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The Free Exercise Clause and RFRA as Applied to Vaccine Mandates and Religious Exemptions of Military Servicemembers

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"No provision in our constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority."[1]

I. Principles of Religious Liberty

As James Madison explained in his Memorial and Remonstrance Against Religious Assessments, the free exercise of religion "is in its nature an unalienable right" because the duty owed to one's Creator "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[2] Religious liberty is not merely a right to personal religious beliefs or even to worship in a sacred place; it also encompasses religious observance and practice.[3] Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith and complying with the law. Therefore, to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity, including employment, contracting, and programming.

The Free Exercise Clause protects not just the right to believe or the right to worship; it protects the right to perform or *abstain from performing* certain physical acts in accordance with one's beliefs.[4] Federal statutes, including the Religious Freedom Restoration Act of 1993, ("RFRA") discussed below, support that protection, broadly defining the exercise of religion to encompass all aspects of observance and practice, whether central to, or required by, a particular religious faith.[5] Religious adherents will often be required to draw lines in the application of

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[1] Mary E. McMahon, *May I Be Excused? Individualized Governmental Assessment Exception and the HHS Mandate*, 53 ST. JOHN'S L. REV. 93, 127 (2014).
[2] James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), in 5 THE FOUNDERS' CONSTITUTION 82 (Philip B. Kurland & Ralph Lerner eds., 1987).
[3] *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation).
[4] *Id.* at 404 (if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid).
[5] 42 U.S. §§ 2000bb-2000bb-4.

their religious beliefs, and government is not competent to assess the reasonableness of such lines drawn, nor would it be appropriate for government to do so.

Except in rare circumstances, government may not treat the same conduct as lawful when undertaken for secular reasons but unlawful when undertaken for religious reasons.[6] A government action that bans an aspect of an adherent's religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice, will qualify as a substantial burden on the exercise of religion, conferring strict scrutiny.[7] The Court has consistently held that the strict scrutiny is satisfied only when a burden on religious exercise is justified by a compelling governmental interest that is advanced by the least restrictive means.[8]

II. Strict Scrutiny Applies to the Military Religious Exemption Claims and Claimants Should Prevail Because the Government Cannot Overcome Strict Scrutiny

Amid the Covid-19 pandemic, both the federal and state governments have issued emergency executive orders and mandates, requiring citizens to conform to a wide array of religious and social restrictions, from occupancy caps on religious gatherings to mandatory vaccination.[9] President Biden required vaccination for three categories of citizens in his 'Covid-19 Action Plan' ("the Plan") appropriately named *Path Out of the Pandemic.*[10] Announced on the White House website on September 9, 2021, the Plan requires vaccination for: (1) employers with 100+ employees affecting over 80 million workers in private sector businesses; (2) federal

[6] *City of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).
[7] *Sherbert*, 374 U.S. at 404.
[8] *Brooklyn Diocese*, 141 U.S. 63, 67 (2020).
[9] Anne Flaherty, *Vaccine or test: Biden advances sweeping new mandates for private sector*, ABC News (Nov. 3, 2021, 10:43 AM) https://abcnews.go.com/Health/vaccine-test-biden-advances-sweeping-mandates-private-sector/story?id=80946163.
[10] President Biden's Covid-19 Action Plan, Path Out of the Pandemic (Sept. 9, 2021) *available at* https://www.whitehouse.gov/covidplan/.

workers and the literal millions of contractors that do business with the federal government; and (3) healthcare workers at Medicare and Medicaid participating hospitals of which there are over 17 million.[11]

The subject of this paper concerns only the second category—federal employees and more specifically, federally employed military servicemembers. This paper contemplates the issues inherent in the federal government's unwillingness to grant religious exemptions to military servicemembers for the Covid-19 vaccine mandate, while granting secular medical exemptions, thus treating religious purposes worse than secular ones.

Federal workers, including military servicemembers, and contractors working with the federal government are subject to mandatory vaccination, as part of the second group covered under Biden's Plan. The Safer Federal Workforce Taskforce established by Executive Order 13991[12], required each "agency" to implement a program to require Covid-19 vaccination for all of its federal employees.[13] The term "agency" means an Executive agency as defined in 5 U.S.C. § 105,[14] which includes "an Executive department, a Government corporation, and an independent establishment."[15] The term "employee" means an employee as defined in 5 U.S.C. § 2105, including an employee paid from non-appropriated funds as referenced in 5 U.S.C. § 2105(c).[16] This U.S. Code provision defines employee as an (a) officer or an individual who is (1) appointed in the civil service by…the President, Member of Congress, a member of uniformed service, an employee under this section, the head of a government controlled corporation, or an adjunct general; (2) engaged in the performance of a Federal function under

[11] *Id*.
[12] Proclamation No. 13991, 86 Fed. Reg. 7045 (Jan. 25, 2021).
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Id*.

authority of law or an Executive act; and (3) subject to the supervision of an individual named by paragraph (1); (b) an individual in the United States Naval Academy, (c) *an individual who is paid for service in the Army, Navy, Air Force, Coast Guard or Marine Corps*.[17]

Prior to *Employment Div. v. Smith*, the Supreme Court interpreted the Free Exercise Clause to require use of strict scrutiny, thereby allowing exemptions from general, neutral laws.[18] The Court's holding in *Smith* declared that any facially neutral law of general applicability, that is one that does not, on its face, target a religion, and applies to everyone equally is constitutional.[19] This decision severely limited religious claimants' ability to succeed in obtaining religious exemptions.[20] Exemptions can be based on personal religious convictions, even if they do not stem from mainstream religious institutions themselves.[21] And even if they do stem from mainstream church institutions, individual church members need not conform to the church's exact teachings and may decide for themselves which doctrines they will follow.[22]

In response to *Smith*, Congress passed RFRA, effectively reinstating strict scrutiny of federal government actions imposing substantial burdens on religion.[23] Thus, the vaccine mandate applied to federal employees, including members of the military, is subject to RFRA.[24] Members of the military have standing to claim a religious exemption from the mandate. Once a federal

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[17] 5 U.S.C. § 2105 (emphasis supplied).
[18] *See Employment Division v. Smith*, 494 U.S. 872 (1990).
[19] *Id.*
[20] *Id.*
[21] *See Davis v. Beason*, 133 U.S. 333 (1890) (holding 'religion' has reference to one's views of his relations to his Creator); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (principle extended to "religions in this country which do not teach what would generally be considered a belief in the existence of God … Buddhism, Taoism, Ethical Culture, Secular Humanism and others."); *United States v. Seeger*, 380 U.S. 163, 166 (1965) ("[w]hether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in relation to a Supreme Being' and the other is not.").
[22] *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981).
[23] 42 U.S. §§ 2000bb-2000bb-4; *See City of Borne v. Flores*, 521 U.S. 507 (1997) (RFRA cannot be applied to the states but remains applicable to federal law).
[24] *See City of Borne v. Flores*, 521 U.S. 507 (1997).

employee asserts that a federal government action substantially burdens their religion, the government then bears the burden of proving the law is the "least restrictive means of advancing a compelling state interest" to justify the burden.[25]

III. The Covid Pandemic and Government Action

The Covid-19 pandemic disrupted virtually every sector of life, changing the very essence of what people view as normal. Federal and state government declarations of public health crises and states of emergencies changed the landscape of life in many ways including the suspension of certain rights previously enjoyed without restriction. Federal and state lockdowns were, in part, justified and were responding to the public health crisis that resulted in over-capacity hospitals.

Some relevant freedoms affected by these lockdowns, besides the right to free exercise of religion, include the right to gain an in-person education, the right to go outside or to travel freely and the right of the pursuit of happiness, including to open and run a business. Both surprisingly and necessarily, medical advice from public health officials carried the power of law. For example, scientific determinations that gathering in large groups or not wearing a mask on one's face affects the health of others; thus, governments declared that violations of health policy, enforced by police, could result in penalties and even jail time. Since gatherings in general were considered dangerous, including for religious purposes, governments told worshippers their freedom to exercise their religions was limited by health policy and even in some jurisdictions, suspended until further notice. Subsequently, there has been a spate of litigation from churches, not over the lockdowns in general, but in response to the religious occupancy limits imposed on religious institutions following mass lockdowns.[26]

[25] 42 U.S. §§ 2000bb-2000bb-4.
[26] *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020).

Once the medical advisors, governors, and president determined that the pandemic was relatively under control, rights were slowly enjoyed more readily. Certain rights were completely reinstated but others like religious exercise only enjoyed qualified freedom. For example, in New York, then-governor Andrew Cuomo placed occupancy limits on houses of worship based on a form of redlining where he designated areas of the city based on the frequency of Covid cases and deaths in that area.[27] Cuomo set worshipper limits on houses of worship seemingly arbitrarily by number of people, and not based on a percentage of occupancy, regardless of the actual physical size of the building. The problem arose, however, when Cuomo treated differently and deemed "essential" some secular businesses, using a percent of occupancy limit rather than a number limit.[28] Cuomo declared the limit on the number of worshippers by zones of Covid prevalence, with the most restrictive zone limited to a mere 10 worshippers in a house of worship at a time.[29] The next restrictive area was limited to 25 worshippers and the least restrictive, limited to 50% occupancy.[30]

The Supreme Court faced and resolved the issue when both the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued Governor Cuomo and New York state to block enforcement of the executive order.[31] In *Roman Catholic Diocese v. Cuomo*, the religious organizations won an injunction barring Cuomo's numerical worshipping limits based on their claims that the order violated their First Amendment right to free exercise of religion, particularly because the order treated secular businesses differently than religious ones.[32] Simultaneously, the government started enforcing vaccine mandates for the military and the

[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Brooklyn Diocese*, 141 S. Ct. 63 (2020).

government's willingness to grant medical but not religious exemptions, creates for many servicemembers unsurprising confusion at the lack of deference to their religious claims of exemption.[33] Recent cases like *Brooklyn Diocese* may possibly aid servicemembers in this novel issue, since they deal directly with Covid restrictions, and are much needed insight into how courts will likely rule when claimants bring religious challenges to government restrictions in response to Covid's nationwide effects and government mandates. In *Brooklyn Diocese* and, in a subsequent case *Tandon v. Newsom*, the Supreme Court struck down New York and California's restrictions on religion, emphasizing the States' singling out and treating differently religious institutions compared with secular institutions, treating better the latter in significant respects.[34] Cuomo's disparate treatment of houses of worship in New York and Newsom's limit on family gatherings for worship, while other businesses had more freedoms, are but two examples.

IV. Historical Evaluation and Evolution

The First Amendment's religious exercise protection is two-fold; it protects not only *actions* in connection with religion but also religious *beliefs*.[35] In the last sixty years, however, courts have grappled with balancing between religious liberties of believers, who claim the right to be exempted from generally applicable laws interfering with religious practices, and legitimate

[33] Jennifer Steinhauer, *Military Grants Few Vaccine Exemptions as Deadlines Loom*, The New York Times (Nov. 2, 2021), https://www.nytimes.com/2021/11/02/us/politics/vaccine-military-army.html?campaign_id=9&emc=edit_nn_20211103&instance_id=44456&nl=the-morning&regi_id=134129829&segment_id=73373&te=1&user_id=5285fe021f44e194cfb0f01e83a94dc3.
[34] *See generally Brooklyn Diocese*, 141 S. Ct. 63 (2020); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).
[35] *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1971) (holding that the free-exercise clause applied only to "a 'religious' belief or practice," and "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.") (emphasis added).

interests of society in uniform laws, often because religion and society at large are inexorably intertwined.[36] Early Court decisions went both ways on this central issue.[37]

The Supreme Court first addressed this balancing issue of burdening religious practices and regulating conduct of citizens uniformly in a series of cases involving nineteenth-century laws aimed at suppressing the practice of polygamy by members of the Church of Jesus Christ of Latter-day Saints, also known as Mormons.[38] The Court unanimously rejected free exercise challenges to these laws, holding that the Free Exercise Clause protects beliefs but not all conduct, announcing "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[39] *Reynolds* influenced interpretation of the Free Exercise Clause most notably with its conclusion that allowing believers to disobey generally applicable laws "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[40]

Subsequently, the Supreme Court the Supreme Court rejected Reynolds' restrictive interpretation and established the long-standing balancing test set forth in its landmark decision *Sherbert v. Verner* for determining whether a law is valid in light of a substantial burden on an individual's religious exercise.[41] The Court in *Sherbert* held that regardless of whether the law

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[36] *Id.* at 216 ("giving no weight to such secular considerations…the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction" citing that "religion pervades and determines virtually their entire way of life").
[37] *Reynolds v. United States*, 98 U.S. 145 (1879) (denying religious exemptions for polygamy because Congress was "deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive to good order."); *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940) (opening the door to federal litigation against the states for religion-clause claims by ruling that the 14th Amendment's protections against state action because the "statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment.).
[38] *Reynolds*, 98 U.S. 145 (1879).
[39] *Id.* at 166.
[40] *Id.* at 167.
[41] *Sherbert v. Verner*, 374 U.S. 398 (1963).

targeted religion or not, when it substantially burdens the free exercise of religion the law is only valid if the government can overcome, not just rational basis review, but strict scrutiny.[42] More specifically, the Court in *Sherbert* reasoned the government's religious-burdening action at issue would be justified only if either "disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . .'"[43] For nearly three decades, the Supreme Court adopted the strict scrutiny analysis established in *Sherbert*.

Important to the Court's reasoning in *Sherbert* was its emphasis of a certain discretionary process, where a government official unilaterally determines whether to grant a religious exemption on an individual basis.[44] The Court in *Smith* also recognized the possible discriminatory uses of "individualized assessments" and retained strict scrutiny in this category of cases.[45]

When assessing servicemembers' religious exemption claims, courts should apply the strict scrutiny standard of review to the individualized assessments utilized by military tribunals and officials for medical exemptions, some of which have been granted.[46] Individual assessments have led to medical but not religious exemptions, thus the concern of discriminatory decision-

[42] *Id.* at 406 ("No showing merely of a rational relationship to some colorable state interest suffices to justify substantial infringement of a person's U.S. Const. amend. I right; in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.").
[43] *Id.* at 403 (*quoting NAACP* v. *Button*, 371 U.S. 415, 438 (1963)).
[44] *Id.* at 412 ("For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.").
[45] *Smith*, 494 U.S. at 884 ("where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.").
[46] Jennifer Steinhauer, *Military Grants Few Vaccine Exemptions as Deadlines Loom*, The New York Times (Nov. 2, 2021), https://www.nytimes.com/2021/11/02/us/politics/vaccine-military-army.html?campaign_id=9&emc=edit_nn_20211103&instance_id=44456&nl=the-morning&regi_id=134129829&segment_id=73373&te=1&user_id=5285fe021f44e194cfb0f01e83a94dc3.

making is present. For example and as stated previously, in cases such as *Brooklyn Diocese* and *Tandon*, religious bodies were treated differently than secular institutions.[47] The Court found in each, that mere inequitable treatment of secular establishments, like markets and hair salons, compared with mere segregation and singling out of an institution as religious triggers strict scrutiny.[48] In other words, when the government even distinguishes and makes differing rules for institutions based on the nature of the institution, like in *Brooklyn Diocese*, where the government flagrantly effectuated unique rules for institutions based on their classification of religious or secular, the Court will employ strict scrutiny forcing the government to justify its categorical approach by evidencing that the regulation is the least restrictive means to achieve a compelling state interest.[49]

But even proving a compelling governmental interest is difficult under pre-*Smith* case law. In the early 1970s, the Court reinforced the basic precept that laws that burden religion should not be absolute, and that sincere religious objectors might be exempt from their reach.[50] In *Wisconsin v. Yoder*, the Court held that the government may not enforce a religiously neutral law of general applicability *unless* the government can prove a "state interest of sufficient magnitude to override the interest claiming protection under the free exercise of religion clause."[51]

The *Yoder* decision essentially became the framework for the modern strict scrutiny standard by adopting formally the premise that the state bears the burden to prove its interest is "of

[47] *See e.g. Brooklyn Diocese*, 141 U.S. 63 (2020); *Tandon v. Newsom*, 141 U.S. 1294 (2021).
[48] *See e.g. Brooklyn Diocese*, 141 U.S. 63 (2020); *Tandon*, 141 U.S. 1294 (2021).
[49] *Brooklyn Diocese*, 141 U.S. at 67 ("Because the challenged restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest.") (*citing Church of Lukumi*, 508 U. S., at 546.).
[50] *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1971) ("Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. However strong the state's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.").
[51] *Id.* at 214.

sufficient magnitude" that imposition of the burden on religion is necessary.[52] While the premise in *Yoder* had lasting implications, the Court's holding that the government could not force the Amish into public school education after middle school is significant in that the Court recognized their genuinely held religious beliefs and found that their free exercise of their religion outweighed government interests of uniformity and educating the youth, otherwise strong interests.[53] The decision in *Yoder* reveals how highly the Court values religion and the extent of the Court's protection.

Nonetheless, Supreme Court jurisprudence pivoted in *Employment Division v. Smith,* in essentially dispensing with the strict scrutiny "compelling interest" analysis and only applying strict scrutiny when a law facially targets religion or shows animus toward their religion or when receipt of benefits is conditioned on forgoing religious beliefs or practices.[54] In *Smith,* the Court held that a facially neutral law of general applicability would be valid despite the incidental burden on an individual's religion.[55] More specifically, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes or prescribes conduct that his religion prescribes or proscribes."[56] So long as the government does not show animus, deny benefits because of religion, or facially target religion the law does not trigger strict scrutiny analysis and is otherwise valid despite the incidental burden on religion.[57] The Court in *Smith* based its decision largely in part on the premise of *Reynolds*—that conduct is distinct from belief in that

[52] *Id.*
[53] *Id.*
[54] *Employment Division v. Smith*, 494 U.S. 872, 898 (1990) ("A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it 'results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.'") (*citing Braunfeld v. Brown,* 366 U.S. 599, 605 (1961)).
[55] *Smith,* 494 U.S. at 878.
[56] *Id.* at 879.
[57] *See generally Smith,* 494 U.S. 872.

the government can objectively regulate conduct by uniform application of laws using a standard based on the conduct itself, while belief is personally unique, may never materialize in any objectively quantified conduct, and is thus nearly impossible to regulate.[58] While laws may regulate conduct generally, even if it burdens religious practices, a man is still free to think and believe, and even act in most circumstances, when it does not affect society and its function or have impacts beyond thought or run counter to necessary generally applicable regulation of conduct for the general benefit of ordered society.[59]

Justice Scalia, who wrote for the majority in *Smith*, emphasized and opined strongly about the potential for anarchy and the subsequent "parade of horribles" that would result if every religious practice, however unique and obscure, were to find constitutional standing and potential exemption from otherwise valid and generally applicable laws.[60] Scalia's fear objectively has merit for the most obscure and dangerous religions such as the small fraction of Protestants who handle snakes.[61] His opinion in *Smith* also has support for opposing religious practices like in *Reynolds*, where polygamy was at issue.[62] The Supreme Court there emphasized that polygamy not only violates one societal value or law, but many.[63] For instance, polygamy is incongruous to marriage and domestic partnerships historically, violates the Equal Protection Clause of the Fourteenth Amendment, and frustrates and encumbers the normal governmental benefits

[58] *Smith,* 494 U.S. at 885 ("To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' -- permitting him, by virtue of his beliefs, 'to become a law unto himself,' *Reynolds v. United States*, 98 U.S., at 167 -- contradicts both constitutional tradition and common sense.").
[59] *See e.g. Smith,* 494 U.S. 872.
[60] *Id.* at 889. ("It is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.").
[61] John R. Vile, *Snake Handling*, The First Amendment Encyclopedia, (2009) https://www.mtsu.edu/first-amendment/article/928/snake-handling.
[62] *See e.g. Reynolds v. United States*, 98 U.S. 145 (1879).
[63] *Id.*

provided to domestic partnerships between two individuals.[64] Whether the law is so explicit that it makes the husband "head and master" of the home with the sole right to control property,[65] or denies a wife benefits awarded automatically to a husband, such as welfare benefits if the wife is unemployed,[66] housing and medical benefits for the wife's spouse,[67] child-care benefits for a surviving spouse,[68] or self-care benefits for a surviving spouse,[69] the Court has found violations of the Equal Protection Clause in each of these situations.

In response to consensus that the Court in *Smith* got it wrong, Congress enacted the Religious Freedom Restoration Act[70] in an attempt to reestablish the "compelling interest" strict scrutiny test to blunt the inevitable constraint *Smith* likely would have on religious free exercise. RFRA states a straightforward operative three-part test, instead of the "facially neutral, generally applicable" *Smith* standard, that Congress feared would find constitutional almost every religious burdening law so long as it does not directly target a religion or a religious practice.[71] First, the plaintiff must establish that a law substantially burdens the plaintiff's religion.[72] The burden then shifts to the government to establish both a "compelling government interest" and that that interest is the "least restrictive" means of accomplishing that government interest.[73] Uniquely explicit, RFRA's text specifically denounces the decision in *Smith*, emphasizing that it "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by

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[64] Susan Deller Ross, *Should Polygamy Be Permitted in the United States*, American Bar Association, (Apr. 1, 2011) https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_spring2011/should_polygamy_be_permitted_in_the_united_states/.
[65] *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).
[66] *Califano v. Westcott*, 443 U.S. 76 (1979).
[67] *Frontiero v. Richardson*, 411 U.S. 677 (1973).
[68] *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).
[69] *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Wengler v. Druggists Mutual Insurance Company*, 446 U.S. 142 (1980).
[70] 42 U.S. §§ 2000bb-2000bb-4.
[71] *Id.*
[72] *Id.*
[73] *Id.*

laws neutral toward religion."[74] In further support of its denouncement, RFRA codified its reasoning that *Smith* is unworkable and "the compelling interest test as set forth in prior federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[75]

V. Federal Employees/Military: Required Religious Vaccine Exemption Under Free Exercise Clause and Religious Freedom Restoration Act

Since Congress enacted RFRA for federal employees, and federal employees include military servicemembers, these members of the military should be able to claim religious exemptions and have standing court.

A. The Supreme Court and RFRA

In the wake of Congressional enactment of RFRA in 1993, the Supreme Court broadly interpreted it. In *Burwell v. Hobby Lobby*, the Court arguably gave greater protection to religious exercise than it did even before *Smith*.[76] In that case, the Court weighed in on certain provisions of the "Patient Protection Provisions in the Affordable Care Act."[77]

Under the Affordable Care Act, employment-based group health care plans must provide certain types of preventative care, such as FDA-approved contraceptive methods.[78] While there are exemptions available for religious employers and non-profit religious institutions, there are no exemptions available for for-profit institutions such as Hobby Lobby Stores, Inc.[79]

On September 12, 2012, the Greens, as representatives of Hobby Lobby Stores, Inc., sued Kathleen Sebelius, the Secretary of the Department of Health and Human Services, and

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[74] *Id.*
[75] *Id.*
[76] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).
[77] *Id.*
[78] *Id.*
[79] *Id.* at 710-12.

challenged the contraception requirement.[80] The plaintiffs argued that the requirement that the employment-based group health care plan cover contraception violated the Free Exercise Clause and RFRA.[81]

The main question the Supreme Court weighed was whether RFRA, "permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners."[82]

The Court held that the "regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest."[83] The Court further concluded that the challenged HHS regulations substantially burdened the free exercise of religion because corporate compliance with said provision contradicted the owners' religious objections to contraceptives aimed at preventing pregnancies, and there existed a heavy financial penalty of hundreds of millions of dollars annually for noncompliance.[84] Assuming that the regulations served a compelling government interest, the Court found that they were not the least restrictive means of serving that interest because there were other ways to ensure that every woman had cost-free access to certain contraceptives[85] and alternatives to the heavy financial penalty still amounted to "roughly $26 million" per year.[86] In fact, a less restrictive method exists in the form of the Department of

[80] *Id.* at 715.
[81] *Id.* at 726.
[82] *Burwell*, 573 U.S. at 689.
[83] *Id.* at 690-91.
[84] *Id.* at 720.
[85] *Id.*
[86] *Id.*

Health and Human Services' exemption for non-profit religious organizations, which the Court held can and should be applied to for-profit corporations such as Hobby Lobby.[87]

Hobby Lobby and its progeny speak to how broadly a religious exemption would have to reach. Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion.[88] In determining whether a belief is rooted in religion, the "resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[89]

Undoubtedly, RFRA applies to the military in the vaccine mandate context. Under *Thomas v. Review Bd.*, relied on heavily in *Hobby Lobby*, the Court found that Thomas terminated his employment for religious reasons, emphasizing the thirty-year precedent that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."[90] Thomas refused to work on munitions at his factory because of his religiously based anti-war stance and for that reason was denied unemployment compensation. The Court continued, citing *Sherbert*, which ruled "that [disqualifying Mrs. Sherbert from benefits because of her refusal to work on Saturday in violation of her faith] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship."[91] This

[87] *Id.*
[88] *See generally Sherbert, supra; Yoder*, 406 U.S. at 215-216 (1972).
[89] *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981).
[90] *Id.* at 716.
[91] *Id.* at 716-717.

"choice" parallels the difficult choices the servicemembers today face; either choose to continue to believe in the same religious convictions or choose to serve in the military. If a servicemember chooses the former, his choice is marred by dishonorable discharge and relinquished lifetime financial benefits typically enjoyed by every honorably discharged servicemember.

The Court concluded "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."[92]

The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[the] essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."[93]

The Court ultimately concluded that neither of the interests advanced by the government were sufficiently compelling to unduly burden Thomas' religious free exercise rights not to work on munitions in violation of his religious convictions.[94] The Court thus found unconvincing the government's reasons proffered which were widespread unemployment from those similarly situated and avoiding a detailed probing of each employee's religious beliefs.[95]

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[92] *Id.* at 717-718.
[93] *Id.* at 718 (quoting *Yoder,* 406 U.S. at 215).
[94] *Thomas,* 450 U.S. 707 (1981).
[95] *Id.*

More support for the Supreme Court's broad interpretation of religious exemption claims can be found in its decision in *Holt v. Hobbs.*[96] In *Holt,* the plaintiff-inmate sought an injunction and temporary relief from the enforcement of the Arkansas Department of Corrections' grooming policy which allowed trimmed mustaches and quarter-inch beards for diagnosed dermatological problems but otherwise no facial hair.[97] Holt succeeded and the Court held that growing a beard was a necessary part of the practice of his religion, that the grooming policy significantly burdened his ability to do so, and that the grooming policy was therefore a violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA).[98] Holt was willing to limit his beard to a length of one-half inch as a form of compromise with the policy.[99]

Both RFRA and RLUIPA require a strict scrutiny standard of review, and both offer the same broad protection for religious exercise.[100] The result of this Supreme Court decision is that *Holt* has become precedent for RFRA interpretations and decisions and not just RLUIPA ones. Especially important, is the Court's harsh treatment of government even when an inmate expresses a religious objection to neutral and generally applicable laws or mandates in a state corrections facility.

B. Religious Freedom Restoration Act Claims Against the Military

Because RFRA applies to federal law and not state law,[101] and the vaccine mandates operate as federal law that burden religious beliefs of some military personnel claiming exemptions, military servicemembers have standing for claims against the federal government.[102] Generally, the members of the military are federal employees, receiving salary, benefits, and employment

[96] *Holt v. Hobbs*, 574 U.S. 352 (2015).
[97] *Id.* at 355-56.
[98] *Id.*
[99] *Id.*
[100] *Id.* at 361-63.
[101] *City of Boerne v. Flores*, 521 U.S. 507 (1997).
[102] *Id.* (RFRA's applicability relates to the defendant, not the plaintiff).

from the federal government.[103] However, members of the military differ in that not only are they employed by the federal government, but they are also uniquely restricted in their ability to control virtually anything in their own lives while enlisted, such as leaving a base unannounced, making their own day-to-day schedules, and the locations the military sends them and for how long they will be stationed there.

Despite the general reassurance that servicemembers are protected by RFRA, the Court in the past articulated harsh doctrine toward the military, insofar as it is uniquely governed by a special system of laws, the Uniform Code of Military Justice (UCMJ), with its own system for prosecuting violations of the code, including courts-martial.[104] When responding to First Amendment challenges from military personnel, the Court consistently treats the military as a special and separate context or environment in which standard First Amendment protections do not apply, or do not apply to the same extent, as they do to citizens or private sector employee.[105] With the exception of potential final review by the U.S. Supreme Court, these Article I courts handle review of military cases in an appellate system that rarely interacts with Article III courts.[106]

Criminal defendants in the Article III judicial system have an automatic right to appeal to federal courts of appeal and then a right to petition the Supreme Court for final review.[107] In contrast, defendants in military cases typically may not appeal their cases to the U.S. Supreme Court unless the highest military court, the United States Court of Appeals for the Armed Forces (CAAF), had also granted discretionary review in the case.[108]

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[103] *United States v. Sterling*, 75 M.J. 407 (CAAF 2016).
[104] *See e.g., United States v. Stevenson*, 65 M.J. 639 (2006) (military courts prosecuted a retired serviceman for rape, a crime often tried in civilian court)
[105] *Id.*
[106] *Id.*
[107] *Sterling*, 75 M.J. 407 (CAAF 2016).
[108] *Id.*

However, Congress in the past has proposed at least two potentially transformative bills, albeit not passed as federal law, that reveal a Congressional concern about the separation of military courts from civilian courts, insofar as the right to petition the Supreme Court has been historically absent.[109] While the Court has treated different sectors of citizens differently for First Amendment purposes including schoolchildren,[110] and federal prisoners,[111] Congressional intervention has provided adequate remedies to petitioners consistent with rights of civilians despite these separate classifications.[112] The same should be true of military service members.

In *Orloff v. Willoughby,* the Court emphasized the Court's "hands off" approach of military actions by explicitly clarifying the Court's role when tasked with assessing whether a doctor drafted into the Army may lawfully be held beyond his desire and without being assigned to any position whatsoever.[113] The Court affirmed that "although courts may determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, the Supreme Court will not revise duty orders as to one lawfully in the service."[114] This issue of holding a citizen against his will, without commissioning him to any position, is one example of how certain freedoms become absent in the military.

Further, the Court acknowledged "the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But

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[109] Equal Justice for Our Military Act of 2009, H.R. 569, 111th Cong. (2009); Equal Justice for Our Military Personnel Act of 2009, S. 357, 111th Cong. (2009) (proposing the authorization of appeals to the U.S. Supreme Court for all military cases, and for all branches of the military, specifically including the currently excluded cases that the Criminal Court of Appeals and the U.S. Court of Appeals for the Armed Forces (CAAF) adjudicated).
[110] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
[111] *Turner v. Safley*, 482 U.S. 78 (1987) (overturned by RFRA for federal employees; RLUIPA for state prisoners).
[112] *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (holding "in a case in which the fact of employment was only tangentially and insubstantially involved in the subject matter of the public communication made by the teacher, it was necessary to regard the teacher as the member of the general public he sought to be; absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not have furnished the basis for his dismissal from public employment; and as no such showing had been made, the teacher's rights to freedom of speech were violated.").
[113] *Orloff v. Willoughby,* 345 U.S. 83, 94 (1953).
[114] *Id.* at 93.

judges are not given the task of running the Army…[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."[115]

On the other hand, the dissent led by Justice Frankfurter, disagrees as to whether a doctor may be held in the Army, without commission, essentially holding him against his will.[116] The dissent states, "if the statements that were made at the hearings and on the floor of the Congress by those who were in charge of the legislation had been made in a formal committee report, this Court could hardly have held that the receipt of a commission was not a condition on keeping in the Army a doctor drafted under these special provisions."[117]

Current jurisprudence holds that *Orloff* no longer applies to military with respect to religious claims under RFRA, since it effectively created a larger umbrella for federal workers, in which servicemembers are unequivocally included. Contrasted with the now-encompassing RFRA umbrella of servicemembers is the then-deferential Court's holding in *Goldman v. Weinberger.*[118] There, the Court deferred to the Army's decision on prohibiting a yarmulke, an Orthodox Jewish headwear, because of the "no headgear" rule.[119] The Court's deference to the military decision was in keeping with the *Orloff* rule.[120]

Today, the Court changed its tune. For example, in *Singh v. Carter*, the United States District Court for the District of Columbia upheld free exercise rights of a member of the military in response to his RFRA claim.[121] In *Singh*, the Court granted the plaintiff-

[115] *Id.* at 93-4.
[116] *Id.* at 95-7.
[117] *Id.* at 98-99.
[118] *Goldman v. Weinberger*, 475 U.S. 503 (1986).
[119] *Id.*
[120] *Id.* at 507.
[121] *Singh v. Carter*, 168 F.Supp.3d 216 (D.D.C. 2016).

servicemember's request for a temporary restraining order enjoining an order from the United States Army's senior command, requiring him to undergo specialized testing to ensure that his religious articles of faith, namely his headdress and beard, did not interfere with his army combat helmet and protective mask.[122] The Court reasoned that under RFRA, plaintiff was not required to exhaust administrative remedies in a court-martial proceeding before bringing constitutional and RFRA claims and singling out the plaintiff for testing due only to his articles of faith was discriminatory and would cause irreparable harm.[123] The pressure on the plaintiff to forego religious precepts or relinquish his employment and ability to make a living via service in the armed forces constituted a substantial burden, the order of testing was not the least restrictive means to further the Army's interest, and the balance of harms weighed in the plaintiff's favor.[124]

While the Court acknowledged the limits on judicial review of military actions and requirements of administrative exhaustion of military personnel decisions generally, "resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board."[125]

Specifically in *Adair v. England*, the federal district court rejected the military's argument that plaintiff-Navy chaplains, who brought First Amendment Free Exercise claims, should have first exhausted their administrative remedies by raising their personnel claims with the internal Board for Correction of Naval Records before bringing the claims into federal court.[126] The court reasoned that "the Supreme Court and [the D.C. Circuit] have heard numerous [constitutional] challenges to military policies",[127] and the "logic underlying nonjusticiability in

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[122] *Id.* at 235.
[123] *Id.*
[124] *Id.*
[125] *Singh v. Carter*, 168 F.Supp. 3d 216, 225, 235 (D.D.C. 2016); *quoting Adair v. England*, 183 F. Supp. 2d 31, 55 (D.D.C. 2002); *quoting Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973).
[126] *See Adair v. England*, 183 F. Supp. 2d 31, 55 (D.D.C. 2002).
[127] *Brannum v. Lake*, 311 F.3d 1127, 1130, 354 U.S. App. D.C. 73 (D.C. Cir. 2002).

military cases is 'wholly inappropriate…when a case presents an issue that is amenable to judicial resolution.'"[128] The Court emphasized that "courts have shown no hesitation to review cases in which a violation of the Constitution, statutes, or regulations is alleged."[129] Further, "[i]t is a basic tenet of our legal system that a government agency is not at liberty to ignore its own laws and that agency action in contravention of applicable statutes and regulations is unlawful…The military departments enjoy no immunity from this proscription."[130]

In terms of a servicemember's RFRA claim, "Congress nowhere inserted any exception for the U.S. Armed Forces from RFRA's application or any exhaustion requirement, as it did, for example, in RFRA's "sister statute," RLUIPA.[131] Thus, RFRA does not require that a servicemember exhaust his or her remedies within military courts before bringing the claim before a civilian court. This difference between RFRA and RLUIPA is important insofar as plaintiffs need not exhaust or rely on remedies within the military when the religious claim is in response to military rules, laws or mandates, including vaccine mandates that burden a religious conviction. This precept grants plaintiffs proper standing outside of military tribunals despite the Court's deference to military decisions and judicial processes, even in light of the historical military practice of intra-branch adjudication. When a free exercise claim is at issue, the military plaintiff need not solely seek refuge in a military judicial system and may bring the claim in a federal court.

While some cases like *United States v. Sterling* found against the petitioner-service person, the court's reasoning and discussion highlight how military members and the military in

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[128] *Singh v. Carter*, 168 F.Supp. 3d 216, 225 (D.D.C. 2016).
[129] *Id*.; citing *Dilley v. Alexander*, 603 F.2d 914, 920, 195 U.S. App. D.C. 332 (D.C. Cir. 1979).
[130] *Singh*, 168 F.Supp, 3d at 230.
[131] *Id*. ("[A] prisoner may not sue under RLUIPA without first exhausting all available administrative remedies") *citing* 42 U.S.C. §§ 1997e(a), 2000cc-2(e*); see also Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F3d 829, 838 (9th Cir. 2012) ("We decline…to read an exhaustion requirement into RFRA where the statute contains no such condition…and the Supreme Court has not imposed one.").

general are still under the umbrella of RFRA.[132] In *Sterling*, the servicemember was convicted for failure to report to her place of duty, disrespect toward a superior commissioned officer, and disobedience to a lawful order.[133] A noncommissioned officer violated various articles of the UCMJ, after she refused to help distribute vehicle passes to families of servicemembers and to remove signs posted on her desk which read "no weapon formed against me shall prosper."[134] Although the servicemember claimed that her decision to post signs on her desk was protected by RFRA, she failed to proffer evidence substantiating this claim and the military court's decision was upheld.[135]

Nonetheless, the court analyzed this seemingly nominal claim of religious freedom under the strict scrutiny RFRA provides. The court reasoned that "[t]he Religious Freedom Restoration Act, which, by its own terms, applies to every 'branch, department agency, instrumentality, and official (or other person acting under the color of law) of the United States' also applies in the military context."[136] Further, at least two general orders prescribe the manner in which religious accommodations to rules of general applicability should be processed and facilitated in the military.[137]

However, *Sterling* differs in important ways including that it is not the usual case of religious accommodation where an individual or group challenges the denial of an accommodation for an exercise of religion. Nor was it the case where the conduct at issue was either patently religious, such as wearing religious headdresses like in *Singh*, or one where a

[132] *United States v. Sterling*, 75 M.J. 407 (CAAF 2016).
[133] *Id.* at 410.
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] Dep't of Defense Instr. 1300.17, Accommodation of Religious Practices Within the Military Services (Feb. 10, 2009, Incorporating Change 1, Jan. 22, 2014); Dep't of the Navy, Secretary of the Navy Instr. 1730.8B CH-1, Accommodation of Religious Practices (Mar. 28, 2012).

government actor knew of a religious practice and sought to prohibit it. Rather, the religious claim refers to speech loosely based on a Bible passage, and arguably the practice of displaying the speech on a desk shared with another servicemember. Further displaced from other jurisprudence, is the fact that petitioner-servicemember failed to inform the supervisor who informed her to take it down that it was based on a religious principle.

C. How to Construct a RFRA Claim Against the Military for Vaccine Exemption

As the federal employee religious exemptions stand today, a military servicemember has two ways in which the government may accept their religious claim, the first being a RFRA claim.

Under RFRA, servicemembers are federal employees whom RFRA affords strict scrutiny whenever a religious exemption is claimed. Similar to *Smith's* individualized assessment protocol, a servicemember's claim to a religious exemption shifts the burden to the government that must prove a compelling interest and that it is the least restrictive means of accomplishing this interest.

Although this concept seems logical, members of the military have not been afforded the same ability to claim exemptions like other federal employees, where many different government agencies have at least been amenable to employee claims for a religious exemption.[138] Interestingly, different branches of the military will handle petitions for religious exemptions independently and not necessarily in the same ways.[139] For service members who have religious objections to receiving a vaccine, the path for how they might seek an exception to the vaccine is

[138] Lisa Rein, *Nearing Monday coronavirus vaccine deadline, thousands of federal workers seek religious exemptions to avoid shots*, The Washington Post, (Nov. 7, 2021). https://www.washingtonpost.com/politics/federal-workers-vaccines-exemptions/2021/11/07/761eb9d8-3da3-11ec-8ee9-4f14a26749d1_story.html. ("Exemptions on religious grounds have been rare, as well, but nonetheless close to 5,000 Air Force members have submitted requests to avoid a coronavirus vaccination, with no approvals reported as of last week.").

[139] C. Todd Lopez, *Services Will Make Call on Religious Exemptions*, U.S. DEPT. OF DEFENSE, (Aug. 10, 2021), https://www.defense.gov/News/News-Stories/article/article/2726774/services-will-make-call-on-religious-exemptions-to-covid-19-vaccines/.

defined by their individual military service's regulations, Pentagon Press Secretary John F. Kirby said.[140]

As of August 21, 2021, the vaccines were only on "emergency use authorization,[141]" from the Food and Drug Administration.[142] Once any of the three vaccines become fully approved, says Secretary of Defense Lloyd J. Austin III, "they will become mandatory immediately."[143] Even if they are not fully approved by Austin's arbitrary cut-off date of "mid-September", Austin stated that he "will request a waiver from the president to make them mandatory."[144] Since then, only the Pfizer vaccine is fully approved by the FDA and is currently mandatory for all branches of the military and their service members.[145]

Surprising is the process the military will use when religious exemptions are claimed by military members. When a servicemember first requests a religious exemption, "there's a process that [the military will] go through to counsel the individual both from a medical and from a command perspective about using a religious exemption."[146] The counseling includes a discussion with both a medical professional and a commander about the risks of not being vaccinated as well as how not being vaccinated might affect deployability, assignments or travel.[147] Instead of potentially allowing the religious exemption or allowing the soldier to prove his case for a religious exemption in front of a judicial body, the servicemember is instead directed to a medical professional and has to explain himself to his commander. Since

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[140] *Id*.
[141] *Id*.
[142] *Id*.
[143] *Id*.
[144] *Id*.
[145] U.S. Army Public Affairs, *Army Announces Implementation of Mandatory Vaccines for Soldiers,* Army.mil, (Sept. 14, 2021). https://www.army.mil/article/250277/army_announces_implementation_of_mandatory_vaccines_for_soldiers.
[146] *Id*.
[147] *Id*.

government officials make individual assessments as to whether a servicemember's request is granted, even under *Smith,* the Court would apply strict scrutiny.

Even more, the penalties for non-compliance are drastic. If a servicemember requests an exemption, but is denied, and still refuses to get vaccinated, he or she faces "adverse administrative action."[148] This "adverse administrative action" includes administrative and non-judicial punishment.[149] Such punishments could include relief of duties or dishonorable discharge, relinquishing their post-duty benefits, like medical care and pensions, and acquiring a perpetually stigmatizing label, often disallowing them from acquiring jobs they could otherwise could have acquired.[150] This animus toward religion, and the punitive consequences following denial and continued noncompliance seems to parallel the punitive treatment of religion in *Church of Lukumi Babalu Aye v. City of Hialeah.*[151] In *Lukumi,* the Court found animus in the creation and promulgation of city ordinances aimed specifically at the religious practices of the Church of Lukumi.[152] Since animus was found, the Court adopted strict scrutiny.[153] Like in *Lukumi,* courts hearing religious exemption claims of military servicemembers could also find animus toward religious convictions, through the military's unavailability, non-acceptance, and harsh penalties of religious exemptions and thus should apply strict scrutiny.

In the case of federally employed military members, RFRA's pre-*Smith* strict scrutiny should apply. When a service member invokes a religious exemption, such that his taking a vaccine "substantially burdens" his or her free exercise of religion, the government must justify

[148] Ellen Mitchell, *Army Sets June 2022 Deadline For Troops to Receive Covid-19 Vaccine,* The Hill, (Sept. 14, 2021) https://thehill.com/policy/defense/572202-army-sets-june-2022-deadline-for-troops-for-covid-19-vaccine.
[149] *Id.*
[150] *Id.*
[151] *City of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).
[152] *Id.*
[153] *Id.*

the burden by a least restrictive compelling interest.[154] The compelling interest test imparts the burden of persuasion on the government following a claim that the law or mandate substantially burdens the free exercise of religion of a federal employee.

Assuming a servicemember claims the vaccine mandate is a substantial burden on his or her religion, as is the case of many servicemembers today, the burden transfers to the government to proffer a compelling interest that is the least restrictive means.

The government interest stated by the Army was "the health protection of our force" which it wants to "continue to ensure that [] personnel have the most up-to-date information on appropriate safety measures to prevent potential spread of the virus."[155] Further, Lt. Gen. R. Scott Dingle, the U.S. Army Surgeon General stated that "[t]his is quite literally a matter of life and death for our Soldiers, their families and the communities in which we live. Case counts and deaths continue to be concerning as the Delta variant spreads, which makes protecting the force through mandatory vaccination a health and readiness priority for the total Army."[156]

As the general health and well-being of the military will most certainly suffice as a compelling government interest, the Court's analysis would then turn to whether vaccinating all service members despite religious objections, and drastic penalties of dishonorable discharge following non-compliance, is the least restrictive means to effectuate that government interest. Again, the burden remains on the government to show that it is.

Like in *Hobby Lobby*, where the penalties were too harsh, a court would likely find that these penalties are similarly excessive. While penalties are not traditionally the basis for courts

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[154] *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[155] U.S. Army Public Affairs, *Army Announces Implementation of Mandatory Vaccines for Soldiers*, Army.mil, (Sept. 14, 2021) https://www.army.mil/article/250277/army_announces_implementation_of_mandatory_vaccines_for_soldiers.
[156] *Id*.

to hold that the government's compelling interest is not the least restrictive, the Supreme Court has established that penalties are at least in part, a determinative factor in the analysis, especially when the penalties are especially harsh.[157] Similar to the penalties at issue in *Hobby Lobby* that were a basis for the Court applying strict scrutiny and a finding of a substantial burden because they were particularly harsh, the penalties at issue here, namely that non-compliance results in dishonorable discharge, a court would apply strict scrutiny and find that there exists a substantial burden on religion.

Prior to FDA approval of the vaccine, service members wore masks and got regular testing, which are measures that could be continued to be utilized if a servicemember exerts a religious exemption. Additionally, the military could require service members to practice other CDC guidelines such as social distancing.

In addition, many of the service members have already had Covid-19 and have robust anti-bodies from surviving the virus.[158] Many renowned studies have shown that these antibodies provide equal or more protection from severe reactions to the virus than does even the vaccine.[159]

There have also been private companies and corporations like Regeneron that have developed other palliative care regimes such as monoclonal antibody treatment that provides protection for up to 8 months.[160]

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[157] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 722 (2014).
[158] National Institutes of Health, *SARS-CoV-2 Antibodies Protect from Reinfection*, (Mar. 2, 2021), https://www.nih.gov/news-events/nih-research-matters/sars-cov-2-antibodies-protect-reinfection.
[159] *Id*.
[160] Manojna Maddipatla, *Regeneron's COVID Antibody Drug Shows Protection for Up to 8 Months,* REUTERS, (Nov. 8, 2021) https://www.reuters.com/business/healthcare-pharmaceuticals/regenerons-antibody-therapy-shows-long-term-protection-against-covid-19-2021-11-08/.

In addition to combating the virus with other forms of treatment besides the vaccine, there are other least restrictive means than to mandate taking a vaccine and the subsequent harsh penalty of dishonorable discharge. The military could allow members to honorably discharge early. One of the major issues with dishonorable discharge is that the label stays with servicemembers for the rest of their lives, often harming their subsequent employment opportunities after their service has ended.[161] In addition, the servicemembers lose all financial benefits gained such as pensions and healthcare.[162]

These less restrictive alternatives could be the basis for a court to hold that the government is not utilizing the least restrictive means assuming they do have a compelling interest. Just like in *Hobby Lobby* where the court assumed the government had a compelling interest but still struck down the law based on the harshness of the penalties, a court may hold that the harsh penalties here are not the least restrictive means available.

D. Free Exercise Claims Against the Military for Vaccine Exemption

Secondly, under *Smith*, the Court carved out an exception to its generally applicable, facially neutral rule for governmental 'individualized assessments' referencing the origins of the *Sherbert* test.[163] The Court pointed out that the *Sherbert* test was:

> developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. [A] distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the *particular circumstances* behind an applicant's unemployment: [t]he statutory conditions [in *Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, without good cause, he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions.[164]

[161] Law for Veterans, *Types of Military Discharge and What They Mean for Veterans,* Lawforveterans.org, (Dec. 2, 2021) https://www.lawforveterans.org/work/84-discharge-and-retirement/497-military-discharge.
[162] *Id.*
[163] *Smith*, 494 U.S. 872.
[164] *Id.* at 884 (emphasis added).

Thus, there still exists an individual assessment, strict scrutiny analysis under *Smith* when the government first assesses an individual based on individual circumstances and even more applicable when the individual's unemployment is the basis of the assessment.[165]

For a servicemember, the military assesses individuals on an individual basis and his or her unemployment, in the form of dishonorable discharge, is one of the possible results of the assessment. Under *Smith*, the government's individual assessment should be subject to strict scrutiny. A servicemember's claim of religious exemption thus should shift the burden to the government to prove a compelling interest and that dishonorable discharge is the least restrictive means of obtaining this interest.

In addition, cases like *Brooklyn Diocese* and *Tandon* highlight the Court's future trend and general propensity to find unconstitutional government infringing action that burdens religion when the action treats religious institutions differently than secular ones. In both those cases the Court struct down emergency mandates promulgated by states that singled out religious institutions.[166] The Court will always use strict scrutiny when religious institutions are targeted and in both cases the government interests of public health and safety were not found sufficiently compelling nor narrowly tailored to overcome the burden imposed on religion.

VI. Conclusion

In sum, courts have historically enforced, upheld, and made available religious exemptions, when interpreting the protections found in the First Amendment's Free Exercise Clause. While Supreme Court jurisprudence has evolved, and pivoted in the Supreme Court's decision in *Smith*, religious free exercise, generally, remains protected by the First Amendment, federal statutes, and courts alike. Although the Supreme Court's decision in *Smith* changed its analysis of Free

[165] *Id.*
[166] *Brooklyn Diocese*, 141 S. Ct. 63 (2020); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

Exercise religious exemptions, it nonetheless maintained the *Sherbert* strict scrutiny analysis for governmental "individualized assessments". Congress' action to overturn *Smith*, codified in the Religious Freedom Restoration Act, attempted to restore the *Sherbert* protections, but the Supreme Court's decision in *Boerne* reduced its application solely to federal laws. RFRA's impact proved far greater than the Supreme Court's interpretation of it; RFRA and *Boerne*, have now provided more religious protections than even before *Smith*. Today, federal employees claiming religious exemptions to federal vaccine mandates, have two separate bases to support religious exemption claims, of which courts will apply strict scrutiny to governmental actions; under both *Smith's* "individual assessment" and under RFRA, courts will apply strict scrutiny, forcing the government to prove a compelling governmental interest and that imposition of this interest is the least restrictive means. As vaccine mandates become an increasingly important, contentious, and changeable issue amid the Covid-19 pandemic, federal employees requesting religious exemptions will become more numerous. The vast number of exemptions in limbo presently will eventually come before a court. As time goes on, more will be known about how courts will address religious exemptions in light of the Covid-19 pandemic. For now, courts are left with what they do know—the Free Exercise Clause will forever be important, and the courts, as defenders of the Constitution, are tasked with the ever-important and necessary function of upholding the religious freedoms and protections our Founders so intelligently safeguarded.