

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,**

Plaintiff,

and

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

v.

**JOSEPH R. BIDEN, in his official capacity as
President of the United States;
DEPARTMENT OF DEFENSE; LLOYD AUSTIN,
in his official capacity as Secretary of the
Defense; DEPARTMENT OF THE AIR FORCE;
FRANK KENDALL III, in his official capacity
as Secretary of the Air Force; DEPARTMENT
OF THE ARMY; and CHRISTINE WORMUTH,
in her official capacity as Secretary of the
Army,**

Defendants.

No. 6:22-cv-3-JCB

GOVERNOR ABBOTT'S MOTION FOR PRELIMINARY INJUNCTION

Governor Greg Abbott is the commander-in-chief of Texas's militia. His orders to the Texas National Guard reflect a firm resolve that COVID-19 vaccination must always be voluntary. President Joe Biden thinks COVID-19 vaccines should instead be mandatory, and he is now trying to impose his will on members of the Texas National Guard.

But President Biden is not the commander-in-chief of Texas’s Guardsmen, because he has not federalized the Texas National Guard in accordance with the U.S. Constitution and Title 10 of the U.S. Code. As long as President Biden is not willing (or able) to take that formal step, he and his subordinates have no constitutional or statutory authority to control, punish, or discharge non-federalized Guardsmen. The Second Militia Clause leaves the “governing” to the Governor until his Guardsmen are lawfully federalized. U.S. Const. art. I, § 8, cl. 16.

This Court should enjoin the Biden Administration’s attempt to commandeer Governor Abbott’s commander-in-chief power. That lawless shortcut would undermine the chain of command, blur the lines of accountability, and hollow out the Texas National Guard in a way that puts all Texans at risk. A preliminary injunction is needed to prevent these imminent and irreparable harms to Governor Abbott and the sovereign State he serves.

FACTUAL BACKGROUND

I. Structure and Command of the National Guard

“The National Guard is the modern Militia reserved to the States by [the First and Second Militia Clauses] of the Constitution.” *Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46 (1965) (citing U.S. Const. art. I, § 8, cl. 15–16). In Texas, Governor Abbott is the “Commander-in-Chief of the military forces of the State, except when they are called into actual service of the United States.” Tex. Const. art. IV, § 7. Charged as he is with “faithfully execut[ing]” the laws of Texas as “the Chief Executive Officer of the State,” Governor Abbott often “call[s] forth the militia,” especially the Texas National Guard, to fulfill his constitutional duties. Tex. Const. art. IV, §§ 1, 7, 10.

Governor Abbott’s chain of command runs through his appointee, Major General Tracy Norris, who serves as the Adjutant General of Texas. *See* Tex. Govt. Code §§ 437.001(2), 437.003(a). General Norris heads the Texas Military Department. *See id.* § 437.052(a). The Texas

Military Department, in turn, houses the Texas National Guard, which comprises the Texas Army National Guard and the Texas Air National Guard. *See id.* § 437.001(13)–(15).¹

Every member of the Texas National Guard swears a dual oath to “obey the orders of the President . . . and of the Governor,” depending on who is in charge at the time. 32 U.S.C. §§ 304, 312. Moreover, “all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States,” which is a reserve component of the federal military. *Perpich v. Dept. of Defense*, 496 U.S. 334, 345 (1990); *see also* 10 U.S.C. § 12107; 32 U.S.C. § 102. The Texas National Guard can thus be described as “a hybrid state-federal organization, for the Governor remains in charge of the National Guard in each state except when the Guard is called into active federal service.” *Holdiness v. Stroud*, 808 F.2d 417, 421 (5th Cir. 1987); *cf. Perpich*, 496 U.S. at 348 (noting various “hats” a Guardsman wears).

A Guardsman can serve in one of three capacities: (1) state active duty status that is both state-funded and under state command; (2) full- or part-time National Guard duty that is federally funded but still under state command, pursuant to Title 32 of the U.S. Code; or (3) full-time federal service under federal command, after being “federalized” in accordance with Title 10 of the U.S. Code. Whether Guardsmen can be federalized is ultimately up to Congress, which has been empowered by the First Militia Clause “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” U.S. Const. art. I, § 8, cl. 15. In turn, Congress has set forth terms on which the President can federalize Guardsmen, sometimes obliging him to secure gubernatorial consent. *See, e.g.*, 10 U.S.C. § 12301.

For so long as they remain federalized, Guardsmen serve under the command of the President, who is “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, *when called into the actual Service of the United States.*” U.S. Const. art. II, § 2

¹ The Texas Military Department also houses the Texas State Guard, a volunteer military force that performs community-service and emergency-response functions. *See* Tex. Govt. Code § 437.001(16). Its members have no federal duty obligations, serve only the Governor, and are not at issue in this case. *See id.* §§ 437.205(b), 437.303, 437.307; *see also* 32 U.S.C. § 109(c). For purposes of this motion, therefore, the word “Guardsmen” refers solely to members of the Texas National Guard.

(emphasis added). At all other times, however, Texas’s non-federalized Guardsmen look to the Governor as their commander-in-chief. *See Maryland ex rel. Levin*, 381 U.S. at 47; *Holdiness*, 808 F.2d at 421; Tex. Const. art. IV, § 7. The power of “governing” non-federalized Guardsmen implicitly belongs to the Governor alone, because the Second Militia Clause limits Congress “[t]o provid[ing] . . . for governing such Part of [the Militia] *as may be employed in the Service of the United States.*” U.S. Const. art. I, § 8, cl. 16 (emphasis added); *see also* U.S. Const. amend. X. The Second Militia Clause also explicitly “reserv[es] to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.” *Id.*

Under the Second Militia Clause, Congress does enjoy the enumerated power “[t]o provide for organizing, arming, and disciplining, the Militia.” U.S. Const. art. I, § 8, cl. 16. By way of *arming*, “[t]he Federal Government provides virtually all of the funding, the materiel, and the leadership for the State Guard units.” *Perpich*, 496 U.S. at 351. By way of *disciplining*, the President is tasked with setting federal standards for Guardsmen’s deployability, physical fitness, and the like. *See, e.g.*, 32 U.S.C. § 110.

II. Conflicting Orders from the Federal Government and Governor Abbott

In his role as commander-in-chief, Governor Abbott has issued a straightforward order to every member of the Texas National Guard within his chain of command: Do not punish any Guardsman for choosing not to receive a COVID-19 vaccine. On August 25, 2021, Governor Abbott issued Executive Order GA-39, under which “[n]o governmental entity can compel any individual to receive a COVID-19 vaccine.” Exh. 2 at 5. This prohibition “ha[s] the force and effect of law.” Tex. Govt. Code § 418.012. On October 4, 2021, Governor Abbott sent General Norris a letter making clear that Executive Order GA-39 governs the Texas National Guard. *See* Exh. 3 at 7.

On August 24, 2021, Secretary of Defense Lloyd Austin issued a memorandum to senior military leadership mandating that servicemembers receive a COVID-19 vaccine. *See* Exh. 1 at 1-2.

Acting “with the support of the President,” Secretary Austin directed the Secretaries of the military departments to “immediately begin full vaccination of all members of the Armed Forces under DoD authority on active duty or in the Ready Reserve, *including the National Guard*, who are not fully vaccinated against COVID-19.” *Id.* at 1 (emphasis added). Secretary Austin noted that military departments “may promulgate appropriate guidance to carry out” the COVID-19 vaccine mandate and called for “ambitious timelines for implementation.” *Id.* at 1-2.

The ensuing series of federal memoranda and orders, issued between September 14, 2021 and December 14, 2021, targeted non-compliant Guardsmen and established specific consequences for failure to get vaccinated. *See* Exh. 7 at 22-23, ¶¶ 17-21; Exh. 4; Exh. 5. The Air Force and Army thus set compliance deadlines of December 31, 2021, and June 30, 2022, respectively, and required commanders to impose particular consequences upon unvaccinated Guardsmen. Exh. 4; Exh. 5; Exh. 7 at 22, ¶¶ 15-17. Specifically, commanders were to prohibit unvaccinated, non-federalized Guardsmen from participating in drills, training, or other duty under Title 32 and were to deny those Guardsmen credit or excused absences when their non-participation was due to having declined the vaccine. Exh. 4 at 8; Exh. 7 at 22, ¶¶ 14-15. In addition, DoD would not allocate funding for payments to those Guardsmen for performing Title 32 duties. Exh. 4 at 8; Exh. 7 at 22, ¶¶ 14-15.

Taken together, the Defendants’ August 24, September 14, November 30, December 7, and December 14 memoranda are the “Enforcement Memoranda.” As Governor Abbott explained in a letter to every non-federalized Guardsman in Texas, the Enforcement Memoranda conflict with his order making vaccination voluntary. Exh. 3 at 7. Governor Abbott also flagged this conflict in a letter to Secretary Austin, *see* Exh. 9, who responded with an explicit threat that a Guardsman’s choice to remain unvaccinated “will jeopardize the member’s status in the National Guard,” Exh. 10.

III. The Enforcement Memoranda's Harmful Consequences

The Enforcement Memoranda effectively require termination of all members of the Texas National Guard—including non-federalized Guardsmen—who remain unvaccinated by the services' respective deadlines. *See* Exh. 7 at 21-23, ¶ 12-21. Subjecting the Texas National Guard to the Enforcement Memoranda would slash the military resources at Governor Abbott's disposal, with potentially catastrophic results for the Texans he and his Guardsmen serve.

The Texas Air National Guard has already lost approximately 90 airmen due to the vaccine mandate outlined in the Enforcement Memoranda. Exh. 7 at 24, ¶ 25. Eighty-three more have since refused to be vaccinated and, according to Air Force guidance, should be discharged. *Id.* ¶ 26. An additional 161 airmen have submitted accommodation or exemption requests, almost all of which are expected to be denied. *Id.* ¶ 27; *see also U.S. Navy SEALS 1-26 v. Biden*, No. 4:21-cv-1236, 2022 WL 34443, at *5-6 (N.D. Tex. Jan. 3, 2022). Assuming those airmen all ultimately refuse the vaccine, there would be a total reduction of 7.2% of the Air Guard's force. *Id.* ¶ 28. In a normal year, the Air Guard loses an average of 356 airmen; losing an additional 244 airmen due to the Enforcement Memoranda would yield a total loss in force of 20.5% during 2022. *Id.* These losses would include critical personnel, such as pilots and aircraft-maintenance personnel. *Id.* at 25-26, ¶¶ 31-36. It would take eleven years to recover that loss of manpower and experience. *Id.* at 24, ¶ 28.

The effects of the Enforcement Memoranda on the Texas Army National Guard are likely to be even more severe. The Army Guard is already facing recruitment and retention challenges due to a separate DoD vaccine mandate for enlistment. *Id.* at 26, ¶ 27. These challenges are compounded by its relatively low rate of vaccination: Only 45% of Texas's Army Guardsmen are fully vaccinated against COVID-19. *Id.* at 27 ¶ 40. If that rate remains unchanged, the Texas Army National Guard stands to lose 10,756 soldiers, or 55% of its force. *Id.* It would take decades to recover from this loss, which amounts to nearly 80,000 service years of leadership, experience, and capabilities. *Id.* ¶ 40-41. It would take roughly \$1.3 billion just to recruit, onboard, and train new members to begin the long process of recovering from such a loss. *Id.* ¶ 40.

ARGUMENT

A plaintiff seeking a preliminary injunction must establish that (1) “he is likely to succeed on the merits,” (2) “he is likely to suffer irreparable harm in the absence of preliminary relief,” (3) “the balance of equities tips in his favor,” and (4) “an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Here, Governor Abbott satisfies each requirement.

I. Governor Abbott Is Likely to Succeed on the Merits of His Claims

Presidential orders and the Executive Branch’s efforts to enforce them are subject to judicial review because no federal official—not even the President—can act *ultra vires* by violating the Constitution and laws of the United States. *See, e.g., Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015); *Gomez v. Trump*, 485 F. Supp. 3d 145, 177 (D.D.C. 2020); *Ancient Coin Collectors Guild v. U.S. Customs & Border Protection*, 801 F. Supp. 2d 383, 406 (D. Md. 2011). Governor Abbott is likely to succeed on the merits of his claims because the Enforcement Memoranda violate the Second Militia Clause and the Tenth Amendment, and because they are arbitrary and capricious under the Administrative Procedure Act.

A. The Enforcement Memoranda Unconstitutionally Intrude Upon Governor Abbott’s Command of the Texas National Guard

“The Framers . . . expressly struck a particular balance between federal interests and state autonomy in the military context.” Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1032 n.120 (1995); *see also* Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 184–86 (1940); Francis X. Conway, *A State’s Power of Defense Under the Constitution*, 11 Fordham L. Rev. 169, 172–73 (1942). Under the First and Second Militia Clauses, “[t]he Congress shall have Power”:

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [and]

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]

U.S. Const. art. I, § 8, cl. 15–16. And the under the Commander-in-Chief Clause:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States

U.S. Const. art. II, § 2.

The States thus retained a measure of control over the militias that had long defended their sovereignty, while sharing some such powers with the federal government. Congress could always enact federal laws for *organizing* and *arming* and *disciplining* the militia. And authority over *officering* and *training* the militia would always remain with the States. *See, e.g.*, The Federalist No. 29 (Alexander Hamilton). But the power of *governing* the militia, as prescribed by federal laws and exercised by the federal commander-in-chief, depended on the militia’s having been federalized to execute federal laws, suppress an insurrection, or repel an invasion. *See, e.g., Johnson v. Sayre*, 158 U.S. 109, 114–15 (1895). At all other times, the Tenth Amendment reserved that *governing* power to the States. *See, e.g., United States ex rel. Gillett v. Dern*, 74 F.2d 485, 487 (D.C. Cir. 1934); The Federalist No. 69 (Alexander Hamilton); 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 424 (2d ed. 1836).

The Enforcement Memoranda violate the Second Militia Clause because President Biden is “governing” members of the Texas National Guard without having federalized them. It is one thing for the federal government to add COVID-19 vaccination to the list of standards prescribed for Guardsmen under 32 U.S.C. § 110; as discussed below in Argument § I.C, the President may determine which Guard units are to be deprived of federal funding for failure to meet some federal standard. But it is quite another thing for the federal government to bypass the Governor and impose punishment directly upon individual Guardsmen by cutting off their pay, barring their

participation in Title 32 duties, and threatening to discharge them from the Texas National Guard altogether.

The Enforcement Memoranda had one aim: to compel Guardsmen who are under *state* command and subject to punishment under *state* standards to submit to orders by *federal* military officials on penalty of punishment under *federal* standards. In this case, the order is to receive a vaccination; the punishments include a loss of pay, of the right to train and serve, and, eventually, of the very status as a Guardsman. It is not the content of the order, however, but the *power* to order, that is the essence of military command. And it is not the content of the punishment for failure to comply, but the *power* to determine whether and how to punish for failure to comply that is inextricably bound up with command authority.

The federal government has long recognized that non-federalized Guardsmen are under the sole command of their respective governors. President Lincoln, for example, received the following advice:

The President . . . has no power over the militia, as Commander-in-Chief, until called into actual service, when the functions of the local commanders-in-chief cease and those of the President begin. Until that time the powers pertaining to that office are exclusive in the governors, for there cannot be two Commanders-in-Chief of the same body at the same time.

Power of the President to Create a Militia Bureau in the War Department, 10 Op. Att’y Gen. 11, 14–15 (1861); *cf.* The Federalist No. 74 (Alexander Hamilton) (“Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”). To take a more recent example: “Within a state, that state’s governor is the key decision maker and commands the state’s National Guard forces when they are not in federal Title 10, USC, status.” Joint Chiefs of Staff, *Joint Pub. 3-0: Joint Ops.*, at VII-6 (Jan. 17, 2017), available at https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_0ch1.pdf.

Indeed, until the Enforcement Memoranda, the Defendants had never attempted to usurp Governor Abbott’s command by issuing a federal military order to non-federalized Guardsmen. They had never demanded specific punishment for a non-federalized Guardsman’s non-

compliance with an order. And they certainly had never issued orders to non-federalized Guardsmen that directly contradict Governor Abbott's orders to those same non-federalized Guardsmen—and then demanded that Governor Abbott impose specific punishment upon non-federalized Guardsmen who follow his orders. The Defendants had no authority to do so.

B. The Enforcement Memoranda Exceed the Authority Granted to the President and the Executive Branch

That Guardsmen serve under exclusive state command unless federalized is also enshrined in federal and state statutes. Federal law sets out the procedures by which Guardsmen are federalized and thereafter serve as part of U.S. armed forces, commonly known as “Title 10” status or service.

Federal law generally prohibits Guardsmen from being federalized without the consent of their State's governor. 10 U.S.C. § 12301(b), (d). However, the President may order Guardsmen into federal duty without their Governor's consent “to repel [an] invasion, suppress [a] rebellion,” or “execute [federal] laws”—an authorization that calls upon the President to issue those orders “through the governors of the States.” 10 U.S.C. § 12406. Guardsmen can also be federalized if Congress determines that “more units and organizations are needed for the national security than are in regular components” of the military. *Id.* § 10103. None of those things have happened here.

Other statutes recognize the division between federalized Guardsmen, who are serving a federal commander, and non-federalized Guardsmen, who are not. Most prominently, the definition of “active duty” in the federal military expressly excludes National Guard duty, even training or duties paid for by federal funds. 32 U.S.C. § 101(12), (19); 10 U.S.C. § 101(d)(1), (5). More specifically, Guardsmen are “not in active Federal service except when ordered thereto under law.” 10 U.S.C. § 12401. Once “ordered to active duty,” a Guardsman is “relieved from duty in the National Guard of his State . . . until he is relieved from [active federal duty]” and thus returned to “National Guard status,” reflecting the constitutional and practical reality that a soldier can only serve in one status and under one commander at a time. 32 U.S.C. § 325(a)(1),

(c).² Indeed, the governing statutes establish that the “functions in the state National Guard and the federal National Guard of the United States are mutually exclusive.” *Clark v. United States*, 322 F.3d 1358, 1368 (Fed. Cir. 2003). It is precisely because non-federalized Guardsmen serve exclusively under state command, and are not part of the federal armed forces, that they can be used in law-enforcement duties without running afoul of the Posse Comitatus Act. *See, e.g., United States v. Hutchings*, 127 F.3d 1255, 1257–59 (10th Cir. 1997) (construing 18 U.S.C. § 1385). As the Texas National Guard and its Guardsmen have not been “ordered to active duty” under Title 10, they remain under Governor Abbott’s sole command.

And this federalized/non-federalized distinction extends to the authority to hold servicemembers accountable for disobeying orders. Only when Guardsmen are federalized are they “subject to the laws and regulations governing the Army or the Air Force.” 10 U.S.C. § 12405. When “not on active duty,” Guardsmen are “administered, armed, equipped, and trained in their status as members of” their National Guard. 10 U.S.C. §§ 10107, 10113. Non-federalized Guardsmen are not subject to the Uniform Code of Military Justice, but to state military codes. *See* 10 U.S.C. § 802(a)(1); Tex. Govt. Code § 432.002 (applying the Texas Code of Military Justice to all members of the state military forces “who are not in federal service under Title 10, United States Code”). And as the Texas National Guard and its Guardsmen have not been ordered to active duty under Title 10, they remain subject solely to the State’s military-justice system—just as contemplated by the Constitution, which grants Congress the power “[t]o make Rules for the Government . . . of the land and naval Forces” with no other direct limitation, but limits the power “to provide for . . . governing” the militia to “such Part of them as may be employed in the Service of the United States.” U.S. Const. art. I, § 8, cl. 14, 16; *see also Kinsella v. United States ex rel.*

² Indeed, simultaneous service in active federal duty and National Guard duty is so out of the ordinary that it legally occurs only for officers and only if the President authorizes it and the Guardsman’s governor consents to it. Even then, it is generally done only to make clear who has the right to issue orders, such as to “establish[] the succession of command of a unit.” 32 U.S.C. § 325(a)(2), (b). Such statuses are not at issue here.

Singleton, 361 U.S. 234, 247 (1960) (“There can be no question but that Clause 14 grants the Congress power to adopt the Uniform Code of Military Justice.”).

C. Governor Abbott’s Authority to Govern the Militia Encompasses the Power to Issue Orders and Punish Their Disobedience

Authority to punish is not within the power to prescribe discipline, but the power to govern. When the Constitution was adopted, the word “discipline” in the Second Militia Clause referred to training, whereas the word “governing” referred to enforcement and punishment. *See, e.g.*, Benjamin Daus, *The Militia Clauses and the Original War Powers*, 11 J. of Natl. Security L. & Pol. 489, 508–09 (2021) (discussing historical sources). As discussed above, the federal authority to “govern” the Texas National Guard is strictly limited to Guardsmen in active federal service, while non-federalized Guardsmen are “governed” by their Governor. This separation of powers—the Constitution’s demarcation of who governs the militia and when—is fundamental to the Guard’s structure.

This sharp division of power is consistent with the Second Militia Clause’s commitment to the States of the authority to train the militia “according to the discipline prescribed by Congress.” U.S. Const. art. I, § 8, cl. 16. As envisioned in the compromise worked out by the Founding Fathers, the federal government would set the standards for the militia to maintain, and the States would train their militias to those standards in the manner each State saw fit. That is, Congress would “specify the structure of militias (organizing), provid[e] military equipment (arming), [and] set[] common military standards across militias (prescribing discipline).” Dwight Stirling & Corey Lovato, *With All Due Respect, Mr. President, We’re Not Going to Follow that Order: How and Why States Decide Which Federal Military Rules Apply to State National Guard Personnel*, 22 Tex. Rev. L. & Pol. 95, 100 (2018). But governance—the power to issue orders and impose consequences for their violation—remained with the States. *Id.* at 115–16. Thus the militia would be prepared for federal service if it became necessary, while otherwise remaining firmly under State control.

But federal officials may not command the actual operations of a State’s militia. The federal government’s remedy if a State’s National Guard refuses to comply with an issued regulation is

financial, not punitive: “the National Guard of that State is barred, in whole or in part, *as the President may prescribe*, from receiving money or any other aid, benefit, or privilege authorized by law.” 32 U.S.C. § 108 (emphasis added); *see Assn. of Civilian Techs., Inc. v. United States*, 603 F.3d 989, 993 (D.C. Cir. 2010). As the federal government itself explained:

[32 U.S.C. § 110] does not authorize the federal government to step in and take over the state’s daily administration duties if it determines that the State National Guard is doing something wrong or fails to meet the established standards. . . . *To extend that power to the federal government would completely undermine the states’ authority to administer their own affairs* while in a Title 32 (non-federal) status. If a State National Guard fails to comply with the regulation, or orders, issued pursuant to 32 U.S.C. § 110, then *the federal government has only one remedy, to withhold funds under 32 U.S.C. § 108*.

Br. of the United States, *Assn. of Civilian Techs., Inc. v. United States*, No. 09-5153, 2009 WL 6506408, at *17 (D.C. Cir. Dec. 9, 2009) (emphases added); *see also* Br. in Opp. for Fed. Resps., *Neville v. Dhillon*, No. 19-690, 2020 WL 1313286, at *3 (U.S. Feb. 2020) (“If a State refuses to follow Department of the Air Force or Bureau regulations or policies, the only federal remedy is withholding federal funds or privileges.”); Br. for the United States, *Maryland ex rel. Levin v. United States*, No. 345, 1965 WL 130174, at *34 (U.S. Feb. 11, 1965) (“The federal government sets standards of federal recognition for both military and civilian employees which the Guard units and personnel must meet in order to receive federal support, but the only federal sanction for failure to meet those standards is the withdrawal of federal support for the unit.”).

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As with the authority to apply and enforce regulations and orders against federalized Guardsmen, this lawsuit does not contest the President’s authority to withhold funds, in accordance with 32 U.S.C. § 108, from a State that fails to comply with a federal standard established under 32 U.S.C. § 110. But that is not what the Defendants are threatening in their Enforcement Memoranda. Instead, the Defendants have burst beyond the constitutional limits on their authority, directly intruding into the Texas National Guard’s day-to-day operations and chain

of command. The Enforcement Memoranda run counter to Texas law and Governor Abbott's express order as the Texas National Guard's commander-in-chief. Only Governor Abbott has the authority to decide what punishment, if any, will attach to non-compliance with the Enforcement Memoranda by Texas's Guardsmen. The Defendants have attempted to usurp that authority, issuing orders they have no power to issue and demanding enforcement they have no power to demand. In so doing, they have intolerably blurred the lines of accountability. *See, e.g., Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018); *Printz v. United States*, 521 U.S. 898, 929–30 (1997); *New York v. United States*, 505 U.S. 144, 168–69 (1992).

Those exercising power must be accountable to the People who entrust them to wield it. The Constitution specifically recognizes as much in the militia context, as do the applicable federal statutes. If President Biden wants to subject the Texas National Guard to a federal vaccine mandate, he cannot hide behind Secretary Austin or commandeer Governor Abbott. President Biden must own his decision, with all the accompanying political and pecuniary costs, by federalizing the Texas National Guard or by defunding it “as *the President* may prescribe.” 32 U.S.C. § 108 (emphasis added). Instead of doing so, President Biden and his subordinate Defendants have exceeded their lawful authority under the Second Militia Clause, the Tenth Amendment, and federal statutes. The Defendants have acted *ultra vires*, and Governor Abbott is likely to prevail on Counts One and Two of his Complaint.

II. The Enforcement Memoranda Violate the Administrative Procedure Act

A. The Enforcement Memoranda Are Final Agency Action

The Enforcement Memoranda purport to set forth actions that Guardsmen must take, deadlines by which they must do so, and penalties for failing to do so; and they further command the Guardsmen's superiors to impose specified punishments. They mark the consummation of the agencies' decision-making processes and are actions from which legal consequences flow. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). The Enforcement Memoranda are neither “tentative” nor “interlocutory;” rather, they “purport[] to bind parties and alter their conduct.” *Louisiana v. U.S.*

Army Corps of Engrs., 834 F.3d 574, 582 (5th Cir. 2016). As such, they constitute final agency action and are subject to review under the APA. *See* 5 U.S.C. § 704.

B. The Enforcement Memoranda Exceed the Constitutional and Statutory Limits on the Defendants’ Powers

As described above, *see* Argument § I, the Enforcement Memoranda are contrary to the constitutional allocation of power between federal and state governments, and they exceed the statutory powers Congress conferred. For this reason alone, they should be held unlawful and set aside. 5 U.S.C. § 706(2)(B)–(C).

C. The Enforcement Memoranda Ignore Texas’s Reliance Interests

The Enforcement Memoranda should also be set aside as arbitrary and capricious. Those affected by a federal agency’s change in its rules or policies are entitled to consideration of any reliance interests that developed around the since-abandoned policy. Agencies promulgating new policies must “be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’ ” *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). “‘It would be arbitrary and capricious to ignore such matters.’ Yet that is what [the Defendants] did.” *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (quoting *Fox*, 556 U.S. at 515). Indeed, the Defendants “entirely failed to consider an important aspect of the problem,” *Motor Veh. Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983): Guardsmen are not a mere supplement to the federal military, but a vital part of each State’s ability to secure its citizens’ property, liberty, and lives—a vitality that is sapped by drumming Guardsmen out of militia service. The Defendants’ failure to weigh those considerations before upending the Texas National Guard’s chain of command requires that the Enforcement Memoranda be set aside.

1. Handling Disasters and Emergencies

Texas substantially relies on its Guardsmen, under the command of its Governor, to respond to disasters and emergencies. As explained by Nim Kidd, Chief of the Texas Division of Emergency

Management (TDEM), the Texas National Guard's expertise and capabilities are irreplaceable, and even a modest reduction in the size of the Guard would be to the substantial detriment of TDEM's ability to manage and coordinate the delivery of resources to areas affected by disasters, emergencies, and other major events. Exh. 8 at 37, 39, ¶¶ 5, 13. When TDEM activates the State Operations Center for emergency operations, it requests the presence of representatives from those of the 39 support agencies whose services it believes may be required. *Id.* at 36, ¶ 3. Of the 87 activations that have occurred during Chief Kidd's tenure, he cannot recall a time when a representative of the Texas Military Department has not been present. *Id.* at 36-37, ¶ 4. That is because "[n]o matter the nature of the emergency, [he] believe[s] that help from the Texas Air and Army National Guard is appropriate and may be required." *Id.*

Chief Kidd details some of the Texas National Guard's "talents in logistics, rescue operations, communications, transportation, and security and law-enforcement support, many of which can be replicated only with great difficulty, and some of which cannot be replicated at all," *id.* at 37, ¶ 5:

- The Army National Guard's 6th Civil Support Team is available to screen for the potential presence of chemical or biological agents and, if necessary, furnish emergency containment and decontamination. *Id.* ¶ 6.
- The Army National Guard's high-profile ground vehicles can traverse floodwaters, washed-out roads, and debris that would otherwise be unpassable, enabling personnel and supplies to reach otherwise inaccessible areas. *Id.* ¶ 8.
- The Air National Guard's Aircraft Coordination Center and airlift capability, for cargo and personnel, make it possible for TDEM and partner agencies to deploy, into areas inaccessible even by the Army Guard's high-profile vehicles, food, water, supplies, medics, civil-engineering teams, search-and-rescue personnel, vehicles, and other large-scale supplies. *Id.* ¶ 8.
- The Guard's communications capabilities enable personnel to coordinate operations in areas where landline and cellular telephone service is unavailable. *Id.* ¶ 9.
- The Guard's logistical capabilities enable it to stage points of distribution for disaster-relief supplies, such as shelter, food, water, and ice, that serve tens of thousands of people per day. These capabilities also enabled it to build, source, and operate

COVID-19 testing sites as soon as the State was allowed to do so, particularly where no appropriate facilities would have otherwise been available and months before private-sector testing was available. *Id.* at 38, ¶¶ 10–11.

- The Guard’s expertise, size, and communications capabilities enable larger, faster, and more efficient deployment and operation of search-and-rescue teams. Guardsmen are also deployed into disaster areas to assist law-enforcement personnel with preventing looting and other criminal activity. *Id.* ¶ 12.

Simply put, the Texas National Guard plays an invaluable role in protecting the health and safety of Texans. Since the beginning of the COVID-19 pandemic, thousands of Guardsmen have served in support of the State’s COVID-19 mitigation and response. *See* Exh. 7 at 20, ¶ 5. Those missions have included production of personal protective equipment, establishing mobile testing and nursing home disinfection teams, and providing food bank support. *Id.* In January 2021, the Guardsmen helped TDEM stand up the State of Texas Mobile Vaccination Team Program. *Id.* at 21, ¶ 7. As part of this effort, Texas’s Guardsmen vaccinated or assisted with vaccinating over 2.3 million Texans. *Id.*

The Texas National Guard also responded to Winter Storm Uri in February 2021. *Id.* ¶ 9. In a span of 96 days, Guardsmen manned shelters, worked with DPS to help motorists, and assisted almost 36,000 Texans in danger. *Id.* During this time, Guardsmen distributed 119,000 cases of bottled water and approximately 7,000 cases of meals to Texans in need. *Id.*

The Defendants took no notice of these many roles that Guardsmen play. They considered none of the effect that forcibly separating Guardsmen from state military service would have on Texas’s ability to fill those roles and thus protect the health, welfare, and safety of Texans, particularly when disaster strikes. In short, they did not consider how Governor Abbott and the State he leads depend on the Texas National Guard, and that failure requires that the Enforcement Memoranda be set aside.

2. Handling Law-Enforcement Exigencies

Nor did the Defendants take into account Texans’ reliance on the Texas National Guard to supplement law-enforcement activity, particularly ongoing law-enforcement activities on the

U.S.–Mexico border. Texas is currently facing a crisis along that border, which is rife with criminal activity including human trafficking, drug trafficking, and human smuggling. Exh. 6 at 16, ¶ 3. These crimes are perpetuated by transnational criminal networks that control trafficking routes and operations along the border. *Id.* These criminal networks, including the Mexican cartels with their affiliated organizations and gangs, routinely prey on illegal migrants and move enormous quantities of dangerous drugs—most notably fentanyl—into Texas. *Id.*

To combat this criminal activity and its widespread effects, Governor Abbott launched Operation Lone Star in March 2021. *Id.* ¶ 4. Operation Lone Star is a law-enforcement surge operation that includes personnel from DPS, local agencies, the Texas State Guard, and the Texas National Guard. *Id.* Operation Lone Star relies heavily on Texas’s Guardsmen and the equipment they bring to bear. *Id.* at 17, ¶ 6. Approximately 6,500 Guardsmen are activated as part of the operation. *Id.* Among other functions, they play a vital role in detecting and curbing criminal activity along the border by manning security posts; conducting air operations; enforcing criminal trespassing laws; installing fencing on private property; supporting data analysis to focus assets on the highest-threat areas; and rapidly surging significant manpower and equipment to specific areas when needed, such as in response to migrant caravans at the border. *Id.*

Before Operation Lone Star, distances between security posts and patrols were sometimes too great to detect cross-border crime; the time to respond to detected illegal activity in some areas was too long; and surges of personnel could occur only through significant reductions elsewhere. *Id.* at 16-17, ¶ 5. But the presence of Guardsmen has been a force multiplier. *Id.* at 17-18, ¶ 6. Operation Lone Star is an effective response to the danger of transnational crime at the border, and this effectiveness depends in large part on the contributions of Guardsmen. *Id.* at 18, ¶ 7. In the words of Freeman Martin, the Deputy Director for Homeland Security Operations for DPS, reducing the Texas National Guard’s “available manpower . . . would undermine [Operation Lone Star’s] goal to protect Texas and the United States” from cross-border criminal activity, “including the tragedies of human trafficking and fentanyl-related deaths.” *Id.* “From a law enforcement operational perspective,” such a reduction “creates an unnecessary risk of harm and

is ill-advised.” *Id.* The Defendants’ failure to take these interests into account requires that the Enforcement Memoranda be set aside.

III. Governor Abbott Is Likely to Suffer Irreparable Harm Absent a Preliminary Injunction

Governor Abbott will suffer irreparable harm absent injunctive relief, in at least two ways. First, the Enforcement Memoranda will hinder his disaster-response efforts by causing attrition of Texas’s non-federalized Guardsmen. Second, the Enforcement Memoranda will contravene and purport to override a direct order that Governor Abbott issued as commander-in-chief to his Adjutant General.

A. The Enforcement Memoranda Will Hinder Disaster-Response Efforts

Governor Abbott depends upon the Texas National Guard to fulfill his constitutional duties. *See* Argument § II.C; Tex. Const. art. IV, §§ 1, 7, 10. Yet the Enforcement Memoranda threaten to hollow out the Texas National Guard through the discharge or attrition of a significant number of non-federalized Guardsmen. *See* Background § III. Terminating disaster-response personnel presents an imminent risk of irreparable harm to Governor Abbott and the Texans he serves, especially considering the myriad responsibilities his Guardsmen face. *See, e.g., Rell v. Rumsfeld*, 389 F. Supp. 2d 395, 399–401 (D. Conn. 2005).

The Enforcement Memoranda will harm the mission of Operation Lone Star by decreasing the number of Guardsmen available to serve. Such a reduction in personnel would undermine Operation Lone Star’s goal of protecting Texas and the United States from human trafficking, drug-related deaths, and other tragedies. *See* Argument § II.C.2. As the commander-in-chief of non-federalized Guardsmen involved in Operation Lone Star, Governor Abbott’s ability to combat crime and ensure public safety on behalf of the Texans he was elected to serve will be irreparably harmed by the loss of personnel he has mobilized to secure the border and deter transnational criminal activity.

The Enforcement Memoranda will also deprive Governor Abbott of personnel who play a critical role in disaster response. *See* Exh. 8 at 36-37, ¶ 4. While the State Operations Center is

most often activated during weather-created disasters, it is also activated to cope with potential civil unrest, to assist with law-enforcement operations, to provide additional security at major events, to respond to fires, and to assist with public-health disasters. *Id.* TDEM relies on the Texas National Guard’s logistics capabilities, which are unmatched by any other agency in Texas. *Id.* at 37-38, ¶ 5, 10. The Guard’s skills in logistics, rescue operations, communications, transportation, and security and law-enforcement support can be replicated only with great difficulty—if at all. *Id.* at 37, ¶ 5. For example, the Texas Air National Guard’s airlift capability for cargo and personnel makes it possible for TDEM and partner agencies to deploy food, water, and other supplies to persons who may be stranded during a disaster with no other access to lifesaving supplies. *Id.* ¶ 7. It also allows TDEM to insert response personnel, such as search-and-rescue teams, in otherwise inaccessible areas. *Id.* The Army Guard’s ground transportation provides similar support, enabling personnel to reach otherwise inaccessible areas by traversing floodwaters, washed-out roads, and debris. *Id.* ¶ 8. The ability to mobilize a significant number of responders at one time is especially crucial in Texas, where multiple natural disasters can happen simultaneously. *Id.* at 39, ¶ 13. By decreasing the number of Guardsmen who can be deployed in response to these disasters, the Enforcement Memoranda will harm Governor Abbott’s ability to protect the health and safety of Texans when they are most vulnerable.

B. The Enforcement Memoranda Scramble the Texas National Guard’s Chain of Command

The Enforcement Memoranda will also irreparably harm Governor Abbott’s ability to issue and enforce orders to Guardsmen under his command, including orders meant to ensure that the Texas National Guard adheres to Texas law. *See, e.g., E.T. v. Paxton*, 19 F.4th 760, 769–70 (5th Cir. 2021). Governor Abbott issued a direct order to the Adjutant General of Texas, commanding the Texas National Guard to comply with Texas law as reflected in Executive Order GA-39. Exh. 3 at 7; *see* Tex. Gov’t Code § 418.012. Accordingly, every non-federalized Guardsman in Texas was prohibited, by an order from their commander-in-chief, from compelling any individual to receive a COVID-19 vaccine. Exh. 2 at 5; Exh. 3 at 7. Yet the Enforcement Memoranda purport to

command non-federalized Guardsmen to do the exact opposite—to compel their subordinate Guardsmen to receive a COVID-19 vaccine or face penalties imposed by the federal government. The Enforcement Memoranda thus require every officer in the Texas National Guard, from the Adjutant General to the junior-most second lieutenant, to disobey their commander-in-chief's direct order and violate Texas law.

Undermining Governor Abbott's command authority in this way is immediately and irreparably harmful. Contravening the commander-in-chief's lawful order to a military subordinate scrambles the chain of command, leaving Guardsmen to wonder whose orders they must follow. Sowing confusion over which orders and which laws to obey is the antithesis of military discipline, and will further deplete the Texas National Guard's operational capability. Moreover, "[w]ithout a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 498 (2010) (quoting *The Federalist No. 70* (Alexander Hamilton)).

IV. The Equities Favor Governor Abbott and an Injunction is in the Public Interest

When governmental action is implicated, the third and fourth injunctive-relief factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). To preserve the status quo until a trial on the merits can be held, federal courts regularly enjoin federal agencies from enforcing new regulations pending judicial review. *See, e.g., Texas v. United States*, 787 F.3d 733, 768 (5th Cir. 2015). Since at least 1787, the status quo has been that the Governor exercises command over his State's militia until such time as that militia is "called into the actual service of the United States." U.S. Const. art. II, § 2. The balance of equities weighs in favor of Governor Abbott because, absent injunctive relief, his power as commander-in-chief of the non-federalized Guardsmen will be unlawfully usurped.

Injunctive relief is also in the public interest. As described above, non-federalized Guardsmen play a crucial role in keeping Texans safe—from combatting rampant crime along the Texas border to responding to natural disasters. The Enforcement Memoranda, if applied to non-federalized

Guardsmen, will lead to a reduction in force that would hamper the ability of the Texas National Guard to effectively protect against these threats, leaving Texas citizens vulnerable. Additionally, “the public interest [is] in having governmental agencies abide by the federal laws that govern their existence and operations.” *See Texas v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021) (internal quotation marks omitted). The Enforcement Memoranda exceed the Defendants’ statutory and constitutional authority, intrude upon state sovereignty, and usurp Governor Abbott’s command authority over the non-federalized Guardsmen serving in the Texas National Guard. “[T]here is generally no public interest in the perpetuation of unlawful agency action.” *Texas v. Brooks-LaSure*, No. 6:21-cv-191, 2021 WL 5154219, at *14 (E.D. Tex. Aug. 20, 2021) (internal quotation marks omitted).

CONCLUSION

Governor Abbott respectfully requests that the Court enjoin the Defendants from applying the Enforcement Memoranda or enforcing them as to non-federalized members of the Texas National Guard.

Date: February 7, 2022.

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CERTIFICATE OF CONFERENCE

I certify that on February 7, 2022, I conferred with James Gillingham, counsel for Defendants, regarding the substance of this motion, and he is opposed to the relief sought in this motion.

/s/ Christopher D. Hilton

CERTIFICATE OF SERVICE

I certify that on February 7, 2022, this document was filed through the Court's CM/ECF system, which automatically serves all counsel of record, and that this document was additionally served upon counsel for Defendants, James Gillingham, by email at james.gillingham@usdoj.gov.

/s/ Christopher D. Hilton