



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 This case involves a challenge to the now-rescinded COVID-19 vaccination requirement implemented by the Department of Defense.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,

A handwritten signature in black ink, appearing to read "E. B. Prelogar". The signature is fluid and cursive, with the first name "E." and last name "Prelogar" clearly distinguishable.

Elizabeth B. Prelogar
Solicitor General

Enclosure