so that the official could not accommodate' a request." (Doc. 111 at 35 (quoting *Holt v. Hobbs*, 574 U.S. 352, 369 (2015)).) "In satisfying this burden of applying RFRA to the person, 'broadly articulated governmental interests and broadly articulated demands of military life' will not suffice." (Doc. 173 at 12; Doc. 111 at 38.) Defendants fail to demonstrate that imposing the vaccine mandate on First Lieutenant is supported by a compelling interest.

As with Navy Commander, Marine Lieutenant Colonel 2, and Marine Captain, Defendants assert mere generalized interests to deny First Lieutenant's requested accommodation. (*See* Doc. 198, ¶ 31 (noting that First Lieutenant received the same "rubber stamp" denial as all other Marines); Ex. A; *see also* Ex. B at 1 (noting that First Lieutenant's only "misconduct" was to refuse a vaccine that violates his sincerely held religious beliefs).)

As the Court has similarly noted in other contexts, a review of First Lieutenant's situation "reveals the same infirmities that plague" the Navy's and Marine Corps' denials of Navy Commander's, Marine Lieutenant Colonel 2's, and Marine Captain's requests for religious accommodation. (Doc. 173 at 13.) In fact, the asserted government interests are identical in all instances. Defendants come to the Court with little more than "military readiness," "unit cohesion," "health and safety of the force," and "demands of military life" for all RFRA claimants before the Court. Defendants' contentions to the Court fail to satisfy RFRA's burden because they "reveal only generalized and ethereal conclusions above interests of the 'Total Force.' [No] letter demonstrates analysis directed 'to the person.'" (Doc. 173 at 13.)

Put simply, "the government has not shown that the stated interests cannot be reasonably preserved without subjecting [First Lieutenant] to vaccination contrary to a sincerely held religious belief protected by RFRA or, given refusal to vaccinate, separating [him] from service." (Doc. 111 at 40.) Indeed, Defendants' "justifications for denying a religious accommodation to [First Lieutenant] are elementally inadequate under RFRA." (Doc. 111 at 39.) "RFRA demands more" (Doc. 111 at 38),

and Defendants offer less. The TRO should issue as to First Lieutenant because Defendants have failed to adequately demonstrate a compelling government interest in mandating vaccination to the person of First Lieutenant, and have not – and certainly cannot – demonstrate any compelling need to forcibly remove First Lieutenant, his wife, and two minor children **on 2-days' notice** from his current station.

2. Defendants fail to discharge their burden under RFRA to demonstrate that forcing First Lieutenant to comply with the vaccine mandate is the least restrictive means.

As was true with Navy Commander, Marine Lieutenant Colonel 2, and Marine Captain, Defendants' denials of First Lieutenant's requested religious accommodation—once again—rely on a mere "generalized assessment of a less restrictive means" plainly insufficient under RFRA. (Doc. 111 at 40.) In fact, the denial of First Lieutenant's RAR was the same "rubber stamp" that Navy Commander, Lieutenant Colonel 2, and Marine Captain all received. (*See* Doc. 198, ¶ 31.)

The Marine Corps' denial of First Lieutenant's RAR was based merely on Defendants' asserted "magic words" (Doc. 111 at 41), as if restating the allegedly compelling government interest in military readiness, unit cohesion, order and discipline, and public health satisfy the least restrictive means. As Mark Twain once opined, "saying so don't make it so." Mark Twain, *The Adventures of Tom Sawyer* 4 (1876). As was true of the Marines' treatment of Marine Captain, Defendants "identif[y] no evidence detailing why the vaccination of [First Lieutenant] is on the

margin a critical component of [First Lieutenant's] individual or unit readiness." (Doc. 173 at 14.) In fact, the Marine Corps "provided neither sources nor reasoning." (Doc. 173 at 14.) In sum, the Marine Corps' denials of First Lieutenant's requested religious accommodation and appeal "employ[] similar conclusory statements [and] present[] little or nothing for a district court to scrutinize." (Doc. 173 at 14.) The Marine Corps "offers only a simulacrum of reasoning, but never reasoning itself." (Doc. 173 at 14.)

As was true of Navy Commander and Marine Lieutenant Colonel 2, "[t]he administrative record documenting the denial of [First Lieutenant's] request for a religious exemption fails to evidence the required 'to the person' evaluation of whether a less restrictive means is available to further a compelling governmental interest" (Doc. 111 at 42), and represents little more than "generalizations tweaked to mimic reasoning." (Doc. 173 at 17.) Such evidentiary legerdemain does not suffice under RFRA, and the preliminary injunction should issue.

III. FIRST LIEUTENANT FACES IMMEDIATE AND IRREPARABLE INJURY ABSENT A TRO.

"[T]here can be no question that the challenged restrictions, if enforced, will cause irreparable harm. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 62, 67 (2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). As the Court has held, "the 'substantial pressure' on a religiously objecting service member to obey the COVID-19 vaccination order and violate a sincerely held religious belief constitutes an irreparable injury redressable by a preliminary

injunction." (Doc. 111 at 44–45.) Indeed, "[r]equiring a service member either to follow a direct order contrary to a sincerely held religious belief or to face immediate processing for separation or other punishment undoubtedly causes irreparable harm." (Doc. 111 at 45.)

Here, despite the fact that over 7 months passed since the final denial of his appeal, Defendants ordered First Lieutenant to remove himself from the Marine Coups installation at Camp Pendleton within 2 days. (Ex. C.) Despite First Lieutenant's honorable and admirable service to the Nation and Marine Corps, the Marines see fit to cast him aside and evict him, his wife, and their 2 minor daughters with 2-days' notice. (Ex. C.) Adding insult to injury, the Marine Corps Deputy Commandant for Manpower and Reserve Affairs, Lt. Gen. David Ottignon, decreed that First Lieutenant's refusal of COVID vaccination based on his sincerely held religious beliefs "demonstrates he has no potential for future service and outweighs any positive aspects of his career." (Ex. B.) Thus, because First Lieutenant "faces immediate processing for separation or other punishment, the record shows irreparable harm will result absent injunctive relief." (Doc. 173 at 18.)

IV. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST FAVOR A TRO.

As the Court has already held, "the public has no interest in tolerating even a minimal infringement on Free Exercise." (Doc. 111 at 45.) Indeed, "no injury to the public results from recognizing a person's constitutional or statutory right or from 'encouraging' a person to vindicate that right in federal court." (Doc. 111 at 46.) In

vivid contrast, the only harm that befalls Defendants in the instant matter is a self-inflicted wound. As the Court held, "to the extent a substantial disruption results from the defendants' systemic failure to assess a religious exemption request to the person, the 'harm' suffered by defendants results from the defendants' own failure to comply with RFRA." (Doc. 111 at 46.) First Lieutenant "requests only narrow, specific, and temporary relief and only that [should be] granted." (Doc. 173 at 19.) "Both the balance of the equities and public interest favor [First Lieutenant]." (Doc. 173 at 19.) The TRO should issue.

CONCLUSION

For the foregoing reasons, and because First Lieutenant faces immediate and irreparable consequences beginning **August 5, 2022**, and because no other relief can possibly aid First Lieutenant at this juncture, a TRO should issue immediately.

s/ Daniel J. Schmid
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VERIFICATION

I, FIRST LIEUTENANT, am over the age of eighteen years and a Plaintiff in this action. The factual statements in this Motion pertaining to me and the attached documents are true and correct, and based upon my personal knowledge (unless otherwise indicated). If called upon to testify to their truthfulness, I would and could do so competently. I declare under penalty of perjury, under the laws of the United States, that the foregoing statements are true and correct to the best of my knowledge.

Dated: August 4, 2022

/s/ FIRST LIEUTENANT
FIRST LIEUTENANT
(Original Signature retained by Counsel)