No. 23-154

In the Supreme Court of the United States

FRANK KENDALL III, SECRETARY OF THE AIR FORCE, ET AL., PETITIONERS

v.

HUNTER DOSTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2021, the Secretary of Defense ordered all military servicemembers to be vaccinated against COVID-19. In the decision below, the Sixth Circuit affirmed orders preliminarily enjoining the Air Force from applying the COVID-19 vaccination requirement to individual plaintiffs who had unsuccessfully sought religious exemptions, certifying a class, and granting a class-wide preliminary injunction. The court of appeals entered judgment on November 29, 2022. On December 23, 2022, Congress enacted legislation directing the Secretary of Defense to rescind the COVID-19 vaccination requirement, and he did so shortly thereafter. The question presented is as follows:

Whether, pursuant to *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), this Court should vacate the court of appeals' judgment and remand with instructions to direct the district court to vacate its orders granting preliminary injunctions as moot.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants below) are Frank Kendall III, in his official capacity as Secretary of the Air Force; Robert I. Miller, in his official capacity as Surgeon General of the Air Force; Marshall B. Webb, in his official capacity as Commander, Air Education and Training Command; Richard W. Scobee, in his official capacity as Commander, Air Force Reserve Command; James C. Slife, in his official capacity as Commander, Air Force Special Operations Command; and the United States.

Respondents (plaintiffs-appellees below) are Hunter Doster, Jason Anderson, McKenna Colantanio, Paul Clement, Joe Dills, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon III, Adam Theriault, and Daniel Reineke, on behalf of themselves and others similarly situated.

RELATED PROCEEDINGS

United States District Court (S.D. Ohio):

Doster v. *Kendall*, No. 22-cv-84 (Mar. 31, 2022)

Doster v. *Kendall*, No. 22-cv-84 (July 14, 2022)

Doster v. *Kendall*, No. 22-cv-84 (July 27, 2022)

Doster v. *Kendall*, No. 22-cv-84 (Aug. 19, 2022)

United States Court of Appeals (6th Cir.):

Doster v. *Kendall*, No. 22-3497 (Nov. 29, 2022)

Doster v. *Kendall*, No. 22-3702 (Nov. 29, 2022)

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of the Air Force, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-79a) is reported at 54 F.4th 398. An earlier order by a motions panel (App., *infra*, 80a-95a) is reported at 48 F.4th 608. The order of the court of appeals denying rehearing and opinions respecting that order (App., *infra*, 179a-183a) are reported at 65 F.4th 792. The orders of the district court granting a preliminary injunction to individual plaintiffs (App., *infra*, 135a-178a) and denying a motion to dismiss are reported at 596 F. Supp. 3d 995 and 615 F. Supp. 3d 741, respectively. The orders

of the district court certifying a class (App., *infra*, 111a-134a), granting a preliminary injunction to the class (App., *infra*, 106a-110a), and denying a stay pending appeal (App., *infra*, 96a-105a) are not published in the Federal Supplement but are available at 342 F.R.D. 117, 2022 WL 2974733, and 2022 WL 3576245, respectively.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 2022. A petition for rehearing was denied on April 17, 2023 (App., *infra*, 179a-183a). On July 7, 2023, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including August 16, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this petition. App., *infra*, 184a-185a.

STATEMENT

A. Background

The U.S. military has relied on mandatory immunization since 1777, when George Washington directed that the Continental Army be inoculated against smallpox. Stanley M. Lemon et al., *Protecting Our Forces: Improving Vaccine Acquisition and Availability in the U.S. Military* 11-12 (2002). As of 2021, nine vaccines were required for all servicemembers, including an annual flu vaccine, and eight other vaccines were required in some circumstances based on risk of exposure. See D. Ct. Doc. 27-6, at 36 (Mar. 9, 2022).

In August 2021, after the Food and Drug Administration approved the first COVID-19 vaccine, the Secretary of Defense announced that vaccination against COVID-19 would be added to the required list. App., *infra*, 5a. The Secretary of the Air Force implemented that directive by requiring active-duty servicemembers to be vaccinated by November 2, 2021, and members of the Air Force Reserve to be vaccinated by December 2, 2021, unless otherwise exempted. *Id.* at 5a, 140a.

The Air Force permitted servicemembers to request exemptions from the vaccination requirement for administrative, medical, or religious reasons. App., *infra*, 6a. Administrative exemptions were generally available only to servicemembers who were scheduled to retire or separate from service in a specified timeframe, or who were on "terminal leave" pending retirement or separation. *Ibid.* (citation omitted). Medical exemptions were available when Air Force medical providers determined that vaccination was not medically appropriate. *Ibid.* All such exemptions were time-limited, varying in length from 30 days to one year. D. Ct. Doc. 27-12, at 4 (Mar. 9, 2022). If the medical condition justifying an exemption continued to exist after that time, Air Force policy permitted medical providers to grant a new exemption—again subject to reevaluation within no more than a year. See *ibid.*

Religious exemptions were governed by the Air Force's preexisting policies for considering requests for religious accommodations. App., *infra*, 6a. As relevant here, a servicemember seeking a religious exemption was required to do so in writing and to consult with a chaplain and medical personnel. *Id.* at 7a-8a. Each officer in the chain of command made a recommendation about whether to grant the request, as did a team of

specialists convened to determine the effect the requested accommodation would have on the military, including any impact on "military readiness, unit cohesion, good order, discipline, public health, safety, and other military requirements." Dep't of the Air Force (DAF), *Instruction 52-201: Religious Freedom in the Department of the Air Force* ¶ 2.13 (June 23, 2021), perma.cc/5RDU-UVGV; see App., *infra*, 6a-10a. The decision to grant a request lay in the first instance with a "commander at a Major or Field Command," subject to appeal to the Surgeon General of the Air Force. App., *infra*, 7a. Unlike medical exemptions, religious exemptions were not time-limited. *Id.* at 40a.

In July 2022, the Air Force reported that, of a total force of approximately 500,000, 624 servicemembers had a medical exemption from the COVID-19 vaccination requirement. Air Force, *DAF COVID-19 Statistics – July 2022* (Aug. 10, 2022) (*COVID-19 Statistics)*, perma.cc/79L7-TNBQ. At that time, the Air Force had received about 10,000 requests for religious exemptions and had granted 135 of them, with thousands of requests still pending. *Ibid.* COVID-19 had resulted in the deaths of 16 servicemembers—more than the number of servicemembers from all military branches killed in action in 2021—and had caused many more airmen to be hospitalized. *Ibid.*; see Def. Cas. Analysis Sys., Dep't of Def., *Active Duty Military Deaths by Year and Manner, 1980-2021* (May 2022), perma.cc/4AFX-QTKZ.[1]

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[1] The Air Force's website also reported that, as of July 2022, 817 servicemembers had an administrative exemption, but that figure included more than 600 members of the Air National Guard who were classified as "Missing" for various reasons, including because they had already retired. See *COVID-19 Statistics, supra*; D. Ct. Doc. 83-4, at 3 (Aug. 15, 2022).

Regardless of their exemption status, the Air Force generally considered all servicemembers who were unvaccinated against COVID-19 not medically ready and therefore ineligible for deployment. See DAF, *Instruction 10-250: Individual Medical Readiness* ¶ 2.1.3 (July 22, 2020), perma.cc/9UBB-P558 (listing compliance with all vaccination requirements among the "[i]ndividual medical readiness requirements" (emphasis omitted)).

B. The Present Controversy

1. In February 2022, 18 servicemembers in the Air Force or its reserve component whose religious exemption requests had been denied (or not yet acted on) brought this suit in the U.S. District Court for the Southern District of Ohio on behalf of themselves and others similarly situated, asserting claims under the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* See App., *infra*, 143a-150a. The gravamen of the complaint was that the Air Force's process for considering religious exemption requests was a "sham" in which nearly all requests were denied, and that the Air Force had discriminated against religion by granting medical and administrative exemptions more freely than religious exemptions. *Id.* at 12a.

2. In March 2022, the district court granted in part and denied in part the individual plaintiffs' motion for a preliminary injunction. App., *infra*, 135a-178a. The court found that the plaintiffs' RFRA and First Amendment claims were likely to succeed. *Id.* at 159a-170a. Under RFRA, the government may not substantially burden a person's exercise of religion unless it demonstrates that the application of the burden to the person is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(b).

Here, the court stated that the government's asserted interest in "military readiness" was not sufficiently specific to the individual plaintiffs, and in any event "ring[s] hollow" because the Air Force had granted administrative and medical exemptions to other servicemembers. App., *infra*, 162a-163a. The court also concluded that the other preliminary-injunction factors favored the individual plaintiffs, observing that their "religious-based refusal to take a COVID-19 vaccine simply isn't going to halt a nearly fully vaccinated Air Force's mission to provide a ready national defense." *Id.* at 172a (citation omitted); see *id.* at 170a-172a.

The district court ordered the government not to take "any disciplinary or separation measures" against the individual plaintiffs based on "their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs." App., *infra*, 177a. The court also stated, however, that its injunction would "not affect the Air Force's ability to make operational decisions, including deployability decisions," *id.* at 174a, and that the preliminary injunction was therefore consistent with this Court's then-recent order in *Austin* v. *U.S. Navy SEALs 1-26*, 142 S. Ct. 1301 (2022).[2]

The government appealed. In July 2022, while that appeal was pending, the district court certified a class

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[2] In *Navy SEALs*, a district court had preliminarily enjoined the Navy from enforcing the Secretary of Defense's COVID-19 vaccination requirement with respect to a group of Navy SEALs and other members of the Naval Special Warfare community. See Gov't Stay Appl. at 10-12, *Navy SEALs*, *supra* (No. 21A477). This Court granted the government's emergency application for a partial stay of that injunction insofar as the injunction had "preclude[d] the Navy from considering [the plaintiffs'] vaccination status in making deployment, assignment, and other operational decisions." *Navy SEALs*, 142 S. Ct. at 1301.

comprising all Air Force servicemembers whose requests for religious exemptions had been denied (or not yet acted upon) by the date of class certification and whose asserted religious objections had been found to be sincere by an Air Force chaplain. App., *infra*, 111a-134a. The government had argued that the plaintiffs' claims were not amenable to class-wide resolution "due to the individualized analysis required under RFRA." *Id.* at 118a; see *Holt* v. *Hobbs*, 574 U.S. 352, 363 (2015) (explaining that RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened") (citation omitted). The court rejected that argument. The court understood the plaintiffs to be alleging that the Air Force had adopted a "policy and practice of discrimination by denying substantially all religious accommodation requests," and the court stated that whether such a policy exists (and its lawfulness) would be a common question for all class members. App., *infra*, 119a.

In an order issued several days later, the district court modified the class definition and granted a class-wide preliminary injunction. App., *infra*, 106a-110a. The court's four-page order did not discuss the equitable factors governing such relief. The court instead stated that it was "extend[ing]" the preliminary injunction to the entire class of approximately 10,000 servicemembers "for the reasons discussed" in the court's prior order granting an injunction to the individual plaintiffs. *Id.* at 106a-107a.

The government appealed the district court's further orders and sought a stay of the class-wide preliminary injunction pending appeal. The court declined to grant

a stay but further modified the class definition and the class-wide injunction. App., *infra*, 96a-105a.

3. The court of appeals also declined to grant a stay pending appeal, but set the government's second appeal on an expedited schedule. App., *infra*, 80a-95a. The court ultimately upheld both preliminary injunctions in a single decision. *Id.* at 1a-79a.

With respect to the individual plaintiffs, the court of appeals found that their RFRA claims were likely to succeed. App., *infra*, 13a-47a. The government had argued that the vaccination requirement serves the compelling interests of ensuring military readiness and the health of the Nation's Air Force. *Id.* at 35a. The court deemed those asserted interests too "general" for RFRA purposes and stated that the government would need to "identify the duties of each" plaintiff and explain why that particular plaintiff must be vaccinated. *Id.* at 36a. When the plaintiffs had moved for a preliminary injunction, the government had submitted "detailed declarations and record materials" describing its compelling interests in vaccinating the five plaintiffs who had by then exhausted the Air Force's administrative process for seeking religious accommodations. *Id.* at 37a (citation omitted). The court acknowledged those materials but declined to consider them because, in the court's view, the government had not made the relevant showing in its appellate briefing. *Id.* at 38a. The court also concluded that the government's asserted interests in military readiness and servicemember health were undercut by the medical and administrative exemptions the Air Force had granted. *Id.* at 38a-42a.

With respect to the class, the court of appeals held that the district court "did not abuse its discretion by finding that common questions existed" to warrant class

certification. App., *infra*, 59a. Specifically, the court of appeals identified the questions common to the class as whether the Air Force had "followed a 'de facto policy' of rejecting religious exemptions based on its generalized health and readiness interests," and whether the Air Force had "followed a 'discriminatory policy' of treating religious exemptions less favorably than other exemptions." *Id.* at 60a (citation omitted).

Both of those questions concerned the Air Force's internal administrative processes for considering requests for religious exemptions. The government had argued that neither alleged policy existed but that, in any event, such policies would be irrelevant if the government could show in litigation that the Air Force had a compelling interest in requiring a particular plaintiff to be vaccinated and that no less restrictive means would satisfy that interest. 22-3702 Gov't C.A. Br. 3, 22-30. The government had further argued that class certification would impede the government from making (and the court from considering) such plaintiff-specific showings. See *ibid.* The court of appeals rejected those arguments, holding that RFRA does not permit the government to rely on "after-the-fact explanations" in court. App., *infra*, 68a (citation omitted).

The court of appeals also perceived no abuse of discretion in the district court's decision to grant a preliminary injunction to a class of approximately 10,000 servicemembers, stating that the "analysis * * * largely overlaps" with the preliminary injunction for the 18 named plaintiffs. App., *infra*, 75a; see *id.* at 75a-79a.

C. Subsequent Developments

1. The court of appeals entered judgment on November 29, 2022. App., *infra*, 1a. A few weeks later, Congress enacted the James M. Inhofe National De-

fense Authorization Act for Fiscal Year 2023 (NDAA), Pub. L. No. 117-263, 136 Stat. 2395, which the President signed into law on December 23, 2022. Section 525 of 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." § 525, 136 Stat. 2571-2572.

Although the Secretary of Defense had opposed the enactment of Section 525 of the NDAA, he promptly complied with Congress's direction.[3] On January 10, 2023, the Secretary rescinded the COVID-19 vaccination requirement he had imposed in August 2021. App., *infra*, 186a-189a. The Secretary's memorandum rescinding the requirement also provided that "[n]o individuals currently serving in the Armed Forces shall be separated solely on the basis of their refusal to receive the COVID-19 vaccination if they sought an accommodation on religious, administrative, or medical grounds," and that "[t]he Military Departments will update the records of such individuals to remove any adverse actions solely associated with denials of such requests, including letters of reprimand." *Id.* at 187a.

On January 23, 2023, the Secretary of the Air Force rescinded prior guidance implementing the COVID-19 vaccination requirement for the Air Force. App., *infra*, 190a-191a. In doing so, the Secretary reiterated that no current servicemembers would be "separated solely on

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[3] See, *e.g.*, Sabrina Singh, Deputy Pentagon Press Sec'y, Dep't of Def., *Press Briefing Tr.* (Dec. 7, 2022), perma.cc/EXQ2-FNBN (stating that the Secretary of Defense "support[ed] continuing the vaccine mandate in the NDAA"); Connor O'Brien, Politico, *Defense bill rolls back Pentagon's Covid vaccine mandate* (Dec. 6, 2022), perma.cc/YQ26-DYAL (quoting a government spokesperson's statement that "Secretary Austin has been very clear that he opposes the repeal of the vaccine policy").

the basis of their refusal to receive the COVID-19 vaccination if they sought an accommodation on religious, administrative, or medical grounds." *Id.* at 190a. The Secretary also confirmed that "[t]he Department of the Air Force [would] update the records" of individuals who had sought religious or other accommodations "to remove any adverse actions solely associated with denials of such requests, including letters of reprimand." *Id.* at 190a-191a.

2. In light of those developments, the government filed a petition for rehearing, for the limited purpose of requesting that the court of appeals vacate its prior judgment and vacate the preliminary injunctions as moot. See Gov't C.A. Reh'g Pet. 1-2.

The court of appeals denied rehearing. App., *infra*, 179a-183a. In an unsigned order, the court stated that "the district court should review this mootness question in the first instance." *Id.* at 180a. The court also stated that it had alternatively concluded that "even if the preliminary injunctions were now moot, that fact would not provide a basis for the 'extraordinary remedy of vacatur' of the panel's opinion." *Id.* at 180a-181a (citation omitted).

Judge Kethledge, joined by Judges Thapar, Bush, and Murphy, concurred in the denial of rehearing en banc and wrote separately to state that vacatur was inappropriate because "the putative mootness here arose from the government's own actions." App., *infra*, 181a; see *id.* at 180a.

Judge Moore, joined by Judges Clay and Stranch, dissented from the denial of rehearing en banc. App., *infra*, 182a; see *id.* at 180a. The dissenting judges observed that "[t]welve federal appellate judges on three courts of appeals have unanimously concluded that the

NDAA and the military's implementation of that legislation mooted similar preliminary-injunction appeals." *Id.* at 182a (citing *Roth* v. *Austin*, 62 F.4th 1114, 1119 (8th Cir. 2023); *Navy Seal 1* v. *Austin*, No. 22-5114, 2023 WL 2482927, at *1 (D.C. Cir. Mar. 10, 2023) (per curiam), petition for cert. pending, No. 22-1201 (filed June 8, 2023); *Dunn* v. *Austin*, No. 22-15286, 2023 WL 2319316, at *1 (9th Cir. Feb. 27, 2023); and *Short* v. *Berger*, No. 22-15755, 2023 WL 2258384, at *1 (9th Cir. Feb. 24, 2023)). The dissenting judges found those decisions persuasive and would have granted rehearing en banc to vacate the panel opinion and "hold that Congress's action mooted the pending appeals of the district court's preliminary-injunction orders." *Ibid.*

The court of appeals issued its mandate on April 25, 2023, one week after denying rehearing. 22-3702 C.A. Doc. 85.

REASONS FOR GRANTING THE PETITION

The court of appeals wrongly upheld preliminary injunctions barring the Air Force from enforcing the military's COVID-19 vaccination requirement. Both preliminary injunctions countermanded the considered judgments of the Nation's professional military leaders that vaccination against COVID-19 was essential to maintaining military readiness and troop health during the pandemic. Given the exceptional significance of the issues, the decision below would have warranted this Court's further review had the challenged vaccination requirement remained in effect. Indeed, the Court had previously granted the government's motion for a partial stay of an injunction in parallel RFRA litigation involving the same vaccination requirement. See *Austin* v. *U.S. Navy SEALs 1-26*, 142 S. Ct. 1301 (2022).

Before the government could obtain further review in this case, however, Congress directed the Secretary of Defense to rescind the military's COVID-19 vaccination requirement, and he did so. Those developments rendered the government's appeals of the preliminary injunctions moot. Consistent with this Court's ordinary practice under such circumstances, the Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand with instructions to direct the district court to dismiss its orders granting the preliminary injunctions as moot. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see also, *e.g.*, *Mayorkas* v. *Innovation Law Lab*, 141 S. Ct. 2842, 2842 (2021).

A. These Appeals Are Moot

The preliminary injunctions issued by the district court, and the government's appeals from those injunctions, became moot after the Secretary of Defense carried out Congress's directive to rescind the vaccination requirement that was the subject of both injunctions.

1. Under Article III, the jurisdiction of the federal courts is limited to the resolution of actual "Cases" or "Controversies." U.S. Const. Art. III, § 2, Cl. 1. "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (citation omitted). "A case that becomes moot at any point during the proceedings is 'no longer a "Case" or "Controversy" for purposes of Article III,' and is outside the jurisdiction of the federal courts." *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (quoting *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013)).

A case or appeal becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already*, 568 U.S. at 91 (citation omitted). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.'" *Ibid.* (citation omitted).

Mootness may result during litigation when a controversy is overtaken by new legislation that "significantly alters the posture of th[e] case." *United States Dep't of the Treasury* v. *Galioto*, 477 U.S. 556, 559 (1986). In *United States* v. *Microsoft Corp.*, 138 S. Ct. 1186 (2018) (per curiam), for example, the Court granted certiorari to address the circumstances under which "a U.S. provider of e-mail services must disclose to the Government electronic communications within its control" that are stored abroad, *id.* at 1187. While the case was pending, Congress enacted new legislation addressing the same issue, and the government applied for and obtained a warrant under the new law. *Id.* at 1187-1188. The Court held that, as a result of those developments, "[n]o live dispute remain[ed] between the parties over the issue with respect to which certiorari was granted," and the case "ha[d] become moot." *Id.* at 1188; see, *e.g.*, *United States Dep't of Justice* v. *Provenzano*, 469 U.S. 14, 15 (1984) (per curiam) (holding that "new legislation * * * plainly render[ed] moot" the question presented); *Galioto*, 477 U.S. at 559 (similar).

2. The NDAA and its implementation caused these preliminary-injunction appeals to become moot. The injunctions had forbidden the government from "taking any disciplinary or separation measures against [re-

spondents] * * * for their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs." App., *infra*, 177a (individual-plaintiff injunction); see *id.* at 102a-103a (class-wide injunction). But any live controversy between the parties about whether respondents may be ordered to be vaccinated or disciplined for failure to comply with that order has now ended.

Section 525 of the NDAA provided that, "[n]ot later than 30 days after the * * * enactment" of the NDAA, "the Secretary of Defense shall rescind the mandate that members of the Armed Forces be vaccinated against COVID-19." § 525, 136 Stat. 2571-2572. Although the Secretary had opposed including any such provision in the NDAA, he complied with Congress's directive by formally "rescind[ing] the mandate that members of the Armed Forces be vaccinated against COVID-19." App., *infra*, 187a.

The Secretary of Defense also ordered that current servicemembers may not be separated from the service "solely on the basis of their refusal to receive the COVID-19 vaccination if they sought an accommodation on religious * * * grounds," as all the named plaintiffs and members of the class did. App., *infra*, 187a; cf. *id.* at 101a-102a (defining the class to include only servicemembers who had already "submitted a religious accommodation request to the Air Force"). The Secretary further directed that the military records of any such individuals be updated "to remove any adverse actions solely associated with" the denial of their requests for religious exemptions, "including letters of reprimand." *Id.* at 187a. And the Secretary of the Air Force issued an analogous memorandum to implement those policies for the Air Force. See *id.* at 190a-191a.

As a result, no live controversy exists between the parties about the issues raised in the government's two appeals. Upholding the preliminary injunctions would do nothing to benefit respondents because they are no longer subject to the rescinded COVID-19 vaccination requirement and face no prospect of being disciplined for failure to comply with it, now or in the past.

Numerous courts have, accordingly, "concluded that the NDAA and the military's implementation of that legislation mooted similar preliminary-injunction appeals." App., *infra*, 182a (Moore, J., dissenting from the denial of rehearing en banc). Judge Moore observed that "[t]welve federal appellate judges on three courts of appeals" had reached such a conclusion. *Ibid.* That number has only grown. In total, seven different panels of six courts of appeals have now recognized that the NDAA and its implementation mooted similar appeals from the grant or denial of preliminary injunctions concerning the now-rescinded COVID-19 vaccination requirement for servicemembers.

For example, the Fifth Circuit concluded that those developments mooted the government's pending appeals in the *Navy SEALs* case in which this Court previously entered a partial stay. See *U.S. Navy SEALs 1-26* v. *Biden*, 72 F.4th 666, 669 (2023); see also p. 6 & n.1, *supra*. The district court in that case, like the district court here, had granted preliminary injunctions to individual plaintiffs and to a certified class, and the NDAA was enacted during the appellate proceedings about those injunctions. See *Navy SEALs*, 72 F.4th at 670-671. The Fifth Circuit recognized that the Navy, "[o]beying a newly enacted federal statute," had rescinded the policies that were the subject of the preliminary injunctions, thus "moot[ing] the appeal[s]." *Id.* at

671-672. The court explained that "the preliminary injunctions no longer provide * * * 'any effectual relief,'" as "[t]here is no need to enjoin policies that no longer exist." *Id.* at 672 (citation omitted).

Every other court of appeals to consider the issue has reached the same conclusion. See *Robert* v. *Austin*, 72 F.4th 1160, 1165 (10th Cir. 2023) ("Congress's revocation of [the military's] vaccine mandate, and [the] implementation of Congress's instruction, means there is no more vaccine mandate to enjoin. The claim [for injunctive relief] is therefore moot."); *Roth* v. *Austin*, 62 F.4th 1114, 1119 (8th Cir. 2023) ("The rescission of the COVID-19 vaccination mandate, as directed by the [NDAA], provides the Airmen all of their requested preliminary injunctive relief and renders this appeal moot."); *Navy Seal 1* v. *Austin*, No. 22-5114, 2023 WL 2482927, at *1 (D.C. Cir. Mar. 10, 2023) (per curiam) (dismissing appeals as moot in light of the implementation of the NDAA), petition for cert. pending, No. 22-1201 (filed June 8, 2023); *Dunn* v. *Austin*, No. 22-15286, 2023 WL 2319316, at *1 (9th Cir. Feb. 27, 2023) (same); *Short* v. *Berger*, No. 22-15755, 2023 WL 2258384, at *1 (9th Cir. Feb. 24, 2023) (same); Judgment, *Alvarado* v. *Austin*, No. 23-1419 (4th Cir. Aug. 3, 2023) (same).

3. In denying the government's petition for rehearing, the Sixth Circuit stated that "the district court should review this mootness question in the first instance." App., *infra*, 180a. But the court did not explain how it could proceed to issue its mandate without first assuring itself of its jurisdiction to do so. Until the issuance of the mandate, the case "remain[ed] within the jurisdiction of the court of appeals," 16AA Charles Alan Wright et al., *Federal Practice and Procedure* § 3987, at 701 (5th ed. 2020), and the court was thus obligated

to confirm that "an actual controversy" remained "extant." *Arizonans for Official English*, 520 U.S. at 67 (citation omitted); see, *e.g.*, *Vital Pharm., Inc.* v. *Alfieri*, 23 F.4th 1282, 1288 (11th Cir. 2022) ("[W]e must ensure—up until the moment our mandate issues—that intervening events have not mooted the appeal."); *Hirschfeld* v. *ATF*, 14 F.4th 322, 325-326 (4th Cir. 2021) (similar), cert. denied, 142 S. Ct. 1447 (2022).

The court of appeals did not elaborate on the issues it believed the district court should examine, but respondents had opposed the government's suggestion of mootness on three grounds, arguing that (1) the appeals were not moot because some plaintiffs allegedly face "collateral consequences" from their prior non-compliance; (2) the exception to mootness for voluntary cessation applies; and (3) the dispute was capable of repetition while evading review. Pls.' C.A. Resp. to Pet. for Reh'g En Banc 7-15. Those theories lack merit.

a. In some circumstances, a federal court may adjudicate an appeal that would otherwise be moot if a decision in a party's favor would alter the "collateral legal consequences" the party faces—the classic example being a criminal defendant who seeks to continue to appeal a conviction even after completing his sentence. *Lane* v. *Williams*, 455 U.S. 624, 632 (1982) (citation omitted). But respondents identify nothing like that here. Both the Secretary of Defense and the Secretary of the Air Force have made clear that servicemembers who sought religious exemptions will not face any future discipline for not complying with the COVID-19 vaccination requirement when it still existed, and that service records will be corrected to remove any prior discipline, including letters of reprimand. See App., *infra*, 186a-189a, 190a-191a; cf. *Roth*, 62 F.4th at 1119 (discussing

those developments and observing that "no adverse action may be taken against the Airmen for refusing to receive the COVID-19 vaccine"). The Deputy Secretary of Defense has also issued guidance making clear that the Air Force's prior "limitations on deployability" based on lack of COVID-19 vaccination are "no longer in effect as of January 10, 2023." D. Ct. Doc. 111-1, at 2 (May 2, 2023).

b. The voluntary-cessation exception to mootness also does not apply here. Under that doctrine, a party "claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already*, 568 U.S. at 91 (citation omitted). Here, however, the Air Force did not voluntarily cease to require servicemembers to be vaccinated against COVID-19. Congress instead compelled the Secretary of Defense to rescind the military's COVID-19 vaccination requirement over the Secretary's opposition. See p. 10 & n.2, *supra*. To say that the mootness "arose from the government's own actions," App., *infra*, 181a (Kethledge, J., concurring in the denial of rehearing en banc), is to ignore that distinction. In prior cases addressing mootness, this Court has never suggested that new Acts of Congress should be attributed to the Executive Branch as a litigant, and doing so would be inconsistent with the separation of powers between the branches of the federal government. Cf. *Microsoft*, 138 S. Ct. at 1187-1188; *Provenzano*, 469 U.S. at 15.

c. These preliminary-injunction appeals also do not implicate any "controversy that is capable of repetition, yet evading review." *Sanchez-Gomez*, 138 S. Ct. at 1540 (citation omitted). "A dispute qualifies for that excep-

tion only 'if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.'" *Ibid.* (citation omitted). Neither requirement is satisfied here. Although the Secretary of Defense continues to adhere to the view that vaccination "enhances operational readiness and protects" the Nation's armed forces, App., *infra*, 187a, no reasonable prospect exists at this time that respondents will be subject to the same COVID-19 vaccination requirement again in the foreseeable future—let alone that they will continue to have religious objections to vaccination or will be denied religious accommodations. Cf. *id.* at 45a (noting the development of vaccines that some plaintiffs do not object to receiving). And in any event, respondents have failed to show that any future controversy about mandatory COVID-19 vaccination in the military would be too short in duration to be fully litigated to a conclusion at that time.

B. The Decision Below Would Have Warranted Review

Vacatur of a lower court's decision because of intervening mootness is generally available only to "those who have been prevented from obtaining the review to which they are entitled." *Camreta* v. *Greene*, 563 U.S. 692, 712 (2011) (quoting *Munsingwear*, 340 U.S. at 39). It has therefore been the longstanding position of the United States that when a case becomes moot after the court of appeals issues its mandate but before this Court acts on a petition for a writ of certiorari, *Munsingwear* vacatur is appropriate only if the question presented would have merited this Court's review had the case not become moot. See, *e.g.*, Pet. at 16-17, *Yellen* v. *United States House of Representatives*, 142 S. Ct.

332 (2021) (No. 20-1738); see also Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4, at 19-28 to 19-29 & n.34 (11th ed. 2019).

That standard is amply satisfied here. The Sixth Circuit upheld preliminary injunctions that overrode the "professional military judgments" of the Nation's senior military commanders about quintessentially military matters affecting thousands of servicemembers. *Navy SEALs 1-26*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring) (citation omitted). Even in the absence of a square circuit conflict, this Court has often granted certiorari to review lower-court decisions interfering with important military policies. See, *e.g.*, *Winter* v. *NRDC, Inc.*, 555 U.S. 7 (2008); *Munaf* v. *Geren*, 553 U.S. 674 (2008). And here, this Court had already granted a partial stay of an injunction against the COVID-19 vaccination requirement and had denied an airman's application for an injunction pending appeal after the lower courts in his case declined to grant that relief. See *Navy SEALs*, 142 S. Ct. at 1301; *Dunn* v. *Austin*, 142 S. Ct. 1707 (2022).

This Court's review also would have been warranted because the court of appeals' decision was seriously flawed. With respect to both the merits of respondents' RFRA claims and the scope of any "appropriate relief" for those claims, 42 U.S.C. 2000bb-1(c), the decision below departed from this Court's longstanding approach to reviewing claims by servicemembers challenging the strictures under which our Nation's military necessarily operates.[4]

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[4] The court of appeals upheld the preliminary injunctions "based solely on [respondents'] RFRA claims" and declined to address respondents' "free-exercise claims." App., *infra*, 13a. Because the challenged policies would have satisfied the test prescribed by

1. This Court has recognized that "judges are not given the task of running the" military, and it is the Executive officials charged with protecting our national security and defending our borders—not courts—who have authority to determine matters of military readiness. *Orloff* v. *Willoughby*, 345 U.S. 83, 93 (1953). Federal courts are therefore "traditionally * * * reluctant to intrude upon the authority of the Executive in military and national security affairs." *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988). Indeed, the Court has emphasized that "[j]udicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters committed to the other branches.'" *Ziglar* v. *Abbasi*, 582 U.S. 120, 142 (2017) (citation omitted). "It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

The Court has adhered to those principles in disputes involving servicemembers and "the guarantees of the First Amendment." *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986). In *Goldman*, for example, the Court upheld the Air Force's refusal to grant any exemption from its uniform requirements for an orthodox Jewish officer who sought to wear a yarmulke indoors while on duty at a medical clinic. See *id.* at 504-505. The Court explained that the military is "'a specialized society separate from civilian society,'" that the military must be able to "'insist upon a respect for duty and a discipline without counterpart in civilian life,'" and that

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RFRA, they also necessarily would have complied with the most stringent standard that could have applied under the Free Exercise Clause of the First Amendment. See *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam).

the "essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'" *Id.* at 506-507 (citations omitted). The Court further explained that "[t]hese aspects of military life" do not render the First Amendment "nugatory," but they do counsel in favor of "far more deferential" judicial review than would apply in other contexts. *Id.* at 507. In particular, the Court stated that, "when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Ibid.*

Congress emphasized similar principles when it later enacted RFRA. The Senate Report on RFRA observed that "[t]he courts have always recognized the compelling nature of the military's interest" in "good order, discipline, and security" and have "always extended to military authorities significant deference in effectuating these interests." S. Rep. No. 111, 103d Cong., 1st Sess. 12 (1993). The Senate Report also made clear that legislators "intend[ed] and expect[ed] that such deference w[ould] continue under" RFRA. *Ibid.* The House Report articulated the same expectation. See H.R. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993).

2. The preliminary injunctions upheld below cannot be reconciled with those principles. Indeed, the court of appeals took the position that RFRA "prohibits" adhering to this Court's pre-RFRA decisions affording significant deference to military decisionmakers in challenges to military regulations. App., *infra*, 34a. The court of appeals was of course correct that RFRA requires courts considering claims in the military context to apply the same compelling-interest standard that

governs in other contexts. See 42 U.S.C. 2000bb-1(b). But nothing in RFRA suggests that, in applying that standard, courts should abandon their deeply rooted practice of affording substantial deference to "professional military judgments." *Navy SEALs*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring) (quoting *Gilligan*, 413 U.S. at 10).

The lower courts' erroneous failure to afford any meaningful deference to the judgments of the Nation's military commanders infected their treatment of both preliminary injunctions. When the individual plaintiffs first sought an injunction, the government submitted detailed declarations from military officials explaining why the government had a compelling interest in vaccinating the five plaintiffs whose claims were fully exhausted (and therefore ripe). See D. Ct. Docs. 27-19 to 27-24 (Mar. 9, 2022). The declarations also explained why the government had no less restrictive means of furthering its compelling interests. In the judgment of the Air Force, vaccination against COVID-19 was the single "most effective way of * * * preventing service members from becoming ill and dying," D. Ct. Doc. 27-17, at 3 (Mar. 9, 2022), and proffered alternatives like masking, testing, or social distancing "would not be as effective and would hinder the Air Force mission," *id.* at 5; see *id.* at 7-20.

The district court did not acknowledge or discuss that evidence—even while faulting the government for allegedly failing to make the plaintiff-specific showing that RFRA requires. App., *infra*, 163a. The Sixth Circuit likewise failed to give the evidence any meaningful consideration, much less the deference warranted under this Court's precedent. With respect to the "detailed declarations and record materials" that the dis-

trict court had overlooked, *id.* at 37a (citation omitted), the court of appeals stated that the "Air Force [had] failed to engage in the properly focused inquiry where it belonged—in its briefing," by which the court apparently meant the government's appellate briefing. *Id.* at 38a. The court also stated that the declarations improperly relied on "after-the-fact 'rationalizations' made for this suit," *ibid.* (citation omitted), but the court did not identify any legal basis for prohibiting the government from making the showing that RFRA requires in the litigation that RFRA authorizes.

At the same time, the court of appeals affirmed the certification of a class that all but guaranteed that the Air Force would have no real opportunity to address (or the court to consider) each RFRA claimant. In the court's view, class certification was nonetheless appropriate because the district court could instead address on a class-wide basis whether the Air Force had a "'de facto policy'" of denying substantially all religious accommodation requests based on "generalized" interests insufficiently tailored to each class member. App., *infra*, 60a (citation omitted).

In each respect, the court of appeals appeared to wrongly conceive of this RFRA litigation as a form of judicial review of the Air Force's administrative process for responding to religious-accommodation requests. As the text of RFRA confirms, however, the relevant question is whether the government "demonstrates" in court, through the presentation of evidence to a factfinder, that application of a burden to the RFRA plaintiff is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. 2000bb-1(b); see 42 U.S.C. 2000bb-2(3) (defining "demonstrates" to mean "meets

the burdens of going forward with the evidence and of persuasion"). RFRA does not create any entitlement to an administrative process for seeking religious accommodations, nor does it authorize federal courts to sit in review of any such process. And doing so was particularly inappropriate in the military context.

The court of appeals also endorsed the district court's flawed comparison between the number of medical and religious exemptions granted by the Air Force, stating that both types of exemptions could be viewed as temporary "in an identical way" because vaccines could be developed in the future as to which respondents might have no religious objections. App., *infra*, 41a (emphasis omitted). The court did not explain why RFRA obligated military commanders to engage in such speculation. And even crediting the possibility that *some* religious objections might have been only temporary, the comparison would still have been inapt. Requiring individuals with medical contraindications to a COVID-19 vaccine to nonetheless take the vaccine would have been antithetical to one of the compelling interests the Air Force was seeking to further: maintaining the "health of its troops." *Id.* at 35a (citation omitted). The same cannot be said for servicemembers with religious objections.

The court of appeals further erred in disregarding the Air Force's expert military judgments about least restrictive means. The court stated that the Air Force had "an obvious alternative" to vaccination, in the form of "reassign[ing] any Plaintiff who works in too close of contact with others." App., *infra*, 44a. But this Court's precedents make clear that federal courts have no warrant to instruct the military to reassign thousands of servicemembers. In *Orloff*, this Court identified "no

case where this Court ha[d] assumed to revise duty orders as to one lawfully in the service," 345 U.S. at 94, but that is just what the court here would have effectively required the Air Force to do. Such a judgment intrudes directly on "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force"; as the Court has emphasized, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan*, 413 U.S. at 10.

3. At a minimum, further review would have been warranted with respect to the scope of any preliminary injunctive relief for the certified class. The district court did not engage in any meaningful analysis of the preliminary-injunction factors for the class. The court instead treated its prior analysis of the equities of granting a preliminary injunction for the 18 named plaintiffs as having already resolved the equities of granting a preliminary injunction covering approximately 10,000 servicemembers. See p. 7, *supra*. But the class-wide injunction was significantly more harmful to the government and the public.

Lieutenant General Kevin B. Schneider, a three-star Air Force general, explained below that Air Force commanders had concluded that unvaccinated servicemembers could not "deploy without risking the overall success of the mission." D. Ct. Doc. 73-1, at 17 (July 21, 2022). He further explained that having a large number of unvaccinated servicemembers "would weaken readiness and diminish the true strength of the Force[,] * * * pos[ing] an unacceptable risk to mission accomplishment and to the health of the Force." *Ibid.* Accordingly, in his view the class-wide preliminary injunction "cause[d] severe harm to the operational readiness of

the" Air Force, degrading its "lethality and force capabilities" by requiring it to retain thousands of individuals whom the Air Force considered "ineligible to deploy" but who continued to occupy billets indefinitely during litigation. D. Ct. Doc. 83-1, at 12 (Aug. 15, 2022).

The district court never addressed Lieutenant General Schneider's declarations, and it failed to explain how the balance of the equities could favor a class-wide injunction given his testimony. The court of appeals also did not address Lieutenant General Schneider's declarations, instead agreeing with the district court that the analysis "largely overlaps" for the individual-plaintiff and class-wide preliminary injunctions. App., *infra*, 75a. The court of appeals further stated that the preliminary injunction permitted the Air Force to take into account the class members' vaccination status in making "operational decisions," *id.* at 78a (citation omitted), without acknowledging the views of the Nation's military commanders that creating a class of 10,000 undeployable servicemembers was itself a threat to the Air Force's operational effectiveness and end strength. The court had no sound basis for disregarding those professional military judgments.

C. Vacatur Is Appropriate Under *Munsingwear*

When a case that would otherwise merit this Court's review becomes moot "while on its way [to this Court] or pending [a] decision on the merits," the Court's "established practice" is to "vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39. That practice ensures that no party is "prejudiced by a [lower-court] decision" and "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 40-41; see *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513

U.S. 18, 21 (1994) ("If a judgment has become moot while awaiting review, this Court may not consider its merits, but may make such disposition of the whole case as justice may require.") (brackets and citation omitted). The Court should follow that usual practice and vacate the Sixth Circuit's decision in this case.

As this Court has repeatedly observed, the determination whether to vacate the judgment when a case becomes moot while pending review ultimately "is an equitable one," *U.S. Bancorp*, 513 U.S. at 29, requiring the disposition that would be "most consonant to justice" in light of the circumstances, *id.* at 24 (citation omitted). See *Azar* v. *Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (observing that because *Munsingwear* vacatur "is rooted in equity, the decision whether to vacate turns on 'the conditions and circumstances of the particular case'") (citation omitted).

This Court has previously indicated that vacatur pursuant to *Munsingwear* is appropriate when a case becomes moot because a challenged law is repealed, see *Diffenderfer* v. *Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414-415 (1972) (per curiam), or substantially amended, see *Microsoft*, 138 S. Ct. at 1188; *Provenzano*, 469 U.S. at 15. And in *Alvarez* v. *Smith*, 558 U.S. 87 (2009), the Court followed its "ordinary practice" and vacated the judgment below where the State petitioner had mooted the case by returning disputed property, explaining that the State had not taken that action out of a "desire to avoid review." *Id.* at 97. Recent cases likewise reflect the principle that *Munsingwear* vacatur is appropriate when challenges to federal policies are mooted by Executive actions, undertaken in good faith and for reasons unrelated to litigation. See, *e.g.*, *Yellen* v. *United States House of Repre-*

sentatives, 142 S. Ct. 332, 332 (2021) (challenge to certain border-wall expenditures moot after Executive Branch ceased the expenditures); *Mayorkas*, 141 S. Ct. at 2842 (challenge to certain immigration practices moot after Executive Branch terminated the practices).

The equities here favor vacatur. This case became moot because Congress, in the NDAA, required the Secretary of Defense to rescind the vaccination requirement that was the subject of the district court's preliminary injunctions. The Secretary thus rescinded the challenged vaccination requirement not out of a "desire to avoid review," *Alvarez*, 558 U.S. at 97, but because Congress overrode his objections and required him to do so. And leaving the decision below unreviewed threatens real practical harm to the government and the public. The court of appeals issued a precedential opinion at odds with decades of precedent concerning the deference that courts owe to the military's operational judgments when servicemembers invoke the First Amendment to challenge military policies. Cf. *Munsingwear*, 340 U.S. at 41 (explaining that vacatur is "commonly utilized * * * to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences"). The Court should follow its ordinary practice and vacate the court of appeals' decision given the breadth of the class-wide injunction and the seriousness of the judicial intrusion into military affairs.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand with instructions to direct the district court to vacate its orders granting preliminary injunctions as moot under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

Respectfully submitted.

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AUGUST 2023

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 22-3497/3702

HUNTER DOSTER; JASON ANDERSON; MCKENNA COLANTANIO; PAUL CLEMENT; JOE DILLS; BENJAMIN LEIBY; BRETT MARTIN; CONNOR MCCORMICK; HEIDI MOSHER; PETER NORRIS; PATRICK POTTINGER; ALEX RAMSPERGER; BENJAMIN RINALDI; DOUGLAS RUYLE; CHRISTOPHER SCHULDES; EDWARD STAPANON, III; ADAM THERIAULT; DANIEL REINEKE, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

v.

HON. FRANK KENDALL, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE AIR FORCE; LT. GENERAL ROBERT I. MILLER, IN HIS OFFICIAL CAPACITY AS SURGEON GENERAL OF THE AIR FORCE; LT. GENERAL MARSHALL B. WEBB, IN HIS OFFICIAL CAPACITY AS COMMANDER, AIR EDUCATION AND TRAINING COMMAND; LT. GENERAL RICHARD W. SCOBEE, IN HIS OFFICIAL CAPACITY AS COMMANDER, AIR FORCE RESERVE COMMAND; LT. GENERAL JAMES C. SLIFE, IN HIS OFFICIAL CAPACITY AS COMMANDER, AIR FORCE SPECIAL OPERATIONS COMMAND; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

Argued: Oct. 19, 2022
Decided and Filed: Nov. 29, 2022

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 1:22-cv-00084—Matthew W. McFarland,
District Judge.

OPINION

Before: KETHLEDGE, BUSH, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge. The Department of the Air Force has ordered all of its over 500,000 service members to get vaccinated against COVID-19. Some 10,000 members with a wide array of duties have requested religious exemptions from this mandate. The Air Force has granted only about 135 of these requests and only to those already planning to leave the service. Yet it has granted thousands of other exemptions for medical reasons (such as a pregnancy or allergy) or administrative reasons (such as a looming retirement). The 18 Plaintiffs who filed this suit allege that the vaccine mandate substantially burdens their religious exercise in violation of the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA). Finding that these claims would likely succeed, the district court granted a preliminary injunction that barred the Air Force from disciplining the Plaintiffs for failing to take a vaccine. But its injunction did not interfere with the Air Force's operational decisions over the Plaintiffs' duties. The court then certified a class of thousands of similar service members and extended this injunction to the class.

The Air Force appeals the individual and class injunctions. Its briefs across the two appeals work at cross-purposes. In its challenge to the class-action certification, the Air Force (correctly) states that RFRA adopts an individual-by-individual approach: the Air Force must show that it has a compelling interest in requiring a "specific" service member to get vaccinated based on that person's specific duties and working conditions. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006). In its challenge to the Plaintiffs' injunction, however, the Air Force fails to identify the specific duties or working conditions of a single Plaintiff. It instead seeks to satisfy RFRA with the "general interests" underlying its vaccine mandate. *Id.* at 438. We are thus asked to deny that common questions exist for purposes of certifying a class but to accept that common answers exist for purposes of rejecting all 18 Plaintiffs' claims on their merits.

We decline this inconsistent invitation. Under RFRA, the Air Force wrongly relied on its "broadly formulated" reasons for the vaccine mandate to deny specific exemptions to the Plaintiffs, especially since it has granted secular exemptions to their colleagues. *Id.* at 431. We thus may uphold the Plaintiffs' injunction based on RFRA alone. The Air Force's treatment of their exemption requests also reveals common questions for the class: Does the Air Force have a uniform policy of relying on its generalized interests in the vaccine mandate to deny religious exemptions regardless of a service member's individual circumstances? And does it have a discriminatory policy of broadly denying religious exemptions but broadly granting secular ones? A district court can answer these questions in a "yes" or

"no" fashion for the entire class. It can answer whether these alleged policies violate RFRA and the First Amendment in the same way. A ruling for the class also would permit uniform injunctive relief against the allegedly illegal policies. We affirm.

I

A

The Air Force lists its mission as: "Fly, fight, and win—airpower anytime, anywhere." R.34-2, PageID 2236. It seeks to ensure that the United States can maintain "air superiority" for all offensive operations overseas and defensive operations at home. R.34-3, PageID 2247. It also conducts aerial missions worldwide to gather intelligence, transfer personnel and cargo, and strike targets. *Id.* The Air Force completes its critical duties through a structure that consists primarily of nine Major Commands and three Field Commands. R.34-2, PageID 2236. The Commands include over 3,000 squadrons that perform varied functions, ranging from fighter and bomber squadrons to medical and maintenance squadrons. *Id.*, PageID 2235-36. To fill its squadrons, the Air Force relies on 501,000 service members spread across those on active duty (about 326,000), in the reserves (about 68,000), and in the Air National Guard (about 107,000). R.34-3, PageID 2248.

The "roles" of these individuals "differ vastly." R.34-2, PageID 2235. The duties of the Plaintiffs exemplify this diversity. Some perform tasks readily associated with the Air Force. Lieutenant Colonel Edward Stapanon trains fighter pilots; Major Daniel Reineke trains pilots for remotely piloted aircraft. R.45, PageID 3078-79; R.42-5, PageID 2964. Others plan for

the future. Second Lieutenant Hunter Doster recently graduated from the Air Force Institute of Technology and develops new technology at the Air Force Research Lab. R.48, PageID 3211-15. Still others undertake the service functions required for a global air operation. Airman First Class McKenna Colantonio maintains fuel systems. R.42-1, PageID 2776. Senior Airman Joseph Dills helps passengers on and off planes. R.48, PageID 3254, 3270-71. While the Plaintiffs serve in varied roles, they all share an objection rooted in their faiths to taking any currently available COVID-19 vaccine.

The military has long imposed vaccine mandates. R.27-4, PageID 1564. Before the COVID-19 pandemic, the Department of Defense required personnel to take some vaccines upon entering the service (including for the flu and polio) and others upon taking specific duty assignments (including for anthrax and yellow fever). *Id.*; R.27-6, PageID 1624.

After the FDA approved the first COVID-19 vaccine for regular use in August 2021, the Secretary of Defense added that vaccine to the list of required vaccinations. R.27-3, PageID 1561. The Secretary ordered all Armed Forces to receive an FDA-approved vaccine, but he also permitted them to satisfy this mandate by taking other vaccines approved for emergency use by the FDA or the World Health Organization. *Id.* The Secretary of the Air Force, Frank Kendall, directed active-duty members to get vaccinated by November 2 and reservists by December 2. R.27-7, PageID 1632. Within months, 97% of those on active duty and 92% of those in the reserves had willingly done so. R.27-17, PageID 1970.

Recognizing that some might object to the vaccine, Secretary Kendall permitted medical, administrative, and religious exemptions. R.27-7, PageID 1646, 1649. He also paused the mandate for those seeking exemptions while the Air Force processed their requests. R.27-8, PageID 1656.

Service members may seek medical exemptions for health reasons like a vaccine allergy. R.27-7, PageID 1646; R.27-12, PageID 1922-23. Pregnant service members may also obtain this exemption despite CDC guidance that they may safely get vaccinated. R.27-7, PageID 1645. To obtain exemptions, service members must notify their unit commanders and visit military medical providers. *Id.*, PageID 1654. A provider decides whether to grant an exemption. *Id.* During any period of exemption, a unit commander may alter a service member's duties. *Id.*, PageID 1647.

Service members may seek administrative exemptions if they are near retirement. Secretary Kendall initially limited this exemption to those on "terminal leave." *Id.*, PageID 1649. These members stop working at the start of leave and retire at its end. R.27-16, PageID 1954. He later expanded the exemption to cover all personnel who planned to retire in five months, even those who planned to remain on active duty during this time. R.27-8, PageID 1656. Unit commanders decide whether to approve these exemptions. R.27-16, PageID 1954.

Service members may lastly seek religious exemptions. R.27-7, PageID 1649. Secretary Kendall relied on existing guidance from a Department of the Air Force Instruction (DAFI 52-201) for this exemption. *Id.* The guidance notes that the Air Force has a com-

pelling interest in "mission accomplishment," including in "military readiness, unit cohesion, good order and discipline, and health and safety for both the member and the unit." DAFI 52-201, § 2.1, at 2 (June 23, 2021). Rather than give unit commanders discretion to decide whether these interests trump exemption requests, the guidance centralizes the process. A commander at a Major or Field Command makes the decision, and the Surgeon General of the Air Force resolves all appeals. R.27-7, PageID 1652-53.

The Air Force follows an 11-step religious-exemption process. *Id.*, PageID 1651-53. At step one, service members must submit a written request that describes why a COVID-19 vaccine burdens their religion. *Id.*, PageID 1651. Most Plaintiffs have objected to the available COVID-19 vaccines because of their ties to aborted fetal tissue during development or testing. Lieutenant Doster, for example, listed this concern when explaining why these vaccines would violate his religious beliefs "as a Born-Again Christian." R.11-4, PageID 331, 334. But not all requesters have raised this religious objection. Lieutenant Colonel Jason Anderson wrote that his Buddhist faith prohibited him from presently taking a vaccine. R.11-6, PageID 392-96.

At steps two and three, service members receive counseling. They must meet with their unit commanders to discuss how the failure to get vaccinated might limit their ability to deploy and alter their duty assignments. R.27-7, PageID 1651. And they must meet with medical providers to discuss the risks from COVID-19 and information about vaccines. *Id.*

At step four, military chaplains conduct in-depth interviews to evaluate, and opine on, the sincerity of a service member's beliefs based on such factors as the member's demeanor and past conduct. *Id.*; DAFI 52-201, at 29. A chaplain, for example, recommended granting Doster an exemption because of "overwhelming" evidence that his objection was sincere, including his statements that he had led a "men's group in worship and study" at the Air Force Academy and that his wife works "at a pro-life, non-profit organization." R.11-4, PageID 339.

At step five, a "Religious Resolution Team" (made up of a lower-level commander, chaplain, public affairs officer, staff judge advocate, and medical provider) recommends whether to grant or deny an exemption. R.27-7, PageID 1651. Teams have reached differing results. The team that reviewed Doster's request recommended a denial (over a dissent) in a short statement. R.42-3, PageID 2839. It agreed that Doster's beliefs were sincere but noted that, as set forth in DAFI 52-201, it considered "whether a compelling governmental interest[] exists and whether the [vaccine mandate] uses the least restrictive means necessary to achieve" it. *Id.* The team did not expressly identify any compelling interest or alternative means. In contrast, the team that reviewed the request of Major Andrea Corvi, a class member, voted to approve it (over two dissents) because she could continue in her duty assignment as an information-operations officer while unvaccinated. R.53-1, PageID 3769-70.

At step six, a staff judge advocate offers legal analysis. R.27-7, PageID 1651. The Air Force has largely redacted the parts of these opinions that do more than

describe background law. *E.g.*, R.42-1, PageID 2789-92. But Major Corvi obtained an unredacted opinion. There, a judge advocate recommended granting her an exemption. R.53-1, PageID 3774-77. He reasoned, among other things, that the exemption would minimally affect military readiness because of her duties as an information-operations officer. *Id.*, PageID 3775. He noted that it also would not affect "unit cohesion" because of the "extremely low likelihood" that her unit would ever deploy. *Id.*, PageID 3776. He added that service members "compose a healthier and younger demographic" and so face a greater risk of dying in a car accident than from COVID-19. *Id.*

At step seven, each officer in a service member's chain of command recommends approval or disapproval. R.27-7, PageID 1652. Officers have performed this review with varying degrees of diligence. Some consider a service member's duties. Airman Colantonio's squadron commander recommended granting her an exemption because her work as a fuel-systems technician required her to wear gear that protected against COVID-19. R.42-1, PageID 2776. Others state in a conclusory fashion: "A compelling government interest exists to vaccinate all Airmen against COVID-19," and there are no "less restrictive means available to achieve that compelling interest." R.42-4, PageID 2934.

At step eight, the commander of the relevant Major or Field Command must decide on the exemption and identify the reasons for all denials. R.27-7, PageID 1652. Despite thousands of requests, commanders have denied exemptions with limited individual-specific analysis. One commander appears to deny requests (including those of Airman Colantonio and Staff Ser-

geant Adam Theriault) with a standard-form memo that merely changes whether he "approve[s]" or "disapprove[s]" the exemption. R.42-1, PageID 2780; R.11, PageID 563. These denial memos summarily state that a "compelling governmental interest in mission accomplishment (military readiness, unit cohesion, good order and discipline, and health and safety for both the member and the unit) exists." R.42-1, PageID 2780. Although another commander issued lengthier memos, their substance did not change significantly across denials. *See* R.11-4, PageID 344-45 (Doster); R.38-3, PageID 2635-36 (Stapanon); R.42-5, PageID 2980-81 (Reineke).

At steps nine and ten, the Air Force completes procedural tasks. It places a copy of the decision in a service member's file, provides notice of the decision, and informs the service member of the right to appeal the denial. R.27-7, PageID 1652.

At step eleven, the Surgeon General of the Air Force, Lieutenant General Robert Miller, decides any appeal. R.27-7, PageID 1653. His standard denial memo contains a paragraph's worth of analysis following the same format. *E.g.*, R.11-7, PageID 417 (Colantonio); R.19-1, PageID 944 (Doster); R.42-2, PageID 2817 (Dills); R.42-5, PageID 2999 (Reineke); R.60-1, PageID 4359 (Stapanon). It first states that "preventing the spread of disease among the force is vital to mission accomplishment." R.19-1, PageID 944. It next spends a sentence or two on a service member's individual "circumstances," typically highlighting that the service member interacts with others. *Id.* It then notes that the service member may someday need to deploy "on short notice[.]" *Id.*

After a denial, commanders order service members to get vaccinated in five days. R.11-21, PageID 569. Some warn that a refusal could result in a wide array of punishments: "Failure to comply with this lawful order may result in administrative and/or punitive action for Failing to Obey an Order under Article 92, Uniform Code of Military Justice." R.19-1, PageID 946. But Secretary Kendall listed "administrative discharge" as the standard (mandatory) sanction. R. 27-8, PageID 1656. By July 2022, the Air Force had "administratively separated" 834 members. DAF COVID-19 Statistics—July 2022, https://perma.cc/J3GG-B59M.

As of that month, 9,754 service members had requested religious exemptions. *Id.* The Air Force had granted only 135 requests. *Id.* Even this number overstates things. It actually granted the "religious" exemptions only to those who qualified (or nearly qualified) for an "administrative" exemption because they would soon retire. *See* R.30-2, PageID 2084-85, 2088, R.46-1, PageID 3121-23. At argument, the Air Force agreed that it has granted zero religious exemptions to anyone who does not plan to leave the service within a year. Arg., No. 22-3497, at 51:33-52:07.

The Air Force, by comparison, has provided no statistics on the total number of medical or administrative exemptions that personnel have requested or that it has granted since the inception of the vaccine mandate. In December 2021, there were a total of 2,047 service members currently with medical exemptions and 2,247 service members currently with administrative exemptions. *See* DAF COVID-19 Statistics—December 2021, https://perma.cc/C6ZZ-BGB4. The total number of members with these exemptions in any given month

appears to have steadily declined since then. *See* DAF COVID-19 Statistics—July 2022.

B

In February 2022, the 18 Plaintiffs, some on active duty and others in the reserves, sued Secretary Kendall, Surgeon General Miller, and the commanders of three Major Commands. R.1, PageID 3-6. Asserting RFRA and First Amendment claims, they alleged that the exemption process is a sham because the Air Force followed a discriminatory policy that denied nearly all religious exemptions but broadly granted medical and administrative exemptions. *Id.*, PageID 13.

The district court issued four decisions that matter now. The court granted the Plaintiffs a preliminary injunction on the ground that the Air Force's blanket denial of religious exemptions likely violated RFRA and the Free Exercise Clause. *Doster v. Kendall*, __ F. Supp. 3d __, 2022 WL 982299, at *11-15 (S.D. Ohio Mar. 31, 2022). This injunction barred the Air Force from disciplining the Plaintiffs for failing to take COVID-19 vaccines. *Id.* at *17. But it did not interfere with the Air Force's "operational decisions" about the Plaintiffs' duties or deployability. *Id.*

The district court next certified a class of members of the Air Force. *See Doster v. Kendall*, 342 F.R.D. 117, 121 (S.D. Ohio 2022). It defined the class to include those whom a military chaplain has found to have sincerely held religious beliefs that are substantially burdened by the vaccine mandate. *See Doster v. Kendall*, 2022 WL 3576245, at *3 (S.D. Ohio Aug. 19, 2022). The district court subsequently extended its preliminary injunction to the class. *See Doster v. Kendall*, 2022 WL 2974733, at *1-2 (S.D. Ohio July 27, 2022). It

then denied a stay of this class-wide injunction pending appeal. *See Doster*, 2022 WL 3576245, at *1.

The Air Force appealed both the district court's individual injunction and the court's class injunction. It immediately sought a stay of the latter from us. We denied the stay but consolidated and expedited these two appeals. *Doster v. Kendall*, 48 F.4th 608, 617 (6th Cir. 2022).

II. Injunction for the Named Plaintiffs

We start with the injunction awarded to the Plaintiffs. Courts ask four questions when deciding whether to grant a preliminary injunction: Will the plaintiffs likely succeed on their claims? Will they suffer an irreparable injury without relief? Which side does the balance of the equities favor? And where does the public interest lie? *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Air Force raises three arguments under this framework. It asserts that the Plaintiffs' claims will likely fail because the claims are not judicially reviewable. It asserts that the claims will likely fail because they do not satisfy the governing standards under RFRA and the Free Exercise Clause. And it asserts that the remaining factors tilt in its favor. We can reject all three arguments based solely on the Plaintiffs' RFRA claims, which alone justified the injunction. Under traditional principles of constitutional avoidance, then, we need not address the Plaintiffs' free-exercise claims. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

A. Justiciability of the RFRA Claims

According to the Air Force, two hurdles to our review —an abstention doctrine tailored to the military and the general ripeness doctrine—bar the Plaintiffs' RFRA claims. Yet the Plaintiffs have satisfied their burden at this stage by showing that we likely can review these claims. *See Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 256 n.4 (6th Cir. 2018).

1. Abstention

The Air Force asks us to decline to hear these RFRA claims under an abstention test that the Fifth Circuit created in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), to govern claims by service members against the military. *See Harkness v. Sec'y of Navy*, 858 F.3d 437, 444-45 (6th Cir. 2017). This test has two parts, each with its own subparts. To obtain review, a service member must allege that the military violated the law and that the service member has exhausted any internal military processes to obtain relief. *Mindes*, 453 F.2d at 201. The service member next must show that a court should resolve the claim despite the "policy reasons" against judicial review of military decisions. *Id.* This part requires a court to consider a claim's strength, the harm from denying review, the degree of military interference, and the extent to which a court must second guess "military expertise or discretion[.]" *Id.* at 201-02. The Air Force argues that we may expand *Mindes*'s test "in common-law fashion" to cover *any* potential claim against the military. *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 746 (6th Cir. 2019).

a. The Air Force "overstates" our abstention power, so we must clarify the circumstances in which a court may decline to hear a properly filed case. *Id.* Courts

start with the presumption of a "virtually unflagging" duty to resolve all cases that fall within their jurisdiction. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989) (citation omitted). As Chief Justice Marshall said long ago, a court would commit "treason to the constitution" if it refused to resolve an Article III "case" because the case's legal issues touched sensitive matters. *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). More recently, the Court has reaffirmed that the judiciary lacks a common-law power to create policy-rooted "exceptions" to its jurisdiction. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126-28 (2014).

Two recent clarifications illustrate this point. The first concerns "prudential" standing. Courts once held that they could adopt "self-imposed limits" on deciding cases for prudential reasons. *Allen v. Wright*, 468 U.S. 737, 751 (1984). But the Supreme Court has since clarified that courts may not create prudential-standing common law. *Lexmark*, 572 U.S. at 128. Rather, they may dismiss a suit based on a prudential limitation on review only if the relevant law is best read to adopt this limit as a matter of statutory interpretation (not judicial policy). *Id.* The second concerns "prudential" exhaustion. Courts once suggested that they could create exhaustion mandates (or exceptions) in common-law fashion. *See United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 35-38 (1952). But the Supreme Court has now clarified that exhaustion likewise raises an interpretive question about whether a law contains an exhaustion mandate (or exception). *See Ross v. Blake*, 578 U.S. 632, 639 (2016); *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992).

These clarifications shed light on the judiciary's power to "abstain" from reviewing claims against the military. True, the Supreme Court has "been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J., concurring) (quoting *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988)). But it has never adopted a general abstention test grounded in judicial "policy" and applicable to all claims against the military. Rather, the Court has implemented its reluctance to interfere in military affairs in three more precise (and legally rooted) ways—in the way that it resolves statutory questions, in the way that it oversees judge-made claims, and in the way that it grants discretionary remedies.

When resolving statutory questions, the Court presumes that laws do not intrude into military affairs when they are ambiguous on the point. Do the civil-service laws give the Merit Systems Protection Board the power to review the Navy's denial of a security clearance? Do the habeas laws give courts the power to review the Army's duty assignments? The Court answered "no" to these questions by interpreting the laws to retain military independence. *See Egan*, 484 U.S. at 527-32; *Orloff v. Willoughby*, 345 U.S. 83, 92-93 (1953). But courts should not overread this canon of construction. Just because "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate," *United States v. Stanley*, 483 U.S. 669, 683 (1987), does not mean that courts may "decline" an invitation that Congress has sent. They should review a claim against the military if Congress has "provided" for that review. *Egan*, 484 U.S. at 530; *e.g.*, *Parisi v. Davidson*, 405 U.S. 34, 39, 44-46 (1972).

When overseeing judge-made claims, the Court has also refused to apply novel causes of action against the military. Take *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which adopted a claim for damages against federal officers for constitutional violations. *Id.* at 397. The Court chose not to extend this *Bivens* remedy to the military because of its hesitancy to disrupt military functions. *See Chappell v. Wallace*, 462 U.S. 296, 300-04 (1983). This principle makes sense. Whatever source of authority gave the Court the power to create *Bivens* also gave it the power to limit *Bivens*. Yet a court should also not take this principle too far. Courts have long permitted "judge-made" claims seeking an injunction (not damages). *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). And they have long permitted those claims against the military. *See Stanley*, 483 U.S. at 683 (citing cases).

When considering discretionary relief, the Court has again accounted for the military context. A court may deny an equitable remedy like an injunction even if a plaintiff has a valid claim. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982); *Younger v. Harris*, 401 U.S. 37, 43-49 (1971). The Court thus considers the effects on military operations when engaging in the balancing over whether to grant an injunction. *See Winter*, 555 U.S. at 24; *Schlesinger v. Councilman*, 420 U.S. 738, 757-58 (1975). This remedial discretion played a big role in the sole military case that the Court dismissed on "political question" grounds. *Gilligan v. Morgan*, 413 U.S. 1, 5-12 (1973). In *Gilligan*, students at Kent State University sued the Ohio Governor and Ohio National Guard following the shooting by guard members that left several students dead. *Id.* at 3.

They sought an amorphous injunction that would have compelled the judiciary to oversee the Ohio National Guard's training and orders. *Id.* at 5-6. The Court relied on the remedy's sweeping scope to find the claim nonjusticiable. *Id.* at 4-12. But it disavowed any broad abstention test. *Id.* at 11-12. So when students later sought more traditional relief for the same incident, the Court permitted their claims. *See Scheuer v. Rhodes*, 416 U.S. 232, 249-50 (1974).

As its caselaw demonstrates, the Supreme Court has never adopted anything like the abstention test that the Air Force asks us to apply here. To justify this test, therefore, the Air Force relies on *Harkness*, our only decision to follow the Fifth Circuit's *Mindes* decision. But *Harkness* did not create a broad abstention test either. It applied *Mindes* to only one of the claims that a military chaplain had brought against the Secretary of the Navy. 858 F.3d at 443-51. We abstained from hearing the claim that the Secretary had violated the First Amendment by denying the chaplain assignments in retaliation for his prior litigation. *Id.* at 443-45. The chaplain cited no statute that allowed him to pursue this claim. *Id.* He also did not seek damages and could not seek an injunction because he had retired, so our review could "obviate[]" no injury. *Id.* at 444. Further, we did not abstain from resolving the chaplain's *other* claim (that the Secretary had wrongly failed to convene a "special selection board") because this claim had a clear statutory source. *Id.* at 441, 445 (citing 10 U.S.C. § 14502(h)(1)). We have thus invoked *Mindes* only once for an unusual claim unconnected to any cause of action or remediable injury.

b. This precedent shows the proper way to approach the Air Force's request that we abstain from deciding the Plaintiffs' RFRA claims because the claims concern military decisions. We must ask an ordinary question of statutory interpretation: Is RFRA best read to adopt an abstention test that allows courts to dismiss claims for "policy reasons" or to require exhaustion within the military? *Mindes*, 453 F.2d at 201. RFRA's text, structure, and context provide the answer: No.

Start with the text. RFRA contains a right to sue: "A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). Because the Plaintiffs' claims arise from this *statutory* source, we may not adopt common-law abstention rules as if we were regulating a *court-created* claim. *See Lexmark*, 572 U.S. at 128; *cf. Chappell*, 462 U.S. at 298-304. The Plaintiffs' claims here thus resemble the claim that we found justiciable in *Harkness* more than the one that we found nonjusticiable. *See* 858 F.3d at 443-51.

RFRA also applies to the Air Force and its vaccine mandate. The law broadly defines the covered entities: "the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States[.]" 42 U.S.C. § 2000bb-2(a). It thus reaches the Air Force officers ("officials" of the "United States") sued here. The law also broadly defines the covered conduct: "[t]his chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16,

1993[.]" 42 U.S.C. § 2000bb-3(a). It thus reaches the vaccine mandate, which "implements" federal law. *See* U.S. Dep't of Def. Instruction 6205.02, Dep't of Def. Immunization Program (July 23, 2019) (authorized by 10 U.S.C. § 136(b)). While the Supreme Court has told us not to interpret ambiguous laws to permit judicial review of military decisions, we must engage in that review where, as here, Congress "specifically has provided" for it. *Egan*, 484 U.S. at 530.

Two broader structural points reinforce that RFRA does not allow us to accept the Air Force's common-law abstention request. For one thing, Congress identified the justiciability rules to follow: "Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution." 42 U.S.C. § 2000bb-1(c). Since courts must follow Article III's rules whether or not RFRA cited them, this text suggests that courts should not adopt other judge-made limits to "govern" a RFRA claim. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1155 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring), *affirmed sub nom.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). To be sure, one of our vacated decisions did not read RFRA to reject prudential standing. *See Autocam Corp. v. Sebelius*, 730 F.3d 618, 623-24 (6th Cir. 2013), *vacated by* 573 U.S. 956 (2014). But that pre-*Lexmark* decision lacks precedential force. *See CIC Servs., LLC v. Internal Revenue Servs.*, 925 F.3d 247, 256-57 (6th Cir. 2019), *rev'd on other grounds by* 141 S. Ct. 1582 (2021). And we have since noted that RFRA allows parties to sue "to the full extent permitted by Article III." *New Doe Child #1 v. Congress of United States*, 891 F.3d 578, 586 (6th Cir. 2018).

For another thing, when Congress imposed procedural limits on RFRA or related statutes, it did so expressly. The Prison Litigation Reform Act of 1995 requires prisoners to exhaust remedies at their prison before suing under any "Federal law[.]" 42 U.S.C. § 1997e(a). When passing RFRA's sister statute, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Congress noted that this prisoner-exhaustion rule applied to that prison-focused statute. 42 U.S.C. § 2000cc-2(e). Other courts have recognized that § 1997e(a) applies to prisoner-filed RFRA claims too. *See Jackson v. District of Columbia*, 254 F.3d 262, 266-67 (D.C. Cir. 2001). Basic interpretive rules suggest that we should not add an implied military-exhaustion requirement on top of this express prisoner-exhaustion requirement. *See Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 509-12 (1982).

RFRA's historical context confirms this result. Congress enacted RFRA after the Supreme Court changed its reading of the Free Exercise Clause. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court had held that state and federal laws that substantially burden religion (including neutral and generally applicable laws) must satisfy strict scrutiny. *See id.* at 406-08; *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). A plaintiff thus could use 42 U.S.C. § 1983—the cause of action that permits suits against state actors for constitutional violations—to challenge a neutral state law that flunked this scrutiny. Yet, in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Court departed from *Sherbert* by holding that neutral and generally applicable laws categorically comport with the Free Exercise Clause. *Id.* at 878-80. In RFRA, Congress sought "to restore" *Sherbert*'s

strict-scrutiny test for these types of laws. 42 U.S.C. § 2000bb(a)(4), (b)(1).

This backdrop shows that a pre-*Smith* free-exercise claim under § 1983 represents the most analogous cause of action to RFRA. The Supreme Court has already said as much. When holding that RFRA allows damages suits against federal officials, it reasoned that § 1983 allowed similar suits before RFRA. *Tanzin v. Tanvir*, 141 S. Ct. 486, 490-92 (2020). The same reasoning applies here. Before RFRA, § 1983 did not require a plaintiff to exhaust a free-exercise claim with a state actor in order to sue that actor. *Patsy*, 457 U.S. at 516. The lack of an exhaustion requirement in § 1983 shows that we should not read *Mindes*'s exhaustion requirement into RFRA.

In sum, we may adopt only those abstention rules that comport with the law under which a plaintiff sues. And RFRA does not contain *Mindes*'s test. So we are left with our "virtually unflagging" duty to resolve the Plaintiffs' RFRA claims. *Lexmark*, 572 U.S. at 126 (citation omitted).

2. Ripeness

The Air Force alternatively argues that we should dismiss the Plaintiffs' claims under the "ripeness" doctrine. This doctrine bars a plaintiff from suing too early. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985). It has a constitutional element drawn from Article III's limits on judicial review. *See Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). And it has a prudential element drawn from the judiciary's discretion over equitable relief. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). The Air Force invokes both elements.

Constitutional Ripeness. Article III permits us to resolve only "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1. A plaintiff has filed a constitutionally "unripe" case if the plaintiff seeks relief for a speculative injury that will occur only if certain contingencies come to pass. *See Trump v. New York*, 141 S. Ct. 530, 535 (2020) (per curiam). This element largely duplicates Article III's separate "standing" test. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 n.5 (2014). In their constitutional senses, both doctrines require a "certainly impending" injury. *Compare Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013), *with Thomas*, 473 U.S. at 581.

At this stage, the Plaintiffs need only show a "substantial likelihood" of that injury. *See Vitolo v. Guzman*, 999 F.3d 353, 359 (6th Cir. 2021). Because an Article III case must have existed when the Plaintiffs sued, we must consider the facts as they were then. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 569 n.4 (1992). Chaplains had confirmed that the vaccine mandate substantially burdened the Plaintiffs' sincerely held religious beliefs. But different Plaintiffs had reached different steps of the Air Force's 11-step process. Some had received final denials from the Surgeon General. Others had appeals of initial denials pending with him. Still others had not yet received an initial denial from the commander of the relevant Major or Field Command.

Did all the Plaintiffs face a certainly impending injury? We need not engage in this inquiry on a Plaintiff-by-Plaintiff basis because even the Plaintiffs who had yet to receive an initial denial showed a significant likelihood of such an injury (and thus the Plaintiffs further

along in the process necessarily did too). The Plaintiffs' claims implicate two common paths to proving future injuries.

Path One: Parties often allege that they plan to engage in an activity (for example, speech protected by the First Amendment), but that a law bars that activity. *See Driehaus*, 573 U.S. at 158-61. In that situation, parties need not first undertake the activity and risk punishment for violating the law before seeking review over whether they have a right to do so. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). The government's future enforcement of the law counts as an "impending" injury if a court can answer "yes" to two questions: Does a plaintiff seek to engage in conduct that the law "arguably" prohibits? *Driehaus*, 573 U.S. at 161-62 (citation omitted). And has the plaintiff shown a "credible threat" that the government will enforce it against the plaintiff? *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

Here, all the Plaintiffs likely proved an imminent injury from the Air Force's future enforcement of its mandate to take a COVID-19 vaccine. *Driehaus*, 573 U.S. at 161. For starters, they proved their "intention" to undertake conduct "arguably" protected by RFRA because they had all filed written requests for religious exemptions. *Babbitt*, 442 U.S. at 298.

The Plaintiffs have also shown that their refusal to take a vaccine would "arguably" violate the mandate even though—in theory, at least—some could still get an exemption at the time that they sued. *Driehaus*, 573 U.S. at 162 (citation omitted). Even then, a near certainty existed that the Air Force would deny the exemption requests of those Plaintiffs who had yet to receive

an initial decision. *Cf. id.* at 158 (quoting *Clapper*, 568 U.S. at 414 n.5). The Air Force had approved just 25 of the over 7,500 then-existing requests. DAF COVID-19 Statistics—March 2022, https://perma.cc/N47B-UB29. It had also granted the few exemptions only to individuals who had agreed to leave the Air Force within a year. Arg., No. 22-3497, at 51:33-52:07. The Air Force points to no evidence suggesting that the Plaintiffs meet this criterion.

The Plaintiffs have lastly shown a "substantial" "threat" that the Air Force would enforce the mandate. *Driehaus*, 573 U.S. at 164. Secretary Kendall issued a memorandum "warning" service members of the sanctions for not complying. *Fischer v. Thomas*, 52 F.4th 303, 307 (6th Cir. 2022) (per curiam). He noted that those who refused to get vaccinated after the Air Force had denied an exemption "*will* be subject to initiation of administrative discharge." R.27-8, PageID 1657 (emphasis added). The Air Force also had a "history" of enforcing this mandate against "others" who refused to comply. *Fischer*, 52 F.4th at 307. It had "administratively separated 236 active duty Airmen" near the time of this suit. DAF COVID-19 Statistics—March 2022.

Path Two: Parties often allege that they seek a government benefit but that the government has forced them to proceed through an unlawful process to obtain it. A plaintiff might allege that the government has adopted a policy that gives permit-issuing officials too much discretion over whether to grant a permit for speech on public property. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56 (1988). A speaker who desires a permit does not need to proceed through this allegedly invalid process to challenge the

policy in court. *See id.*; *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 406-08 (6th Cir. 1999). Similarly, a plaintiff might allege that the government has adopted a policy that discriminates on the basis of race in the awarding of public contracts. *See Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). A contractor who is "able and ready" to apply for a contract need not proceed through the discriminatory process (and have the application denied) before challenging the policy. *Id.*; *Vitolo*, 999 F.3d at 358-59.

Here, the Plaintiffs were "able and ready" to apply for exemptions since they had already done so when they sued. *Ne. Fla. Chapter*, 508 U.S. at 666. And the Plaintiffs do not only complain about the final denials. They also complain about the Air Force's *policies* for deciding whether to grant exemptions. The Plaintiffs assert that the Air Force has followed a "de facto policy" to reject all religious exemptions "regardless of their individual circumstances" and a "discriminatory policy" to deny religious exemptions in favor of other exemptions. *Doster*, 48 F.4th at 613. Just as someone may challenge a racially discriminatory policy for awarding contracts without receiving a formal denial, *Ne. Fla. Chapter*, 508 U.S. at 666, so too the Plaintiffs likely can challenge a religiously discriminatory policy without receiving a formal denial.

In response, the Air Force asserts that Plaintiffs may not raise their RFRA claims until it initiates termination proceedings against them for failing to take a vaccine, at which point they can invoke RFRA as a defense. This argument conflicts with century-old law. The Supreme

Court has long held that parties may raise pre-enforcement challenges to a legal mandate before engaging in the act that will trigger it. *See MedImmune*, 549 U.S. at 128-29. This rule also extends to threatened "administrative action[.]" *Driehaus*, 573 U.S. at 165. The Plaintiffs thus need not wait until the Air Force has kicked them out for exercising their religion before their claims are ripe.

Prudential Ripeness. The Supreme Court measures a case's "prudential" ripeness using two metrics, asking whether it raises legal issues "fit[]" for review and whether the plaintiff would suffer "hardship" from delay. *Abbott Laboratories*, 387 U.S. at 149. Recently, the Court questioned whether it may impose these "prudential" limits on cases over which it has jurisdiction. *Driehaus*, 573 U.S. at 167. This concern has special resonance for RFRA given that it refers only to Article III standing. 42 U.S.C. § 2000bb-1(c). Yet prudential ripeness might have stronger legal footing than the Air Force's requested abstention test because it arises from the judiciary's traditional discretion over equitable relief. *See Miller v. City of Wickliffe*, 852 F.3d 497, 507-08 (6th Cir. 2017) (Rogers, J., concurring). And RFRA gives courts the power to grant "appropriate relief," a phrase that likely incorporates that discretion. 42 U.S.C. § 2000bb-1(c). Yet we need not "resolve" this debate now because the Plaintiffs "easily" meet the two prudential factors. *Driehaus*, 573 U.S. at 167.

Courts commonly find a case "fit" for review if the government has issued a "final decision" on a matter. *See Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226, 2228 (2021) (per curiam). Under this "relatively modest" requirement, the government need only have

reached a non-tentative finding. *Id.* at 2230. So, for example, an agency makes a final decision when it issues a "jurisdictional determination" that certain lands contain "waters of the United States" triggering the Clean Water Act's requirements. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 593, 597-600 (2016). The landowner may sue immediately to challenge that non-tentative determination and does not need to wait and see whether the agency will enforce the Act against it. *Id.* at 600-02.

The Air Force has reached the same type of "final" decision for most of the Plaintiffs. We evaluate prudential ripeness (unlike Article III jurisdiction) based on the facts that exist now, not at the time of the complaint. *See Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974); *DM Arbor Ct., Ltd. v. City of Houston*, 988 F.3d 215, 219-20 (5th Cir. 2021). The Plaintiffs tell us that 14 of them have now had their appeals denied by the Surgeon General. Appellees' Br., No. 22-3497, at 26. (We could find only 10 final denials in the record, but the Air Force does not dispute this fact.) The Air Force thus has reached a "definitive" position that these Plaintiffs do not qualify for exemptions. *Hawkes*, 578 U.S. at 598. That is enough. *Pakdel*, 141 S. Ct. at 2230.

Even the four Plaintiffs who have yet to have their appeals rejected meet this "fitness" element given the nature of their claims. The Supreme Court has held that a party can raise a "fit" challenge to a government process before the party finishes the process—as when the party challenges the authority of a non-Article III tribunal to adjudicate a claim. *See Thomas*, 473 U.S. at 580-81. And the Plaintiffs allege that the Air Force has

adopted an exemption process plagued by illegal policies of discrimination and of denying all exemptions for generalized reasons.

Courts commonly find "hardship" from delayed review when a government decision has "adverse effects of a strictly legal kind"—namely, when it compels a party to undertake activity on threat of sanction. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). The Air Force's vaccine mandate shares this trait. Because the Surgeon General has denied the appeals of most Plaintiffs, they face a choice between violating their religious beliefs by taking the vaccine or "risking" a sanction by failing to follow an order. *Driehaus*, 573 U.S. at 167-68.

Even the Plaintiffs who have yet to have their appeals denied have shown hardship from delayed review. After the Surgeon General denies an appeal, the Air Force gives service members a mere five days to take a vaccine or face sanctions. R.42-5, PageID 2998; R.11-21, PageID 569. Sergeant Theriault, for example, received notice of his denial on January 25, 2022, was ordered to take a vaccine by January 30, and had been "reprimanded" by February 8. R.11-21, PageID 569-71. When the government pressures parties to give up intangible rights like those protected by RFRA, courts should not delay review until the time that the parties must rush into court seeking a temporary restraining order to protect these rights. *See Carey v. Wolnitzek*, 614 F.3d 189, 196 (6th Cir. 2010); *cf. Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57 (1984).

The case on which the Air Force relies says nothing to the contrary. *See Miles Christi Religious Ord. v. Township of Northville*, 629 F.3d 533, 537-41 (6th Cir.

2010). In *Miles Christi*, a religious order used a home for religious services, and zoning officials decided that the order must build a parking lot or get a variance. *Id.* at 535. We found the religious order's RLUIPA suit unripe. *Id.* Unlike the Plaintiffs who have obtained final denials from the Surgeon General, the religious order could obtain a variance. *See id.* at 538. And unlike the other Plaintiffs, the religious order did not attack the variance process itself. *See id.* That process also stayed enforcement proceedings. *See id.* at 542. So the possibility of a variance eliminated the need for the religious order to choose between exercising its religion or risking those proceedings. Most Plaintiffs now face that "Hobson's choice." *Id.* at 540. And because the others would face this choice within five days of the Surgeon General's denial, they should not have to wait. All Plaintiffs thus likely filed ripe claims.

B. RFRA Merits

The Air Force next turns to the merits. Yet the Plaintiffs also likely will prove that the Air Force violated RFRA when it denied their requests for religious exemptions from its COVID-19 vaccine mandate. *See Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012).

1

We start with the RFRA ground rules. The law grants "very broad" legislative "protection for religious liberty." *Hobby Lobby*, 573 U.S. at 693. It adopts a blanket prohibition: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability[.]" 42 U.S.C. § 2000bb-1(a). It then carves out a narrow exception: "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." *Id.* § 2000bb-1(b).

This text adopts a burden-shifting approach. RFRA plaintiffs must initially prove that a government action violates the law's general ban on burdening religion. *See Holt v. Hobbs*, 574 U.S. 352, 360-61 (2015). (*Holt* considered a RLUIPA claim, but the Supreme Court relies on its precedent for the two laws interchangeably. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1277 (2022) (relying on *O Centro*, 546 U.S. at 429-30).) To meet their burden, plaintiffs must prove that they hold the religious belief that they espouse and do not seek to use religion as a pretext to avoid a government-imposed duty. *Hobby Lobby*, 573 U.S. at 717 n.28. They also must prove that the government has substantially burdened their religion by, for example, punishing religiously motivated conduct. *See Holt*, 574 U.S. at 361.

Once plaintiffs satisfy this step, the burden switches to the government to "demonstrate"—in other words, satisfy the "burdens" of production and "persuasion"—that the challenged government action falls within RFRA's narrow exception to its ban on burdening religion. 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(3); *see O Centro*, 546 U.S. at 429. This exception codifies as statutory law what the Supreme Court has called the "most demanding test known to constitutional law": strict scrutiny. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

The government will successfully run this strict-scrutiny gauntlet only in "rare cases." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). It must first identify a "compelling" interest for its action. 42 U.S.C. § 2000bb-1(b)(1). Before RFRA, the Supreme Court had made clear that this word "means what it says[.]" *Smith*, 494 U.S. at 888. The government must rely on interests that serve the "highest order," *Yoder*, 406 U.S. at 215, or seek to stop "the gravest abuses," *Sherbert*, 374 U.S. at 406. The interests that the government cites in court also must be the "true" reasons for its action; it may not rely on made-for-litigation interests. *Haight v. Thompson*, 763 F.3d 554, 562 (6th Cir. 2014) (citation omitted).

The government next must prove that its action qualifies as the "least restrictive means" to further its interest. 42 U.S.C. § 2000bb-1(b)(2). This test represents the most rigorous type of "means-ends" scrutiny. *See Hobby Lobby*, 573 U.S. at 728. It requires the government to show more than that its proposed action is "narrowly tailored" to the interest that it seeks to serve. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477-78 (1989). Rather, the government must show that every other possible "alternative will be ineffective to achieve its goals"; if any less-restrictive alternative exists, the government "must use it." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 815-16 (2000); *see also Holt*, 574 U.S. at 364-65.

RFRA prohibits the government from relying on *generalities* to meet either part of this test. The government instead must show that its "marginal interest" in enforcing a mandate against a *specific* "person" is compelling and that it cannot further its interest in an-

other way that imposes less of a burden on that person's religious exercise. 42 U.S.C. § 2000bb-1(b); *Hobby Lobby*, 573 U.S. at 726-27. When considering compelling interests and alternative means, the government has often lost sight of this individualized focus. For example, it may well have critical safety interests in the ban on the "exceptionally dangerous" drugs in Schedule I of the Controlled Substances Act. *O Centro*, 546 U.S. at 430-32. But the Attorney General wrongly relied on that general interest when seeking to bar a religious sect's specific use of a tea listed in Schedule I. *Id.* at 432-37. Similarly, when considering alternatives to a mandate that all employers (including those with religious objections) provide employees with insurance for contraception, the government should consider paying for this coverage itself. *See Hobby Lobby*, 573 U.S. at 728-30. And it cannot rebut that option with a generalized showing that it would cost too much to insure *all* women; the alternative means must be unfeasible even for the *smaller subset* whose employers have religious objections. *See id.*

Of particular relevance, RFRA provides greater protection to religion in this military context than the Supreme Court's current view of the Free Exercise Clause. As noted, *Smith* read that clause not to trigger *Sherbert*'s strict-scrutiny test as long as a government action is neutral and generally applicable. 494 U.S. at 878-80. Even before *Smith*, though, the Court had refused to apply strict scrutiny to military regulations that burdened a service member's religious exercise. *Id.* at 884 (discussing *Goldman v. Weinberger*, 475 U.S. 503 (1986)). *Goldman* upheld an Air Force regulation requiring "standardized uniforms" that had the effect of barring a Jewish service member from wearing a yar-

mulke. 475 U.S. at 504-05, 508-09. The Court held that the Constitution required courts to review "military regulations" with a "far more deferential" eye than the scrutiny that governs "similar laws or regulations designed for civilian society." *Id.* at 507. It added that it must give "great deference" to military judgments about the "relative importance of a particular military interest." *Id.* RFRA's text, by contrast, prohibits this rational-basis-style deference. Although *Goldman* rejected *Sherbert*'s strict-scrutiny test in the military context (at least for a military regulation that was arguably neutral and generally applicable), RFRA requires the government to meet that test for *all* actions that substantially burden religious exercise, including actions by a military "branch." 42 U.S.C. § 2000bb-2(1); *see id.* § 2000bb-1(b).

The Air Force likely cannot satisfy these standards. The burdens of proof at this preliminary-injunction stage "track the burdens" of proof at trial. *O Centro*, 546 U.S. at 429. The Plaintiffs met their duty to prove that the vaccine mandate imposed a substantial burden on their sincerely held religious beliefs. *See Ramirez*, 142 S. Ct. at 1277. The Air Force required them to participate in deposition-style inquiries into their beliefs, and its own chaplains found them sincere. A refusal to take a vaccine also triggers "serious disciplinary" sanctions. *Holt*, 574 U.S. at 361.

The "burdens of going forward with the evidence and of persuasion" thus shifted to the Air Force to show that it could satisfy strict scrutiny. 42 U.S.C. § 2000bb-2(3). At the outset, the Air Force does not attempt to meet these burdens by citing any "extraordinarily compelling interest in maintaining strategic and operational control

over the assignment and deployment" of its personnel. *Austin*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring). The Supreme Court seemingly relied on that interest when it stayed an injunction to the extent it barred the Navy from considering a Navy Seal's vaccination status in its operational decisions. *Id.* at 1301 (order). Here, by contrast, the district court's injunction allows the Air Force to consider the Plaintiffs' vaccination status when making such decisions. *Doster*, 2022 WL 982299, at *17. The injunction bars the Air Force only from taking "adverse or punitive action against" them. *Id.* And the Air Force has failed to show that it has a compelling interest in forcing the Plaintiffs to get vaccinated on threat of punishment or that this action is the least restrictive means to serve such an interest.

a. *Compelling Interests*. The Air Force asserts that it can punish the Plaintiffs for failing to get vaccinated because this mandate serves two compelling interests: those in "military readiness" and in the "health of its troops." Appellants' Br., No. 22-3497, at 31. It highlights the need for all of its personnel to be immediately deployable, *id.* at 33; the potential harms to a mission from a COVID-19 outbreak in a deployed setting, *id.*; the vaccine mandates in other countries, *id.* at 34; the need for members to be in close contact at home, *id.*; and the reduced health risks for vaccinated personnel, *id.* at 35-36. These arguments conflict with two well-established rules.

First, "invocation of such general interests, standing alone, is not enough." *O Centro*, 546 U.S. at 438. Just as the Attorney General could not rely on the generally dangerous nature of the drugs barred by the drug laws to stop a specific religious sect from using a prohibited

tea, *id.* at 432-33, the Air Force cannot rely on its general readiness or health concerns to refuse specific exemptions. In the abstract, the Air Force may well have a compelling interest in requiring its 501,000 members to get vaccinated. It has also largely achieved this general interest, as evidenced by its ability to vaccinate over 97% of its force. DAF COVID-19 Statistics—July 2022. Under RFRA, however, the Air Force must show that it has a compelling interest in refusing a "specific" exemption to, say, Lieutenant Doster or Airman Colantonio. *Hobby Lobby*, 573 U.S. at 726-27; *O Centro*, 546 U.S. at 431. And just because it might have a compelling interest in the abstract does not mean that it has one "in each marginal percentage point by which" it achieves this abstract interest. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 803 n.9 (2011).

To succeed under RFRA's "'more focused' inquiry," the Air Force must identify the duties of each Plaintiff and offer evidence as to why it has a compelling interest in forcing someone with those duties to take the vaccine or face a sanction. *Hobby Lobby*, 573 U.S. at 726 (quoting *O Centro*, 546 U.S. at 430). The Air Force itself concedes the need for this Plaintiff-by-Plaintiff inquiry. It opposed the certification of a class action because "differences in occupational duties, deployment tempo, and work environment all factor into" the RFRA analysis, R.34, PageID 2213, and because "the roles and responsibilities of individual Airmen and Guardians may differ vastly," R.34-2, PageID 2235. But the Air Force did not even *undertake* this individualized inquiry during this litigation, let alone *prove* a compelling "marginal" interest for any specific Plaintiff. *Hobby Lobby*, 573 U.S. at 727.

Most glaringly, the Air Force's opening brief did not describe the duties of a single Plaintiff. From a review of that brief, we would have no idea that Lieutenant Doster was a student at the Air Force Institute of Technology at the start of this suit and later became a developmental engineer at the Air Force Research Lab. R.48, PageID 3211, 3215. Nor would we know that Airman Colantonio serves as a fuel-systems technician, R.42-1, PageID 2776, or that Airman Dills serves as a passenger representative helping passengers on and off flights, R.48, PageID 3254, 3270-71. Even after the district court identified this legal error, *Doster*, 2022 WL 982299, at *13, the Air Force has doubled down on appeal by mistakenly relying on generalized interests.

An example shows why the Air Force cannot do so. It asserts that the COVID-19 vaccine mandate furthers its readiness interest by ensuring that service members can quickly deploy. It is "hard to swallow" the claim that this interest was compelling for Lieutenant Doster when he attended the Air Force Institute of Technology. *Holt*, 574 U.S. at 364. Personnel in training "are not immediately ready for deployment," R.34-5, PageID 2281-82, so the Air Force treated Doster as "non-deployable," R.42-3, PageID 2846. To accept the Air Force's generalized "readiness" argument, we would have to find that it has a compelling interest in ensuring the immediate deployability of someone who is not immediately deployable. Only "unquestioning deference" could uphold such a claim. *Holt*, 574 U.S. at 364.

The Air Force responds that the district court failed to cite its "detailed declarations and record materials" allegedly explaining why each Plaintiff's duties required that Plaintiff to take a vaccine. Appellants' Br., No. 22-

3497, at 40. But, as far as we can tell, the Air Force introduced Plaintiff-specific declarations for only 5 of the 18 Plaintiffs. R.27-19 to R.27-23, PageID 1981-2026. And besides, "'[j]udges are not like pigs, hunting for truffles' that might be buried in the record." *Dibrell v. City of Knoxville*, 984 F.3d 1156, 1163 (6th Cir. 2021) (citation omitted). The Air Force failed to engage in the properly focused inquiry where it belonged—in its briefing.

The Air Force's declarations also raise red flags that it seeks to rely on after-the-fact "rationalizations" made for this suit. *Haight*, 763 F.3d at 562. For example, in one post-litigation declaration, Airman Colantonio's group commander (Colonel Deedrick Reese) testified that Colantonio needed the vaccine partly because she must work "in close settings with other service members" as a fuel-systems technician. R.27-22, PageID 2014. During the earlier exemption process, however, her squadron commander recommended granting an exemption because of her work's inherent COVID-19 protections: "Much of the fuels maintenance is done wearing protective respirators due to the fuel vapors, so safety protection is big priority on a daily basis[.]" R.42-1, PageID 2776. During that process, Colonel Reese did not cite work-related concerns to recommend a denial; he noted only that Colantonio (like all Air Force personnel) may need to deploy quickly. *Id.*, PageID 2778. This generalized analysis fails to pass muster under RFRA. And the Air Force cannot come up with other more specific interests merely "in response to litigation." *Haight*, 763 F.3d at 562 (citation omitted).

Second, the Supreme Court has told us to ask an objective question to uncover whether the Air Force con-

siders its interests compelling: Does it discriminate against religious conduct by permitting other conduct that undercuts its interests in the same way? The Court held, for example, that an exemption in the drug laws for the use of peyote undercut the claim that the Attorney General had a compelling safety interest in stopping the religious sect's use of tea. *See O Centro*, 546 U.S. at 433. And here, the Air Force appears to freely grant medical and administrative exemptions from its vaccine mandate. These exemptions "produc[e] substantial harm" to the health and readiness interests that the Air Force claims to be compelling. *Lukumi*, 508 U.S. at 547.

As for its health interest, the Air Force says that it must reject religious exemptions because those working in "close physical contact" can spread COVID-19. Appellants' Br., No. 22-3497, at 34. But the Air Force has allowed medical or administrative exemptions even when these exemptions undercut that interest. The Surgeon General, for example, denied Lieutenant Doster a religious exemption because his work as a student "require[d] intermittent to frequent contact with others[.]" R.19-1, PageID 944. But the Air Force granted multiple medical exemptions to pregnant women who worked with him and performed "identical assignments[.]" R.46-1, PageID 3123; R.48, PageID 3215-16. Likewise, the Surgeon General denied Airman Dills a religious exemption because he had "frequent contact with others" as a passenger representative. R.42-2, PageID 2817. Yet Dills worked with "[s]everal" colleagues who obtained other exemptions. R.48, PageID 3261. The Air Force allowed these members to continue "interacting with people" and "working in close quarters" without change. *Id.*, PageID 3262. Per-

haps most striking, the Surgeon General denied a religious exemption for Major Corvi (a class member) because her assignment "require[d] intermittent to frequent contact with others." R.53-1, PageID 3788. In the same month, she received a medical exemption for her pregnancy. *Id.*, PageID 3789; R.52-1, PageID 3461, 3502, 3508. The Air Force does not explain why service members who remain unvaccinated because of their pending retirement or pregnancy pose less of a risk of spreading COVID-19 than those who remain unvaccinated because of their religion.

As for its readiness interest, the Air Force says that it must ensure that all service members remain immediately deployable. But service members who obtain medical or administrative exemptions generally cannot deploy because the Air Force treats anyone who has not taken a COVID-19 vaccine as nondeployable. Appellants' Br., No. 22-3702, at 8. (Commanders may grant exceptions and permit unvaccinated members to deploy on a case-by-case basis. R.34-3, PageID 2251-52.) So even though the Surgeon General denies religious exemptions on the ground that the Air Force "must be able to leverage our forces on short notice," R.19-1 PageID 944, the Air Force does not believe that this "immediately deployable" concern also requires it to compel the vaccination of a service member who has an allergy or plans to retire in the near future.

The Air Force responds that the other exemptions do less harm to this deployability interest because they last for shorter periods. The Air Force treats religious exemptions as permanent. It treats medical exemptions as temporary because factual changes (like a new vaccine to which a member is not allergic) would allow a

medically exempt service member to take a vaccine later. R.27-12, PageID 1922-23, 1925. According to military guidance, a medical exemption also may last only a year, at which point the Air Force must assess whether to discharge the service member. R.34-5, PageID 2276, 2282-83. But religious and medical exemptions can be "temporary" in an *identical* way. An allergic service member is permitted to wait for a new vaccine that does not contain the allergy-triggering ingredient. R.27-17, PageID 1959 & n.14. Most Plaintiffs would likewise take a new vaccine made in a manner consistent with their beliefs. *See, e.g.*, R.11-17, PageID 533; R.11-19, PageID 548. So a single new vaccine (one that contains a different ingredient and that is made in a different way) could simultaneously alleviate the physical and spiritual obstacles. Yet the Air Force gives the medical objector at least a year-long exemption and the religious objector an immediate denial.

Regardless, the Air Force does not automatically discharge service members with medical exemptions after a year. The guidance on which the Air Force relies notes that it may retain nondeployable personnel for longer "on a case-by-case basis" if it is in the military's interest. R.34-5, PageID 2279, 2290. Top-notch fighter pilots thus may receive indefinite allergy exemptions. But Lieutenant Colonel Stapanon, who earned two air medals during Operation Iraqi Freedom, cannot obtain an indefinite religious exemption. R.45, PageID 3068, 3078-79. This "system" of case-by-case "exceptions" to deployability further undermines the Air Force's claimed interest that all service members must be immediately deployable. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021). This same guidance, moreover, treats several types of service members as

permanently nondeployable, including conscientious objectors. R.34-5, PageID 2285-86. If the Air Force can permanently retain those who cannot deploy because of their religious objections to a war, it must explain why it cannot permanently retain those who cannot deploy because of their religious objections to a vaccine.

b. *Least Restrictive Means*. The Air Force next says that its requirement that the Plaintiffs take a COVID-19 vaccine or get sanctioned is the "least restrictive means" to achieve its interests. It explains that regular testing may catch an infection too late, Appellants' Br., No. 22-3497, at 41, that the science remains unclear over the protection from "natural immunity," *id.* at 42, that "masking" depends on the "wearer's behavior" and does not reduce the risk of bad health outcomes, *id.* at 43, and that those who must deploy or work in close contact cannot isolate, *id.*

These arguments suffer from the same two legal flaws. *First*, the Air Force lists generic reasons why no other means will achieve its interests; it does not undertake a "'more focused' inquiry" into whether alternative means exist for each Plaintiff. *Hobby Lobby*, 573 U.S. at 726 (quoting *O Centro*, 546 U.S. at 430). But RFRA requires it to explain why a Plaintiff's specific duties prevented all other options, such as masking, social distancing, or reassignment. The Air Force's general "conjecture" that mask wearers behave irresponsibly, for instance, does nothing to establish that a specific Plaintiff will. *Ramirez*, 142 S. Ct at 1280. *Second*, the Air Force does not justify its discrimination. Because it accommodates other personnel for secular reasons, it must explain why it could not extend the identical ac-

commodation to those who requested it for religious reasons. *See Hobby Lobby*, 573 U.S. at 730-31; *see also Fulton*, 141 S. Ct. at 1882; *Holt*, 574 U.S. at 367-68. It did not do so.

Again consider the Air Force's asserted health interest in stopping the spread of COVID-19. It bears the burden of showing that no alternative means exist for each Plaintiff. *See Ramirez*, 142 S. Ct. at 1281. It attempted to satisfy this burden by stating that all Plaintiffs "work in close contact with others[.]" Appellants' Br., No. 22-3497, at 43. But it cites evidence for only half of the Plaintiffs. *Id.* And it engages in no individual analysis. When Lieutenant Doster attended the Air Force Institute of Technology, for example, his commander noted that he could "telework." R.42-3, PageID 2846. Even if teleworking will not suffice for future roles, the Air Force must explain why it would not have sufficed for that role. Likewise, the Air Force must explain why it cannot provide the same accommodation to Airman Dills in his role as a passenger representative that it provided to his colleagues who received other exemptions. R.48, PageID 3261-62. Similarly, Major Reineke works in a squadron that "train[s] undergraduate remotely piloted aircraft pilots and sensor operators." R.42-5, PageID 2964. His squadron commander found that the squadron could accommodate his request because he spent "most of his time on administrative tasks at his desk" in a "large ventilated room" "where transmission can be mitigated via a facial covering and social distancing." *Id.* While others up the chain disagreed, *e.g.*, R.42-5, PageID 2968, the Air Force cannot rebut his squadron commander's precise factual claims with vague generalities.

In addition, the Air Force ignores an obvious alternative: It may reassign any Plaintiff who works in too close of contact with others. The Air Force's general religious-accommodation instruction lists "reassignment" as an option it should consider. DAFI 52-201, § 2.7, at 4. Nothing in the injunction prohibited that option, *Doster*, 2022 WL 982299, at *17, and the Air Force makes no claim that reassignment would be administratively unfeasible, *cf. Holt*, 574 U.S. at 368. But the Air Force never even considered whether reassigning the Plaintiffs to positions capable of teleworking (or that allowed other preventative measures) could serve as a less-restrictive means of advancing its interests.

Or consider the Air Force's general interest in ensuring that every member be immediately deployable. A developmental engineer like Doster "rarely deploys," and only "1%" of those engineers work outside the country. R.42-3, PageID 2847. Why couldn't the Air Force equally serve this interest by waiting to compel Doster and others with a low likelihood of deployment to take a one-dose vaccine only if in fact they receive orders to quickly deploy? Secretary Kendall's guidance raised this possibility, noting that "changes in circumstances," like a "deployment," could lead the Air Force to reassess a religious exemption. R.27-7, PageID 1652. In addition, the Air Force does not require all personnel to take *other* vaccines on the speculation that they might need these vaccines someday if they must quickly deploy to certain places. It instead requires some vaccines (such as for yellow fever) only for certain duty assignments. R.27-6, PageID 1624.

Lastly, the Air Force fails to explain why it could not help willing Plaintiffs obtain alternative vaccines that do

not burden their faiths. For unidentified reasons, it permits service members to meet its mandate by traveling overseas to take a COVID-19 vaccine approved by the World Health Organization (but not the FDA). R.27, PageID 1561. Two Plaintiffs (Connor McCormick and Alex Ramsperger) felt compelled to travel to Mexico at personal expense to take one such FDA-unapproved vaccine (Covaxin) because the Air Force threatened to cancel their pilot training. R.66-1, PageID 4402. Yet the Air Force did not "meaningfully facilitate" their trip. *Id.* at 4404. If this mandate truly serves an "interest of the highest order," it is "hard to understand" why the Air Force believes that it need not "pay *anything* in order to achieve this important goal." *Hobby Lobby*, 573 U.S. at 729. (The Air Force now alleges that these two Plaintiffs' claims are moot. We will leave that issue for the district court because other Plaintiffs have live claims for injunctive relief, *see T.M. ex rel. H.C. v. DeWine*, 49 F.4th 1082, 1087 n.3 (6th Cir. 2022), and because RFRA permits damages suits, *see Tanzin*, 141 S. Ct. at 491.)

* * *

At day's end, the Air Force all but acknowledges that it cannot succeed under traditional strict-scrutiny review. It instead asks us to read RFRA as if it simply codified the "great deference" that the Supreme Court had previously given to the military under the Free Exercise Clause. Appellants' Br., No. 22-3497, at 32 (quoting *Goldman*, 475 U.S. at 507). We see no textual path to that result. Indeed, the Air Force does not ground this claim in RFRA's text. Rather, it points to a statement in a Senate Report noting that courts have "always extended to military authorities significant deference in

effectuating" their compelling interests and that the committee "intends and expects that such deference will continue under" RFRA. S. Rep. No. 103-111, at 12 (1993).

This statement resembles the type of "strategic manipulation[]" that the Supreme Court has warned against. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Perhaps these Senators (or their staffers) made the statement because they could not get a military "exception" into the law. But the Senators failed to reconcile their unenacted intent with the law's enacted text. *Goldman* deferred to the military in a particular way: by reading the Free Exercise Clause to *depart* from *Sherbert*'s strict-scrutiny test. 475 U.S. at 507. In sharp contrast, RFRA unambiguously *codified* that test. The Senate Report itself elsewhere recognized that *Goldman* rejected strict scrutiny but that RFRA required it. *Id.* at 11-12. A separate House Report likewise recognized that "[s]eemingly reasonable" military "regulations based upon speculation" would not survive RFRA. H.R. Rep. 103-88, at 8 (1993). In all events, RFRA's text—not its legislative history—is the law that binds. And its text requires us to apply the "most demanding test known to constitutional law," not some watered-down knockoff. *City of Boerne*, 521 U.S. at 534.

To be sure, strict scrutiny permits courts to recognize that military officers are "experts" in overseeing a lethal military force, just as it permits them to recognize that prison administrators are "experts" in running a secure prison. *Holt*, 574 U.S. at 364; *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005). But that fact does not allow us to accept the Air Force's legal reasoning here. Its

arguments are both overinclusive (because it relies on general interests divorced from specific Plaintiffs) and underinclusive (because it fails to justify exemptions for other service members that undercut its interests in similar ways). That type of imprecision may suffice under the rational-basis review that *Goldman* envisioned, but it does not under the law that Congress enacted.

3

The Air Force ends its merits discussion by pointing to RFRA's remedies. The law gives a party the right to seek "appropriate relief" for a violation. 42 U.S.C. §2000bb-1(c). The Air Force asserts that an injunction against the military can never be "appropriate." It is wrong.

When a person says that something is "appropriate," the person conveys that it is "suitable" or "proper" for the given situation. *Tanzin*, 141 S. Ct. at 491 (quoting 1 *Oxford English Dictionary* 586 (2d ed. 1989)). Under this "open-ended" definition, the word's meaning turns on the "context" in which it is used. *Id.* (quoting *Sossamon v. Texas*, 563 U.S. 277, 286 (2011)). RFRA and RLUIPA authorize suits to challenge the illegal conduct of governments or their officials, so the Supreme Court has looked to the remedies traditionally available in that context to decide on the "suitable" relief available under these laws. *See id.* at 491-92. Because courts have long barred damages claims against a sovereign, the Court held that RLUIPA did not permit that relief against a state. *Sossamon*, 536 U.S. at 286-93. Because courts have long allowed damages claims against officers in their personal capacities, by contrast, the Court held that RFRA permitted that remedy against federal officials. *Tanzin*, 141 S. Ct. at 491-93.

This reasoning allows courts to issue injunctions against military officials under RFRA. As a general matter, an injunction qualifies as the most "suitable" relief against illegal government conduct. Dating "back to England," courts of equity have had the power to enjoin that conduct. *Armstrong*, 575 U.S. at 327; *Ex parte Young*, 209 U.S. 123, 155-56 (1908). As a specific matter, this power has long extended to the military. When refusing to create a *Bivens* remedy against the military for damages, the Supreme Court noted that service members could seek the "traditional" remedy "designed to halt" illegal conduct: an injunction. *Stanley*, 483 U.S. at 683. Both before and after RFRA, then, courts have authorized such injunctions. *See Hartmann v. Stone*, 68 F.3d 973, 978, 986 (6th Cir. 1995); *Townsend v. Zimmerman*, 237 F.2d 376, 377-78 (6th Cir. 1956).

C. Other Injunction Factors

Turning to the remaining injunction factors, the Air Force argues that the Plaintiffs have not shown an irreparable injury and that the district court failed to properly assess its interests. These types of arguments face an uphill battle in constitutional cases because courts typically treat a showing that the government likely violated the Free Exercise Clause (or some other right) as outcome dispositive. *See Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (per curiam). The Supreme Court, for example, has held that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" that cannot be adequately remedied after the fact. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (quoting *Elrod v. Burns*, 427 U.S.

347, 373 (1976) (plurality opinion)). Because RFRA protects the same bedrock free-exercise rights, the same rule necessarily applies to it. *See Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013); *Hobby Lobby*, 723 F.3d at 1146.

The Air Force responds that the Plaintiffs lack an irreparable injury because a court could repair any employment-related harms through remedies like reinstatement at this lawsuit's end. *See Sampson v. Murray*, 415 U.S. 61, 88-92 (1974). The Air Force's reliance on a case about a captain's discharge for "drunk and disorderly conduct," *Hartikka v. United States*, 754 F.2d 1516, 1517 (9th Cir. 1985), reveals a lack of sensitivity to the foundational rights at stake. The Plaintiffs do not complain just about the tangible loss of pay. They complain about a direct military order commanding them to act against their faiths. This intangible injury (the coerced violation of religious beliefs) is irreparable even when the coercion comes from such lesser forms of pressure as the threatened loss of a civilian job or the loss of the ability to play a college sport. *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 730, 736 (6th Cir. 2021) (per curiam); *see TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021); *Elrod*, 427 U.S. at 373 (plurality opinion). It is irreparable here too.

In cases concerning constitutional rights, similar logic generally makes it unnecessary to "dwell" on the discretionary balancing of harms or the public interest. *Roberts*, 958 F.3d at 416. The government usually cannot rely on the harm from stopping its likely unconstitutional conduct. *See Bays*, 668 F.3d at 825. And the people have an interest in ensuring that it follows the Free Exercise Clause. *See Dahl*, 15 F.4th at 736.

This analysis would again seem to extend to RFRA, a law that the people's representatives passed to protect against the violation of free-exercise rights. *See Korte*, 735 F.3d at 666; *Hobby Lobby*, 723 F.3d at 1145-46 (plurality opinion).

That said, because courts have long considered the effects on the military when engaging in this balancing, *see Winter*, 555 U.S. at 24-33, RFRA likely allows us to consider these effects when deciding whether an injunction is "appropriate," 42 U.S.C. §2000bb-1(c); *cf. Ramirez*, 142 S. Ct. at 1281-83. Yet the district court properly accounted for this military interest. Unlike an injunction that regulates the Navy's "sonar-training program," *Winter*, 555 U.S. at 12, alters a soldier's "duty orders," *Orloff*, 345 U.S. at 94, or takes over a national guard, *Gilligan*, 413 U.S. at 5, the district court did not interfere with the Air Force's operations, *Doster*, 2022 WL 982299, at *17. It merely barred the Air Force from disciplining the Plaintiffs. *Id.* Because the Air Force has not shown how its inability to punish them interferes with any operational concerns, the court did not abuse its discretion in granting this narrow injunction. *See O Centro*, 546 U.S. at 428.

III. Injunction for the Class

This conclusion leaves the Air Force's appeal of the class-wide injunction. The Air Force primarily argues that the district court should not have certified a class action under Federal Rule of Civil Procedure 23. It asserts that the class does not satisfy Rule 23(a)'s prerequisites and that the class members' varied interests prohibit the court from maintaining the action under Rule 23(b)(2). Alternatively, the Air Force argues that the court again misapplied the preliminary-injunction fac-

tors. Yet the court's class-action certification adheres to longstanding caselaw that permits this type of class action in civil-rights cases. And the court did not abuse its discretion in extending its narrow-in-scope injunction to the broader class.

A. Jurisdiction

At the outset, the Plaintiffs argue that we lack jurisdiction over the district court's class-certification order because the Air Force did not follow the proper procedure to appeal it. Rule 23 gives us discretion to hear an interlocutory appeal of "an order granting or denying class-action certification[.]" Fed. R. Civ. P. 23(f). But the rule required the Air Force to file a petition seeking our permission to appeal within 45 days. *Id.* It did not. Although Rule 23(f)'s time limits do not restrict our jurisdiction, we must rigorously enforce them. *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714-15 (2019). The Air Force thus does not rely on Rule 23(f) here. It instead says that we may review its certification arguments based on our separate appellate jurisdiction over the district court's class-wide injunction order.

As the Air Force notes, we have "jurisdiction of appeals from" "[i]nterlocutory orders" "granting, continuing, modifying, refusing or dissolving injunctions[.]" 28 U.S.C. § 1292(a)(1). One might read this text as limiting our review to the four corners of the injunction order. Courts, though, have never read it that way. Before Congress put this provision at its current location, the Supreme Court had interpreted its predecessor to permit appellate review of any issue that would create an "insuperable objection" to an injunction, such as the issue of whether the complaint even stated a claim. *Deckert v. Indep. Shares Corp.*, 311 U.S. 282, 287 (1940)

(citation omitted). This reasoning comports with the usual preliminary-injunction factors because a plaintiff could not show the "probability of success on the merits" required to obtain an injunction if the plaintiff would lose on a predicate issue that would prohibit a court from issuing it. *Cf. Port Auth. Police Benevolent Ass'n, Inc. v. Port Auth. of N.Y. & N.J.*, 698 F.2d 150, 152-53 (2d Cir. 1983).

When the propriety of an injunction depends on this type of predicate issue, then, courts have regularly reviewed that issue under 1292(a)(1). We, for example, reviewed a district court's order that it had personal jurisdiction over a defendant in an appeal under § 1292(a)(1) because the court's power to issue the injunction turned on that jurisdiction. *See Kroger Co. v. Malease Foods Corp.*, 437 F.3d 506, 510 & n.2 (6th Cir. 2006). Likewise, we reviewed a district court's order refusing to remand a case to state court in an appeal under § 1292(a)(1) because the remand order implicated the court's subject-matter jurisdiction to issue the injunction. *See Kysor Indus. Corp. v. Pet, Inc.*, 459 F.2d 1010, 1011 (6th Cir. 1972) (per curiam); *see also, e.g.*, *Doe v. Sundquist*, 106 F.3d 702, 707-08 (6th Cir. 1997). Other courts have reviewed a "wide variety" of similar matters. 16 Charles A. Wright et al., *Federal Practice and Procedure* § 3921.1, at 32-43 (3d ed. 2012).

Notably, many courts have relied on this principle to review "class action determinations" under § 1292(a)(1). *Id.* § 3921.1, at 37 & n.23. A class-certification order, by itself, does not fall within that provision. *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 480-82 (1978). Even before the Supreme Court adopted Rule 23(f), however, courts had recognized that they could review

the propriety of a class-action certification when such an issue mattered to a class-wide injunction. *See, e.g.*, *Paige v. California*, 102 F.3d 1035, 1038-40 (9th Cir. 1996); *Wagner v. Taylor*, 836 F.2d 578, 584-86 (D.C. Cir. 1987); *Port Auth.*, 698 F.2d at 152-53; *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 522 F.2d 1235, 1237-38 (7th Cir. 1975). And courts have continued to follow the same approach after Rule 23(f)'s enactment. *See, e.g.*, *Melendres v. Arpaio*, 695 F.3d 990, 996-97 (9th Cir. 2012); *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 492 (7th Cir. 2012).

This logic covers this case. Just as a plaintiff could not receive an injunction if it could not obtain personal jurisdiction, *Kroger*, 437 F.3d at 510, so too the Plaintiffs could not receive a class-wide injunction if they could not obtain class certification. The one hinges on the other. We thus have jurisdiction under § 1292(a)(1) to review the Air Force's certification arguments.

B. Rule 23(a)

To certify a class action, a plaintiff must initially establish Rule 23(a)'s four prerequisites. The Air Force raises only Rule 23(a)'s "commonality" and "typicality" prerequisites here.

1. Commonality

A court certifying a class action must find that "there are questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). To explain what this factor demands, we must distinguish a legal question (what elements make a question "common"?) from an evidentiary one (what must a plaintiff do to prove these elements?).

What elements make a question "common"? Although written in the plural, Rule 23(a)(2) requires

that the class identify only one common question. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). But not just any "common" question will do. Here, for example, it is not enough to ask: Do all of the class members raise RFRA claims? *Id.* at 349. Parties instead must identify only a certain type of question that has only a certain type of answer. *Id.* at 350.

Begin with the "right" type of question: It must be "central" to the class's claims. *Id.* The question typically will affect at least one element of the claims. 1 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 3:20, at 400 (6th ed. 2022). So when a party alleged that Ford had made a car with a defective part, the party needed to tie this "defect" issue to the class's claims. *See Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006). And since the class asserted breach-of-warranty claims alleging that Ford had agreed to repair defective parts, the issue implicated the key "breach" element. *See id.* In this way, the certification stage "overlaps" with the merits stage because the question must *matter* to the merits. *Wal-Mart*, 564 U.S. at 352.

Turn to the "right" type of answer: The question must allow a decisionmaker to reach a yes-or-no answer for the class in "one stroke." *Id.* at 350. It will fall short if the decisionmaker could answer "yes" for some members and "no" for others. *See id.* at 355-56. A famous example shows how a suit can meet this all-or-nothing test. A "class" of children alleged that the racial segregation in their school district was "inherently unequal." *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). The segregation either did or did not violate equal protection; the answer would not change for each

child. 2 William B. Rubenstein, *Newberg and Rubenstein on Class Actions*, § 4:26, at 116-17 (6th ed. 2022); *cf. Gratz v. Bollinger*, 539 U.S. 244, 267 (2003).

The typical Title VII claim, by contrast, will not meet this test. *Gen. Tele. Co. of Sw. v. Falcon*, 457 U.S. 147, 157-59 (1982). Suppose an employee alleges that his company failed to promote him because of his race and uses this claim to certify a class alleging that the company discriminated against all employees of the same race. *Id.* at 149-51. Although the question of whether the company engaged in intentional discrimination is central to the claims, a factfinder typically cannot decide that question for all class members at once. *Id.* at 157-58. One employee may not have received a promotion because of her supervisor's animus, but another might not have received it because of his lack of qualifications, and so on. *Id.* An allegation that one employee suffered one discriminatory act does not provide the "glue" that permits a single answer "to the crucial question" of why each employee did not get promoted. *Wal-Mart*, 564 U.S. at 351.

What can provide the glue? An employee might allege that the company engaged in a "common course of conduct" or had a "common unlawful policy" that affected the class. 7A Charles A. Wright et al., *Federal Practice and Procedure* § 1763.1, at 290 (4th ed. 2021). Just as the board of education in *Brown* had an explicit segregation policy, the company might have an explicit "testing procedure" alleged to be discriminatory. *Falcon*, 457 U.S. at 159 n.15. Or it might follow a "pattern or practice" of discrimination as its "standard operating procedure." *Cooper v. Fed. Rsrv. Bank of Richmond*, 467 U.S. 867, 876 (1984) (citation omitted). A factfinder

could decide whether the employer has this illegal procedure or practice with a yes-or-no answer for the class. Indeed, pattern-or-practice class actions have a long history for Title VII claims. *See id.*; *see also Chi. Tchrs. Union, Loc. No. 1 v. Bd. of Educ. of City of Chi.*, 797 F.3d 426, 441-42 (7th Cir. 2015); *Brown v. Nucor Corp.*, 785 F.3d 895, 902-17 (4th Cir. 2015).

Courts have applied the same rules beyond Title VII cases. To list a few examples, the Supreme Court found that a common question existed when applicants alleged that a university had a policy of considering race in college admissions in violation of the Equal Protection Clause. *Gratz*, 539 U.S. at 263-68. Similarly, the Eighth Circuit held that a common question existed when prisoners with Hepatitis C alleged that officials had a policy of denying them medications in violation of the Eighth Amendment. *Postawko v. Mo. Dep't of Corrs.*, 910 F.3d 1030, 1038 (8th Cir. 2018); *cf. Ross v. Gossett*, 33 F.4th 433, 437-39 (7th Cir. 2022); *Parsons v. Ryan*, 754 F.3d 657, 674-84 (9th Cir. 2014). Likewise, the Seventh Circuit held that a common question existed when employees alleged that a company had an "unofficial policy" of requiring off-the-clock work. *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 374-75 (7th Cir. 2015); *cf. Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165-66 (9th Cir. 2014).

How must plaintiffs prove the commonality elements? Plaintiffs must show that they meet Rule 23's requirements, *Wal-Mart*, 564 U.S. at 350, and a court must engage in "rigorous analysis" to ensure that they do, *Falcon*, 457 U.S. at 161. In obvious cases, plaintiffs may rely on allegations in the "pleadings" alone. *Id.* at 160. If the parties disagree over a fact critical to a Rule

23 requirement, though, plaintiffs cannot rest on their complaint. They must provide evidence. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). *Wal-Mart* suggested that a plaintiff must offer "[s]ignificant proof" of a critical fact. 564 U.S. at 353 (citation omitted). It is not clear what this phrase means. Was it invoking the preponderance-of-the-evidence test? Something lower? *See* 3 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 7:21, at 117 (6th ed. 2022). We have left the question open (and can do so here too because the issue does not affect the outcome). *Gooch v. Life Invs. Ins. Co. of Am.*, 672 F.3d 402, 418 n.8 (6th Cir. 2012).

Two examples show how factual disputes can matter to Rule 23. Rule 23(a)(1) requires a class to be sufficiently "numerous." What if a plaintiff alleges that the class consists of 10,000 members, but a defendant claims it includes 10? *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (Easterbrook, J.). The plaintiff must offer proof. *Id.* Likewise, Rule 23(b)(3) requires common questions to "predominate" over individual ones. Securities-fraud plaintiffs often cannot satisfy this rule because the fraud claim's "reliance" element requires buyer-by-buyer proof. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 461-63 (2013). To show reliance on a class-wide basis, Plaintiffs regularly try to use the fraud-on-the-market theory: that public misrepresentations are baked into the price of a stock traded on an efficient market. *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1958-59 (2021). But they must prove (not plead) most of the elements of this factual theory to satisfy Rule 23(b)(3). *Id.*

The same evidentiary rules govern commonality. If a disputed fact is critical to whether a common question can be answered yes or no for the class, the plaintiff must offer proof. *Wal-Mart*, 564 U.S. at 351. This requirement often may not pose much of a commonality obstacle. An insured, for example, might bring a contract class action claiming that an insurer breached a "standard-form" contract. *Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452, 458-59 (6th Cir. 2020). Although commonality turns on a key fact (that the insurer *used* a standard-form contract), the insurer might not even dispute the point. *See id.*; 1 Rubenstein, *supra*, § 3:24, at 423 & n.21.

Yet *Wal-Mart* shows that this proof requirement can matter to commonality. There, three plaintiffs asserted that Wal-Mart denied them equal pay and promotions because of their sex in violation of Title VII. 564 U.S. at 343. The plaintiffs sought to certify a class of 1.5 million. *Id.* But they did not allege that Wal-Mart had a uniform policy of discrimination; they alleged that it had a nonuniform policy of "*allowing discretion* by local supervisors over employment matters." *Id.* at 355. This theory presented a commonality problem. "The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard." *Id.* at 353. To prove that a common question could be resolved for the entire class, the plaintiffs needed to show that the policy of giving thousands of managers discretion had led them to exercise that discretion in a uniformly discriminatory way. *Id.* at 355-56. The plaintiffs attempted to do so with statistical regression analyses suggesting a nationwide disparate impact on female employees and anecdotal evidence from 120 employees. *Id.* at 356-59. Yet this proof did not

show the existence of a common question that, if answered, would resolve any element in one stroke. *Id.*

Although *Wal-Mart* considered merits-related evidence of sex discrimination, a court should not overread its use of this evidence. At the certification stage, courts may not conduct a "free-ranging" review of the merits. *Amgen*, 568 U.S. at 466. They may peek at evidence on the merits only when required to resolve a Rule 23 issue. *Id.* For commonality purposes, this limit means that we may look at merits evidence only if needed to decide whether a question will *have a common answer* central to each of the class member's claims—not whether the common answer will *favor the class*. *See Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 505-06 & n.3 (6th Cir. 2015); *see also, e.g.*, *Bell*, 800 F.3d at 374, 376-79; *Jimenez*, 765 F.3d at 1166 n.5.

*

Under these standards, the district court did not abuse its discretion by finding that common questions existed. *See Hicks*, 965 F.3d at 457, 459. Our reasoning begins with a description of the class and its claims. The court defined the class to include all Air Force members (including those on active duty, in the reserves, in the Air National Guard, and in the Space Force) who:

> (i) submitted a religious accommodation request to the Air Force from the Air Force's COVID-19 vaccination requirement, where the request was submitted or was pending, from September 1, 2021 to July 27, 2022; (ii) were confirmed as having had a sincerely held religious belief substantially burdened by the Air Force's COVID-19 vaccination requirement by or through Air Force Chaplains; and (iii) either had

> their requested accommodation denied or have not had action on that request.

Doster, 2022 WL 3576245, at *3. The Plaintiffs' RFRA and free-exercise claims on behalf of this class differ from their individual claims. The individual claims challenge the Air Force's specific denials of exemptions for the Plaintiffs and seek an injunction to compel the Air Force to grant those specific exemptions. R.1, PageID 19. The class claims challenge the Air Force's "systematic" denial of religious exemptions and seek an injunction to compel the proper "processing" of all exemption requests. *Id.*, PageID 2, 19. The class has also identified at least two questions: Has the Air Force followed a "de facto policy" of rejecting religious exemptions based on its generalized health and readiness interests in the vaccine mandate? *Doster*, 48 F.4th at 613. And has the Air Force followed a "discriminatory policy" of treating religious exemptions less favorably than other exemptions? *Id.*

These questions satisfy the commonality elements. They raise the "right" type of questions because they implicate "issue[s]" "central to" the class's RFRA and free-exercise claims. *Wal-Mart*, 564 U.S. at 350. As for RFRA, it requires the Air Force to prove that it has a "compelling" interest in enforcing its vaccine mandate against each class member and that the mandate "is the least restrictive means" to achieve that interest. 42 U.S.C. § 2000bb-1(b). The common questions implicate whether the Air Force has met this test. Assume that the Air Force has followed a policy of denying all religious exemptions because of, say, its "broadly formulated interest[]" in ensuring that all service members can deploy on short notice. *O Centro*, 546 U.S. at 431.

This policy would show that the Air Force has been uniformly violating RFRA because it has been failing to undertake the "'more focused' inquiry" that RFRA demands. *Hobby Lobby*, 573 U.S. at 726 (quoting *O Centro*, 546 U.S. at 430). Similarly, assume that the Air Force has followed a policy of discriminating against religious objectors by granting far fewer religious exemptions than other exemptions without justification. This policy would show that the Air Force lacks a compelling interest to enforce the mandate against religious objectors, *see O Centro*, 546 U.S. at 433-34, and that it actually does have the capacity to accommodate them, *see Hobby Lobby*, 573 U.S. at 730-32.

As for the Free Exercise Clause, it requires the government to meet a similar strict-scrutiny test for actions that are not "neutral and generally applicable." *Fulton*, 141 S. Ct. at 1876-77, 1881. The question of whether the Air Force has followed a discriminatory policy implicates the preliminary free-exercise inquiry: Is its vaccine mandate a "neutral and generally applicable" regulation? *Id.* at 1876. If not, both of the class's common questions would then matter to the Free Exercise Clause's strict-scrutiny test for the same reasons that they matter to RFRA's. *See id.* at 1881-82; *Lukumi*, 508 U.S. at 546-47. Admittedly, the Court's decision in *Goldman* (upholding the Air Force's refusal to allow a service member to wear a yarmulke) leaves unclear how these usual free-exercise principles apply in this military context. Yet the regulation in *Goldman* arguably was neutral and generally applicable because the military required "standardized uniforms" for everyone. 475 U.S. at 508-09. So this uncertainty only results in another common legal question for the class: Does *Goldman*'s deferential test apply even when the

military "proceeds in a manner intolerant of religious beliefs" rather than in a neutral and generally applicable way? *Fulton*, 141 S. Ct. at 1877.

Next, the Plaintiffs have met their burden to establish that these common questions have the "right" kind of yes-or-no answers for the entire class. To be sure, just like Title VII, RFRA and the Free Exercise Clause generally necessitate an individual inquiry into the "crucial question" of "why" the government denied a specific exemption to a specific person. *Wal-Mart*, 564 U.S. at 352. Here, then, a mere allegation that one service member did not receive a religious exemption would not suffice to certify a class of all service members who did not receive one. *See Falcon*, 457 U.S. at 157-59. Like Title VII, however, RFRA and the Free Exercise Clause permit the Plaintiffs to assert a general "pattern or practice" of illegal conduct. *Cooper*, 467 U.S. at 876. After all, this pattern-or-practice approach arises from Rule 23, not anything in Title VII. *See Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 147-50 (2d Cir. 2012). And the Plaintiffs' class claims look similar to other constitutional or statutory claims that courts have certified outside Title VII. *See Gratz*, 539 U.S. at 263-68; *Postawko*, 910 F.3d at 1038; *Ross*, 33 F.4th at 438-39.

Like the plaintiffs in those cases, the Plaintiffs here have adequately proved that each question will "yield a common answer" for the class. *Rikos*, 799 F.3d at 506 n.3. A decisionmaker can answer "yes" or "no" to the question of whether the Air Force has followed a policy of denying religious exemptions based on its generic health and readiness justifications regardless of a service member's circumstances. The Plaintiffs have offered "[s]ignificant proof"—indeed, the evidence is un-

disputed—that the Air Force has a "uniform" practice of denying religious exemptions to anyone who wants to remain in the service. *Wal-Mart*, 564 U.S. at 355; *Ross*, 33 F.4th at 438. As of July 2022, about 9,754 service members had requested exemptions. The Air Force had granted only 135 of the requests. And it granted these limited requests only to personnel who fit within (or nearly fit within) the administrative exemption because they planned to leave the service within a year. Arg., No. 22-3497, at 51:33-52:07. The parties "dispute" only the *reason* for the uniform denials. *Ross*, 33 F.4th at 438. According to the Plaintiffs, the Air Force has a "standard operating procedure" of violating the law by denying exemptions based on its general health and readiness interests. *Cooper*, 467 U.S. at 876 (quoting *Teamsters v. United States*, 431 U.S. 324, 336 (1984)). According to the Air Force, it has examined each member's unique circumstances and reached the conclusion that its compelling health and readiness interests in requiring vaccination win out over every conceivable mix of specific duties and alternative means. Either way—whether this practice stems from an illegal broad-brush approach or from a legal individualized analysis—the answer will be the same for the whole class.

Likewise, a decisionmaker can answer "yes" or "no" to the question of whether the Air Force has followed a discriminatory policy of denying virtually all religious exemptions but broadly granting other exemptions. The Plaintiffs have offered "[s]ignificant proof"—again, the evidence is undisputed—that the Air Force treats those requesting religious exemptions differently from those requesting other exemptions. *Wal-Mart*, 564 U.S. at 355. Although it has granted no religious ex-

emptions to service members who would like to remain, it has granted well over 4,000 medical and administrative exemptions. The parties dispute only whether the other exemptions are "comparable" to religious exemptions. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam); *see Ross*, 33 F.4th at 438-39. According to the Plaintiffs, these exemptions undermine the Air Force's general interests in the same way that religious exemptions do, so this disparate treatment represents unlawful discrimination. *Cf. Holt*, 574 U.S. at 367-68. According to the Air Force, religious exemptions are not comparable to the other exemptions because, for example, the former are permanent whereas the latter are temporary. Either way—whether these exemptions are generally comparable or incomparable—the answer will be the same for the whole class.

*

The Air Force responds that no common questions exist because: (1) the Plaintiffs did not provide the "significant proof" required for class certification and (2) the alleged policies would not matter for the class's RFRA claims even if the policies existed. It is twice mistaken.

Response One: The Air Force argues that the Plaintiffs lack "significant proof" of the existence of a general policy. Appellants' Br., No. 22-3702, at 21-27. Yet the Air Force's argument again "confuses the certification stage with the merits stage." *Doster*, 48 F.4th at 613. At this stage, we must ask only if a decisionmaker can answer the Plaintiffs' questions all at once "through evidence common to the class." *Amgen*, 568 U.S. at 467; *Rikos*, 799 F.3d at 506 n.3. The Air Force does not argue that the Plaintiffs' questions flunk that

test by requiring member-by-member answers. As with similar pattern-or-practice claims, the evidence will focus not on "individual [exemption] decisions, but on a pattern of [improper] decisionmaking." *Cooper*, 467 U.S. at 876 (quoting *Teamsters*, 431 U.S. at 360 n.46). The Air Force instead argues that the decisionmaker will categorically answer these questions *in its favor* for all class members. But this full-throated "merits" inquiry does not belong at this stage; if anything, it displays the Air Force's own concession that common answers exist. *Ross*, 33 F.4th at 438.

Consider the Air Force's arguments why it does not have a "de facto policy" of denying religious exemptions based on the general interests underlying its mandate. *Doster*, 48 F.4th at 613. It concedes the basic "fact that [it] has overwhelmingly denied religious exemption requests[.]" Appellants' Br., No. 22-3702, at 22. But it says that it has an "overwhelming interest" that uniformly justifies all these denials. *Id.* at 23. What does it offer? It asserts that it must ensure that all personnel "can deploy worldwide on very short notice" and that personnel who do not take the vaccine are nondeployable. *Id.* at 22-23. The Air Force thus relies on its "general interest" in immediate deployability to justify its across-the-board denials. *O Centro*, 546 U.S. at 438. Perhaps the Air Force could prove that this general interest is so compelling that it suffices no matter the many differences in its members' duties. And perhaps it could prove that it has no alternative means to serve this interest other than to fire all unvaccinated personnel. But it is hard to see how its own logic does not prove the Plaintiffs' point: a decisionmaker can answer "yes" or "no" on a class-wide basis whether its general justification can authorize uniform denials.

Or consider the Air Force's arguments why it has not followed a "discriminatory policy" that denies religious exemptions more frequently than other exemptions. *Doster*, 48 F.4th at 613. The Air Force concedes the basic "fact that [it] has granted medical and administrative exemptions more frequently than religious exemptions[.]" Appellants' Br., No. 22-3702, at 23. But it justifies this disparate treatment on the grounds that we have described: religious exemptions are supposedly permanent; the other exemptions are supposedly temporary. *Id.* at 23-25, 29-30. If it can prove that these exemptions are not "comparable," perhaps it could justify the disparate treatment under RFRA and the Free Exercise Clause. *Cf. Tandon*, 141 S. Ct. at 1296; *Holt*, 574 U.S. at 367-68; *O Centro*, 546 U.S. at 433-34. Yet its reliance on a "common answer" to justify the disparate treatment of all class members again confirms that the Plaintiffs raise a common question. *Rikos*, 799 F.3d at 506; *see Gratz*, 539 U.S. at 267-68.

As these arguments show, the Air Force misreads *Wal-Mart*. *See Rikos*, 799 F.3d at 505-06. *Wal-Mart* did not require the plaintiffs to present significant proof of a policy of sex discrimination for its own sake. It instead required the plaintiffs to present this evidence to ensure that their theory of sex discrimination could "be proved on a classwide basis." 564 U.S. at 356. They alleged that Wal-Mart's nonuniform policy of delegating employment decisions to "thousands of managers" somehow led all the managers to act in a "common way." *Id.* at 345, 356. But the plaintiffs failed to identify any "specific employment practice" that these managers all engaged in. *Id.* at 357. So, apart from an inquiry framed at a sky-high level of abstraction ("did Wal-Mart violate Title VII?"), the plaintiffs did not even ask a com-

mon *question*, let alone show that it could be *answered* in the same way for the entire class of 1.5 million employees.

The Plaintiffs, by contrast, do not rely on an oxymoronic theory of uniform nonuniformity. Unlike Walmart's delegated decisionmaking, the Air Force centralizes its decisionmaking. *Cf. Bell*, 800 F.3d at 375. The Plaintiffs also do not raise an abstract question like "did the Air Force violate RFRA?" They raise concrete questions about whether the Air Force has a policy of relying on generalized interests to deny religious exemptions and of treating those exemptions less favorably than others. And to the extent *Wal-Mart* looked to significant proof that the alleged policies do in fact exist, the Plaintiffs here have provided it. Again, the basic facts are undisputed: the Air Force has denied all religious-exemption requests unless a service member has agreed to leave within a certain time, and it has granted far more medical and administrative exemptions. Either the Air Force can justify these policies or it cannot. But the Plaintiffs have pointed to specific questions that matter for the class's claims and that a decisionmaker can resolve "in one stroke." *Wal-Mart*, 564 U.S. at 350.

Response Two: Even if the Air Force followed the policies that the Plaintiffs identify, it next argues, these policies do not violate RFRA. Appellants' Br., No. 22-3702, at 27-30. According to the Air Force, RFRA allows it to freely burden a service member's religious beliefs (even for irrational reasons) in its day-to-day operations. The Air Force says that the statute gets triggered only in judicial proceedings, at which point it must come up with sufficient justifications for its actions under strict scrutiny. Lest there be any doubt, counsel

responded "more or less yes" when asked at argument whether the executive branch took the "position that [it does] not have to worry about RFRA until somebody sues." Arg., No. 22-3497, at 18:37-:46. Under this view, even if the Air Force had patently misread RFRA when denying religious exemptions (say, by rejecting all requests on the ground that RFRA does not apply to the military), that universal error provides no basis for class certification. Instead, the Air Force could correct all such systematic errors by later engaging in the proper case-by-case inquiry in court.

We see nothing in RFRA's text that makes the law a second-class civil-rights statute in the way that the Air Force claims. That text imposes a categorical limit on government: it "*shall not* substantially burden a person's exercise of religion" unless it can satisfy strict scrutiny. 42 U.S.C. § 2000bb-1(a) (emphasis added). The law does not say that the government may freely burden a person's religion unless and until the person sues to stop it.

Perhaps the Air Force adopted this view of RFRA because the law's exception to its general ban notes that the government may burden religion if it "demonstrates" that it can satisfy strict scrutiny. *Id.* § 2000bb-1(b). RFRA defines "demonstrates" with court-sounding language: to meet the "burdens" of production and "persuasion." *Id.* § 2000bb-2(3). Does this definition signal Congress's choice that the government need only come up with reasons for burdening religion in court? Not at all. As we explained when applying RLUIPA, the compelling-interest test bars the government from invoking "after-the-fact explanations" to justify actions that have burdened religion. *Haight*, 763 F.3d at 562.

The reasons that the government recites in court must be the "true" reasons for its actions. *Id.*; *Yellowbear v. Lampert*, 741 F.3d 48, 58 (10th Cir. 2014) (Gorsuch, J.). Or, as the Supreme Court explained in the free-exercise context, "[g]overnment 'justification[s]' for interfering with First Amendment rights 'must be genuine, not hypothesized or invented post hoc in response to litigation.'" *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2432 n.8 (2022) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). RFRA thus forecloses the Air Force's "burden first, ask questions later" approach. If it has been systematically denying exemptions based on the policies that the Plaintiffs assert, it has been violating RFRA. And the Plaintiffs could seek injunctive relief to put a stop to those policies.

2. Typicality

A court certifying a class action must also find that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The district court could reasonably find this factor met largely for the reasons that it found the commonality factor met. The two factors "tend to merge" in a case like this one. *Doster*, 48 F.4th at 612 (quoting *Falcon*, 457 U.S. at 147 n.13); *Rikos*, 799 F.3d at 509. A plaintiff's claims generally will be "typical" of the class's when all of them arise from the same "course of conduct" and assert the "same legal theory." 1 Rubenstein, *supra*, § 3:29, at 444-47; *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 543 (6th Cir. 2012); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996). Here, the Plaintiffs and the class rely on the same pattern of conduct: the Air Force's serial denial of religious exemptions. And they assert the same the-

ories: that the denials violated the law because of the Air Force's reliance on generic interests and its religious discrimination.

The Air Force responds with two distinct typicality arguments. It first suggests that it has "unique defenses" against the Plaintiffs because they failed to exhaust their claims and because the claims are not "ripe." These exhaustion and ripeness defenses are "insignificant" for the reasons that we have explained. 1 Rubenstein, *supra*, § 3:45, at 45, at 505-06. They thus pose no typicality problem. *Id.*; *cf. Duncan v. Governor of Virgin Islands*, 48 F.4th 195, 209 (3d Cir. 2022).

The Air Force next suggests that the Plaintiffs (those on active duty or in the reserves) may not represent other categories of service members, such as those in the Air National Guard. At the stay stage, we thought it sufficed to respond that "the Supreme Court's decision in *Gratz* likely refutes that assertion." *Doster*, 48 F.4th at 615. It still suffices. *Gratz* held that a transfer student seeking admission to a university could represent applicants seeking freshman admission because both claims raised the same "set of concerns" against the university's race-based admission policies. 539 U.S. at 265-67. The Air Force's general practice of denying religious exemptions to service members falls within this reasoning. *See* 1 Rubenstein, *supra*, § 3:47, at 524-25.

C. Rule 23(b)(2)

A court certifying a class action next must find that the class fits within one of Rule 23(b)'s three categories. *See Comcast*, 569 U.S. at 33. Although the district court here relied on both Rule 23(b)(1)(A) and (b)(2), we may uphold its decision based on Rule 23(b)(2) alone.

That provision allows a court to certify a class if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2).

This language contains two parts. The class must sue over a uniform action or inaction by the defendant, and it must request a uniform injunction or declaratory judgment from the court. 2 Rubenstein, *supra*, § 4:26, at 113-14; *Shook v. Bd. of Cnty. Comm'rs of Cnty. of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008) (Gorsuch, J.). These requirements are tailor-made for civil-rights cases seeking to stop a general policy or practice. *See Wal-Mart*, 564 U.S. at 361; *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 58-59 (3d Cir. 1994); 7AA Charles A. Wright et al., *Federal Practice & Procedure* § 1776, at 83-93 (3d ed. 2005). Indeed, this rule grew out of precedent (like *Brown*) that had used the class-action device to attack "racial segregation" through a "single class-wide order." *Wal-Mart*, 564 U.S. at 361; 2 Rubenstein, *supra*, § 4:26, at 116-18.

In this way, Rule 23(b)(2) serves a purpose that is both important and narrow. Importantly, it permits plaintiffs to seek "a *single* injunction or declaratory judgment" that enjoins the challenged policy (or declares it invalid) for the whole class. *Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016). Narrowly, it does not permit plaintiffs to seek relief that would require a court to issue "*different* injunction[s] or declaratory judgment[s]" on a member-by-member basis. *Wal-Mart*, 564 U.S. at 360; *Shook*, 543 F.3d at 604. The rule thus merely eliminates the need for each class

member to sue for an injunction with the same content. In recent years, courts may have lost sight of this rule because of the growth of "nationwide injunctions or universal remedies" that bar defendants from enforcing laws or regulations against nonparties even *outside* the class-action setting. *Arizona v. Biden*, 40 F.4th 375, 396 (6th Cir. 2022) (Sutton, C.J., concurring). If, as the rising chorus would seem to suggest, courts eventually scrap these universal remedies, Rule 23(b)(2)'s importance will reemerge. *Cf. id.* at 395 (citing cases); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 475-76 (2017).

That said, Rule 23(b)(2)'s narrow purpose does not foreclose using it as a springboard for additional proceedings. A class action might end with a final "award of prospective relief to the class" that enjoins the challenged practice but permits separate suits by class members seeking individual relief. *Cf. Cooper*, 467 U.S. at 876, 880-81. We, for example, have held that plaintiffs could use Rule 23(b)(2) to obtain a declaratory judgment about the meaning of a standard-form contract, and that class members could later use that judgment "as a predicate for monetary damages" in individual suits. *Gooch*, 672 F.3d at 427-29, 433; *see Clemons v. Norton Healthcare Inc. Ret. Plan*, 890 F.3d 254, 279-80 (6th Cir. 2018); *see also* 18A Charles A. Wright et al., *Federal Practice and Procedure* § 4455.2, at 444-45 & n.5 (3d ed. 2017).

The Air Force does not seem to dispute that the Plaintiffs here would meet Rule 23(b)(2)'s remedial requirements if they sought an injunction against the illegal policies that they allege. As we noted at the stay stage, such an injunction could enjoin the allegedly ille-

gal policies, "root and branch," and bar the Air Force from taking "adverse action" against class members based on its prior illegal denials of religious exemptions. *Doster*, 48 F.4th at 615. The Air Force instead argues that Rule 23(b)(2) could not apply "[t]o the extent" that the Plaintiffs ask to litigate individual "RFRA or First Amendment claims that are not based on the purported existence of a systematic policy of denying religious exemption requests[.]" Appellants' Br., No. 22-3702, at 35. Perhaps these individual claims would entail a "different injunction" for each class member in the way that *Wal-Mart* prohibits. 564 U.S. at 360. But this argument is beside the point. The Plaintiffs' *class* claims do rest on a "systematic" policy of violating the law, and only their *individual* claims ask the court to compel the Air Force to grant them exemptions outright. R.1, PageID 2, 19.

Even if the Plaintiffs seek the proper uniform remedy, the Air Force next argues that the district court still abused its discretion by certifying the class action under Rule 23(b)(2). Most significantly, it asserts that class certification of even the narrow class claims would unfairly harm absent class members. Because claim preclusion would bind these members if the class lost, the Air Force reasons, the absent class members might lose the right to litigate "meritorious" RFRA or free-exercise claims tied to their "individual" duties and working conditions. Appellants' Br., No. 22-3702, at 37. The Air Force identifies a legitimate concern. Unlike when a court rejects a request for a universal injunction outside the class-action context (which has no preclusion effects on nonparties), a failed class claim binds all class members. *See Cooper*, 467 U.S. at 874; Michael T. Morley, *De Facto Class Actions?*, 39 Harv. J.

L. & Pub. Pol'y 487, 531-33, 541 (2016). But the Supreme Court has already rejected this precise preclusion concern in an analogous context involving a Title VII pattern-or-practice claim. *Cooper*, 467 U.S. at 875-81. Yes, a judgment for the Air Force would prohibit the absent class members from raising the same *pattern-or-practice* claims that the Plaintiffs seek to litigate on behalf of the class. *Id.* at 881. But no, this judgment would not affect the class members' ability to assert their distinct *individual* claims under RFRA or the Free Exercise Clause (like the claims that the Plaintiffs separately raise here). *Id.* Just because a general pattern-or-practice claim fails on its merits does not mean that all fact-specific individual claims fail. *Id.* at 878. So class members "remain free" to litigate those claims elsewhere. 18A Wright, *supra*, § 4455.2, at 444.

The Air Force relatedly argues that the district court lacked the power to alleviate this purported preclusion problem in the way that it did: by allowing class members to opt out of the class. The Air Force is correct that we (like the Supreme Court) have noted in passing that class members have no *automatic* right to opt out of a Rule 23(b)(2) class action. *See Wal-Mart*, 564 U.S. at 362; *Gooch*, 672 F.3d at 433. But many courts have also held that a district court retains *discretion* to allow class members to opt out of such an action. *See* 2 Rubenstein, *supra*, § 4:36, at 179 & n.8 (citing cases); *see, e.g.*, *Eubanks v. Billington*, 110 F.3d 87, 94-95 (D.C. Cir. 1997). Regardless, we need not conclusively resolve whether we agree with these courts. The Air Force identifies this alleged opt-out problem only to reiterate its preclusion concerns. As we have explained, those concerns are illusory given the nature of the Plaintiffs' class claims.

The Air Force next suggests that the district court failed to properly account for other pending cases brought by other Air Force members when certifying a class action. *See, e.g.*, *Knick v. Austin*, 2022 WL 2157066, at *4-6 (D.D.C. June 15, 2022); *Roth v. Austin*, 2022 WL 1568830, at *13-31 (D. Neb. May 18, 2022). This argument, too, misunderstands the nature of the certified class claims. Because the Plaintiffs seek to litigate pattern-or-practice claims, these general claims will not "improperly interfere" with other claims seeking individual relief and requesting the Air Force to grant an exemption outright. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see Cooper*, 467 U.S. at 880; *Fortner v. Thomas*, 983 F.2d 1024, 1031 (11th Cir. 1993). The district court thus did not abuse its discretion by certifying this class action under Rule 23(b)(2).

D. Class-Wide Injunction Factors

Even if the district court properly certified a class action, the Air Force lastly contends that the court's class-wide injunction cannot stand. The Air Force criticizes the court for incorporating the reasoning from its narrower order granting the Plaintiffs an injunction into its broader order granting the class an injunction. Yet, when evaluating the preliminary injunction for the class, we must ask the same four questions that we did before. *See NAACP v. City of Mansfield*, 866 F.2d 162, 166 (6th Cir. 1989). The analysis thus largely overlaps—a fact that the Air Force recognizes by, for example, relying on identical arguments across its two appellate briefs to suggest that neither the Plaintiffs nor the class members have suffered an irreparable injury. Contrary to its claims, however, the coerced violation of religious beliefs irreparably harms a class member in the same way

that it irreparably harms a Plaintiff. *See Roman Cath. Diocese*, 141 S. Ct. at 67; *Korte*, 735 F.3d at 666. We thus need not linger on the Air Force's duplicative arguments because they fail for the reasons we already explained. The Air Force does, however, add two distinct class-wide contentions. It says that the scope of the class-wide injunction exceeds the scope of the RFRA violation. And it says that the district court's equitable balancing ignored the broader harms that a class-wide injunction would cause.

Injunction's Scope. The Air Force notably does not argue that the Plaintiffs have failed to show a likelihood of success on the merits of their class-wide claims that its broad denial of religious exemptions has arisen from RFRA-violating policies. It instead offers the conclusory assertion that the district court abused its discretion by issuing a preliminary injunction (barring the Air Force from temporarily disciplining class members) that exceeds the potential scope of final relief (enjoining the Air Force's policies but allowing it to discipline individual class members under an individualized, nondiscriminatory approach). Appellants' Br., No. 22-3702, at 38-39.

The Air Force does not cite a single case in support of this argument, which confuses the role of a preliminary injunction with that of a permanent one. As a matter of historical practice, preliminary injunctions have typically sought merely to preserve the "status quo" by stopping a defendant's threatened conduct from causing (irreparable) harm until the court has a meaningful chance to resolve the case on the merits. *See Burniac v. Wells Fargo Bank, N.A.*, 810 F.3d 429, 435 (6th Cir. 2016); *see also Huisha-Huisha v. Mayorkas*, 27

F.4th 718, 733 (D.C. Cir. 2022); *O Centro Espírita Beneficiente União Do Vegetal v. Ashcroft*, 389 F.3d 973, 1012-13 (10th Cir. 2004) (McConnell, J., concurring), *affirmed sub nom.*, *O Centro*, 546 U.S. 418; 11A Charles A. Wright et al., *Federal Practice and Procedure* §§ 2947-48, at 112-13, 124-27 (3d ed. 2013). A district court enjoys wide latitude when crafting the scope of such temporary relief to fit the equities of a case, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam), and we review its choices for an abuse of discretion, *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 599 (6th Cir. 2012) (per curiam).

In various situations, courts have recognized that this status-quo relief might look broader than the ultimate relief. We, for example, preliminarily stopped a school from eliminating a women's sports team for an alleged Title IX violation, while conceding that the university would have discretion to choose how to comply with Title IX at the case's end. *See Balow v. Mich. State Univ.*, 24 F.4th 1051, 1061 (6th Cir. 2022). Similarly, another court preliminarily stopped the military from discharging certain service members under a categorical rule treating them as unfit, even though final relief might allow it to discharge them under an "individualized determination" of unfitness. *Roe v. Dep't of Defense,* 947 F.3d 207, 217, 232-34 (4th Cir. 2020); *see also, e.g.*, *Coal. for Basic Human Needs v. King*, 654 F.2d 838, 842-43 (1st Cir. 1981) (per curiam).

Under these standards, the Air Force's bare-bones argument does nothing to show that the district court abused its discretion by temporarily prohibiting it from engaging in "any disciplinary or separation measures against the members of the Class for their refusal to re-

ceive the COVID-19 vaccine[.]" *Doster*, 2022 WL 3576245, at *3. The Air Force itself opted to provide the same "temporary exemptions to service members during the pendency of their requests for religious exemptions." *Doster*, 48 F.4th at 616. The district court's injunction thus merely retained "*that* status quo" during the pendency of this suit. *Huisha-Huisha*, 27 F.4th at 733. And we fully expect that the district court will usher the suit to a swift completion.

Class-Wide Equities. The Air Force ends by pointing out that a preliminary injunction for thousands of class members will cause it to suffer greater harm than a preliminary injunction for the 18 Plaintiffs. It raises a fair point. Here again, however, the district court's injunction did not interfere in any operational matters within the Air Force's "professional military judgments." *Winter*, 555 U.S. at 24 (citation omitted). The injunction broadly permits the Air Force to exercise complete control over how a class member's "vaccination status" should affect its "deployment, assignment, and other operational decisions." *Doster*, 2022 WL 3576245, at *4; *cf. Austin*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring).

The Air Force also fails to explain how temporarily retaining class members—rather than immediately discharging them—will harm any operational concerns. *Doster*, 48 F.4th at 616. Its own willingness to exempt these thousands of class members from its mandate while it processed their exemption requests over many months undercuts any such urgent need. *Id.* And while the Air Force criticizes the district court's rhetoric, that court did respond to its concerns. At the Air Force's urging, it narrowed the scope of its injunction to

permit the Air Force to refuse to enlist or commission new service members who refuse to take a COVID-19 vaccine. *Doster*, 2022 WL 3576245, at *4. All told, the district court did not abuse its discretion in extending its narrowly written injunction to the broader class. *See O Centro*, 546 U.S. at 428.

* * *

We affirm.__

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 22-3702

HUNTER DOSTER, ET AL., PLAINTIFFS-APPELLEES

v.

HON. FRANK KENDALL, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE AIR FORCE, ET AL., DEFENDANTS-APPELLANTS

Decided and Filed: Sept. 9, 2022

On Motion for Emergency Stay
United States District Court
for the Southern District of Ohio at Cincinnati.
No. 1:22-cv-00084—Matthew W. McFarland,
District Judge.

ORDER

Before: KETHLEDGE, BUSH, and MURPHY, Circuit Judges

KETHLEDGE, Circuit Judge. In this case the plaintiffs allege that the Department of the Air Force de facto rejects every request it receives for a religious exemption to its COVID-19 vaccine mandate—while granting requests for medical and administrative exemptions relatively freely. The district court preliminarily en-

joined the Department from taking, during the pendency of this suit, certain punitive measures against a class of service members with sincere faith-based objections to receiving the vaccine. The Department has appealed that order and now moves for an emergency stay of the class-wide injunction, challenging for the most part the district court's reasoning in certifying the class. We deny the Department's motion but expedite our consideration of its appeal.

I.

In August 2021, Secretary of Defense Lloyd Austin directed that all members of the armed forces be vaccinated against COVID-19. The Secretary of the Air Force accordingly mandated that all of the Department's active-duty service members and reservists (including members of the Air Guard) be vaccinated. Under the Department's guidelines, affected service members can seek exemptions from the mandate on medical, administrative, and religious grounds. The Department has since granted thousands of medical and administrative exemptions to the mandate. As of May 23, 2022, however, the Department had denied 8,869 requests for religious exemptions, while granting a total of 85. *See DAF COVID-19 Statistics - May 2022*, U.S. Air Force (May 24, 2022), https://perma.cc/CD2H-5J2G. The plaintiffs contend—and the Department does not dispute—that all those exemptions were granted to service members who were separately eligible for an administrative exemption (on the ground, it appears, that they were near the end of their service term). Thus the record suggests that, at present, the number of exemptions that the Department has granted on religious grounds stands at zero.

Eighteen active-duty or active-reservist members of the Air Force brought this suit in February 2022, claiming that the Department's "systematic" denial of requests for religious exemptions violated the Religious Freedom and Restoration Act ("RFRA") and the First Amendment. In addition to seeking individual relief, the plaintiffs sought certification of a class of some 10,000 affected service members. Pursuant to the Department's procedure for seeking religious exemptions, Air Force chaplains had already interviewed each plaintiff and had confirmed, in writing, that the Department's vaccination mandate substantially burdened their sincerely held religious beliefs. (Typically the plaintiffs' objections concerned the use of aborted fetal cells in the development of the Air Force's COVID-19 vaccines.) The commanding officers for plaintiffs Airman First Class McKenna Colantanio and Major Daniel Reineke recommended that their requests for exemptions be granted, on the ground that less-restrictive means (like masking or social distancing) could satisfy the Air Force's operational interests in their particular cases; but the Department denied those requests and those of every other plaintiff whose request had been processed as of the complaint's filing.

The plaintiffs thereafter moved for a preliminary injunction, which the court granted in part after an evidentiary hearing. The court's injunction barred the Department from "taking any disciplinary or separation measures" against the named plaintiffs during the pendency of their lawsuit. The Department filed a notice of appeal as to that injunction. *See* 28 U.S.C. § 1292(a)(1). The plaintiffs also filed a motion to certify a class of service members who had sought, but not received, a religious exemption to the Department's vac-

cination mandate. The district court granted that motion and certified a class that—after some revisions in later orders—comes to us defined as follows:

> All active-duty, active reserve, reserve, national guard, inductees, and appointees of the United States Air Force and Space Force, including but not limited to Air Force Academy Cadets, Air Force Reserve Officer Training Corps (AFROTC) Cadets, Members of the Air Force Reserve Command, and any Airman who has sworn or affirmed the United States Uniformed Services Oath of Office or Enlistment and is currently under command and could be deployed, as of July 27, 2022, who: (i) submitted a religious accommodation request to the Air Force from the Air Force's COVID-19 vaccination requirement, where the request was submitted or was pending, from September 1, 2021 to July 27, 2022; (ii) were confirmed as having had a sincerely held religious belief substantially burdened by the Air Force's COVID-19 vaccination requirement by or through Air Force Chaplains; and (iii) either had their requested accommodation denied or have not had action on that request.
>
> Excluded from this definition shall be any person within the above class who: (i) opts out, by delivering notice to the Government and Class Counsel in writing of their election to opt out, to the electronic mail addresses of Counsel, which will be filed with Court.

In a separate order, the court entered a preliminary injunction likewise barring the Department from taking "disciplinary or separation measures" against the members of the class. The Department then filed a notice

of appeal as to the certification order and the class-wide preliminary injunction. The Department also moved in the district court for an emergency stay of its class-wide injunction during the pendency of that appeal. The district court denied that motion. The Department then moved for the same emergency stay in our court, which is the motion before us now.

II.

The decision whether to grant a stay depends upon "an exercise of judicial discretion." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotation marks omitted). Four factors guide the exercise of that discretion: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434 (internal quotation marks omitted). The party requesting a stay—here, the Department—bears the burden of showing that these factors justify the issuance of a stay. *Id.* at 433-34. The first two factors of this standard "are the most critical." *Id.* at 434.

Here, as to the first factor, the Department challenges only the merits of the district court's decision to certify the class—the Department's position being that, even if the named plaintiffs are likely to prevail on their individual claims, the court's certification of the class was an abuse of discretion, and thus so too was the court's issuance of a class-wide preliminary injunction.

The decision whether to certify a class is governed by Federal Rule of Civil Procedure 23, under which certification requires two showings: first, that the four "pre-

requisites" of Rule 23(a) are met; and second, that the case fits within at least one of the three "types of actions" described in Rule 23(b). We begin with Rule 23(a), under which the Department argues that the plaintiffs cannot satisfy two prerequisites, namely commonality and typicality. Commonality means that "there are questions of law or fact common to the class"; typicality means that "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" Fed. R. Civ. P. 23(a)(2), (3). In cases involving claims of class-wide discrimination, these two requirements "tend to merge." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

The commonality requirement covers most of the relevant Rule 23(a) ground here. "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 349-50 (2011) (cleaned up). That requires more than a showing that "they have all suffered a violation of the same provision of law." *Id.* at 350. Instead, it requires that the class members' claims "depend upon a common contention" whose resolution "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Thus a common question, for purposes of Rule 23(a), is one that is likely to "generate common *answers*" class-wide. *Id.* (internal quotation marks omitted).

That kind of common question can arise from a contention that the defendant "operated under a general policy of discrimination." *Id.* at 353 (internal quotation marks omitted). And that is precisely the contention the plaintiffs make here. From the very first paragraph of their Complaint, to their briefing in opposition

to the Department's motion now, the plaintiffs have alleged the existence of a "systematic effort" by the Department to deny service members' requests for religious exemptions categorically, while granting thousands of medical and administrative exemptions. The district court recognized as much when it thrice referenced what it called "Defendants' clear policy of discrimination against religious accommodation requests" in finding the commonality requirement met. July 14 Order at 8. And we think the district court was likely correct when it held that, on this record, that contention supports litigation of both a RFRA claim and a First Amendment free-exercise claim class-wide.

RFRA provides that the federal government "may substantially burden a person's exercise of religion" only when doing so "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). That restriction, as the Department itself emphasizes throughout its briefing, allows the Department to impose that burden on a service member's exercise of her faith only as a last resort, after examining all the circumstances relevant to her individual case. A de facto policy to impose that burden upon class members in gross, regardless of their individual circumstances, would seem rather plainly to violate that restriction. Yet that would be the effect of the Department's alleged policy to deny all requests for religious exemptions. Meanwhile, "[t]he Free Exercise Clause protects religious observers against unequal treatment[.]" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (internal quotation marks omitted). A discriminatory policy to deny all requests for religious exemptions, while granting

thousands of medical and administrative ones, would seem to violate that guarantee as well. The plaintiffs' contention that the Department operates under such a policy could therefore "resolve an issue that is central to the validity of" the class members' RFRA and First Amendment claims "in one stroke." *Dukes*, 564 U.S. at 350. And the same contention would establish typicality, since the same discriminatory policy would account for the failure to grant the named plaintiffs' and class members' requests alike. The Department, for its part, argues that RFRA claims categorically cannot be certified for class treatment. Here, for example, it says that the plaintiffs' RFRA claim requires the court to determine separately for each service member whether the vaccination mandate is the least restrictive means of furthering a compelling governmental interest. We agree that most RFRA claims require that kind of individualized analysis; and we have no quarrel with the Department's contention that such an analysis could not be conducted class-wide here. But the Department's argument misconceives the nature of the RFRA claim that the district court certified. The court's order emphasized on almost every page that the RFRA claim it certified was one based on a class-wide "clear policy of discrimination against religious accommodation requests." July 14 Order at 8. That claim, as explained above, does not turn on an analysis of the class members' individual circumstances and likely can be adjudicated class-wide.

The Department next responds that the plaintiffs' RFRA claim cannot be litigated classwide because, the Department says, it does not have any general policy to deny all requests for religious exemptions, and instead uses "an individualized process that accounts for facts

particular to each service member." Gov't Br. at 14. That response confuses the certification stage with the merits stage. The question for purposes of certification is not whether the Department in fact had a general policy of discrimination against requests for religious exemptions, but instead whether the plaintiffs have "significant proof" that the Department had such a policy. *Dukes*, 564 U.S. at 353 (cleaned up). And the Department's stay motion does not cite *Duke*'s test for establishing a general policy at this stage, or provide the Department's view of the amount of evidence this test demands, or explain why the plaintiffs' evidence of a de facto policy fails to meet it. These issues thus provide no basis on which we may grant a stay.

Moreover, our own review of the record does nothing to convince us that the Department is likely to prevail on this evidentiary point. As an initial matter, though the plaintiffs claim that the Department refuses to grant any exemptions to its vaccination mandate on religious grounds, proof that it is biased against granting such exemptions is enough to support certification. *See Gratz v. Bollinger*, 539 U.S. 244, 267-68 (2003) (affirming class certification when race was one of many factors in the University of Michigan's admissions policy); *Dukes*, 564 U.S. at 353 (proof of a biased "evaluation method" can support certification); *cf. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) ("The Free Exercise Clause bars even subtle departures from neutrality on matters of religion" (internal quotation marks omitted)). To establish a general policy, therefore, the plaintiffs need not show that the Department rejects 100% of requests for religious exemptions. And the Department's own statistics show that, as of May 23, 2022, it had rejected more than 99%

of them. *See DAF COVID-19 Statistics - May 2022*, U.S. Air Force (May 24, 2022), https://perma.cc/CD2H-5J2G. That the Department has granted only a comparative handful of religious exemptions, while granting thousands of medical and administrative ones, is itself at this stage of the case significant proof of discrimination. *See Washington v. Davis*, 426 U.S. 229, 242 (1976) ("discriminatory impact" can be proof of discriminatory intent); *id.* at 253 (Stevens, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor"). Meanwhile, the plaintiffs have contended throughout this litigation that even the handful of exemptions that the Department has approved were granted only to service members who were nearing the end of their service term and thus eligible for an administrative exemption anyway. The Department notably has not disputed that contention for purposes of this motion; and a lawyer for the Department appeared to concede the point when questioned by the court in a related case. *See* Transcript of Preliminary Injunction Hearing at 59:17-25, R. 30-2, *Poffenbarger v. Kendall*, No. 3:22-cv-0001-TMR (S.D. Ohio Feb. 22, 2022) (stating that, as to the nominally religious exemptions granted by the Department, "some service members chose instead to submit their terminal leave request, the admin exemptions for terminal leave, they submitted it as a religious exemption even though they were eligible for a terminal leave [exemption]"). The Department is thus not likely to prevail on this point either.

The Department's two remaining arguments as to Rule 23(a) are lightly developed and insubstantial. First, the Department says that some of the named

plaintiffs' RFRA claims are not "exhausted" because their appeals of the Department's denials of their requests for exemptions remain pending within the Department. But whether RFRA claims are even subject to an exhaustion requirement is an open question. *See, e.g.*, *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012). Nor does the Department offer any authority for the proposition that such a requirement would lack a futility exception. Hence this argument is not likely one on which the Department will overturn the certification order. Second, the Department asserts that "none of the named plaintiffs is a cadet or member of the national guard, and thus they lack standing to challenge requirements applied to those groups." Gov't Br. at 15. Suffice it to say that the Supreme Court's decision in *Gratz* likely refutes that assertion. *See* 539 U.S at 263-67; *cf. Falcon*, 457 U.S. at 159 n.15.

Finally, as to certification proper, the Department argues that the district court was wrong to conclude that the RFRA claim can be certified under Rule 23(b). As an initial matter, we agree with the Department that the district court did not provide an adequate explanation for its decision to certify a class under Rule 23(b)(1)(A). But the parties focus on Rule 23(b)(2) in particular, and so do we. That provision allows for certification when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2).

"Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples of

what (b)(2) is meant to capture." *Dukes*, 564 U.S. at 361 (cleaned up). And that is precisely the kind of case we have here. As the district court recognized, the ground on which the Department allegedly acted—and the ground that applies generally to the class—is its alleged policy of discrimination against religious exemptions. The scope of the alleged discrimination in this case is indeed coterminous with the definition of the class. In that respect, this case is akin to Title VII class actions in which the plaintiffs allege a pattern or practice of racial discrimination. *See, e.g.*, *Chicago Teachers Union, Local No. 1 v. Board of Education of City of Chicago*, 797 F.3d 426, 441-42 (7th Cir. 2015). Moreover, if the plaintiffs eventually prove the existence of a discriminatory policy, final injunctive or declaratory relief would be appropriate for the class as a whole. *See, e.g.*, *Gratz*, 539 U.S. at 264-67; *Chicago Teachers Union*, 797 F.3d at 442.

We differ with the district court, however, as to what that relief might look like. The court appeared to assume that such relief would broadly enjoin the Department to provide a class-wide "religious accommodation relating to the COVID-19 vaccine mandate." July 14 Op. at 19. But an appropriate remedy might more narrowly enjoin the Department to abolish the discriminatory policy, root and branch, and to enjoin any adverse action against the class members on the basis of denials of religious exemptions pursuant to that policy. *See Masterpiece Cakeshop*, 138 S. Ct. at 1732; *but see id.* at 1740 (Gorsuch, J. concurring). Those denials are themselves discrete occurrences as to which such injunctive relief would be final. And this relief might leave open the possibility for the Department to establish a need to apply the vaccine mandate to individual service mem-

bers without resorting to the discriminatory policy. In any event, the particulars of any permanent injunction in this case can be litigated if and when necessary. Thus, in summary, the Department has not made a strong showing that it "is likely to succeed on the merits" of its appeal of the district court's class-wide injunction. *Nken*, 556 U.S. at 434.

Several concluding observations are in order with respect to the certification issue. First, and most remarkable, in bringing this motion the Department has not made any argument as to whether the First Amendment claim (as opposed to the RFRA claim) was improperly certified. That certification stands unchallenged; that claim can support class-wide relief as much as the RFRA claim can; and that omission is an independent reason to deny the Department's motion to stay the class-wide preliminary injunction. Second, the Department might be correct that the district court was mistaken to exclude from its definition of the class any member who chooses to opt-out. *See Dukes*, 564 U.S. at 362 ("Rule [23] provides no opportunity for (b)(1) or (b)(2) class members to opt out"); *but cf. Eubanks v. Billington*, 110 F.3d 87, 93-95 (D.C. Cir. 1997). That mistake, if it was one, can be corrected after disposition of the Department's appeal of the class-wide preliminary injunction.

We address more briefly the Department's few arguments concerning the remaining factors governing issuance of a stay of the district court's class-wide preliminary injunction. That injunction—as relevant to the Department's arguments here—enjoins the Department from "(i) taking, furthering, or continuing any disciplinary or separation measures against the members

of the class for their refusal to receive the COVID-19 vaccine . . . [and] (ii) Defendants shall not place or continue active reservists on no points, no pay status for their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs[.]" The court further stated that "[n]othing in this Order precludes the Department of the Air Force from considering vaccination status in making deployment, assignment, and other operational decisions." July 27 Order at 2-3; *see Austin v. U.S. Navy Seals 1-26, et al.*, 142 S. Ct. 1301, 1301 (2022) (adopting the same limiting language).

The Department argues that this injunction causes the Department to suffer "irreparable harm" because it "requires [the Department] to retain"—as opposed to terminate—"nearly 10,000 unvaccinated service members who, in the judgment of professional military commanders, are ineligible to deploy and are limited in their ability to travel for training, exercise, and other operational needs." Gov't Br. at 20. The Department similarly argues that the "no pay/no points status" portion of the injunction "requires [the Department] to return reservist class members to their operational units and to pay them, even though they do not meet medical readiness standards required for participating in the reserve and may not be able to effectively perform their military duties." *Id.* at 19. But those are all the very same harms that the Department imposed on itself when, to its credit, it chose to grant temporary exemptions to service members during the pendency of their requests for religious exemptions. Moreover, the record shows that the Department routinely takes many months to render a final decision as to those requests, during which time the Department's temporary exemptions remain in place. That suggests that the Department's

concerns about these harms are not as urgent as the Department's briefing now says. We therefore do not think the Department has demonstrated that the district court likely abused its discretion when, in effect, it afforded the class members—during the pendency of claims as to which the Department has not yet shown a likelihood it will prevail—the same relief that the Department itself has afforded them.

The Department also criticizes the district court's assertion, in its opinion denying the Department's motion for an emergency stay, that, "in today's global climate, it is in the public's interest for the armed services to remain at full strength, rather than separating thousands of Airmen due to their refusal to get the COVID-19 vaccine." August 19 Order at 4. We agree with the Department's criticism: whatever the merits of that assertion, the district court strayed well outside its judicial role in making it. But we do not think that assertion is material to the disposition of the Department's motion here.

Finally, to assuage the Department's concerns on one point, we deem the portions of the district court's injunction that the district court "rescinded" in its August 19 Order to be in fact rescinded.

* * *

The Department's motion for an emergency stay is denied. We will expedite the Department's appeal of the district court's class-wide preliminary injunction. The Department must file its principal brief within two weeks of the entry of this order. The plaintiffs will have two weeks to respond. The Department will then have seven days to reply. Oral argument will be sched-

uled for October 19, 2022, and we will strive to decide the Department's appeal in November.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION—CINCINATTI

Case No. 1:22-cv-84

HUNTER DOSTER, ET AL., PLAINTIFFS

v.

HON. FRANK KENDALL, ET AL.,
DEFENDANTS-APPELLANTS

Filed: Aug. 19, 2022

ORDER DENYING EMERGENCY MOTION FOR STAY PENDING APPEAL AND FOR IMMEDIATE ADMINISTRATIVE STAY, MODIFYING CLASS DEFINITION, AND MODIFYING PRELIMINARY INJUNCTION

Judge MATTHEW W. MCFARLAND

This matter is before the Court on Defendants' Emergency Motion for Stay Pending Appeal and for Immediate Administrative Stay (Doc. 83) and Plaintiffs' response (Doc. 85). Defendants seek a stay of the Court's Order Granting Class-Wide Preliminary Injunction (Doc. 77). For the reasons below, the Court **DENIES** Defendants' Emergency Motion, **MODIFIES** the Class Definition, and **MODIFIES** the preliminary injunction. The Court incorporates all prior orders except as modified herein.

A. The matter will not be stayed

"A stay is not a matter of right." *Nken v. Holder*, 556 U.S. 418, 433 (2009). This Court must evaluate four factors in considering a stay pending appeal. *Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 661 (6th Cir. 2016). These factors include:

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Id. (quoting *Serv. Emp. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012)). The factors "are interconnected considerations that must be balanced together." *Id.* The moving party has the burden to show that a stay is warranted. *Id.* at 662.

Defendants' arguments mirror many of the same issues the Court considered and ruled upon when it granted class certification and issued a class-wide preliminary injunction. (*See* Order Granting Class-Wide Preliminary Injunction, Doc. 77; Order Regarding Pending Motions, Doc. 72; Order Denying Defendants' Motion to Dismiss, Doc. 71; Order Granting in Part and Denying in Part Plaintiffs' Motion for a Preliminary Injunction and Issuing a Preliminary Injunction, Doc. 47.) No new arguments persuade the Court that a stay is now warranted.

Likelihood of success. Defendants do not have a likelihood to prevail on the merits of their appeal. Plaintiffs satisfied the Fed. R. Civ. P. 23(a) prerequi-

sites of numerosity, commonality, typicality, and adequacy of representation, as well as Fed. R. Civ. P. 23(b)(1)(A) and (b)(2), therefore warranting class certification. Such certification was consistent with similar litigation in this country involving service members from other branches of the military, including the Navy, *see U.S. Navy SEALs 1-26 v. Austin*, --- F. Supp. 3d ---, 2022 WL 1025144 (N.D. Tex. Mar. 28, 2022) (O'Connor, J.), and the Marines, *see Colonel Financial Mgmt. Officer, et al. v. Austin, et al.*, No. 8:22-cv-1275 (M.D. Fla., Aug. 18, 2022), ECF No. 229 (Merryday, J.). Additionally, Plaintiffs established that a class-wide preliminary injunction is proper. The class has a strong likelihood of success on the merits of the First Amendment Free Exercise Clause violation claim, as well as the Religious Freedom Restoration Act claim. Plaintiffs established that the class would face irreparable harm without a class-wide preliminary injunction, as Defendants appear prepared to separate any airman who objects to getting the COVID-19 vaccine due to sincerely held religious beliefs—a practice, incidentally, that seems to work at cross-purposes to Defendants' stated goal of military readiness. Thus, the first consideration weighs against a stay.

Irreparable harm. Defendants, on the one hand, seek to separate thousands of Airmen who remain unvaccinated while admitting that "[e]very Airman is critical to the accomplishment of the Air Force mission[,]" on the other. (Defendants' Emergency Motion for Stay Pending Appeal, Doc. 83, Pg. ID 4583.) To the extent Defendants face irreparable harm in the form of having fewer Airmen to deploy, Airmen within the class face far more comprehensive irreparable harm, in the

form of losing their entire military careers. Accordingly, the second factor weighs against issuing a stay.

Harm to others. Third, thousands of Airmen would be harmed if the Court were to issue a stay. It seems, in the Court's view, that Defendants seek a stay in order to swiftly discipline and separate thousands of Airmen prior to a ruling by the Sixth Circuit. Doing so would irreparably harm the Airmen who object to getting the COVID-19 vaccine. A stay would force each and every unvaccinated Airman, besides the named Plaintiffs, to choose between two highly objectionable choices: get vaccinated in violation of his or her sincerely held religious beliefs or suffer the consequences. Thus, the third factor weighs heavily against issuing a stay.

Public interest. Lastly, the public interest weighs heavily against issuing a stay. As this Court has stated, "it is always in the public interest to prevent the violations of a party's constitutional rights." (Order Granting in Part and Denying in Part Plaintiffs' Motion for Preliminary Injunction and Issuing a Preliminary Injunction, Doc. 47, Pg. ID 3199.) Additionally, in today's global climate, it is in the public's interest for the armed services to remain at full strength, rather than separating thousands of Airmen due to their refusal to get the COVID-19 vaccine. Thus, the public interest weights against issuing a stay.

In summary, after over two years of living with COVID-19 and its many variants, this record, the law, and common sense require the preliminary injunction, as modified below and applied to the modified class, to remain in effect. Lieutenant Colonel Edward Stapanon, an Air Force pilot and almost 21-year veteran, testified that as long as he has been a pilot, the Air Force

has had a shortage of pilots. (Transcript, Doc. 45, Pg. ID 3067, 3079-80.) And yet Defendants maintain the untenable position that it somehow promotes military readiness to separate and discipline pilots and other Airmen because they object to the vaccine mandate. This, despite the increasingly clear reality that "the vaccines do not prevent transmission of the disease, but can only be claimed to reduce symptom severity."[1] Moreover, Defendants' blanket vaccine mandate across all groups is increasingly out of touch with the Center for Disease Control's own recognition that the risk of severe cases of COVID-19 is a risk faced by specific groups.[2] All things considered, it remains this Court's conclusion that the most prudent way forward is to proceed with this litigation with the class-wide preliminary injunction in effect. Moving forward will permit the adversarial process to achieve its truth-seeking function. *See Gardner v. Florida.*, 430 U.S. 349, 360 (1977). Accordingly, Defendants' Emergency Motion for Stay Pending Appeal and for Immediate Administrative Stay (Doc. 83) is **DENIED**.

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[1] Stephanie Seneff, Greg Nigh, Anthony M. Kyriakopoulos, Peter A. McCullough, *Innate immune suppression by SARS-CoV-2 mRNA vaccinations: The role of G-quadruplexes, exosomes, and MicroRNAS,* FOOD AND CHEMICAL TOXICOLOGY 164 (2022).

[2] "Factors That Affect Your Risk of Getting Very Sick from COVID-19," CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/your-health/risks-getting-verysick.html (last visited August 19, 2022). *See also* "COVID-19: vulnerable and high risk groups," WORLD HEALTH ORGANIZATION, https://www.who.int/westernpacific/emergencies/covid-19/information/high-risk-groups (last visited August 19, 2022).

B. Modified Class Definition

Defendants request that the Court modify the Class Definition to clarify whether it limits the class to service members who had sought religious accommodations as of the date of certification, the date of the injunction, or whether the Class was open-ended. (Doc. 83, Pg. ID 4570, fn. 1.) Plaintiffs assert that the Class is confined to those who met the Class Definition on July 27, 2022, the date the Court first modified the Class Definition and entered the class-wide preliminary injunction. *Doster v. Kendall*, No. 1:22-CV-84, 2022 WL 2974733, at *1 (S.D. Ohio July 27, 2022). Plaintiffs propose modifying the Class Definition accordingly.

The Court agrees. Because this Court retains jurisdiction over the matter at this stage, *see* Fed. R. Civ. P. 23(f) (providing that a Rule 23(f) appeal does not stay district court proceedings without a court order), and has the discretion to modify class definitions, *Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007), the Court modifies the Class Definition as follows, with the sole change being to replace each instance of "to the present" with "July 27, 2022":

> All active-duty, active reserve, reserve, national guard, inductees, and appointees of the United States Air Force and Space Force, including but not limited to Air Force Academy Cadets, Air Force Reserve Officer Training Corps (AFROTC) Cadets, Members of the Air Force Reserve Command, and any Airman who has sworn or affirmed the United States Uniformed Services Oath of Office or Enlistment and is currently under command and could be deployed, as of July 27, 2022, who: (i) submitted a religious accommodation request to the Air Force from the Air

> Force's COVID-19 vaccination requirement, where the request was submitted or was pending, from September 1, 2021 to July 27, 2022; (ii) were confirmed as having had a sincerely held religious belief substantially burdened by the Air Force's COVID-19 vaccination requirement by or through Air Force Chaplains; and (iii) either had their requested accommodation denied or have not had action on that request.
>
> Excluded from this definition shall be any person within the above class who: (i) opts out, by delivering notice to the Government and Class Counsel in writing of their election to opt out, to the electronic mail addresses of Counsel, which will be filed with Court.

C. Modified preliminary injunction

In order to remove its prior application to enlisting or commissioning, remove its application to pending courts-martial since Defendants advised none are pending, and make even clearer that the injunction applies to Defendants' mandate, not any state mandate, the Court modifies the preliminary injunction at Doc. 77 as follows:

(1) Defendants, and their officers, agents, servants, employees, and attorneys, and other people acting in concert or participation with them, who receive notice of this preliminary injunction, are **PRELIMINARILY ENJOINED** from:

> (i) taking, furthering, or continuing any disciplinary or separation measures against the members of the Class for their refusal to receive the COVID-19 vaccine, while keeping in place the current tempo-

rary exemption; such disciplinary or separation measures include, but are not limited to, "adverse administrative actions, non- judicial punishment, administrative demotions, administrative discharges, and courts-martial;" for the benefit of Defendants, this includes continuing any administrative separation or punitive processes or initiating the same.

(ii) Defendants shall not place or continue active reservists on no points, no pay status for their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs.

(iii) The requirement that Defendants not refuse to accept for commissioning or enlistment any inductee or appointee due to their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs in Doc. 77, is *rescinded and withdrawn* in light of separation of powers issues and the President's unreviewable appointment power under Article II. *Orloff v. Willoughby*, 345 U.S. 83, 73 S. Ct. 534 (1953).

(iv) Insofar as the restrictions on National Guards are concerned, the application of the injunction is limited to the enforcement of the Secretary of the Air Force's vaccine mandate, for those meeting the Class Definition, and would not apply to any vaccine requirement that was separately imposed by any Governor, State Adjutant General, state legislature, or separate state authority.

(iv) Members who submitted requests for religious accommodation may cancel or amend previous voluntary retirement or separation requests or requests to transfer to the Air Force Reserve.

(v) Nothing in this Order precludes the Department of the Air Force from considering vaccination status in making deployment, assignment, and other operational decisions.

(2) Defendants, as well as any person acting in concert with Defendants, are enjoined and restrained from taking any adverse action against any Class Member on the basis of this lawsuit or his request for religious accommodation from the COVID-19 vaccine.

(3) The temporary exemptions from taking the COVID-19 vaccine currently in place for all class members shall remain in place during the resolution of this litigation.

(4) In accordance with Federal Rule of Civil Procedure 65(d)(2), this Order binds the following who receive notice of it by personal service or otherwise: the parties; the parties' officers, agents, servants, employees, and attorneys; and other persons who act in concert or participate with the parties or the parties' officers, agents, servants, employees, and attorneys.

(5) Pursuant to Federal Rule of Civil Procedure 65(c), the Court has considered the need for Defendants to post security and concludes that no sum is required under the facts of this case.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

By: /s/ MATTHEW W. McFARLAND
JUDGE MATTHEW W. MCFARLAND

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION—CINCINATTI

Case No. 1:22-cv-84

HUNTER DOSTER, ET AL., PLAINTIFFS

v.

HON. FRANK KENDALL, ET AL.,
DEFENDANTS-APPELLANTS

Filed: July 27, 2022

ORDER GRANTING CLASS-WIDE PRELIMINARY INJUNCTION

Judge MATTHEW W. MCFARLAND

On July 14, 2022, this Court granted Plaintiffs' Motion for Class Certification (Doc. 21) and certified a class. (Order Regarding Pending Motions, Doc. 72, Pg. ID 4468-69.) The Court further ordered Defendants to file a supplemental brief identifying why the Court should not grant a class-wide preliminary injunction. (Id. at 4469.) Defendants timely filed such a brief on July 21, 2022. Plaintiffs filed a supplemental brief on July 25, 2022. Thus, this matter is ripe for the Court's review.

Defendants fail to raise any persuasive arguments for why the Court should not extend the Preliminary In-

junction issued on March 31, 2022 to cover the Class Members. Thus, for the reasons discussed in this Court's Order Granting In Part and Denying In Part Plaintiffs' Motion for a Preliminary Injunction and Issuing a Preliminary Injunction (Doc. 47), the Court finds Defendants' arguments not well taken.

Lastly, the Court reminds Defendants that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Thus, due to the systematic nature of what the Court views as violations of Airmen's constitutional rights to practice their religions as they please, the Court is well within its bounds to extend the existing preliminary injunction to all Class Members.

Accordingly, the Court **ORDERS** the following:

1. The Court **MODIFIES** the Class as follows:

   All active-duty, active reserve, reserve, national guard, inductees, and appointees of the United States Air Force and Space Force, including but not limited to Air Force Academy Cadets, Air Force Reserve Officer Training Corps (AFROTC) Cadets, Members of the Air Force Reserve Command, and any Airman who has sworn or affirmed the United States Uniformed Services Oath of Office or Enlistment and is currently under command and could be deployed, who: (i) submitted a religious accommodation request to the Air Force from the Air Force's COVID-19 vaccination requirement, where the request was submitted or was pending, from September 1, 2021 to the present; (ii) were confirmed as having had a sincerely held religious belief substantially burdened by the Air Force's COVID-19 vaccination

requirement by or through Air Force Chaplains; and (iii) either had their requested accommodation denied or have not had action on that request. Excluded from this definition shall be any person within the above class who: (i) opts out, by delivering notice to the Government and Class Counsel in writing of their election to opt out, by electronic mail addresses to be filed with Court.

2. Defendants, and their officers, agents, servants, employees, and attorneys, and other people acting in concert or participation with them, who receive notice of this preliminary injunction, are **PRELIMINARILY ENJOINED** from: (i) taking, furthering, or continuing any disciplinary or separation measures against the members of the Class for their refusal to receive the COVID-19 vaccine, while keeping in place the current temporary exemption; such disciplinary or separation measures include, but are not limited to, "adverse administrative actions, non-judicial punishment, administrative demotions, administrative discharges, and courts-martial;" for the benefit of Defendants, this includes continuing any administrative separation or punitive processes or initiating the same. However, if there are any court-martials that are in process with members in which the members have been sworn or a witness having been sworn such that jeopardy has attached, those actions shall be stayed, and the Government shall provide notice to this Court of a listing of any such actions within 7 days for further consideration or resolution of this issue; (ii) Defendants shall not place or continue active re-

servists on no points, no pay status for their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs; and (iii) Defendants shall not refuse to accept for commissioning or enlistment any inductee or appointee due to their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs. Further, Members who submitted requests for religious accommodation may cancel or amend previous voluntary retirement or separation requests or requests to transfer to the Air Force Reserve. Nothing in this Order precludes the Department of the Air Force from considering vaccination status in making deployment, assignment, and other operational decisions.

3. Defendants, as well as any person acting in concert with Defendants, are enjoined and restrained from taking any adverse action against any Class Member on the basis of this lawsuit or his request for religious accommodation from the COVID-19 vaccine.

4. The temporary exemptions from taking the COVID-19 vaccine currently in place for all Class Members shall remain in place during the resolution of this litigation.

5. In accordance with Federal Rule of Civil Procedure 65(d)(2), this Order binds the following who receive notice of it by personal service or otherwise: the parties; the parties' officers, agents, servants, employees, and attorneys; and other persons who act in concert or participate with the parties or the parties' officers, agents, servants, employees, and attorneys.

6. Pursuant to Federal Rule of Civil Procedure 65(c), the Court has considered the need for Defendants to post security and concludes that no sum is required under the facts of this case.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

By: /s/ MATTHEW W. McFARLAND
JUDGE MATTHEW W. MCFARLAND

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION—CINCINATTI

Case No. 1:22-cv-84

HUNTER DOSTER, ET AL., PLAINTIFFS

v.

HON. FRANK KENDALL, ET AL., DEFENDANTS

Filed: July 14, 2022

ORDER REGARDING PENDING MOTIONS
(DOCS. 21, 35, 52, 53, 54)

Judge MATTHEW W. MCFARLAND

This matter is before the Court on several pending motions, including Plaintiffs' Motion for Class Certification (Doc. 21), Defendants' Motion to Sever (Doc. 35), Proposed Intervenors' Motion to Intervene (Doc. 52), Proposed Intervenors' Motion for a Preliminary Injunction (Doc. 53), and Emergency Motion for a Temporary Restraining Order by Proposed Intervenors Johnathan Oberg and Johnathan Nipp (Doc. 54). All motions are fully briefed and ripe for review. The Court's disposition of the Motion for Class Certification resolves these

pending motions.[1] As explained below, Plaintiffs' Motion for Class Certification is **GRANTED**.

BACKGROUND

Plaintiffs in this action are United States Air Force servicemen. Plaintiffs brought this case, on behalf of themselves and those similarly situated, against multiple Air Force superiors in their official capacity, including, but not limited to, the Secretary of the Air Force and the Surgeon General of the Air Force, as well as the United States of America (collectively, "Defendants"). They seek redress for "the systematic efforts of the Defendants, and those who report to them, to flagrantly violate" the Religious Freedom and Restoration Act ("RFRA") and the Free Exercise Clause of the First Amendment by requiring all Airmen to obtain the COVID-19 vaccination without granting religious accommodation requests for those who oppose receiving the vaccine due to their sincerely held religious beliefs. (Verified Complaint ("Ver. Compl."), Doc. 1, Pg. ID 1.) This Court granted in part Plaintiffs' Motion for a Preliminary Injunction (Doc. 13) on March 31, 2022. The Court ordered the following:

> 1. Defendants, as well as any persons acting in concert with Defendants, are enjoined and restrained from taking any disciplinary or separation measures against the Plaintiffs named in this action for their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs. Such disciplinary or separation measures include, but are not limited to, "adverse administrative actions, non-judicial punish-

[1] This Order does not have any effect on Defendants' pending Motion to Dismiss (Doc. 51).

> ment, administration demotions, administrative discharges, and courts-martial." (Dec. of Col. Hernandez, Doc. 27-14, Pg. ID 1941);
>
> 2. Defendants, as well as any person acting in concert with Defendants, are enjoined and restrained from taking any adverse action against Plaintiffs on the basis of this lawsuit or their request for religious accommodation from the COVID-19 vaccine[.]

(Order Granting in Part and Denying in Part Plaintiffs' Motion for Preliminary Injunction and Issuing a Preliminary Injunction, Doc. 47, Pg. ID 3203-04.)

As of June 6, 2022, the Air Force had received 9,062 religious accommodation requests, granting 86 of those requests while denying 6,343 requests. (DAF COVID-19 Statistics June 7, 2022, https://www.af.mil/News/Article-Display/Article/3055214/daf-covid-19-statistics-june-7-2022/ (last visited June 30, 2022.)) Following such denials, the Air Force had received 3,837 appeals from Airmen whose initial religious accommodation requests were denied. (*Id.*) As of June 6, 2022, the Air Force has granted only 23 of those appeals, denying 2,978. (*Id.*) A quick calculation shows that the Air Force, either through initial requests or appeals, have granted approximately 1% of religious accommodation requests between September 1, 2021, when the Air Force vaccine requirement went into effect, and June 6, 2022. Despite the Air Force's apparent policy and practice of denying virtually all religious accommodation requests, the Air Force has granted 729 medical exemption requests and 1,006 administrative exemption requests since implementing its COVID-19 vaccination requirement policy September 1, 2021. (*Id.*)

Plaintiffs now seek class certification on behalf of:

> All active-duty, and active reserve members of the United States Air Force who: (i) submitted a religious accommodation request to the Air Force from the Air Force's COVID-19 vaccination requirement, where the request was submitted or was pending, from September 1, 2021 to the present; (ii) were confirmed as having had a sincerely held religious belief by or through Air Force Chaplains; and (iii) either had their requested accommodation denied or have not had action on that request.

(Motion for Class Certification ("Motion for Class Cert."), Doc. 21, Pg. ID 952.)

LAW

This Court "maintains substantial discretion in determining whether to certify a class." *In re Countrywide Fin. Corp. Mort. Lending Practices Litig.,* 708 F.3d 704, 707 (6th Cir. 2013). "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 348 (2011) (citation omitted). "In order to justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Zehentbauer Family Land, LP v. Chesapeake Expl., L.L.C.,* 935 F.3d 496,503 (6th Cir. 2019).

Class certification first requires the moving party to satisfy the Rule 23(a) prerequisites. *Dukes,* 564 U.S. at 345. These prerequisites are known as "numerosity, commonality, typicality, and adequate representation[.]" *Id.* at 349. Such prerequisites "effectively limit the

class claims to those fairly encompassed by the named plaintiff's claims." *Id.*

Additionally, "[a] class action may be maintained if Rule 23(a) is satisfied and if" Rule 23(b)(1), (2), or (3) is also satisfied. *Id.* at fn. 8. Relevant here, Rule 23(b)(1)(a) is satisfied if "prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards or conduct for the party opposing the class[.]" Fed. R. Civ. P. 23(b)(1)(a). Additionally, Rule 23(b)(2) is satisfied if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2).

When determining whether class certification is appropriate, courts must "probe behind the pleadings[,]" because certification is only proper after "a rigorous analysis" into whether Rule 23's prerequisites are met. *Comcast Corp. v. Behrend,* 569 U.S. 27, 33 (2013). Such rigorous analysis "will frequently entail overlap with the merits of the Plaintiff's underlying claim . . . because a class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 33-34 (cleaned up). However, this "rigorous analysis is not . . . a 'license to engage in free-ranging merits inquiries at the certification stage.'" *Zehentbauer Family Land,* 935 F.3d at 504 (quoting *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds,* 568 U.S. 455, 466 (2013)).

ANALYSIS

Plaintiffs argue that class certification is warranted because the Rule 23(a) prerequisites are satisfied and because they satisfy both Rule 23(b)(1)(a) and Rule 23(b)(2). Defendants do not contest Plaintiffs' definition of the putative class, nor do they contest that Plaintiffs established the numerosity requirement. Instead, Defendants challenge the remaining Rule 23(a) prerequisites: commonality, typicality, and adequacy of representation. Additionally, Defendants argue that Plaintiffs fail to satisfy Rule 23(b)(2) but ignore Plaintiffs' argument regarding Rule 23(b)(1)(a).

For the reasons that follow, Plaintiffs have satisfied the Rule 23(a) prerequisites, as well as Rule 23(b)(1)(a) and Rule 23(b)(2). Thus, class certification is warranted.

I. Plaintiffs Have Satisfied the Rule 23(a) Prerequisites.

a. Numerosity

First, Plaintiffs must establish numerosity. To satisfy the numerosity requirement, Plaintiffs must show that "the class is so numerous that joinder of all members is impracticable[.]" Fed. R. Civ. P. 23(a)(1). "No numerical test exists" to satisfy the numerosity requirement. *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 541 (6th Cir. 2012). However, "substantial numbers of affected [individuals] are sufficient to satisfy" such requirement. *Id.*

Here, the Government does not contest that Plaintiffs satisfy Rule 23(a)'s numerosity requirement, and the Court finds that Plaintiffs clearly demonstrate that the putative class is numerous enough to merit certifica-

tion. In their reply, "Plaintiffs seek a class of: 'All active-duty, and active reserve members of the United States Air Force and Space Force who: (i) submitted a religious accommodation request to the Air Force from the Air Force's COVID-19 vaccination requirement, where the request was submitted or was pending, from September 1, 2021 to the present; (ii) were confirmed as having had a sincerely held religious belief by or through Air Force Chaplains; and (iii) either had their requested accommodation denied or have not had action on that request." (Reply in Support, Doc. 46, Pg. ID 3105.) Plaintiffs contend that such class would include, at the time Plaintiffs filed this motion, over 12,000 Airmen. (Motion for Class Cert., Doc. 21, Pg. ID 955.) Thus, a substantial number of Airmen are affected in this case and joinder of all Airmen seeking religious accommodations is impracticable. Plaintiffs' proposed class clearly satisfies the numerosity requirement.

b. Commonality

Second, Plaintiffs must establish commonality. Rule 23(a)(2), the commonality prerequisite, "requires that for certification there must be 'questions of law or fact common to the class.'" *In re Am. Med. Sys., Inc.,* 75 F.3d 1069, 1080 (6th Cir. 1996) (quoting Fed. R. Civ. P. 23(a)(1)). While Rule 23(a)(2) "speaks of 'questions' in the plural," the Sixth Circuit has held that "there need only be one question common to the case." *Sprague v. Gen. Motors Corp.,* 133 F.3d 388,397 (6th Cir. 1998).

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury[,]'" not merely demonstrate that the class members "have all suffered a violation of the same provision of law." *Dukes,* 564 U.S. at 349-50 (quoting *Gen. Tel. Co.*

of Sw. v. Falcon, 457 U.S. 147, 157 (1982)). Thus, "their claims must depend upon a common contention." *Id.* at 350. And the common contention "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

Plaintiffs argue that Rule 23(a)(2) is satisfied because "[a]ll of the claims here involve what is, essentially, claims for religious discrimination" and such claims all have "common elements of proof to prove the claims at issue for each Plaintiff and for the class." (Motion for Class Cert., Doc. 21, Pg. ID 957.) Defendants disagree, arguing that Plaintiffs must either: "(1) show that the employer 'used a biased testing procedure' common to the whole proposed class, or (2) provide '[s]ignificant proof that an employer operated under a general policy of discrimination' that would apply to the class" as provided in *Dukes*, 564 U.S. at 353. (Response in Opposition ("Response in Opp."), Doc. 34, Pg. ID 2205.) Additionally, Defendants argue that, due to the individualized analysis required under RFRA, commonality cannot be established.

Here, Plaintiffs and the putative class members have all allegedly suffered the same injury: violation of their constitutional rights. A putative class would consist only of Airmen who have submitted religious accommodation requests, had an Air Force Chaplain define their religious beliefs as sincerely held, and yet their religious accommodation requests have been denied or delayed. The facts show Defendants have engaged in a pattern of denying religious accommodation requests. Indeed, of the over nine thousand religious exemption

requests, only 109 have been granted by either initial determination or appeal. ((DAF COVID-19 Statistics June 7, 2022, https://www.af.mil/News/Article-Display/Article/3055214/daf-covid-19-statistics-june-7-2022/ (last visited June 30, 2022.)).) This amounts to only 1 % of religious accommodation requests being granted. (*Id.*) "[I]t is hard to imagine a more consistent display of discrimination." *U.S. Navy SEALs 1-26 v. Austin,* No. 4:21-cv-01236-O, 2022 WL 1025144, *5 (N.D. Tex. Mar. 28, 2022).

Importantly, damages stemming from the alleged violation need not be identical for this Court to grant class certification. *See Sterling v. Velsicol Chem. Corp.,* 855 F.2d 1188, 1197 (6th Cir. 1988) ("No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action. Consequently, the mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible"). Thus, the putative class members face the same injury: violation of their constitutional freedom by Defendants' clear policy of discrimination against religious accommodation requests.

Additionally, Plaintiffs' claims are capable of classwide resolution. A finding in favor of Plaintiffs on the RFRA or Free Exercise claims also resolves such claims by the putative class because they involve the same common analysis: Does Defendants' policy and practice of discrimination by denying substantially all religious accommodation requests by Airmen who maintain sincerely held religious beliefs further a compelling gov-

ernmental interest and is such policy and practice the least restrictive means to achieve compelling governmental interests, if any exist? A finding for Plaintiffs or Defendants would result in class-wide resolution, satisfying the commonality requirement.

Defendants' argument that, due to the "highly individualized nature of RFRA claims[,]" commonality cannot be established, fails. (Response in Opp., Doc. 34, Pg. ID 2203.) Under these facts, analysis of the violation itself does not need to be "highly individualized" because it arises from Defendants' overt policy of denying substantially all religious accommodation requests. The unity of analysis as to the violation establishes commonality here. Whether a separate analysis is necessary regarding individualized damages does not affect this conclusion. *See Sterling,* 855 F.2d at 1197. Thus, Defendants' argument fails.

Thus, because putative class members have suffered the same injury as Plaintiffs and class-wide resolution is possible for Plaintiffs' RFRA and Free Exercise claims, Plaintiffs have satisfied the commonality requirement pursuant to Fed. R. Civ. P. 23(a)(2).

c. Typicality

Third, Plaintiffs must establish typicality. To satisfy the typicality requirement, Plaintiffs must establish that "the claims or defenses of the representative parties are typical of the claims or defenses of the class . . . " Fed. R. Civ. P. 23(a)(3). "The commonality and typicality requirements of Rule 23(a) tend to merge." *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, fn. 13 (1982). This is because "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action

is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.*

"[M]any courts have found typicality if the claims or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory." *Rikos v. Procter & Gamble Co.,* 799 F.3d 497, 509 (6th Cir. 2015) (citing Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 7 A Federal Practice and Procedure § 1764 (3d ed. 2005)). The Sixth Circuit has explained that the typicality test "limits the class claims to those fairly encompassed by the named plaintiffs' claims." *Sprague,* 133 F.3d 388,399 (6th Cir. 1998).

As the *Sprague* court explained:

> Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct . . . A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members.

Id. (quotations omitted).

"The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." *Id.*

Plaintiffs argue that typicality is established here for the exact reasons that commonality is established: be-

cause the class claims would all involve "claims of religious discrimination and [would be] centered upon the Government's granting of thousands of administrative and medical exemptions, and systemic denial of religious exemptions." (Motion for Class Cert., Doc. 21, Pg. ID 957.) The Government argues that such similarities are not enough because the roles, responsibilities, levels of proximity, likelihood of deployment or travel, and ability to telework varies from Airmen to Airmen. Additionally, the Government argues that because "Plaintiffs' putative dass [would] also include[] service members with a broad variety of religious beliefs and, consequently, different reasons for objecting to the COVID-19 vaccine[,]" typicality cannot be established. (Response in Opp., Doc. 34, Pg. ID 2215.)

Typicality is established here. Plaintiffs seek relief under RFRA and the Free Exercise Clause of the First Amendment. These are also the only claims which would be pursued by the putative class. Just as in the commonality element, Plaintiffs' claims and the class claims stem from a unitary course of conduct and are based on the same legal and remedial theory. "The factual circumstances need not be identical for each of the class members; some variation among members is permissible." *U.S. Navy SEALs 1-26,* 2022 WL 1025144 at *7. Thus, the claims are typical of, and, in fact, identical to, the claims of the entire class.

Defendants' argument that factual differences between putative class members disallow a finding of typicality is not persuasive. Defendants appear to again argue that the Court must individually analyze each Airmen's claims on the one hand, while systematically denying all religious accommodation requests despite

the factual differences Defendants claim the Court should consider on the other. The Court appreciates there may be minor factual differences between the members of the class, including roles, responsibilities, levels of proximity, likelihood of deployment or travel, and ability to telework, as well as different religious beliefs and reasons for objecting to the COVID-19 vaccine. However, these minor differences do not outweigh that Defendants' typical response when receiving a religious accommodation request is to deny it. The typicality of the putative class is reflected in the fact that Defendants have indiscriminately denied almost all religious accommodation requests and their use of form letters to deny the accommodation requests. (*See* DAF COVID-19 Statistics—June 7, 2022, https://www.af.mil/News/Article-Display/Article/3055214/daf-covid-19-statistics-june-7-2022/ (last visited June 30, 2022.); *see also* Exhibit Comparison of Command Religious Accommodation Denials, Doc. 46-3; Exhibit Comparison of Air Force Surgeon General Religious Accommodation Denials, Doc. 46-4.) Such facts suggest that Defendants do not individually weigh each applicant's belief or circumstances in issuing their response, further cementing the typicality of the class.

Furthermore, these factual differences do not defeat typicality. Plaintiffs' claims are typical of the class because the claims stem for a unitary course of conduct: Defendants' overt policy to deny virtually all religious accommodation requests. And, in cases where the executive implements a COVID-19 vaccine requirement and discriminates against religious accommodation requests, this Court is not the first to find that such conduct establishes typicality. *See U.S. Navy SEALs 1-26,* 2022 WL 1025144.

Thus, because the class claims are fairly encompassed by Plaintiffs' claims and such claims all stem from Defendants' unitary course of conduct, Plaintiffs have satisfied the typicality requirement pursuant to Fed. R. Civ. P. 23(a)(3).

d. Adequacy of Representation

Fourth, Plaintiffs must establish adequacy of representation. Rule 23(a)(4) allows a court to certify a class only if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The commonality and typicality requirements "also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *Dukes,* 564 U.S. at 378, fn. 5 (quoting *Falcon,* 457 U.S. at 157-58, fn. 13). The Sixth Circuit has articulated a two-prong test to determine adequacy-of-representation: "(1) the representative must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *In re Am. Med. Sys., Inc.,* 75 F.3d at 1083.

Plaintiffs argue that the two-prong adequacy-of-representation test is satisfied here. First, Plaintiffs argue that "Plaintiffs and the Class Members possess the same interest and suffered the same injury: each of them requested a religious accommodation and have either had it denied, or have not had it acted upon . . . " (Motion for Class Cert., Doc. 21, Pg. ID 958.) Second, Plaintiffs argue that the second prong is met because "Plaintiffs are represented by qualified counsel with extensive experience prosecuting class actions, constitu-

tional matters, and religious freedoms cases." (*Id.*) However, Defendants argue that adequacy-of-representation is not satisfied because Plaintiffs and the proposed putative class possess conflicts of interests due to separately filed lawsuits "around the country challenging the COVID vaccine requirements for members of the Air Force[,]" especially considering three separate lawsuits brought by Airmen also purport to bring class action claims.[2] (Response in Opp., Doc. 24, Pg. ID 2219.)

First, Plaintiffs have common interests with unnamed members of the class. The class includes Airmen who have been denied or delayed religious accommodations from receiving a COVID-19 vaccine due to their sincerely held religious beliefs, just like Plaintiffs. Despite the nine thousand Airmen seeking religious accommodations, less than one percent have been granted. Thus, thousands of Airmen with sincerely held religious beliefs, all of whom fall into the class, are facing punishment, including involuntary separation. Plaintiffs and the class all have a common interest in injunctive relief disallowing Airmen who seek religious accommodations from being punished for abstaining from receiving the COVID-19 vaccine despite such sincerely held religious beliefs. Therefore, the first prong of the adequacy-of-representation test is satisfied.

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[2] Additionally, Defendants argue that multiple Plaintiffs and the putative class have not exhausted their administrative remedies, which bars a finding that common interests exist. (Response in Opp., Doc. 34, Pg. ID 2221.) This Court has already ruled that such argument is not persuasive because exhaustion is futile. (Order Granting in Part and Denying in Part Plaintiff's Motion for Preliminary Injunction and Issuing a Preliminary Injunction, Doc. 47, Pg. ID 3182.) Thus, the Court need not address such argument.

Second, it appears that the class representatives and counsel will vigorously prosecute the class through qualified counsel. As described below, the Court finds Plaintiffs' counsel to be qualified to represent the class. Counsel all have experience in representing classes actions and individuals seeking remedy for constitutional violations. (*See* Declaration of Christopher Weist, Doc. 21-1.) Thus, the second prong of the adequacy-of-representation test is also satisfied.

The Court is not persuaded by Defendants' conflicts of interest argument. The Northern District of Texas ruled that no conflicts of interest existed in a case nearly identical to this case, and that court's reasoning is persuasive. In *U.S. Navy SEALs 1-26,* the defendants, all Navy executives and officials, argued that class certification was not warranted of all Navy servicemen due to the conflict created by concurrent litigation. 2022 WL 1025144 at *7. However, the court rejected the argument, stating that "the injunctive relief that Plaintiffs seek will benefit all religiously opposed Navy servicemembers who are presently involved in other mandate litigation. Potential class members will not be harmed by class-wide relief. Likewise, Plaintiffs here will benefit from injunctive relief granted in other courts." *Id.* The court then found that no conflicts exist, and the plaintiffs satisfied the adequacy of representative requirement. *Id.* at *8.

This Court agrees with the Northern District of Texas's ruling in *U.S. Navy SEALs 1-26.* Simultaneous litigation does not present a conflict of interest for the class representatives or counsel. This is because the injunctive relief would benefit all religiously opposed Airmen who are currently pursuing litigation for

the same purpose as Plaintiffs. And Plaintiffs would benefit from injunctive relief granted in other courts. Thus, Defendants' argument that Plaintiffs cannot establish adequacy of representation is unavailing.

Because Plaintiffs satisfied both prongs of the adequacy-of-representation test, Plaintiffs have shown adequacy of representation as required by Fed. R. Civ. P. 23(a)(4). Therefore, Plaintiffs have satisfied Fed. R. Civ. P. 23(a).

II. Plaintiffs Have Satisfied Rule 23(b).

In order for the Court to grant class certification, Plaintiffs must also show that they may maintain a class action under Rule 23(b)(1), (2), or (3). *Amchem Prod., Inc. v. Windsor,* 521 U.S. 591,614 (1997). Plaintiffs seek certification of the class pursuant to Rule 23(b)(1)(A) and (2).

Rule 23(b)(1)(A) covers cases for which separate lawsuits by individual litigants would risk establishing "incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). This provision applies to cases where the defending party is legally obligated to treat the members of the class alike or must treat all alike as a matter of practical necessity. *Amchem,* 521 U.S. at 614.

The other potential class vehicle here, Rule 23(b)(2), permits class actions for declaratory or injunctive relief when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

For the reasons set forth below, the proposed class is certifiable under both Rule 23(b)(1)(A) and Rule 23(b)(2).

a. Plaintiffs Have Satisfied Rule 23(b)(1)(A).

Plaintiffs argue that this case is cognizable under Rule 23(b)(1)(A) because the First Amendment and RFRA oblige the Defendants to treat the members of the class alike. The Court agrees.

To start, Defendants do not contest that the proposed class is certifiable under Rule 23(b)(1)(A). And, upon examination, the class may proceed under that provision. Rule 23(b)(1)(A) serves to prevent defendants from being legally bound by contradictory rulings. It is designed to avoid injunctive or declaratory "whipsawing" where different courts require the same defendant to abide by incompatible or contradictory rulings. *Payne v. Tri-State CareFlight, LLC,* 332 F.R.D. 611,664 (D.N.M. 2019). The concern under this provision is not primarily that different lawsuits would yield different results for different plaintiffs; rather, the concern is that different judicial outcomes would impose conflicting obligations on the same defendant or group of defendants. *See id.; see also Snead v. CoreCivic of Tennessee, LLC,* No. 3:17-CV-0949, 2018 WL 3157283, at *14 (M.D. Tenn. June 27, 2018).

This case presents just such a risk. Similar claims may be brought in another court. That court and this Court may arrive at incompatible conclusions with respect to Airmen who seek religious exemptions from the vaccine mandate. One court may find that Defendants may enforce its vaccine mandate over and against religious objections, and another court may find the opposite. Such a scenario would prevent Defendants from

pursuing a uniform course of conduct towards service-members. *Compare Clemons v. Norton Healthcare Inc. Ret. Plan,* 890 F.3d 254, 280 (6th Cir. 2018) (affirming certification under Rule 23(b)(1)(A) for purposes of interpreting a retirement plan, because individual actions would have risked establishing incompatible standards of conduct for the defendant); *Spurlock v. Fox,* No. 3:09-CV-00756, 2012 WL 1461361, at *3 (M.D. Tenn. Apr. 27, 2012) (finding Rule 23(b)(1)(A) certification appropriate so that defendants could pursue a uniform course of conduct regarding a re-zoning plan) *with Pipe.fitters Loe. 636 Ins. Fund v. Blue Cross Blue Shield of Michigan,* 654 F.3d 618, 633 (6th Cir. 2011) (finding Rule 23(b)(1)(A) certification inappropriate because there was no indication that individual adjudications would subject defendant to conflicting affirmative duties).

Accordingly, there exists here the risk of inconsistent or varying adjudications that would establish incompatible standards of conduct under which Defendants would have to comply. Because this case presents a (b)(1)(A) risk, the proposed class is certifiable under that provision.

b. Plaintiffs Have Satisfied Rule 23(b)(2).

Plaintiffs also maintain that a Rule 23(b)(2) class is appropriate, because Defendants' policy on vaccines applies to the class as a whole such that the entire class is entitled to declaratory and injunctive relief. Defendants, on the other hand, argue that Plaintiffs seek individualized determinations with regard to their religious accommodation requests, rather than relief that addresses a singular, discrete issue that affects the entire putative class. They contend that the analysis in reli-

gion cases is individualized and specific, requiring a court to determine whether each and every class member holds a sincerely held religious belief that precludes the use of a vaccine. The Court agrees with Plaintiffs on this point and concludes that the proposed class may also proceed under Rule 23(b)(2).

A class may proceed under (b)(2) if the parties opposing the class have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). This provision is met when the relief sought affects the entire class at once. *Dukes,* 564 U.S. at 361-62. To qualify for class-wide injunctive relief, class members must have suffered harm in essentially the same way and injunctive relief must predominate over monetary damages. *U.S. Navy SEALs 1-26,* 2022 WL 1025144, at *8.

The proposed class satisfies the (b)(2) requirement. Defendants' attempt to characterize the relief sought as hinging on individualized determinations concerning their religious accommodation requests and sincerely held religious beliefs. But the relief the proposed class seeks is the same: a religious accommodation relating to the COVID-19 vaccine mandate. And they have been harmed in" essentially the same way." *Id.* They face separation from the Air Force and other disciplinary measures. A single injunction would provide relief to the entire class. *See Dukes,* 564 U.S. at 360. Indeed, the main purpose of a (b)(2) class is to provide relief through a single injunction or declaratory judgment. *Cole v. City of Memphis,* 839 F.3d 530, 542 (6th Cir. 2016). Because Defendants have uniformly maintained

a policy of overriding Airmen's religious objections to the COVID-19 vaccine, they have acted "on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2). Moreover, the class definition requires that a Chaplain certify that the airman's religious beliefs are sincerely held. Finally, a single injunction would provide the proposed class with the relief they seek from the harm they stand to suffer. *U.S. Navy SEALs,* 2022 WL 1025144 at *9. Accordingly, the class may be certified under Rule 23(b)(2).

III. Temporary Restraining Order Covering the Class

Because the Plaintiffs have satisfied the necessary Rule 23 requirements, the Court will certify the following class:

> All active-duty and active reserve members of the United States Air Force and Space Force, including but not limited to Air Force Academy Cadets, Air Force Reserve Officer Training Corps (AFROTC) Cadets, Members of the Air Force Reserve Command, and any Airman who has sworn or affirmed the United States Uniformed Services Oath of Office and is currently under command and could be deployed, who: (i) submitted a religious accommodation request to the Air Force from the Air Force's COVID-19 vaccination requirement, where the request was submitted or was pending, from September 1, 2021 to the present; (ii) were confirmed as having had a sincerely held religious belief by or through Air Force Chaplains; and (iii) either had their requested accommodation denied or have not had action on that request.

In its broad discretion to modify class definitions, the Court has modified the class definition to more precisely

delineate the scope of the class. *Powers v. Hamilton Cnty. Pub. Def Comm'n,* 501 F.3d 592, 619 (6th Cir. 2007). Furthermore, to facilitate briefing and shepherd this matter to the next pretrial stage, the Court will issue a temporary restraining order prohibiting Defendants from enforcing the vaccine mandate against any of the above Class Members for the next 14 days following the entry of this Order. (*See* Doc. 13, Plaintiffs' Motion for an Emergency Temporary Restraining Order). Within that timeframe, the parties will advise the Court, as laid out below, as to whether any significant change precludes extending the current preliminary injunction to include all Class Members.

IV. Rule 23(g)

This Court may appoint class counsel, pursuant to Fed. R. Civ. P. 23(g). "In appointing class counsel, the court . . . must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class[.]" Fed. R. Civ. P. 23(g)(1)(A). Additionally, "the court . . . may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class[.]" Fed. R. Civ. P. 23(g)(1)(B).

As demonstrated by the Declaration of Christopher Wiest and its exhibits, each counsel for Plaintiffs has experience in handling complex litigation and constitutional rights violation cases. (*See* Declaration of Christopher Weist, Doc. 21-1.) Additionally, such experience demonstrates that counsel all have knowledge of

the applicable law in this case. Lastly, based on the advocacy of Plaintiffs' counsel thus far, each have exhibited that they are willing to commit the necessary resources to adequately represent the Plaintiffs' and putative class members' interests in this case. Accordingly, the Court will appoint Plaintiffs' counsel as class counsel in this matter.

CONCLUSION

For the foregoing reasons, the Court **ORDERS** the following:

1. Plaintiffs' Motion for Class Certification (Doc. 21) is **GRANTED**.
2. Such class **SHALL** consist of active-duty and active reserve members of the United States Air Force and Space Force, including but not limited to Air Force Academy Cadets, Air Force Reserve Officer Training Corps (AFROTC) Cadets, Members of the Air Force Reserve Command, and any Airman who has sworn or affirmed the United States Uniformed Services Oath of Office and is currently under command and could be deployed, who: (i) submitted a religious accommodation request to the Air Force from the Air Force's COVID-19 vaccination requirement, where the request was submitted or was pending, from September 1, 2021 to the present; (ii) were confirmed as having had a sincerely held religious belief by or through Air Force Chaplains; and (iii) either had their requested accommodation denied or have not had action on that request.
3. Defendants' Motion to Sever (Doc. 35) is **DENIED AS MOOT**.

4. Proposed Intervenors' Motion to Intervene (Doc. 52), Proposed Intervenors' Motion for Preliminary Injunction (Doc. 53), and Emergency Motion for Temporary Restraining Order by Proposed Intervenors Johnathan Oberg and Johnathan Nipp (Doc. 54) are **DENIED WITHOUT PREJUDICE**.

5. Plaintiffs' counsel is **APPOINTED** as class counsel in this matter.

6. The Court **ISSUES a TEMPORARY RESTRAINING ORDER** prohibiting Defendants from enforcing the vaccine mandate against any Class Member, to expire 14 days from the entry of this Order.

7. Defendants are **ORDERED** to file a supplemental brief, no later than July 21, 2022 and no more than ten (10) pages in length identifying why this Court should not grant a class-wide preliminary injunction. Plaintiffs may file a response, limited to ten (10) pages, to Defendants' supplemental brief by July 25, 2022.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

By: /s/ MATTHEW W. McFARLAND
JUDGE MATTHEW W. MCFARLAND

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION—CINCINATTI

Case No. 1:22-cv-84

HUNTER DOSTER, ET AL., PLAINTIFFS

v.

HON. FRANK KENDALL, ET AL., DEFENDANTS

Filed: Mar. 31, 2022

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (Doc. 13) AND ISSUING A PRELIMINARY INJUNCTION

This matter is before the Court on Plaintiffs' Motion for a Preliminary Injunction (Doc. 13). Defendants filed a response in opposition to Plaintiffs' Motion (Doc. 27), to which Plaintiffs replied (Doc. 30). Additionally, the Court held a preliminary injunction hearing on March 25, 2022. Thus, the motion is fully briefed and ripe for review. As explained below, Plaintiffs' Motion for a Preliminary Injunction is **GRANTED IN PART** and **DENIED IN PART**.

I. RELIGIOUS LIBERTY

"For centuries now, people have come to this country from every corner of the world to share in the blessing

of religious freedom. Our Constitution promises that they may worship in their own way, without fear of penalty or danger, and that in itself is a momentous offering." *Town of Greece, N. Y. v. Galloway,* 572 U.S. 565, 615 (2014) (Kagan, J., dissenting). That momentous offering clearly is in great peril as to Plaintiffs herein.

The world as we knew it changed in March of 2020 with COVID-19's inception and the shutdown of most of the world. While a return to normalcy is desired, the cost of the return should never jeopardize religious liberty. As Justice Gorsuch recently explained, "Even if the Constitution has taken a holiday during the pandemic, it cannot become a sabbatical." *Roman Cath. Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring). In this Court's opinion, assuming the Constitution has taken a holiday, the holiday is long over, and it needs to get back to work, NOW.

From the time our Founding Fathers signed the Declaration of Independence and, later, the United States Constitution, United States citizens have been provided with the freedom to practice their religious beliefs as they deem fit. Religious liberty was just as important to those who founded this nation as it is today. As John Adams said, "[n]othing is more dreaded than the national government meddling with religion." John Adams, *From John Adams to Benjamin Rush, 12 June 1812,* National Archives: Founders Online, https://founders.archives.gov/documents/Adams/99-02-02-5807 (last viewed Mar. 28, 2022). And, as James Madison explained, "[t]he Religion then of every man must be left to the conviction and conscience of every man: and it is the right of every man to exercise it as these may dictate." James Madison, *Memorial and Remonstrance*

Against Religious Assessment, [CA. 20 June] 1785, National Archives: Founders Online, https://founders.archives.gov/documents/Madison/01-08-02-0163 (last visited Mar. 28, 2022).[1]

Since December 15, 1791, when the Bill of Rights was ratified, the Free Exercise Clause of the First Amendment has been a safe haven for this country's religious liberty. "Congress shall make no law respecting an establishment or religion, or prohibiting the free exercise thereof. . . . " U.S. Const. amend. I. It has been this way since the beginning of the Nation-even, critically, in the context of military conscription. Consider our own history. In the Colonies, service in the militia was required of able-bodied young men. *Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1905-06 (2021) (Alito, J., concurring). But Quakers, Mennonites, and other religious groups objected to militia service based on their religious convictions. Conscription would do "violence to their consciences." *Id.* at 1906. Of course, being a new Nation, we were often" desperately in need of soldiers." *Id.* at 1906. Indeed, "the very survival of the new Nation often seemed in danger." *Id.* The stakes were high. Members of Congress faced "bleak personal prospects if the war was lost." *Id.* But that did not stop the early Continental Congress from granting religious accommodations. *Id.*

And the Free Exercise Clause has withstood the test of time. In 1963, Justice Clark wrote, "[t]he Free Exercise Clause . . . withdraws from legislative power,

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[1] James Madison has been credited by many as the Father of Religious Liberty. For a detailed historical discussion of his work, see Rodney K. Smith, James Madison: the Father of Religious Liberty (2019).

state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individuals by prohibiting any invasions thereof by civil authority." *Sch. Dist. of Abington Twp., Pa. v. Schempp,* 374 U.S. 203, 222-23 (1963).

In fact, the Religious Freedom Restoration Act ("RFRA") was enacted in 1993 to further protect United States citizens' right to religious liberty. Under the RFRA, "Government shall not substantially burden a person's exercise of religion even if the burden results of general applicability . . . " 42 U.S.C. § 2000bb-1. For when the government saddles an individual with a disadvantage "solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax." *Locke v. Davey,* 540 U.S. 712, 727 (2004) (Scalia, J., dissenting).

Sadly, religious liberty has been called into question time and time again throughout our nation's history.[2] Recently, now District of Columbia Circuit Judge Justin R. Walker noted, "the Free Exercise Clause remains a too-often tested bulwark against discrimination toward people of faith, from religious cakemakers to religious preschoolers." *On Fire Christian Ctr., Inc. v. Fischer,* 453 F. Supp. 3d 901, 907 (W.D. Ky. 2020). However, the importance of religious liberty cannot be understated:

> That's because, as de Tocqueville wrote, religion, which among the Americans never directly takes part

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[2] *See* Alexis Miller Buese, Dino LaVerghetta, Abigail Hudson, *2020: COVID-19 versus the First Amendment,* Daily Journal Oanuary 22, 2021) for a discussion on court rulings on attacks of individuals' constitutional right to freedom of religion and the Free Exercise Clause during the COVID-19 pandemic.

> in the government of society, must be considered as the first of their political institutions; for if it does not give them the taste of liberty, it singularly facilitates the use of it.

Id. (quotations omitted).

Now, in front of the backdrop of this country's emphatic protection of religious liberty, this Court is faced with the specific instances before it.

II. FACTS

This action involves eighteen active duty and active reservist Airmen stationed across the United States at Wright-Patterson Air Force Base, Ohio; Hulburt Field, Florida; Randolph Air Force Base and Dobbins Air Reserve Base, Georgia; and March Air Reserve Base, Riverside County, California ("Plaintiffs"). These Plaintiffs seek injunctive relief from being required by the Air Force to receive the COVID-19 vaccines in violation of their sincerely held religious beliefs and despite having applied for religious exemptions from the vaccine. Plaintiffs bring this action against numerous Air Force officials, including the Secretary and Surgeon General of the Air Force, claiming statutory and constitutional violations of their rights to free exercise of religion.

A. The Air Force Mandates the COVID-19 Vaccine

On August 24, 2021, almost 18 months after the beginning of the COVID-19 pandemic and approximately 12 months after the vaccines had been available to the public, "the Secretary of Defense issued a mandate for all members of the Armed Forces under the Department of Defense authority on active duty or in the Ready Reserve, including the National Guard, to immediately begin full vaccination against COVID-19." (Memoran-

dum for Department of the Air Force Commanders, 3 Sept. 2021, Plaintiffs PI Hearing Ex. 2.) The COVID-19 vaccination mandate, however, allows for medical, administrative, and religious exemptions. (COVID-19 Mandatory Vaccination Implementation Guidance for Service Members, Doc. 27-7, Pg. ID 1676-47, 1649.) The mandate also provides that, "[u]nless exempted, Active Duty Airmen and Guardians will be fully vaccinated by 2 November 2021. Unless exempted, Ready Reserve, to include the National Guard, Airmen and Guardians will be fully vaccinated by 2 December 2021." (Memorandum for Department of the Air Force Commanders 3 Sept. 2021, Plaintiffs PI Hearing Ex. 2.)

The Air Force sent a Memorandum relating to vaccination exemptions to Airmen on December 7, 2021. (Supplemental Coronavirus Disease 2019 Vaccination Policy, Doc. 27-8, Pg. ID 1656-67). This Memorandum provided that:

> Commanders will take appropriate administrative and disciplinary actions consistent with federal law and Department of the Air Force (DAF) policy in addressing service members who refuse to obey a lawful order to receive the COVID-19 vaccine and do not have a pending separation or retirement, or medical, religious or administrative exemption. Refusal to comply with the vaccination mandate without an exemption will result in the member being subject to initiation of administrative discharge proceedings.

(*Id.* at Pg. ID 1656.)

The Memorandum continued:

> Regular service members who continue to refuse to obey a lawful order to receive the COVID-19 vaccine

> after their exemption request or final appeal has been denied or retirement/ separation has not been approved will be subject to initiation of administrative discharge. Discharge characterization will be governed by the applicable Department of the Air Force Instructions. Service members separated due to refusal of the COVID-19 vaccine will not be eligible for involuntary separation pay and will be subject to recoupment of any unearned special or incentive pays.

(*Id.* at Pg. ID 1657.)

Lastly, regarding unvaccinated reservists, the Memorandum provides:

> Unvaccinated members who request a medical exemption or RAR will be temporarily exempt from the COVID-19 vaccination requirement while their exemption request is under review. For those members who have declined to be vaccinated, or have not otherwise complied with the guidance above, they are potentially in violation of the Uniform Code of Military Justice (UCMJ) by refusing to obey a lawful order. Commanders should use their discretion as appropriate when initiating disciplinary action.

(*Id.* at Pg. ID 1658.)

B. Potential Consequences For Refusing the Vaccine

Defendants submitted the declaration of Colonel Elizabeth M. Hernandez to explain the consequences Airmen faced if they refused to get vaccinated without receiving an exemption. (Declaration of Colonel Elizabeth M. Hernandez ("Col. Hernandez Dec."), Doc. 27-14, Pg. ID 1940-46.) Col. Hernandez explained that, "[p]otential dispositions for failing to obey a lawful order

to receive the COVID-19 vaccination include adverse administrative actions, non-judicial punishment, administrative demotions, administrative discharges, and courts-martial." (*Id.* at Pg. ID. 1941.) Administrative actions include: "Records of Individual Counseling, Letters of Counseling, Letters of Admonishment, and Letters of Reprimand." (*Id.*) She continues, stating that those who refuse to comply with the COVID-19 vaccination mandate, "absent an exemption, regular service members will be subject to initiation of administrative discharge proceedings." (*Id.* at Pg. ID 1943.) Lastly, and most severely, Col. Hernandez outlines the possible sentences in a court-martial, which include "confinement, reduction in grade (enlisted only), and punitive discharges." (*Id.* at Pg. ID 1944.)

C. Air Force's General Response to Exemption Requests

The Air Force provides their COVID-19 virus statistics on the Air Force's website. These statistics include the total number of COVID-19 cases, percentage of Airmen vaccinated, approved medical and administrative exemptions, and number of pending, approved, and denied religious exemption requests, both at the initial and appeals stage. (DAF COVID-19 Statistics—March 22, 2022, Plaintiffs' PI Hearing Ex. 10.) As of March 22, 2022, 98% of activity duty Airmen were fully vaccinated and 93.3% of Guard and Reserve Airmen were fully vaccinated. (*Id.*) Thus, 96.4% of the Air Force was fully vaccinated as of March 22, 2022. (*Id.*) Additionally, as of March 22, 2022, the Air Force had approved 1,129 medical exemptions and 1,426 administrative exemptions, equaling a total of 2,555 total approved medical and administrative exemptions. (*Id.*)

As of March 22, 2022, the Air Force had adjudicated 4,403 religious exemption requests, but of those requests at the initial stage, the Air Force had only granted 21 requests. (*Id.*) That is right-only 21. Thus, at the initial stage, the Air Force had only granted .47% of religious exemptions heard. (*Id.*) The Surgeon General of the Air Force had adjudicated 1,162 appeals of denials of religious exemption requests. (*Id.*) Of those 1,162 appeals adjudicated, the Surgeon General only approved two (2) additional religious exemption requests. (*Id.*) So, at the appeals stage, the Air Force only approved .17% of appeals of denials of religious exemption requests. (*Id.*) Consequently, of the thousands of religious exemptions the Air Force has adjudicated, the Air Force has only approved a shameful number of 23 religious exemptions. (*See id.*)

D. Plaintiffs' Requests for Religious Exemption from the Vaccine

Here, each Plaintiff in this case has, at a minimum, filed a religious exemption request with the Air Force. (Ver. Compl., Doc. 1, Pg. ID 7-11.) Each Plaintiff was interviewed by an Air Force Chaplain, who confirmed (in writing) the sincerity of each Plaintiff's religious belief. (*Id.*) Four Plaintiffs, 2LT Connor McCormick, Maj. Daniel Reineke, Lt. Col. Edward Stapanon, III, and Maj. Patrick Pottinger, have had their religious exemption requests denied and currently have appeals of such denials pending with the Air Force Surgeon General. (*Id.* at Pg. ID 9-10; *see also* Decision Regarding 2LT McCormick Religious Accommodation Request,

Doc. 38-5, Pg. ID 2655.)[3] Additionally, six Plaintiffs, 2LT Hunter Doster, Maj. Paul Clement, SSgt Adam Theriault, SRA Joe Dills, Maj. Heidi Mosher, and SMSgt Chris Schuldes, have had their initial religious exemption request and their appeal of such denial to the Air Force Surgeon General denied. (*Id.* at Pg. ID 7-10; *see also* Decision Regarding Maj. Mosher Religious Accommodation Appeal, Doc. 38-1, Pg. ID 2631; Decision Regarding 2LT Doster Religious Accommodation Appeal, Doc. 19-1, Pg. ID 944.)[4]

All Plaintiffs face administrative actions, non-judicial punishment, administrative demotions, administrative discharges, and courts-martial if Plaintiffs continue to refuse to get the COVID-19 vaccine.

During the preliminary injunction hearing, the Court heard testimony from three Plaintiffs. Their individual circumstances are briefly summarized as follows.

1. 21 T Hunter Doster

Plaintiff 2LT Hunter Doster submitted a religious exemption request on September 7, 2021. (Doster Religious Accommodation Request, Denial and Subsequent Appeal, Doc. 8-4, Pg. ID 79.) In his request, 2LT Doster explains his religious convictions and the reasons

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[3] Plaintiff 2LT McCormick's religious exemption request was denied after Plaintiffs' filed their Verified Complaint and, thus, was filed at a later date. (*See* Decision Regarding 2LT McCormick Religious Accommodation Request, Doc. 38-5.)

[4] Plaintiffs Maj. Mosher and 2LT Doster' s appeals of the denial of their religious requests were denied after Plaintiff filed their Verified Complaint and, thus, were filed at a later date. (*See* Decision Regarding Maj. Mosher Religious Accommodation Appeal, Doc. 38-1; Decision Regarding 2LT Doster Religious Accommodation Appeal, Doc. 19-1.)

he is seeking an exemption. (*Id.*) Specifically, 2LT Doster stated,

> Two foundational components of this New Covenant are that all life is created by God and is therefore sacred and that I am the Temple of the Lord because God's Spirit, The Holy Spirit, dwells in me. Due to these bedrock principles of my faith, I cannot in good conscience take the COVID-19 Vaccinations because of their ties with aborted fetal tissue, and my beliefs in the spiritual gift of healing.

(*Id.*)

2LT Doster included an attachment with his request, approximately three pages long, that additionally explains his convictions. (*Id.* at Pg. ID 81-83.) He also submitted a letter from Pastor Isaacs, which stated,

> Put simply, being forced to benefit from the taking of a life of a child by taking this vaccine will cause a burden on Hunter's ability to practice his faith with a clear conscience before a Holy God . . . I am asking that you strongly and advisedly afford him the opportunity to live according to his deeply held religious convictions by granting him an exemption to these vaccines.

(*Id.* at Pg. ID 84-85.)

2LT Doster also submitted a letter from Reverend Patrick Tanton that supported his religious exemption request. (*Id.* at Pg. ID 86.) In addition, on October 1, 2021, Air Force Chaplain, Maj. Krista Ingram, also submitted a Memorandum in Support of 2LT Doster' s religious exemption request, stating:

> Current vaccination requirements place a substantial burden on Lt Doster's free exercise of religion by requiring him to participate in an activity prohibited by his sincerely held beliefs. He will submit religious accommodation requests for other vaccinations as they are necessary, and he is prepared to choose obedience to God over military service.

(*Id.* at Pg. ID 87.)

Despite the resounding support for 2LT Doster's religious exemption request by religious leaders within and outside the Air Force, his request was denied on January 6, 2022. (*Id.* at Pg. ID 92.) In a letter signed by Lieutenant General Marshall Webb, this denial stated, "[f]irst, the Air Force's compelling government interest outweighs your individual belief and no lesser means satisfy the government's interest." (*Id.*) The denial continued, stating that the measures the Air Force had taken "for the past 18 months" could no longer be afforded to 2LT Doster because 11[c]ontinuing to implement these drastic measures detracts from readiness, efficiency and good order and discipline in the force, and is unsustainable as the long-term solution." (*Id.*)

2LT Doster appealed this decision on January 18, 2022, relying on the same religious covenants as his initial request to establish his sincerely held religious beliefs. (*Id.* at Pg. ID 94.) However, the Air Force denied 2LT Doster's appeal on February 22, 2022. Signed by the Air Force Surgeon General Robert Miller, the denial states,

> The Department of the Air Force has a compelling government interest in requiring you to comply with the requirement for the COVID-19 immunization be-

> cause preventing the spread of disease among the force is vital to mission accomplishment. In light of your circumstances, your present duty assignment requires intermittent to frequent contact with others and is not fully achievable via telework or with adequate distancing . . . Foregoing the above immunization requirement would have a real adverse impact on military readiness and public health and safety. There are no less restrictive means available in your circumstance as effective as receiving the above immunization in furthering these compelling government interests.

(Doster Appeal Denial, Doc. 19-1, Pg. ID 944.)

Then, following the denial of his appeal, 2L T Doster received a Memorandum, requiring he get vaccinated within five days. (*Id.* at Pg. ID 945.) The memorandum concluded, stating "[f]ailure to comply with the lawful order may result in administrative and/or punitive action for Failing to Obey an Order under Article 92, Uniform Code of Military Justice." (*Id.* at Pg. ID 946.)

2. Sr A Joseph Dills

Like 2LT Doster, SrA Joseph Dills filed a religious exemption request on October 2, 2021. (Sr A Joseph Dills Religious Exemption Request, Doc. 8-5, Pg. ID 131.) In support of his request, Sr A Dills stated,

> I am a Patriot and it is an honor to be an Airman. I wear my uniform with pride and I truly want to do my part to give back to my country . . . With that, my faith comes first. I am pro life and believe in protecting the unborn. This vaccine contains used cells originally isolated from fetal tissue often

> referred to fetal cells. Some of which are derived from aborted fetuses.

(*Id.*)

Dills' s religious exemption request was accompanied by a Memorandum from Wing Chaplain Brandon Stephens. (Chaplain Stephens Memorandum in Support of Sr A Dills Religious Exemption Request, Doc. 36-2, Pg. ID 2375-77.) Chaplain Stephens, affirming Sr A Dills' sincerely held religious beliefs, stated:

> Sr A Joseph Dills has a religious and ethical conviction and believes that any use of a vaccine that uses aborted fetal cell tissue for testing and manufacturing or introduced into a vaccine will be a violation of his religious and ethical conviction of his faith.

(*Id.* at Pg. ID 2375.)

Although the exact date is not provided within the record, SrA Dills's religious exemption request was denied in November of 2021. (Ver. Compl., Doc. 1, Pg. ID 11.) SrA Dills immediately appealed the denial on November 5, 2021. (SrA Appeal and Denial, Doc. 42-2, PG. ID 2800.) Such appeal cited to the same sincerely held religious beliefs as his initial religious exemption request. (*Id.*) SrA Dills's appeal was denied on December 16, 2021. (*Id.* at 2817.) Other than swapping out names and positions, SrA Dills's appeal denial was identical to 2LT Doster. (*Id.*) After the Air Force denied SrA Dills's appeal, he received a Letter of Reprimand on January 3, 2022 for refusing to get the COVID-19 vaccine. (Letter of Reprimand, Doc. 8-5, Pg. ID 135.)

3. LT Col. Edward Stapanon, III

LT Col. Edward Stapanon, III filed a religious exemption request on September 21, 2021. (LT Col. Edward Stapanon Religious Exemption Requests, Appeals and Denials, Doc. 33-4, Pg. ID 2174.) In his religious exemption, LT Col. Stapanon stated:

> This request is based on my sincerely held belief regarding the sanctity of innocent human life. This belief stems from my decades-long, deeply-held devotion to the Catholic faith and its teachings . . . Based on this belief, I believe abortion is the intentional murder of human life . . . Therefore I cannot before God, and in good conscience, accept a vaccine when the development, testing, or production of that vaccine has made use of morally compromised cell lines derived from aborted babies. Unfortunately, each of the three available COVID-19 vaccines in the United States used these cell lines at some stage of manufacturing or testing.

(*Id.*)

Although the specifics of such interview and findings are not easily identifiable in the record, "an Air Force Chaplain interviewed Lt. Colonel Stapanon on September 21, 2021 and confirmed the sincerity of his beliefs[.]" (Ver. Comp!., Doc. 1, Pg. ID 10.)

Despite LT Col. Stapanon's sincerely held religious beliefs, such request was denied by the Air Force on March 4, 2022. (Stapanon Denial of Religious Exemption Request, Doc. 33-3, Pg. ID 2163.) Again, other than swapping out names and positions, LT Col. Stapanon's religious exemption request denial is identical to 2LT Doster. (*Id.*) LT Col. Stapanon filed his

appeal of such denial on March 13, 2022, and the appeal is still pending before the Air Force Surgeon General. (Stapanon Appeal, Doc. 33-4, Pg. ID 2166.)

III. PROCEDURAL HISTORY

Plaintiffs filed the Verified Complaint on February 16, 2022, bringing a violation of the Religious Freedom Restoration Act, 42 U.S.C. § 200066-1(a)-(b), and violation of the First Amendment of the United States Constitution. (Ver. Compl., Doc. 1, Pg. ID 17-18.) Since filing their Verified Complaint and Motion for a Preliminary Injunction (Doc. 13), the parties have filed multiple Notices of Supplemental Authority (Doc. 32, 41, 43 & 44), Notices of Additional Factual Developments (Docs. 33 & 38), and Notices of Additional Materials (Docs. 42 & 36) regarding Plaintiffs' Motion for injunctive relief. Plaintiffs have also filed, in addition to motions seeks injunctive relief, a Motion to Amend or Correct (Doc. 11) and a Motion for Class Certification (Doc. 21). Defendants have filed a Motion to Sever (Doc. 35). All remain pending before the Court.

IV. LAW AND ANALYSIS

A. Justiciability

Before the Court can analyze the merits of whether Plaintiffs are entitled to a preliminary injunction, the Court must first confirm the matter is reviewable. The Government argues that this Court lacks jurisdiction over this case because: (1) it is not ripe for the Court's review, and (2) not all Plaintiffs have exhausted their administrative remedies with the Air Force. Part and parcel with the Government's exhaustion argument, however, is whether the Court should review a military decision at issue in this litigation. *See Harkness v.*

Sec'y of the Navy, 858 F.3d 437, 444 (6th Cir. 2017). Accordingly, the Court analyzes both the ripeness and judicial reviewability of the Air Force's denial of the religious exemption requests herein.

1. Ripeness

The ripeness doctrine "prevent[s] the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568,580 (1985) (citation omitted). Previously, the Supreme Court has instructed courts to evaluate generally "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Airline Pros. Ass'n of Int'l Bhd. of Teamsters, Loe. Union No. 1224, AFL-CIO v. Airborne, Inc.,* 332 F.3d 983, 988 (6th Cir. 2003) (quoting *Abbott Lab'ys v. Gardner,* 387 U.S. 136, 149 (1967)).

The Sixth Circuit further identified the following factors to determine if a constitutional violation claim is ripe: "(1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings." *Berry v. Schmitt,* 688 F.3d 290, 298 (6th Cir. 2012). Additionally, "[i]n the First Amendment context, we evaluate the likelihood of the harm factor by focusing on how imminent the threat of prosecution is and whether the plaintiff has sufficiently alleged an intention to refuse to comply with the statute." *Id.* In this context, the Sixth Circuit has found that the plaintiff established hardship by the denial of judicial relief, stating that" [Plaintiff] is faced

with a present quandary—speak now and risk punishment or forever hold his peace." *Id.*

A similar conclusion is required in this case. First, there is a substantial likelihood that the harm to Plaintiffs will come to pass. Plaintiffs continue to face serious repercussions by refusing to get the COVID-19 vaccine in light of Defendants' denial of their religious exemptions. Specifically, as Col. Hernandez explained, "[p]otential dispositions for failing to obey a lawful order to receive the COVID-19 vaccination include adverse administrative actions, non-judicial punishment, administrative demotions, admirative discharges, and courts-martial." (Col. Hernandez Dec., Doc. 27-14, Pg. ID 1940.) Further, each of the Plaintiffs who testified at the hearing indicated that they were being threatened with imprisonment for refusing the vaccine without an exemption. Accordingly, an imminent threat of punitive action by Defendants is present and appears likely to come to pass.

Second, the record is sufficiently developed for the Court to fairly adjudicate the merits of Plaintiffs' Motion. Each party provided significant briefing as well as numerous declarations and evidence in support of their positions, and the Court heard several hours of testimony during the preliminary injunction hearing. Thus, the second factor outlined in *Bern;* is satisfied.

Finally, Plaintiffs stand to face significant hardship if the Court does not address the issue at this time. Plaintiffs face severe punitive action due to their refusal to receive the COVID-19 vaccine-including prison as made clear during the evidentiary hearing. Like in *Berry,* Plaintiffs are faced with a present quandary - refuse to get vaccinated now and face punishment, includ-

ing criminal prosecution and prison, or get vaccinated in violation of their sincerely held religious beliefs. *See Berry,* 688 F.3d at 298. Accordingly, the Court concludes that Plaintiffs' claims are ripe for adjudication.

2. Judicial Reviewability of a Military Decision

Generally, "[a]n internal military decision is unreviewable unless two initial requirements are satisfied: (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures." *Harkness,* 858 F.3d at 444 (citing *Mindes v. Seaman,* 453 F.2d 197,201 (5th Cir. 1971)). "If the plaintiff meets both prerequisites, then four factors must be weighed to determine justiciability: (1) the nature and strength of the plaintiff's challenge; (2) the potential injury to the plaintiff of withholding review; (3) the degree of anticipated interference with the military function; and (4) the extent to which military experience or discretion is involved." *Id.*

Here, Plaintiffs undisputedly alleged the deprivation of a constitutional right, (Ver. Compl., Doc. 1, Pg. ID 1, 17-18), and so only the question of exhaustion is at issue as to the identified prerequisites. To that point, Defendants argue Plaintiffs have failed to exhaust their administrative remedies, and thus this Court should refuse to hear this matter.

"The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence- to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson,* 405 U.S. 34, 38 (1972). However, the Sixth Circuit has

adopted exceptions to this general rule, one being futility, which occurs "where pursuit of administrative remedies would be a futile gesture." *Shawnee Coal Co. v. Andrus,* 661 F.2d 1083, 1093 (6th Cir. 1981).

In a factually similar case to this one, the Fifth Circuit analyzed the question of futility using the *Mindes* standard, the same test adopted by the Sixth Circuit. *U.S. Navy Seals 1-26 v. Biden,* 27 F.4th 336, 346 (5th Cir. 2022). There, that court determined that, when evidence suggests that exhaustion is futile because the military "has effectively stacked the deck against even those exemptions supported by Plaintiffs' immediate commanding officers and military chaplains[,]" the second prerequisite is satisfied. *Id.* at 347.

After hearing the testimony of three Plaintiffs and reviewing the record, there is no question to the Court that exhaustion in this instance is futile. As of March 22, 2022, the Air Force had adjudicated 4,403 religious exemptions. (DAF COVID-19 Statistics—March 22, 2022.) Of those 4,403 religious exemptions, the Air Force granted ***only 21***. (*Id.*) Additionally, the Air Force has ruled on 1,162 appeals of the denials of religious exemptions. (*Id.*) And, of those 1,162, the Air Force has granted only 2 ***appeals***. (*Id.*) In light of these farcical statistics, this Court finds that the Air Force "has effectively stacked the deck" against service members seeking religious exemptions, *see U.S. Navy Seals 1-26,* 27 F.4th at 347, and thus further finds that exhaustion of the Air Force proceedings on any religious exemptions is futile.

Next, the Court turns to the applicable four factors. *Harkness,* 858 F.3d at 444. The first factor, the nature and strength of the plaintiff's challenge, weighs in favor

of judicial review. Plaintiffs are challenging the Air Force's administration of its COVID-19 vaccination mandate, including the administration of religious exemption. The challenge involves free exercise of religion protections under both the RFRA and the First Amendment. As the Northern District of Texas recently explained, because "Plaintiffs move for a preliminary injunction based on specific violations of their constitutional rights under the Free Exercise Clause, plus similar violations of the RFRA[,] Plaintiffs' claims are squarely in the category of claims most favorable for judicial review." *U.S. Navy SEALs 1-26 v. Biden,* No. 4:21-cv-01235-O, 2022 WL 34443, at *7 (N.D. Tex. Jan. 3, 2022). Also, as discussed below, this Court finds that Plaintiffs' claims are strong and likely to succeed on the merits. Accordingly, the first factor weighs in favor of justiciability.

The second factor, the potential injury to the plaintiff of withholding review, also weighs in favor of judicial review. If the Court withholds review, Plaintiffs find themselves in the iniquitous position of choosing between their First Amendment freedoms and their livelihoods and benefits for each of them and their families. *Poffenbarger v. Kendall,* No. 3:22-cv-1, 2022 WL 594810, at *9 (S.D. Ohio Feb. 28, 2022). Also, Plaintiffs could face criminal charges or even prison due to their refusal to receive the COVID-19 vaccine. Thus, the second factor weighs in favor of justiciability.

Regarding the third factor, which asks this Court to examine the degree of anticipated interference with the military function, "[i)nterference per se is insufficient since there will always be some interference when review is granted. . . . " *Mindes,* 453 F.2d at 201.

Thus, "courts ought to abstain only where the interference would be such as to seriously impede the military in the performance of vital duties." *U.S. Navy Seals 1-26,* 27 F .4th at 348 (internal quotations omitted). Here, the interference with military function would be minimal because only a very small percentage of Air Force service members remain unvaccinated. As of March 22, 2022, 96.4 % of the Air Force is fully vaccinated. (DAF COVID-19 Statistics, March 22, 2022.) Of the remaining unvaccinated, as of March 22, 2022, the Air Force has granted 1,129 medical exemptions and 1,426 administrative exemptions. (*Id.*) Thus, "[i]t seems illogical to think, let alone argue, that [Plaintiffs'] religious-based refusal to take a COVID-19 vaccine would seriously impede military function when the Air Force has at least [2,500] other service members still on duty who are just as unvaccinated as [Plaintiffs]." *Air Force Officer v. Austin,* No. 5:22-cv-009, 2022 WL 468799, at *7 (M.D. Georgia Feb. 15, 2022); *see also U.S. Navy Seals 1-26,* 27 F.4th at 349 ("It is therefore 'illogical . . . that Plaintiff[s'] religious-based refusal to take a COVID-19 vaccine would 'seriously impede' military function when the [Navy] has [over 5,000] service members still on duty who are just as unvaccinated as [the Plaintiffs]"). Further, to argue an impediment to military functioning while at the same time threatening disciplinary action to the unvaccinated defies logic and common sense. Thus, the third factor does not weigh against justiciability.

Lastly, the fourth factor asks this Court to examine the extent to which military experience or discretion is involved. While "[c]ourts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific

military functions," *see Mendes,* 453 F.2d at 201-02, "the particular issues and constitutional questions presented here are not so foreign to those outside the military as to give the Court serious concern about its ability to decide the case." *Poffenbarger,* 2022 WL 594810, at *9. And, where the evidence suggests that the military is intentionally ignoring, and will continue to ignore, RFRA and the First Amendment's protections, such as here, "courts must intervene because generals don't make good judges- especially when it comes to nuanced constitutional issues." *U.S. Navy Seals 1-26,* 27 F .4th at 349; *see also Air Force Officer,* 2022 WL 468799, at *8 (" . . . judges don't make good generals . . . But, by that same token, it's a two-way street: Generals don't make good judges-especially when it comes to nuanced constitutional issues"). The Constitution appropriately places in Article III judges the duty to defend it and secure its religious liberties to all. Thus, the fourth factor does not weigh against justiciability.

Thus, this Court finds that this matter is reviewable. Plaintiffs assert serious constitutional violations and have either exhausted their administrative remedies or exhaustion is futile. Further, the remaining factors weigh in favor of this Court's present review of these issues. Accordingly, the Court finds that this matter is justiciable.

V. PRELIMINARY INJUNCTION FACTORS

Federal Rule of Civil Procedure 65(a) allows the Court to issue a preliminary injunction against an adverse party. Fed. R. Civ. P. 65(a). If a Court grants a preliminary injunction, the Court must "(A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail-and not by refer-

ring to the complaint or other document-the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1).

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch,* 451 U.S. 390, 395 (1981). "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.* "A party thus is not required to prove his case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Id.* (internal citation omitted).

In determining whether to impose a preliminary injunction, this Court is required to consider four factors: "(1) the movant's likelihood of success on the merits; (2) whether the movant will suffer irreparable injury without a preliminary injunction; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction." *McNeilly v. Land,* 684 F.3d 611, 615 (6th Cir. 2012). "The harm to the opposing party and the public interest factors merge when the Government is the opposing party." *Poffenbarger,* 2022 WL 594810, at *7 (quoting *Wilson v. Williams,* 961 F.3d 829,845 (6th Cir. 2020)).

These four factors are "to be balanced and not prerequisites that must be satisfied." *Id.* "In First Amendment cases, however, the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood

of success on the merits." *Bays v. City of Fairborn,* 668 F.3d 814, 819 (6th Cir. 2012). This is because "the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the state action." *Id.* (cleaned up). Thus, "a court must not issue a preliminary injunction where the movant presents no likelihood of merits success." *Wilson,* 961 F.3d at 844. "The party seeking the preliminary injunction bears the burden of justifying such relief, including showing irreparable harm and likelihood of success on the merits." *McNeilly,* 684 F.3d at 615.

A. Likelihood of Success on the Merits

1. Religious Freedom Restoration Act

Plaintiffs' first claim is a violation of the RFRA. RFRA was enacted "in 1993 in order to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 693 (2014). Indeed, "[b]y enacting RFRA, Congress went far beyond what [the Supreme Court] has held is constitutionally required." *Id.* at 706. RFRA, per its plain text, applies to the military. *See* 42 U.S.C. § 2000bb-1; 42 U.S.C. § 2000bb-2(1); *Poffenbarger,* 2022 WL 594810, at *8.

Specifically, RFRA states that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." 42 U.S.C. § 2000bb-1(a). Subsection (b) provides an exception to this overarching prohibition, providing that the "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 govern-

mental interest." 42 U.S.C. § 2000bb-1(b). A court may grant appropriate relief against the government when an individual's religious exercise has been burdened in violation of the RFRA. 42 U.S.C. § 2000bb-1(c).

Defendants concede that Plaintiffs possess sincerely held religious beliefs. Thus, the Court must address whether: (1) Plaintiffs' sincerely held religious beliefs are being substantially burdened by Defendants; (2) the substantial burden, if it exists, is in furtherance of the Government's compelling interest; and (3) the substantial burden is the least restrictive means of furthering Defendants' compelling interests. The Court analyzes each in turn.

a. Substantial Burden

"The substantial-burden test asks whether the Government is effectively forcing plaintiffs to choose between engaging in conduct that violates sincerely held religious beliefs and facing a serious consequence." *New Doe Child #1 v. Cong. of United States,* 891 F.3d 578,589 (6th Cir. 2018). Indeed, "the Government substantially burdens an exercise of religion when it places substantial pressure on an adherent to modify his behavior and to violate his beliefs or effectively bars his sincere faith-based conduct." *Id.*

Defendants' single contention that this case does not involve a substantial burden is that "[t]he 'substantial burden' in this case is not forcing the Plaintiffs to choose between their religious beliefs and their jobs, but rather the significantly lesser burden related to traveling internationally to receive one of the several vaccines that does not involve fetal cell testing and therefore does not violate Plaintiffs' religious beliefs." (Def. Resp. in

Opp., Doc. 27, Pg. ID 1553 at fn. 12). For the reasons below, Defendants' argument fails.

Here, Plaintiffs must choose between receiving the COVID-19 vaccine, which as approved for use in the United States violate Plaintiffs' sincerely held religious beliefs, or face disciplinary or separation measures including "adverse administrative actions, nonjudicial punishment, administration demotions, administrative discharges, and courts-martial." (Decl. of Col. Hernandez, Doc. 27-14, Pg. ID 1941.) The threat of such severe repercussions can only be seen as requiring Plaintiffs to choose between their religious beliefs and their livelihoods, which is a classic case of" substantial pressure." *See Sherbert v. Verner,* 374 U.S. 398,404 (1963).

Defendants cite no case law to support their contention that international travel to take a vaccine that is not currently approved in the United States constitutes a "significantly lesser burden." And the Court is unpersuaded by such argument.

Mandating that Plaintiff take a vaccine developed in another country and not subject to the same oversight or approval required within the United States cannot reasonably be found to be a "significantly lesser burden." It is patently absurd. Thus, the Court finds that the Air Force Covid Vaccination Mandate constitutes a substantial burden to Plaintiffs' sincerely held religious beliefs.

b. Compelling Interests

Thus, the question becomes whether the Air Force can show its vaccine mandate and blanket denial of religious exemptions further a compelling interest as re-

quired by subsection (b) of the RFRA statute. *See* 42 U.S.C. § 2000bb-1(b)(1). Importantly, "RFRA . . . contemplates a more focused inquiry: It requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person-the particular claimant whose sincere exercise of religion is being substantially burdened." *Hobby Lobby,* 573 U.S. at 726 (quotation omitted).

Here, the Court must "look beyond formulated interests and to scrutinize the asserted harm of granting specific exemptions to particular religious claimants . . . " *Id.* at 25 726-27 (cleaned up). "That is, [Defendants] must demonstrate a compelling interest supporting the specific denial of [Plaintiffs'] exemptions and the absence of an alternative for [Plaintiffs]." *Navy Seal 1 v. Biden,* No. 8:21-cv-2429, 2021 WL 5448970, at *10 (M.D. Fla. Nov. 21, 2021). And "[a]lthough '[s]temming the spread of COVID-19 is unquestionably a compelling interest," its limits are finite." *U.S. Navy Seals 1-26,* 2022 WL 34443, at *10 (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63, 67 (2020)).

Defendants argue that denying Plaintiffs' religious exemptions, and virtually all religious exemption requests, is in furtherance of two compelling interest: (1) stemming the spread of COVID-19 and (2) military readiness. (*See* Def. Resp. in Opp., Doc. 27, Pg. ID 1432-33); (*see also* Decision on Religious Accommodation Appeal, Plaintiffs Exhibit 8) (noting in denying an airman's appeal of the denied religious exemption request that "[t]he Department of the Air Force has a compelling governmental interest in requiring you to comply with the requirement for the COVID-19 immun-

ization because preventing the spread of disease among the force is vital to mission accomplishment").

None of Defendants' stated interests constitute compelling interests justifying the substantial burden on Plaintiffs' religious liberties. First, RFRA precludes Defendants from relying on broadly formulated interests such as "national security" and "stemming the spread of COVID-19" to overcome Plaintiffs' claims. *Hobby Lobby,* 573 U.S. at 726-27. Rather, Defendants "must articulate a compelling interest in vaccinating" the Plaintiffs before this Court. *Id.* Defendants have failed miserably to do so. Defendants provide no specific compelling interests in denying these Plaintiffs' specific religious exemptions while at the same time granting numerous medical and administrative exemptions.

Second, even the broad formulaic claims of "stemming the spread of COVID-19" and promoting military readiness and national security ring hollow in light of the fact that over 2,500 exempt Airmen are carrying out their respective duties unvaccinated. The only difference between the over 2,500 Airmen who have otherwise received exemptions and the 18 Plaintiffs before this Court is solely the type of exemption they requested. It appears to the Court that the Air Force has freely granted medical and administrative exemptions while denying almost all religious exemption requests. Thus, by permitting certain types of exemptions significantly more often than others, the Air Force's mandate and related grant of exemptions are underinclusive in furtherance of the alleged compelling interest. And "underinclusiveness . . . is often regarded as a telltale sign that the government's interest in enacting a

liberty-restraining pronouncement is not in fact compelling." *BTS Holdings,* L.L.C. *v. OSHA,* 17 F.4th 604, 616 (5th Cir. 2021).

Further, the Court cannot ignore that these Airmen served with loyalty and conviction during the pandemic, when there was no vaccine. They complied with all necessary precautionary measures and have continued to do so when required. Defendants have not identified any specific harm resulting from Plaintiffs' unvaccinated status at any time during the pandemic or since the mandate has been in place. Indeed, any such claim would seem manufactured given the thousands of currently exempted, unvaccinated individuals permitted to work in their normal duty stations. As the court in *Air Force Officer* recognized:

> No matter whether one service member is unvaccinated for a medical reason and another unvaccinated for a religious reason, one thing remains the same for both of these service members—they're both unvaccinated. In other words, both of these service members pose a similar hazard to Defendants' compelling interest in stemming the spread of COVID-19 within the military.

Air Force Officer, 2022 WL 468799, at *11 (internal quotations omitted).

Therefore, because Defendants fail to demonstrate a compelling interest supporting the specific denial of Plaintiffs' exemptions, Defendants have failed to establish a compelling interest for substantially burdening Plaintiffs' sincerely held religious beliefs.

c. Least Restrictive Means

Here, even if Defendants could demonstrate a compelling interest, the Air Force's COVID-19 vaccination mandate is not the least restrictive means to further any compelling interests. "The least-restrictive-means standard is exceptionally demanding." *Hobby Lobby,* 573 U.S. at 728. When applying the least-restrictive-means standard, a defendant must show that it "lacks other means of achieving its desired goal without imposing substantial burden on the exercise of religion by the objecting party." *Id.*

First, all Plaintiffs, while unvaccinated, have continued to successfully perform their duties and heroically accomplish their missions during the pandemic. No Airmen was vaccinated until the vaccine became readily available, approximately a year after the pandemic began. The Air Force did not require vaccinations until August of 2021, approximately 18 months after the pandemic began.

Moreover, the Plaintiffs have all received temporary exemptions during the course of their appeal, any disciplinary proceedings, and, potentially, this litigation, meaning that they have been permitted to continue to work as they have always done. They have not been quarantined or prohibited from working in close proximity to anyone. And during this time, Plaintiffs, and the Air Force, have continued to perform their duties and accomplish their missions. Thus, the Court is unpersuaded by Defendants' argument that the least restrictive way to further their compelling interest of military readiness is by denying almost all religious exemptions while unvaccinated Airmen, including Plaintiffs, continue to perform their duties. *See also U.S. Navy*

SEALS 1-26, 2022 WL 34443, at *7 (holding that the Navy's vaccine mandate did not satisfy the least restrictive means standard because it "treats comparable secular activity (e.g., medical exemptions) more favorably than religious activity"); *Poffenbarger*, 2022 WL 594810 at *12 (finding that the Air Force's denial of plaintiff's religious exemption is not the least restrictive means because less restrictive means "are being provided . . . on non-religious grounds").

Because the Air Force has willingly and freely granted administrative and medical exemptions but refuses to grant virtually all religious exemptions, this Court finds that the Air Force has not satisfied the least-restrictive-means standard.

* * * * *

Accordingly, Plaintiffs established that the Air Force's COVID-19 vaccination mandate is a substantial burden on Plaintiffs' sincerely held religious beliefs. Defendants failed to establish a compelling interest as to the specific Plaintiffs before the Court to justify the mandate, and, even if they did, Defendants failed to establish that the mandate satisfied the least-restrictive-means standard.

As such, Plaintiffs have a likelihood of success on the merits of their RFRA claim.

2. Free Exercise Clause

Plaintiffs' second claim is that Defendants' policy of denying substantially all religious exemptions violates the Free Exercise Clause of the First Amendment. Defendants argue that the Air Force's COVID-19 vaccination mandate is a "neutral law of general applicability" and, thus, need only survive rational basis review.

(Def. Resp. in Opp., Doc. 27, Pg. ID 1547.) Plaintiffs, on the other hand, argue that the vaccination mandate is neither neutral nor generally applicable and, thus, must survive strict scrutiny, which they argue it cannot. And, Plaintiffs are correct.

The First Amendment Free Exercise Clause, incorporated by the Fourteenth Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. CONST. amend. I. "A neutral law of general applicability need not be justified by a compelling governmental interest even if the law incidentally burdens religious practices." *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 733 (6th Cir. 2021). "But a law that is not neutral and generally applicable must undergo the most rigorous of scrutiny." *Id.*

"A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877. A law or mandate "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's interest in a similar way." *Id.* "Accordingly, where a state extends discretionary exemptions to a policy, it must grant exemptions for cases of 'religious hardship' or present compelling reasons not to do so." *Dahl*, 15 F.4th at 733 (quoting *Fulton*, 141 S. Ct. at 1877).

Here, the Air Force's COVID-19 vaccination mandate is not generally applicable because it allows for medical and administrative exemptions as well as religious exemptions. An esteemed colleague within this district recently held as much because "it distinguishes

between religious and non-religious exemptions." *Poffenbarger,* 2022 WL 594810, at *16. Other courts have also held that military COVID-19 vaccination mandates are not neutral and generally applicable. *See Air Force Officer,* 2022 WL 468799 at *12; *see also U.S. Navy Seals 1-26,* 2022 WL 34443 at *11. Thus, because this Court finds the Air Force's vaccination mandate to be neither neutral nor generally applicable, the Air Force must overcome strict scrutiny.

For Defendants to prevail under strict scrutiny, they must "show that [the Air Force's] failure to exempt [Plaintiffs] serves interests of the highest order and is narrowly tailored to achieve those interests." *Dahl,* 15 F.4th at 734-35. Like in *Dahl,* here, "the question before [this Court] is not whether [the Air Force] has a compelling interest in enforcing its vaccine policies generally, but whether it has such an interest in denying an exemption to [P]laintiffs, and whether its conduct is narrowly tailored to achieve that interest." *Id.* at 735; *see also Fulton,141* S. Ct. at 1881 (same).

Defendants do not establish a compelling interest in denying Plaintiffs' exemptions, on the one hand, while granting thousands of medical and administrative exemptions, on the other, relatively none. Like the Sixth Circuit held in *Maryville Baptist Church,* "restrictions inexplicably applied to one group and exempted from another do little to further [Defendants'] goals and do much to burden religious freedoms." *Maryville Baptist Church, Inc. v. Beshear,* 957 F.3d 610, 615 (6th Cir. 2020). And, this Court held above that the Air Force' COVID-19 vaccination mandate is not narrowly tailored. Thus, Defendants fail to satisfy strict scrutiny, because

"[w]hile the law may take periodic naps during a pandemic, we will not let it sleep through one." *Id.*

In a last ditch effort to persuade the Court, Defendants rely on the long standing principle of military deference. Whether military deference should be considered "stands as a separate option open to the military to justify [a] regulation" being challenged under the First Amendment. *Poffenbarger,* 2022 WL 594810 at *17 (quoting *Harmann v. Stone,* 68 F.3d 973, n.7 (6th Cir. 1995)). This Court also recognizes that courts have consistently deferred to military decision-making. *See Goldman v. Weinberger,* 475 U.S. 503 (1986); *see also Winter v. Nat. Res. Def Council, Inc.,* 555 U.S. 7 (2008).

However, such deference can only go so far. The Supreme Court has explained that it "neither hold[s] nor impl[ies] that the conduct of [a military division] is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief." *Gilligan v. Morgan,* 413 U.S. 1, 12 (1973). And "some First Amendment protection still exists" beyond military deference. *Hartmann,* 68 F.3d at 984.

The evidence before this Court is sufficient to establish that, at this stage of the litigation, Defendants' overt policy to deny substantially all religious exemptions violates the Free Exercise Clause, as well as RFRA. Here, "Defendants essentially want 'the Court to accord a degree of deference that is tantamount to unquestioning acceptance, which is not the proper function of a court in a RFRA' or First Amendment case." *Poffenbarger,* 2022 WL 594810, at *18 (quoting *Singh v. McHugh,* 185 F. Supp. 3d 201, 221 (D.D.C. 2016)). The

Court will not turn a blind eye to such apparent and serious violations of the Free Exercise clause.

Clearly, Plaintiffs have established a likelihood of success on the merits of their Free Exercise Clause claim, as well.

B. Irreparable Harm

"To merit a preliminary injunction, an injury must be both certain and immediate, not speculative or theoretical." *D. T. v. Sumner Cnty. Schs.,* 942 F.3d 324,327 (6th Cir. 2019). First, " [a] plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." *Certified Restoration Dry Cleaning Network,* L.L.C. *v. Tenke Corp.,* 511 F.3d 535, 550 (6th Cir. 2007). Thus, if monetary damages are difficult to calculate, then "the injury is not fully compensable by monetary damages." *Id.* My colleague within this district has previously determined that, in the case where an airman is facing punitive action for refusing to receive the COVID-19 vaccination in violation of the Air Force's mandate, "[m]uch of the alleged harm to [plaintiff] is not irreparable." *Poffenbarger,* 2022 WL 594810 at *18. In *Poffenbarger,* the plaintiff faced the similar, if not identical, punitive action as Plaintiffs face in this case. *Id.* at *5. Thus, the punitive action that may be taken against Plaintiffs if they to refuse to get vaccinated without an exemption does not, alone, establish irreparable harm.

Yet, even if the harm is fully compensable by monetary damages, the Sixth Circuit has previously found that violations of the First Amendment and RFRA rights satisfy the irreparable harm requirement. *Maryville Baptist Church, Inc.,* 957 F.3d at 615-16 (finding restriction that burdened religion" assuredly inflicts ir-

reparable harm"); *Autocam Corp. v. Sebelius,* 730 F.3d 618 (6th Cir. 2013) (same). Unquestionably, the loss of First Amendment freedoms, for even minimal periods of time, "constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). "This principle also applies to violation of rights under the RFRA." *Poffenbarger,* 2022 WL 594810 at *19.

Additionally, Courts with similar issues presented to them in the past few months have determined that "the substantial pressure on a religious objecting service member to obey the COVID-19 vaccination order and violate a sincerely held religious belief constitutes an irreparable injury redressable by a preliminary injunction." *Navy Seal 1 v. Austin,* No. 8:21-cv-2429, 2022 WL 534459, at *19 (M.D. Fla. Feb. 18, 2022); *see also Air Force Officer,* 2022 WL 468030 at *12 (finding that the plaintiff established irreparable injury because her religious exemption request was denied by the Air Force and such denial "essentially infringed upon the free exercise of her religion"); *U.S. Navy Seals 1-26,* 2022 WL 34443 at *3 ("But because these injuries are inextricably intertwined with Plaintiffs' loss of constitutional rights, this Court must conclude that Plaintiffs have suffered irreparable harm").

As such, because this Court finds Plaintiffs have established a likelihood of success on the merits for their RFRA and Free Exercise Clause claims, Plaintiffs have also established irreparable harm.

C. Substantial Harm to Others & Public Interest

As noted above, the third and fourth requirements for issuance of a preliminary injunction-the balance of harms and whether the requested injunction will disserve the public interest—"merge when the Govern-

ment is the opposing party." *Nken v. Holder,* 556 U.S. 418, 435 (2009). Defendants argue that these factors "tilt decisively against granting a preliminary injunction here." (Def. Resp. in Opp., Doc. 27, Pg. ID 1552.) The Court acknowledges that weighty public interests are being considered in this case. First, "it is always in the public interest to prevent the violations of a party's constitutional rights." *Dahl,* 15 F.4th at 736. However, the Court also acknowledges the strong public interest in national defense, including military readiness. *See Winter,* 555 U.S. at 24. As this Court explains in greater detail below, the limited scope of this preliminary injunction will not cause substantial harm to the Air Force because "[Plaintiffs'] religious-based refusal to take a COVID-19 vaccine simply isn't going to halt a nearly fully vaccinated Air Force's mission to provide a ready national defense." *Air Force Officer,* 2022 WL 468799, at *12.

Therefore, because Plaintiffs' harm and the public interest in preventing constitutional rights violations outweigh any nominal harm the Air Force may sustain due to Plaintiffs' vaccination status, the third and fourth factors weigh in favor of a preliminary injunction.

VI. SCOPE OF INJUNCTION

Plaintiffs originally sought a nationwide preliminary injunction granting broad injunctive relief. Specifically,

> Plaintiffs request a preliminary injunction . . . that (i) requires the immediate processing and acceptance of Plaintiffs' religious accommodation requests under RFRA; (ii) requires timely and good faith processing of other religious accommodation requests in accordance with the timelines [sic] con-

> tained in current Department of Defense instructions, and appropriately considers whether such requests can be accommodated within the framework of RFRA and its least restrictive means (as well as a fulsome consideration of alternatives to denies of such request); and (iii) ceases the Defendants' current policy of engaging in a double standard between, on the one hand, granting, where appropriate, medical and administrative exemptions but, on the other hand, almost never granting religious exemptions.

(PL Motion for Prelim. Inj., Doc. 13, Pg. ID 598-99.)

Defendants argued that "such universal and class-wide injunctive relief" is improper here "even if the Court determined that Plaintiffs were entitled to some individual relief at this stage." (Def. Response in Opp., Doc. 27, Pg. ID 1554.) However, Plaintiffs have since revised their requested relief and now "seek only the relief that extended to the portion of the lower court judgment [in *U.S. Navy Seals 1-26,* 2022 WL 34443] that the Supreme Court left in place [in *Austin v. U.S. Navy Seals 1-26,* No.21A477, 2022 WL 882559 (Mem) (2022)]: a prohibition against disciplinary or separation measures to these Plaintiffs under RFRA." (Plaintiffs Response to Defendants' Notice of Additional Authority, Doc. 44, Pg. ID 3062.)

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Camenisch,* 451 U.S. at 395. As the Supreme Court recently explained, "[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents. *Trump v. Int'l Refugee Assistance Project,* 137

S. Ct. 2080, 2087 (2017). A court should limit its preliminary injunction that "goes beyond a restoration of the status quo and impose new obligations" on a party. *See Blaylock v. Cheker Oil Co.,* 547 F.2d 962, 965 (6th Cir. 1976) (finding that a district court's preliminary injunction that went "beyond the restoration of the status quo and impose[d] new obligations on" the defendant was an abuse of discretion).

The Court finds the targeted relief Plaintiffs now seek is "a prohibition against disciplinary or separation measures to these Plaintiffs under RFRA," and thus the Court grants a preliminary injunction of such scope, enjoining Defendants from taking any adverse or punitive action, including but not limited to disciplinary or separation measures, against the Plaintiffs in this case for their refusal to receive the COVID-19 vaccine, while keeping in place the current temporary exemption.

The Court's conclusion is not affected by the Supreme Court's recent decision in *Austin v. U.S. Navy Seals 1-26,* 2022 WL 882559, or Justice Kavanaugh' s concurrence which cautions against intervention in the military' s chain of command. That case is distinguishable from the present one, and this Court's injunction. As set forth below, the injunction in this case is limited to solely these Plaintiffs and only maintains the status quo by maintaining the current temporary exemptions and prohibiting adverse or punitive action against those Plaintiffs for their refusal to receive the COVID-19 vaccine. It does not affect the Air Force's ability to make operational decisions, including deployability decisions.

VII. FINAL THOUGHTS

This case presents the constitutional collision of brave men and women serving in the Air Force sincerely

trying to exercise their religious beliefs and their esteemed superiors who have loaded their weapons against them. During this preliminary injunction hearing the Court watched and heard the testimony of Plaintiffs, some appearing in their full military uniforms and others also in uniform with their young families, watching for justice to unfold in this case. And, at that moment, the Court wondered what General George Washington would think of this battle between the Executive branch, the First Amendment and RFRA. In fact, the Court asked counsel that question.

As America's first and perhaps finest general, Washington's watchwords completely captured this Court's own thinking in a way that borders the prescient. In a letter dated 27 January 1793 to the New Jerusalem Church of Baltimore, he wrote:

> We have abundant reason to rejoice, that in this land the light of truth and reason have triumphed over the power of bigotry and superstition, and that every person may here worship God according to the dictates of his own heart. In this enlightened age and in this land of equal liberty, it is our boast, that a man's religious tenets will not forfeit the protection of the laws, nor deprive him of the right of attaining and holding the highest offices that are known in the United States.

Founders Online, *From George Washington to the Members of the New Jerusalem Church of Baltimore,* 27 *January,* 1793, http://founds.archives.gov/documents/Washington/05-12-0027#print_view (last visited March 30, 2022).

Yet here and now, the Air Force has put these Airmen in the unconscionable position of choosing between

their faith in an eternal God and their career in the United States military. Indeed, active duty Lt. Col. Edward Joseph Stapanon, III, who logged 174 hours of combat time flown in Operation Iraqi Freedom and earned two air medals, testified in the preliminary injunction hearing in this case as follows:

> Q: Now, you understand the seriousness of things, of the decision that you're making today; correct?
>
> A: Yes, ma' am, I do.
>
> Q: And if pushed, will you in fact go to prison to stand behind your religious beliefs?
>
> A: Yes, Ma'am. I don't see that I have any other alternative. When I meet my maker, I'm going to be held responsible for the decisions I've made, and I'd much rather go to prison. There's been a lot of saints that have gone to prison, so I'm willing to do that.

(Transcript of Excerpt of Preliminary Injunction Hearing, Testimony of Edward Joseph Stapanon, III, Doc. 45, Pg. ID 3076-77.)

As such, decorated Lt. Col. Stapanon, who also testified that there is a shortage of pilots, would rather endure prison than betray his sincerely held religious beliefs. And, the enforcement of this vaccine mandate would take this American hero and his other patriots and discharge them from their hard-earned duty stations.

Accordingly, and with a respectful nod of gratitude to the Father of our great country, this Court, as a sworn guardian of the Constitution, will not order the Air Force personnel at this stage to forfeit the protections

of our laws and of the Free Exercise Clause of the First Amendment.

VIII. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' Motion for a Preliminary Injunction. Thus, the Court **ORDERS** the following:

1. Defendants, as well as any persons acting in concert with Defendants, are enjoined and restrained from taking any disciplinary or separation measures against the Plaintiffs named in this action for their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs. Such disciplinary or separation measures include, but are not limited to, "adverse administrative actions, non-judicial punishment, administration demotions, administrative discharges, and courts-martial." (Dec. of Col. Hernandez, Doc. 27-14, Pg. ID 1941);

2. Defendants, as well as any person acting in concert with Defendants, are enjoined and restrained from taking any adverse action against Plaintiffs on the basis of this lawsuit or their request for religious accommodation from the COVID-19 vaccine;

3. Thus, the temporary exemptions from taking the COVID-19 vaccine currently in place for these Plaintiffs shall remain in place during the resolution of this litigation;

4. In accordance with Federal Rule of Civil Procedure 65(d)(2), this Order binds the following who receive actional notice of it by personal service or

otherwise: the parties; the parties' officers, agents, servants, employees, and attorneys; and other persons who are in active concert or participation with the parties or the parties' officers, agents, servants, employees, and attorneys;

5. Pursuant to Federal Rule of Civil Procedure 65(c), the Court has considered the need for Defendants to post security and concludes that no sum is required under the facts of this case; and

6. Plaintiffs' Emergency Motion for Temporary Restraining Order as to Hunter Doster (Doc. 19) is **DENIED AS MOOT**.

IT IS SO **ORDERED this 31st day of March, 2022**.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

By: /s/ MATTHEW W. McFARLAND
JUDGE MATTHEW W. MCFARLAND

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 22-3497/3702

HUNTER DOSTER; JASON ANDERSON; MCKENNA COLANTANIO; PAUL CLEMENT; JOE DILLS; BENJAMIN LEIBY; BRETT MARTIN; CONNOR MCCORMICK; HEIDI MOSHER; PETER NORRIS; PATRICK POTTINGER; ALEX RAMSPERGER; BENJAMIN RINALDI; DOUGLAS RUYLE; CHRISTOPHER SCHULDES; EDWARD STAPANON, III; ADAM THERIAULT; DANIEL REINEKE, PLAINTIFFS-APPELLEES

v.

FRANK KENDALL, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE AIR FORCE; ROBERT I. MILLER, IN HIS OFFICIAL CAPACITY AS SURGEON GENERAL OF THE AIR FORCE; MARSHALL B. WEBB, IN HIS OFFICIAL CAPACITY AS COMMANDER, AIR EDUCATION AND TRAINING COMMAND; RICHARD W. SCOBEE, IN HIS OFFICIAL CAPACITY AS COMMANDER, AIR FORCE RESERVE COMMAND; JAMES C. SLIFE, IN HIS OFFICIAL CAPACITY AS COMMANDER, AIR FORCE SPECIAL OPERATIONS COMMAND; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

Decided and Filed: Apr. 17, 2023

On Petition for Rehearing En Banc
United States District Court
for the Southern District of Ohio at Cincinnati
No. 1:22-cv-00084—Matthew W. McFarland,
District Judge.

ORDER

Before: KETHLEDGE, BUSH, and MURPHY, Circuit Judges.

* * * * *

The court issued an order denying the petition for rehearing en banc. KETHLEDGE J. (pg. 3), delivered a separate statement, in which THAPAR, BUSH, and MURPHY, JJ., joined, concurring in the denial of the petition for rehearing en banc. MOORE, J. (pg. 4), delivered a separate statement, in which CLAY and STRANCH, JJ., joined, dissenting from the denial of the petition for rehearing en banc.

ORDER

The court received a petition for panel rehearing and for rehearing en banc. The petition did not seek review of the issues that the panel's opinion decided. Rather, it sought vacatur of the opinion and of the district court's preliminary injunctions on the ground that events postdating the opinion have now mooted the appeal and the preliminary injunctions. The original panel has reviewed the petition for panel rehearing and has concluded that the district court should review this mootness question in the first instance. It has also concluded that, even if the preliminary injunctions were now moot, that fact would not provide a basis for the "extraordinary remedy of vacatur" of the panel's opin-

ion. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). The petition then was circulated to the full court. Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petition is denied.

STATEMENT

KETHLEDGE, Circuit Judge, concurring in the denial of rehearing en banc. That a party chooses to comply with our decision is hardly a reason to vacate it. Here, at Congress's direction, the Air Force has rescinded the vaccine mandate at issue in this suit. The Air Force—by way of a petition for rehearing en banc—now seeks vacatur of our opinions upholding the district court's preliminary injunctions. Vacatur of our opinions is not a "normal effect" of mootness but an "extraordinary" one. *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994). And the Air Force has not even tried to explain why it is entitled to vacatur when the putative mootness here arose from the government's own actions. *See generally id.* at 25.

All those actions, of course, occurred well after we issued our opinions here. Meanwhile, "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole." *Id.* at 26. In this case, our opinions will stand as a caution against violating the Free Exercise rights of men and women in uniform—which, by all appearances, is what the Air Force did here.

STATEMENT

KAREN NELSON MOORE, Circuit Judge, dissenting from the denial of rehearing en banc. The issue in this case is whether the Air Force's administration of its COVID-19 vaccine mandate violated certain of its servicemembers' religious rights. After a panel of this court affirmed the district court's judgment preliminarily enjoining the Air Force from enforcing its vaccine mandate—but before the case was returned to the district court—Congress enacted the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 ("NDAA"), which ordered the Secretary of Defense to rescind the military's COVID-19 vaccine mandate. Pub. L. No. 117-263, § 525, 136 Stat. 2395, 2571-72 (2022). Twelve federal appellate judges on three courts of appeals have unanimously concluded that the NDAA and the military's implementation of that legislation mooted similar preliminary-injunction appeals. *See Roth v. Austin*, 62 F.4th 1114, 1119 (8th Cir. 2023); *Dunn v. Austin*, No. 22-15286, 2023 WL 2319316, at *1 (9th Cir. Feb. 27, 2023) (order); *Short v. Berger*, No. 22-15755, 2023 WL 2258384, at *1 (9th Cir. Feb. 24, 2023) (order); *Navy Seal 1 v. Austin*, No. 22-5114, 2023 WL 2482927, at *1 (D.C. Cir. Mar. 10, 2023) (per curiam). My review of these decisions and the record in this case leads me to the same conclusion. I would therefore grant the petition for rehearing en banc, which would have the normal effect of vacating the panel's opinion, and hold that Congress's action mooted the pending appeals of the district court's preliminary-injunction orders.

ENTERED BY ORDER OF THE COURT
/s/ DEBORAH S. HUNT
DEBORAH S. HUNT, Clerk

APPENDIX H

1. U.S. Const. Amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 42 U.S.C. 2000bb-1 provides:

Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

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.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to as-

sert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

APPENDIX I

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

[Jan. 10, 2023]

MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP COMMANDERS OF THE COMBATANTCOMMANDS DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS

SUBJECT: Rescission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces

I am deeply proud of the Department's work to combat the coronavirus disease 2019 (COVID-19). Through your leadership, we have improved the health of our Service members and the readiness of the Force, and we have provided life-saving assistance to the American people and surged support to local health care systems and agencies at all levels of government. The Department has helped ensure the vaccination of many Americans, while simultaneously providing critical and timely acquisition support for life-saving therapeutics, tests, and treatments for COVID-19. We have demonstrated the ability to support and defend the Nation under the most trying of circumstances.

The Department will continue to promote and encourage COVID-19 vaccination for all Service members. The Department has made COVID-19 vaccination as easy and convenient as possible, resulting in vaccines

administered to over two million Service members and 96 percent of the Force—Active and Reserve—being fully vaccinated. Vaccination enhances operational readiness and protects the Force. All commanders have the responsibility and authority to preserve the Department's compelling interests in mission accomplishment. This responsibility and authority includes the ability to maintain military readiness, unit cohesion, good order and discipline, and the health and safety of a resilient Joint Force.

On December 23, 2022 the James M. Inhofe National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023 was enacted. Section 525 of the NDAA for FY 2023 requires me to rescind the mandate that members of the Armed Forces be vaccinated against COVID-19, issued in my August 24, 2021 memorandum, "Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members." I hereby rescind that memorandum.

I also hereby rescind my November 30, 2021 memorandum, "Coronavirus Disease 2019 Vaccination for Members of the National Guard and the Ready Reserve."

No individuals currently serving in the Armed Forces shall be separated solely on the basis of their refusal to receive the COVID-19 vaccination if they sought an accommodation on religious, administrative, or medical grounds. The Military Departments will update the records of such individuals to remove any adverse actions solely associated with denials of such requests, including letters of reprimand. The Secretaries of the Military Departments will further cease any ongoing reviews of current Service member religious, administra-

tive, or medical accommodation requests solely for exemption from the COVID-19 vaccine or appeals of denials of such requests.

Religious liberty is a foundational principle of enduring importance in America, enshrined in our Constitution and other sources of Federal law. Service members have the right to observe the tenets of their religion or to observe no religion at all, as provided in applicable Federal law and Departmental policy. Components shall continue to apply the uniform standards set forth in DoD Instruction 1300.17, "Religious Liberty in the Military Services."

Other standing Departmental policies, procedures, and processes regarding immunizations remain in effect. These include the ability of commanders to consider, as appropriate, the individual immunization status of personnel in making deployment, assignment, and other operational decisions, including when vaccination is required for travel to, or entry into, a foreign nation.

For Service members administratively discharged on the sole basis that the Service member failed to obey a lawful order to receive a vaccine for COVID-19, the Department is precluded by law from awarding any characterization less than a general (under honorable conditions) discharge. Former Service members may petition their Military Department's Discharge Review Boards and Boards for Correction of Military or Naval Records to individually request a correction to their personnel records, including records regarding the characterization of their discharge.

The Under Secretary of Defense for Personnel and Readiness shall issue additional guidance to ensure uni-

form implementation of this memorandum, as appropriate.

The Department's COVID-19 vaccination efforts will leave a lasting legacy in the many lives we saved, the world-class Force we have been able to field, and the high level of readiness we have maintained, amidst difficult public health conditions. Our efforts were possible due, first and foremost, to the strength and dedication of our people. I remain profoundly greatful to the men and women of the Department of Defense for their efforts to protect our Force, the Department of Defense community, and to aid the American people.

/s/ [ILLEGIBLE]

APPENDIX J

SECRETARY OF THE AIR FORCE
WASHINGTON

[Jan. 23, 2023]

MEMORANDUM FOR DEPARTMENT OF THE AIR FORCE COMMANDERS

SUBJECT: Rescission of 3 September 2021 Mandatory Coronavirus Disease 2019 Vaccination of Department of the Air Force Military Members and 7 December 2021 Supplemental Coronavirus Disease 2019 Vaccination Policy Memoranda

In accordance with the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 Sec. 525 and the Secretary of Defense's 10 January 2023 memorandum, "Rescission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces," I hereby rescind my 3 September 2021 memorandum, "Mandatory Coronavirus Disease 2019 Vaccination of Department of the Air Force Military Members." The "Supplemental Coronavirus Disease 2019 Vaccination Policy" I issued on 7 December 2021 expired, by its own terms on 7 December 2022.

No individuals currently serving in the Department of the Air Force shall be separated solely on the basis of their refusal to receive the COVID-19 vaccination if they sought an accommodation on religious, administrative, or medical grounds. The Department of the Air Force

will update the records of such individuals to remove any adverse actions solely associated with denials of such requests, including letters of reprimand. The Department of the Air Force will cease any ongoing reviews of current Service member religious, administrative or medical accommodation requests solely for exemption from the COVID-19 vaccine or appeals of denials of such requests. Former Department of the Air Force Service members may petition the Air Force Discharge Review Board and Board for Correction of Military Records to individually request a correction to their personnel records, including records regarding the characterization of their discharge. Additional guidance on implementation of the memorandum will be forthcoming, as needed.

I am immensely proud of the work the Department of the Air Force has done to combat COVID-19. The Regular Air Force and Space Force are 99% vaccinated, the Air National Guard and Air Force Reserve are vaccinated at 94.3% and 95.9%, respectively. As a result of this outstanding response by our members, including incredible work by our healthcare professionals, we maintained our worldwide commitments and provided effective support to the nation. A heartfelt thank you to all Airmen and Guardians for your sustained effort-it made a difference.

One Team, One Fight.

/s/ FRANK KENDALL
FRANK KENDALL

cc:
SAF/DS