

# Military Members Seek New Injunction Against COVID Vaccine Mandates

U.S. military members involved in a lawsuit challenging the military's COVID vaccine mandate on Dec.10 filed an amended complaint seeking a new injunction after a judge last month rejected the U.S. Department of Defense's assertion the Pfizer-BioNTech and Comirnaty COVID vaccines are "interchangeable."

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*U.S. military members involved in a [lawsuit](#) challenging the military's COVID vaccine mandate on Dec. 10 filed an [amended complaint](#) seeking a new injunction.*

*The move came after a judge last month [rejected](#) the U.S. Department of Defense's (DOD) assertion the Pfizer-BioNTech and [Comirnaty](#) COVID vaccines are "interchangeable, but before the [U.S. Air Force](#) and [U.S. Marines](#) began discharging unvaccinated service members.*

In an interview with [The Defender](#), attorney Travis Miller, who represents the 18 plaintiffs in [Doe et al v. Austin](#), told The Defender:

"Our clients face comparable challenges. As our amended complaint alleges, the [U.S. Food and Drug Administration's] 'approval' of the Comirnaty vaccine excluded testing on large segments of the American population, including those with previous [COVID-19](#) infections (an alleged 3% of trial participants), pregnant women, and individuals with serious pre-existing conditions.

"The clinical trials were inappropriately truncated, with trial participants being observed for an average of four months, instead of the FDA's recommended period of one to two years."

On Nov. 12, U.S. Federal District Judge Allen Winsor of the U.S. District Court for the Northern District of Florida denied plaintiffs' original request for a [preliminary injunction](#) against the military's [vaccine mandate](#).

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However, in his [order](#) denying the injunction, Judge Winsor acknowledged that under the Emergency Use Authorization (EUA) [statute](#), "recipients of EUA drugs must be 'informed' ... of the option to accept or refuse administration of the product."

Judge Winsor also pointed out that DOD's guidance documents explicitly state only FDA-licensed COVID vaccines are mandated.

While this would be applicable to the Comirnaty vaccine, the judge noted:

“The plaintiffs have shown that the DOD is requiring injections from vials not labeled ‘Comirnaty.’ Indeed, defense counsel could not even say whether vaccines labeled ‘Comirnaty’ exist at all.”

Miller said the FDA’s “wrongful conclusion” that two distinct vaccines can be ‘interchangeable’” is one of the claims in the amended complaint.

Miller told The Defender:

“The FDA incorrectly determined that the EUA Pfizer vaccine can be used interchangeably with the licensed Comirnaty vaccine. Whether the FDA can make that determination is currently being litigated. And this FDA determination presents a significant problem for military service members. With the Comirnaty vaccine being unavailable, those in the military are improperly being forced to take an EUA vaccine.”

DOD violated own vaccine mandate guidance, plaintiffs allege

The plaintiffs’ amended complaint cites five primary causes of action, including two new causes related to the FDA’s “wrongful conclusion that two distinct vaccines can be ‘interchangeable.’”

Miller said black letter law states products issued under a EUA [are rescinded](#) once a fully licensed alternative becomes available.

On this basis, the plaintiffs filed a claim of action in relation to the armed services’ violation of the DOD’s own vaccine mandate, wherein service members are being mandated to receive the vaccines administered under a EUA instead of the Comirnaty vaccine, which the military claims is “unavailable.”

As part of their amended complaint, the plaintiffs are now once again requesting injunctive relief from the court, including declaratory judgment from the “unlawful” mandate, which they argue is in violation of AR 40-562, DOD procedural requirements, the APA, and federal informed consent laws.

Furthermore, the plaintiffs are requesting a declaratory judgment on the basis that federal law only permits fully licensed vaccines to be mandated for members of the armed service, and to that end, “implementation of the mandate are [sic] unlawful to the extent that they permit or require an EUA product to be administered pursuant to the mandate.”

The plaintiffs additionally request that any implementation of the DOD vaccine mandate be enjoined, that plaintiffs “with natural immunity due to previous infection are entitled to a medical exemption from COVID-19 vaccination under AR 40-562,” and that the DOD and the armed services be enjoined from treating the Pfizer-BioNTech vaccine “as if” it were the licensed Comirnaty vaccine, and that this practice be declared unlawful.

The FDA is also the target of the plaintiffs’ claims for relief, as they are requesting that the FDA’s approval of the Comirnaty vaccine be declared unlawful, and that this decision be vacated and remanded, “for reconsideration consistent with [applicable] laws and regulations.”

Accordingly, the plaintiffs further request that a declaratory judgment be issued against the FDA presenting it from simultaneously treating “the same product as an EUA product and licensed product for the same indication and use” or using the BioNTech and Comirnaty vaccines “interchangeably” or in a way where they can be “substituted” for each other.

As [The Defender reported](#), even though the Comirnaty vaccine was fully licensed by the FDA, an EUA for the very same vaccine was also issued, shielding it from liability laws applicable only to licensed products.

[Trial is scheduled](#) for Sept. 14, 2022.

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At stake for plaintiffs: health, livelihoods and careers

The amended complaint introduced each of the individual service members and their unique circumstances, ranging from the non-availability of the licensed Comirnaty vaccine, to rejection of medical and religious exemptions and other pre-existing health risks.

Miller said for the plaintiffs, there is more at stake than the refusal to take a vaccine for any reason, or the willingness of some to only receive a licensed vaccine.

“What’s at stake for refusing this vaccine? Everything. Their careers, their livelihoods, everything they’ve sacrificed and worked for,” Miller said.

The plaintiffs, and their reasons for refusal, are summarized below:

- Army Major and board-certified family physician Dr. Samuel Sigoloff, who was stationed in Arizona as the medical director for Fort Huachuca, was relieved and suspended from treating patients, due to his granting medical exemptions from the DOD mandate to several of his patients, and for prescribing alternative treatments, including Ivermectin. He subsequently received a negative counseling statement and is the subject of a pending investigation due to his refusal, based on applicable legal and ethical principles, to provide the names of his patients that were granted medical exemptions.
- Air Force Master Sergeant Nickolas Kupper, stationed at Luke Air Force Base, Arizona, had previously applied for, and been granted, exemptions from other required vaccines. He has also recovered from a previous COVID infection. His requests for medical and religious exemptions are pending. He confirmed, both from his base immunologist and from a Pfizer representative, that the Comirnaty vaccine is unavailable. He has submitted a complaint to the DOD inspector general regarding the validity of the order to take an unlicensed EUA vaccine.
- Air Force Captain Taylor Roberts, stationed in New Mexico, requested a medical exemption based on a genetic predisposition to increased likelihood of adverse requests from vaccination. While this exemption was temporarily granted, it was subsequently revoked. He has also challenged the lawfulness of the vaccination order on the basis of being asked to take the EUA Pfizer-BioNTech vaccine instead of the Comirnaty vaccine. This complaint was, however, dismissed.
- Air Force Captain Jordan Karr is stationed at Hurlburt Field, Fla. She is a woman of childbearing potential (WOCBP) and would likely be injured by the vaccine due to a medical disorder. She has been told that the Comirnaty vaccine is unavailable and that she would be required to take an EUA-labeled vaccine.

- Air Force Master Sergeant Joseph Connell, stationed in Hurlburt Field, Fla., had his medical exemption request, submitted in relation to his prior history with cancer, denied.
- Air Force Captain Sean Cothran, stationed at Hurlburt Field, Fla., was refused a medical exemption on the basis of prior infection and natural immunity. He did not receive a response from his base's immunology department regarding the availability of the licensed Comirnaty vaccine.
- Air Force Captain Blake Morgan, stationed at Eglin Air Force Base, Fla., also submitted a request for an exemption based on prior exemption, via a positive serology test. This request was denied, and he has been required to cancel mission-critical travel as a result.
- Similarly, Marine Corps Major Eric Kaltrider, stationed at Camp Lejeune, NC, was denied a medical exemption based on previous infection. As a result, he has been withdrawn from assignment.
- Non-commissioned Air Force officer David Lund, stationed at Fort Walton Beach, Fla., was also told that the licensed Comirnaty vaccine was not available. His objection, based on a previous COVID-19 infection, was rejected, and he was obliged to receive the EUA Janssen (Johnson & Johnson) vaccine.
- Air Force Staff Sergeant Samuel Craymer, stationed at Eielson Air Force Base, Alaska, inquired about the availability of the Comirnaty vaccine after receiving his vaccination orders in September. He was told that it was unavailable and that he was required to take an EUA vaccine, and was shown several vials of the vaccine being administered, which was the Pfizer-BioNTech EUA vaccine. Upon challenging the lawfulness of the order to take the EUA vaccine via a complaint filed with the DOD Inspector General, he received an Article 15 violation for "failing to follow a lawful order." A religious accommodation request remains pending.
- Similarly, Air Force Major Kacy Dixon, in response to the vaccination order she received, inquired about the availability of the licensed Comirnaty vaccine from pharmacies and other healthcare providers. Upon being told it was unavailable, she sought clarification as to whether she was being obliged to take an unlicensed vaccine, and was informed that she must take the "interchangeable" Pfizer-BioNTech vaccine. Her subsequent request for a medical waiver on the basis of "lack of [licensed] vaccine supply" was denied, as was her appeal. Moreover, her request for a medical exemption, filed because she is breastfeeding, was also denied.
- Brain Stermer, Sergeant First Class in the Army Reserve stationed at Fort Leonard Wood, Missouri, also was previously infected with COVID-19. He has also challenged the legality of the vaccination orders obliging him to receive an EUA vaccine due to the unavailability of the Comirnaty product. He has been threatened with administrative action and separation from the Army if he does not comply.
- Marine Corps Major Nicholas Harwood, stationed at Camp Pendleton, California, also was informed that the Comirnaty vaccine was unavailable. In response to his refusal of the EUA vaccine, he has faced "adverse employment and disciplinary action," including removal from his position, severe duty restrictions, and a withholding of his promotion to Lieutenant Colonel, while continued refusal to receive the vaccine will result in a "refusal of a lawful order" counseling statement, which will launch the process for his administrative separation or dismissal from the Marine Corps. Such a process has already been completed for

11 Marines in his unit and is in progress for an additional 11 Marines.

- Marine Corps Master Sergeant Michael Thompson, stationed at MCAS Cherry Point, North Carolina, also inquired about the availability of the licensed Comirnaty vaccine and was told that it was not available. He nevertheless observed that medical records for at least one other service member who was given an EUA vaccine indicated that Comirnaty had been administered. He is currently under a non-deployable status and has received a “Page 11 counseling statement” which will form the basis for his administrative separation. According to him, other Marines at MCAS Cherry Point have been processed for administrative separation due to their refusal to receive EUA vaccines.
- Andrew Snow, a Major in the Air Force Reserve stationed in Delaware, was denied a religious exemption. His appeal remains pending. He has confirmed that the Comirnaty vaccine is not available at his base. He currently faces severe duty and flight restrictions, and will be placed under “no point, no pay” status if his appeal is denied. After two months, he will then be dismissed for cause.
- Navy Chief Benjamin Coker, stationed in Washington, D.C., and Kalem Cossette, a Chief Warrant Officer-3 in the Marine Corps who is stationed in Twentynine Palms, California, had their religious accommodation requests denied.
- Similarly, Navy Commander James Furman, who had been stationed in Arlington, Virginia, had his request for a religious exemption denied. He opted to retire and end his 22-year military career.

Congress weighing bill that would prohibit military members from being discharged for noncompliance with mandates

The issue of service members facing dishonorable discharge simply due to not receiving the COVID vaccine, has reached Congress.

The Senate on Wednesday [passed a draft](#) of the new National Defense Authorization Act that includes a rider forbidding the DOD from dishonorably discharging servicemembers for not getting the vaccine.

The rider was included in the larger bill by Sen. Roger Marshall (R-Kan.), a vocal [opponent](#) of President Biden’s vaccine mandates, to “prevent Joe Biden from dishonorably discharging servicemembers for choosing to not get the COVID vaccine.”

The bill now is headed to Biden’s desk for his signature. However, Biden may choose to veto this bill and demand changes to it before signing it.

According to Miller though, “the proposed legislation does not go far enough to protect the rights of military service members.”

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