IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CINCINNATTI DIVISION

HUNTER DOSTER, *et al.*, Plaintiffs, v. **FRANK KENDALL**, *et al.*, Defendants.	No. 1:22-cv-00084 Hon. Matthew W. McFarland

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

On March 2, 2022, 17 of the 18 plaintiffs moved to certify the following class:

> 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.

Pls.' Mot. to Certify Class ("Mot.") at 4, Doc. No. 21, PageID 955.

Plaintiffs' proposed class fails to meet the requirements of Rule 23. The Supreme Court has made clear that claims raised under the Religious Freedom Restoration Act ("RFRA") require an individualized assessment. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 727 (2014). This highly individualized review means that these claims are not appropriate for class certification. Indeed, to the extent Plaintiffs bring a facial challenge to Air Force policies, such claim fails because the Air Force *already* has a process to review religious accommodation requests to the vaccine requirement on a case-by-case basis. To the extent that Plaintiffs seek to represent a class challenging the Air Force's decisions regarding each class member's religious requests, those claims do not satisfy Rule 23's requirements for many reasons. The class members have different bases for their requested religious accommodations, different job positions and responsibilities, and different potentially less restrictive means of achieving the Air Force's compelling governmental interest in maintaining a medically fit force ready for deployment at all times. Given the individualized injunctive and declaratory relief that Plaintiffs seek, Plaintiffs also fail to show that Defendants have "acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2).

Nor do Plaintiffs address how they overcome conflicts between themselves and members

of the putative class in light of the seven lawsuits—including three putative class actions, one of which was filed separately by Plaintiffs' counsel and is pending in this very district—that Air Force service members have filed around the country challenging the COVID vaccine requirements.

For these reasons and others, the Court should deny Plaintiffs' motion for class certification.

ARGUMENT

Class actions are an exception to the ordinary course of American legal practice. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). A putative class representative may litigate the class's claims only if he is "part of the class and 'possess[es] the same interest and suffer[s] the same injury' as the class members." *Id.* at 348–49 (citation omitted)).

To obtain class certification, a plaintiff bears the burden of showing that "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." *In re Whirlpool Corp. Front–Loading Washer Prods. Liab. Litig.* ("*In re Whirlpool*"), 722 F.3d 838, 850 (6th Cir. 2013) (quoting Fed. R. Civ. P. 23(a)) (quotations omitted). These four threshold requirements are commonly known as "numerosity, commonality, typicality, and adequate representation." *Id.* In addition, a plaintiff seeking class certification must also satisfy one of the three requirements of Rule 23(b). *Id.* Here, Plaintiffs seek certification under Rule 23(b)(2), which requires the district court to find that "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). Plaintiffs bear the burden of proving that these class certification requirements are met. *In re Whirlpool*, 722 F.3d at 851.

A district court must conduct a "rigorous analysis" to ensure "that the requirements of Rule 23 have been met." *In re Whirlpool*, 722 F.3d at 851 (quoting *Wal–Mart*, 564 U.S at 351). Under this standard, a district court does not presume plaintiff's allegations to be true; rather, for disputed factual and legal issues, the court must "probe behind the pleadings before coming to rest on the certification question." *Gooch v. Life Invs. Ins. Co. of Am.*, 672 F.3d 402, 417 (6th Cir. 2012) (quoting *Wal-Mart*, 564 U.S at 351–52) (holding district court erred by conducting only a "limited factual inquiry" that "took plaintiff's allegations as true and resolved doubts in the plaintiff's favor" (quotations omitted)); *see also Davis v. Cintas Corp.*, 717 F.3d 476, 484 (6th Cir. 2013) ("Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." (quoting *Wal-Mart*, 564 U.S at 351–52)); *Reeb v. Ohio Dep't of Rehab. & Corr.*, 81 F. App'x 550, 557–59 (6th Cir. 2003) (vacating class certification for district court's failure to conduct requisite "rigorous analysis" where plaintiffs alleged merely that entire putative class was subject to "unspoken policies, procedures, and treatments" of gender discrimination). Plaintiffs fail to show that the class has the requisite commonality, typicality, or adequate representation; and fail to show that the class meets the requirements of Rule 23(b)(2).

I. The Proposed Class Does Not Satisfy Rule 23(a) Requirements.

A. The Proposed Class Does Not Share Common Questions.

The highly individualized nature of RFRA claims means that the purported class will not share common questions sufficient to satisfy Rule 23(a)(2). Commonality under Rule 23(a)(2) is the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This requires not just the literal raising of "common 'questions,'" but also "the capacity of a class-wide

proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350 (citation omitted). Plaintiffs must demonstrate not only that their claims depend on a "common contention," but that 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 central to the validity of each one of the claims in one stroke." *Id.*; *see also Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 468 (2013); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) ("It is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What we are looking for is a common issue the resolution of which will advance the litigation."); *cf. Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 506 (6th Cir. 2015) (finding common question in whether product was falsely advertised); *In re Whirlpool*, 722 F.3d at 853 (finding common question in whether design defects proximately caused mold). This requires more than showing "merely that [class members] have all suffered a violation of the same provision of law." *Wal-Mart*, 564 U.S. at 350. This is because, "[q]uite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can be productively litigated at once." *Id.*; *see, e.g.*, *Sprague*, 133 F.3d at 397–98 (noting that certification was not proper because although plaintiffs challenged General Motors' system-wide general policy that changed retirees' health benefits, General Motors had made individual "side deal[s]" with each retiree that differed substantively).

Establishing commonality in a RFRA class action poses unique hurdles because RFRA "contemplate[s] an inquiry more focused than [a] categorical approach." *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). Resolving a RFRA claim

necessarily requires individualized analysis of the particular burden on the individual's exercise of religion, the government's compelling interest in implementing a requirement, and the availability of less restrictive alternatives to each such application. *See id.*; *see also Hobby Lobby*, 573 U.S. 682. 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." *Gonzales*, 546 U.S. at 430–31 (quoting 42 U.S.C. § 2000bb–1(b)). Thus, the fact that many putative class members might raise a RFRA claim as to the same policy does not, in itself, establish commonality. *See Wal-Mart*, 564 U.S. at 350.

Rather, in a discrimination-type case, the putative class must establish that the *reasons* for adverse treatment are the same for each putative class member. *See id.* at 352 (explaining that when plaintiffs "wish to sue about literally millions of employment decisions at once" under Title VII, "[w]ithout some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was*" each exemption request denied); *see also* Mot. at 6, Doc. No. 21, PageID 957 ("All of the claims here involve what is, essentially, claims of religious discrimination[.]"). This standard applies both to Plaintiffs' RFRA claims and First Amendment claims. The Supreme Court in *Wal-Mart* explained that when a party seeks to certify a class concerning thousands of independent employment decisions under a theory of a pattern or practice of discrimination, it 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. *Wal-Mart*, 564 U.S. at 353; *see also id.* at 347 (rejecting plaintiffs' argument that their "evidence of

commonality was sufficient to 'raise the common question whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts)"); *Davis*, 717 F.3d at 488 (explaining that plaintiff failed to show that defendant "used a biased testing procedure" or "operated under a general policy of discrimination" because "the gravamen of [plaintiff's] claim is not that the [hiring system]'s objective criteria led to an anti-female bias, but that subjective decisions made by some of [defendant's] managers favored males" (quoting *Wal-Mart*, 564 U.S. at 353)).

Plaintiffs' proposed class action fails to meet these requirements. First, Plaintiffs do not allege that Defendants used biased procedures common to any of the three subclasses. Regardless, Plaintiffs cannot make such a showing in light of the Air Force's highly individualized process to review and adjudicate religious exemption requests on a case-by-case basis. Ex. 1 ¶ 4 (Decl. of Major General Sharon R. Bannister); Decl. of Major Matthew J. Streett ¶¶ 4–16, Doc. No. 27-13, PageID 1932–38. "This is a fact- and labor-intensive analysis that is particular to the circumstances of the requestor." Ex. 1 ¶ 6 (explaining how each request is routed through every single commander in the requestor's chain of command). That process considers, individually for each requestor, the sincerity of the requestor's religious belief; whether the vaccine requirement imposes a substantial burden upon that belief; if so, whether that burden is required in furtherance of a compelling governmental interest; and whether there are any less restrictive means to achieve that interest. Streett Decl. ¶ 5, Doc. No. 27-13, PageID 1932–33. Indeed, Plaintiffs themselves repeatedly emphasize the individualized, case-by-case, discretionary nature of the exemption process. *See, e.g.*, Pls.' Mot. for TRO and Prelim. Inj. ("P.I. Mot.") 13–14, 17, Doc. No. 13, PageID 593–94, 597; Mot. 6, Doc. No. 21, PageID 957.

Nor have Plaintiffs provided any evidence that the Air Force "operated under a general

policy of discrimination." *Wal-Mart*, 564 U.S. at 353. "In this case, just as in *Walmart*, Plaintiffs do not allege that the [Air Force] ever had an express policy" of discrimination. *See In re Navy Chaplaincy*, 306 F.R.D. 33, 48 (D.D.C. 2014). Rather, Plaintiffs summarily allege that "Defendant Kendall gave directives to Commanders, through official and/or unofficial channels, that religious accommodations were not to be granted to the COVID-19 vaccination policy." Compl. ¶ 51, Doc. No. 1, PageID 13. But this Court is not expected to take Plaintiffs' allegations on their face in a motion for class certification, *see Gooch*, 672 F.3d 402, and Plaintiffs present no evidence—let alone the requisite "[s]ignificant proof," *Wal-Mart*, 564 U.S. at 353—of this alleged Air Force–wide scheme.

Plaintiffs argue that there must be a policy of discrimination against religious accommodation requests because "a mere handful" of requests have been granted. P.I. Mot. 15, Doc. No. 13, PageID 595. Preliminarily, this argument is internally contradictory: there cannot be a policy of denying all religious accommodation requests if indeed not all religious accommodation requests have been denied. Moreover, Plaintiffs themselves recognize that only a small percentage of religious accommodation requests have been fully adjudicated on appeal across the Air Force. Compl. ¶ 49, Doc. No. 1, Page ID 13 (citing to public Air Force data showing that, as of February 8, 2022, the Air Force had received 12,623 requests for religious accommodation and had fully adjudicated only 452 requests). Drawing any conclusions from the available data—and certainly any conclusion that accommodation requests are not being considered in good faith—is thus unwarranted. Regardless, mere "[s]tatistical disparities . . . are not proof that any particular plaintiff, must less the class as a whole, has been discriminated against." *In re Navy Chaplaincy*, 306 F.R.D. at 52; *see also In re Navy Chaplaincy*, No. 19-5204, 2020 WL 11568892, at *1 (D.C. Cir. Nov. 6, 2020) (per curiam), *cert. denied sub nom. Chaplaincy*

of Full Gospel Churches v. Dep't of the Navy, 142 S. Ct. 312 (2021) (rejecting same evidence of statistical disparity in affirming district court's grant of summary judgment in favor of the Navy); *Wal-Mart*, 564 U.S. at 357 (holding that statistical disparity in pay or promotion was insufficient to show discrimination and does "not demonstrate that commonality of issues exist"). Simply put, statistics do not show *why* any particular religious accommodation request was denied or whether such a denial violated RFRA, let alone provide evidence of a classwide violation.

More importantly, the fact that many requests have been denied is entirely consistent with the military's compelling interest in stemming the spread of COVID-19 and maintaining a medically fit force. Ex. 2 ¶ 5 (Decl. of Lieutenant General Kevin B. Schneider) ("It is my professional military judgment that vaccination against COVID-19 is the most effective way to combat the disease and is necessary to ensure we maintain a credible fighting force able to deter our adversaries, protect our nation, and – if necessary – prosecute our wars and other military operations."); Ex. 3 ¶ 3 (Decl. of Colonel Artemio C. Chapa); Ex. 4 at 4 (DoDI 1332.45) ("To maximize the lethality and readiness of the joint force" it is DoD policy that "all Service members are expected to be deployable."). "[W]hen 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." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). Such deference applies with equal force in the context of constitutional claims and military decisions about the health and welfare of the troops, *see Solorio v. United States*, 483 U.S. 435, 448 (1987); *Mazares v. Dep't of Navy*, 302 F.3d 1382, 1385 (Fed. Cir. 2002), and in the RFRA context, *see* S. Rep. No. 103-111, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1901 (1993) (explaining that "the courts have always extended to military authorities significant deference in effectuating" the military's interest in maintaining

good order, discipline, and security, and "[t]he committee intends and expects that such deference will continue under this bill"). Plaintiffs may disagree that the Air Force has a compelling interest in slowing the spread of COVID-19, or that vaccines are not the least restrictive means of furthering that interest, but such disagreement does not mean that Air Force leaders are operating in bad faith.[1] Yet Plaintiffs' claim that the entire religious accommodation request process is a sham necessarily requires a finding that hundreds of military officials are acting in concert to issue indiscriminate and undifferentiated denials of each service member's request.[2] *Cf. Dodson v. Dep't of Army*, 988 F.2d 1199, 1204 (Fed. Cir. 1993) ("[M]ilitary administrators are presumed to act lawfully and in good faith like other public officers, and the military is entitled to substantial deference in the governance of its affairs."); *Doe 2 v. Shanahan*, 917 F.3d 694, 731 (D.C. Cir. 2019) (Williams, J., concurring) (noting that "the plausibility of such a scheme tends to unravel as we try to imagine the dozens of participants," including "Cabinet members and other officials," "who would have been needed for its realization" (quotation marks omitted)); *Wal-Mart*, 564 U.S. at 356 ("In a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction."); *see also* Ex. 1 ¶ 4 ("There is no blanket policy or practice of disapproving all religious accommodation requests.").

[1] Recent world events have confirmed the necessity of maintaining service members in a constant state of readiness. The United States responded to the Russian invasion of Ukraine by rapidly deploying aircraft, equipment, and thousands of Service members, many within only 24 to 48 hours of notification. Ex. 2 ¶ 7.

[2] The process for adjudicating a single service member's religious accommodation request involves review by: a chaplain; the service member's unit commander; a military physician; a Religious Resolution Team comprised of the commander, Senior Installation Chaplain, a public affairs officer, and a member of the Staff Judge Advocate's office; each commander in the chain of command, including (depending on the particular chain of command), squadron command, group command, wing command or delta commander, Numbered Air Force commander, and the MAJCOM (or equivalent) commander; and another Religious Resolution Team at the MAJCOM (or equivalent) level. Streett Decl. ¶¶ 9–13, Doc. No. 27-13, PageID 1934–36.

Plaintiffs' reliance on the Air Force's medical and administrative exemptions in support of class certification is also misplaced. Compl. ¶ 50, Doc. No. 1, PageID 13 (alleging that such exemptions "belie[] any assertion that vaccination is mission-critical"). These exemptions in no way provide any basis for class certification. As Defendants explained in their Opposition to Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction ("Defs.' Opp'n to Pls.' P.I. Mot."), Doc. No. 27 at 21–22, PageID 1538–39, medical and administrative exemptions are not comparable to religious accommodations. *See e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) ("Comparability is concerned with the risks various activities pose"). Virtually all medical exemptions categories (all except exemption for pregnancy) exist for circumstances wherein vaccination would threaten the requesting service member's health, which would in turn undermine the Air Force's compelling interest in maintaining a medically fit and deployable force. Ex. 3 ¶ 13. In contrast, when the Air Force denies a request for religious accommodation from the COVID-19 vaccine, it has necessarily determined that *granting* that accommodation would undermine the Air Force's compelling interest in maintaining a medically fit and deployable force.

Moreover, medical exemptions are temporary, lasting between 30 days (or less) to one year depending on the underlying reason for the exemption—for example, pregnancy, current COVID-19 infection, or allergic reaction to a previous dose of the COVID-19 vaccine. Ex. 3 ¶¶ 5–6. As of March 19, 2022, 35% of medical exemptions for all service members—including U.S. Air Force, U.S. Space Force, Air National Guard, and Air Force Reserve Command—were pregnancy-related. *Id*. ¶ 20. The Air Force is not able at this time to further break down the medical exemptions by particular medical condition or by duty status, but it is informative to compare to the Navy's breakdown of medical exemptions: for active-duty Sailors, 48% were related to

pregnancy and an additional 22% were related to current or recent infection with acute illness (including COVID-19), for a combined total of 70%. *See* Ex. 6 ¶ 6 (Decl. of Rear Admiral Gayle D. Shaffer, filed in *Navy SEAL #1 v. Biden*, 8:21-cv-02429 (M.D. Fla.)). Medical exemptions render a service member non-deployable and subject to additional restrictions, *id*. ¶¶ 15–17, and service members who remain non-deployable for more than 12 consecutive months are evaluated for whether they should be retained in military service, Ex. 4 ¶ 1.2(b) (DoDI 1332.45). In contrast, Plaintiffs seek a permanent religious exemption to the COVID-19 vaccine that would allow them to remain active in deployable units without complying with a lawful vaccination order. Although Plaintiffs claim that they seek only temporary exemption, their initial religious accommodation requests request no such temporal limitation. *See generally* Doc. Nos. 11-3 through 11-16. And indeed, many Plaintiffs' professed reasons for requesting a religious accommodation are premised on objection to *any* COVID-19 vaccine (sometimes in addition to opposing abortion), which necessarily requires a permanent exemption. *See* Religious Accommodation Request of Plaintiff Lt. Hunter Doster, Doc. No. 11-4, PageID 331, 334 ("I request a waiver of the immunization requirements . . . to be exempt from receiving *any* COVID-19 vaccinations. . . . [Because] by receiving this vaccine, I am not only dishonoring [g]od with my body by participating in this evil act of abortion, but I am neglecting the gift of healing." (emphasis added)); Religious Accommodation Request of Plaintiff SrA Joe Dills, Doc. No. 11-5, PageID 383 (explaining that the Bible "include[s] several passages . . . illustrating that I should instead wear an approved mask," arguing that "[t]his vaccine" has not been around long enough to be "vetted, tested and proven," and explaining that the vaccine "is setting up [g]od's people for 'the mark'"); Religious Accommodation Request of Plaintiff Lt. Col. Jason Anderson, Doc. No. 11-6, PageID 392–96 (explaining that he will not take any COVID vaccines); Religious Accommodation Request of

Plaintiff Maj. Benjamin Leiby, Doc. No. 11-9, PageID 430 (opposing all mRNA vaccines); Religious Accommodation Request of Plaintiff Lt. Connor McCormick, Doc. No. 11-11, PageID 443 (explaining that "[g]od told [him] not to receive the COVID shot"); Religious Accommodation Request of Plaintiff Maj. Heidi Mosher, Doc. No. 11-12, PageID 448 (explaining that she came to her decision through prayer); Religious Accommodation Request of Plaintiff Lt. Alex Ramsperger, Doc. No. 11-15, PageID 494 (explaining that god "instructed [him] to deny vaccination against the COVID-19 virus"). In any event, nothing about the medical exemption process remotely supports class certification or undercuts the point that religious exemption requests are reviewed on an individualized basis.

Nor are administrative exemptions comparable to religious accommodations. Administrative exemptions are only granted to service members on terminal leave, separating, or retiring from the Air Force. Decl. of Lieutenant Colonel Justin L. Long ¶¶ 4–5, Doc. No. 27-24, PageID 2029–30; Decl. of Lieutenant Colonel Nekitha M. Little ¶ 3, Doc. No. 27-16, PageID 1953–54. Some administrative exemptions are also granted to service members who are actively participating in COVID-19 vaccine clinical trials in the interest of furthering the efficacy of the vaccine itself. Ex. 3 ¶ 17 ("I am not personally aware of anyone that currently has an exemption from the COVID-19 vaccine because they are participating in a vaccine clinical trial."). Plaintiffs emphasize that the Air Force has granted 1,604 administrative exemptions. Reply in Supp. of Pls.' Mot. for Prelim. Inj. ("P.I. Reply Mot.") 6, Doc. No. 30, PageID 2052. But because the nature of these exemptions is temporary, as of March 22, 2022, there are currently only 32 administrative exemptions for active-duty service members in the Air Force, and 170 for reservists. Ex. 5 (Air Force COVID-19 Statistics as of March 22, 2022). These circumstances have no relevance to Plaintiffs' individualized demands for a religious accommodation, let alone support class

certification.

Plaintiffs also have inconsistent positions on administrative exemptions. Plaintiffs request honorable discharge as an alternative, lesser restrictive means to vaccination. P.I. Mot. 7, Doc. No. 13, PageID 587. Yet Air Force policy for a service members who continues to refuse vaccination is to initiate discharge proceedings, which may result in an honorable discharge. *See* Defs.' Opp'n to Pls.' P.I. Mot. 27, Doc. No. 27, PageID 1544; Decl. of Colonel Elizabeth M. Hernandez ¶ 10, Doc. No. 27-14, PageID 1943–44. Additionally, administrative exemptions may be granted for service members who are separating or retiring—which would result in an honorable discharge—as long as their request to retire or separate is approved and they meeting other timing criteria. Decl. of Lieutenant Colonel Justin L. Long ¶ 6, Doc. No. 27-24, PageID 2030. Plaintiffs thus simultaneously argue that they should be granted honorable discharges, which would lead to an administrative exemption, while claiming that administrative exemptions somehow justify entirely distinct religious exemptions. The Air Force's granting of medical and administrative exemptions does not provide any evidence that the Air Force is somehow systematically biased against granting religious accommodations so as to support class certification.

Ultimately, Plaintiffs fail to show that the Air Force either "used a biased testing procedure" or "operated under a general policy of discrimination" that would apply to the whole class. *Wal-Mart*, 564 U.S. at 353. At best, Plaintiffs provide "anecdotal evidence," which is "too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory," *id*. at 358, and fails to show that any alleged discrimination "manifested itself . . . in the same general fashion" across each of the putative class members' unique religious accommodation requests. *Id*. at 353. Rather, Plaintiffs' claims turn on the distinct contours of each putative class member's case—the individualized assessment of the vaccine mandate as

applied to each "particular claimant." *Gonzales*, 546 U.S. at 430–31. Such an inquiry cannot be resolved on a classwide basis for either Plaintiffs' RFRA or First Amendment claims. Because Plaintiffs fail to establish a "common contention," the determination of which "will resolve an issue that is central to the validity of each one of the [RFRA and First Amendment] claims in one stroke," Plaintiffs have failed to establish commonality pursuant to Rule 23(a)(2). *Wal-Mart*, 564 U.S. at 350.

B. The Named Plaintiffs Are Not Typical Of The Putative Class.

For related reasons, the named Plaintiffs cannot satisfy the typicality requirement of Rule 23(a)(3). Typicality and commonality "tend to merge," and both ultimately address "whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim[s] and the class claim[s] are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Wal-Mart*, 564 U.S. at 349 n.5 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157–58 n.13 (1982)). A claim is typical if "it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Beattie v. CenturyTel Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996)).

Under RFRA, each claim requires an individual analysis of relative burden to the service member's religion and less restrictive means of furthering the government's compelling interest. Accordingly, differences in occupational duties, deployment tempo, and work environment all factor into that analysis. Yet Plaintiffs' putative class includes service members across the entire possible range of Air Force occupations. *See* Mot. at 6, Doc. No. 21, PageID 957 (acknowledging that Plaintiffs seek to "represent reservists and active-duty members, pilots, technicians, and

students, in a host of settings"). With over 10,000 pending religious accommodation requests in the Air Force, this putative class could include service members across approximately 3,300 squadrons, which each range in size from seven personnel to over 600 personnel. Ex. 1 ¶ 16. Traditional squadrons include "fighter squadrons, bomber squadrons, mobility squadrons, tanker squadrons, missile squadrons, intelligence squadrons, surveillance reconnaissance squadrons, command and control squadrons, and training squadrons," and operational support squadrons include "medical squadrons, aircraft maintenance squadrons, civil engineering squadrons, mission support squadrons, and security forces squadrons." *Id*. The roles and responsibilities of service members in these fields "differ vastly." *Id*. These occupations all require varying levels of proximity to other individuals, likelihood of deployment, likelihood of travel, and ability to telework. *Id*. ¶¶ 19, 22. Some service members who have requested religious accommodations "fly in a single-occupancy aircraft or fly in close proximity with multiple service members in a crew-type aircraft"; "some requestors are medical providers" who must work "in close proximity with individuals who are immuno-compromised or who have otherwise been unable to obtain public health vaccinations"; yet other requestors "may work more in an office setting or outdoors with less proximate physical contact to others." *Id*. ¶¶ 19–20.

Plaintiffs' putative class also includes service members with a broad variety of religious beliefs and, consequently, different reasons for objecting to the COVID-19 vaccine. These differences are essential in determining whether a particular vaccine places a substantial burden upon a service member's religion and whether there are available lesser restrictive means. For example, a service member requesting exemption from mRNA vaccines may not be substantially burdened if offered another type of vaccine, such as the Janssen (Johnson & Johnson) vaccine. Among named Plaintiffs, the most common reason for requesting a religious accommodation is a

Christian or Catholic belief that the vaccines are immoral due to testing or development related to aborted fetal tissue lines. *See, e.g.*, Religious Accommodation Request of Plaintiff Hunter G. Doster, Doc. No. 11-4 ¶ 2, PageID 331–32. These service members may not be substantially burdened if offered a vaccine that did not utilize aborted fetal cells.

Even among named Plaintiffs, their beliefs and purported burdens vary in important ways. Indeed, the Air Force has agreed to delay adverse action against one Plaintiff so he may seek a temporary Religious Accommodation Request allowing him to take the Novavax vaccine following EUA approval. *See* Decl. of Adam Theriault, Doc. No. 30-20 ¶ 3, PageID 2147–48; Letter from SSgt. Adam P. Theriault, Doc. No. 27-25, PageID 2032 (requesting Novavax).[3] Although Defendants offered all named Plaintiffs the ability to fulfill the COVID-19 vaccine requirement by taking Novavax, the remaining Plaintiffs declined, claiming that taking a vaccine whose creators compared insect-cell derived spike protein to COVID-19 spike proteins produced by third parties using fetal cell lines would be a substantial burden on their religion. *See generally* Doc. Nos. 30-4 through 30-19, PageID 2094–146 (Declarations of Named Plaintiffs regarding Defendants' proffer of Novavax to fulfill COVID-19 vaccine requirement).

Yet other named Plaintiffs object to the COVID-19 vaccine for reasons unrelated to abortion. For example, one Plaintiff has a Buddhist belief wherein his "objections to the vaccines are not dependent on the aborted fetal issues that certain Christians have raised." *See* Decl. of Jason Anderson, Doc No. 30-3 ¶ 3, PageID 2091; *id.* ¶ 4, PageID 2092 (explaining that he does "not [have] an opposition to every vaccine," nor "a permanent and enduring objection to COVID-19 vaccines"). Rather, this Plaintiff requested a religious accommodation because, having

[3] Plaintiffs seek to exclude Plaintiff Theriault as a class Plaintiff, presumably because his acceptance of the Novavax offer means his claims are mooted. The point remains, however, that Plaintiff Theriault's religious beliefs are indicative of the variety of beliefs among the putative class members.

"evaluat[ed] the Right Action pertaining to the present mandate," he has determined that "[a]ccepting this inoculation would violate [his] Buddhist practice of Right View, Right Thought, Right Effort, and Right Action," "does not follow The Middle Way of practice," and "would violate [his] commitment to Right Livelihood." *See* Religious Accommodation Request by Jason Anderson, Doc. No. 11-6 ¶¶ 5–6, PageID 392–95 (listing the medical information related to COVID-19 that led him to this decision). Plaintiff Anderson's highly personal and individualized beliefs grounded in "free will to make the right choices," *id*. ¶ 11, PageID 395, are illustrative of the broad variety of different reasons putative class members have requested religious accommodations. The outcome of each request for a religious accommodation may vary based on such individual circumstances, as may the outcome of judicial review should a request be denied. None of these claims satisfy the typicality requirement of Rule 23(a)(3).

Moreover, the putative class includes service members in varying stages of exhaustion of their intra-military administrative remedies. Because the Air Force provides many opportunities for service members to present their arguments—which differ depending on the service members' particular circumstances—putative class members are spread across the continuum of exhaustion. Streett Decl. ¶¶ 4–16, Doc. No. 27-13, PageID 1932–38; Hernandez Decl. ¶¶ 3–14, Doc. No. 27-14, PageID 1941–45. Just as with named Plaintiffs, some class members have submitted requests and not yet received even an initial determination from the approval authority, which may be approved. Some have received an initial determination but have not yet received a determination on appeal by the Air Force Surgeon General, which may be approved. Some have received a determination on appeal but have not yet been subject to any one of the variety of administrative and disciplinary actions available. Hernandez Decl. ¶¶ 3–14, Doc. No. 27-14, PageID 1941–45. For active-duty members, some who have received a determination on appeal have not yet have

been subject to initiation of administrative discharge proceedings, which themselves differ in scope depending on the characterization of the separation (for failure to vaccinate, either "Honorable" or "General") and the service member's time in office. *Id.* ¶ 3. For reserve members, some who have received a determination on appeal have not yet have been subject to administrative action, such as a Letter of Reprimand; for those who have received a Letter of Reprimand, some have not yet have had their opportunity to consult with free defense counsel, provide a response, and then receive a decision from the issuing authority; some have not yet have appealed that decision. *Id.* ¶ 6. Even for those who have fully appealed, they may not have yet been placed in a no pay/no points status and reassigned to the Individual Ready Reserve. Decl. of Lt. Col. Ethel M. Watson ¶ 8, Doc. No. 27-15, PageID 1950. To include every single active-duty and reserve service member in the Air Force who has submitted a religious accommodation request—excluding only those confirmed by Air Force Chaplains as not having sincerely held religious beliefs, and those who had their requests approved—Plaintiffs seek to include a range of class members whose claims are nonjusticiable and at different stages of exhaustion. This is especially problematic given that, as noted, there may be different possible outcomes of the intra-military administrative remedies: some class members may obtain an religious accommodation depending on their specific circumstances; some may opt to be vaccinated after the denial of a request and proceed with their service rather than pursuing litigation; some may request honorable discharge as a possible alternative to vaccination. This underscores why joining all service members into a single class to litigate unexhausted claims is not appropriate.

Moreover, these differences all go to the heart of each service member's individual RFRA claim. An individual's particular reason for objecting to the vaccine and current job obligations within the Air Force are essential for determining whether there are lesser restrictive means for

furthering the government's compelling interest in maintaining a medical fit and deployable force. Ex. 1 ¶¶ 11–23. Plaintiffs seek to litigate a class that includes different circumstances, religious objections, jobs in different locations with different responsibilities, and different outcomes. *See Stout v. J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000) (affirming denial of class certification in fraud case where "district court identified discrepancies between Plaintiffs and the ostensible class members ranging from the type of car, the degree of repairs necessitated, the response to those repairs, the purpose for which the car was purchased, the individual circumstances and transactions surrounding each purchase including each class member's understanding of the terms and conditions of their purchase agreements, and the extent of the injury suffered"). Each purported class members requires an individual assessment of the sincerity of their religious beliefs, the burden upon those beliefs, the compelling governmental interest, and the least restrictive means of achieving that interest. Accordingly, Plaintiffs have failed to establish typicality.

C. Plaintiffs And Their Counsel Have Not Shown They Will Fairly And Adequately Protect The Interests Of The Classes.

Under Rule 23(a)(4), the plaintiff must establish that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This rule is particularly important in classes certified under Rule 23(b)(2), as Plaintiffs propose, because such classes are mandatory—any and every person within the class will be bound by this Court's judgment without the opportunity to opt out, either before or after judgment. *See, e.g., Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 645 (6th Cir. 2006) ("Rule 23(b)(2) authorize[s] 'mandatory' class actions under which potential class members do not have an automatic right to notice or a right to opt out of the class."); *Chavez v. Plan Benefit Servs. Inc.*, 957 F.3d 542, 547 (5th Cir. 2020) ("[T]he existence of a class fundamentally alters the rights of present and absent members, particularly for mandatory classes such as the one here.").

Accordingly, before a Rule 23(b)(2) class can be certified, the Court must rigorously examine whether the proposed class representatives will adequately represent the interests of the absent class members. *See, e.g.*, *Berger v. Compaq Comput. Corp.*, 257 F.3d 475, 479–80 (5th Cir. 2001). This inquiry "serves to uncover conflicts of interest between [the named plaintiffs] and the class they seek to represent." *Beattie*, 511 F.3d at 562 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)). In particular, the Court considers "whether class counsel are qualified, experienced and generally able to conduct the litigation," and "whether the class members have interests that are not antagonistic to one another." *Id*. at 562–63 (quoting *Stout*, 228 F.3d at 717).

First, Plaintiffs here fail to show how they can overcome conflicts between themselves and members of the proposed class. Putative class members have separately filed at least seven lawsuits around the country challenging the COVID vaccine requirements for members in the Air Force.[4] Three of those lawsuits—including one in this very district brought by Plaintiffs' counsel in this case—purport to bring competing class action claims.[5] Plaintiffs in those lawsuits have

[4] *See Air Force Officer v. Austin*, 5:22-cv-00009 (M.D. Ga.); *Bongiovanni v. Austin*, 3:22-cv-00237 (M.D. Fla.); *Coker v. Austin*, 3:21-cv-01211 (N.D. Fla.); *Crosby v. Austin*, 8:21-cv-02730 (M.D. Fla.); *Dunn v. Austin*, 2:22-at-00165 (E.D. Cal.); *Navy SEAL 1 v. Austin*, 8:21-cv02429 (M.D. Fla); *Poffenbarger v. Kendall*, 3:22-cv-00001 (S.D. Ohio); *Roth v. Austin*, 4:22-cv-03038 (Neb.).

[5] *See Air Force Officer v. Austin*, 5:22-cv-00009, Doc. No. 57 at 1 (M.D. Ga.) (seeking to certify "all members of the United States Air Force who (a) are subject to a mandate of the Department of Defense or Air Force to receive a COVID-19 vaccine, (b) submitted a request for religious accommodation regarding such mandate based on a sincerely held religious belief, and (c) have received or will receive a final denial of such request from the Department of Defense or Air Force"); *Navy SEAL 1 v. Austin*, 8:21-cv02429, Doc. No. 35 at 1 (M.D. Fla) (seeking to certify class of "all United States Armed Forces servicemembers and civilian federal employees and contractors who are subject to Defendants COVID-19 Vaccine Mandate, have requested a religious exemption or accommodation from the Mandate based on sincerely held religious beliefs against receiving a COVID-19 vaccine, and been denied such exemption or accommodation"); *Poffenbarger v. Kendall*, 3:22-cv-00001, Doc. No. 1 ¶ 32 (S.D. Ohio) (seeking to certify class of "persons who: (i) have been confirmed by Air Force Chaplains to have a sincerely held religious belief against the Air Force's vaccination requirements; (ii) have submitted paperwork demonstrating and seeking a religious accommodation; and (iii) have had their accommodation requests denied").

chosen their own counsel and their own forums to press their claims, and to date, none has sought to consolidate with this present action. Several have already resulted in decisions.[6] Given that these lawsuits all raise different issues—including claims not raised in this class action—managing a class action would be especially untenable. *See, e.g.*, *Coker v. Austin*, 3:21-cv-1211, Doc. No. 47 (N.D. Fla.) (including claims under substantive due process and unconstitutional conditions doctrine); *Navy Seal 1 v. Austin*, 8:21-cv-02429, Doc. No. 49-1 (M.D. Fla.) (including claims under APA and FDCA). Plaintiffs make no mention of these competing lawsuits, nor do they proffer explanation of how putative class members might choose which lawsuit to join. Other putative class members may choose to litigate their claim alone, or with other counsel, or may wish to raise different claims or arguments, or, as noted, conceivably may wish not to seek legal redress at all—preferring to comply with a lawful order after their administrative claim is decided and maintain their military service without litigation, or indeed perhaps choose to leave the service or retire. The decision whether to file suit in this setting is uniquely personal, and yet all class members would be forced to have their claim adjudicated as part of this lawsuit.

In situations like these, where multiple plaintiffs challenge a government policy in many different forums, the Supreme Court has affirmed the importance of allowing individual lower courts to consider the issue. "Government litigation frequently involves legal questions of substantial public importance," and "[a]llowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *See United States v. Mendoza*, 464 U.S. 154, 160 (1984); *see also Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). Any order

[6] *See, e.g.*, *Poffenbarger v. Kendall*, 3:22-cv-00001, Doc. No. 3 (S.D. Ohio) (denying TRO motion); *Coker v. Austin*, 3:21-cv-01211, Doc. No. 47 (N.D. Fla. Nov. 12, 2021) (denying preliminary injunction motions); *Crosby v. Austin*, 8:21-cv-02730, Doc. No. 48 (M.D. Fla.) (denying TRO and preliminary injunction motions).

issued here should be narrowly tailored to the claims of named Plaintiffs.

Second, "unique defenses [against lead plaintiffs] bear on both the typicality and adequacy of a class representative." *Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006). Here, the Government may be able to present unique defenses that would negate the claims of a class representative. *Cf. TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.") (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016)). For example, as described in Defendants' Opposition to Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction, Doc. No. 27 at 11–15, PageID 1528–32, all but two Plaintiffs have non-justiciable claims that are neither ripe nor exhausted because they have not completed the process for requesting exemptions or exhausted their intra-military remedies. *See Roberts v. Roth*, No. 21-cv-01797, Doc. No. 48 at 7–8 (D.D.C Mar. 21, 2022) (dismissing as unripe service member's RFRA challenge to COVID-19 vaccination requirement because plaintiff had not yet been discharged); *Salem v. Mich. Dep't of Corr.*, No. 13-cv-14567, 2019 WL 4409709, at *10 (E.D. Mich. Sept. 16, 2019) (holding that plaintiffs could not establish typicality or adequacy where they failed to show that they had exhausted their administrative remedies); *H.M. v. United States*, No. CV 17-00786, 2017 WL 10562558, at *28 (C.D. Cal. Aug. 21, 2017) (explaining that Rule 23(a)(4) requires that plaintiffs "must ensure that the proposed class representatives have standing to pursue claims that are ripe"). And even if Plaintiffs had all exhausted their intra-military remedies or were subject to some exception, their claims still are not justifiable insofar as they seek injunctive relief regarding their specific duty assignments, deployment, and medical fitness for duty. *See Harkness v. Sec'y of the Navy*, 858 F.3d 437, 443–44 (6th Cir. 2017) (adopting *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), as proper testing for determining justiciability of claims involving

internal military decisions and explaining that "courts are generally reluctant to review claims involving military duty assignments"). In addition, as discussed in Defendants' concurrently filed Motion to Sever, venue is not proper in this forum for Plaintiffs who do not reside here and cannot establish that a "substantial part of the events or omissions giving rise to the claim occurred" in this forum. *See Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 56 (2013).

Such jurisdictional or venue defects call into question whether lead Plaintiffs and counsel can adequately represent the class. Accordingly, Plaintiffs fail to establish that the prerequisites of Rule 23(a) are met.

II. Plaintiffs Fail to Show a Class That Can Be Maintained Under Rule 23(b).

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem*, 521 U.S. at 614. As noted, Plaintiffs here seek to certify a class under Rule 23(b)(2), which applies 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). Plaintiffs fail to make the required showing for this type of mandatory class.

As the Sixth Circuit has explained, the "defining characteristic of a mandatory class" under Rule 23(b)(2) is "the homogeneity of the interests of the members of the class." *Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 432 (6th Cir. 2009) (quoting *Reeb*, 435 F.3d at 649). "Because homogeneity is required, unitary adjudication of the claims is feasible without the devices of notice and opt-out" found in Rule 23(b)(3). *Id*. "On the other hand, where individualized determinations are necessary, the homogeneity needed to protect the interests of

absent class members is lacking." *Id.* at 432–33; *see also Casa Orlando Apartments, Ltd. v. Fed. Nat'l Mortg. Ass'n*, 624 F.3d 185, 198 (5th Cir. 2010) (explaining that "this rule seeks to redress what are really group as opposed to individual injuries," thus "render[ing] the notice and opt-out provisions of [Rule 23](b)(3) unnecessary" (quoting *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 975 n.22 (5th Cir. 2000))). Accordingly, certification under Rule 23(b)(2) is thus permissible "only when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart*, 564 U.S. at 360. Certification fails "when each individual class member would be entitled to a *different* injunction or declaratory judgment." *Gooch*, 672 F.3d at 427 (quoting *Wal-Mart*, 564 U.S. at 360).

Yet that is precisely the relief that Plaintiffs here request. Plaintiffs seek "a declaration that the challenged orders are unconstitutional . . . as applied to those submitting accommodations"; "injunctive relief to order timely and good faith processing" of each accommodation request; and "injunctive relief to order Defendants to grant Plaintiffs' accommodation requests." Compl. at 18–19, Doc. No. 1, PageID 18–19. Plaintiffs thus seek "individualized determinations" with regard to their respective religious accommodation requests, rather than relief that addresses a singular, discrete issue that affects the entire putative class. *Romberio*, 385 F. App'x at 432 (citing *Reeb*, 435 F.3d at 649). Plaintiffs' requested relief is not "indivisible" in that "the conduct . . . can be enjoined or declared unlawful only as to all of the class members or to none of them." *Gooch*, 672 F.3d at 428 (quoting *Wal-Mart*, 564 U.S. at 360); *cf. id.* (certifying class action under Rule 23(b)(2) alleging breach of contract against insurer, where plaintiffs sought declaratory judgment that would apply to insurer's uniform interpretation of its policy with respect to each class member). Indeed, it is impossible to even define the scope of Plaintiffs' proposed Rule 23(b)(2) class, since there is no standard way to confirm whether a putative class member falls within the

class definition as having a "sincerely held religious belief" before the religious accommodation request is adjudicated.

The individualized nature of Plaintiffs' claims makes sense within the context of RFRA. As explained, whether an employer has violated a civil rights statute depends on the specific circumstances surrounding each individual employment action. This is particularly true when, as here, Plaintiffs attempt to lump together every single denial within the Air Force. In doing so, Plaintiffs attempt to litigate a broad swath of different factual circumstances in one fell swoop. Yet a RFRA assessment is highly specific: the Court must determine whether each and every class members holds a sincerely held religious belief that precludes the use of a COVID-19 vaccine; must determine whether a particular vaccination requirement substantially burdens that religious belief; and (if the plaintiff meets those burdens) must examine, in light of the plaintiff's particular role, job responsibilities, and workplace, whether the government may use any means less restrictive than vaccination to advance its compelling interests as applied to that particular individual. And as discussed, Plaintiffs have failed to provide "[s]ignificant proof" that the Air Force "operated under a general policy of discrimination." *Wal-Mart*, 564 U.S. at 353 (citation omitted). The Air Force reviews and adjudicates religious exemption requests on a case-by-case basis. The mere fact that many requests have been denied is consistent with the military's compelling interest in stemming the spread of COVID-19 and maintaining a medically fit force and is not evidence that any particular request, let alone all requests within a putative class, should have been approved under RFRA or the First Amendment. Accordingly, Plaintiffs have failed to establish the requirements for a mandatory class under Rule 23(b)(2).

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for class certification should be denied.

Dated: March 23, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2022, I electronically filed the foregoing paper with the Clerk of Court using this Court's CM/ECF system, which will notify all counsel of record of such filing.

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Table of Exhibits

Exhibit Number	Exhibit Description
1.	Declaration of Major General Sharon R. Bannister
2.	Declaration of Lieutenant General Kevin B. Schneider
3.	Declaration of Colonel Artemio C. Chapa
4.	Department of Defense Instruction ("DoDI") 1332.45
5.	Air Force COVID-19 Statistics as of March 22, 2022
6.	Declaration of Rear Admiral Gayle D. Shaffer, filed in *Navy SEAL #1 v. Biden*, 8:21-cv-02429 (M.D. Fla.)

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

HUNTER DOSTER, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:22-cv-00084
	)	
FRANK KENDALL, *et al.*,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF MAJOR GENERAL SHARON R. BANNISTER

I, Sharon R. Bannister, hereby state and declare as follows:

1. I am a Major General in the United States Air Force currently assigned as the Director of Medical Operations at the Department of the Air Force Office of the Surgeon General. I have been in this position since June 10, 2021. As a part of my duties, I am responsible for ensuring a medically ready force, which includes oversight of the Headquarters-level Religious Resolution Team for the Department of the Air Force (HAF/RRT).

2. I am generally aware of the various lawsuits filed throughout the United States concerning the Secretary of Defense and Secretary of the Air Force mandates requiring that all service members, including Active Duty and Reserve Components, receive vaccinations against the COVID-19 virus. I am generally aware of the allegations set forth in the pleadings filed in this matter. I make this declaration in my official capacity as the Director overseeing the HAF/RRT and based upon my personal knowledge and information that has been provided to me in the course of my official duties.

3. Religious accommodation requests for exemption from an immunization requirement are reviewed and resolved in accordance with Department of the Air Force Instruction (DAFI) 52-201, *Religious Freedom in the Department of the Air Force*, dated 23 June 2021, and Air Force Instruction (AFI) 48-110_IP, *Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases*, dated 7 October 2013 (certified current 16 February 2018). Religious Resolution Teams (RRT) aid and advise the initial approval level decision authority. The initial approval authority is the member's Major Command (MAJCOM), Field Command (FIELDCOM), Direct Reporting Unit (DRU), or Field Operating Agency (FOA) commander.[1] The appeal authority is the Air Force Surgeon General.[2] If an appeal is made from the initial decision, a separate RRT assists and advises the appellate authority. At the initial level (installation level), the RRT will be comprised of, at a minimum: the commander (or designee), Senior Installation Chaplain (or equivalent), Public Affairs Officer, Judge Advocate, and medical provider.[3] At the appeal level, the RRT comprises, at a minimum: a Chaplain, Judge Advocate, medical provider, member from Public Affairs, and member from the office of the Deputy Chief of Staff for Manpower, Personnel, and Services.[4] The Air Force Surgeon General, as the appeal authority, provides an individualized review of each request and is not required to rely on the determinations made by the approval authority. Additionally, the appeal authority is not limited to the documentation submitted by the approval authority. If necessary, the appeal authority can and will request additional information from the approval authority or others in requestor's chain of command in order to make an informed decision. The Surgeon General may deny the religious accommodation request or overrule the initial disapproval and grant the religious

[1] DAFI 52-201, paragraph 6.6.1.
[2] DAFI 52-201, Table 6.1.
[3] DAFI 52-201, paragraph 3.8.1.1.
[4] DAFI 52-201, paragraph 3.8.1.2.

accommodation request in full or in part. I am familiar with the religious accommodation process for exemption from an immunization requirement and the RRT as it falls within the scope of my official duties.

4. There is no blanket policy or practice of disapproving all religious accommodation requests. Every religious accommodation request is unique. Each request is reviewed individually—by both the initial approval level decision authority and the appellate authority, if applicable—to determine (1) if an individual has a sincerely held religious belief, (2) if the vaccination requirement substantially burdens that individual's sincerely held religious belief, and if so, (3) whether there is a compelling government interest in requiring that specific requestor to be vaccinated, and (4) whether there are less restrictive means in furthering the compelling government interest in that individual's vaccination.[5]

5. Several members of the Air Force have not limited their request to the new COVID-19 vaccine, but request exemption from multiple (or all) DoD vaccination requirements. Each aspect of the requested exemption must be considered separately since the compelling government interest and possible less restrictive means may differ for each vaccine.

6. This is a fact- and labor-intensive analysis that is particular to the circumstances of the requestor. To aid in this endeavor, a religious accommodation package includes a written request from the service member,[6] a memorandum from a chaplain who interviewed the member, counseling memoranda from both a medical provider and the member's commander, a recommendation from the RRT, and then recommendations from every commander in the service member's chain of command. The recommendations from the chain of command discuss

[5] DAFI 52-201, paragraphs 2.2 – 2.10.
[6] The request may also include letters from ecclesiastical leaders or others in support of the sincerely held religious belief.

whether there is a compelling government interest in vaccinating that member, the impact on mission accomplishment if the member is not vaccinated, and whether there are less restrictive means. Other pertinent information for resolving the request may also be included. It is common practice for the Religious Resolution Team for the Appeal Authority to send requests, as needed, for additional information about the individual requestor's particular circumstances, such as additional facts about the requestor's career field, duties, and work environment. To date, the Religious Resolution Team has submitted requests for additional information in more than a third of cases reviewed.

Sincerely Held Religious Beliefs

7. As noted above, religious accommodation requests are not all the same. One request is not representative of another. As an initial matter, requests must be reviewed to determine if the beliefs are sincerely held and if they are religious in nature. Some requests do not provide support showing that the belief is religious in nature. Some members have also asserted expressly non-religious reasons, such as medical concerns, within their religious exemption requests. For example, some question the safety of the vaccine or the speed with which it was approved by the Food and Drug Administration (FDA). Others have expressed a concern that the vaccine will be used to implant a surveillance chip. These non-religious bases may be the only justification given or may be intermixed with beliefs of a more religious nature.

8. Requestors have presented a wide range of religious beliefs. Some have stated a religious-based opposition to abortion and the use of aborted fetal stem cells in the development and testing of vaccines. Others have asserted a religious-based opposition to putting contaminants into their body. Some have asserted that an mRNA-vaccine alters what the DNA does, thus violating their religious beliefs.

9. The approval and appeal authority may still consider whether the belief is sincerely held. This analysis involves looking at, among other things, how the individual demonstrates adherence to that belief. For example, an individual who requests a religious accommodation based on opposition to contaminants may raise questions as to how their belief system defines a contaminant and how they have adhered to that system in the past and present. An approval authority or the appeal authority may assume, without deciding, there is a sincerely held belief and focus the analysis on the other factors.

Substantial Burden

10. Identifying the sincerely held religious belief is necessary for determining whether there is a substantial burden on that belief. For instance, a service member requesting an exemption from COVID-19 vaccinations that used aborted fetal cells in the testing of the vaccine may not be substantially burdened if offered a vaccine that was not tested in this fashion. Similarly, a member requesting exemption from mRNA vaccines may not be substantially burdened if offered another type of vaccine, such as the Janssen (Johnson & Johnson) vaccine.

11. In addition, the substantial burden to a service member's religion may be temporal in nature. Certain immunization requirements are only due at certain times or under certain conditions. For example, the Tetanus-diphtheria (Td) booster is only required every 10 years.[7] A request to be exempt from these types of vaccines requires an analysis to determine whether there is a substantial burden at this time for that member. A substantial burden may not exist for a member requesting exemption from Td if that member is not due to receive the booster for an extended period. If a substantial burden does not exist due to such timing, the member may need to resubmit a religious accommodation request at a later date.

[7] AFI 48-110_IP, paragraph 4-16(c).

12. Similarly, certain vaccines are only required if a particular assignment or duty would expose the member to the risk, such as a deployment or relocation to certain geographic locations. For example, a member is required to vaccinate against smallpox only if warranted based on duties (e.g., medical teams at hospitals/clinics), geographical locations that pose a higher risk, or in designated occupational roles.[8] Accordingly, a member requesting exemption from smallpox may not be substantially burdened if the member is not required to take the relevant vaccine anyway based on that member's circumstances.

13. In both types of scenarios—the vaccine is not required for an extended period of time or not yet required based on the member's individual circumstances—there is no substantial burden and the Department of the Air Force cannot properly review the compelling government interest and less restrictive means until closer in time to when the vaccine is actually required. This is because the service member's circumstances—physical, geographic, occupational, and otherwise—may change drastically between when the member initially request an exemption request and when the vaccine would otherwise be required.

14. Given the global nature of COVID-19 and the danger that the disease presents to military readiness, the Department of Defense and the Air Force have determined that vaccination against COVID-19 is required worldwide. To satisfy that requirement, service members must take a COVID-19 vaccine that received full licensure from the Food and Drug Administration. Service members may also satisfy the vaccination requirement by voluntarily receiving a COVID-19 vaccine under FDA Emergency Use Authorization or World Health Organization Emergency Use Listing in accordance with the applicable dose requirements.

[8] AFI 48-110_IP, paragraph 4-15(g).

Compelling Government Interest

15. The Department of the Air has a compelling interest in preventing and minimizing the impact of infectious disease that affects "military readiness, unit cohesion, good order and discipline, and health and safety for both the member and the unit."[9] The Department of the Air Force, along with the rest of the Department of Defense, maintains robust vaccination requirements for its members including both routine vaccinations and risk-based or occupation-related vaccinations. In the event of a request for exemption from a particular vaccination, the Air Force's determination is made on an individualized basis. As previously noted, commanders within a member's chain of command provide recommendations and input on the circumstances of the requestor, including the impact approving the accommodation would have on the requestor's unit and the accomplishment of its mission.

16. Some considerations for a religious accommodation request are unique to the Department of the Air Force itself. Even within the Department of the Air Force, the roles and responsibilities of individual Airmen and Guardians may differ vastly. The Air Force has approximately 3,300 different squadrons with different types of missions. Squadrons come in sizes ranging from seven personnel to over 600 personnel and may have a specialized tactical or functional mission. The traditional squadrons include fighter squadrons, bomber squadrons, mobility squadrons, tanker squadrons, missile squadrons, intelligence squadrons, surveillance reconnaissance squadrons, command and control squadrons, and training squadrons. These specialized squadrons, along with an operational support squadron, usually make up the operational group on any specific base. Other squadrons include medical squadrons, aircraft

[9] DAFI 52-201, paragraph 2.1.

maintenance squadrons, civil engineering squadrons, mission support squadrons, and security forces squadrons.

17. There are nine Major Commands (MAJCOMs), three Field Commands (FIELDCOMs), and approximately 20 Direct Reporting Units (DRUs) or Field Operating Agency (FOA) in the Department of the Air Force. Each has their own unique mission and requirements, which support the overall mission of the Department of the Air Force in defending national security. The vast majority of commanders (i.e., approval authorities) for the MAJCOMs and FIELDCOMs are three- and four-star General Officers.

18. There are multiple factors that could impact the Air Force's interest in requiring a vaccination for a particular service member, including the member's career field, the proximity and amount of time they must work with other individuals, the likelihood of the member being required to travel with little or no notice, the requirement for all service members to be medically ready and deployable (which requires vaccination), whether the member is leaving service, and the impact to the mission if that member contracted a disease, such as COVID-19, or infected another member with the disease either in garrison or while deployed. These individualized factors are considered in connection with requests for religious exemption from the COVID-19 vaccine requirement.[10]

19. The primary mission of the U.S. Air Force is "Fly, fight, and win – airpower anytime, anywhere."[11] Thus, Airmen and Guardians are expected to maintain a high state of readiness – physical, mental, and occupational – to perform both the duties they typically train for in their respective career fields and as augmentees in other military duties such as disaster and relief

[10] While addressing COVID-19 in the example, the same analysis may apply for other vaccines from which a particular member may request exemption.
[11] U.S. Air Force Mission, https://www.airforce.com/mission, last visited November 19, 2021.

operations or physical security for Air Bases or Garrisons. Some requestors' primary duties in the Department of the Air Force involve flight or space operations. Other requestors fulfill the Air Force's mission through intelligence operations, logistics support, aircraft maintenance, finance, and medical support, to name a few. Depending on the specialty, service members requesting an exemption may fly in a single-occupancy aircraft or fly in close proximity with multiple service members in a crew-type aircraft. The impact to mission accomplishment if a member in a single occupancy aircraft contracted COVID-19 may be different than the impact if a member of an aircrew contracted COVID-19 and the entire crew was exposed. The approval or appeal authority may find there is a compelling government interest in both scenarios, or it might find otherwise, but the discrete facts are relevant and reviewed separately.

20. Likewise, some requestors are medical providers, working with service members and their dependent family members. Accordingly, they may come in close proximity with individuals who are immuno-compromised or who have otherwise been unable to obtain public health vaccinations. Other service members may work more in an office setting or outdoors with less proximate physical contact to others. With over 10,000 religious accommodation requests pending in the Department of the Air Force (including routing for initial approval authority action or routing for appeal authority action), the types of situations that may be presented are as diverse as the career fields and assignments the Department of the Air Force has to offer. Our Approval and Appeal Authorities review each fact scenario on an individualized case by case basis in determining whether there is a compelling government interest.

Less Restrictive Means

21. Whether there are less restrictive means available that are as effective as vaccination in furthering the compelling government interest is fact-dependent as well. For one, a potentially

less restrictive means available for one service member may not be reasonable for another service member in a different career field, at a different geographic location, or in different work circumstances that would compel the service member's physical presence. Pilots and other aircrew, for example, cannot telework. Other positions may be able to telework, but only in a degraded capacity or at the risk of losing unit cohesion, and may still be at risk themselves due to exposure in the local community or through family and friends. Service members remaining in service cannot telework while deployed. The Air Force has a deadline for all personnel to be vaccinated for COVID-19 because approving an accommodation conditioned on future vaccination may not be feasible to address mission needs. For example, even if a deployable service member could sometimes telework without degrading the mission at their primary duty location (i.e., home station), that member may still need to be fully vaccinated because the nature of military operations can make the need to deploy or otherwise travel unpredictable. When the Air Force needs its forces to travel immediately to meet an evolving threat, there is not enough time to wait for the member to reach a fully vaccinated status in two, three, or four weeks. An Approval or Appeal Authority often has to weigh multiple factors like these to determine whether or not the facts warrant an accommodation.

22. The availability of a less restrictive means may also depend on the sincerely held religious belief. A less restrictive means for a member who requested an exemption based on how the vaccine was developed may involve permitting them to take a vaccine that was not developed the same way. A service member with limited time remaining in service may be able to be accommodated differently than a member who has a four- to six-year service commitment.

23. The Air Force does not apply a "blanket" rule that no less restrictive means of protecting the force exists other than a vaccination. The Approval and Appeal Authority must look at

numerous factors that vary by individual. The Department of the Air Force strives to make sure full and appropriate consideration is given to each request. Where an accommodation can be granted without adversely impacting the compelling government interest in mission accomplishment, it will be.

24. COVID-19 is no exception, but presents some unique challenges. The spread of the disease has been difficult to control and the disease has already demonstratively adversely impacted mission accomplishment and military effectiveness. There has been a surge of accommodation requests to be exempt from the vaccine that is unprecedented. Identifying the situation where less restrictive alternatives to the vaccine would not adversely impact mission accomplishment requires an individualized analysis.

25. I understand that Plaintiffs have claimed that "the Air Force Surgeon General himself has already predetermined the denial of religious accommodation appeals demonstrating that the entire religious accommodation process is nothing more than an exercise in futility." ECF No. 30 at 15. That statement is false. I have personal knowledge that every appeal is considered on an individual basis and carefully reviewed by the Surgeon General and his staff. The outcome is not predetermined—the Surgeon General has granted at least two appeals that had been initially denied.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 22nd day of March 2022.

BANNISTER.SHARON.RUSCH.1102715019

Digitally signed by BANNISTER.SHARON.RUSCH.1102715019
Date: 2022.03.22 11:12:21 -04'00'

SHARON R. BANNISTER, Maj Gen, USAF
Director of Medical Operations

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

HUNTER DOSTER, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:22-cv-00084
	)	
FRANK KENDALL, *et al.*,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF LIEUTENANT GENERAL KEVIN B. SCHNEIDER

I, Kevin B. Schneider, hereby state and declare as follows:

1. I am a Lieutenant General[1] in the United States Air Force currently assigned as the Director of Staff for the Headquarters of the Air Force, located in the Pentagon, Arlington, Virginia. I have served in this position since August 2021.

2. I am generally aware of the various lawsuits – and kept apprised of new lawsuits – filed throughout the United States concerning the Coronavirus Disease 2019 (COVID-19) vaccination mandates issued by the Secretary of Defense and the Secretary of the Air Force, that require all Department of the Air Force Service members on active duty, in the Air Force Reserve, and Air National Guard, to be fully vaccinated against COVID-19. I make this declaration in support of the Government to address the impact COVID-19 has had within the Department of the Air Force,[2] and the impact that granting thousands of religious accommodations would have on the mission, and the harm posed by a preliminary injunction exempting a single Plaintiff from being vaccinated – let alone an injunction covering thousands of Service members. The statements made in this declaration are based upon my personal knowledge, my military judgment and experience, and upon information that has been provided to me in my official duties.

Air Force Background and Experience

3. I am a 1988 graduate of the U.S. Air Force Academy and have continuously served in the U.S. Air Force for nearly 34 years. My experience includes multiple assignments in senior leadership and operational positions. As Commander of the 380th Air Expeditionary Wing, I led

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[1] The rank of "Lieutenant General" is the second highest military rank in the Department of the Air Force, and is sometimes referred to as a "Three-Star General." The term "general" is also frequently referred to as "general officers." General officers include the ranks of Brigadier General, Major General, Lieutenant General, and General. General Officers comprise the most senior levels of uniformed leadership in the Department of the Air Force.

[2] The Department of the Air Force is comprised of two distinct military services: the U.S. Air Force and the U.S. Space Force.

one of the most diverse combat wings in the U.S. Air Force and conducted combat operations to include close air support and strike missions as well as intelligence, surveillance, reconnaissance, and aerial refueling. In my duties as Assistant Deputy Commander of U.S. Air Forces Central Command and Vice Commander of the 9th Air Expeditionary Task Force, I was responsible for the command and control of all air operations in a 20-nation area of responsibility covering Central and Southwest Asia. While serving as the Chief of Staff for the Headquarters of the Pacific Air Force, I coordinated a command staff directing 46,000 personnel across sixteen time zones. As Chief of Staff for the U.S. Indo-Pacific Command, I coordinated a joint force staff providing combat capabilities to the Secretary of Defense across 52% of the globe. Most recently, as Commander of U.S. Forces Japan and the 5th Air Force, I was responsible for overseeing joint and bilateral exercises and improving combat readiness for 54,000 military and Department of Defense civilian personnel. I am also a command pilot with more than 4,000 flying hours in the F-16C *Fighting Falcon*, F-15E *Strike Eagle*, T-38C *Talon*, and UH-1N *Iroquois*; which includes 530 combat flying hours, serving in Operations SOUTHERN WATCH, ENDURING FREEDOM, IRAQI FREEDOM, and INHERENT RESOLVE.

4. I currently serve as the Director of Staff for the Air Force Headquarters. In that role, I assist the Secretary of the Air Force in his statutory duties and responsibilities as they pertain to the U.S. Air Force. Under 10 U.S.C. § 9032, those duties include "prepar[ing] for such employment of the Air Force" and "recruiting, organizing, supplying, equipping . . . , training, servicing, mobilizing, demobilizing, administering, and maintaining of the Air Force." Additionally, I synchronize and integrate policy, plans, positions, procedures, and cross functional issues for the headquarters staff. In that role, I work with my counterpart in the U.S. Space Force, Lieutenant General Nina M. Armagno, and am aware of the overall impact of

COVID-19 on both the U.S. Air Force and U.S. Space Force. Specifically, as related to COVID-19, I am responsible for providing oversight to the Air Force COVID-19 Team, which has implemented the Secretary of Air Force vaccination mandate across both services within the Department of the Air Force.

Preliminary Statement

5. I have reviewed the Declaration of Admiral Daryl Caudle, Commander, United States Fleet Forces Command, filed in *U.S. Navy SEALs 1-26 v. Austin et. al.*, N.D. TX, Case 4:21-CV-01236-O. I agree with his assessment regarding the importance of having a fully vaccinated Force to blunt the impact of COVID-19 and the significant harm that would come from allowing a subset of that Force to remain unvaccinated. Unvaccinated or partially vaccinated Service members are at a higher risk of contracting COVID-19 and substantially more likely to develop severe symptoms resulting in hospitalization or death. Not only does this increase risks to the health and safety of vaccinated Service members, and the communities in which they live, it adversely impacts our ability to execute the mission. It is my professional military judgment that vaccination against COVID-19 is the most effective way to combat the disease and is necessary to ensure we maintain a credible fighting force able to deter our adversaries, protect our nation, and – if necessary – prosecute our wars and other military operations.

6. Not only does the Department of the Air Force have a compelling interest in the health and mission readiness of the U.S. Air Force and U.S. Space Force as a whole, we have a compelling interest to ensure the health and mission readiness of each and every Service member. This is because we cannot ensure the collective health or readiness of the Force unless we ensure the health and readiness of each member who composes that Force. In my opinion, if a large number of Department of the Air Force Service members were to be exempt from the

COVID-19 vaccine mandate, it would pose a significant and unprecedented risk to military readiness and our ability to defend the nation.

7. Observing the current state of global affairs verifies that we are operating in a volatile, uncertain, and complex environment. In this environment, the need for constant vigilance and defense preparation cannot be overstated. This requires our Service members to be in a constant state of readiness. Recently, our nation responded to the Russian invasion of Ukraine by rapidly deploying aircraft, equipment, and thousands of Service members, many within only 24 to 48 hours of notification. Currently, there are hundreds of aircraft and tens of thousands of Department of the Air Force personnel deployed in support of operations furthering our nation's interests throughout the world. Those personnel must be medically ready to deter conflict and aggressively execute the mission. In my opinion, it would be a failure of leadership to allow Service members who are not fully vaccinated against COVID-19 to deploy without regard to the risk they pose to themselves, others, and the mission. For this reason, such decisions, and the appropriate balance of risks associated with them, should be left to the judgment of the military chain of command.

8. A preliminary injunction that prevents the Department of the Air Force from enforcing the COVID-19 vaccination mandate on even a single plaintiff would result in that plaintiff not being medically ready to support military operations to defend the nation. Similarly, an injunction expanded to apply to 10,000 or more Service members seeking a vaccination exemption would amplify this outcome across the Force, creating significant and irreparable harm to good order and discipline, force health protection, and military readiness; seriously endangering the Department of the Air Force's ability to decisively execute its mission.

Specific Functions of the Department of the Air Force

9. The U.S. Air Force and U.S. Space Force comprise the Nation's principal Air and Space Forces. Their mission is to "provide the Nation with global vigilance, global reach, and global power in the form of in-place, forward-based, and expeditionary forces possessing the capacity to deter aggression and violence by state, non-state, and individual actors to prevent conflict, and, should deterrence fail, prosecute the full range of military operations in support of U.S. national interests."[3]

10. The Department of the Air Force is tasked to "organize, train, equip, and provide air, space, and cyberspace forces for the conduct of prompt and sustained combat operations, military engagement, and security cooperation in defense of the Nation, and to support the other military services and joint forces."[4] These forces include pilots, aircraft maintainers, aircrew, chaplains, security forces, medical providers, personnel specialists, and more. Providing fully trained and combat ready Service members to Combatant Commanders[5] is vital to ensuring the security of our nation and operational success. Whether tasked to stand as ever-ready sentinels of freedom at outposts throughout the world, provide humanitarian aid, or engage in armed conflict with our adversaries, our Service members must be medically and physically ready to accomplish the mission under inhospitable conditions and in hostile environments.

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[3] Department of Defense Directive (DoDD) 5100.01, *Functions of the Department of Defense and Its Major Components*, Change 1, Sep. 17, 2020, Encl. 6, ¶ 6.a.

[4] Ibid.

[5] The military services provide forces to combatant commanders who then exercise authority, direction and control over the commands and forces assigned to them and employ those forces to accomplish missions assigned to the combatant commander within their area of operation. Department of Defense Directive (DoDD) 5100.0 I, Change I, 09/17/20, Encl. 5, ¶ 1.a through d. The operational chain of command runs from the President of the United States to the Secretary of Defense to the Combatant Commanders. There are 11 combatant commands, each of which provides command and control of military forces, regardless of branch of service, in peace and war. Some combatant commands are geographic, such as Central Command (CENTCOM), whose area of responsibility includes the Middle East. Others are functional, such as Special Operations Command (SOCOM), which utilizes the special operations units within the services to carry out special operations world-wide.

11. The U.S. Air Force protects U.S. interests and defends the nation through its five core missions: (1) Air and Space Superiority; (2) Intelligence, Surveillance, Reconnaissance (ISR); (3) Rapid Global Mobility; (4) Global Strike; and (5) Command and Control.[6] Air and space superiority are crucial to ensuring the safety of our Service members. It is axiomatic that "whoever controls the air generally controls the surface."[7] Air and Space Superiority: the U.S. Air Force brings the ability and capability to conduct offensive and defensive operations to gain and maintain air superiority in support of U.S. and allied forces in the domains of land, sea, air, and space. This includes the ability to engage in offensive operations within our adversaries' airspace, as well as defensive operations to protect our own airspace. ISR: the U.S. Air Force provides the ability to gather real-time intelligence for warfighters and policymakers through manned and unmanned aircraft, space, and other technology. Rapid Global Mobility: the U.S. Air Force rapidly moves personnel and equipment around the world, enabling operational success. This includes providing aerial refueling to truly make global deployment possible and aeromedical transport to ensure the prompt treatment of injured troops. Global Strike: through bombers, fighters, and missiles, the U.S. Air Force provides the ability to attack targets, worldwide, in support of U.S. interests and in the defense of our nation. In addition to conventional ordnance, the U.S. Air Force mission includes two of the three legs of the nuclear deterrence triad – nuclear-capable bombers, and intercontinental ballistic missiles (ICBMs). Command and Control: finally, through various means, including air, space, and cyberspace platforms, the U.S. Air Force provides and defends the systems necessary to ensure a clear operational picture and means of communicating with our forces throughout the world.

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[6] Congressional Research Service, *Defense Primer: The United States Air Force*, Oct. 26, 2021, available at https://crsreports.congress.gov.

[7] Col Philip S. Meilinger, *Ten Propositions Regarding Airpower*, 1995.

12. Similarly, the U.S. Space Force protects U.S. interests and defends the nation through its missions: (1) Space Security; (2) Combat Power Projection; (3) Space Mobility and Logistics; (4) Information Mobility; and (5) Space Domain Awareness.[8] Space Security: controlling space has become increasingly important to ensure successful military operations and the U.S. Space Force protects U.S. military, civilian, and commercial space assets from danger or hostile actions. Combat Power Projection: the U.S. Space Force ensures U.S. and allied forces are able to operate freely in space by employing offensive and defensive capabilities designed to reduce the effectiveness of threats to space capabilities. Space Mobility and Logistics: the ability to sustain our space assets is crucial to sustaining continued space technology and operational advantages. The U.S. Space Force ensures the continued ability to launch and recover space assets vital to the protection of our nation. Information Mobility: U.S. Space Force technology allows for the rapid collection and dissemination of information globally in support of military operations. This capability ensures, communications, ISR, missile warning, and nuclear detonation detection, and other important capabilities. Space Domain Awareness: finally, the U.S. Space Force effectively monitors space, and objects in the space domain, analyzing potential impacts to military operations, and the safety and security of U.S. interests.

13. As of March 14, 2022, the Department of the Air Force had approximately 501,000 uniformed Service members – including 326,000 active duty, 68,000 Reserve, and 107,000 Air National Guard personnel – and 5,800 aircraft to support the mission. Regardless of the career field, rank, or duty status, every Service member plays an important role in accomplishing the mission and must be ready to perform their duties when called upon anytime, anywhere.

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[8] Space Capstone Publications, *Space Power: Doctrine for Space Forces*, June 2020, available at https://www.spaceforce.mil/Portals/1/Space%20Capstone%20Publication_10%20Aug%202020.pdf.

Mandatory Vaccination Requirements for COVID-19

14. On August 24, 2021, the Secretary of Defense directed the Secretaries of the Military Departments to immediately begin full vaccination of all members of the Armed Forces, including Service members on active duty or in the Ready Reserve, including the National Guard. The Secretary of Defense found that "[t]o defend the nation, we need a healthy and ready force" and "[a]fter careful consultation with medical experts and military leadership, and with the support of the President . . . vaccination against the coronavirus disease 2019 (COVID-19) is necessary to protect the Force and defend the American people."[9] The Secretary of the Air Force directed implementation via Department-wide memorandum on September 3, 2021. The memorandum applies to both services within the Department of the Air Force, the U.S. Air Force and the U.S. Space Force. It requires all active duty Service members, unless exempted, to be fully vaccinated with an FDA-approved COVID-19 vaccine[10] by November 2, 2021. It further requires, unless exempted, all Service members in the Ready Reserve, to include the Air National Guard, to be fully vaccinated by December 2, 2021. Like other orders in the United States military, the COVID-19 vaccination mandate constitutes a lawful order under Article 92 of the Uniform Code of Military Justice and failure to comply may result in administrative and/or disciplinary action. On the same date, the Department of the Air Force also issued implementation guidance, outlining the policy, administration and reporting requirements, and general guidance related to logistics and distribution of vaccines.

[9] Secretary of Defense memorandum, *Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members* (August 24, 2021).

[10] Although only FDA-approved vaccines are mandated by the order, Service members may voluntarily receive a vaccine that has obtained an FDA Emergency Use Authority or is included on the World Health Organization's Emergency Use Listing.

15. On December 7, 2021, the Secretary of the Air Force issued supplemental guidance that reiterates the requirement to be vaccinated against COVID-19 unless the Service member has an approved or pending medical, religious, or administrative exemption. It also implements and outlines options for Service members if they are notified that their exemption request is denied, providing opportunities for Service members to request a voluntary separation or retirement, if eligible, in lieu of vaccination. If approved in accordance with the applicable separation or retirement regulations, and they meet other conditions (e.g., separating within established timelines), they would be temporarily exempt from the vaccination requirement for the brief period of their remaining service. The guidance provides options that are adapted to active duty, various types of Reserve, and Air National Guard situations.

16. The COVID-19 vaccination requirement is not unique. The Department of Defense has a well-established "Individual Medical Readiness" requirement for all Service members – whether on active duty or in the Reserves – to ensure each Service member is physically and medically fit to perform their duties and to mobilize in support of our national defense. Among other things, Service members are required to undergo required physical health assessments and dental examinations to ensure the member is medically ready for operational needs.[11] Included in that requirement are a number of vaccines that all Service members are required to receive, including communicable diseases – such as influenza, hepatitis A & B, measles, mumps, and rubella – and non-communicable diseases – such as tetanus. These required based on the professional judgment of Department of Defense military and civilian leadership, that the vaccinations are

[11] While not intuitive, dental care is an important component of operational readiness. A deployed Service member with a dental emergency (e.g., abscessed or cracked tooth) may be unable to perform their duties – limiting the unit's ability to complete its mission – and may require a medical evacuation to ensure they are able to receive the care they need. This can be a drain on operational capabilities as resources are diverted from their original tasking to evacuate the member. Annual dental examinations and follow-up care is a DoD requirement to reduce the operational risks.

necessary to medically protect our Service members and to maintain a combat ready force. Diseases can be a serious threat to the ability of our Service members to perform their duties, and especially dangerous for Service members who are mobilized in support of combat operations. Vaccination is the most effective way to minimize the risk of disease in Service members which allows us to maximize our operational capabilities and mission effectiveness.

17. Service members who fail to meet medical readiness requirements are typically non-deployable. While Service members may go through brief periods where they are non-deployable, all members are expected to return to and maintain a deployable status. Reserve Component Service members are required to maintain the same physical and medical readiness as active duty Service members. The purpose of the Reserve Component is to provide fully trained and qualified personnel to support the military mission as necessary. In fact, medical readiness is a long-standing pre-requisite for active participation in the Air Force Reserve and Air National Guard.[12]

18. It is my professional judgment that Service members who are not fully vaccinated against COVID-19 pose an unacceptable risk to military operations while in garrison[13] or at deployed locations in the field. Although Combatant Commands can waive medical readiness

[12] *See* Air Force Manual (AFMAN) 36-2136, *Reserve Personnel Participation*, Sept. 6, 2019, para. 1.7.1-1.7.2 ("All reservists have to meet the medical standards in AFI 48-123 and the associated Medical Standards Directory (MSD) to be considered medically qualified to fully participate in the Air Force Reserve. . . . Note: Air Force Reserve commanders may initiate involuntary transfer to the Individual Ready Reserve (IRR) for failing to meet medical standards. . . Reservists with any expired Individual Medical Readiness requirement as defined in AFI 10-250 will not participate in any point-gaining activities other than a military medical/dental evaluation or examination consistent with DoDI 1215.06."); Air National Guard Instruction (ANGI) 36-2001, *Management of Training and Operational Support within the Air National Guard*, Apr. 30, 2019, para. 2.1 ("Members must meet the standards as outlined in DoDI 1215.06 [requiring medical readiness] when taking part in a pay or points gaining activity.") *See also* Department of the Air Force Instruction (DAFI) 36-2110, *Total Force Assignments*, Aug 2, 2021 ("Members with any expired Individual Medical Readiness requirements in accordance with DAFMAN 48-123 are subject to involuntary reassignment to a non-participating status").

[13] "In garrison" refers to Service members at their assigned duty location (e.g., base) and not currently deployed.

requirements[14] to allow a Service member to deploy, those decisions are informed by risk assessments on a case-by-case basis.[15] Medical readiness is similarly important while in garrison, to ensure each Service member is able to perform their duties in support of the mission. In garrison, illness can delay or prevent a Service member from being effectively trained or prepared to perform their duties if tasked to deploy. Vaccination is the most effective way of decreasing the risk that a member will unexpectedly be taken out of the fight or otherwise be prevented from performing their duties.

19. Policies and procedures were established, and implemented, to allow Service members the opportunity to request an exemption from the COVID-19 vaccination mandate based on medical or administrative criteria, including religious objections. All Department of the Air Force Service members who remain unvaccinated are subject to limitations on their service. Being unvaccinated impacts readiness for deployment, travel, and certain assignments or trainings. Service members with an approved religious accommodation are not treated differently than Service members with pending or approved exemptions in other categories.

20. Service members may request an administrative exemption through a religious accommodation based on their sincerely held beliefs. The Department of the Air Force does not have a blanket policy of denying religious accommodation requests. Each religious accommodation is individually considered by the Service member's chain of command to ascertain, among other things, whether the circumstances may lessen the compelling government interest in the health and medical readiness of every Service member or whether the situation

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[14] The waiving of a medical readiness requirement would be required for Service members with an approved exemption to deploy without meeting one or more medical requirements for that deployment.

[15] Some unvaccinated Service members deployed within a few months of the vaccine mandate, before there was a sufficient pool of vaccinated members to institute a vaccination requirement to that deployed location to reduce the operational risks. Although the mission continues, it does so at a heightened risk to success and typically with less effective mitigation measures that reduce the operational effectiveness of the member and/or units.

lends itself to less restrictive alternatives to vaccination that are just as effective in furthering those interests.[16] If a request is initially denied, the Service member may appeal that decision to the Air Force Surgeon General. If the appeal is denied, that Service member must comply with the requirements of the COVID-19 vaccination mandate.

21. As previously noted, the Department of the Air Force also has procedures for processing medical exemptions. Requests for medical exemptions are adjudicated by professional military medical providers based on the medical condition(s) of the individual. Medical exemptions primarily exist to support the compelling government interest in protecting the health of the Force where vaccination is contraindicated for that Service member. Approved medical exemptions are temporary and the Service member is expected to receive the vaccination when the temporary exemption expires.

22. Likewise, the Department of the Air Force allows administrative exemptions to account for individual circumstances, primarily, individuals on terminal leave (that is, on leave immediately prior to separating or retiring and not expected to return to duty), individuals approved to retire or separate within a short period of time, and individuals participating in a vaccine clinical trial. These exemptions reflect how the military's compelling interests intersect. For example, providing an exemption for Service members to participate in vaccine clinical trials would be in the interest of the military because it provides the opportunity for new and better vaccines in the future. With that said, to the best of my knowledge, I am not aware of any Service member in the Department of the Air Force who is currently exempt from the COVID-19 vaccine because they are participating in a vaccine clinical trial. Additionally, it is the

[16] I am aware that some courts have expressed skepticism that the religious accommodation process is individualized. The low number of approvals reflects the difficulty in identifying situations where a Service member's beliefs can be accommodated without undermining Force Health Protection and Readiness; both are a Department of the Air Force-wide and individual interest.

professional judgment of the Department of the Air Force, military and civilian leadership, that its interest in military readiness and mission accomplishment is not served by requiring members to be vaccinated when they are not returning to duty (i.e., terminal leave) or are leaving military service within a short timeframe (i.e., retiring or separating). Since many of those with administrative exemptions are in the process of leaving the Air Force, I expect the number of administrative exemptions to continue declining.

23. Good order and discipline, which includes obeying orders, is a foundational principle in the U.S. military. Absent a pending or approved exemption, Service members are expected to promptly comply with the lawful order to vaccinate. When a Service member willfully refuses to comply with a lawful order it erodes good order and discipline. The military cannot properly function when orders are disregarded because of personal objections. Senior Department of the Air Force officials are reviewing the religious accommodation requests and taking into account any religious concerns in determining whether the member should be ordered to receive the vaccine. If the senior officials determine the member still needs to vaccinate (i.e., religious accommodation request disapproved), ignoring the order is not an acceptable option and would likely result in the Service member being subject to formal disciplinary proceedings, including discharge proceedings.

24. Military operations require complete trust in the integrity of units and individual Service members to swiftly and unwaveringly execute lawful orders. For many military operations, obedience is literally a matter of life or death. Our ability to secure our nation's interests and to

protect our people depends on unhesitating compliance with orders. The only exception is an order that is "patently illegal."[17]

25. The judgment of the Military Services is that the order to receive the COVID-19 vaccine is a lawful order and it is "a key Force Protection and readiness issue."[18] Vaccination is the most effective and readily available tool to protect the Force and to ensure military personnel are fully mission capable and ready to execute operations. The more unvaccinated members in the Force, the greater the threat to readiness and successful mission accomplishment. Therefore, ensuring Service members are vaccinated is a national security issue and the amount of risk acceptable to our national security should be left to the military chain of command, and the Legislative and Executive branches.

COVID-19 Threat to the Department of the Air Force

26. Since the beginning of the pandemic, COVID-19 has unquestionably threatened the health and safety of the Armed Forces – as a whole and individually – and has diminished our abilities to perform our mission and effectively defend the nation. As of March 14, 2022, a total of 91,984 Department of the Air Force Service members had contracted COVID-19 during the pandemic, resulting in 229 hospitalizations, of which 14 died. Of those who died, 12 (86%) were completely unvaccinated.

27. Service members must often work in close physical proximity. The configuration of aircraft often requires Service members to sit and work in cramped operating conditions without the possibility of socially distancing. Likewise, Service members working on the ground are

[17] Manual for Courts-Martial (MCM), Part IV, ¶ 16.c.(2)(a)(i), 2019 (For a violation of Article 90, Willfully disobeying superior commissioned officer, "an order requiring the performance of a military duty or act may be inferred to be lawful, and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime"). *See also* id. at ¶ 18.c(1)(c) (referencing ¶ 16.c for a violation of Article 92, Failure to obey order or regulation).

[18] Memorandum for the Joint Force from General Mark A. Milley, Chairman of the Joint Chiefs of Staff, CM-0141-21 (Aug. 9, 2021).

often unable to socially distance due to the nature of military operations. Additionally, most forward-deployed locations do not have extensive medical facilities like those we are accustomed to in garrison. An outbreak of COVID-19 in Service members deployed to the field, where everyone is in close contact and living within the same area for months at a time, could easily overwhelm local medical capacity, taking away from the ability to effectively treat front-line battle injuries and other illnesses. Furthermore, such an outbreak could severely diminish operational capabilities, as deployed locations are often minimally manned. If a Service member were to get sick – let alone contract long-COVID, get hospitalized, or die – that would directly impact our ability to perform the mission. For example, an outbreak could limit the number of available pilots and aircrew to directly accomplish operations, or the number of maintainers and weapons loaders to ensyre aircraft are serviced and fully armed in support of operations. COVID-19 is a threat across all career fields and operational needs, an infection removing a Service member from the fight could leave little redundancy or backup to perform that Service member's duties. Under these conditions, an outbreak impacting multiple Service members could potentially risk the mission altogether. While illness is always a hazard in a deployed environment, COVID-19 has already had a real impact on military readiness and operations and we have a duty to mitigate the impact and ongoing risk to the greatest extent possible.

Harm to Readiness if Preliminary Injunction is Issued

28. A preliminary injunction preventing the Department of the Air Force from enforcing the vaccination mandate against a Plaintiff, and from determining the assignment of Service members based on their unvaccinated status, removes control of health and readiness from the Services and places it under the control of the judiciary. Every individual plaintiff judicially-exempted from being fully vaccinated against COVID-19 undermines the Department of the Air

Force's ability to support operations and defend our nation. This danger would be exponentially greater if the Department of the Air Force was enjoined from enforcing the vaccination mandate for large numbers of Service members, and would create an unacceptable risk to operational readiness. The Department of the Air Force is facing an unprecedented number of religious accommodation requests for exemption from the COVID-19 vaccination. Given the sheer volume of religious accommodation requests, an injunction that prevents the Air Force from enforcing the vaccination mandate, or from determining the assignment of Service members based on their unvaccinated status, would seriously threaten our readiness. We would be required to keep in service a large number of personnel who are non-deployable – or worse, be forced to assign and deploy unvaccinated Service members despite an intolerable risk to military operations. The amount of risk the Department of the Air Force should accept to the health and readiness of the Force should be left to the professional judgment of senior military officials based on the individualized circumstances of the requestor (e.g., career field, duties, and work environment).

29. Over the last two years, the Department of the Air Force has deployed unvaccinated individuals because there was no alternative when vaccination was not available. In doing so, our Service members were exposed to a heightened risk of illness and operations at an increased risk of failure. Operational efficiency was also degraded and Service members were delayed in reaching the theater of operations. Deployed Service members were exposed to and contracted COVID-19. As a result, personnel were taken out of the fight to quarantine or isolate and assets were unavailable for in-theater use as some members were medically evacuated to better medical facilities. This is not a sustainable model for continued operational success, vaccination is necessary to minimize the risk from COVID-19. Additionally, COVID-19 vaccination is

necessary to enhance our ability to project power into certain regions. Some allied and friendly countries require Service members to be vaccinated against the COVID-19 disease prior to entering their country.

30. If all religious accommodation requests were approved, or if the Department of the Air Force was prevented from enforcing the mandate on those Service members, the Department would be faced with an unparalleled crisis – unvaccinated fighter and bomber pilots who cannot deploy without risking the overall success of the mission; Reservists who cannot be called to active duty without risking the health of others. Across the Service, we would have some leaders who are exempt from the vaccination requirement themselves but still obligated to enforce a requirement to be medically ready that they themselves do not have to meet. In that circumstance, the authoritative force of the vaccination mandate would be entirely undermined, along with the fundamental principle of obedience to lawful orders and military discipline itself. This would weaken readiness and diminish the true strength of the Force. For these reasons, having large numbers of unvaccinated Service members poses an unacceptable risk to mission accomplishment and to the health of the Force.

31. An injunction that would prohibit discipline and adverse administrative action, would also irreparably harm good order and discipline. Service members have even alleged that non-adverse, routine personnel decisions, such as assignment or training decisions, are punishments and should be enjoined. Deployments, assignments, and training, however, are not rights or privileges. Rather, they are command decisions about how best to allocate personnel for national security and mission success. Any injunction that would prohibit the Air Force from not only enforcing the vaccination mandate but also from determining the assignment of Service members based on their unvaccinated status would wrest control of the Force from military leaders, would

cause immense and lasting harm to military discipline, and would create an unacceptable risk to operational readiness.

Conclusion

32. **In summary, it is my professional military judgment, and that of the Department of the Air Force military and civilian leadership, that our mission requires a healthy, fit, and medically ready fighting force, and that the most effective means of furthering this compelling interest is for Service members to receive the COVID-19 vaccine. An injunction blocking the enforcement of the mandate for a single Plaintiff, group of Plaintiffs, or class of many thousands seeking an exemption, would severely undermine military readiness and cause irreparable harm to military operations. Allowing unvaccinated members to serve without restriction, would significantly increase risk to accomplishing the Air Force mission while causing substantial and lasting harm to military order and discipline.**

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 23rd day of March 2022.

KEVIN B. SCHNEIDER, Lt Gen, USAF
Director of Staff

Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CINCINNATI DIVISION

HUNTER DOSTER, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:22-cv-00084
	)	
FRANK KENDALL, *et al.*,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF COLONEL ARTEMIO C. CHAPA

I, Artemio C. Chapa, hereby state and declare as follows:

1. I am a Colonel in the United States Air Force currently assigned as the Division Chief for Medical Operations at the Air Force Medical Readiness Agency. I have been in this position since July 2018. As a part of my duties, I am responsible for medical operations in the COVID-19 pandemic policy.

2. I am generally aware of the allegations set forth in the pleadings filed in this matter. I make this declaration in my official capacity as the Division Chief for Medical Operations and based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

3. It is the professional judgment of the Military Services and military medical providers that vaccines are the least restrictive, most effective and readily available tool the Armed Forces has to keep Airmen and Guardians safe, fully mission capable and prepared to execute the Commander-in-Chiefs orders to protect vital United States' national interests.

General Information about Exemptions

4. Per Air Force Instruction (AFI) 48-110_IP, *Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases*, dated October 7, 2013 (certified current February 16, 2018),[1] "[t]here are two types of exemptions from immunization – medical and administrative. Granting medical exemptions is a medical function. Granting administrative exemptions is a nonmedical function." In accordance with the applicable Department of Defense and Department of the Air Force policy,[2] the only administrative exemptions available for the COVID-19 vaccine are for religious accommodations, service members on terminal leave (i.e., not returning to duty), actively participating in a vaccine clinical trial started before November 22, 2021, or retiring or separating from service within a short timeframe.[3]

Medical Exemptions

5. Medical exemptions from immunization requirements are accomplished in accordance with AFI 48-110_IP. I am familiar with the medical exemption policy and process as it falls within the scope of my professional duties. Medical exemptions are vaccine-specific and are determined "based on the health of the vaccine candidate and the nature of the immunization under consideration."[4] Accordingly, there is no automatic presumptive exemption from a vaccine.

[1] AFI 48-110_IP is an inter-service publication. The Army identifies it as Army Regulation (AR) 40-562, Navy as Bureau of Medicine and Surgery Instruction (BUMEDINST) 6230.15B, and Coast Guard (CG) as Commandant Instruction (COMDTINST) M6230.4G.
[2] *See* DAF COVID-19 implementation Guide, dated September 3, 2021; Secretary of the Air Force memorandum, *Supplemental Coronavirus Disease 2019 Vaccination Policy*, dated December 7, 2021; and Force Health Protection Guidance (Supplement 23), Revision 3, *Department of Defense Guidance for Coronavirus Disease 2019 Vaccination Attestation, Screening Testing, and Vaccination Verification*, dated December 20, 2021.
[3] Additional administrative exemption tracking codes may be used for situations where a Service member is physically unavailable to take the vaccine (e.g., civilian incarceration or AWOL).
[4] AFI 48-110_IP, paragraph 2-6.(a).

6. A service member may request a medical exemption from the COVID-19 immunization requirement through a military medical provider.[5] The service member must make an appointment with the Military Treatment Facility (MTF) to be evaluated by a military medical provider. The military medical provider will evaluate the service member to determine if a medical exemption is warranted. The military medical provider's decision to grant or deny a medical exemption request is based on the provider's individualized assessment of the service member's medical situation. By way of example, individuals who are granted a medical exemption from the COVID-19 vaccine may include (1) people who previously received passive antibody therapy within the last 90 days, including treatment with monoclonal antibodies or convalescent plasma;[6] (2) Multisystem Inflammatory Syndrome in Adults (MIS-A); (3) acute current COVID-19 infection; (4) pregnancy; (5) myocarditis or pericarditis following first dose or current unresolved myocarditis/pericarditis; (6) prior anaphylaxis to Pfizer COVID vaccine or a component of the vaccine;[7] or (7) immediate allergic reaction of any severity to a previous dose or known (diagnosed) allergy to a component of the COVID-19 vaccine.[8] A military medical provider may seek further consultation if medically indicated.

7. The provider will also counsel the service member including providing specific information about COVID-19, Centers for Disease Control scientific recommendations, the

[5] A military medical provider can be a military service member, civilian, or contractor so long as they are privileged at a "Military Treatment Facility."
[6] As of February 11th, 2022, the CDC has updated the guidance that it is no longer necessary to delay COVID-19 vaccination following receipt of monoclonal antibodies or convalescent plasma. The AF Medical Service is evaluating removing this as a medical exemption criteria.
[7] This is defined as the onset within 4 hours of urticarial, wheezing/dyspnea, vomiting or diarrhea, hypotension, or angioedema.
[8] Air Force Medical Readiness Agency, "COVID-19 Vaccine Exemptions Guidance for AFMS Medical Personnel" (Sept. 3, 2021).

potential risks of infection, benefits of vaccination, and vaccine-specific information about the product constituents, risks, and benefits.

8. If a military medical provider makes a determination that a medical exemption applies to a service member, the provider documents the exemption in the Aeromedical Services Information Management System (ASIMS),[9] which is used to track Individual Medical Readiness,[10] and the Electronic Health Record. At this time, all medical exemptions to the COVID-19 vaccination requirement granted by the Air Force are temporary. The duration of a medical exemption depends on the underlying reason for the medical exemption. It may be as short as 30 days and as long as one year. Scientific information can also be updated to remove a medical exemption criteria, such as the February 11th, 2022, CDC notice that it is no longer recommended to delay COVID-19 vaccination following receipt of monoclonal antibodies or convalescent plasma. Additionally, because new or additional COVID-19 immunization products may be approved that do not cause the same medical concerns (e.g. allergic reactions), permanent medical exemptions are not permitted at this time. After the medical exemption expires, the member may be reevaluated to determine if a new exemption is warranted. Additionally, a military medical provider may revoke a medical exemption when it is no longer clinically warranted. The military medical provider will also submit a Memorandum For Record to the service member's commander notifying them if the medical exemption was approved or denied. The number of medical exemptions fluctuates as temporary exemptions are granted and expire, but the overall trend has been a decrease in the number of active medical exemptions and the Air Force expects that trend to continue. Indeed, between January 7, 2022 to the date of this

[9] An alternative database it can be entered is Military Health System Genesis.
[10] The Individual Medical Readiness displays a member's medical readiness, including what immunization requirements have been accomplished, which are coming due, and which are outstanding.

declaration, the number of temporary medical exemptions dropped from 1,723 to 1,148. As of March 18, 2022, there were just 549 temporary medical exemptions in active duty in Air Force.

9. A service member's commander may review the member's Individual Medical Readiness to ensure the member has met all the medical requirements directed. Once a medical exemption is annotated in ASIMS, the service member's Individual Medical Readiness will display that the member is medically exempt for the COVID-19 vaccination requirement and it will no longer display the member as coming due or overdue for the requirement.

10. If a military medical provider determines that a service member does not meet the criteria for a medical exemption, the provider will document the denial in the member's Electronic Health Record and provide the rationale for disapproval. Like any other medical condition, a service member may seek a second opinion.[11] To qualify for a medical exemption, the second opinion must come from a military medical provider, whether at the same or different Medical Treatment Facility. If the second medical evaluation denies the medical exemption as well, the provider annotates this denial in the Electronic Health Record and it is considered a final medical exemption disposition. If the medical evaluations conflict, the Chief of Medical Staff and military medical provider may consult with the facility's allergist or with the Defense Health Agency Immunization Healthcare Division for resolution and final adjudication by the Chief of the Medical Staff for the Military Treatment Facility.

11. The timeline for resolution of a medical exemption request will vary depending on the purported medical issues involved and the appointment availability at the individual Military Treatment Facilities.

Temporary Nature of Medical Exemptions

[11] This is true of any medical condition, including if the service member was granted a medical exemption.

12. Medical exemptions are granted based on concerns that a COVID-19 vaccine would place the individual service member at a heightened health risk. Healthcare determinations are based upon individual provider encounters with each patient, with the provider assessing the service member's medical history and considering all relevant aspects of that patient's unique medical circumstances and needs. Decisions concerning vaccination, to include the medical necessity to issue a temporary exemption are no exception to this rule and are tailored to the individual patient.

13. As previously noted, Department of the Air Force policy is to only grant temporary medical exemptions from immunization requirements. The duration of these exemptions necessarily vary based on the medical conditions and history of the patient at the time of evaluation, along with the specifics of the vaccine. Circumstances under which a temporary exemption could be granted are wide-ranging. A temporary medical exemption for allergic reaction to the vaccine or components of the vaccine is a good example. While a service member may have a severe allergic reaction to an ingredient, it may not occur with a future COVID-19 vaccine of a different formulation. A temporary exemption allows the Air Force to reassess individuals with allergies or severe adverse reactions to determine whether an updated or new vaccine has been approved with constituents the member can safely take.[12] An exemption may also be temporarily granted for other medical reasons and conditions, such as when receiving the vaccine caused myocarditis or pericarditis following the first dose, or when the vaccine could create a confusing clinical diagnostic assessment during an active COVID-19 infection (e.g., is a fever due to a side effect from a COVID-19 vaccine or due to the COVID-19 infection), or for a pregnancy (which is time limited).

[12] For example, the FDA's recent approval of the Moderna vaccine, now marketed under the name "SPIKEVAX."

14. The period of an exemption is dependent on the underlying medical reason, but can be as short as 30 days (or less) for someone who has an acute COVID-19 infection to 365 days for an individual with a severe allergic reaction. Many exemptions are limited to 30, 60, or 90 days.

15. Denying medical exemptions where they are not warranted protects the member, unit, and mission by ensuring the member gets vaccinated and is medically ready. Granting medical exemptions when warranted also serves the military interests in readiness and promoting the health of the force. If giving the vaccine would undermine the health of that particular service member, the military's interests in readiness and force health protection would be degraded in that circumstance by vaccination. After the individual health risk to vaccination has subsided, the member is again required to vaccinate.

16. A service member with a medical exemption is still subject to restrictions and/or limitations related to the fact that they are unvaccinated (e.g., deployment eligibility, foreign country entry restrictions, frequent COVID-19 testing or extended quarantine requirements, restrictions from all non-mission essential travel, etc.). Therefore, receipt of a medical exemption does not permit the recipient to continue to freely perform any and all duties without consequences. To the extent necessary for the mission and commander decision-making, that member may be reassigned and/or likely categorized as non-deployable just as any other unvaccinated person with or without a pending religious accommodation.

17. Moreover, receiving any type of exemption from the vaccine requirement will likely require an additional medical waiver in order to deploy overseas, be assigned to an operational unit, or engage in other special duties or assignments. For example, if a service member is scheduled to deploy to a specific geographic area the member may need to obtain separate

medical clearance from their Service and from the Combatant Command[13] to enter that commander's geographic area of responsibility. Different Combatant Commands have specific requirements for vaccination based on the endemic biomedical threats that naturally exist in their geographic area as well as any biowarfare threats from adversaries. An unvaccinated member who deploys to a geographic region where there is an endemic infectious disease would put not only his health at risk, but also the health of any other service member. Thus, a determination that a member is not deployable takes into account the risk to other personnel, the risk to mission as well as the unvaccinated member. These deployment determinations do not take into account whether a member is unvaccinated for secular or religious reasons; all unvaccinated service members are treated the same for purposes of determining whether they should travel or deploy.

18. Even if a member has a medical exemption for the COVID-19 vaccine, that exemption does not automatically render a service member deployable. Individuals who receive a medical exemption cannot be deployed until the Combatant Command makes a separate determination based on an individual's medical circumstances and associated risks. Additionally, many of the common reasons that a service member may receive a medical exemption from an immunization requirement, on their own, could separately make the service member not medically qualified and non-deployable. For example, AFI 48-110_IP, ¶ 2.6 lists immune competence, pharmacologic or radiation therapy and/or pregnancy as common reasons for a medical

[13] Since the passage of the Goldwater-Nicholas Department of Defense Reorganization Act of 1986, combatant commanders are vested with vast authorities and responsibilities for military operations within their area of responsibility. The Air Force, Space Force, and other branches of the Armed Forces provide forces to the combatant commanders to execute those responsibilities and functions. The combatant commanders exercise authority, direction and control over the commands and forces assigned to them and employ those forces to accomplish missions assigned to the combatant commander. Department of Defense Directive (DoDD) 5100.01, Change 1, 09/17/2020, Encl. 1, ¶ 1.a through d.

exemption from an immunization.[14] These conditions would almost certainly lead to a finding of unsuitability for deployment and an inability for the service member to serve on an aircraft or go overseas on deployment regardless of vaccination status.

19. As a physician, this process of individual service member review with individual vaccine medical review to adjudicate proper temporary medical exemption clearly consolidates an un-biased alignment with policy,[15] occupational health, member protection, and military interest. Both granting a temporary medical exemption and requiring service members without a medical condition to be vaccinated are evidence of the goal of the military interest in preserving a healthy, responsive force and medical readiness.

20. On March 18, 2022, the numbers of exemptions from the COVID-19 vaccine in the ASIMS data was 1,148 Total Force Service Members (549 U.S. Air Force, 11 U.S. Space Force, 376 Air National Guard and 212 Air Force Reserve Command), with 398 of these for pregnancy.[16] The "Medical Temporary" code documents all exemptions due to medical conditions (e.g., pregnancy, allergic reaction, participation in vaccine trial). The Department of the Air Force cannot readily ascertain howmany Service members, if any at all, have medical exemptions for each particular medical condition.

Administrative Exemption for Vaccine Clinical Trials

[14] AFI 48-110_IP ¶ 2.6 also lists evidence of immunity based on serologic tests, documented infection, or similar circumstances as a possible basis for a medical exemption for an immunization. However, the paragraph makes it clear that these are "[g]eneral examples of medical exemptions" and that the exemptions are based on the health of the patient and "the nature of the immunization under consideration." Section 2.1(g) also makes it clear that serologic tests can be used only "[f]or *some* vaccine-preventable diseases." (emphasis added). Pursuant to DoD policy and CDC recommendations about vaccination, a prior COVID-19 infection, by itself, is not grounds for a medical exemption to the COVlD-19 vaccination requirement.

[15] Per AFI 48-110, medical exemptions are vaccine-specific and are determined "based on the health of the vaccine candidate and the nature of the immunization under consideration."

[16] This is a snapshot in time. Medical exemptions from COVID-19 are all temporary in nature. The period of an exemption is dependent on the underlying medical reason, but can be as short as 30 days (or less) for someone who has an acute COVID-19 infection to 365 days for an individual with a severe allergic reaction. Many exemptions are limited to 30, 60, or 90 days. The pregnancy numbers are calculated from numbers of pregnant member without COVID vaccination, not a direct calculation titled as pregnancy medical exemption, and is a snapshot in time.

21. I am familiar with the administrative exemption policy and process for Vaccine Clinical Trials as part of my professional duties. Pursuant to Force Health Protection Guidance (Supplement 23), Revision 3, *Department of Defense Guidance for Coronavirus Disease 2019 Vaccination Attestation, Screening Testing, and Vaccination Verification*, service members who are "actively participating in COVID-19 vaccine clinical trials begun prior to November 22, 2021, are exempt from mandatory vaccination against COVID-19 until the trial is complete in order to avoid invalidating the such clinical trial results." Although not a medical condition, a temporary exemption from the COVID-19 vaccination requirement for a Service member while they are actively participating in a vaccine clinical trial is annotated in ASIMS as "Medical Temporary." If a Service member is not actively participating (e.g., chose not to continue the trial, etc.) or if the clinical trial is not for a vaccine, the service member is not exempt. This exemption would be temporary and the Service member would be required to vaccinate at the end of the trial if they had not received an EUA-authorized or World Health Organization (WHO) EUL vaccine.

22. Service members shall follow their command policies regarding the requirement to obtain command permission to participate in a clinical trial. If approved, the Service member would be required to provide the study information and proof of participation to the MTF for review of a medical temporary exemption. There are different types of vaccine clinical trials, included blinded (where the member is unaware if they received the actual vaccine or a placebo) and not blinded (where member knows if they received the vaccine). If the member received a placebo and was blinded, the MTF would document a "Medical Temporary" exemption in ASIMS. The member would be temporarily exempt until the study was unblinded or until the study ends. If the member received the actual vaccine, and not a placebo, and it was EUA-authorized or on the

World Health Organization (WHO) EUL, the MTF would document the immunization in ASIMS showing the member had been vaccinated.

23. ASIMS is unable to identify in a searchable format how many service members are actively participating in a vaccine clinical trial and have a temporary medical exemption. This "Medical Temporary" code is the same code used to document exemptions due to medical conditions (e.g., pregnancy, allergic reaction) as described above. As such, the Department of the Air Force is not readily able to ascertain how many Service members, if any at all, in the pool of "Medical Temporary" ASIMS data are participating in a vaccine clinical trial. I am not personally aware of anyone that currently has an exemption from the COVID-19 vaccine because they are participating in a vaccine clinical trial.

24. Moreover, even if an individual participates in a vaccine clinical trial, it does not mean they are unvaccinated. For example, during a blinded trial, an individual's vaccination status is unknown, even to that person.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 22nd day of March 2022.

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ARTEMIO C. CHAPA, Colonel, USAF
Division Chief, Medical Operations,
AFMRA SG3

Exhibit 4

DoD Instruction 1332.45

Retention Determinations for Non-Deployable Service Members

Originating Component:	Office of the Under Secretary of Defense for Personnel and Readiness
Effective: **Change 1 Effective:**	July 30, 2018 April 27, 2021
Releasability:	Cleared for public release. Available on the Directives Division Website at https://www.esd.whs.mil/DD/.
Incorporates and Cancels:	Office of the Under Secretary of Defense for Personnel and Readiness Memorandum, "DoD Retention Policy for Non-Deployable Service Members," February 14, 2018
Approved by: **Change 1 Approved by:**	Robert L. Wilkie, Under Secretary of Defense for Personnel and Readiness Virginia S. Penrod, Acting Under Secretary of Defense for Personnel and Readiness

Purpose: In accordance with the authority in DoD Directive 5124.02, this issuance:

- Establishes policy, assigns responsibilities, and provides direction for retention determinations for non-deployable Service members.
- Provides guidance and instructions for reporting deployability data for the Total Force.

TABLE OF CONTENTS

SECTION 1: GENERAL ISSUANCE INFORMATION

1.1. APPLICABILITY.

This issuance applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this issuance as the "DoD Components").

1.2. POLICY.

It is DoD policy that:

a. To maximize the lethality and readiness of the joint force, all Service members are expected to be deployable.

b. Service members who are considered non-deployable for more than 12 consecutive months will be evaluated for:

(1) A retention determination by their respective Military Departments.

(2) As appropriate, referral into the Disability Evaluation System (DES) in accordance with DoD Instruction (DoDI) 1332.18 or initiation of processing for administrative separation in accordance with DoDI 1332.14 or DoDI 1332.30. This policy on retention determinations for non-deployable Service members does not supersede the policies and processes concerning referral to the DES or the initiation of administrative separation proceedings found in these issuances.

c. Implementation for this policy is October 1, 2018.

1.3. INFORMATION COLLECTIONS.

The Monthly Non-deployable Report, referred to in Paragraph 3.2. of this issuance, has been assigned report control symbol DD-P&R(M)2671 in accordance with the procedures in Volume 1 of DoD Manual 8910.01. The expiration date of this collection is listed in the DoD Information Collections Website at https://www.esd.whs.mil/Directives/collections_int/.

1.4. SUMMARY OF CHANGE 1.

The changes to this issuance:

a. Reflect updates to reporting tracking procedures (Paragraph 3.1. of this issuance) and timelines (Paragraph 3.2. of this issuance).

b. Provide additional clarity for reporting temporary non-deployable categories (Paragraph 3.5. of this issuance) and individual medical readiness (IMR) deficits (Paragraph 3.7. of this issuance).

c. Update the formatting according to new issuance template guidelines.

SECTION 2: RESPONSIBILITIES

2.1. UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS (USD(P&R)).

The USD(P&R) establishes and oversees policy on retention determinations for non-deployable Service members.

2.2. ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER AND RESERVE AFFAIRS (ASD(M&RA)).

Under the authority, direction, and control of the USD(P&R), the ASD(M&RA):

a. Develops policy on the retention of non-deployable Service members.

b. Monitors the implementation of this guidance.

c. Tracks the number of non-deployable Service members and those non-deployable Service members retained in military service and the justification for such retention, in accordance with Section 3 of this issuance.

2.3. ASSISTANT SECRETARY OF DEFENSE FOR HEALTH AFFAIRS.

Under the authority, direction, and control of the USD(P&R), the Assistant Secretary of Defense for Health Affairs:

a. Develops policy recommendations to the USD(P&R) for uniform retention medical standards in coordination with the Secretaries of the Military Departments.

b. Provides oversight of related medical policies and programs.

2.4. SECRETARIES OF THE MILITARY DEPARTMENTS.

The Secretaries of the Military Departments:

a. Will:

(1) Determine the deployability status of Service members.

(2) Make retention determinations consistent with this issuance for Service members who have been non-deployable for more than 12 consecutive months.

(3) Submit monthly reports identifying the number of non-deployable Service members for all components within their Departments to the Office of the USD(P&R) in accordance with Paragraph 3.2. of this issuance.

(4) Monitor compliance with requirements established in DoDI 6025.19 to ensure required evaluations, assessments, and other medically related actions are accomplished to improve individual and overall unit readiness.

b. May:

(1) Retain in service those Service members whose period of non-deployability exceeds the 12 consecutive month limit in Paragraph 1.2. of this issuance if determined to be in the best interest of the Military Service.

(2) Delegate the authority in Paragraph 2.4.(b)(1) of this issuance to retain in service those Service members whose period of non-deployability exceeds the 12 consecutive month limit. Such a delegation must be in writing, and may only be made to Presidentially Appointed, Senate-Confirmed officials; Senior Executive Service members; or general/flag officers serving at the Military Department or Service headquarters.

(3) Initiate administrative separation processing, or referral to the DES, as appropriate, prior to a non-deployable Service member being in a non-deployable status for 12 months when the Military Service determines there is a reasonable expectation that the reason will not be resolved and the Service member will not become deployable.

SECTION 3: PROCEDURES

3.1. TRACKING.

a. The Military Departments will monitor and track the number of Service members by Military Service that are:

(1) Non-deployable in accordance with the categories established in Paragraphs 3.5. and 3.6. of this issuance.

(2) Deployable with limitations in accordance with Paragraph 3.3. of this issuance.

(3) Deployable but have IMR deficits in accordance with Paragraph 3.7. of this issuance.

(4) In training or in a transient status in accordance with the category defined in Paragraph 3.4. of this issuance.

b. To ensure accurate and consistent accounting across the DoD, Military Services will account for Service members in only one category.

(1) If a Service member can be accounted for in more than one category, the Service member will be counted only once and in the category with the highest priority listed in accordance with Paragraph 3.8. of this issuance.

(2) This restriction does not apply to Service members who may also be counted as IMR deficits in accordance with Paragraph 3.7. of this issuance. In addition to the categories listed in Paragraphs 3.3. through 3.6. of this issuance, Service members with IMR deficits will also be counted in accordance with Paragraph 3.8.g. of this issuance.

3.2. REPORTING.

a. The Secretaries of the Military Departments will report to the ASD(M&RA) the number of non-deployable personnel (and other categories as provided in this section) for all Military Services, and their respective components, on a monthly basis.

(1) The format for the Monthly Non-deployable Report can be found at https://prhome.defense.gov/M-RA/Inside-M-RA/MPP/OEPM/.

(2) Reports are due **no later than** the 20th of each month with data current as of the last day of the previous month. For example, the May Non-deployable Report is due by June 20th with non-deployable data as of May 31st. Reports will be accepted earlier if available.

b. The number of non-deployable Service members is reported by categories, either temporary or permanent, and grouped into medical, legal, or administrative sub-categories. Each sub-category is further broken down to account for the specific reasons or conditions that make a Service member non-deployable.

c. The number of Service members who are deployable with limitations, in accordance with Paragraph 3.3. of this issuance, will be categorized separately on the monthly report. Such Service members are not to be counted in the non-deployable populations.

d. The number of Service members who require urgent or emergent dental treatment for dental readiness (Dental Class 3), are overdue for annual dental screening (Dental Class 4), or are overdue for a Periodic Health Assessment (PHA) are reported as IMR Deficits in accordance with Paragraph 3.7. of this issuance. Such Service members are not counted in the non-deployable populations.

e. The number of Service members who are in a training or transient status are reported in one of the four categories listed in Paragraph 3.4. of this issuance.

3.3. DEPLOYABLE WITH LIMITATIONS.

Service members with a medical condition that requires additional medical screening, or Combatant Command approval prior to deployment outside the continental United States, will be categorized as Deployable with Limitations. This includes, but is not limited to, conditions referred to in DoDI 6490.07.

3.4. TRAINING AND TRANSIENT.

The Training and Transient category provides a means to track the human resources necessary to maintain a healthy force, within current end strength constraints. This category contains Service members who are not immediately ready for deployment and fall into one of the following four categories:

a. Initial Entry Training.

These Service members are:

(1) Enlisted Service members at recruit training, initial skill training, and other proficiency or developmental training accomplished before moving to the member's first permanent duty assignment. This includes all in-transit time commencing upon entry into active service, through completion of the final course of initial entry training that terminates enlisted trainee status.

(2) Enlisted trainees who enter officer candidate school, officer training school, and Service academy preparatory school following enlistment on active duty. These members will be considered:

(a) Enlisted trainees from initial entry on active duty until commissioning.

(b) Upon commissioning, officer accession students and will remain in the initial entry training category for any subsequent initial entry training, or until they begin travel to their first permanent duty assignment.

(3) Officers at officer basic courses, and all initial skill and proficiency training taken before travel to the Service member's first permanent duty assignment. This includes all in-transit time from entry on active duty until completion of the last initial entry course of instruction.

(4) Reserve Component (RC) Service members (enlisted and officer) who enter the Ready Reserve and are awaiting initial entry training.

b. Cadets and Midshipman.

These are individuals currently attending the U.S. Military Academy, the U.S. Air Force Academy, or the U.S. Naval Academy. In accordance with Section 115 of Title 10, United States Code (U.S.C.), cadets and midshipman are counted in the active duty end strength for their respective Service, but by policy are non-deployable while attending school.

c. All Other Training.

These are Service members who are attending training that is 20 weeks or more in length, and is conducted after their initial entry training. Examples include Command and Staff Colleges, Senior Service College, the United States Army Sergeants Major Academy, medical residencies, and all other post-graduate professional education opportunities.

d. Transient.

These are Service members who are not available for duty while executing permanent change of station orders at the time of the report. This category does not include military personnel who are:

(1) On temporary duty for training between permanent duty stations, or;

(2) Moving between entry-level courses of instruction, specifically Service members who have departed from one duty station and are in transit but have not yet reported for duty at the next permanent duty station.

3.5. TEMPORARY NON-DEPLOYABLE CATEGORIES.

a. Medical.

Service members are considered temporarily non-deployable for one of three reasons:

(1) Patient.

In accordance with DoDI 1120.11, Service members who are hospitalized and are projected to heal, recover, and return to full duty in less than 12 months are temporarily non-deployable.

(2) Medical Condition That Limits Full Duty.

Service members who have temporary profiles or are in limited duty status are counted as temporarily non-deployable. Light duty will not be reported as non-deployable unless the duration exceeds 30 days, with discretion given to the medical officer to extend light duty status for up to 60 days, making light duty no longer than 90 days for conditions expected to recover or stabilize within that time. Service members who are considered to be classified as light duty are considered deployable and expected to be able to deploy, at the local commander's discretion, despite the medical condition causing their light duty status.

(3) Pregnancy (including post-partum).

Service members who are pregnant or in the post-partum phase are temporarily non-deployable. The post-partum phase ranges from 6 to 12 months after childbirth for female Service members and is determined by individual Service policy.

b. Legal.

Service members are considered temporarily non-deployable for one of two reasons:

(1) Prisoner.

Service members convicted by civilian or military authorities and sentenced to confinement of more than 30 days, but for 6 months or less, are temporarily non-deployable. Service members confined for more than 6 months are not included in end strength numbers and will not be included in the monthly non-deployability report.

(2) Legal Action.

Service members who are under arrest, confined 30 days or less, pending military or civil court action, under investigation, a material witness, on commander directed hold, pending non-judicial punishment action under Section 815 of Title 10, U.S.C., also known as Article 15 of the Uniformed Code of Military Justice (UCMJ), or pending discharge based on action under the UCMJ are temporarily non-deployable.

c. Administrative.

These Service members are considered temporarily non-deployable for one of eight reasons:

(1) Absent Without Leave or Unauthorized Absence.

Service members who are absent without leave, as defined in Section 886 of Title 10, U.S.C., also known as Article 86 of the UCMJ, will be considered as temporarily non-deployable.

(2) Family Care Plan.

In accordance with DoDI 1342.19, Service members required but failing to have a family care plan in place are temporarily non-deployable.

(3) Adoption.

Service members who are single parents or one member of a dual military couple and are adopting a child are temporarily non-deployable. They are non-deployable for at least 6 months after the child is placed in the home, or longer dependent on the administrative stabilization period prescribed by the jurisdiction in which the adoption occurred.

(4) Service Member Under 18.

Service members who are not yet 18 years of age are temporarily non-deployable. The Child Soldier Prevention Act of 2007 prohibits Service members under the age of 18 from taking part in hostilities as a member of governmental armed forces.

(5) Humanitarian Assignment.

Service members assigned to a location to provide support to a family member are temporarily non-deployable. These Service members typically receive 12 to 24 months stabilization by Military Service policy.

(6) Service Discretion.

Military Services may designate Service members temporarily non-deployable when the previous categories do not apply. Examples include:

(a) Simultaneous Membership Program or Officer Candidate School.

(b) Education stabilization; mobilization deferral for affiliation after release from Active Component.

(7) Pending Administrative Separation.

Service members being processed for administrative separation are temporarily non-deployable.

(8) Unsatisfactory Participants or Administrative Action Pending (RC Only).

Service members who are determined to be unsatisfactory participants (defined in DoDI 1215.13 as a Service member that has nine unexcused absences within a 12-month period or fail to perform prescribed periods of active duty for training), are considered temporarily non-deployable, after the 90 day recovery period has elapsed. The Military Services will have no more than 90 days to recover the unsatisfactory participant before the unsatisfactory participant is counted as temporarily non-deployable. The Military Services will determine when an RC

Service member who was classified as an unsatisfactory participant is considered recovered, and no longer counted as non-deployable.

3.6. PERMANENT NON-DEPLOYABLE CATEGORIES.

a. Medical.

Service members are considered non-deployable for one of three reasons listed below.

(1) Permanent Limited Duty.

Service members with a medical condition that permanently prevents deployment are non-deployable. This includes Service members processed through the DES who are not deployable and were retained in the Military Service. In accordance with Section 1214a of Title 10, U.S.C., Service members cannot be involuntarily administratively separated or denied reenlistment due to unsuitability based solely on the medical condition considered in the evaluation unless the request to separate the Service member is approved by the Secretary of Defense. The Military Service may direct the Service member to reenter the DES process to be reconsidered for retirement or separation for disability.

(2) Enrolled in DES.

In accordance with DoDI 1332.18, Service members currently enrolled in the DES process are non-deployable. That includes those pending separation or retirement after receiving a "not fit for duty" determination through the DES.

(3) Permanent Profile Non-duty Related Action Needed (RC).

Those RC Service members who have a permanent profile and are pending a decision on a line of duty determination are non-deployable.

b. Administrative.

These Service members are considered non-deployable for one of three reasons:

(1) Sole Survivor, Surviving Family Member, or Deferred from Hostile Fire Zone.

Service members who acquired the status in accordance with DoDI 1315.15 are non-deployable.

(2) Unable to Carry a Firearm.

Service members who are subject to the provisions of Section 922 of Title 18, U.S.C. are non-deployable.

(3) Conscientious Objector.

Service members who are granted restriction of military duties in accordance with DoDI 1300.06 are non-deployable.

c. Approved for Retention.

This category accounts for Service members who are retained by the Military Department despite being in a non-deployable status for 12 months or longer. Service members who the Military Departments retained in Service and are considered non-deployable for one of two reasons:

(1) Combat Wounded.

These are Service members whose injuries were the result of hostile action, meet the criteria for awarding of the Purple Heart, and whose injuries were not the result of their own misconduct.

(2) Other.

These are Service members who are not designated as combat wounded but are non-deployable and retained in the Military Service by the Secretary of the Military Department in accordance with Paragraph 2.4. of this issuance.

3.7. IMR DEFICITS.

These IMR categories are not considered non-deployable conditions. While Service members who do not have a current PHA (completed) or whose dental readiness assessment is classified as either Dental Class 3 or Dental Class 4 are not medically ready to deploy, they will not be reported in the non-deployable population. Components are expected to immediately correct all IMR deficits to ensure Service members are medically ready to deploy.

a. Overdue PHA.

These Service members are not compliant with the requirement to complete a PHA in accordance with DoDI 6025.19.

b. Dental Readiness (Dental Class 3).

Service members who require urgent or emergent dental treatment.

c. Overdue Dental Screening (Dental Class 4).

Service members who are not compliant with the requirement to complete a dental screening in accordance with DoDI 6025.19.

d. Additional IMR Categories.

In addition to dental categories (Dental Classes 3 and 4) and PHAs, the Military Departments track three additional areas of IMR: immunization status, medical readiness and laboratory studies, and individual medical equipment. In accordance with DoDI 6025.19, Service members who are not current in these areas are considered partially-medically ready.

3.8. PRIORITIZATION OF SERVICE MEMBERS BY CATEGORY.

This paragraph sets the prioritization for the grouping of Service members into categories to provide consistent reporting among the Military Departments, in accordance with Paragraph 3.1.b. of this issuance. With the exception of Service members who may be accounted for in IMR deficits, in accordance with Paragraph 3.1.b.(2) of this issuance, Service members will be counted only once, in a single category; Service members who may fall into more than one category will be reported in the priorities established in this paragraph. These categories are listed below in descending order of priority.

a. Deployed.

This category includes Service members who are currently deployed. These Service members will not be counted in any other category (including deployable with limitations or approved for retention).

b. Deployable with Limitations.

c. Approved for Retention.

(1) Combat wounded – Non-deployable but retained.

(2) Other – Non-deployable but retained.

d. Permanent Non-Deployable.

(1) Medical permanent limited duty.

(2) Administrative.

(a) Sole survivor, surviving family member, or deferred from hostile fire zone.

(b) Unable to carry a firearm (e.g., Lautenberg Amendment).

(c) Conscientious objector.

(d) Ex-prisoner of war.

(3) Medical Enrolled in DES.

(4) Permanent profile non-duty related action needed (RC).

e. Training and Transient.

(1) Initial entry training.

(2) Cadets or Midshipmen.

(3) All other training.

(4) Transient (permanent change of station).

f. Temporary Non-Deployable.

(1) Medical.

(a) Patient (assigned to "Individuals Account").

(b) Medical condition that limits full duty.

(c) Pregnancy (including post-partum).

(2) Legal.

(a) Prisoner.

(b) Legal Action.

(3) Administrative.

(a) Absence without leave.

(b) Family Care Plan.

(c) Adoption.

(d) Service member under 18.

(e) Humanitarian assignment.

(f) Service Discretion.

(g) Pending Administrative Separation.

(h) Unsatisfactory participants or admin action pending (RC).

g. IMR Deficits.

Service members with IMR deficits may be counted as both overdue PHA and as either Dental Class 3 or Dental Class 4.

(1) Overdue PHA.

(2) Dental readiness (Dental Class 3).

(3) Overdue dental screening (Dental Class 4).

SECTION 4: RETENTION DETERMINATION

4.1. RETENTION AUTHORITY FOR NON-DEPLOYABLE SERVICE MEMBERS.

In accordance with Paragraph 2.4. of this issuance, the Secretaries of the Military Departments have retention authority.

4.2. RETENTION DETERMINATION.

a. The Secretaries of the Military Departments may retain Service members who are non-deployable in excess of 12 consecutive months, on a case-by-case basis, if determined to be in the best interest of the Service, based on:

(1) The Service member's ability to perform appropriate military duties commensurate with his or her office, grade, rank, or skill.

(2) The likelihood that the Service member will resolve the condition or reason that is the underlying cause of his or her non-deployable status.

b. The Secretaries of the Military Departments may approve retention for Service members who are non-deployable in excess of 12 consecutive months for up to:

(1) The length of time remaining on a Service member's enlistment contract; or

(2) Three years for officers, including warrant officers, and those enlisted members serving on indefinite contracts.

(3) Upon expiration of the retention period, the Secretary of the Military Department concerned may renew retention for a Service member on a case-by-case basis for periods stated in this paragraph.

c. The Secretaries of the Military Departments may establish procedures for Service members who are or will be non-deployable for 12 months or longer due to an administrative reason to request retention consideration.

d. Approval of the retention for Service members who are non-deployable for 12 months or longer will only be made for individual Service members, not an entire cohort or skill set of Service members.

e. Except as required by DoDI 1332.18, the Secretaries of the Military Departments may request from the Secretary of Defense the authority to automatically exempt Service members serving in specified positions from the requirement for a retention determinations pursuant to Paragraph 2.4.b.

f. When appropriate, Service members not recommended for further retention will be considered for processing for administrative separation in accordance with DoDI 1332.14 or DoDI 1332.30, or referral for disability separation in accordance with DoDI 1332.18.

4.3. SPECIAL CATEGORIES.

a. Pregnant and post-partum Service members, as a group, are exempt from Paragraph 2.4.a., for pregnancy-related health conditions during pregnancy through the post-partum period.

b. The Secretaries of the Military Departments have the authority to retain combat wounded Service members who have been evaluated through the DES and whose reason for non-deployability is a direct result of their combat wounds, if requested by the Service member.

(1) Disapproval of retention for non-deployable combat wounded Service members, who wish to be retained and whose reason for non-deployability is a direct result of their combat wounds, may not be delegated.

(2) Retention will be authorized in accordance with Paragraph 4.2.b.

c. Unless found unfit for duty through the DES, Service members serving in specified positions approved by the Secretary of Defense pursuant to Paragraph 4.2.e. are exempt from requiring a retention determination based solely on being in a non-deployable status for 12 months or longer. Upon reassignment, these Service members will again require a retention determination in accordance with Paragraph 4.2.a.

d. Unless sooner discharged or retired under another provision of law, or discharged due to misconduct or sub-standard performance, the Secretaries of the Military Departments may retain those Service members who are, or will be, non-deployable for 12 months or longer due to administrative reasons and who have attained such years of creditable service so as to be within 3 years of qualifying for:

(1) Regular retirement (or in the case of enlisted members of the Navy or Marine Corps, transfer to the Fleet Reserve or Fleet Marine Corps Reserve, as the case may be) pursuant to Sections 3911, 3914, 6323, 6330, 8911, or 8914 of Title 10, U.S.C.; or

(2) Non-regular retirement (but for age) pursuant to Sections 12731 and 12735 of Title 10, U.S.C., if, in the case of RC members other than RC members within 3 years of qualifying for regular retirement, they have attained at least 17 years of qualifying creditable service as computed in accordance with Section 12732 of Title 10, U.S.C., and continue to attain qualifying creditable service as computed under Section 12732 of Title 10, U.S.C. to become eligible for non-regular retirement within the 3-year period.

SECTION 5: AUTHORITIES FOR SEPARATIONS AND RETIREMENTS

5.1. In accordance with Paragraph 1.2. of this issuance, a Service member who has been non-deployable for an administrative reason (not medical or legal) for more than 12 consecutive months, will be processed for administrative separation in accordance with DoDI 1332.14 or DoDI 1332.30. Military Services should ensure expeditious administrative separation proceedings in accordance with Military Department and Military Service policies.

5.2. A Service member who has been non-deployable due to a physical disability that makes him or her potentially unfit for the duties of his or her office, grade, rank, or rating for more than 12 consecutive months will be referred into the DES in accordance with DoDI 1332.18.

GLOSSARY

G.1. ACRONYMS.

ACRONYM	MEANING
ASD(M&RA)	Assistant Secretary of Defense for Manpower and Reserve Affairs
DES	Disability Evaluation System
DoDI	DoD instruction
IMR	individual medical readiness
PHA	periodic health assessment
RC	Reserve Component
UCMJ	Uniformed Code of Military Justice
U.S.C.	United States Code
USD(P&R)	Under Secretary of Defense for Personnel and Readiness.

G.2. DEFINITIONS.

Unless otherwise noted, these terms and their definitions are for the purpose of this issuance.

TERM	DEFINITION
active duty	Defined in the DoD Dictionary of Military and Associated Terms.
active service	Defined in Section 101(d)(3) of Title 10, U.S.C.
active status	Defined in Section 101(d)(4) of Title 10, U.S.C.
combat wounded	Service members whose injuries were the result of hostile action, who meet the criteria for awarding of the Purple Heart, and whose injuries were not the result of their own misconduct.
deployable	A Service member who does not have a Service-determined reason that precludes him or her from deployment.

TERM	DEFINITION
deployment	The movement of personnel into and out of an operational area or in support of operations. Deployment encompasses all activities from origin or home station through destination, specifically including inter-theater, and intra-theater movement legs, staging, and holding areas.
Military Departments	The Departments of the Army, Navy, and Air Force.
Military Service Headquarters	Headquarters, United States Army; Headquarters, United States Navy; Headquarters, United States Air Force; and Headquarters, United States Marine Corps.
Military Services	The United States Army, the United States Navy, the United States Air Force, the United States Space Force, and the United States Marine Corps.
military specialty	A military occupational specialty in the Army and the Marine Corps; an Air Force specialty code in the Air Force; or a rating or Navy enlisted classification in the Navy.
non-deployable	A Service member who has a Service-determined reason that precludes him or her from deployment.
permanently non-deployable	A Service member who has a reason that precludes them from deployment, and there is a Service expectation that the reason will not be resolved and the Service member will never be deployable.
profile	A document used to communicate to commanders the individual medical restrictions for Soldiers and Airmen.
Ready Reserve	Defined in the DoD Dictionary of Military and Associated Terms.
reason code	The term used to define non-deployable categories.
separation	A general term that includes discharge, release from active duty, release from custody and control of the Military Services, transfer to the Individual Ready Reserve, and similar changes in Active and Reserve status.
temporarily non-deployable	A Service member who has a reason or reasons that precludes him or her from deployment, and there is a Service expectation that the reason or reasons will be resolved and the Service member will be deployable.

REFERENCES

DoD Directive 5124.02, "Under Secretary of Defense for Personnel and Readiness (USD(P&R))," June 23, 2008

DoD Instruction 1120.11, "Programming and Accounting for Active Component (AC) Military Manpower," March 17, 2015

DoD Instruction 1215.13, "Ready Reserve Member Participation Policy" May 5, 2015

DoD Instruction 1300.06, "Conscientious Objectors," July 12, 2017

DoD Instruction 1315.15, "Special Separation Policies for Survivorship," May 19, 2017

DoD Instruction 1332.14, "Enlisted Administrative Separations," January 27, 2014, as amended

DoD Instruction 1332.18, "Disability Evaluation System (DES)," August 5, 2014, as amended

DoD Instruction 1332.30, "Commissioned Officer Administrative Separations," May 11, 2018, as amended

DoD Instruction 1342.19, "Family Care Plans," May 7, 2010, as amended

DoD Instruction 6025.19, "Individual Medical Readiness (IMR)," June 9, 2014, as amended

DoD Instruction 6490.07. "Deployment-Limiting Medical Conditions for Service Members and DoD Civilian Employees" February 5, 2010

DoD Manual 8910.01, Volume 1, "DoD Information Collections Manual: Procedures for DoD Internal Information Collections," June 30, 2014, as amended

Office of the Chairman of the Joint Chiefs of Staff, "DoD Dictionary of Military and Associated Terms," current edition

The Child Soldier Prevention Act of 2007, 110th Congress, S.1175

United States Code, Title 10

United States Code, Title 18

Exhibit 5

AIR FORCE

DAF COVID-19 Statistics - March 22, 2022

Published March 22, 2022
Secretary of the Air Force Public Affairs

WASHINGTON (AFNS) -- Below are current **coronavirus disease 2019** statistics for Department of Air Force personnel:

March 22, 2022
Current as of 2 p.m., March 21, 2022

DAF TOTAL STATS*				
	CASES	**HOSPITALIZED**	**RECOVERED**	**DEATHS**
Military**	92,322	52	91,312	15
Civilian	20,452	27	20,231	107
Dependents	17,966	5	17,571	8
Contractors	5,534	10	5,469	31
Total	**136,274**	**94**	**134,583**	**161**

*These numbers include all of the cases that were reported since our last update on March 15.
**Military includes Active and Reserve components.

DAF TOTAL VACCINATED				
	ACTIVE DUTY	**GUARD**	**RESERVE**	**TOTAL FORCE**
% Partially Vaccinated	0.1%	0.2%	0.3%	0.2%
% Fully Vaccinated	98%	93.3%	93.3%	96.4%

DAF APPROVED EXEMPTIONS				
	ACTIVE DUTY	**GUARD**	**RESERVE**	**TOTAL FORCE**
Medical	522	371	236	1,129
Administrative	32	1,224	170	1,426

RELIGIOUS ACCOMMODATION REQUESTS		
	MAJCOM/FLDCOM	**DAF/APPEALS**
Pending	3,091	1,229
Approved	21	2

AIR FORCE

*Civilian statistics are unaccounted for.
**These numbers are subject to change.

Unvaccinated: All those who have verbally refused, have not started the vaccination process or are erroneously coded. Does not include those who have approved exemptions.

Medical: Medical exemptions are determined individually by the member's medical provider.

Administrative: Administrative exemptions are determined individually. For example, if a member obtained a commander-approved submission for separation or retirement by Nov. 1, they are administratively exempt.

Religious Accommodation: Religious accommodations are a subset of administrative exemptions and are determined by the MAJCOM/FLDCOM commanders. The DAF has 30 business days (active component in CONUS) to process requests. Appeals are determined by the DAF's Surgeon General with inputs from the chaplain and staff judge advocate. Individuals do not have to get immunized as long as their request is in the process of being decided.

Personnel Numbers (approximates):
326,000 Active Component (U.S. Air Force and U.S. Space Force)
107,000 Air National Guard
68,000 Air Force Reserve
501,000 Total Force (Active Duty, Air National Guard and Air Force Reserve)

March 15, 2022
Current as of 2 p.m., March 14, 2022

DAF TOTAL STATS*				
	CASES	**HOSPITALIZED**	**RECOVERED**	**DEATHS**
Military**	91,984	52	90,791	15
Civilian	20,425	27	20,156	107
Dependents	17,799	5	17,430	8
Contractors	5,530	10	5,459	31
Total	**135,738**	**94**	**133,836**	**161**

*These numbers include all of the cases that were reported since our last update on Mar. 8.
**Military includes Active and Reserve components.

DAF TOTAL VACCINATED				
	ACTIVE DUTY	**GUARD**	**RESERVE**	**TOTAL FORCE**
% Partially Vaccinated	0.1%	0.2%	0.3%	0.2%
% Fully Vaccinated	98%	93.2%	93.4%	96.4%

DAF APPROVED EXEMPTIONS				
	ACTIVE DUTY	**GUARD**	**RESERVE**	**TOTAL FORCE**

RELIGIOUS ACCOMMODATION REQUESTS		
	MAJCOM/FLDCOM	**DAF/APPEALS**
Pending	3,260	1,167
Approved	21	2
Disapproved	4,222	1,037

As of March 15, the Air Force has administratively separated 212 active duty Airmen.

*Civilian statistics are unaccounted for.
**These numbers are subject to change.

Unvaccinated: All those who have verbally refused, have not started the vaccination process or are erroneously coded. Does not include those who have approved exemptions.

Medical: Medical exemptions are determined individually by the member's medical provider.

Administrative: Administrative exemptions are determined individually. For example, if a member obtained a commander-approved submission for separation or retirement by Nov. 1, they are administratively exempt.

Religious Accommodation: Religious accommodations are a subset of administrative exemptions and are determined by the MAJCOM/FLDCOM commanders. The DAF has 30 business days (active component in CONUS) to process requests. Appeals are determined by the DAF's Surgeon General with inputs from the chaplain and staff judge advocate. Individuals do not have to get immunized as long as their request is in the process of being decided.

Personnel Numbers (approximates):

326,000 Active Component (U.S. Air Force and U.S. Space Force)
107,000 Air National Guard
68,000 Air Force Reserve
501,000 Total Force (Active Duty, Air National Guard and Air Force Reserve)

March 8, 2022
Current as of 2 p.m., March 7, 2022

DAF TOTAL STATS*				
	CASES	**HOSPITALIZED**	**RECOVERED**	**DEATHS**
Military**	91,582	54	89,772	15
Civilian	20,382	57	20,004	107
Dependents	17,683	5	17,209	8
Contractors	5,525	10	5,416	31
Total	**135,172**	**126**	**132,401**	**161**

*These numbers include all of the cases that were reported since our last update on Feb. 22.
**Military includes Active and Reserve components.

AIR FORCE

	ACTIVE DUTY	GUARD	RESERVE	TOTAL FORCE
% Partially Vaccinated	0.1%	0.2%	0.3%	0.2%
% Fully Vaccinated	97.9%	93.1%	93.2%	96.3%

DAF APPROVED EXEMPTIONS				
	ACTIVE DUTY	GUARD	RESERVE	TOTAL FORCE
Medical	568	385	249	1,202
Administrative	35	1,360	209	1,604

RELIGIOUS ACCOMMODATION REQUESTS		
	MAJCOM/FLDCOM	DAF/APPEALS
Pending	3,249	964
Approved	18	1
Disapproved	4,013	1,025

As of March 8, the Air Force has administratively separated 205 active duty Airmen.

*Civilian statistics are unaccounted for.
**These numbers are subject to change.

Unvaccinated: All those who have verbally refused, have not started the vaccination process or are erroneously coded. Does not include those who have approved exemptions.

Medical: Medical exemptions are determined individually by the member's medical provider.

Administrative: Administrative exemptions are determined individually. For example, if a member obtained a commander-approved submission for separation or retirement by Nov. 1, they are administratively exempt.

Religious Accommodation: Religious accommodations are a subset of administrative exemptions and are determined by the MAJCOM/FLDCOM commanders. The DAF has 30 business days (active component in CONUS) to process requests. Appeals are determined by the DAF's Surgeon General with inputs from the chaplain and staff judge advocate. Individuals do not have to get immunized as long as their request is in the process of being decided.

Personnel Numbers (approximates):

326,000 Active Component (U.S. Air Force and U.S. Space Force)
107,000 Air National Guard
68,000 Air Force Reserve
501,000 Total Force (Active Duty, Air National Guard and Air Force Reserve)

FEATURED NEWS

AIR FORCE

CMSAF speaks with Airmen during visit to Hill AFB

Tyndall AFB's Hololab debuts virtual gateway to Installation of the Future

Kendall provides Logistics Officer Association keynote, underscores importance of logistics in executing 'Seven Operational Imperatives'

Readout of Air Force Chief of Staff Gen. CQ Brown, Jr.'s travel to Switzerland

SNCO Academy's enhanced curriculum development takes center stage during CSAF inaugural visit

Tyndall AFB's Hololab debuts virtual gateway to Installation of the Future

Ideas wanted for 2022 AFIMSC Innovation Rodeo; at least $1M up for grabs

Empowered Airmen from 109th AW modernize LC-130 for future fight

'Project Arcwater' reigns as 2022 Spark Tank winner

Air Force Operational Energy has breakthrough year

Empowered Airmen from 109th AW modernize LC-130 for future fight

Ho'oikaika strengthens total force integration

Malmstrom AFB Women's Symposium: Empowered women empower women

Cotton talks strategic deterrence at 2022 AFA Warfare Symposium

AFSOC hosts 2022 LEAD Symposium

Exhibit 6

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

NAVY SEAL #1, *et al.* Plaintiffs, v. **JOSEPH R. BIDEN**, in his official capacity as President of the United States, *et al.* Defendants.	Case No. 8:21-cv-02429-SDM-TGW

DECLARATION OF REAR ADMIRAL GAYLE D. SHAFFER

I, Rear Admiral Gayle D. Shaffer, U.S. Navy, hereby state and declare as follows:

1. I am the Deputy Surgeon General and Deputy Chief, U.S. Navy Bureau of Medicine and Surgery, and I am currently stationed in Falls Church, Virginia. I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I began serving as the Navy Deputy Surgeon General and Deputy Chief, U.S. Navy Bureau of Medicine and Surgery February 28, 2020. In that capacity, I am one of four Flag Officers authorized to grant permanent medical exemptions to members of the Navy and Navy Reserve. In addition, I am thoroughly familiar with both the temporary and permanent medical exemption processes, the procedures under which these exemptions are evaluated and adjudicated, and the numbers of exemptions granted.

3. Medical exemptions to vaccination, including vaccination to COVID-19, are available when a documented medical contraindication to the COVID-19 vaccine exists.

Regulations and procedures are found in BUMEDINST 6230.15B, "Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases," dated October 7, 2013; BUMEDNOTE 6300, Navy Coronavirus Disease 2019 Vaccine Medical Temporary, and Medical Permanent Exemption for Medical Contraindication Approval Process, dated September 3, 2021; and BUMED NOTICE 6150 (Corrected Version), Guidance for Coronavirus Disease 2019 Vaccination Deferral Status Reporting, dated September 22, 2021.

4. As discussed further below, the vast majority of medical exemptions are temporary in nature (i.e., limited to a maximum period of 30 days). Only 11 permanent medical exemptions from COVID-19 vaccines have been granted in the Navy and Navy Reserve as of this date.

5. Medical exemption decisions are made on an individualized basis, and only after a clinical evaluation of potential risk factors applicable to the patient concerned. Health care providers are responsible for "determin[ing] a medical exemption based on the health of the vaccine candidate and the nature of the immunization under consideration."[1] Health care across the Navy is based upon individual provider encounters with each Sailor as a patient, with the provider assessing the member's medical history, and considering all relevant aspects of that patient's unique medical circumstances and needs. Decisions concerning vaccination, to include the medical necessity to issue an exemption, temporary or permanent, are no exception to this rule and are tailored to the individual patient. Individual medical providers may give a temporary medical exemption from a particular vaccination, to include the COVID-19 vaccination, on a clinical discretionary basis.

[1] BUMEDINST 6230.15B, para. 2-6a.

6. The vast majority of medical exemptions granted with respect to COVID-19 are temporary in nature. Temporary medical exemptions are in effect for only 30 days, but subject to renewal by a medical provider in 30-day increments. They are based on the medical conditions and history of the patient at the time of evaluation, and circumstances under which a temporary exemption could be granted are wide-ranging. Common categories of temporary medical exemptions include 1) individuals undergoing workup for Medical Contraindication to vaccination; 2) confirmed COVID-19 cases awaiting recovery; 3) or pregnancy or other temporary medical contraindication as determined by a medical provider.[2] Although it is not possible to analyze all temporary medical exemptions without reviewing all of the individual patients' medical records, some data about temporary medical exemptions—also called deferrals—was gleaned from the Navy's Medical Readiness Reporting System (MRRS) and is in the chart below.[3] The chart reflects that nearly 70% of the temporary medical exemptions granted by the Navy for active duty Sailors were related to pregnancy or current or recent infection with COVID-19 or another acute illness.

Branch Service	Medical Temporary (MT) Deferrals*	Pregnancy Related	COVID or Acute Illness	Total Accounted	Percent MT
USN	176	85	38	123	69.89%
USNR	89	17	4	21	23.60%
USMC	186	104	41	145	77.96%
MCR	31	8	4	12	38.71%
Total	**482**	**214**	**87**	**301**	**62.45%**

[2] BUMEDNOTE 6150 dated 22 September 2021 paragraph 5.b.(5).

[3] Although the Navy and the Marine Corps both report medical readiness through MRRS, the two services have separate programs for granting temporary and medical exemptions from vaccination. Aside from the data presented in this chart, this declaration is limited to medical exemptions for members of the Navy and Navy Reserve only.

7. Some temporary medical exemptions have a more predictable time period than others. A primary example is pregnancy, which may result in a temporary medical exemption for any number of medical reasons, including contraindications based on the patient's current health or medical complications that have arisen as a result of the pregnancy. It is important to note, however, that a temporary medical exemption for vaccines due to pregnancy would not cover all vaccines; rather it is specific to a particular vaccine considering the patient's medical condition and history. Some vaccines, including the COVID-19 vaccine, are strongly recommended during pregnancy by the American College of Obstetrics and Gynecology. Nonetheless, if a temporary medical exemption is given based on pregnancy, there is a predictable end point when the medical exemption will expire and the member will be required to receive the vaccine.

8. Another example is current or recent infection with COVID-19. In accordance with Centers for Disease Control and Prevention (CDC) guidance, the Navy has granted temporary medical exemptions for individuals who are currently infected or were recently infected with COVID-19. Current CDC guidance is to wait until acute symptoms from SARS-CoV-2 infection have passed and criteria for isolation have been met before receiving a first or second dose of COVID-19 vaccine.[4] However, once the requisite time has passed after infection, the temporary medical exemption will expire and the Sailor will be required to get the COVID-19 vaccine.

[4] https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html. "For people who previously received passive antibody therapy as part of COVID-19 treatment, defer vaccination for at least 90 days after receipt of passive antibody therapy (monoclonal antibodies or convalescent plasma)." https://www.cdc.gov/vaccines/covid-19/hcp/faq.html

9. Regardless of the underlying reason for the temporary exemption, the facts remain that these exemptions are temporary in nature and limited in time. Upon expiration of the exemption, the member will be required to receive the vaccine in order to come into compliance with military medical readiness standards.

10. A total of 11 permanent medical exemptions have been approved in the Navy as of February 4, 2022. Ten of the 11 members received an initial dose of the COVID-19 vaccine and experienced a serious and documented medical reaction to the first dose with recommendations to avoid further COVID-19 vaccination. The eleventh member had medical conditions that precluded vaccination due to family history of vaccine reaction and severe cardiac disease, with a recommendation for medical board separation processing due to these underlying conditions. In all 11 cases, the decision was in alignment with CDC guidelines for vaccine exemption and retention medical standards per Department of Defense Instruction 6130.03 Volume 2. The decision authority determined that the potential health risk of vaccination to the Sailor outweighed the benefit of the vaccine. Navy Medicine will continue to review these cases as new tests, treatments, and vaccines are developed, with the potential to adjust or rescind permanent medical exemptions where appropriate and restore Sailors to full military medical readiness.

11. Navy Medicine's focus includes ensuring the warfighter is medically ready. A fundamental responsibility in ensuring medically ready Sailors is not to harm them by administering a vaccine in the rare situation in which it is medically contraindicated. But Navy Medicine's responsibility does not end there. We harness our personnel, equipment, infrastructure, and analytical capabilities to produce medically ready forces. Producing medically

ready forces includes treating Sailors in order to restore their full military medical readiness when possible.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of February, 2022.

G. D. SHAFFER
Rear Admiral, U.S. Navy