IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO – Western Division at Cincinnati

HUNTER DOSTER, et. al.	:	**Case No.: 1:22-cv-00084**
On behalf of themselves and others similarly situated	:	
	:	
Plaintiffs	:	
v.	:	
Hon. FRANK KENDALL, et. al.	:	
Defendants		

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION FOR CLASS CERTIFICATION

INTRODUCTION

Since September 2021, the Department of the Air Force (the "Air Force," which includes both the Air and Space Force) denied thousands of religious accommodations to its vaccine mandate through a system that is, at best, nothing more than theatrical performance. The Air Force's Religious Accommodation Process (the "Process") is discriminatory from the beginning, and the 17 named Plaintiffs are only a small sample of victims of the Air Force's ongoing systemic denial of those who seek accommodation under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4 ("RFRA"), and the First Amendment.

Defendants would have the Court believe that class certification is not appropriate in this case. However, when one steps back and looks at this from a bird's eye view, the same rampant discrimination is occurring against all Air Force personnel who have requested a religious accommodation from receiving the COVID-19 vaccine. Although each member may have a different religious basis for their request, or may work in a different job or position, the Process

fails to account for any of these differences when making determinations about religious accommodation to the mandate. How can it when the Process' final decision authority himself determined from the beginning, ". . . that there are no lesser restrictive means than vaccination of these individual service members to further the military's compelling interests in readiness and ensuring the health and safety of all service members."[1] Taking Defendants at their word, not just Plaintiffs, but all potential class members were set up for a denial from the very start of the Process. This is in sharp contradiction to Defendants' stated "case-by-case basis"[2] review they want the Court to believe they have engaged in. A review that is belied by their admitted 99% religious accommodation denial rate. For these and the reasons set forth below, Plaintiffs seek an injunctive relief class, pursuant to FRCP 23(a) and (b)(1) and (2).

We have attached, to this Reply, the Declaration of Lt. Doster, who explains the fact that he is a member of several Telegram groups of thousands of Air and Space Force Members who have sought religious accommodations to the Department of the Air Force's ("DAF") vaccine mandate. [Third Dec. Doster at ¶ 3]. These individuals have shared paperwork with each other, and discerned a pattern concerning the DAF's processing of religious accommodation requests. *Id.* Through these groups, he has been able to determine that the Defendants: (i) use the same general process regarding how they process religious accommodation requests across commands, and across the active-duty and reserve force; (ii) utilize the same regulations in how they process religious accommodation requests; (iii) utilize the same criteria in how they process religious accommodation requests; (iv) use the same form denials, at both the MAJCOM and Surgeon General levels; (v) systemically deny each and every religious accommodation request unless

[1] Defendants' Opposition to Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction, Doc # 25.
[2] Doc 34 Page 7.

someone is at the end of their term of service and qualify for an administrative exemption. *Id.* at ¶4. A religious accommodation request will be denied with the exception of those who are at the end of their term of service and qualify for an administrative exemption. *Id.* at ¶5. He knows that, in no small part, because to date, at least insofar as the thousands of people who are part of the Telegram groups that Lt. Doster is part of, all such religious accommodation requests have been denied, with the exception of those who are at the end of their term of service and qualify for an administrative exemption, regardless of (i) Air Force or Space Force job duties; (ii) level of person-to-person interaction in duties; (iii) time in service; (iv) base; (v) future assignments; (vi) whether or not they are likely to deploy; or (vii) any other individual factor (with the exception of those who are at the end of their term of service and qualify for an administrative exemption). *Id.* That is so, even though the Defendants grant a number of medical and administrative exemptions to similarly situated individuals, employing a different standard (again, Lt. Doster perform duties with pregnant women who have identical assignments who have been granted a medical exemption, while he was denied one). *Id.* at ¶6. The standard the Government has employed is whether duties can be performed "100% remotely," and, since not one Air Force active duty or reserve duty can be performed "100% remotely," all requests have been denied. *Id.* at ¶7.

As he further confirms, Air Force leaders have indicated that they individually consider the requests and he agrees that they do: they do consider each request, namely to look at each person's job duties and interactions to fill in their form denial letters, which are otherwise identical, minus this information. *Id.* at ¶8. Every person that he has spoken to, and every piece of paperwork he has observed, both within the 18 person named Plaintiff group, the approximately 40-person group at Wright Patterson Air Force base, and the larger 2,500-person group who has interacted with us on Telegram, all of whom have documented sincerely held religious beliefs, have been treated in

an identical and common way by the Air Force (the only difference being where they are in terms of the back log of the processing of denials). *Id.* at ¶9. All 18 of the named Plaintiffs are typical of the treatment of other members of the Air and Space Force, both in the treatment of the Plaintiffs, the systemic denial of exemption requests, and in the potential claims everyone has. *Id.*

Because we cite to it extensively, we have attached an order issued in *U.S. Navy Seals 1-26 v. Austin*, 4:21-cv-01236 (NDTX 2022), DE#140 (the "*Navy Class Order*"), certifying a class similar to the one sought here involving the Navy, on a largely identical fact pattern.

REVISED CLASS DEFINITION

Plaintiffs seek a class of: "All active-duty, and active reserve members of the United States Air Force and Space Force who: (i) submitted a religious accommodation request to the Air Force from the Air Force's COVID-19 vaccination requirement, where the request was submitted or was pending, from September 1, 2021 to the present; (ii) were confirmed as having had a sincerely held religious belief by or through Air Force Chaplains; and (iii) either had their requested accommodation denied or have not had action on that request." To the extent the Court believes the definition is in any way inadequate, and as the Court explained in the *Navy Class Order*, the Court can revise it as it sees fit. *Powers v. Hamilton County Pub. Defender Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007) ("district courts have broad discretion to modify class definitions").

ARGUMENT

I. The Proposed Class Satisfies the Requirement of 23(a).

Defendants argue that Plaintiffs fail to meet the required showings of commonality, typicality, and adequacy under Rule 23(a).[3] That argument fails for numerous reasons, as discussed below.

[3] Defendants do not contest that Plaintiffs have satisfied numerosity under Rule 23(a).

A. Commonality: The Proposed Class Has Common Questions of Fact and Law.

There is one primary question in this case capable of classwide resolution that is "central to the validity of each class member's claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Did Defendants violate RFRA and the First Amendment in their processing of thousands of requests for religious accommodation while simultaneously approving thousands of medical and administrative requests for accommodation? Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Although the Rule "speaks of 'questions' in the plural," the Sixth Circuit has held that "one question common to the class" satisfies this requirement. *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998). Commonality also does not require "the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Zehentbauer Family Land, LP*, 935 F.3d 496, 503 (6th Cir. 2019) (*quoting Wal-Mart*, 564 U.S. at 350). Defendants' response fails to mention or address any of Plaintiffs' common questions, but instead presents arguments regarding the merits of Plaintiffs' claims. Defendants focus on the *answers* to many of the common questions presented by Plaintiffs rather than whether these *questions* satisfy commonality under Federal Rule of Civil procedure 23(a).

Commonality may also be demonstrated by showing that the defendants "operated under a general policy of discrimination." *Wal-Mart*, 564 at 353 (*quoting Gen. Tele. Co. of Sw. v. Falcon*, 347 U.S. 147, 159 n.15 (1982)). That is exactly what Plaintiffs have alleged here, and what the Fifth Circuit recognized. *U.S. Navy Seals 1-26 v. Biden*, 2022 U.S. App. LEXIS 5262, --- F.4th --- (5th Cir. 2022). Common questions that apply to all class members involve whether the Department of the Air Force inappropriately discriminated against religious belief when, in compelling vaccination despite those well-found beliefs, refused to accommodate those beliefs,

but only granted exemptions for secular reasons instead? Defendants do not and cannot dispute that these are common ***questions*** capable of resolution on a class wide basis.

Defendants argue that resolving RFRA claims requires an individualized analysis of each class member's claim. Although true, it misses the point. Whether Defendants actually engage in an individualized analysis of each class member's claim is the common question of fact. Not surprisingly, Defendants submit that they do so, allegedly using a ". . . 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); Doc 34, page 12, all of which results in a not-very-individualized 99% denial rate. (Third Dec. Doster at ¶¶ 4-9). While Defendants consider their merely plugging particular members' job duties into form denial letters a "case-by-case" effort on their part, Plaintiffs submit the outcome of the Process and the systemic denials of religious accommodation requests, while routinely granting administrative and medical exemptions, speaks for itself as far as the method actually employed.

As noted, a review of the initial denial letters from each command confirms this conclusion as the similarities per command are striking.[4] At most, the same couple of lines in each letter are altered for the purpose of giving the appearance that Defendants reviewed each case separately before deciding the religious accommodation request. And, as it pertains to the final appellate authority decision letters signed by the Air Force Surgeon General, those denials letters are also nothing more than a template where a few lines are added in on every appeal denial Defendants received.[5] As the Supreme Court held in *Wal-Mart*, what matters for purposes of class certification is presenting common questions that will drive the resolution of the claims on a classwide basis,

[4] Exhibit 3 – Six Initial Denial Letters with highlighting on text that is different in terms of denials from each command.
[5] Exhibit 4 – Final appeal denial letters for four Plaintiffs.

not whether Plaintiffs will actually win on the merits of those claims. Do Defendants have classwide policies or practices of across-the-board denial of all religious accommodation requests, except those that otherwise qualify for an administrative accommodation, while granting thousands of administrative and medical exemptions? The proof of such policies or practices (or lack thereof) is a merits question to be determined after the proposed class is certified. Plaintiffs satisfy Rule 23(a) because they alleged a common policy or practice of denying all religious accommodation requests, while granting thousands of medical and administrative exemptions, and these facts present numerous common questions that will drive the resolution of the claims on a classwide basis.

In fact, by focusing their commonality arguments on the answers to these common questions, Defendants essentially concede there are such common questions as to all class members as Rule 23(a) requires. Further, Plaintiffs have established that Defendants "operated under a general policy of discrimination" that would apply to the entire class. *Wal-Mart*, 564 U.S. at 353. Defendants only approved 0.47% of the 4,641 requests adjudicated at the MAJCOM/FLDCOM level, submitted for their "highly individualized" consideration,[6] and on appeal granted an appeal in in 0.2% of the 1,505 appeals adjudicated, all of which they have already admitted were only for those who qualified for an administrative exemption. The reality is that their Process actually is premised on templated denial memoranda showing that each Plaintiff is treated, and will be treated, similar to all others in a class. With this, Plaintiffs have established a "common contention" for the class and have therefore established commonality pursuant to Rule 23(a)(2). *Wal-Mart*, 564 U.S. at 350.

[6] *Secretary of the Air Force Public Affairs, DAF COVID-19 Statistics*-March 29, 2022 (March 28, 2022, 1728 PM), https://www.af.mil/News/Article-Display/Article/2959594/daf-covid-19-statistics-march-29-2022/ .

Here, "Plaintiffs' claims share a common legal question central to the validity of each of the putative class member's claims: [whether Defendants violated RFRA and the First Amendment by denying their religious accommodation request while simultaneously granting thousands of medical and administrative exemptions?" *Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452, 459 (6th Cir. 2020). That common legal question is sufficient to establish commonality. *Id.*

In *Navy Class Order*, the Northern District of Texas found that the plaintiffs met the commonality requirement because "Common questions that apply to all class members involve whether the Navy inappropriately discriminated against religious belief in compelling vaccination despite those beliefs, refusing to accommodate those beliefs, and granting exemptions for secular but not religious reasons. By addressing these questions, Plaintiffs argue, the 'class-wide proceeding [will] generate common answers apt to drive the resolution of the litigation.'" *Id.* at p. 8 (*citing Wal–Mart*, 564 U.S. at 350).

Further, rejecting the Government's arguments about case-by-case inquiries requiring that a class not be certified, the District Court observed:

> Here, the potential class members have suffered the "same injury," arising from violations of their constitutional rights. Each has submitted a religious accommodation request, and each has had his request denied, delayed, or dismissed on appeal. Exactly zero requests have been granted. And while Defendants encourage this Court to disregard the data, it is hard to imagine a more consistent display of discrimination. As previously explained in this Court's preliminary injunction order, Plaintiffs have suffered the serious injury of infringement of their religious liberty rights under RFRA and the First Amendment. *Id.* at 10.

The same is true in the Air and Space Forces. Thus, "Plaintiffs' claims are also capable of class-wide resolution. A finding in favor of the named Plaintiffs on their RFRA and First Amendment claims also resolves the RFRA and First Amendment claims of the class." *Id.* "The

bottom-line question under commonality and typicality is whether the relief the named plaintiffs seek from the Court will resolve all class members' legal claims." *Id.*

B. Typicality: The class members' claims are typical of the claims of all class members.

Federal Rule of Civil Procedure 23(a)(3) requires plaintiffs to demonstrate that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "Typicality is met if the class members' claims are 'fairly encompassed by the named plaintiffs' claims.'" *Hendricks v. Total Quality Logistics, LLC*, No. 1:10-cv-649, 2019 U.S. Dist. LEXIS 96940, 2019 WL 2387206, at *7 (S.D. Ohio Mar. 22, 2019) (*quoting Sprague*, 133 F.3d at 399). The purpose of the requirement is to ensure that the representatives' interests and the interests of the class members are aligned. *Id.* "Many courts have found typicality if the claims or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory." *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 509 (6th Cir. 2015) (*quoting* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 7A Federal Practice and Procedure § 1764 (3d ed. 2005)). Further, the "typicality standard is closely related to the test for [commonality]." *Id.* Indeed, the receipt of form letters that form the basis of a complaint has been held to establish typicality, and, here, the denial letters are, indeed, form letters. *Macy v. GC Servs. L.P.*, 897 F.3d 747, 762 (6th Cir. 2018).

Defendants argue that Plaintiffs have not satisfied typicality because there are ". . . differences in occupational duties, deployment tempo, and work environment . . .", ". . . service members with a broad variety of religious beliefs . . . different reasons for objecting to the COVID-19 vaccine." and ". . . service members in varying stages of exhaustion of their intra-military administrative remedies." Doc 34, page 14, 15 and 17. This argument fails for the same reasons Defendants' commonality arguments fail. Plaintiffs' claims do not require an individualized

assessment where Defendants' policies and practices result in across-the-board violations of all class members' rights.

The processing of Lt. Doster's packet is a typical example of Defendants' routine and systemic denials, where any level of individualized assessment would have compelled the opposite conclusion. The Government made a filing, at DE#36, that partially revealed the futility of the Process. First, the base religious resolution team met, DE#36-3, PageID#2411-2412, and the Chaplain actually dissents from the refusal to grant an accommodation by asking: "*There has to be a way for this member to serve their country honorably and hold onto their sincerely held religious beliefs.*" Then, Lt. Colonel Salvatore's recommendation, admission actually, at DE#36-3, and which starts at PageID#2417, gives the game away. He admits that Doster actually can telework, and that there are no issues accommodating Doster's belief today. However, at some point in time in the future Lt. Doster ***may*** need to be vaccinated, so Salvatore recommended a denial of the request today (even though the accommodation request Lt. Doster asks for is a temporary one). Among other things, Salvatore points to the SECAF memo, issued to all commanders in the Air and Space Force, that the SECAF's expectation is that everyone must be vaccinated, and he interpreted it the way Plaintiffs interpret it: everyone will be vaccinated regardless of their sincerely held religious beliefs and regardless of whether they temporarily can be accommodated (except, as the evidence shows, those with medical and administrative exemptions). *Id.*

Colonel Harmer, PageID#2419, makes similar admissions: Lt. Doster is not deployable, his career field rarely deploys, only 1% of billets are overseas, and he can be accommodated now, but who knows what the future will bring, so Defendants should deny his accommodation request

now. Apparently, Colonel Harmer also got the SECAF memo and expected 100% vaccination (except, again, as the evidence shows, for those with medical and administrative exemptions).

And so, Lt. Doster's request went to General Webb and his staff. And we see an Air Force Personnel Center "Case Management System" form and process that starts at PageID#2476-2479, which suggests a tilt towards denial. On February 4, 2022, on PageID#2478-2479, where Colonel Christine Jones asks the questions: what will Doster's duties at the Air Force Research lab be? Can he telework? What sorts of interactions will he have with others? Can we really defend this decision? And then, apparently, her counterpart at the Pentagon, Colonel Elizabeth Beal, at PageID#2479, asks the same questions. And while we never see what those answers are in the record, we do see Major Hines' input on February 10, where he, states that Doster "cannot perform 100% of duties teleworking or in isolation from the unit." PageID#2480.

Without question, Lt. Doster has duties that do not involve regular person-to-person contact, and instead involve laboratory engineering work, and yet his request was denied. And so were all the other requests. In fact, the Government admitted on the record a few weeks ago, that *not one single religious exemption* has been granted without being eligible for an administrative exemption. [Dec. Wiest, attached as Exhibit 2, with transcript of hearing in *Poffenbarger v. Kendall* attached at DE#30-2]. That demonstrates typicality.

And, again, *Navy Class Order* addressed and rejected the same arguments on typicality that Defendants make here. On typicality, the Court observed:

> The Named Plaintiffs seek relief on RFRA and First Amendment grounds. These are "the precise claim[s] that the Named Plaintiffs seek to litigate on behalf of other members of the Navy Class, the [NSW/SO] Subclass and the Navy SEALs Subclass." Pls.' Class Cert. Br. 14, ECF No. 90. Thus, the Named Plaintiffs' claims are typical of—in fact, identical to—those of the entire class. The factual circumstances need not be identical for each of the class members; some variation among members is permissible.

> …
>
> Defendants suggest that the class members' different roles, job duties, and locations are "essential for determining the elements of [each] individual's RFRA claim." Defs.' Class Cert. Resp. 19, ECF No. 120. But in the Navy's own analysis, such distinctions make no difference.

The same is true for the Air Force. An engineer with no deployment potential, and limited contact, like Lt. Doster, has his exemption denied in the same way that aircrew members like SSgt Schuldes and Lt. Colonel Stapanon do. These religious accommodations are all denied. And the Government has admitted that they all will be denied unless the particular person qualifies for an administrative exemption because they are about to separate. [Dec. Wiest, attached as Exhibit 2, with transcript of hearing in *Poffenbarger v. Kendall* attached at DE#30-2]. As in *Navy Class Order*, "All members of the class have unsuccessfully requested religious accommodation." *Id.* at 13. Plaintiffs' claims are therefore typical of the claims of all other class members.

C. Adequacy of Representation: The named Plaintiffs will fairly and adequately represent and protect the interests of the Class.

The adequacy of representation requirement of Rule 23(a)(4) ensures that "the representative parties will fairly and adequately protect the interests of the class." This requirement has two components: (1) the representatives must have common interests with the unnamed class members, and (2) it must appear that the representatives will vigorously prosecute the class action through qualified counsel. *See Rikos v. Proctor & Gamble*, No. 1:11-cv-225, 2018 U.S. Dist. LEXIS 72722, 2018 WL 2009681, at *5 (S.D. Ohio Apr. 30, 2018) (*citing Senter v. Gen. Motors Corp.*, 532 F.2d 511, 524-25 (6th Cir. 1976)).[7] "[The] requirements [of commonality

[7] Because the Government picked off SSgt Theriault, and obtained a resolution of this matter with respect to him, we seek to exclude SSgt Theriault as a class Plaintiff. *See, e.g. Wilson v.*

and typicality] ... tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *Falcon*, 457 U.S. at 158 n.13.

The named Plaintiffs are clearly adequate representatives and satisfy the first prong of the adequacy requirement. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 626 (6th Cir. 2007) ("Class representatives are adequate when it appears that they will vigorously prosecute the interest of the class through qualified counsel . . . which usually will be the case if the representatives are part of the class and possess the same interest and suffer the same injury as the class members"). Defendants argue that there are conflicts between Plaintiffs and members of the proposed class because there are cases pending in other federal courts challenging the same or similar military vaccine requirements.

"A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 543 (6th Cir. 2012); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997). In such a situation, "there is every reason to believe that [the plaintiff] will vigorously prosecute the interests of the class." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 563 (6th Cir. 2007). The Sixth Circuit has cautioned, however, that "because few people are ever identically situated, it is easy to paint an image of the class representative's interests as peripherally antagonistic to the class. That depiction does not make the plaintiff an inadequate representative." *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 429 (6th Cir. 2012).

Gordon, 822 F.3d 934, 947-951 (6th Cir. 2016) (explaining the practice of picking off Plaintiffs in a class action matter).

The fact that plaintiffs in other cases are seeking relief from policies and practices that are similar to those being challenged here does not give rise to a conflict between Plaintiffs and any other proposed Class Member. In fact, the injunctive relief that Plaintiffs seek on behalf of the proposed class would be consistent with – and certainly not in conflict with – the relief being sought in other lawsuits challenging the same or similar policies and practices.

As the District Court in *Navy Class Order* held, "[s]imultaneous litigation in other courts does not present a conflict here. To the contrary, the injunctive relief that Plaintiffs seek will benefit all religiously opposed Navy servicemembers who are presently involved in other vaccine mandate litigation. Potential class members will not be harmed by class-wide relief. Likewise, Plaintiffs here will benefit from injunctive relief granted in other courts." *Id.* at p. 14-15.

The final prerequisite under Rule 23(a) guarantees that the class representative "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This inquiry is two-pronged: "1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *In re American Medical Sys.*, 75 F.3d 1069, 1083 (6th Cir. 1996); *Senter v. GMC*, 532 F.2d 511 (6th Cir. 1976).

Finally, Plaintiffs are represented by qualified counsel with extensive experience prosecuting class actions and religious freedom cases. (See Declaration Wiest). Accordingly, the second prong of the adequacy requirement is met. *See Stout v. J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000).

Defendants argue that there is a conflict because the undersigned counsel represent a Plaintiff, an Air Force reservist, in an almost identical action in *Poffenbarger v. Kendall*, SDOH 3:22-cv-00001. As a basis of support, they cite cases in which plaintiffs' counsel have sought to

litigate competing FRCP 23(b)(3) class actions, seeking recovery in conflicting actions against a common pool of money. But, again, this case involves a class action seeking not money damages, but declaratory and injunctive relief. And, as it turns out, the injunctive relief Lt. Poffenbarger seeks to enjoin – additional punitive measures against him and to be made whole – is the same injunctive relief these Plaintiffs seek: to enjoin additional punitive measures against them and the class, and to be made whole.

Further, rather than being a conflict, as the District Court in *Navy Class Order* held, "[s]imultaneous litigation in other courts does not present a conflict here. To the contrary, the injunctive relief that Plaintiffs seek will benefit all religiously opposed Navy servicemembers who are presently involved in other vaccine mandate litigation. Potential class members will not be harmed by class-wide relief. Likewise, Plaintiffs here will benefit from injunctive relief granted in other courts." *Id.* at p. 14-15. The representation of Lt. Poffenbarger brought to light, and placed on the record, the admission by the Government that the few religious exemptions that the Department of the Air Force had granted were shams, in that those individuals had otherwise qualified for administrative exemptions, aiding Plaintiffs in this case (and, frankly, aided counsel in other cases, as the undersigned Counsel has been requested to provide and has provided that transcript to no less than four other law firms that requested it as they are pursuing similar claims). That is not a conflict.

"'Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement.'" *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th Cir. 2015) (*quoting* 1 William B. Rubenstein et al., Newberg on Class Actions § 3.58 (5th ed. 2011)); *see Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-27, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

Absent any actual conflict (and here there is none), the existence of other lawsuits, even against the same defendant, is of no moment, particularly where, as is the case here, it involves a case that does not involve competing claims against a fixed pot of money. *Abdeljalil v. GE Capital Corp.*, 306 F.R.D. 303, 310 (SD Cal. 2015). "Minor conflicts among class members do not defeat certification*[.]" In re Motor Fuel Temperature Sales Practices Litig.*, 292 F.R.D. 652, 671 (D. Kan. 2013), *citing E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977) (further citations omitted)). Only a "fundamental conflict" about the specific issues in controversy will prevent a named plaintiff from representing the interests of the class adequately. *Id.* A fundamental conflict exists where some class members claim an injury resulting from conduct that benefited other class members. *Id.*

II. The Class Satisfies the Requirements of Rule 23(b)(2).

In addition to satisfying the threshold requirements of Rule 23(a), the Class also satisfies the requirements of Rule 23(b)(2),[8] which requires 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." The Supreme Court has held that this requirement is satisfied "when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart*, 564 U.S. at 360; *see also id.* at 361-62 ("[T]he relief sought must perforce affect the entire class at once. . . ."). This is exactly on point with what the named Plaintiffs here are requesting: declaratory and injunctive relief that protects the religious rights of each class member under the First Amendment and RFRA. Defendants' arguments under Rule 23(b) are nothing more than a baseless attempt to defend their claims that the Air Force conducts their "case-by-case" reviews for the purpose of adjudicating Name

[8] Defendants do not contest that Plaintiffs have satisfied certification of the class under 23(b)(1).

Plaintiffs religious exemption requests, despite the evidence. Ex. 1 ¶ 4 (Decl. of Major General Sharon R. Bannister); Doc 34, page 12.

But more to the point, this argument has also been addressed in *Navy Class Order*, and there, as here, the District Court observed:

> The Named Plaintiffs and potential class members have all been harmed in essentially the same way. Each is subject to the Navy's COVID-19 vaccine mandates. Each has submitted her religious accommodation request, and none has received accommodation. Without relief, each servicemember faces the threat of discharge and the consequences that accompany it. Even though their personal circumstances may factually differ in small ways, the threat is the same—get the jab or lose your job. *Id.* at 17.

The same is true here. Further, "because potential class members may receive relief from a single injunction, the claim is appropriate for class-wide resolution under Rule 23(b)(2)." *Id.*

III. Rule 23(g)

Under Rule 23(g), "a court that certifies a class must appoint class counsel." Fed. R. Civ. P. 23(g)(1). In doing so, "the court must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) resources that counsel will commit to representing the class." Defendants do not oppose Plaintiffs' request to appoint class counsel. Plaintiffs' counsel has experience litigating complex matters and has expertise in First Amendment and RFRA litigation. Plaintiffs' counsel has identified and investigated all claims and have committed sufficient resources to this action.

IV. A Preliminary Injunction should extend to the class

As in *Navy Class Order*, this Court should reject the Government's arguments about exhaustion (both because it does not apply to RFRA, and because the futility exception applies).

Id. at 22. Further, on the merits of the preliminary injunction, the issues of fact and law involving the preliminary injunction of the class are identical to those of the named Plaintiffs, which have been thoroughly briefed by Plaintiffs [DE#13, DE#30], and the Government [DE#25]. Those arguments are incorporated herein. As in *Navy Class Order*, a preliminary injunction should issue, enjoining Defendants from taking punitive measures against Plaintiffs or anyone in the class, to include any separation or disciplinary measures.

CONCLUSION

Plaintiffs therefore respectfully move this court to grant the motion and enter an order certifying the class and appointing Plaintiffs' counsel as class counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing upon all Counsel of record, by filing same with the Court via CM/ECF, this 30 day of March, 2022.

/s/ Christopher Wiest

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO – Western Division at Cincinnati

HUNTER DOSTER, et. al.	:	Case No. 1:22-CV-84
Plaintiffs	:	
v.	:	
FRANK KENDALL, et. al.	:	
Defendants	:	

THIRD DECLARATION OF HUNTER DOSTER

Pursuant to 28 U.S.C. §1746, the undersigned, Hunter Doster, makes the following declaration, under penalty of perjury under the laws of the United States of America, that the facts contained herein are true and correct to the best of my knowledge and belief and that such facts are made based on my personal knowledge:

1. My name is Hunter Doster, and I am a Plaintiff in the above captioned matter.
2. As I previously testified to at the hearing on March 25, 2022, the Defendants are systemically denying all religious accommodation requests to the vaccine mandate, with the exception of those who are at the end of their term of service and qualify for an administrative exemption. That is true for the 18 named Plaintiffs in this suit, and it is true more generally.
3. In addition to regularly communicating with the 18 named Plaintiffs via a Signal group, I am also a member of a group on GroupMe, with approximately 40 others who are stationed at Wright-Patterson Air Force Base. In addition, I am a member of three Telegram groups, which comprise approximately 2,500 people in one group, approximately 2,250 people in the second group, and approximately 900 people in the third group, who are members of the Air and Space Forces. In these groups, we have

had occasion to share our paperwork with each other, and, as a result, have been able to discern a pattern.

4. Through my participation in these groups, I have been able to determine that the Defendants: (i) use the same general process regarding how they process religious accommodation requests across commands, and across the active-duty and reserve force; (ii) utilize the same regulations in how they process religious accommodation requests; (iii) utilize the same criteria in how they process religious accommodation requests; (iv) use the same form denials, at both the MAJCOM and Surgeon General levels; (v) systemically deny each and every religious accommodation request unless someone is at the end of their term of service and qualify for an administrative exemption.

5. A religious accommodation request will be denied with the exception of those who are at the end of their term of service and qualify for an administrative exemption. I know that, in no small part, because to date, all of them have been denied, with the exception of those who are at the end of their term of service and qualify for an administrative exemption, regardless of (i) Air Force or Space Force job duties; (ii) level of person-to-person interaction in duties; (iii) time in service; (iv) base; (v) future assignments; (vi) whether or not they are likely to deploy; or (vii) any other individual factor (with the exception of those who are at the end of their term of service and qualify for an administrative exemption).

6. That is so, even though the Defendants grant a number of medical and administrative exemptions to similarly situated individuals, employing a different standard (again, I

perform duties with pregnant women who have identical assignments who have been granted an exemption, while I was denied one).

7. The standard the Government has employed is whether duties can be performed "100% remotely," and, since not one Air Force active duty or reserve duty can be performed "100% remotely," all requests have been denied.
8. I understand that Air Force leaders have indicated that they individually consider the requests. I agree that they do: they do consider each request, namely to look at each person's job duties and interactions to fill in their form denial letters, which are otherwise identical, minus this information.
9. Every person that I have spoken to, and every piece of paperwork I have observed, both within the 18 Plaintiff group, the approximately 40-person group at Wright Patterson Air Force base, and the larger 2,500-person group who has interacted with us on Telegram, all of whom have documented sincerely held religious beliefs, have been treated in an identical and common way by the Air Force (the only difference being where they are in terms of the back log of the processing of denials). All 18 of the Plaintiffs in our case are typical, both in our treatment, the systemic denial of exemption requests, and in the potential claims we have.
10. We (the 18 named Plaintiffs, except SSgt Theriault) are collectively prepared to litigate this matter to its conclusion, and we collectively understand duties to the class. We have retained counsel who are competent to handle this matter.
11. As an aside, collectively, each Plaintiff in this case, and in other cases, who seek to enjoin the Defendants and stop them from taking punitive actions against Air Force and Space Force Members have common, aligned interests.

Pursuant to 28 U.S.C. §1746, I declare under penalties of perjury under the laws of the United States of America that the foregoing Declaration is true and correct to the best of my knowledge and belief and that such facts are made based on my personal knowledge.

Executed on 3/29/2022

Hunter Doster

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. NAVY SEALs 1–26, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 4:21-cv-01236-O**
	§	
LLOYD J. AUSTIN, III, et al.,	§	
	§	
	§	
Defendants.	§	

ORDER ON MOTIONS FOR CLASS CERTIFICATION AND CLASS-WIDE PRELIMINARY INJUNCTION

Before the Court are Plaintiffs' Motion to Certify Class (ECF No. 89), filed January 25, 2022, and Plaintiffs' Motion for Class-Wide Preliminary Injunction (ECF No. 104), filed February 7, 2022.[1] Having considered the briefing, the Court concludes that Plaintiffs' Motion for Class Certification should be and is hereby **GRANTED** in part. The Court also **GRANTS** Plaintiffs' Motion for Class-Wide Preliminary Injunction, but immediately **STAYS** the injunction "insofar as it precludes the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions." *Austin v. U.S. Navy SEALs 1–26,* ___ S. Ct. ___, 2022 WL 882559 (March 25, 2022).

[1] The parties have filed the following briefing related to these two motions: Plaintiffs' Brief in Support of Class Certification (ECF No. 90), filed January 25; Defendants' Response (ECF No. 120), filed February 15; Defendants' Appendix (ECF No. 121), filed February 15; Plaintiffs' Reply (ECF No. 136), filed March 1; and Plaintiffs' Appendix (ECF No. 137), filed March 1; Plaintiffs' Brief in Support of Class-Wide Preliminary Injunction (ECF No. 105), filed February 7; Defendants' Response (ECF No. 129), filed February 23; Defendants' Appendix in Support (ECF No. 130), filed February 23; Plaintiffs' Reply (ECF No. 133), filed February 28; and Plaintiffs' Appendix in Support (ECF No. 134), filed February 28.

I. BACKGROUND

On January 3, 2022, the Court granted Plaintiffs' Motion for Preliminary Injunction, enjoining enforcement of the Navy's COVID-19 vaccination policies against the thirty-five Plaintiffs, who object to the vaccine on religious grounds. *See* ECF No. 66. Since then, Plaintiffs have alleged that Defendants are violating the injunction by preventing some Plaintiffs from attending training, receiving medical treatment, or returning to their job duties. *See* Mot. for Order to Show Cause, ECF No. 95. Defendants claim that Plaintiffs' allegations are meritless and feared outcomes are speculative. *See* Defs.' Resp. 6–12, ECF No. 110. On January 24, 2022, Defendants filed a Motion to Stay the injunction, asking the Court to allow Defendants to consider Plaintiffs' vaccination status when making assignment decisions, including those involving deployment and training. ECF No. 85. The Court denied Defendants' Motion on February 13, 2022. *See* ECF No. 116. Defendants appealed, and the Fifth Circuit likewise denied the Motion to Stay. *See U.S. Navy Seals 1–26 v. Biden*, 27 F.4th 336, 2022 WL 594375 (5th Cir. Feb. 28, 2022). On March 7, Defendants submitted an Application for Partial Stay to the Supreme Court. *See* Appl. for Partial Stay, No. 21A477. The Supreme Court granted the partial stay of the preliminary injunction, "insofar as it precludes the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions." *U.S. Navy SEALs 1–26*, ___ S. Ct. ___, 2022 WL 882559.

In the meantime, Plaintiffs decided to pursue a class action on behalf of 4,095 Navy servicemembers who have filed religious accommodation requests. Pls.' Class Cert. Br. 7, ECF No. 90; *see* Defs.' Ex. 4, App. 56, ECF No. 121. As of February 3, no requests had been granted, 3,728 had been denied, and 285 remained pending. Defs.' Ex. 4, App. 56, ECF No. 121. Servicemembers have appealed 1,222 denials. *Id.* The Navy has "fully resolved" eighty-one

appeals with final denials. *Id.* Meanwhile, the Navy has granted 263 permanent and temporary medical exemptions to the vaccine requirement. *Id.* SEALs 1–3 and EOD 1 ("Named Plaintiffs") filed this Motion to Certify Class (ECF No. 89) and Motion for Class-Wide Preliminary Injunction (ECF No. 104), both of which are now ripe for the Court's review.

II. LEGAL STANDARD

A. Class Certification

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citation omitted). The party seeking class certification "bear[s] the burden of proof to establish that the proposed class satisfies the requirements of Rule 23." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012). "The decision to certify is within the broad discretion of the court, but that discretion must be exercised within the framework of rule 23." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996) (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981)). A district court must "look beyond the pleadings to 'understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination'" of the certification issues. *Stukenberg*, 675 F.3d at 837 (internal quotation marks and citation omitted).

The Court also "has discretion to modify [a party's] proposed class and subclass to form workable class definitions." *Jones v. Realpage, Inc.*, No. 3:19-cv-2087, 2021 WL 852218 (N.D. Tex. 2021) (cleaned up) (citing *In re Monumental Life Ins.*, 365 F.3d 408, 414 & n.7 (5th Cir. 2004)). "This discretion extends to creating subclasses, as well as to modifying an approved class." William B. Rubenstein, *Newberg on Class Actions* § 7:27 (5th ed. 2021) (footnote omitted). The Fifth Circuit provides broad discretion to district courts, permitting them "to limit or modify class

definitions to provide the necessary precision." *Monumental Life Ins.*, 365 F.3d at 414 (citing *Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir. 1993) ("A court is not bound by the class definition proposed in the complaint and should not dismiss the action simply because the complaint seeks to define the class too broadly.")).

Federal Rule of Civil Procedure 23 governs whether a proposed class falls within this limited exception. "To obtain class certification, parties must satisfy Rule 23(a)'s four threshold requirements, as well as the requirements of Rule 23(b)(1), (2), or (3)." *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 523 (5th Cir. 2007). Rule 23(a)'s four threshold requirements are:

> (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.

Fed. R. Civ. P. 23(a). These four threshold conditions are "commonly known as 'numerosity, commonality, typicality, and adequacy of representation.'" *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 766 (5th Cir. 2020) (citations omitted). Additionally, the Fifth Circuit has articulated an "ascertainability" doctrine implicit in Rule 23. *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of Federal Rule of Civil Procedure 23."). "[T]o maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable." *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam).

A plaintiff seeking certification must also satisfy at least one of the grounds identified in Rule 23(b). Rule 23(b)(2) applies where the four threshold requirements are met and "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). This requirement is satisfied "when a single injunction or

declaratory judgment would provide relief to each member of the class." *Wal–Mart*, 564 U.S. at 360.

B. Preliminary Injunction

A preliminary injunction is an "extraordinary remedy" and will be granted only if the movants carry their burden on all four requirements. *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008). The Court may issue a preliminary injunction if the movants establish (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm; (3) that the balance of hardships weighs in the movants' favor; and (4) that the issuance of the preliminary injunction will not disserve the public interest. *See Daniels Health Servs., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 582 (5th Cir. 2013); *see also* Fed. R. Civ. P. 65. "The decision to grant or deny a preliminary injunction is discretionary with the district court." *Miss. Power & Light Co. v. United Gas Pipe Line*, 760 F.2d 618, 621 (5th Cir. 1985).

The movants must make a clear showing that the injunction is warranted, and the issuance of a preliminary injunction "is to be treated as the exception rather than the rule." *Miss. Power & Light*, 760 F.2d at 621. "Only in rare instances is the issuance of a mandatory preliminary injunction proper." *Harris v. Wilters*, 596 F.2d 678, 680 (5th Cir. 1979) (per curiam).

III. ANALYSIS

A. Class Certification

Plaintiffs ask the Court to certify one class and two subclasses: (1) a class of all Navy servicemembers subject to the vaccine mandate who have submitted religious accommodation requests ("Navy Class"); (2) a subclass of those "who are now or will be assigned to Naval Special Warfare/Special Operations" and have submitted religious accommodation requests ("NSW/SO Subclass"); and (3) a subclass of those "who are now or will be . . . Navy SEALs" and have

submitted religious accommodation requests ("SEALs Subclass"). Pls.' Class Cert. Br. 5, ECF No. 90. Defendants argue that Plaintiffs' proposed classes fail to meet the requirements of Rule 23. In particular, they claim Plaintiffs' proposed classes are not ascertainable and do not share common questions. Defs.' Class Cert. Resp. 6–7, ECF No. 120.

1. Rule 23(a)

a. Ascertainability

Defendants argue that neither of Plaintiffs' proposed subclasses are ascertainable, because their membership is constantly in flux. Defs.' Class Cert. Resp. 10, ECF No. 120. In other words, there is no way to determine which servicemembers *will be* assigned to NSW/SO or SEALs. "[T]he pool of special operator trainees is highly fluid and ever-changing." *Id.* (citing Galvez Decl., Ex. 2, ECF No. 121). Plaintiffs respond that the subclasses are necessarily limited to members of the Navy Class who have already submitted religious accommodation requests. Pls.' Class Cert. Reply 3, ECF No. 136. Because "[t]he Navy knows and can easily ascertain the number of servicemembers who have submitted Religious Accommodation requests," Defendants are in a better position than anyone to know which servicemembers fall into these subclasses. *Id.*

While not a requirement of Rule 23, courts only certify classes ascertainable under objective criteria. *See DeBremaecker*, 433 F.2d at 734. "There can be no class action if the proposed class is 'amorphous' or 'imprecise.'" *John*, 501 F.3d at 445 n.3. Precisely who *will be* assigned to NSW/SO or SEALs is speculative. And while a court "need not know the identity of each class member before certification," class members must be ascertainable "at some stage of the proceeding." *Frey v. First Nat'l Bank Sw.*, 602 F. App'x 164, 168 (5th Cir. 2015) (internal quotation marks omitted) (quoting Rubenstein, *supra*, at § 3:3). It is not possible to ascertain

potential subclass members, even among those who "are currently serving in units across the Navy" and may one day join the NSW/SO community.

However, Plaintiffs' proposed subclasses do not necessarily fail at this stage. "[H]olding plaintiffs to the plain language of their definition would ignore the ongoing refinement and give-and-take inherent in class action litigation. . . . District courts are permitted to limit or modify class definitions to provide the necessary precision." *Monumental Life*, 365 F.3d at 414. Accordingly, to clear the subclasses of speculation, the Court limits Plaintiffs' proposed subclasses in the following way:

- The Navy Special Warfare/Special Operations (NSW/SO) Subclass includes all members of the Navy Class who (1) *are* assigned to NSW/SO, and (2) have submitted a religious accommodation request concerning the vaccine mandate.
- The Navy SEALs Subclass includes all members of the Navy Class who (1) *are* SEALs, and (2) have submitted a religious accommodation request concerning the vaccine mandate.

Under these definitions, the members of each subclass are ascertainable. Defendants maintain records of those who have submitted religious accommodation requests and those who are presently members of NSW/SO and SEALs. Within the Venn diagram of each of these categories is an ascertainable subclass.

b. Numerosity

Defendants do not contest that Plaintiffs have satisfied the numerosity requirement under Rule 23(a). Plaintiffs argue that each class and subclass is so numerous that joinder of all members is impractical. Pls.' Class Cert. Br. 6, ECF No. 90. The proposed Navy Class contains approximately 4,095 servicemembers who have submitted religious accommodation requests under the vaccine requirement. *Id.* at 7; *see* Defs.' Ex. 4, App. 56, ECF No. 121. According to Navy records dated February 3, none of these requests have been approved, while 3,728 have been denied. Of those on appeal, 81 have been denied and another 1,222 are still pending. *Id.* Plaintiffs

cannot provide an exact number of NSW/SO and SEALs subclass members, but they anticipate the number is "over one hundred." *Id.*

Courts have regularly certified classes with far fewer members than the minimum number asserted by Plaintiffs. *See e.g.*, *Mullen*, 186 F.3d at 625 ("[T]he size of the class in this case—100 to 150 members—is within the range that generally satisfies the numerosity requirement."). However, the actual number of class members is not necessarily "the determinative question, for '(t)he proper focus (under Rule 23(a)(1)) is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors.'" *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981) (citation omitted).

Because joinder of all class members is impractical, Plaintiffs' proposed class and subclasses clearly satisfy the numerosity requirement.

c. Commonality

Plaintiffs argue that each class and subclass share a number of common questions of law and fact. In particular, Plaintiffs identify four fact questions related to the Navy's policies and practices, and eight additional questions of law under the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause of the First Amendment. Pls.' Class Cert. Br. 8–9, ECF No. 90. "Common questions that apply to all class members involve whether the Navy inappropriately discriminated against religious belief in compelling vaccination despite those beliefs, refusing to accommodate those beliefs, and granting exemptions for secular but not religious reasons." *Id.* at 13. By addressing these questions, Plaintiffs argue, the "class-wide proceeding [will] generate common *answers* apt to drive the resolution of the litigation." *Id.* at 8 (citing *Wal–Mart*, 564 U.S. at 350).

Defendants argue that Plaintiffs fail to satisfy the commonality requirement because RFRA claims must be assessed on a case-by-case basis, analyzing the sincerity of each servicemember's beliefs. *See* Defs.' Class Cert. Resp. 11, ECF No. 120 (citing *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013)). Defendants contend that Plaintiffs have not shown the accommodation process is discriminatory or lacks individualized assessment. "Drawing any conclusions from the available data . . . is entirely unwarranted." Defs.' Class Cert. Resp. 14, ECF No. 120. Finally, Defendants allege that their "detailed, individualized process" allows for "the possibility of exemptions," requiring the Court to consider each servicemember's circumstances on an individual, not class-wide, basis. *Id.* at 18.

Under the commonality requirement, potential class members must show they have suffered the "same injury" and present common questions capable of class-wide resolution. "In order to satisfy commonality under *Wal–Mart*, a proposed class must prove that the claims of every class member 'depend upon a common contention . . . that is capable of class-wide resolution . . . .'" *Stukenberg*, 675 F.3d at 838 (quoting *Wal–Mart*, 564 U.S. at 350). This occurs where "the contention is 'of such a nature . . . that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Id.* (quoting *Wal–Mart*, 564 U.S. at 350). Put plainly, "Rule 23(a)(2) requires that all of the class member[s'] claims depend on a common issue of law or fact whose resolution 'will *resolve* an issue that *is central to the validity* of each one of the [class members'] claims in one stroke.'" *Id.* at 840 (quoting *Wal–Mart*, 564 U.S. at 350). And a court's "obligation to perform a 'rigorous analysis'" of the commonality prong may "entail some overlap with the merits of the plaintiff's underlying claim." *Id.* (quoting *Wal–Mart*, 564 U.S. at 350).

Here, the potential class members have suffered the "same injury," arising from violations of their constitutional rights. Each has submitted a religious accommodation request, and each has had his request denied, delayed, or dismissed on appeal. Exactly zero requests have been granted. And while Defendants encourage this Court to disregard the data, it is hard to imagine a more consistent display of discrimination. As previously explained in this Court's preliminary injunction order, Plaintiffs have suffered the serious injury of infringement of their religious liberty rights under RFRA and the First Amendment.

> The crisis of conscience imposed by the mandate is itself an irreparable harm. *See BST Holdings, LLC v. Occupational Safety & Health Admin*, 17 F.4th 604, 618 (5th Cir. 2021); *Sambrano v. United Airlines*, 19 F.4th 839, 842 (5th Cir. 2021) (Ho, J., dissenting) (citing *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974)). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). The same is true of RFRA. *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012).

Order 24, ECF No. 66. Plaintiffs may experience diverse damages as a result of their beliefs, but they have suffered the same core injury. *See In re Deepwater Horizon*, 739 F.3d, 810–11 (5th Cir. 2014) (explaining that the "same injury" requirement is satisfied "even when the resulting injurious effects—the damages—are diverse.").

Plaintiffs' claims are also capable of class-wide resolution. A finding in favor of the Named Plaintiffs on their RFRA and First Amendment claims also resolves the RFRA and First Amendment claims of the class. "The bottom-line question under commonality and typicality is whether the relief the named plaintiffs seek from the Court will resolve all class members' legal claims." *Vita Nuova, Inc. v. Azar*, No. 4:19-cv-532, 2020 WL 8271942, at *8 (N.D. Tex. Dec. 2, 2020). By resolving the Navy Class's common questions, this Court may provide relief to all servicemembers in the class and subclasses. The inverse is not necessarily true. The NSW/SO Subclass presents questions that specifically address the heightened physical standards required of

special operations personnel. In other words, that portion of the MANMED is not applicable to the entire Navy Class. Regardless, by resolving the Navy Class's questions, the Court can provide relief to the NSW/SO Subclass simultaneously—even without resolving the special operations medical waiver question.[2]

Finally, Defendants argue there is a need for individualized assessment of potential class members' sincerity prior to certification. *See* Defs.' Class Cert. Resp. 11–12, ECF No. 120. The Court disagrees. The sincerity inquiry under RFRA is not an exacting one. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (In evaluating sincerity, the Court's "narrow function" is to determine whether the plaintiffs' asserted religious belief "reflects 'an honest conviction.'" (citation omitted)); *Moussazadeh v. Tex. Dep't of Crim. Just.*, 703 F.3d 781, 791–92 (5th Cir. 2012) ("Sincerity is generally presumed or easily established," and courts must handle the sincerity inquiry "with a light touch, or 'judicial shyness.'").

The Court need not consider the sincerity of each individual's beliefs prior to certification. *See Bear Creek Bible Church v. EEOC*, No. 4:18-cv-00824, 2021 WL 5449038 (N.D. Tex. Nov. 22, 2021). Even so, Plaintiffs and potential class members have provided evidence of sincerity in the process of applying for religious accommodation. As part of the Navy's accommodation process, applicants must interview with a chaplain, who completes both a checklist and memorandum attesting to the "sincerity" of the applicant's beliefs. *See* ECF No. 62. In short, everyone eligible for the class has submitted a religious accommodation request, and no one may submit that request without a chaplain's memorandum attesting to the applicant's sincerity. Thus,

[2] As addressed in the Order on Motion to Stay (ECF No. 116), issued February 13, 2022, the parties present conflicting interpretations of Trident Order #12 and MANMED § 15-105. But this Court determined that it need not resolve the dispute at this stage. Although the First Amendment claim triggers strict scrutiny when a regulation is not neutral and generally applicable, the RFRA claim does not require such a finding; strict scrutiny is automatically required. Order 6 n.3, ECF No. 116.

all potential class members have carried their (light) burden of demonstrating their religious beliefs are sincere.

d. Typicality

The Named Plaintiffs argue that their RFRA and First Amendment claims are typical of the entire class. Pls.' Class Cert. Br. 14, ECF No. 90. "The interests of the Named Plaintiffs are aligned with those of the other class members, and each class member benefits from a declaratory judgment and injunction that prohibits Defendants from violating their rights." *Id.* In response, Defendants argue that factual differences defeat typicality, because the Named Plaintiffs have a "wide variety of reasons" for opposing the vaccine. Defs.' Class Cert. Resp. 19, ECF No. 120. Among the purported class members, Defendants also identify differences in the members' (1) positions within the Navy, (2) current job duties, and (3) geographical locations and contexts. *Id.* For these reasons, Defendants argue the Court must analyze each servicemember's circumstances, and therefore this litigation is not appropriate for class resolution.

"The commonality and typicality requirements of Rule 23(a) tend to merge." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982). "Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.* "Like commonality, the test for typicality is not demanding. It 'focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent.'" *Mullen v. Treasure Chest Casino*, 186 F.3d 620, 625 (5th Cir. 1999). "[T]he critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual

differences will not defeat typicality." *James v. City of Dallas*, 254 F.3d 551, 571 (5th Cir. 2001) (internal quotation marks omitted) (quoting 5 James Wm. Moore et al., *Moore's Federal Practice* ¶ 23.24[4] (3d ed. 2000)).

The Named Plaintiffs seek relief on RFRA and First Amendment grounds. These are "the precise claim[s] that the Named Plaintiffs seek to litigate on behalf of other members of the Navy Class, the [NSW/SO] Subclass and the Navy SEALs Subclass." Pls.' Class Cert. Br. 14, ECF No. 90. Thus, the Named Plaintiffs' claims are typical of—in fact, identical to—those of the entire class. The factual circumstances need not be identical for each of the class members; some variation among members is permissible. *See Bear Creek*, 2021 WL 5449038 at *16 (certifying a class containing diverse members of Catholic, United Methodist, and Southern Baptist faith traditions).

Defendants suggest that the class members' different roles, job duties, and locations are "essential for determining the elements of [each] individual's RFRA claim." Defs.' Class Cert. Resp. 19, ECF No. 120. But in the Navy's own analysis, such distinctions make no difference. Defendants admit that the goal of the Standard Operating Procedure (SOP) is efficiency, not nuanced review. The SOP is "merely an administrative tool to efficiently adjudicate the unprecedented amount of requests." Defs.' Class Cert. Resp. 16, ECF No. 120; *see* Ex. 1, ECF No. 62. While the SOP touts "case-by-case review," it calls for pre-drafted denial letters. Ex. 1, ECF No. 62. Perhaps the Navy actually weighed each applicant's beliefs and circumstances. But granting none of 4,095 religious accommodation requests suggests otherwise.

Factual differences do not defeat typicality. All members of the class have unsuccessfully requested religious accommodation. The Named Plaintiffs' claims "have the same essential

characteristics" of the Navy Class and subclasses. *See James*, 254 F.3d at 571. Thus, despite factual differences, the Named Plaintiffs' causes of action are typical of the class.

e. Adequacy

Having established that the Named Plaintiffs' claims are common and typical, the Court now assesses the adequacy of representation. Under the adequacy requirement, courts consider "(1) the zeal and competence of the representatives' counsel; (2) the willinginess [sic] and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees; and (3) the risk of conflicts of interest between the named plaintiffs and the class they seek to represent." *Slade v. Progressive Sec. Ins.*, 856 F.3d 408, 412 (5th Cir. 2017) (cleaned up) (citation omitted)

Plaintiffs argue representation is adequate because (1) Plaintiffs' counsel satisfies the "zeal and competence" requirement, (2) the Named Plaintiffs have already shown their willingness to pursue the litigation despite substantial professional risk, and (3) there is no conflict of interest between Named Plaintiffs and the members of the proposed class and subclasses. Pls.' Class Cert. Br. 14–16, ECF No. 90. Defendants argue that conflicts may arise between Named Plaintiffs and the potential class members for two reasons. First, other servicemembers across the country have filed seven similar lawsuits challenging the military's COVID-19 vaccine mandates. Defs.' Class Cert. Resp. 22, ECF No. 120. And second, the Named Plaintiffs are proceeding pseudonymously, making it difficult for potential class members to know who is representing them and whether conflicts exist. *Id.* at 23. Defendants also contest venue and ripeness.[3] *Id.*

Simultaneous litigation in other courts does not present a conflict here. To the contrary, the injunctive relief that Plaintiffs seek will benefit all religiously opposed Navy servicemembers who

[3] The Court will address venue and ripeness in a forthcoming order on Defendants' Motion to Dismiss.

are presently involved in other vaccine mandate litigation. Potential class members will not be harmed by class-wide relief.[4] Likewise, Plaintiffs here will benefit from injunctive relief granted in other courts. For example, the Named Plaintiffs and potential class members here would benefit from a class-wide injunction protecting "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." *See Navy SEAL 1 v. Biden*, 8:21-cv-02429, Pls.' Mot. Certify Class ECF No. 35 (M.D. Fla.).

Defendants' claim that some potential class members may prefer to litigate independently or avoid legal action altogether, "preferring to comply with a lawful order after their administrative claim is decided and maintain their military service without litigation, or . . . choose to leave the service or retire." Defs.' Class Cert. Resp. 22, ECF No. 120. If—and indeed, *if*—such servicemembers exist, they may choose to get vaccinated, withdraw their religious accommodation requests, voluntarily separate, or proceed with retirement plans. The potential class members, then, are those who seek to remain in the Navy and refuse to compromise their religious beliefs (i.e., continue to forgo the vaccine). That group is intently interested in the relief the Named Plaintiffs seek, especially as the Navy begins to involuntarily separate unvaccinated sailors.

[4] As in *Miller v. Vilsack*, this Rule 23(b)(2) class seeks purely injunctive relief and thus is not one that Plaintiffs may opt out of. *See* 4:21-cv-00595-O (N.D. Tex. Oct. 13, 2021) ("Movants cannot explain how they could, as a practical matter, be excluded from the certified classes. . . . Presumably, opting out would mean that Defendant could discriminate against Movants on the basis of race."). Here, opting out of a class-wide preliminary injunction would "thwart the objectives of representative suits" and expose Plaintiffs to enforcement of the vaccine mandates despite their religious accommodation requests. In *Miller*, this Court denied the Movants' request to opt out of the class but permitted them to petition the courts in which they were proceeding individually to go forward with their personal lawsuit. This class certification does not prevent other judges from handing similar pending cases elsewhere as one district court is not permitted to interfere with the proceedings of another.

Lastly, Defendants argue that potential class members cannot determine the identities of, and therefore potential conflicts of interest with, the Named Plaintiffs.[5] Defs.' Class Cert. Resp. 23, ECF No. 120. Though proceeding under pseudonyms, Plaintiffs have publicly filed detailed declarations in which each servicemember describes his role, rank or year of entry, basis for religious beliefs, and any pertinent details about his religious accommodation request and denial. *See* Pls.' App. Tabs 2–35, ECF No. 17; Supp. Decl. Tabs 1–34, ECF No. 59; Supp. Decl. of SEAL 26, ECF No. 63. This information is arguably more informative and relevant to conflict analysis than Plaintiffs' actual names. Equipped with these details about the pseudonymous Plaintiffs, potential class members can determine whether conflicts exist and whether they agree to representation.

Accordingly, the Court concludes that Plaintiffs have satisfied all elements for class certification for the Navy Class, NSW/SO Subclass, and SEALs Subclass as to the RFRA and First Amendment claims. The Court now considers whether the elements of Rule 23(b) have been met.

2. Rule 23(b)(2)

Class certification under Rule 23(b)(2) is appropriate if the requirements of 23(a) are satisfied *and* "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). To qualify for class-wide

[5] Regarding pseudonymous litigation, Defendants cite a single nonbinding case out of the United States District Court for the District of Wyoming. *See Sherman v. Trinity Teen Sols., Inc.*, 339 F.R.D. 203 (D. Wyo. 2021). There, the court denied a child abuse victim the opportunity to proceed anonymously, because allowing potential class members to assess conflicts outweighed any "real threat of imminent physical danger" to the Plaintiff. *Id.* at 205–06. Here, the parties have temporarily agreed that Plaintiffs may proceed pseudonymously but must disclose their identities to Defendants. *See* ECF Nos. 34, 37. The Court has not resolved the pending briefing on Plaintiffs' Motion. *See* ECF No. 26. But in the meantime, Plaintiffs have also filed detailed declarations, so even while they remain anonymous, there is little concern that potential class members will be unable to assess conflicts. Regardless, *Sherman* does not bind this Court.

injunctive relief, class members must have been harmed in essentially the same way, and injunctive relief must predominate over monetary damages. *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 975–76 (5th Cir. 2000). In other words, "the relief sought must perforce affect the entire class at once . . . ." *Wal–Mart*, 564 U.S. at 361–62. Additionally, the injunctive relief order must be specific. Fed. R. Civ. P. 65(d); *see also Ala. Nursing Home Ass'n v. Harris*, 617 F.2d 385, 387–88 (5th Cir. 1980).

Plaintiffs argue Defendants have "acted or refused to act on grounds that apply generally to the class" by mandating the vaccine despite sincere religious objections and issuing across-the-board denials of religious accommodation requests, while simultaneously granting secular exemptions. Pls.' Class Cert. Br. 17, ECF No. 90. Defendants argue that "Plaintiffs attempt to litigate a broad swath of different factual circumstances in one fell swoop." Defs.' Class Cert. Resp. 25, ECF No. 120. Once again, Defendants point to their "case-by-case" analysis to suggest that this analysis must be individualized and cannot be resolved on a class-wide basis. *Id.*

The Named Plaintiffs and potential class members have all been harmed in essentially the same way. Each is subject to the Navy's COVID-19 vaccine mandates. Each has submitted her religious accommodation request, and none has received accommodation. Without relief, each servicemember faces the threat of discharge and the consequences that accompany it. Even though their personal circumstances may factually differ in small ways, the threat is the same—get the jab or lose your job. *See BST Holdings*, 17 F.4th at 618. By uniformly denying potential class members' religious accommodation requests, the Navy has "acted . . . on grounds that apply generally to the class." And because potential class members may receive relief from a single injunction, the claim is appropriate for class-wide resolution under Rule 23(b)(2).

3. Rule 23(g)

Finally, Plaintiffs request that the Court appoint its counsel to represent the class and subclasses. Pls.' Class Cert. Br. 18, ECF No. 90. Under Rule 23(g), "a court that certifies a class must appoint class counsel." Fed. R. Civ. P. 23(g)(1). In doing so, "the court must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A).

Defendants do not oppose Plaintiffs' request to appoint class counsel. The Court finds that Plaintiffs' counsel is qualified to represent the interests of the class and subclasses. Plaintiffs' counsel has experience litigating complex matters and has expertise in First Amendment and RFRA litigation. Plaintiffs' counsel has identified and investigated all claims and have committed sufficient resources to this action.

B. Class-Wide Preliminary Injunction

Having certified the proposed class and subclasses, the Court now turns to Plaintiffs' Motion for Class-Wide Preliminary Injunction. ECF No. 104. Plaintiffs ask this Court to extend the existing preliminary injunction to the entire class. *Id.*; *see* ECF No. 66. As in previous briefing, Defendants contend that Plaintiffs have not exhausted their intra-military remedies, and thus, their claims are nonjusticiable. Even if these claims are reviewable, Defendants argue, a preliminary injunction would be inappropriate, because Plaintiffs are unlikely to succeed on the merits of their claims.

As in the initial preliminary injunction, the threshold question before the Court is whether Plaintiffs' class-wide claims are justiciable under the *Mindes* test.

1. Justiciability Under *Mindes*

Defendants argue that this case is nonjusticiable because Plaintiffs have not exhausted military remedies, and because the Court must not intrude on military decision-making authority. Defs.' Class P.I. Resp. 13–14, ECF No. 129. Each of the Named Plaintiffs and the class members have, by definition, submitted religious accommodation requests. According to the latest numbers in the briefing, the Navy has denied 3,728 of these 4,095 requests. It has granted none. Defendants say the Court must wait for the Navy to decide each request, because otherwise, "one can only speculate as to the final outcome of any proceedings." *Id.* at 12 (quoting *Smith v. Harvey*, 541 F. Supp. 2d 8, 13 (D.D.C. 2008)).

The record indicates the denial of each request is predetermined. This is even more evident today than it was at the time of the Court's January 3 Order, when the Navy had made no final determinations on appeal. *See* Order 4, ECF No. 66. Now, the Navy has finally adjudicated at least eighty-one appeals by denying each of them. Even though the Navy has adjudicated thousands of requests, it has not granted a single one. These class members need not wait for the Navy to engage in even more empty formalities. Because exhaustion is futile and will not provide complete relief, the case is justiciable.

Though courts generally refrain from reviewing internal military affairs, *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953), the issue at hand is appropriate for judicial review. *U.S. Navy SEALs 1–26*, 27 F.4th at 347–48. Like the Named Plaintiffs, the members of the Navy Class (1) have undisputedly alleged violations of their constitutional rights under the First Amendment and RFRA, and (2) need not exhaust administrative remedies, because the Navy's review process

inevitably results in a denial.[6] The evidence overwhelmingly indicates that class members' requests and appeals will be summarily denied with "boilerplate" language and "simplistic" analysis.[7] Pls.' Class P.I. Reply 10, ECF No. 133. Thus, both criteria under *Mindes* have been satisfied. *See Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971).

The Court then weighs four factors to determine whether the issue is justiciable: (1) the nature and strength of the plaintiffs' challenge; (2) the potential injury to the plaintiffs if review is refused; (3) the type and degree of anticipated interference with the military function; and (4) the extent to which the exercise of military expertise or discretion is involved. *Id.* at 201–02. Each of these factors suggest that the class's claims are justiciable.

First, the nature and strength of the Navy Class's claims weigh in favor of judicial review. As to the nature of the claim, "[c]onstitutional claims [are] normally more important than those having only a statutory or regulatory base." *Id.* at 201. But "not all constitutional claims are to be weighed equally." *NeSmith v. Fulton*, 615 F.2d 196, 201 (5th Cir. 1980). Courts tend to favor review of constitutional claims "founded on infringement of specific constitutional rights" such as the First Amendment freedoms at issue here. *Id.* at 201–02. Plaintiffs move for a class-wide preliminary injunction based on specific violations of their constitutional rights under the Free Exercise Clause and RFRA. These claims fall squarely in the category of claims most favorable to judicial review.

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[6] Plaintiffs need not exhaust military remedies "when resort to the administrative reviewing body would be futile." *Hodges v. Callaway*, 499 F.2d 417, 420 (5th Cir. 1974). They are required to exhaust only those remedies that would "provide a real opportunity for adequate relief." *Id.*

[7] For example, after a class member's request was denied on appeal, he submitted a renewed request based on changed circumstances under BUPERSINST 1730.11A. The servicemember had contracted COVID in January 2022 and reported this development, alleging a change in physical circumstances (i.e., new natural immunity). Pls.' Class P.I. App. 105, Decl. of De Sousa, ECF No. 134. The Deputy Chief of Naval Operations denied his renewed request with a form letter stating that there had been "no substantive changes" to his circumstances, physical or otherwise. *See id.* at 125.

Second, the potential injury to class members if review is refused weighs in favor of judicial review. As explained in the Court's January 3 preliminary injunction order, Plaintiffs are suffering ongoing injury while waiting for the Navy's decision. Order 15, ECF No. 66. Likewise, members of the Navy Class are facing similar consequences for seeking religious accommodation. One commander was relieved of his duties as his squadron's executive officer—or second in command—"while [his] vaccine waiver works its way through the system." Pls.' Class P.I. App. 4–5, ECF No. 134. Elsewhere, when an EOD division officer appealed the denial of his religious accommodation request, his chain of command replaced him, and he was instructed to "get [his] personal things in order" in preparation for separation from the Navy. Pls.' Class P.I. App. 132, ECF No. 134. He is "no longer performing duties that correlate with [his] rank." *Id.* Plaintiffs, and many more class members like them, are experiencing harm simply for asserting their First Amendment rights.

Third, the type and degree of anticipated interference with the military function weighs in favor of judicial review. "Interference per se is insufficient since there will always be some interference when review is granted." *Mindes*, 453 F.2d at 201. Whether denying religious accommodations violates the First Amendment is a distinct legal question that would not "seriously impede the military in the performance of vital duties." *Id.* Insofar as an injunction "precludes the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions," this Court will partially stay the order. *U.S. Navy SEALs 1–26*, ___ S. Ct. ___, 2022 WL 882559.

Fourth, the extent to which the exercise of military expertise or discretion is involved weighs in favor of review. "Courts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military

functions." *Mindes*, 453 F.2d at 201–02. Of course, "judges don't make good generals," but "it's a two-way street: Generals don't make good judges—especially when it comes to nuanced constitutional issues." *U.S. Navy SEALs 1–26*, 24 F.4th at 349; *see also Air Force Officer v. Austin*, ___ F. Supp. 3d ___, 2022 WL 468799 (M.D. Ga. Feb. 15, 2022).

Thus, Plaintiffs have satisfied all four *Mindes* factors, and the claims of the Navy Class are justiciable.

2. Members of the Navy Class and Subclasses are likely to succeed on the merits.

Having established that Plaintiffs class-wide claims are justiciable, the Court must consider the first of the four requirements under the preliminary injunction standard: whether Plaintiffs have established a "substantial likelihood of success on the merits." *Daniels Health Scis.*, 710 F.3d at 582. This Court has already determined that Defendants have substantially burdened Plaintiffs' religious beliefs, and thus strict scrutiny applies. Order 18, ECF No. 66. The Navy has not conducted individualized assessment of class members' religious accommodation requests, which demonstrates "a pattern of disregard for RFRA rights." *U.S. Navy SEALs*, 24 F.4th at 352. Because the Navy continues to treat those with secular exemptions more favorably than those seeking religious exemptions, strict scrutiny is triggered. Defendants fail to show a compelling interest.

a. Religious Freedom Restoration Act

Under the Religious Freedom Restoration Act, the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. "RFRA undoubtedly 'applies in the military context.'" *U.S. Navy SEALs*, 24 F.4th at 346 (quoting *United States v. Sterling*, 75 M.J. 407, 410 (C.A.A.F. 2016)).

The Navy has substantially burdened each class members' religious beliefs by threatening his job and "putting substantial pressure on [the] adherent to modify his behavior and to violate his beliefs." *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). The Named Plaintiffs and a number of class members have already provided evidence of demotions, reassignments, threat of separation, and other punitive measures as a result of their religious accommodation requests. *See* Supp. App. 1032, 1096, 1107, 1126, ECF No. 59; Compl., Ex. 3, ECF No. 1-3; Pls.' Class P.I. App. 4–5, 105, 132, ECF No. 134.

Plaintiffs claim that "Defendants are not individually assessing *any* requests for religious accommodation, and instead are merely denying *all* requests based on identical rationale." Pls.' Class P.I. Br. 3, ECF No. 105. In response, Defendants echo previous arguments that stemming the spread of COVID-19 is a compelling interest, and that "[t]he stronger the compelling governmental interest, the less likely any individual request will be approved." Defs.' Class P.I. Resp. 23, ECF No. 129.

Even so, the Navy must demonstrate a compelling interest in enforcing its vaccination policies—not merely a generalized interest, but one particular to each servicemember. *U.S. Navy SEALs*, 24 F.4th at 351 (citing *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1881 (2021)). This Court found that Defendants could not present a compelling interest with respect to the thirty-five Plaintiffs seeking preliminary injunction of the mandates. Order 19, ECF No. 66. Now, Defendants argue that "allowing up to 4,000 service members to go unvaccinated and to potentially deploy unvaccinated would 'severely undermine military readiness.'" Defs.' Class P.I. Resp. 26, ECF No. 129 (quoting Decl. of Caudle, App. 17, ECF No. 130). Defendants' efforts to vaccinate the force have been overwhelmingly successful. Indeed, all 4,095 class members are part of the "vanishingly small 0.6%" of the Navy that remains unvaccinated. Order 16, ECF No. 66. Many of

these class members already have natural immunity, thereby bolstering—not undermining—the Navy's goal of "stemming the spread of COVID-19 and maintaining a medically fit force." Defs.' Class P.I. Resp. 23, ECF No. 129.

Defendants argue that "[i]n the deadly business of protecting our national security, we cannot have a Sailor who disobeys a lawful order to receive a vaccine because they harbor a personal objection any more than we can have a Sailor who disobeys the technical manual for operating a nuclear reactor because he or she believes they know better."[8] Decl. of Caudle 16, Ex. 1, ECF No. 130. But the Navy's willingness to grant *hundreds* of permanent and temporary medical exemptions belies this insistence on complete uniformity and widespread vaccination. Defs.' Ex. 4, App. 56, ECF No. 121. It is "illogical . . . that Plaintiffs' religious-based refusal to take a COVID-19 vaccine would seriously impede military function when the Navy has over 5,000 servicemembers still on duty who are just as unvaccinated as the Plaintiffs." *U.S. Navy SEALs*, 24 F.4th at 349 (cleaned up).

For these reasons, the Court finds that Defendants do not demonstrate a compelling interest to overcome the class members' substantial burden. Without a compelling interest, the Court need not address whether Defendants have used the least restrictive means.

b. First Amendment

The Court finds that the class prevails on the First Amendment claim for the same reasons it succeeds on its RFRA claim. The Navy's mandate is not neutral and generally applicable. Moreover, Defendants cannot carry their burden to demonstrate a compelling interest.

"[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity

[8] The Court notes that Plaintiffs refuse vaccination based on sincerely held religious belief—not mere "personal objection." The former has long been afforded constitutional protections. The latter has not.

more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). The Navy's vaccine requirement blatantly treats those who applied for medical exemptions more favorably than the class members here. "For one thing, requests for medical exemptions were seriously considered, and quite a few were granted, at least on a temporary basis." *U.S. Navy SEALs 1–26*, ___ S. Ct. ___, 2022 WL 882559, at *5 (Alito, J., dissenting). Some factual debate exists as to whether those seeking medical exemptions are subject to the separate waiver requirement. *See* Order on Motion to Stay 6 n.3, ECF No. 116. Regardless, the record presents no evidence that servicemembers with pending medical exemptions are facing the same injuries as Plaintiffs, who have been denied opportunities for training and advancement, removed from leadership positions, demoted, and prepared for the separation process. *See* Order 23, ECF No. 66.

As discussed in the prior section, Defendants fail to satisfy the compelling interest requirement, so there is no need to consider least restrictive means. Plaintiffs have established a substantial likelihood of success on the merits of the class's RFRA and First Amendment claims, satisfying the first requirement of the preliminary injunction standard.

3. The class members are being irreparably harmed.

Under the second prong of the preliminary injunction standard, the movants must establish a substantial threat of irreparable harm. The class members satisfy the irreparable injury requirement for the same reasons Plaintiffs have done so. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). The same is true of RFRA. *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012). Any losses the class members have suffered in connection with their religious accommodation requests sufficiently demonstrate irreparable injury, even if injuries like demotion, reassignment, and separation are otherwise

compensable. *See* Order 24, ECF No. 66. Thus, the second requirement for injunctive relief has been satisfied as to the class and subclasses.

4. The balance of hardships weighs in the class members' favor, and the issuance of the preliminary injunction will not disserve the public interest.

The final two elements of the preliminary injunction standard—the balance of the harms and whether an injunction will disserve the public interest—must be considered together. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). This injunction does not disserve the public interest because it prevents constitutional deprivations. *See Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014). As this Court has explained, "Plaintiffs' loss of religious liberties outweighs any forthcoming harm to the Navy." Order 26, ECF No. 66. By early November, 99.4% of active-duty Navy servicemembers had been fully vaccinated, and that percentage is likely even higher today. The Navy has had extraordinary success in vaccinating its force. Yet Defendants' briefing and declarations describe a catastrophic future if these class members remain unvaccinated. *See* Defs.' Class P.I. Resp. 29–30, ECF No. 129. Fortunately, Defendants' predictions are highly speculative.

Defendants have repeatedly argued that Plaintiffs can only speculate as to the final outcome of the appeals proceedings. *Id.* at 12. But Plaintiffs are statistically far more likely—in fact, almost guaranteed—to be denied a religious accommodation request than to contract a severe case of COVID-19. Plaintiffs' vaccinated colleagues are becoming infected and contributing towards the "massive loss of time and readiness" that the Navy fears. *See id.* at 29. Defendants' claims that the unvaccinated class members "present an unacceptable risk to naval operations" is hyperbolic, especially because these servicemembers successfully carried out their tasks in the pre-vaccine era of the pandemic. *Id.* at 30; *see U.S. Navy Seals 1–26*, 27 F.4th at 343.

Since this Court issued its January 3 preliminary injunction order, COVID-19 cases have dropped dramatically worldwide. The Navy's interest in vaccinating the remaining 0.6% of its personnel—or less—does not outweigh the harm Plaintiffs are facing as they try to exercise their constitutional rights. Thus, the Court finds that the class members have satisfied the final two requirements for preliminary injunction.

IV. CONCLUSION

For the reasons stated, the Court **GRANTS** in part Plaintiffs' Motion for Class Certification as to the Navy Class, NSW/SO Subclass, and SEALs Subclass, subject to the amended class definitions removing unascertainable language. The Court appoints Plaintiffs' counsel as class counsel under Rule 23(g). The Court also **GRANTS** Plaintiffs' Motion for Class-Wide Preliminary Injunction. Defendants are enjoined from applying MANMED § 15-105(3)(n)(9); NAVADMIN 225/21; Trident Order #12; and NAVADMIN 256/21 to members of the Navy Class and Subclasses.

This class-wide injunction is immediately **STAYED** in part, "insofar as it precludes the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions." *U.S. Navy SEALs 1–26*, ___ S. Ct. ___, 2022 WL 882559.

SO ORDERED on this **28th day** of **March, 2022.**

Reed O'Connor
UNITED STATES DISTRICT JUDGE

Attachment 1

DEPARTMENT OF THE AIR FORCE
AIR EDUCATION AND TRAINING COMMAND

28 January 2022

MEMORANDUM FOR MAJOR DANIEL D. REINEKE

FROM: HQ AETC/CC
1 F Street, Suite 1
JBSA Randolph TX 78150-4324

SUBJECT: Decision Regarding Religious Accommodation Request

I have received your accommodation request for exemption from the COVID-19 immunization requirement based on your religious beliefs. After careful consideration of the specific facts and circumstances, I deny your request for exemption from Air Force COVID-19 immunization standards based on the recommendations from your chain of command and the Religious Resolution Team (any other religious exemption that you seek must be addressed in a separate, specific request). A copy of this decision memorandum will be placed in your automated personnel records.

I thoroughly reviewed your request, examined the comments and recommendations from the functional and legal experts, and considered the impact on you personally, the Airmen with whom you work and the mission. I find that your request, while sincere, does not meet the threshold necessary for an exemption.

First, the Air Force's compelling government interest outweighs your individual belief and no lesser means satisfy the government's interest. For the past 18 months, the Air Education and Training Command fought through the COVID pandemic by implementing several extreme measures and processes to ensure the health, safety and welfare of our Airmen. These measures included maximum telework, workplace occupancy limitations, extreme adjustments to Basic Military Training to include multiple training sites and modified training, and remote learning for most Professional Military Education to name just a few actions. Similar measures for the medical community included telehealth consultations and reduced in-person appointments. Despite these efforts, the Air Force remained in this posture until vaccinations became available and administered, and only then did our pandemic numbers begin to decrease. Continuing to implement these drastic measures detracts from the readiness, efficiency, good order and discipline of the force, and is unsustainable as the long-term solution.

When I reviewed your request, I used the same method as I did for requests from other similarly situated individuals, taking into account factors such as your duty position and rank. In your particular position, Remotely Piloted Aircraft Weapons Subject Matter Expert, there is a compelling government interest for you to receive the vaccine. Specifically, you are required to have close contact with students and aircrew personnel in order to accomplish your mission. An exemption will create the perception that there are different standards for leaders and will limit member's ability to lead, detracting from good order and discipline. Unit cohesion will also be

negatively impacted as your ability for in-person training and mentoring with student pilots will be limited. Your personal lack of readiness will impact your ability to deploy, perform temporary duties away from your home station, and be transferred overseas. Even if you are permitted to travel on official orders with an exemption, your ability to perform the mission may be limited due to restriction of movement and isolation requirements that are inapplicable to vaccinated members. Finally, failure to receive the vaccine increases the risk to your own personal health and safety and that of those around you.

Lesser means to accomplish the government's compelling interest are insufficient. You cannot instruct students via telework or social distancing. Further, your ability to lead is not as effective if you must interact virtually or while remaining socially distanced. Finally, Mask wear alone is insufficient intervention.

Upon receipt of this decision, I expect you will take every action necessary to comply with the requirement for COVID-19 immunization as soon as possible. You have five (5) calendar days from receipt of this memorandum to accomplish one of the following: (1) receive an approved COVID-19 vaccination and provide proof of vaccination to your commander; (2) submit for retirement or separation; or (3) appeal this decision to the Air Force Surgeon General. Should you elect to appeal this decision, follow the procedures in AFI 52-201, *Religious Freedom in the Department of the Air Force*, Chapter 6. If you appeal this decision, submit your appeal to your commander in writing. Include in your appeal any additional matters you wish for the AF/SG to consider. Your commander will forward your appeal and any additional matters to HQ AETC/SG for further processing.

If you have any questions, contact HQ AETC/HC at 210-652-3822 (DSN 487), or email at aetc.hc@us.af.mil.

MARSHALL B. WEBB
Lieutenant General, USAF
Commander

cc:
Member's Unit
Member's Servicing FSS

DEPARTMENT OF THE AIR FORCE
AIR EDUCATION AND TRAINING COMMAND

4 March 2022

MEMORANDUM FOR LIEUTENANT COLONEL EDWARD J. STAPANON III

FROM: HQ AETC/CC
1 F Street, Suite 1
JBSA Randolph TX 78150-4324

SUBJECT: Decision Regarding Religious Accommodation Request

I have received your accommodation request for exemption from the COVID-19 immunization requirement based on your religious beliefs. After careful consideration of the specific facts and circumstances, I deny your request for exemption from Air Force COVID-19 immunization standards based on the recommendations from your chain of command and the Religious Resolution Team (any other religious exemption that you seek must be addressed in a separate, specific request). A copy of this decision memorandum will be placed in your automated personnel records.

I thoroughly reviewed your request, examined the comments and recommendations from the functional and legal experts, and considered the impact on you personally, the Airmen with whom you work and the mission. I find that your request, while sincere, does not meet the threshold necessary for an exemption.

First, the Air Force's compelling government interest outweighs your individual belief and no lesser means satisfy the government's interest. For the past 18 months, the Air Education and Training Command fought through the COVID pandemic by implementing several extreme measures and processes to ensure the health, safety and welfare of our Airmen. These measures included maximum telework, workplace occupancy limitations, extreme adjustments to Basic Military Training to include multiple training sites and modified training, and remote learning for most Professional Military Education to name just a few actions. Similar measures for the medical community included telehealth consultations and reduced in-person appointments. Despite these efforts, the Air Force remained in this posture until vaccinations became available and administered, and only then did our pandemic numbers begin to decrease. Continuing to implement these drastic measures detracts from the readiness, efficiency, good order and discipline of the force, and is unsustainable as the long-term solution.

When I reviewed your request, I used the same method as I did for requests from other similarly situated individuals, taking into account factors such as your duty position and rank. In your particular position as an Assistant Director of Operations and T-38C Introduction to Fighter Fundamentals Instructor Pilot, there is a compelling government interest for you to receive the vaccine. Specifically, you are required to have close contact with students and other personnel in order to accomplish your mission. An exemption will detract from good order and discipline by creating the perception that there are different standards for those in leadership roles. Unit

cohesion will also be negatively impacted as your ability to train and mentor Airmen will be limited. Your personal lack of readiness will impact your ability to deploy, perform temporary duties away from your home station, and be transferred overseas. Even if you are permitted to travel on official orders with an exemption, your ability to perform the mission may be limited due to restriction of movement and isolation requirements that are inapplicable to vaccinated members. Finally, failure to receive the vaccine increases the risk to your own personal health and safety and that of those around you.

Lesser means to accomplish the government's compelling interest are insufficient. You cannot train your students via teleworking. Additionally, you cannot perform as effectively as a leader if you are required to socially distance from your students. Finally, mask wear is not permitted while flying as it will interfere with your equipment and ability to communicate.

Upon receipt of this decision, I expect you will take every action necessary to comply with the requirement for COVID-19 immunization as soon as possible. You have five (5) calendar days from receipt of this memorandum to accomplish one of the following: (1) receive an approved COVID-19 vaccination and provide proof of vaccination to your commander; (2) submit for retirement or separation; or (3) appeal this decision to the Air Force Surgeon General. Should you elect to appeal this decision, follow the procedures in AFI 52-201, *Religious Freedom in the Department of the Air Force*, Chapter 6. If you appeal this decision, submit your appeal to your commander in writing. Include in your appeal any additional matters you wish for the AF/SG to consider. Your commander will forward your appeal and any additional matters to HQ AETC/SG for further processing.

If you have any questions, contact HQ AETC/HC at 210-652-3822 (DSN 487), or email at aetc.hc@us.af.mil.

Marshall B. Webb

MARSHALL B. WEBB
Lieutenant General, USAF
Commander

cc:
Member's Unit
Member's Servicing FSS

1st Ind, LT COL EDWARD J. STAPANON III

MEMORANDUM FOR ALL REVIEWING AUTHORITIES

I have received AETC/CC's decision regarding my request for a religious based exemption from the COVID-19 vaccine on 8 March 2022 (date). I understand that I have five (5) calendar days to accomplish one of the following:

a. Receive an approved COVID-19 vaccine and provide proof of vaccination to my commander;

b. Apply for retirement or separation;

(c.) Appeal this decision in writing to the Air Force Surgeon General.

EDWARD J. STAPANON III, Lt Col, USAF

2d Ind, LT COL EDWARD J. STAPANON III

MEMORANDUM FOR ALL REVIEWING AUTHORITIES

Five calendar days have elapsed since I received AETC/CC's decision denying my request for a religious based exemption from the COVID-19 vaccine. I have chosen to:

_____ Receive an approved COVID-19 vaccine on _____(date) and provide proof of vaccination to my commander on _____(date).

_____ Apply on _____(date) for retirement or separation.

_____ Appeal this decision in writing on _____(date) to the Air Force Surgeon General.

_____ Refuse to comply with this order.

EDWARD J. STAPANON III, Lt Col, USAF

DEPARTMENT OF THE AIR FORCE
AIR EDUCATION AND TRAINING COMMAND

JAN 0 6 2022

MEMORANDUM FOR SECOND LIEUTENANT HUNTER G. DOSTER

FROM: HQ AETC/CC
1 F Street, Suite 1
JBSA Randolph TX 78150-4324

SUBJECT: Decision Regarding Religious Accommodation Request

I have received your accommodation request for exemption from the COVID-19 immunization requirement based on your religious beliefs. After careful consideration of the specific facts and circumstances, I deny your request for exemption from Air Force COVID-19 immunization standards based on the recommendations from your chain of command and the Religious Resolution Team (any other religious exemption that you seek must be addressed in a separate, specific request). A copy of this decision memorandum will be placed in your automated personnel records.

I thoroughly reviewed your request, examined the comments and recommendations from the functional and legal experts, and considered the impact on you personally, the Airmen with whom you work and the mission. I find that your request, while sincere, does not meet the threshold necessary for an exemption.

First, the Air Force's compelling government interest outweighs your individual belief and no lesser means satisfy the government's interest. For the past 18 months, the Air Education and Training Command fought through the COVID pandemic by implementing several extreme measures and processes to ensure the health, safety and welfare of our Airmen. These measures included maximum telework, workplace occupancy limitations, extreme adjustments to Basic Military Training to include multiple training sites and modified training, and remote learning for most Professional Military Education to name just a few actions. Similar measures for the medical community included telehealth consultations and reduced in-person appointments. Despite these efforts, the Air Force remained in this posture until vaccinations became available and administered, and only then did our pandemic numbers begin to decrease. Continuing to implement these drastic measures detracts from the readiness, efficiency and good order and discipline of the force, and is unsustainable as the long-term solution.

When I reviewed your request, I used the same method as I did for requests from other similarly situated individuals, taking into account factors such as your duty position and rank. In your particular position, Masters Student at Air Force Institute of Technology, you will soon complete your coursework and will be transferring to the Air Force Research Laboratory where you will be required to interact with staff in-person. As such, there is a compelling government interest for you to receive the vaccine. An exemption will create the perception of favoritism, detracting from good order and discipline. Your personal lack of readiness will impact your

ability to deploy, perform temporary duties away from your home station, and be transferred overseas. Even if you are permitted to travel on official orders with an exemption, your ability to perform the mission may be limited due to restriction of movement and isolation requirements that are inapplicable to vaccinated members. Finally, failure to receive the vaccine increases the risk to your own personal health and safety and that of those around you.

Lesser means to accomplish the government's compelling interest are insufficient. You cannot achieve your duty objectives at the Air Force Research Laboratory via telework or social distancing. As a junior officer, hands-on supervision and guidance from your leadership is also necessary for your professional development. Further, your ability to lead and mentor subordinates is not as effective if you must interact virtually or while remaining socially distanced. Finally, mask wear alone is an insufficient intervention.

Upon receipt of this decision, I expect you will take every action necessary to comply with the requirement for COVID-19 immunization as soon as possible. You have five (5) calendar days from receipt of this memorandum to accomplish one of the following: (1) receive an approved COVID-19 vaccination and provide proof of vaccination to your commander; (2) submit for retirement or separation; or (3) appeal this decision to the Air Force Surgeon General. Should you elect to appeal this decision, follow the procedures in AFI 52-201, *Religious Freedom in the Department of the Air Force*, Chapter 6. If you appeal this decision, submit your appeal to your commander in writing. Include in your appeal any additional matters you wish for the AF/SG to consider. Your commander will forward your appeal and any additional matters to HQ AETC/SG for further processing.

If you have any questions, contact HQ AETC/HC at 210-652-3822 (DSN 487), or email at aetc.hc@us.af.mil.

MARSHALL B. WEBB
Lieutenant General, USAF
Commander

cc:
Member's Unit
Member's Servicing FSS

DEPARTMENT OF THE AIR FORCE
AIR FORCE RESERVE COMMAND

JAN 31 2022

MEMORANDUM FOR MAJ HEIDI MOSHER

FROM: HQ AFRC/CC
555 Robins Parkway, Suite 250
Robins AFB GA 31098-2005

SUBJECT: Request for Immunization Exemption

1. I have reviewed your request for religious exemption from the recently approved COMIRNATY®/ Pfizer-BioNTech COVID-19 vaccine, the EUA COVID-19 vaccines that include Johnson's Janssen and the Moderna COVID-19 vaccines. I understand your concerns, which are based on your sincerely held beliefs. After carefully considering the specific facts and circumstances of your request, the recommendation of your chain of command and the MAJCOM Religious Resolution Team, I **disapprove** your request for religious exemption for the COVID-19 vaccine.

2. I do not doubt the sincerity of your beliefs. However, when evaluating your request for religious exemption, I also had to consider the risk to our mission. All immunizations, including those listed above, are an important element of mission accomplishment, as they contribute to the health, safety, and readiness of the force. Given the importance of our mission, the Department of Defense and the Department of the Air Force have a compelling government interest in maintaining a healthy and ready military force through vaccination. Specifically regarding the COVID-19 vaccination, since less restrictive means of protecting our force from COVID-19 are unavailable, all uniformed Airmen must be fully vaccinated against COVID-19 and other infectious diseases. Individual medical readiness is a critical requirement for maintaining a healthy and ready force.

3. If you choose to appeal this decision, please submit your written request to your unit commander within five (5) calendar days of receiving notice of my decision.

4. A copy of this decision memorandum will be placed in your online personnel records. My point of contact is Ch, Lt Col Stacey Hanson, stacey.hanson@us.af.mil, DSN 497-1221.

RICHARD W. SCOBEE
Lieutenant General, USAF
Commander

cc:
22 AF
94 AW/CC
94 ASTS/CC

DEPARTMENT OF THE AIR FORCE
AIR FORCE RESERVE COMMAND

JAN 07 2022

MEMORANDUM FOR MAJ PATRICK K. POTTINGER

FROM: HQ AFRC/CC
555 Robins Parkway, Suite 250
Robins AFB GA 31098-2005

SUBJECT: Request for Immunization Exemption

1. I have reviewed your request for religious exemption from the recently approved COMIRNATY®/ Pfizer-BioNTech COVID-19 vaccine, the EUA COVID-19 vaccines that include Johnson's Janssen and the Moderna COVID-19 vaccines. I understand your concerns, which are based on your sincerely held beliefs. After carefully considering the specific facts and circumstances of your request, the recommendation of your chain of command and the MAJCOM Religious Resolution Team, I **disapprove** your request for religious exemption for the COVID-19 vaccine.

2. I do not doubt the sincerity of your beliefs. However, when evaluating your request for religious exemption, I also had to consider the risk to our mission. All immunizations, including those listed above, are an important element of mission accomplishment, as they contribute to the health, safety, and readiness of the force. Given the importance of our mission, the Department of Defense and the Department of the Air Force have a compelling government interest in maintaining a healthy and ready military force through vaccination. Specifically regarding the COVID-19 vaccination, since less restrictive means of protecting our force from COVID-19 are unavailable, all uniformed Airmen must be fully vaccinated against COVID-19 and other infectious diseases. Individual medical readiness is a critical requirement for maintaining a healthy and ready force.

3. If you choose to appeal this decision, please submit your written request to your unit commander within 5 calendar days of receiving notice of my decision.

4. A copy of this decision memorandum will be placed in your online personnel records. My point of contact is Ch, Lt Col Stacey Hanson, stacey.hanson@us.af.mil, DSN 497-1221.

RICHARD W. SCOBEE
Lieutenant General, USAF
Commander

cc:
22 AF/CC
340 FTG/CC
39 FTS/CC

DEPARTMENT OF THE AIR FORCE
AIR FORCE RESERVE COMMAND

22 October 2021

MEMORANDUM FOR SMSGT CHRISTOPHER M. SCHULDES

FROM: HQ AFRC/CC
555 Robins Parkway, Suite 250
Robins AFB GA 31098-2005

SUBJECT: Request for Immunization Exemption-SMSgt Christopher M. Schuldes, 4 AF/A3/5

1. I have reviewed your request for religious exemption from the recently approved COMIRNATY®/ Pfizer-BioNTech COVID-19 vaccine, the EUA COVID-19 vaccines that include Johnson's Janssen and the Moderna COVID-19 vaccines. I understand your concerns, which are based on your sincerely held beliefs. After carefully considering the specific facts and circumstances of your request, the recommendation of your director and the MAJCOM Religious Resolution Team, I **disapprove** your request for religious exemption from required immunizations, including the COVID-19 vaccine.

2. I do not doubt the sincerity of your beliefs. However, when evaluating your request for religious exemption, I also had to consider the risk to our mission. All immunizations, including those listed above, are an important element of mission accomplishment, as they contribute to the health, safety, and readiness of the force. Given the importance of our mission, the Department of Defense and the Department of the Air Force have a compelling government interest in maintaining a healthy and ready military force through vaccination. Specifically regarding the COVID-19 vaccination, since less restrictive means of protecting our force from COVID-19 are unavailable, all uniformed Airmen must be fully vaccinated against COVID-19 and other infectious diseases. Individual medical readiness is a critical requirement for maintaining a healthy and ready force.

3. If you choose to appeal this decision, please submit your written request to your director within 72 hours of receiving notice of my decision.

4. A copy of this decision memorandum will be placed in your online personnel records. My point of contact is Ch, Lt Col Stacey Hanson, stacey.hanson@us.af.mil, DSN 497-1221.

SCOBEE.RICHARD.W.1173556620
Digitally signed by SCOBEE.RICHARD.W.1173556620
Date: 2021.10.25 18:38:06 -04'00'

RICHARD W. SCOBEE
Lieutenant General, USAF
Commander

cc:
4 AF/CC
4 AF/A3/5

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON DC

JAN 06 2022

MEMORANDUM FOR AIRMAN FIRST CLASS MCKENNA R. COLANTONIO

FROM: HQ USAF/SG
1780 Air Force Pentagon
Washington, DC 20330-1780

SUBJECT: Decision on Religious Accommodation Appeal

Your final appeal is denied. In accordance with Department of the Air Force Instruction (DAFI) 52-201, *Religious Freedom in the Department of the Air Force*, paragraph 3.2, I have carefully reviewed your request for religious accommodation, specifically for an exemption from the COVID-19 immunization.

The Department of the Air Force has a compelling government interest in requiring you to comply with the COVID-19 immunization requirement because preventing the spread of disease among the force is vital to mission accomplishment. Specifically, in light of your circumstances, your present duty assignment requires intermittent to frequent contact with others and is not fully achievable via telework or with adequate distancing. You are also in a high ops tempo career field where short-notice deployment taskings occur frequently, so the delay of vaccination would incur a serious burden on the unit and degrade overall military readiness. We must be able to leverage our forces on short notice as evidenced by recent worldwide events. Your health status as a non-immunized individual in this dynamic environment, and aggregated with other non-immunized individuals in steady state operations, would place health and safety, unit cohesion, and readiness at risk. Foregoing the above immunization requirement would have a real adverse impact on military readiness and public health and safety. There are no less restrictive means available in your circumstance as effective as receiving the above immunization in furthering these compelling government interests.

A copy of this decision memorandum will be placed in your automated personnel records. Please contact your unit leadership for questions or concerns.

Robert Miller

ROBERT I. MILLER
Lieutenant General, USAF, MC, SFS
Surgeon General

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON DC

DEC 16 2021

MEMORANDUM FOR SENIOR MASTER SERGEANT CHRISTOPHER M. SCHULDES

FROM: HQ USAF/SG
1780 Air Force Pentagon
Washington, DC 20330-1780

SUBJECT: Decision on Religious Accommodation Appeal

Your final appeal is denied. In accordance with Department of the Air Force Instruction (DAFI) 52-201, *Religious Freedom in the Department of the Air Force*, paragraph 3.2, I have carefully reviewed your request for religious accommodation, specifically for an exemption from the COVID-19 immunization.

The Department of the Air Force has a compelling government interest in requiring you to comply with the COVID-19 immunization requirement because preventing the spread of disease among the force is vital to mission accomplishment. Specifically, in light of your circumstances, your present duty assignment as a loadmaster and CRT team chief involves time in and around aircraft and requires frequent contact with other aircrew, CRT team members, aerial port personnel, and passengers. Completion of your duties is not fully achievable via telework or with adequate distancing. Addtionally, you are in a high ops tempo careerfield, and short-notice deployment taskings occur frequently, so the delay of vaccination would incur a serious burden on the unit and degrade overall military readiness. We must be able to leverage our forces on short notice as evidenced by recent worldwide events. Your health status as a non-immunized individual in this dynamic environment, and aggregated with other non-immunized individuals in steady state operations, would place health and safety, unit cohesion, and readiness at risk. Foregoing the above immunization requirement would have a real adverse impact on military readiness and public health and safety. There are no less restrictive means available in your circumstance as effective as receiving the above immunization in furthering these compelling government interests.

A copy of this decision memorandum will be placed in your automated personnel records. Please contact your unit leadership for questions or concerns.

Robert I. Miller

ROBERT I. MILLER
Lieutenant General, USAF, MC, SFS
Surgeon General

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON DC

JAN 21 2022

MEMORANDUM FOR STAFF SERGEANT ADAM P. THERIAULT

FROM: HQ USAF/SG
1780 Air Force Pentagon
Washington, DC 20330-1780

SUBJECT: Decision on Religious Accommodation Appeal

Your final appeal is denied. In accordance with Department of the Air Force Instruction (DAFI) 52-201, *Religious Freedom in the Department of the Air Force*, paragraph 3.2, I have carefully reviewed your request for religious accommodation, specifically for an exemption from the COVID-19 immunization.

The Department of the Air Force has a compelling government interest in requiring you to comply with the COVID-19 immunization requirement because preventing the spread of disease among the force is vital to mission accomplishment. Specifically, in light of your circumstances, your present duty assignment requires intermittent to frequent contact with others and is not fully achievable via telework or with adequate distancing. In addition, your deployable position may require you to deploy in a time-frame in which you cannot attain fully immunized status prior to departure. Your instructor role also requires frequent contact and immersion with multiple individuals, which would significantly impact training accomplishment if you or your trainees were exposed or actively infected. We must be able to leverage our forces on short notice as evidenced by recent worldwide events. Your health status as a non-immunized individual in this dynamic environment, and aggregated with other non-immunized individuals in steady state operations, would place health and safety, unit cohesion, and readiness at risk. Foregoing the above immunization requirement would have a real adverse impact on military readiness and public health and safety. There are no less restrictive means available in your circumstance as effective as receiving the above immunization in furthering these compelling government interests.

A copy of this decision memorandum will be placed in your automated personnel records. Please contact your unit leadership for questions or concerns.

Robert I. Miller

ROBERT I. MILLER
Lieutenant General, USAF, MC, SFS
Surgeon General