NO. 22-10077 consolidated with NO. 22-10534

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

U.S. Navy SEALs 1-26; U.S. Navy Special Warfare Combatant Craft Crewmen 1-5; U.S. Navy Explosive Ordnance Disposal Technician 1; U.S. Navy Divers 1-3,

Plaintiffs-Appellees,

v.

Joseph R. Biden, Jr., in his official capacity as President of the United States of America; Lloyd Austin, Secretary, U.S. Department of Defense, individually and in his official capacity as United States Secretary of Defense; United States Department of Defense; Carlos Del Toro, individually and in his official capacity as United States Secretary of the Navy,

Defendants-Appellants.

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

BRIEF OF AMICI CURIAE MEMBERS OF CONGRESS

Amici Curiae are eight United States Senators and nineteen Members of the United States House of Representatives. Amici from the U.S. Senate are Sen. Ted Cruz (TX) – Senate Leader of Brief; Sen. Mike Lee (UT); Sen. James M. Inhofe (OK); Sen. James Lankford (OK); Sen. Steve Daines (MT); Sen. Roger F. Wicker (MS); Sen. Mike Braun (IN); and Sen. Roger Marshall (KS). Amici from the U.S. House of Representative are Rep. Mike Johnson (LA) – House Leader of Brief; Rep. Brian Babin, D.D.S. (TX); Rep. Jack Bergman (MI); Rep. Warren Davidson (OH); Rep. Scott DesJarlais (TN); Rep. Louie Gohmert (TX); Rep. Michael Guest (MS); Rep. Diana Harshbarger (TN); Rep. Ronny Jackson (TX); Rep. Doug LaMalfa (CA); Rep. Doug Lamborn (CO); Rep. Debbie Lesko (AZ); Rep. Thomas Massie (KY); Rep. Brian Mast (FL); Rep. Gregory Murphy, M.D. (NC); Rep. Ralph Norman (SC); Rep. Chip Roy (TX); Rep. Greg Steube (FL); and Rep. Daniel Webster (FL).

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AND NINETEEN U.S. REPRESENTATIVES

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IDENTITY OF AMICI, THEIR INTEREST IN THE CASE, AND SOURCE OF THEIR AUTHORITY TO FILE

A. **Identity of Amici**.

Amici Curiae are eight United States Senators and nineteen Members of the United States House of Representatives. Amici from the U.S. Senate are Sen. Ted Cruz (TX) – Senate Leader of Brief; Sen. Mike Lee (UT); Sen. James M. Inhofe (OK); Sen. James Lankford (OK); Sen. Steve Daines (MT); Sen. Roger F. Wicker (MS); Sen. Mike Braun (IN); and Sen. Roger Marshall (KS). Amici from the U.S. House of Representative are Rep. Mike Johnson (LA) – House Leader of Brief; Rep. Brian Babin, D.D.S. (TX); Rep. Jack Bergman (MI); Rep. Warren Davidson (OH); Rep. Scott DesJarlais (TN); Rep. Louie Gohmert (TX); Rep. Michael Guest (MS); Rep. Diana Harshbarger (TN); Rep. Ronny Jackson (TX); Rep. Doug LaMalfa (CA); Rep. Doug Lamborn (CO); Rep. Debbie Lesko (AZ); Rep. Thomas Massie (KY); Rep. Brian Mast (FL); Rep. Gregory Murphy, M.D. (NC); Rep. Ralph Norman (SC); Rep. Chip Roy (TX); Rep. Greg Steube (FL); and Rep. Daniel Webster (FL).

B. **Amici's Interest**.

First, as members of Congress, Amici have a strong interest in ensuring laws enacted by Congress—including, the Religious Freedom Restoration Act ("RFRA")—are interpreted in a manner consistent with their text and history. Second, Amici likewise have a strong interest in ensuring that the First Amendment,

which is RFRA's constitutional backdrop, is enforced with vigor. Third, members of Congress support and defend the Constitution of the United States against all enemies, foreign and domestic. This requires members to ensure that America's military is in position to robustly defend our national security. All these interests impel Amici to address the Court on the critical issues raised in this appeal, which implicate the fine-tuning and balancing of these interests with respect to members of the United States military, who serve such a critical role in the defense of our country.

C. **Source of Authority to File**.

Rule 29(a)(2), FED. R. APP. P., permits that "Any other amicus curiae [besides the United States or its officer or agency or a state] may file a brief only by leave of court or if the brief states that all parties have consented to its filing." Amici here qualify, as they have obtained such consent, and also have filed a motion for leave under Rule 29(a)(3), FED. R. APP. P., showing their interest and the reason their amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

STATEMENT UNDER RULE 29(a)(4)(E), FED. R. APP. P.

(i) No parties' counsel authored this brief in whole or in part;

(ii) No parties' counsel contributed money that was intended to fund preparing or submitting this brief; and

(iii) No person—other than the amici curiae or its counsel—contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

A. INTRODUCTORY STATEMENT.

No right is more precious than the right to religious liberty. That is why the very first clause of the very First Amendment explicitly states that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. CONST. amend. I. This amendment, case law, and Congress's passage of the Religious Freedom Restoration Act ("RFRA") all speak to the fact that, without entrenched, generally applicable, and judicially enforceable protections for religious liberty, lawmakers and government bureaucrats are prone to override sincere religious beliefs in favor of what they perceive to be the "greater good."[1]

This is precisely what is happening with Defendants' vaccine mandate. Plaintiffs' religious liberty and the government's asserted interest in protecting our service members from COVID-19 need not be in conflict, especially where, as here, the individuals seeking an exemption are willing to adopt non-vaccination measures to protect themselves and others from the spread of COVID-19. These interests are only in conflict because Defendants refuse to accommodate Plaintiffs' religious

[1] *See* Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 102d Cong. 340-341 (1993) (statement of Douglas Laycock, Professor of Law, University of Texas) ("No government bureaucrat admits that he is against religious liberty, but almost every government bureaucrat thinks his own program is so important that no religious exception can be tolerated.").

objections even as they accommodate those who will not receive the vaccine for non-religious reasons. This violates RFRA by substantially burdening Plaintiffs' free exercise of religion without a compelling interest, and violates the First Amendment's guarantee that government not discriminate against religion.

Congress passed RFRA for exactly this situation, namely, where the federal government exercises its power to substantially burden the free exercise of religion, without a compelling interest and without regard to less restrictive alternatives. This Court should enforce RFRA and the First Amendment's promise of the Free Exercise of religion by upholding the preliminary injunction to prevent Defendants from forcing service members to receive a vaccine against their sincerely held religious beliefs.

B. PRIOR SUPREME COURT RULINGS PROTECTING FREE EXERCISE OF RELIGION.

Prior to 1990, the Supreme Court held that "a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1890 (2021) (Alito, J., concurring). This standard, articulated in *Sherbert v. Verner*, 374 U.S. 398 (1963), robustly protected religious liberty against infringement—including against infringement by laws that advanced strong government interests.

In *Wisconsin v. Yoder*, for example, the Court applied this test to hold that a

law requiring children to remain in school until the age of sixteen violated the free-exercise rights of Amish parents. 406 U.S. 205, 234-36 (1972). Indeed, this standard was strong enough to protect religious liberty even when the exercise of that liberty could affect national defense. *See Thomas v. Review Bd. of Ind. Employ. Sec. Div.*, 450 U.S. 707, 709, 719 (1981) (holding unconstitutional a "State's denial of unemployment compensation benefits to . . . a Jehovah's Witness who terminated his job because his religious beliefs forbade participation in the production of armaments.").

C. CONGRESS'S PASSAGE OF RFRA.

After the Supreme Court in *Employment Division v. Smith* discarded the *Sherbert* test and instead held that the Free Exercise Clause tolerates infringements on religious liberty so long as the infringing law or policy is neutral and generally applicable, 494 U.S. 872, 885 (1990), Congress swiftly enacted RFRA to return to the American people their fundamental religious liberty protections. As the Supreme Court explained in *Hobby Lobby*, "Congress enacted RFRA in 1993 in order to provide *very broad protection* for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014) (emphasis added).

In RFRA, Congress's expressly stated purpose was not only to "restore the compelling interest test" from *Sherbert* and *Yoder*, but "to guarantee its application in *all* cases where free exercise of religion is substantially burdened." 42 U.S.C.

§2000bb(b)(1) (emphasis added). And it codified that standard in legislative text: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

This decision to subject laws infringing on religious liberty to the strictest scrutiny was overwhelmingly bipartisan. As the sponsor of an early version of RFRA stated, RFRA was produced by an "extraordinary ecumenical coalition in the Congress of liberals and conservatives, Republicans and Democrats, Northerners and Southerners, and in the country as a whole, a very broad coalition of groups that have traditionally defended . . . the various religious faiths . . . as well as those who champion the cause of civil liberties." Religious Freedom Restoration Act of 1990: Hearing before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 101st Cong. 13 (1991) (statement of Rep. Solarz, chief sponsor of H.R. 5377). This bipartisanship was evident in the fact that the bill passed out of the House by voice vote and passed the Senate with 97 votes in favor and only 3 in opposition. H.R. Res.1308, 103rd Cong. (1993).

D. DEFENDANTS' ACTIONS VIOLATE RFRA.

Defendants' policies mandating that Plaintiffs be vaccinated in violation of their sincerely held religious beliefs does not come close to satisfying the strictest

scrutiny Congress demands in RFRA. Defendants' vaccine mandate forces Plaintiffs—individuals who have devoted their lives to the protection of the country—to choose between following their sincerely held religious convictions and effectively being discharged, losing their calling, and destroying their financial well-being. *See Burwell*, 573 U.S. at 720 (holding that a mandate substantially burdened the exercise of religion where the exercise of religion would result in "severe" "economic consequences"); *see also Sherbert*, 374 U.S. at 404 (substantial burden exists where a law forces a choice "between following the precepts of [one's] religion and forfeiting benefits" or between "abandoning one of the precepts of [one's] religion in order to accept work").

Defendants force this choice even though there is no compelling interest in requiring these specific Plaintiffs to receive the vaccine. The development of the COVID-19 vaccine no doubt was a significant and important step in combatting the spread of COVID-19. The Navy, however, has already admitted that not *every* single person must be vaccinated, as it exempted from the vaccine mandate individuals with medical issues as well as individuals who took a placebo vaccine as part of medical trials. Because accommodations can be made for these individuals, there is no compelling interest in forcing Plaintiffs and other individuals with sincere religious objections to violate their core beliefs by receiving the vaccine.

Even if there were a compelling interest in demanding vaccinations for

religious individuals while allowing exemptions for secular individuals as part of a COVID-19 risk mitigation strategy—and, to be sure, there is not—vaccinations are not the only way to mitigate COVID-19 risk. Plaintiffs here have all agreed to take other steps to stop the spread of the disease in lieu of vaccination, as, presumably, would all service members seeking religious accommodation—mitigation strategies that worked for more than a year before vaccinations became widely available.

The question, then, is simply whether the government should have to adopt a different but similarly effective COVID-19 mitigation strategy with regard to these Plaintiffs if doing so will protect their religious liberty. Thankfully, Congress expressly answered that question in the affirmative in RFRA by prohibiting any substantial infringement on religious liberty unless it is the "*least* restrictive" means of furthering the government interest. 42 U.S.C. § 2000bb-1(b) (emphasis added).

E. DEFENDANTS' ACTIONS VIOLATE THE FIRST AMENDMENT.

Even if Congress had never passed RFRA to protect religious liberty, Defendants' mandate would still be unlawful because it violates the First Amendment. "The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 542 (1993)).

Religious freedom is fundamental to every American's liberty, but in recent years there has been increasing hostility among elected and appointed government officials toward those who seek to exercise that freedom. In *Masterpiece Cakeshop*, for example, the Supreme Court found that a Colorado commission demonstrated "elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated [an individual's] objection" to a state law. *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1729 (2018). In *Fulton*, the Court held that the City of Philadelphia violated the First Amendment by seeking to enforce a policy that discriminated against Catholic Social Services. *Fulton*, 141 S. Ct. at 1882. And the Supreme Court enjoined a California law ostensibly aimed to mitigate the spread of COVID-19 because it impermissibly "treat[ed] some comparable secular activities more favorably than at-home religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021).

That same hostility to religion is on display with Defendants' mandate. Defendants could easily accommodate Plaintiffs and similarly-situated religious individuals given that Defendants are already accommodating individuals with medical issues or those who received placebos in clinical trials. They have simply chosen not to do so. But as the Supreme Court has made clear: "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without a compelling reason." *Fulton*, 141 S.

Ct. at 1877 (quoting *Smith*, 494 U.S. at 884). Defendants' position that a vaccine exemption combined with non-invasive precautions are sufficient for secularly exempt individuals, but insufficient for service members who simply seek to adhere to their sincerely-held religious beliefs, is an unambiguous violation of the First Amendment.

The government has suggested that because over 3,000 service members have requested religious accommodations, this somehow absolves them of the need to make religious exemptions. But it would be a perverse rule whereby the greater the number of affected religious persons, the less secure their religious freedom. As Justice Gorsuch recently explained in a dissent from the Supreme Court's denial of an application for emergency injunctive relief, the "general applicability test doesn't turn on that kind of numbers game." *Dr. A. v. Hochul*, 142 S. Ct. 552, 556 (Gorsuch, J., dissenting). "Laws operate on individuals; rights belong to individuals. And the relevant question here involves a one-to-one comparison between the individual seeking a religious exemption and one benefiting from a secular exemption." *Id*. Even indulging the government's premise, a greater number of persons suffering a constitutional deprivation would seemingly counsel in *favor* of granting relief. This Court should not be dissuaded from vindicating the sincerely held religious beliefs of American service members on the basis of how many people seek such relief.

F. CONCERN FOR MILITARY READINESS DOES NOT OVERRIDE RFRA AND FIRST AMENDMENT PROTECTIONS.

There is no reason why this Court should shirk from its duty "to say what the law is" simply because case involves military readiness. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Acknowledging Justice Kavanaugh's concurring opinion,[2] Amici respectfully submit that this concurrence misstates the deference afforded the military chain of command under circumstances where Congress has clearly spoken on the issue. In *Dep't of Navy v. Egan*, 484 U.S. 518 (1988), the Court, though noting the traditional deference to the President in foreign policy matters, *id*. at 529-30, specifically applied the caveat, "*unless Congress specifically has provided otherwise*...." *Id*. at 530 (emphasis added). The Court then went through a statutory analysis to determine that Congress had *not* "provided otherwise" in that case. *Id*. at 530-32. The Court further noted that the employee in question would *not* have had "greater procedural protections" under the avenue he argued for. *Id*. at 533. As a result, *Egan* does not hold that in any instance where the Executive Branch deals with matters pertaining to the military it may freely countermand express rights specifically granted by Congress without further analysis. Indeed, the Court in *Egan*

[2] *Austin v. U. S. Navy Seals 1-26*,, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J., concurring). Amici note that a concurring opinion by a Supreme Court Justice is not binding precedent. *See Maryland v. Wilson*, 519 U.S. 408, 412-13 (1997) ("We agree with respondent that the former statement was dictum, and the latter was contained in a concurrence, so that neither constitutes binding precedent.").

noted at the very outset that it was deciding a "narrow question" regarding a "decision to deny or revoke a security clearance." *Id*. at 923-24. In this case, Congress has specifically provided for RFRA to apply to the military. As Justice Alito points out, Defendants do not claim that Article II imperatives absolve the Navy's chain of command from complying with RFRA, and concede that the statute applies to the military. *Austin*, 142 S. Ct. at 1304 (2022) (Alito, J., dissenting). Therefore, as acknowledged by the Defendants themselves, RFRA—and its demand of narrow tailoring and its demonstration of a compelling government interest—governs this case.

Justice Kavanaugh also cites to *Gilligan v. Morgan*, 413 U.S. 1 (1973), restating *Gilligan*'s reasoning that the "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments." *Austin*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring). But *Gilligan* holds these professional military judgments are always subject to civilian control of the Legislative and Executive Branches. *Gilligan*, 413 U.S. at 10. To hold that military judgement is never subject to legislative oversight flouts the Constitution. *Chappell v. Wallace*, 462 U.S. 296, 301 (1983) ("It is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment."). Moreover, *Gilligan* specifically noted that the case did not

involve—unlike the case here— "an action seeking a restraining order against some specified and imminently threatened unlawful action." *Id*. at 5. The Court also noted that in that circumstance it was deferring to *both* political branches, Congress and the Executive, as opposed to resolving a matter of conflict *between* those branches. Finally, and most tellingly, the Court concluded by saying "we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages *or injunctive relief*. We hold *only* that no such questions are presented in this case." *Id*. at 11-12 (emphasis added). Thus, *Gilligan* also does not deprive this Court of judicial power to grant injunctive relief.

Finally, Justice Kavanaugh cites to *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Contrary to sustaining the actions of the Executive Branch in this case, *Youngstown* clearly holds that the activity in question was subject to *legislation by Congress*, and ***not*** the prerogative of the President, and that this rule applied *even in the event of a perceived national emergency*. *Id*. at 587-89. "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times." *Id*. at 589. Consequently, *Youngstown* authorizes the judiciary to determine whether the actions of the military authorities (the Executive Branch) are consistent or inconsistent with RFRA, the law that Congress has

adopted.

In short, Defendants' insistence that an injunction would interfere with military functions and "intrude into the management of the military" does not defeat this Court's responsibility to apply RFRA to the issues presented. While some amount of deference may be owed to military leaders when analyzing the government's interests in First Amendment and RFRA claims, courts do not abandon their duties whenever it is the military, rather than some other arm of government, invading religious liberty rights. *See, e.g.*, *Singh v. McHugh*, 109 F. Supp. 3d 72, 88-90 (D.D.C. 2016) (holding that the Army's refusal to grant a Sikh student a requested religious exemption violated RFRA); *see also Holt v. Hobbs*, 574 U.S. 352, 358 (2015) (applying RFRA in the sensitive context of prisons).

Indeed, the impact on the military and national security strongly counsels *in favor of* upholding the preliminary injunction. The mandate sidelines the deployment of soldiers on whose service America relies. If this mandate (as currently being applied or threatened) is not enjoined, these Plaintiffs cannot fulfill their pledge to serve and defend their country, even though, based upon their training and experience, these Plaintiffs, as well as others similarly situated, are some of the nation's most qualified, equipped, and fearless service members. The men and women of the Armed Forces have fought to protect the freedoms that every American, regardless of belief, enjoys. Now they ask this Court to protect their

religious freedom from encroachment by the very government they have sworn to protect with their lives.

If Defendants' mandate is allowed to stand without realistically obtainable religious exemptions for America's service members, it could create significant consequences for our military's future readiness. Every year, young men and women of faith across this country bravely choose to join America's fighting forces. They do so believing that they may simultaneously serve their country and their God. The mandate at issue, however, sends a strong signal to these young men and women that they must choose between their faith and their desire to protect America because the military will not reasonably accommodate their sincerely held religious beliefs.[3] If the mandate stands, it is likely, then, that it will be more difficult for the military to recruit highly-qualified individuals of faith to serve—a consequence that is wholly unnecessary, damaging to the military's morale, and damaging to American national security.

CONCLUSION

Amici respectfully urge this Court to enforce RFRA, enforce the First Amendment's guarantee of the Free Exercise of religion, and protect America's

[3] *Cf. Doster v. Kendall*, __ F. Supp. 3d __, 2022 WL 982299, 2022 U.S. Dist. LEXIS 59381, at *53 (S.D. Ohio Mar. 31, 2022) ("enforcement of this vaccine mandate would take this American hero and his other patriots and discharge them from their hard-earned duty stations"), *appeal filed*, No. 22-3497 (6th Cir. May 31, 2022).

armed service members by affirming the preliminary injunction.

Respectfully submitted,

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ATTORNEYS FOR AMICI, EIGHT U.S. SENATORS AND NINETEEN U.S. REPRESENTATIVES

CERTIFICATE OF SERVICE

On August 29th, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1.

/s/ Thomas S. Brandon, Jr.
Thomas S. Brandon, Jr.

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of FED. R. APP. P. 29(a)(5) and 32(a)(7)(B)(i) and the type-volume limitation of the Court's June 9, 2022 briefing schedule because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), this document contains 3,541 words.

This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word Version 2108 (Microsoft 365 Apps) (the program used for the word count) in 14 point Times New Roman type style.

/s/ Thomas S. Brandon, Jr.
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No. 22-10077 U.S. Navy SEALs 1-26 v. Biden
USDC No. 4:21-CV-1236
USDC No. 4:21-CV-1236

Dear Mr. Brandon,

You must electronically file a "Form for Appearance of Counsel" within 14 days from this date. You must name each party you represent, see **FED. R. APP. P.** 12(b) and **5TH CIR. R.** 12 & 46.3. The form is available from the Fifth Circuit's website, www.ca5.uscourts.gov. If you fail to electronically file the form, the brief will be stricken and returned unfiled.

We received your Motion to File Brief Amicus curiae. A motion is not necessary as the Amicus Parties is a government entity, no action will taken on the motion.

Sincerely,

LYLE W. CAYCE, Clerk

Roeshawn Johnson

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Roeshawn Johnson, Deputy Clerk
504-310-7998

cc: Mr. Michael Berry
Mr. Justin E. Butterfield
Mr. Talmadge Butts
Ms. Sarah Wendy Carroll
Ms. Sarah Jane Clark
Ms. Deborah Jane Dewart
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Mr. Hiram Stanley Sasser III
Mr. Charles Wylie Scarborough
Mr. Kelly J. Shackelford
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NO. 22-10077 consolidated with NO. 22-10534

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Defendants-Appellants.

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MOTION OF AMICI CURIAE FOR LEAVE TO FILE BRIEF

A. **Identity of Amici**.

Amici Curiae are eight United States Senators and nineteen Members of the United States House of Representatives. Amici from the U.S. Senate are Sen. Ted Cruz (TX) – Senate Leader of Brief; Sen. Mike Lee (UT); Sen. James M. Inhofe (OK); Sen. James Lankford (OK); Sen. Steve Daines (MT); Sen. Roger F. Wicker (MS); Sen. Mike Braun (IN); and Sen. Roger Marshall (KS). Amici from the U.S. House of Representative are Rep. Mike Johnson (LA) – House Leader of Brief; Rep.

Brian Babin, D.D.S. (TX); Rep. Jack Bergman (MI); Rep. Warren Davidson (OH); Rep. Scott DesJarlais (TN); Rep. Louie Gohmert (TX); Rep. Michael Guest (MS); Rep. Diana Harshbarger (TN); Rep. Ronny Jackson (TX); Rep. Doug LaMalfa (CA); Rep. Doug Lamborn (CO); Rep. Debbie Lesko (AZ); Rep. Thomas Massie (KY); Rep. Brian Mast (FL); Rep. Gregory Murphy, M.D. (NC); Rep. Ralph Norman (SC); Rep. Chip Roy (TX); Rep. Greg Steube (FL); and Rep. Daniel Webster (FL).

B. **Movants' Interest**.

First, as members of Congress, Amici have a strong interest in ensuring laws enacted by Congress—including, as relevant here, the Religious Freedom Restoration Act ("RFRA")—are interpreted in a manner that is consistent with their text and history. Second, Amici likewise have a strong interest in ensuring that the First Amendment, which is RFRA's constitutional backdrop, is enforced with vigor. Third, members of Congress support and defend the Constitution of the United States against all enemies, foreign and domestic. This requires members to ensure that America's military is in position to fully and robustly defend our national security. All these interests impel Amici to seek to address the Court on the critical issues raised in this appeal, which implicate the finetuning and balancing of these interests with respect to members of the United States military, who serve such a critical role in the defense of our country and are particularly worthy of full

protection of our laws and Constitution, which Amici are sworn to protect and uphold.

C. **Desirability and Relevance of Amici Brief**.

As stated recently by Judge Ho in granting an *opposed* motion for leave to file an amici brief by three retired federal judges,

> courts should welcome amicus briefs for one simple reason: "[I]t is for the honour of a court of justice to avoid error in their judgments." *The Protector v. Geering*, 145 Eng. Rep. 394 (K.B. 1686). As Judge Higginbotham wrote in his *American College of Obstetricians* dissent, "even in a court as learned as ours, we might be able to avoid some unnecessary catastrophes if we have the will and the patience to listen." 699 F.2d at 647. Then-Judge Alito put it this way: "[A]n amicus who makes a strong but responsible presentation in support of a party can truly serve as the court's friend." *Neonatology Associates*, 293 F.3d at 131. ***
>
> Besides which, "[i]f an amicus brief that turns out to be unhelpful is filed, the merits panel, after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief." *Neonatology Associates*, 293 F.3d at 133. "On the other hand, if a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance." *Id*. So we would be "well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted." *Id*.

Lefebure v. D'Aquilla, 15 F.4th 670, 675, 676 (5th Cir. 2021).

As members of the United States Congress, Amici have a particularized posture to opine as to how legislation adopted by that Congress should be construed. Certainly, also Amici are daily constrained to follow the Constitution of the United States in their deliberations respecting adopting legislation, and hence have a

especial perspective in that regard beyond that of laymen. Consequently, Amici respectfully submit that their unique understanding and argument relating to the key issues of constitutional and statutory analysis which is at issue in this case is both relevant and desirable, insofar as being of assistance in resolving the critical questions of the rights and protections afforded to the esteemed men and women of our Armed Services by our Constitution, and also the laws adopted by the Congress of which Amici are members, both of which Amici are sworn to protect and uphold.

WHEREFORE, Amici respectfully ask the Court to grant them leave to file the Brief of Amici Curiae Members of Congress submitted herewith.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that on August 23rd, 2022, I exchanged emails with one of the attorneys for the Appellants, namely, Cason Ross, with the Department of Justice, concerning the filing the Brief of Amici Curiae Members of Congress, which is submitted with this Motion in accordance with Rule 29, FED. R. APP. P., who advised that the Appellants did not oppose the timely filing of the said Brief. I also conducted a telephone conference on August 23rd, with one of the attorneys for the Appellees, namely, Mike Berry, who likewise advised that Appellees did not oppose the filing of said Brief.

/s/ Thomas S. Brandon, Jr.
Thomas S. Brandon, Jr.

CERTIFICATE OF SERVICE

On August 29th, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1.

/s/ Thomas S. Brandon, Jr.
Thomas S. Brandon, Jr.

CERTIFCATE OF COMPLIANCE

This document complies with the word limit of FED. R. APP. P. 27(d)(2)(A) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), this document contains 749 words.

This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word Version 2108 (Microsoft 365 Apps) (the program used for the word count) in 14 point Times New Roman type style.

/s/ Thomas S. Brandon, Jr.
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