



**Written Testimony of  
Danielle Runyan, Senior Counsel  
First Liberty Institute  
Before the Select Subcommittee on the Coronavirus Pandemic of the  
Committee on Oversight and Accountability  
July 27, 2023**

**INTRODUCTION**

Chairman Westrup, Ranking Member Ruiz, and members of the Select Subcommittee on the Coronavirus Pandemic of the Committee on Oversight and Accountability, I am Danielle Runyan, Senior Counsel with First Liberty Institute, a nationwide legal organization dedicated to defending religious liberty for all Americans. Thank you for the invitation to provide testimony on this important topic.

While many Americans may have largely moved beyond the detrimental impacts of the COVID-19 vaccine mandates, one of our nation's greatest assets—our military service members—are still suffering the consequences. This testimony will explain the following: how the military mandates remained in effect long after all other Executive Branch-level mandates were overturned, the unlawful treatment service members received once they exercised their rights and lawfully objected to required vaccination, and how despite the 2023 NDAA language requiring rescission of the Department of Defense COVID-19 vaccine requirement, our national security remains at risk.

## THE GOVERNMENT’S RESPONSE TO COVID-19 BEFORE THE MANDATES ISSUED

The World Health Organization declared the COVID-19 outbreak a public health emergency on January 30, 2020.<sup>1</sup> Vaccines first became available in December 2020.<sup>2</sup> At that time, Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, said that “if 75 percent to 80 percent of Americans are vaccinated in broad-based campaigns likely to start in the second quarter of next year, then the U.S. should reach . . . herd immunity threshold months later.”<sup>3</sup> According to Dr. Fauci, “[i]f vaccination levels are significantly lower, 40 percent to 50 percent . . . it could take a very long time to reach that level of protection.”<sup>4</sup>

But by May of 2021, as reported by The Hill, Dr. Fauci changed his message, stating that “[t]he herd immunity threshold is not attainable — at least not in the foreseeable future, and perhaps not ever.”<sup>5</sup> The article reported that “[i]nstead, [experts] are coming to the conclusion that rather than making a long-promised exit, the virus will most likely become a manageable threat that will continue to circulate in the United States for years to come, still causing hospitalizations and deaths but in much smaller numbers.”<sup>6</sup> In fact, Dr. Fauci said “people should forget about what experts have said in the past, which they said depended on herd immunity, and focus on getting vaccinated or encouraging them to get vaccinated.”

Shifting gears from the herd immunity approach, the Executive Branch began incentivizing Americans to get vaccinated. In April of 2021, the President “announced a tax credit for employers offering vaccine-related paid leave as the White House urge[d] more

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<sup>1</sup> World Health Org., Timeline: WHO’s COVID-19 response, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline>

<sup>2</sup> HHS.gov, “COVID-19 Vaccines,” <https://www.hhs.gov/coronavirus/covid-19-vaccines/index.html>

<sup>3</sup> <https://news.harvard.edu/gazette/story/2020/12/anthony-fauci-offers-a-timeline-for-ending-covid-19-pandemic/>

<sup>4</sup> *Id.*

<sup>5</sup> <https://thehill.com/changing-america/well-being/prevention-cures/551559-herd-immunization-for-the-coronavirus-is/>

<sup>6</sup> *Id.*

Americans to seek out Covid shots amid a slight decline in vaccinations.”<sup>7</sup> Then, in May of 2021, “[t]he U.S. coronavirus vaccination campaign ha[d] reached a tipping point, with supply outstripping demand due to factors including ambivalence or skepticism about the vaccines as well as access issues. In [the spring of 2021], the number of Americans seeking to be vaccinated against COVID-19 dropped by a third, according to the U.S. Centers for Disease Control and Prevention (CDC).”<sup>8</sup> That forced “public health officials to try new strategies to persuade people to get the shot, efforts that range[d] from creative gimmicks to grassroots outreach resembling get-out-the-vote drives.”<sup>9</sup>

By June of 2021, it was reported that the President was offering more incentives, “[d]angling everything from sports tickets to a free beer, President Joe Biden is looking for that extra something — anything — that will get people to roll up their sleeves for COVID-19 shots when the promise of a life-saving vaccine by itself hasn’t been enough.”<sup>10</sup> At the same time, on June 30, 2021, a Military.com article explained that a “new study of U.S. service members found higher than expected rates of heart inflammation following receipt of COVID-19 vaccines. It’s a finding Defense Department researchers say should call attention to the condition, known as myocarditis, as a potential side effect of the immunizations. In an article published . . . in JAMA Cardiology<sup>11</sup>, U.S. Army, Navy and Air Force physicians described 23 cases of myocarditis in previously healthy males who developed the condition within four days of receiving a COVID-

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<sup>7</sup> <https://www.cnn.com/2021/04/21/covid-vaccines-biden-announcing-paid-leave-tax-credit-for-businesses.html>

<sup>8</sup> <https://www.reuters.com/business/healthcare-pharmaceuticals/free-booze-baseball-tickets-offered-us-demand-covid-19-vaccine-drops-2021-05-05/>

<sup>9</sup> *Id.*

<sup>10</sup> <https://apnews.com/article/coronavirus-pandemic-business-government-and-politics-health-8168ae1c68ca955b620082d862c911ad>

<sup>11</sup> [https://jamanetwork.com/journals/jamacardiology/fullarticle/2781601?utm\\_source=silverchair&utm\\_medium=email&utm\\_campaign=article\\_alert-jamacardiology&utm\\_content=olf&utm\\_term=062921](https://jamanetwork.com/journals/jamacardiology/fullarticle/2781601?utm_source=silverchair&utm_medium=email&utm_campaign=article_alert-jamacardiology&utm_content=olf&utm_term=062921)

19 vaccine . . . All were previously healthy and physically fit and none showed any evidence of having acute COVID-19 illness or any other infection, according to the report.”<sup>12</sup>

But on July 22, 2021, U.S. News and World Report, in an article titled, “Biden Goes Too Far in Assurances About Vaccines,” reported that “President Joe Biden offered an absolute guarantee . . . that people who get their COVID-19 vaccines are completely protected from infection, sickness and death from the coronavirus. The reality is not that cut and dried . . . ‘breakthrough’ infections do occur and the delta variant driving cases among the unvaccinated in the U.S. is not fully understood.”<sup>13</sup>

### **THE ONSET OF THE COVID-19 VACCINE MANDATES**

After assuring the public that the COVID vaccines provided complete protection from the virus, on July 29, 2021, in addition to announcing vaccination mandates for federal employees pursuant to Executive Order 14043 (Federal Employee Mandate) and federal contractors pursuant to Executive Order 14042 (Federal Contractor Mandate), the President announced that he directed the Department of Defense (DoD) to require military service members to receive a COVID-19 vaccination.<sup>14</sup> “[T]he President bluntly argued that if you are unvaccinated, ‘You present a problem to yourself, to your family and to those with whom you work.’”<sup>15</sup> As reported by CNN, the decision “mark[ed] a pivot away from encouraging Americans to get vaccinated in their own time and stepping toward placing the onus on unvaccinated individuals.”<sup>16</sup>

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<sup>12</sup> <https://www.military.com/daily-news/2021/06/30/dod-confirms-rare-heart-inflammation-cases-linked-covid-19-vaccines.html>

<sup>13</sup> <https://www.usnews.com/news/politics/articles/2021-07-21/ap-fact-check-biden-inflates-jobs-impact-from-his-policies>

<sup>14</sup> <https://www.cnn.com/2021/07/29/politics/joe-biden-vaccination-requirement-announcement/index.html>

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

However, just one day later, on July 30, 2021, new data<sup>17</sup> was released by the CDC showing that “vaccinated people infected with the delta variant can carry detectable viral loads similar to those of people who are unvaccinated.”<sup>18</sup> According to an August 2, 2021 article published by the Johns Hopkins Bloomberg School of Public Health, there was also “some question about how cultivatable – or viable – this virus retrieved from vaccinated people actually is.”<sup>19</sup> Looking a few months ahead, on October 29, 2021, a Lancet study<sup>20</sup> found even more evidence that “once infected, the vaccinated were just as likely to transmit COVID to people in their own households as the unvaccinated” and that the “asymptomatic infection rate among vaccinated and unvaccinated participants was similar: around 30 percent.”<sup>21</sup>

Despite this developing data, the Biden Administration continued to mandate COVID-19 vaccination, which eventually affected nearly every aspect of the American workforce. In addition to the Federal Employee Mandate, Federal Contractor Mandate, and the military mandates, on November 5, 2021, employers with at least 100 employees were required to implement a mandatory COVID-19 vaccination policy as directed by the OSHA Emergency Temporary Standard.<sup>22</sup> However, because the mandates, generally, imposed significant U.S. Constitutional, statutory, and financial, and other harm on citizens, service members, and businesses, 56 lawsuits were filed in federal district courts across the nation.<sup>23</sup> Ultimately, each of the mandates was rescinded.

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<sup>17</sup> [https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm?s\\_cid=mm7031e2\\_w](https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm?s_cid=mm7031e2_w)

<sup>18</sup> <https://publichealth.jhu.edu/2021/new-data-on-covid-19-transmission-by-vaccinated-individuals>

<sup>19</sup> *Id.*

<sup>20</sup> [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(21\)00648-4/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(21)00648-4/fulltext)

<sup>21</sup> <https://www.scientificamerican.com/article/the-risk-of-vaccinated-covid-transmission-is-not-low/>

<sup>22</sup> <https://www.federalregister.gov/documents/2021/11/05/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard>; 86 Fed. Reg. 61402 (2021)

<sup>23</sup> Exhibit 1, First Liberty Institute Mandate Related Case List, July 26, 2023

## **A. The DoD's COVID-19 Vaccine Mandate**

On August 24, 2021, Secretary of Defense Lloyd J. Austin issued a memorandum directing the DoD to vaccinate all active-duty and reserve service members against COVID-19.<sup>24</sup> The DoD also confirmed that the mandate applied to members of the National Guard.<sup>25</sup> The memo made clear that service members who contracted and recovered from COVID-19 must still receive a vaccination. But the memo also exempted from the mandate all service members who are currently participating in a COVID-19 clinical trial—even those given a placebo.

The total number of service members that were required to comply with this mandate was approximately 1,417,800.<sup>26</sup>

### **1. The Navy's COVID-19 Vaccine Mandate**

On August 30, 2021, Secretary of the Navy Carlos del Toro issued All Navy (ALNAV) message 062/21, entitled “Department of Navy Mandatory COVID-19 Vaccination Policy.”<sup>27</sup> This policy imposed a vaccination mandate for Navy active-duty and reserve personnel, directing them to become vaccinated within 90 and 120 days, respectively, and reiterated the exemption for “[s]ervice [m]embers who are actively participating in COVID-19 clinical trials[.]”<sup>28</sup> The total number of Navy service members who were required to comply with the Navy's COVID-19 vaccination requirement were approximately 438,561.<sup>29</sup>

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<sup>24</sup> <https://media.defense.gov/2021/Aug/25/2002838826/-1/-1/0/MEMORANDUM-FOR-MANDATORY-CORONAVIRUSDISEASE-2019-VACCINATION-OF-DEPARTMENT-OF-DEFENSE-SERVICE-MEMBERS.PDF>

<sup>25</sup> <https://www.defense.gov/News/News-Stories/Article/Article/2842978/defense-secretary-has-authority-to-order-mandatory-covid-19-shots/>

<sup>26</sup> [https://en.wikipedia.org/wiki/United\\_States\\_Department\\_of\\_Defense](https://en.wikipedia.org/wiki/United_States_Department_of_Defense)

<sup>27</sup> [https://www.mynavyhr.navy.mil/Portals/55/Messages/ALNAV/ALN2021/ALN21062.txt?ver=Vbl\\_3soAE1K4DhYwqjSGLw%3D%3D](https://www.mynavyhr.navy.mil/Portals/55/Messages/ALNAV/ALN2021/ALN21062.txt?ver=Vbl_3soAE1K4DhYwqjSGLw%3D%3D)

<sup>28</sup> *Id.*

<sup>29</sup> [https://en.wikipedia.org/wiki/United\\_States\\_Navy#:~:text=With%20336%2C978%20personnel%20on%20active,b ranches%20in%20terms%20of%20personnel.](https://en.wikipedia.org/wiki/United_States_Navy#:~:text=With%20336%2C978%20personnel%20on%20active,b ranches%20in%20terms%20of%20personnel.)

In addition to requiring vaccination, the Navy threatened punishment on those who declined the COVID-19 vaccines. On September 24, 2021, the Navy issued “Trident Order #12 – Mandatory Vaccination for COVID-19.”<sup>30</sup> In this order, the Navy declared “non-deployable” all SEALs and SWCCs who obtain—or even merely request—a religious accommodation. This disdain for religious service members sharply contrasted with the Navy’s more receptive attitude toward those submitting medical exemption requests; the medical disqualification provision in Manual of the Medical Department (MANMED) 15-105(3)(n)(9) expressly “does not pertain to medical contraindications or allergies to vaccine administration.” Thus, an unvaccinated Special Operations service member who received a medical accommodation could be deployed, but one who merely asked for a religious accommodation was rendered non-deployable.

A few weeks later, on October 13, 2023, the Chief of Naval Operations issued NAVADMIN 225/21, which threatened religious objectors not only with the loss of their careers, but also with potentially crippling debt.<sup>31</sup> It stated that, “[t]o date, over 98 percent of active-duty U.S. Navy service members have met their readiness responsibility by completing or initiating a COVID-19 vaccination series.”<sup>32</sup> NAVADMIN 225/21 further stated that “Navy service members refusing the COVID-19 vaccination, absent a pending or approved exemption, shall be processed for administrative separation.”<sup>33</sup> It also provided that the Navy “may seek recoupment of applicable bonuses, special and incentive pays, and the cost of training and education for service members refusing the vaccine.”<sup>34</sup> On its face, this recoupment provision was not forward-looking. Instead, it targeted *past* training costs, bonuses, and payments, even for duties already

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<sup>30</sup> Exhibit 2 - Navy’s Trident Order #12, September 24, 2021

<sup>31</sup>[https://www.mynavyhr.navy.mil/Portals/55/Messages/NAVADMIN/NAV2021/NAV21225.txt?ver=EfkG2psijI2X0IEKSIId\\_5w%3D%3D#:~:text=This%20NAVADMIN%20announces%20the%20assignment,are%20not%20fully%20vaccinated%20per](https://www.mynavyhr.navy.mil/Portals/55/Messages/NAVADMIN/NAV2021/NAV21225.txt?ver=EfkG2psijI2X0IEKSIId_5w%3D%3D#:~:text=This%20NAVADMIN%20announces%20the%20assignment,are%20not%20fully%20vaccinated%20per)

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

fulfilled. For Special Operations personnel, such as SEALs, this meant that the Navy was threatening to force each of them to pay back over \$1 million.

NAVADMIN 225/21 also authorized temporary reassignment of “Navy service members who refused the COVID-19 vaccine, regardless of exemption status, based on operational readiness or mission requirements.”<sup>35</sup> It also mandated that “[c]ommands shall not allow those refusing the vaccine to promote/advance, reenlist, or execute orders, with the exception of separation orders, until the CCDA has completed disposition of their case.”<sup>36</sup> And it directed that “commanders and commanding officers shall delay the promotion of any officer refusing the vaccine.”<sup>37</sup>

On November 15, 2021, the Navy issued another discriminatory policy—NAVADMIN 256/21, “CCDA Guidance to Commanders.”<sup>38</sup> This policy states that “Navy service members whose COVID-19 vaccination exemption request is denied are required to receive the COVID-19 vaccine as directed by the exemption adjudicating authority or commence vaccination within 5 days of being notified of the denial, if the exemption adjudicating authority does not specify.”<sup>39</sup> NAVADMIN 256/21 also states that Navy service members who continue to refuse vaccination after the expiration of the five days “will be processed for separation and be subject to the other administrative actions described in this NAVADMIN and [NAVADMIN 225/21].”<sup>40</sup> In addition to immediate processing for separation, the “other administrative actions described in this NAVADMIN” include adverse performance evaluations; denial of promotion or advancement; and, subject to the discretion of the Department of Veterans Affairs (“VA”), the loss of eligibility

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> <https://www.mynavyhr.navy.mil/Portals/55/Messages/NAVADMIN/NAV2021/NAV21256.txt>

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*



for some VA benefits such as the GI Bill, including the transfer of GI Bill benefits to dependents.<sup>41</sup>

Because these policies caused significant harm to the Navy's religious service members, First Liberty Institute and Hacker Stephens LLP brought *Navy SEALs 1-26 v. Biden*, Case No. 4:21-cv-01236, in the federal district court of the Northern District of Texas on behalf of 26 U.S. Navy SEALs, 5 Special Warfare Combatant Craft Crewmen, 1 Navy Explosive Ordnance Disposal Technician, and 3 U.S. Navy Divers against President Biden, the DoD, Secretary Lloyd Austin, the Navy, and Secretary Carlos Del Toro.

On November 9, 2021, First Liberty filed a complaint citing violations of the Religious Freedom Restoration Act (RFRA), the First Amendment, and the APA. Shortly thereafter, on November 24, 2021, First Liberty filed a Motion for Preliminary Injunction, seeking immediate relief from the Navy's discriminatory policies. After the matter was fully briefed and a hearing was held, on January 3, 2022, the court concluded that the Plaintiffs were likely to succeed on their substantive claims that the Navy's vaccine mandate violated RFRA and the First Amendment, and that the mandate's permanent medical-disqualification provision failed strict scrutiny. While the government asserted that vaccination was the least restrictive means to achieve its end, the court determined that the government had not demonstrated a compelling interest justifying the substantial burden imposed on the Plaintiffs' religious beliefs. In short, the court granted Plaintiffs the relief they requested, which allowed them to remain employed without being vaccinated.

One of the important factors in the court reaching its decision was that the Navy did not conduct an individualized assessment of the Plaintiffs' RARs to justify the Navy's compelling

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<sup>41</sup> *Id.*

interest in the Plaintiffs being vaccinated. Instead, to “adjudicate a religious accommodation request, the Navy used a six-phase, fifty-step process<sup>42</sup>.”<sup>43</sup> In the court’s words, “[b]y all accounts, Plaintiffs have safely carried out their jobs during the pandemic.”<sup>44</sup> And even if the government had a broad compelling interest in widespread vaccination of its force, this goal was achieved because “[a]t least 99.4% of all active-duty Navy servicemembers” were vaccinated at that time, and “[t]he remaining 0.6% [were] unlikely to undermine the Navy’s efforts.”<sup>45</sup> Moreover, the court noted, “the Navy is willing to grant exemptions for non-religious reasons,” as its “mandate includes carveouts for those participating in clinical trials and those with medical contraindications and allergies to vaccines . . . . Because these categories of exempt servicemembers are still deployable, a clinical trial participant who receives a placebo may find himself ill in the high-stakes situation that Defendants fear.”<sup>46</sup> Taking all relevant facts into consideration, the court determined that the “Navy provides a religious accommodation process, but by all accounts, it is theater.”<sup>47</sup>

After class-wide injunctive relief was issued and extended to the Navy Class on March 28, 2022, as of March 31, 2022, the Navy reported 89,791 total cases of COVID-19, 2 hospitalizations, and 17 deaths, as well as 13 approved permanent medical exemptions, 207 approved temporary medical exemptions, and 0 approved religious accommodation requests.<sup>48</sup>

## **2. The Department of the Air Force’s COVID-19 Vaccine Mandate**

On September 3, 2021, Secretary Frank Kendall issued a memorandum to all Air Force Commanders implementing the Department of the Air Force’s COVID-19 Vaccine Mandate. The

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<sup>42</sup> Exhibit 3 – Navy’s 50 Step SOP

<sup>43</sup> Exhibit 4 – *Navy SEALs 1-26 v. Biden*, Preliminary Injunction Order

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Exhibit 5 – U.S. Navy March 31, 2022, COVID-19 Update

Air Force COVID-19 Vaccine Mandate directed all Air Force commanders to take “all steps necessary to ensure all uniformed Airmen and Guardians receive the COVID-19 vaccine.” It further directed that, unless exempted, Active-Duty Airmen and Guardians must be fully vaccinated within 60 days, by November 2, 2021, and Ready Reserve, including National Guard, Airmen and Guardians must be fully vaccinated within 90 days, by December 2, 2021. The total number of Airmen who were required to comply with the COVID-19 vaccination requirement were approximately 399,131.<sup>49</sup>

Because Department of the Air Force service members were experiencing similar discriminatory treatment by the DoD and the Department of the Air Force for requesting to be religiously accommodated from the COVID-19 vaccine requirements, a class action complaint was filed in *Doster v. Kendall*, Case No. 1:22-cv-84, on February 16, 2022. Similar to the issues raised in the *Navy SEALs 1-26* case, the *Doster* Plaintiffs cited to the government’s violations of RFRA and the First Amendment and requested injunctive relief to halt the ongoing violations of law. On February 22, 2022, in a request to obtain immediate relief, the Plaintiffs filed an Emergency Motion for a Temporary Restraining Order and Motion for Preliminary Injunction, which was granted on March 31, 2022. This relief was eventually extended to the Department of the Air Force class members on July 14, 2022 and allowed the class members to remain employed without the vaccine.

Before the *Doster* class was certified, First Liberty and Schaerr Jaffe LLP filed a class action lawsuit, *Spence v. Austin*, Case. No. 4:22-cv-00453, on May 27, 2022. The case is comprised of nine Air Force officers who each have a religious objection to taking a COVID-19 vaccine. The harms each of the Plaintiffs experienced in that case ranged from loss of

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<sup>49</sup> [https://en.wikipedia.org/wiki/United\\_States\\_Department\\_of\\_the\\_Air\\_Force](https://en.wikipedia.org/wiki/United_States_Department_of_the_Air_Force)

promotions and the threat of imminent loss of retirement to loss of flying privileges.<sup>50</sup> On July 14, 2022, that case became part of the *Doster* lawsuit once the *Doster* class was certified.

As of February 16, 2022, according to the Department of the Air Force's own data, there were 90,116 active duty and reserve cases of COVID-19, 53 hospitalizations and 15 deaths from the virus, with 96.1% of the total force fully vaccinated, 1,393 approved medical exemptions, 12,623 requests for religious accommodation submitted, and only 1 religious accommodation request was fully approved.<sup>51</sup>

## **B. The Federal Contractor Mandate (EO 14042)**

On September 9, 2021, President Biden issued EO 14042, which required that “Executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A) (agencies), shall, to the extent permitted by law, ensure that contracts and contract-like instruments . . . include a clause that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier subcontracts. This clause shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance or Guidance), provided that the Director of the Office of Management and Budget (Director) approves the Task Force Guidance and determines that the Guidance, if adhered to by contractors or subcontractors, will promote economy and efficiency in Federal contracting. This clause shall apply to any workplace locations (as specified by the Task Force Guidance) in which an individual is working on or in connection with a Federal Government contract or contract-like instrument.”<sup>52</sup>

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<sup>50</sup> Exhibit 6 – *Spence v. Austin* Plaintiffs Declarations.

<sup>51</sup> <https://www.af.mil/News/Article-Display/Article/2919591/daf-covid-19-statistics-february-2022/>

<sup>52</sup> <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>

On December 7, 2021, the U.S. District for the Southern District of Georgia, in *Georgia v. Biden*, Case No. 1:21-cv-163, issued an injunction because the court found that the states could likely prove that Congress did not clearly authorize President Biden to issue EO 14042 under the Federal Property and Administrative Services Act (FPASA).<sup>53</sup> In the court’s opinion, EO 14042 “goes far beyond addressing administrative and management issues in order to promote efficiency and economy in procurement and contracting” and practically operates as a regulation of public health, which is not clearly authorized under FPASA.<sup>54</sup> The court determined that states could likely prove that EO 14042 does not have a sufficient nexus to the purposes of FPASA and thus does not fall within the authority granted to the President under FPASA. Additionally, the time and effort federal contractors spent on implementing a vaccine mandate in the past (and will spend in the future) constitute irreparable compliance costs resulting from EO 14042. And in balancing the harms, the court found that enjoining EO 14042 “would, essentially, do nothing more than maintain the status quo; entities will still be free to encourage their employees to get vaccinated, and the employees will still be free to choose to be vaccinated. In contrast, declining to issue a preliminary injunction would force Plaintiffs to comply with the mandate, requiring them to make decisions which would significantly alter their ability to perform federal contract work which is critical to their operations.”<sup>55</sup>

This ruling impacted over 5,138 government contractors currently employed in the United States.<sup>56</sup>

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<sup>53</sup> Exhibit 7 – *Georgia v. Biden*, Preliminary Injunction Order

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> <https://www.zippia.com/government-contractor-jobs/demographics/>

### **C. The Federal Employee Mandate (EO 14043)**

On September 9, 2021, President Biden issued Executive Order 14043, which generally required all federal employees to be vaccinated. Employees who did not comply would face termination.

Shortly thereafter, on December 21, 2021, *Feds for Medical Freedom*, a non-profit organization with over 6,000 members employed by numerous federal agencies and contractors, along with a chapter of the American Federation of Government Employees and more than 50 individual Plaintiffs filed a complaint against President Biden and other Executive Branch officials challenging the Federal Employee Mandate and Federal Contractor Mandate.<sup>57</sup> The next day, the Plaintiffs filed a Motion for Preliminary Injunction requesting the court to enjoin both mandates. In their filings, Plaintiffs raised several constitutional and statutory claims. First, they argued that the President did not have inherent Article II authority to issue either mandate, and that any purported congressional delegation of such power violated either the major questions doctrine or the non-delegation doctrine. Second, they claimed both mandates were arbitrary, capricious, and otherwise not in accordance with law under the Administrative Procedure Act (“APA”), and that the contractor mandate violated the APA because it was not in accordance with law. Finally, they sought relief under the Declaratory Judgment Act.

While the district court declined to enjoin the contractor mandate because it was already the subject of a nationwide injunction, on January 21, 2022, it enjoined the Federal Employee Mandate. Although the government appealed that injunction, on March 23, 2021, the Fifth Circuit affirmed the district court’s ruling. This ruling impacted 2,8790,000 federal civilian employees.<sup>58</sup>

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<sup>57</sup> *Feds for Medical Freedom v. Biden*, Case No. 3:21-cv-356

<sup>58</sup> <https://www.statista.com/statistics/204535/number-of-governmental-employees-in-the-us/>

#### D. The OSHA Mandate

On November 4, 2021, the Occupational Safety and Health Administration (OSHA) issued its Emergency Temporary Standard (ETS) that applied to roughly 84 million workers, covering virtually all employers with at least 100 employees.<sup>59</sup> The ETS stated that covered employers must “develop, implement, and enforce a mandatory COVID–19 vaccination policy,”<sup>60</sup> and were required to verify the vaccination status of each employee and maintain proof of it.<sup>61</sup> The ETS contained an “exception” for employers that required unvaccinated workers to “undergo [weekly] COVID-19 testing and wear a face covering at work in lieu of vaccination.”<sup>62</sup> Unvaccinated employees who did not comply with OSHA’s rule were required to be “removed from the workplace.”<sup>63</sup> And employers who committed violations faced hefty fines: up to \$13,653 for a standard violation, and up to \$136,532 for a willful one.<sup>64</sup>

After OSHA published its vaccine mandate, scores of parties—including States, businesses, trade groups, and nonprofit organizations—filed petitions for review, with at least one petition arriving in each regional Court of Appeals. The Fifth Circuit initially entered a stay preventing OSHA’s rule from taking effect.<sup>65</sup> But when the cases were consolidated before the Sixth Circuit, that court lifted the stay and allowed OSHA’s rule to proceed.<sup>66</sup> However, in response to an emergency petition, the Supreme Court determined that the ETS was no

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<sup>59</sup> <https://www.federalregister.gov/documents/2021/11/05/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard>; 86 Fed. Reg. 61402 (2021).

<sup>60</sup> *Id.* at 61402.

<sup>61</sup> *Id.* at 61552.

<sup>62</sup> *Id.* at 61402.

<sup>63</sup> *Id.* at 61532.

<sup>64</sup> 29 CFR §1903.15(d) (2021).

<sup>65</sup> *BST Holdings, L.L.C. v. Occupational Safety and Health Admin.*, 17 F. 4th 604, 609 (5th Cir. 2021)

<sup>66</sup> *In re MCP No. 165*, 20 F.4th 264 (6th Cir. 2021)

“‘everyday exercise of federal power.’ It is instead a significant encroachment into the lives—and health—of a vast number of employees.”<sup>67</sup>

Importantly, the majority Court noted that “in its half century of existence, [OSHA] 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. 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.”<sup>68</sup>

### **SERVICE MEMBERS DISCRIMINATED AGAINST FOR LAWFULLY OBJECTING TO REQUIRED VACCINATION**

As previously stated, service members across the military branches were discriminated against after exercising their religious liberty rights in response to the COVID-19 vaccine mandate. In the *Navy SEALs* case, some of the most common examples of the coercion and punishment First Liberty’s clients suffered are as follows:

#### **A. Navy SEAL 26**

Navy SEAL 26 was denied permission to travel to a treatment program for Traumatic Brain Injury, which the court called an “egregious example” of harm suffered by Plaintiffs. SEAL 26’s request to travel to obtain treatment was made before the injunction was issued, and on January 3, 2022, the same day the court issued the preliminary injunction, SEAL 26’s request was officially denied.<sup>69</sup> At that time, an officer in his chain of command began trying to obtain approval of leave for SEAL 26 so that he could at least attend treatment on his own dime. This is precisely what SEAL 3, also a Plaintiff, had to do, as he testified at the preliminary-injunction hearing. Ultimately, SEAL 26 was denied the ability to travel to a Traumatic Brain Injury

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<sup>67</sup> *Nat’l Fed’n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661 (2022)

<sup>68</sup> *Id.*

<sup>69</sup> Exhibit 8 - SEAL 26 Declaration



treatment program twice (both prior to and after the issuance of the injunction), even to receive the treatment out of his own pocket. This action clearly violated the injunction's prohibition on "adverse action" and is all the more egregious given that this treatment was necessary for injuries sustained during his service.

### **B. Navy SEAL 21**

Plaintiff Navy SEAL 21 was kicked out of his platoon and forced to turn in his gear prior to the issuance of the injunction. He was unable to participate in training, which meant he could not deploy.<sup>70</sup> SEAL 21 was explicitly told—after the injunction was issued—that he could not take the chief examination (a requirement for promotion) as scheduled because of NAVADMIN 225/21 paragraph 7.D, because he was "refusing the vaccine." Subsequently, he was permitted to take the chief examination "in case things get over turned." When SEAL 21 took his exam on January 24, 2022, there was a notation at the top of his paperwork stating that he was unable to promote due to NAVADMIN 225/21. Additionally, SEAL 21's work duties (along with Plaintiff SEAL 25 and another SEAL with a pending Religious Accommodation Request (RAR)) were to pick up trash around the base and report what he picked up to his chief.

### **C. Navy SEAL 13**

Navy SEAL 13 was removed from a four-month course (despite completing over half) for submitting a RAR.<sup>71</sup> The course was for a critical qualification for being at his current command and for being in the position of Lead Petty Officer (LPO), which he was at the time. SEAL 13 was subsequently removed from that position and replaced with another person who didn't have the course qualification SEAL 13 would have had if he had not been removed from the course.

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<sup>70</sup> Exhibit 9 – SEAL 21 Declaration

<sup>71</sup> Exhibit 10 – SEAL 13 Declaration

SEAL 13 took the chief examination on January 26, 2022, but was ineligible for promotion because he was removed from his leadership position for submitting his RAR.

#### **D. Navy SEAL 22**

Navy SEAL 22 was supposed to transfer from a training detachment to a SEAL Team for a milestone position as a platoon chief in October 2021.<sup>72</sup> But because of his pending RAR, he was not allowed to formally transfer to the Team. As a result, he lost his position as SEAL Team 7 Alpha platoon chief. On January 28, 2022, SEAL 22 was told by his command that he was not permitted to attend a training course along with the other members of his training cell because of his pending RAR. NAVADMIN 256/21 denied educational opportunities to vaccine refusers, but SEAL 22 is not a “refuser” because he had a pending RAR.

Unfortunately, these types of harms were not limited to the *Navy SEALs* Plaintiffs. They also extended to members of the Navy Class who were threatened with having to repay the cost of schooling and already earned bonuses<sup>73</sup> and being forced to live in deplorable conditions.<sup>74</sup> Air Force service members in the *Spence* case similarly experienced harm by being grounded from flying duties<sup>75</sup> while pilots with medical reasons for refusing the vaccine received a one-year medical exemption that allowed a full return to regular pilot duties.<sup>76</sup>

#### **THE DOD WAS NONCOMPLIANT WITH ITS POLICY ON PROCESSING RELIGIOUS ACCOMMODATION REQUESTS**

The DoD’s policy for processing religious accommodation requests is found in DoD Instruction 1300.17, *Religious Liberty in the Military Services*, 1 September 2020.<sup>77</sup> The relevant

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<sup>72</sup> Exhibit 11 – SEAL 22 Declaration

<sup>73</sup> Exhibit 12 – Lieutenant Commander (Select) Levi Beaird Declaration

<sup>74</sup> Exhibit 13 – Petty Officer Third Class Faith Mack Declaration

<sup>75</sup> <https://www.foxnews.com/politics/biden-declared-pandemic-over-unvaxxed-air-force-pilots-still-grounded>

<sup>76</sup> Exhibit 14 – Lieutenant Colonel Michael McCoy Declaration

<sup>77</sup> <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130017p.pdf>

purpose of the instruction is to “[e]stablish[] DoD policy in furtherance of the Free Exercise Clause of the First Amendment to the Constitution of the United States, recognizing that Service members have the right to observe the tenets of their religion, or to observe no religion at all,” “[e]stablish[] DoD policy on the accommodation of individual expressions of sincerely held beliefs (conscience, moral principles, or religious beliefs), which do not have an adverse impact on military readiness, unit cohesion, good order and discipline, or health and safety,” and “[i]mplements requirements in Section 2000bb-1 of Title 42, United States Code (U.S.C), also known as ‘The Religious Freedom Restoration Act’ (RFRA), and other laws applicable to the accommodation of religious practices for DoD to provide, in accordance with the RFRA, that DoD Components will normally accommodate practices of a Service member based on a sincerely held religious belief.”<sup>78</sup>

While the Secretary of Defense delegated his authority to act on requests for the accommodation of religious practices to the Secretaries overseeing the individual military branches, Section 3 of the instruction explains how accommodation requests should be processed. However, as this process related to the COVID-19 vaccine mandate, on June 2, 2022, the Inspector General (IG) for the DoD informed the Secretary of Defense of “potential noncompliance with standards for reviewing and documenting the denial of religious accommodation requests of Service members identified through complaints submitted to my office . . . We found a trend of generalized assessments rather than individualized assessment that is required by Federal law and DoD and Military service policies . . . The denial memorandums we reviewed generally did not reflect an individualized analysis, demonstrating that the Senior Military Official considered the full range of facts and circumstances relevant to the particular

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<sup>78</sup> *Id.*

religious accommodation request . . . Additionally, the volume and rate at which decisions were made to deny requests is concerning. The appeal authorities of the Services we reviewed indicated that an average of 50 denials per day were processed over a 90-day period. Assuming a 10-hour work day with no breaks or attention to other matters, the average review period was about 12 minutes for each package. Such a review period seems insufficient to process each request in an individualized manner and still perform the duties required of their position.”<sup>79</sup>

The DoD IG’s findings are consistent with the court’s determination in the *Navy SEALs* case that the Navy’s religious accommodation process was “theater.”

### **THE DOD HAD NO DESIRE TO RESCIND THE COVID-19 MANDATE**

In December 2022, as the legislative text for the 2023 NDAA was being finalized, the National Security Council coordinator for strategic communications, John Kirby, announced “We continue to believe that repealing the vaccine mandate is a mistake. Making sure our troops are ready to defend this country and prepared to do so that remains the President’s priority and the vaccine requirement for Covid does just that.”<sup>80</sup> This statement was made after Mr. Kirby appeared for an interview on Fox and Friends on October 4, 2022, where he continued to support the COVID-19 vaccine requirement, stating “[p]art of being ready is being healthy . . . and not having the ability to infect your unit and make their unit readiness any worse than it is.”<sup>81</sup> Yet, during the interview, he announced that he was working from home, as he was “wrapping up [his] own bout with COVID,” despite being “double boosted.”<sup>82</sup> When the host of the show then said “to invest in our people and then train them and to dismiss them for an experimental vaccine is folly when every one of your branches can’t recruit their threshold, yet you’re kicking out

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<sup>79</sup> Exhibit 15 – DoD IG Report, September 2, 2022

<sup>80</sup> <https://www.cnn.com/2022/12/07/politics/biden-military-covid-mandate-ndaa/index.html>

<sup>81</sup> <https://www.foxnews.com/video/6313240705112>

<sup>82</sup> *Id.*

good men and women, how do you explain that,” and that “it’s a risk to our national security,” Mr. Kirby answered, “Yes, it’s a tough recruiting environment . . . but this is a valid military requirement.”<sup>83</sup>

Secretary of the Navy, Carlos Del Toro also responded to the news of Congress’s proposal to end the DoD’s vaccine mandate. In December, he “spoke against removing the mandate at a Navy League event, raising concerns such as what happens to sailors who need to go to countries with strict vaccine requirements. Congress needs to understand the secondhand consequences of their decisions, the Navy Secretary said. ‘But unquestionably it’ll create almost two classes of citizens in our services,’ Del Toro said. ‘Those that can’t deploy and those that can deploy. And that creates all sorts of problems.’”<sup>84</sup> This was the view of senior military leadership despite lower-level commanders supporting subordinates who submitted RARs and determining that no compelling interest existed for requiring vaccination and denying RARs.<sup>85</sup>

### **THE HARM IS STILL ONGOING**

While the Secretary of Defense rescinded the August 24, 2021 COVID-19 vaccination mandate pursuant to Section 525 of the NDAA,<sup>86</sup> which states, “Not later than 30 days after the date of the enactment of this Act, the Secretary of Defense shall rescind the mandate that members of the Armed Forces be vaccinated against COVID-19 pursuant to the memorandum dated August 24, 2021, regarding ‘Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members’, ”<sup>87</sup> the harm is still ongoing for service members.

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<sup>83</sup> *Id.*

<sup>84</sup> <https://news.usni.org/2022/12/07/pentagon-unclear-how-military-would-handle-end-of-mandatory-covid-19-vaccines>

<sup>85</sup> Exhibits 16 and 6

<sup>86</sup> <https://media.defense.gov/2023/Jan/10/2003143118/-1/-1/1/SECRETARY-OF-DEFENSE-MEMO-ON-RESCISSION-OF-CORONAVIRUS-DISEASE-2019-VACCINATION-REQUIREMENTS-FOR-MEMBERS-OF-THE-ARMED-FORCES.PDF>

<sup>87</sup> <https://www.congress.gov/bill/117th-congress/house-bill/7776/text>

After nearly 33 total lawsuits were filed by service members against the DoD and their respective individual armed services and Secretaries,<sup>88</sup> those who sought a religious accommodation from their respective branch of service are now one to three years behind their peers as a result of being removed from their duties. As a result, many will be unable to promote and are faced with the future prospect of losing their careers. Considering a total of 19,460 service members remained unvaccinated as of October 4, 2022,<sup>89</sup> this means we could lose millions in training costs, and hundreds of thousands of years of invaluable institutional knowledge. At a time when young Americans have no desire to join the military<sup>90</sup> and military members are telling their children not to join the military,<sup>91</sup> we should consider this a significant national security crisis.

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<sup>88</sup> Exhibit 1 – First Liberty Institute Mandate Related Case List, July 26, 2023

<sup>89</sup> <https://www.foxnews.com/video/6313240705112>

<sup>90</sup> <https://abcnews.go.com/Politics/military-struggling-find-troops-fewer-young-americans-serve/story?id=86067103#:~:text=Only%209%25%20of%20young%20people,PTSD%20or%20other%20psychological%20problems.>

<sup>91</sup> <https://www.wsj.com/articles/military-recruiting-crisis-veterans-dont-want-their-children-to-join-510e1a25>