IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GOVERNOR GREG ABBOTT, in his official capacity as Governor of the State of Texas,

and

GOVERNOR MIKE DUNLEAVY, in his official capacity as Governor of the State of Alaska,
Plaintiffs,

v.

JOSEPH R. BIDEN, in his official capacity as President of the United States, *et al.*,
Defendants.

No. 6:22-cv-3-JCB

DEFENDANTS' STATUS REPORT

Defendants previously requested, and the Court granted, an extension of the deadline to file a status report until October 11, 2023, the date after the deadline to file a petition for certiorari. ECF No. 61. The Department of Justice has decided not to seek Supreme Court review of the Fifth Circuit's decision in *Abbott v. Biden*, 70 F.4th 817 (5th Cir. 2023). Consistent with 28 U.S.C. § 530D, the Solicitor General advised the House of Representatives of the Department's decision in a letter dated September 27, 2023. A copy

of that letter is attached to this report. *See* Sept. 27, 2023 Ltr. E. Prelogar to K. McCarthy, attached as Ex. A.

Defendants now submit this status report, which addresses the issues raised in the Court's Order from August 30, 2023, ECF No. 58.

Question 1: If Plaintiffs still desire to seek prospective relief in this case, the most efficient course of action is to proceed directly to summary judgment and then to final judgment. Defendants see no reason to litigate preliminary relief separate from permanent relief.

Question 2: Since this case involves review of an administrative action, Defendants do not believe that a trial on the merits is necessary or appropriate, as this case should be decided at summary judgment on the administrative record. Defendants propose a schedule similar to their previous proposal, which provided for the production of an administrative record and briefing on summary judgment. *See* ECF No. 53.

Defendants understand that Plaintiffs are challenging the following agency actions: August 24, 2021 Secretary of Defense Memorandum (Am. Compl., Ex. 1); November 30, 2021 Secretary of Defense Memorandum (Am. Compl., Ex. 4); December 7, 2021 Secretary of the Air Force Memorandum (Am. Compl., Ex. 5); Army Order dated September 14, 2021 (Am. Compl. ¶ 59); and Army Order dated December 14, 2023 (Am. Compl. ¶ 60).

Defendants anticipate being able to produce an administrative record for those actions within 30 days of confirmation by Plaintiffs that these are the agency actions challenged in this case. If Plaintiffs challenge any other agency decisions, and assuming that Defendants agree that the actions identified by Plaintiffs are final agency actions and within the scope of the lawsuit, Defendants will expeditiously work to compile those records.

Defendants propose the following briefing schedule:

- 30 days after Administrative Record is served, parties file cross-motions for summary judgment, not to exceed 30 pages.
- 21 days later, parties file cross-responses, not to exceed 30 pages.
- 14 days later, parties file cross-replies, not to exceed 15 pages.

Question 3: The interpretation of the Constitution is a pure question of law. The Court can decide the meaning of the Militia Clauses based on traditional analysis of the text, contemporaneous reference materials (like dictionaries), and judicial decisions interpreting those provisions. The Court does not need to hear testimony from historical or linguistical experts.

Question 4: Defendants expect that parties' cross-motions and this court's final judgment may address legal questions that have not been resolved by the Fifth Circuit's opinion.

Question 4(a): Plaintiffs' APA claims do not implicate the provisions cited in Section III.A. of the Fifth Circuit's opinion. *See Abbott v. Biden*, 70 F.4th 817, 825–26 (5th Cir. 2023) (citing (5 U.S.C. § 553(a)(1) and 5 U.S.C. § 554(a)(4)). Plaintiffs bring APA claims under 5 U.S.C. § 706, arguing that the agency actions were arbitrary and capricious or otherwise contrary to law. *See* Am. Compl, Counts IV, V, and VI. Defendants do not understand Plaintiffs to challenge agency actions for alleged failure to comply with the rulemaking requirements of § 533(a)(1) or adjudication requirements of § 554(a)(4). Defendants reserve the right to challenge the justiciability of any APA claim on other grounds.

Question 4(b): It is not clear that the court of appeals actually decided a question concerning the constitutionality of the statutory provisions that it briefly mentioned. *Abbott*, 70 F. 4th at 844–45 (discussing 32 U.S.C. §§ 108, 322–24, 501–02). Plaintiffs' complaint does not challenge the constitutionality of any statute, and instead the complaint challenges agency action—Secretary of Defense memoranda and other orders—as purportedly inconsistent with federal law and the Constitution. *See* Am. Compl. ¶ 62.

Should Plaintiffs seek to challenge the constitutionality of any statute, they should file an amended complaint clearly identifying what statutes they seek to challenge and identify the basis for those constitutional challenges. The notice requirements of Rule 5.1 of the Federal Rules of Civil Procedure do not apply to this case because "the United

States, one of its agencies, or one of its officers or employees in an official capacity" is a party in this case. Fed. R. Civ. P. 5.1(a)(1)(A). As the United States Department of Justice is already participating in these proceedings, Rule 5.1 does not place any limit on the Court's ability to enter final judgment in this case.

Question 4(c): The Court may need to decide the question of whether "the Texas National Guard or Alaska National Guard is the entirety of that State's 'militia,' within the meaning of the Constitution, as opposed to merely a subset of that State's militia." Aug. 20, 2023 Order.

Since the beginning of the Republic, Congress has used the term "militia" to refer to a broad group of people. *See* Act of 1792, § 1, (defining the militia as "each and every free able-bodied white male citizen of the respective states, residents therein, who is or shall be the age of eighteen years, and under the age of forty-five years").

That general understanding persists today and now encompasses, but is not limited to, members of the National Guard. *See* 10 U.S.C. § 246(a) ("The militia of the United States consists of all able-bodied males at least 17 years of age . . . and under 45 years of age who are . . . citizens of the United States and of female citizens of the United States who are members of the National Guard."); *id*. § 246(b) ("the organized militia [] consists of the National Guard and the Naval Militia" and "the unorganized militia [] consists of the members of the militia who are not members of the National Guard or the Naval Militia").

Question 4(d): The Secretary of Defense has rescinded the COVID-19 vaccination requirement. "Plaintiffs must maintain their personal interest in the dispute at all stages of litigation." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). Plaintiffs should therefore identify precisely what prospective relief they continue to seek in this matter that has not already been rendered moot by the rescission. The Fifth Circuit's decision did not consider the National Guard Bureau's implementation of the rescission, and thus did not resolve whether Plaintiffs still have a live controversy in light of that implementation. *See* Jan. 18, 2023 National Guard Bureau Memo, available at https://www.pec.ng.mil/MediaShare/Documents/CNGBReturnToDutyMemo.pdf

Question 4(e): The Court may need to decide whether Congress's power to "govern[]" the part of the Militia "as may be employed in the Service of the United States" applies to all members of reserve components of the United States Armed Forces, including those members of Texas and Alaska national guard.

Question 4(f): The Court may need to study the holding in *Perpich v. Department of Defense*, particularly that Militia Clauses supplement—rather than restrict—other grants of congressional power in the Constitution. 496 U.S. 334, 344 (1990) ("the plenary power to raise armies was 'not qualified or restricted by the provisions of the militia clause.'" (citing *Cox v. Wood*, 247 U.S. 3 (1918)).

Date: October 11, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 11, 2023, this document was filed through the Court's CM/ECF system, which automatically serves all counsel of record.

/s/ Zachary A. Avallone

Exhibit A

U.S. Department of Justice
Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

September 27, 2023

The Honorable Kevin McCarthy
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Re: *Abbott* v. *Biden*, 70 F.4th 817 (5th Cir. 2023) (No. 22-40399)

Dear Speaker McCarthy:

Consistent with 28 U.S.C. 530D, I write to advise you that the Department of Justice has decided not to seek Supreme Court review of the above-referenced decision of the United States Court of Appeals for the Fifth Circuit. A copy of the decision is attached.

1. This case involves a challenge to the now-rescinded COVID-19 vaccination requirement implemented by the Department of Defense. In August 2021, after the Food and Drug Administration approved the first COVID-19 vaccine, the Secretary of Defense directed that vaccination against COVID-19 would be added to the list of vaccines required for servicemembers, including members of the Army and Air National Guard of the United States whose members are concurrently members of their respective State organized militias. In January 2022, Governor Abbott filed suit, challenging the vaccination requirement's application to members of the Texas National Guard as violating, *inter alia*, the Militia Clauses of the Constitution, Art. I, § 8, Cls. 15, 16. The district court denied Governor Abbott's subsequent request for a preliminary injunction, finding that he was unlikely to succeed on the merits of his constitutional claim. Governor Abbott appealed.

After the court of appeals heard oral argument but before it issued its decision, Congress enacted and the President signed into law the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (NDAA), Pub. L. No. 117-263, 136 Stat. 2395. The NDAA directed the Secretary of Defense to rescind, within 30 days, "the mandate that members of the Armed Forces be vaccinated against COVID-19." *Id.* at 2571. The Secretary promptly did so.

The government then filed a supplemental letter brief with the court of appeals, arguing that the appeal of the district court's denial of a preliminary injunction was moot because Governor Abbott had sought to enjoin a military directive that no longer existed, and because he requested

only prospective relief. The court of appeals rejected that argument, holding that the Secretary's rescission of the COVID-19 vaccination requirement as required by Congress in the NDAA did not moot the appeal because the Secretary "reserved the ability to punish Guardsmen who didn't seek a religious, administrative, or medical accommodation while the mandate was operative." Op. 8-9.

In reviewing the merits of Governor Abbott's constitutional claim, the court of appeals first observed that members of the National Guard sometimes act in a state militia capacity, and at other times act in a federal capacity (for example, when they are "call[ed] * * * into federal service," which is commonly known as being "federalized"). Op. 2-3. The military readiness requirement to take the COVID-19 vaccine applied to all members of the National Guard, including those who had not been called into federal service. The Secretary of Defense had directed the Army and Air Force to create policies and implementation guidance to address the failure of non-federalized National Guard members to maintain the Department of Defense military readiness requirements by remaining unvaccinated. See Op. 6, 26. The court found that the Secretary had indicated that members of the National Guard who did not comply with the vaccination requirement could potentially be subject to four consequences: (1) discharge from the National Guard; (2) a prohibition on participating in drills, training, and other duties; (3) withholding of federal pay for such activities; and (4) court-martial. Op. 26.

The court of appeals "acknowledge[d]" that the United States "can set readiness requirements for non-federalized Guardsmen by dint of the 'disciplining' power" under the Militia Clauses of the Constitution and that Governor Abbott had "stipulate[d]" that the vaccination requirement "was one such readiness requirement." Op. 25-26. But based on its reading of the Militia Clauses, Op. 13-25, the court determined that the government was barred from taking any of the four actions mentioned above against a member of the National Guard who had not been called into federal service, Op. 25-26.

In reaching that conclusion, the court of appeals noted that "the Government point[ed] to 32 U.S.C. §§ 322–24 to justify its authority to withdraw Guardsmen's federal recognition and discharge them; to §§ 501–02 for its authority to prohibit Guardsmen from participating in drills, training, and other duties; and to § 108 for its authority to withhold pay from individual Guardsmen." Op. 44. In the court's view, it was "unclear that the Government has the best reading of these statutes." *Ibid.* But the court stated that, "in any event, * * * [r]egardless of whether the Government's reading of these statutes is correct, the Constitution forbids President Biden from bypassing the States, stepping into Governor Abbott's shoes, and directly governing Texas's non-federalized militiamen." Op. 44-45.

2. It is not clear that the court of appeals actually decided a question concerning the constitutionality of the statutory provisions to which it briefly referred. Under the circumstances, however, I thought it appropriate to advise you of the court's decision and the Justice Department's determination concerning further review.

As an initial matter, the Department of Justice disagrees with the court of appeals' decision to express a view on any constitutional issue in this important context of military readiness, because the district court had denied a preliminary injunction and the COVID-19 vaccine

requirement was rescinded as required by the NDAA. Those developments materially changed the circumstances underlying the appeal.

The Department of Justice continues to believe—and Governor Abbott and the court of appeals agreed—that the Secretary of Defense has the authority to adopt vaccination and other military readiness requirements that are applicable to members of the National Guard of the United States who have not yet been called into federal service. The Secretary has the authority to do so because such servicemembers are members of the reserve of the Army and the Air Force and must be in a state of readiness if the need for federal service arises. As Congress has recognized, it is "essential that the strength and organization" of the National Guard "be maintained and assured at all times." 32 U.S.C. 102.

The Department of Justice also maintains the position that the statutory framework governing the National Guard permits the military to discharge or withdraw federal recognition of an individual member of the National Guard who has not yet been called into federal service based on that member's failure to comply with federal military readiness requirements and to take other appropriate measures to ensure readiness. That is so because such an individual, regardless of whether he has been federalized, has enlisted in the National Guard of the United States, independent of any concurrent membership in a state militia. The Department of Justice further maintains that such actions are consistent with the Militia Clauses of the Constitution. The Department of Justice therefore believes that the Department of Defense continues to have the authority to adopt and ensure compliance with requirements like the COVID-19 vaccine and other vaccine requirements, short of calling National Guard members into federal service. And the Department of Justice will continue to defend the constitutionality of such measures and, as necessary, challenge the Fifth Circuit's decision in this case in the future.

But, in the Department of Justice's view, filing a petition for a writ of certiorari in the present circumstances is unwarranted. Because the COVID-19 vaccine requirement has been rescinded, the decision does not interfere with the implementation of any current Defense Department readiness policy. And the Department of Defense is not presently subject to any injunction in this case. Rather, after finding that Governor Abbott was likely to succeed on the merits, the court of appeals remanded the case for the district court to consider the remaining factors that Governor Abbott would have to establish in order to obtain an injunction, in light of the fact that "the situation is materially different now than it was when the district court first considered Governor Abbott's preliminary injunction motion." Op. 46. The potential mootness question, and the related question concerning the appropriateness of awarding any equitable relief in these circumstances, likewise counsel against further review at this time.

A petition for a writ of certiorari in this case would be due, after one extension of time, on October 10, 2023. Please let me know if we can be of any further assistance in this matter.

Sincerely,

Elizabeth B. Prelogar
Solicitor General

Enclosure