

No. 22-3702

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

HUNTER DOSTER, JASON ANDERSON, MCKENNA COLANTANIO, PAUL CLEMENT,
JOE DILLS, BENJAMIN LEIBY, BRETT MARTIN, CONNOR MCCORMICK, HEIDI
MOSHER, PETER NORRIS, PATRICK POTTINGER, ALEX RAMSPERGER, BENJAMIN
RINALDI, DOUGLAS RUYLE, CHRISTOPHER SCHULDES, EDWARD STAPANON III,
ADAM THERIAULT, DANIEL REINEKE, on behalf of themselves and others similarly situated,

Plaintiffs-Appellees,

v.

FRANK KENDALL, in his official capacity as Secretary of the Air Force, ROBERT I. MILLER, in
his official capacity as Surgeon General of the Air Force, MARSHALL B. WEBB, in his official
capacity as Commander, Air Education and Training Command, RICHARD W. SCOBEE, in his
official capacity as Commander, Air Force Reserve Command, JAMES C. SLIFE, in his official
capacity as Commander, Air Force Special Operations Command, UNITED STATES OF
AMERICA,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Ohio

**EMERGENCY MOTION FOR STAY OF THE DISTRICT COURT'S
JULY 27, 2022 ORDER PENDING APPEAL**

BRIAN M. BOYNTON

Principal Deputy Assistant Attorney General

KENNETH L. PARKER

United States Attorney

CHARLES W. SCARBOROUGH

LOWELL V. STURGILL JR.

CASEN B. ROSS

SARAH J. CLARK

ANNA O. MOHAN

Attorneys, Appellate Staff

Civil Division, Room 7533

U.S. Department of Justice

950 Pennsylvania Avenue NW

Washington, D.C. 20530

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY	1
STATEMENT	3
A. Military Immunization and COVID-19	3
B. Prior Proceedings.....	6
ARGUMENT	11
I. The Government Is Likely to Succeed on Appeal.....	11
A. The District Court’s Class-Wide Preliminary Injunction Is Invalid Because Class Members’ Claims Are Incapable of Class-Wide Resolution	11
B. The Class-Wide Injunction Second-Guesses Military Judgment and Intrudes on Core Military Decisionmaking	17
II. The Balance of Equities Warrants a Stay	19
CONCLUSION	23
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	
ADDENDUM	

TABLE OF AUTHORITIES

Cases:	<u>Page(s)</u>
<i>Austin v. U.S. Navy SEALs 1-26</i> , 142 S. Ct. 1301 (2022)	18, 21
<i>Beck v. Maximus, Inc.</i> , 457 F.3d 291 (3d Cir. 2006).....	14
<i>Bendectin Prods. Liab. Litig., In re</i> , 749 F.2d 300 (6th Cir. 1984)	15
<i>Creaghan v. Austin</i> , 2022 WL 1685006 (D.D.C. May 26, 2022)	16
<i>Dunn v. Austin</i> , 142 S. Ct. 1707 (2022)	16
<i>Gilligan v. Morgan</i> , 413 U.S. 1 (1973).....	20
<i>Goldman v. Weinberger</i> , 475 U.S. 503 (1986)	18
<i>Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal</i> , 546 U.S. 418 (2006)	12
<i>Guitard v. U.S. Sec’y of Navy</i> , 967 F.2d 737 (2d Cir. 1992).....	22
<i>Harkness v. Secretary of the Navy</i> , 858 F.3d 437 (6th Cir. 2017)	14
<i>Knick v. Austin</i> , 2022 WL 2157066 (D.D.C. June 15, 2022).....	16
<i>Maier v. Orr</i> , 754 F.2d 973 (Fed. Cir. 1985)	18-19

<i>Navy Chaplaincy, In re</i> , 534 F.3d 756 (D.C. Cir. 2008).....	15
<i>Ohio State Conference of NAACP v. Husted</i> , 769 F.3d 385 (6th Cir. 2014)	11
<i>Orloff v. Willoughby</i> , 345 U.S. 83 (1953).....	18
<i>Rostker v. Goldberg</i> , 453 U.S. 57 (1981).....	21
<i>Roth v. Austin</i> , 2022 WL 1568830 (D. Neb. May 18, 2022).....	16
<i>Sampson v. Murray</i> , 415 U.S. 61 (1974).....	22
<i>Vassalle v. Midland Funding LLC</i> , 708 F.3d 747 (6th Cir. 2013)	11
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. 338 (2011)	12, 16
<i>Winter v. Natural Res. Def. Council, Inc.</i> , 555 U.S. 7 (2008).....	19-20
Statutes:	
10 U.S.C. § 1552	22
10 U.S.C. § 9013	21
42 U.S.C. § 2000bb-1(b)	13
42 U.S.C. § 2000bb-1(b)(1)	14
42 U.S.C. § 2000bb-1(b)(2)	14

Rules:

Fed. R. Civ. P. 23(b)(1)(A)15

Fed. R. Civ. P. 23(b)(2)16

Other Authorities:

Air Force, *DAF COVID-19 Statistics – July 12, 2022* (July 12, 2022),
<https://go.usa.gov/xSXwJ>5

CDC, *COVID Data Tracker*, <https://go.usa.gov/xSNTH>.....3

Sec’y of the Air Force, *DAF Instruction 52-201* (June 23, 2021),
https://static.e-publishing.af.mil/production/1/af_hc/publication/dafi52-201/dafi52-201.pdf 12-13

Protecting Our Forces: Improving Vaccine Acquisition and Availability in the U.S. Military (Stanley M. Lemon et al. eds., 2002),
<https://perma.cc/E545-TQ9G>3

INTRODUCTION AND SUMMARY

The Department of the Air Force (DAF) has long imposed medical requirements designed to ensure service members' readiness to serve, including that they be vaccinated against numerous illnesses.¹ In 2021, DAF added the COVID-19 vaccination to those requirements after concluding that the vaccine is critical to ensuring service members are fit to deploy and train.

The named plaintiffs—18 service members in the Air Force and Air Force Reserve—challenged this requirement, arguing that it violates the Religious Freedom Restoration Act (RFRA) and the First Amendment. The district court granted preliminary injunctive relief to those named plaintiffs, and the government appealed.

While that appeal was pending, the district court issued a radically broader class-wide injunction. First, without regard to any individual's particular religious objections or roles and responsibilities within DAF, the court certified a class of roughly 10,000 service members, including plaintiffs who already have challenged the requirement in other jurisdictions. The court then extended preliminary injunctive relief to that entire class, without explaining why the requisite factors were met for every member of such a broad and diverse class.

This Court should stay the extraordinary class-wide preliminary injunction pending the government's appeal of that order. The injunction reflects a fundamental

¹ DAF includes the Air Force and the Space Force, a service branch within DAF.

misunderstanding of the nature of the claims at issue here: RFRA requires courts to conduct an individualized assessment of whether the government has a compelling interest in applying the challenged policy to any particular person who can demonstrate a substantial burden on his religious exercise. RFRA remedies are not dispensed in gross. To decide whether a service member has presented a valid RFRA claim, a court must assess whether that individual's particular beliefs are religious and sincerely held, whether any burden on that individual's exercise of religion is substantial, and whether considering that individual's military duties, there are less restrictive ways to accomplish the military's compelling interests. The class-wide injunction pretermits that particularized inquiry and distorts the operation of RFRA, subverting Congress's recognition that religious beliefs are deeply personal and varied and that religious accommodations are inescapably individualized and contextual.

The harms flowing from the class-wide injunction are plain and irreparable. As a three-star general explained, the injunction places DAF in the untenable position of either treating unvaccinated service members as deployable—contrary to the judgment of senior military officials—or maintaining nearly 10,000 non-deployable service members. Either scenario will cause “immediate and lasting harm to the Department and its ability to defend the nation” by degrading lethality and force capabilities, eroding good order and discipline, and unnecessarily risking mission failures. Schneider Decl., R. 83-1, Page ID # 4596, 4600-01. By contrast, the named plaintiffs—who remain covered by the court's earlier injunction—will suffer no harm

from a stay of the class-wide injunction. And any potential employment-related harms that other class members might suffer are compensable.

This Court should accordingly stay the class-wide preliminary injunction pending appeal.

STATEMENT

A. Military Immunization and COVID-19

1. The U.S. military instituted its first immunization program in 1777 when General Washington directed the inoculation of the Continental Army for smallpox. *Protecting Our Forces: Improving Vaccine Acquisition and Availability in the U.S. Military* 11-12 (Stanley M. Lemon et al. eds., 2002), <https://perma.cc/E545-TQ9G>. Military-mandated vaccines continue to play a key role in reducing infectious disease morbidity and mortality among military personnel. As of early 2021, the Department of Defense (DoD) required that all service members receive nine vaccines, including the annual influenza vaccine. *See* DAF Instruction, Table D-1, R. 27-6, Page ID # 1624.

2. To date, more than 93 million Americans have been diagnosed with, and over one million have died from, COVID-19. CDC, *COVID Data Tracker*, <https://go.usa.gov/xSNTH>. The COVID-19 pandemic has also significantly disrupted the military's activities. As of March 1, 2022, "there have been 387,621 cases" of COVID-19 in military service members, leading to 94 deaths. Stanley Decl., R. 27-11, Page ID # 1912.

3. On August 24, 2021, the Secretary of Defense directed the Secretaries of the military departments to immediately vaccinate all members of the armed forces under DoD authority who were not already fully vaccinated. *See* Sec’y Def. Mem., R. 27-3, Page ID # 1561. Shortly after, DAF issued implementing guidance, directing all active-duty service members and reservists to become fully vaccinated. *See* Sec’y Air Force Mem., R. 27-7, Page ID # 1632.

a. As with other vaccination requirements, DoD and DAF guidance establish processes for seeking religious exemptions to the COVID-19 vaccination requirement. DAF members first submit a written request and consult with a chaplain, their commander, and a military medical provider. *See* Streett Decl., R. 27-13, Page ID # 1932, 1934-35. Each commander provides a recommendation, and a multidisciplinary team then reviews the request and provides a recommendation to the approval authority. *Id.*, Page ID # 1933-36.

The approval authority—generally a higher-level commander—individually assesses each request to determine “(1) if there is a sincerely held religious ... belief,” “(2) if the vaccination requirement substantially burdens the applicant’s religious exercise” based on that belief, and if so, “(3) whether there is a compelling government interest in requiring that specific requestor to be vaccinated, and (4) whether there are less restrictive means in furthering that ... interest.” Streett Decl., R. 27-13, Page ID # 1932-33, 1936-37. If the approval authority denies the request,

the service member may appeal to the Air Force Surgeon General. *See id.*, Page ID # 1932-33, 1937-38.

A service member is temporarily exempted from the vaccination requirement while his religious-exemption request is pending, including during any administrative appeal. *See* Street Decl., R. 27-13, Page ID # 1937-38. As of July 12, 2022, DAF had approved 135 religious-exemption requests to the COVID-19 vaccination requirement (including 31 approved on appeal). *See* Air Force, *DAF COVID-19 Statistics – July 12, 2022* (July 12, 2022), <https://go.usa.gov/xSXwJ>.

b. Commanders may take administrative and disciplinary actions against a service member whose exemption request is denied and who refuses the COVID-19 vaccine. *See* Hernandez Decl., R. 27-14, Page ID # 1941-45.

Active-duty service members may be subject to administrative discharge proceedings in which they receive notice of the recommendation for discharge, the opportunity to respond, and potentially a formal hearing. *See* Hernandez Decl., R. 27-14, Page ID # 1943. Reservists may be placed in a “no pay/no points status” and then reassigned to the Individual Ready Reserve. Watson Decl., R. 27-15, Page ID # 1950. The service member remains a member of DAF but does not train with his unit, earn pay as a reservist, or receive credit toward retirement. *See id.*; *see also* Heyen Decl., R. 27-18, Page ID # 1978-80.

B. Prior Proceedings

1. Plaintiffs, 18 active-duty and active-reservist members of the Air Force, filed a class-action complaint, asserting that DAF's failure to grant their requests for religious exemptions from the COVID-19 vaccination requirement violates RFRA and the First Amendment. *See* Compl., R. 1, Page ID # 17-18. At the time, several of the named plaintiffs had not yet received any decision on their pending religious-accommodation request, and most had not yet completed the intramilitary appeal process for their requested religious exemptions. *See* Order, R. 47, Page ID # 3172-73.

2. Plaintiffs moved for a preliminary injunction, and the district court granted plaintiffs' motion, prohibiting DAF from "taking any disciplinary or separation measures against the [named] [p]laintiffs ... for their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs." Order, R. 47, Page ID # 3203.

The district court concluded that plaintiffs were likely to succeed on the merits of their RFRA claims because DAF supposedly lacks a compelling interest in requiring the named plaintiffs to be vaccinated and the vaccination requirement is purportedly not the least restrictive means to further any such interest. Order, R. 47, Page ID # 3189-93; *see id.*, Page ID # 3194-97 (similar for First Amendment claims). The court also determined that equitable factors favored preliminary relief for the named plaintiffs. *Id.*, Page ID # 3197-99. The government appealed that preliminary injunction. *See Doster v. Kendall*, No. 22-3497 (6th Cir.).

3. While briefing was underway on appeal, the district court certified a class consisting 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.

Order, R. 72, Page ID # 4466-67.

The court concluded that plaintiffs satisfied Rule 23(a)’s commonality requirement because they “have all allegedly suffered the same injury: violation of their constitutional rights,” and their claims all “involve the same common analysis”—whether DAF’s denials of “substantially all religious accommodation requests by Airmen who maintain sincerely held religious beliefs further a compelling governmental interest” and whether “such policy and practice [is] the least restrictive means to achieve compelling governmental interests, if any exist.” Order, R. 72, Page ID # 4454-56.

The court held that the proposed class satisfied Rule 23(a)’s typicality requirement “for the exact reasons that commonality is established,” rejecting the argument that the class members’ different roles and responsibilities, as well as different religious beliefs and reasons for objecting to the COVID-19 vaccine, would defeat typicality. Order, R. 72, Page ID # 4457-58, 4459.

The court also found the requirements of Rules 23(b)(1)(A) and 23(b)(2) satisfied. As to Rule 23(b)(1)(A), the court expressed concern that different courts “may arrive at incompatible conclusions with respect to Airmen who seek religious exemptions from the vaccine mandate.” Order, R. 72, Page ID # 4464. The court stated that certification was also appropriate under Rule 23(b)(2) because “the relief the proposed class seeks is the same: a religious accommodation relating to the COVID-19 vaccine mandate,” and all class members “have been harmed in ‘essentially the same way.’” *Id.*, Page ID # 4466.

The court then entered a temporary restraining order prohibiting DAF “from enforcing the vaccine mandate against any Class Member.” Order, R. 72, Page ID # 4469.

4. On July 27, the district court entered a class-wide preliminary injunction in a four-page order that contained no meaningful legal analysis. The court did not discuss any of the preliminary injunction factors. Instead, the court stated that “due to the systematic nature of what the Court views as violations of Airmen’s constitutional rights to practice their religions as they please, the Court is well within its bounds to extend the existing preliminary injunction to all Class Members.” Order, R. 77, Page ID # 4539.

At plaintiffs’ urging, and without any opportunity for the government to respond, the district court also expanded the class to include “inductees[]” (presumably referring to prospective enlisted members), “appointees” (*i.e.*, individuals,

including civilians, who are not yet officers), the national guard, cadets, and all of the reserve (not just the “active reserve”). Order, R. 77, Page ID # 4539. The district court prohibited DAF from “refus[ing] to accept for commissioning or enlistment any inductee or appointee due to their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs.” *Id.*, Page ID # 4539-40. And the court enjoined DAF from “plac[ing] or continu[ing] active reservists on no points, no pay status for their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs.” *Id.*, Page ID # 4540. Finally, the court excluded from the mandatory class any member who “opts out, by delivering notice to the Government and Class Counsel in writing of their election to opt out.” *Id.*, Page ID # 4539.

5. The government appealed and moved to stay the class-wide preliminary injunction pending appeal. In response, plaintiffs conceded that the aspects of the injunction related to the “commissioning of new officers” and “enlisting of new members” needed to be withdrawn in light of the Executive’s constitutionally established authority to appoint military officers and the military’s exclusive power over its enlistment decisions. Opp., R. 85, Page ID # 4654-55.

The district court denied the government’s request for a stay. The court concluded that the government was not likely to succeed on appeal for the reasons stated in its prior orders granting class certification and class-wide injunctive relief. Order, R. 86, Page ID # 5008-09. The court also concluded that the equitable favors weighed against granting a stay. Class members would face irreparable harm if the

injunction were stayed, the court reasoned, because DAF “appear[ed] prepared to separate any airman who objects to getting the COVID-19 vaccine due to sincerely held religious beliefs.” *Id.*, Page ID # 5009. That harm, the court suggested, was “far more comprehensive” than any harm DAF would face from “having fewer Airmen to deploy.” *Id.* The court also expressed doubt that DAF faced any harm at all, labeling as “untenable” DAF’s judgment that it “promotes military readiness to separate and discipline pilots and other Airmen because they object to the vaccine mandate.” *Id.*, Page ID # 5010. And the court opined that the public interest weighed against a stay because “in today’s global climate, it is in the public’s interest for the armed services to remain at full strength, rather than separating thousands of Airmen due to their refusal to get the COVID-19 vaccine.” *Id.*

At the same time, the district court modified several aspects of its class-wide injunction. The court modified the class definition so that the injunction applied only to individuals who satisfied that definition as of the date of the class-wide injunction. Order, R. 86, Page ID # 5011-12. And “in light of separation of powers issues and the President’s unreviewable appointment power under Article II,” the court “rescinded” and “withdr[ew]” the portion of the injunction that prohibited DAF from “refus[ing] to accept for commissioning or enlistment any inductee or appointee” who refuses a COVID-19 vaccine for religious reasons. *Id.*, Page ID # 5013.

ARGUMENT

In determining whether to grant a stay pending appeal, this Court considers: (1) the likelihood of success on appeal; (2) whether the applicant will suffer irreparable injury; (3) the balance of hardships; and (4) the public interest. *Ohio State Conference of NAACP v. Husted*, 769 F.3d 385, 387 (6th Cir. 2014). Each factor weighs in favor of staying the class-wide preliminary injunction pending appeal.

I. The Government Is Likely to Succeed on Appeal

The district court erred in granting injunctive relief to a class of roughly 10,000 DAF service members without considering whether the vaccination requirement violates RFRA as applied to any particular service member. Beyond violating the basic requirements for defining the scope of a class, the district court’s decision usurps professional military judgments and intrudes on core areas of military decisionmaking.

A. The District Court’s Class-Wide Preliminary Injunction Is Invalid Because Class Members’ Claims Are Incapable of Class-Wide Resolution

For claims to be resolved on a class-wide basis, plaintiffs must show that their proposed class satisfies Rule 23(a)’s prerequisites and at least one of Rule 23(b)’s requirements. *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 756 (6th Cir. 2013). The district court erred in concluding that the class it certified satisfies those requirements and in extending preliminary injunctive relief to that class.

1. The district court wrongly suggested that plaintiffs’ class satisfies Rule 23(a)’s “commonality” and “typicality” requirements because class members have suffered

the “same injury”—a “violation of their constitutional rights.” Order, R. 72, Page ID # 4454-57; see *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n.5 (2011)

(commonality and typicality requirements “tend to merge”). As the Supreme Court has stressed, showing that class members “have all suffered a violation of the same provision of law” is not enough to establish that those claims are appropriate for class-wide resolution. *Dukes*, 564 U.S. at 350. Rather, plaintiffs must identify

“common *answers* apt to drive the resolution of the litigation.” *Id.* (citation omitted).

That is particularly true where plaintiffs are asserting claims under RFRA because RFRA requires courts to consider “application of the challenged law ‘*to the person.*’”

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430-31 (2006)

(emphasis added). RFRA questions are almost uniquely unsuited to class-wide resolution because, as Congress recognized in enacting RFRA, questions of religious belief are deeply personal and appropriate religious accommodations are context-dependent.

The district court did not solve the problem by limiting the class to service members who had a chaplain confirm that they “had a sincerely held religious belief substantially burdened by” the vaccination requirement. Order, R. 77, Page ID # 4539. A chaplain’s initial determinations are not binding on the approval or appeal authority, Streett Decl., R. 27-13, Page ID # 1935-36, and chaplains only identify the burden the claimant proposes; they are not tasked with assessing its substantiality. See Sec’y of the Air Force, *DAF Instruction 52-201*, Table A5.1 (June 23, 2021),

https://static.e-publishing.af.mil/production/1/af_hc/publication/dafi52-201/dafi52-201.pdf. More fundamentally, whether a claimant can demonstrate a sincerely held religious belief is only part of a RFRA claim—the *court* must evaluate whether the policy substantially burdens the claimant’s exercise of religion; whether any such burden furthers a compelling government interest; and whether the policy is the least restrictive means of furthering that interest as to that particular claimant. *See* 42 U.S.C. § 2000bb-1(b). Resolution of those issues requires considering the individual circumstances of each service member. Service members have a range of personal religious beliefs, only some of which could be substantially burdened. Indeed, since filing suit, two named plaintiffs have testified that they are willing to receive a newly authorized vaccine that does not use fetal cell or mRNA technology, and two others have traveled internationally to receive a vaccine that conforms with their religious beliefs.² Moreover, the importance of vaccinating a particular service member may be heightened, depending on that individual’s deployment conditions and how contracting COVID-19 would adversely affect that service member’s mission accomplishment. Bannister Decl., R. 34-2, Page ID # 2235-37. And whether a less burdensome alternative to vaccination would be equally effective to advance the

² *See* Theriault Decl., R. 30-20, Page ID # 2147-48; Hearing Tr., R. 48, Page ID # 3280; Salvatore Decl., R. 65-1, Page ID # 4396; Second Ramsperger Decl., R. 66-1, Page ID # 4403-04.

military's compelling interests could depend on specific duty assignments, type of work, and workspace configuration. *Id.*, Page ID # 2237-39.

The district court was also wrong to rely on DAF's purported "policy and practice of ... denying substantially all religious accommodation requests." Order, R. 72, Page ID # 4455-56. The mere fact that each plaintiff unsuccessfully sought a religious exemption from DAF does not establish commonality or typicality. No RFRA violation has occurred if DAF can "demonstrate[]" *in court* that applying its policy "to the person" furthers a compelling governmental interest and is the least restrictive means of doing so. 42 U.S.C. § 2000bb-1(b)(1), (2). Thus, whether plaintiffs were all treated similarly in DAF's internal administrative process is not a common question relevant to resolving the disposition of their RFRA claims in this case. And if anything, the fact that DAF already has granted more than 130 religious exemptions shows that, far from denying all requests as a matter of policy, DAF is using an individualized process that accounts for facts particular to each service member. *See* Streett Decl., R. 27-13, Page ID # 1932-34.

That the named plaintiffs' claims are subject to "unique defense[s]" further demonstrates that class treatment is inappropriate. *Beck v. Maximus, Inc.*, 457 F.3d 291, 301 (3d Cir. 2006). For example, many of the named plaintiffs have not completed the appeal process for their requested religious exemptions, and none has been separated or reassigned to the Individual Ready Reserve. They accordingly do not have ripe or exhausted claims. *See Harkness v. Secretary of the Navy*, 858 F.3d 437, 443 (6th Cir. 2017).

Additionally, none of the named plaintiffs is a cadet or member of the national guard, and thus they lack standing to challenge requirements applied to those groups. *Cf. In re Navy Chaplaincy*, 534 F.3d 756, 760-61 (D.C. Cir. 2008).

2. The district court also erred in concluding that the class could be maintained under Rule 23(b) and in extending the preliminary injunction to the class on that basis.

Rule 23(b)(1)(A) allows class treatment when “prosecuting separate actions ... would create a risk of” “inconsistent or varying adjudications ... that would establish incompatible standards of conduct for the party opposing the class.” Fed. R. Civ. P. 23(b)(1)(A). The district court expressed concern that, absent class treatment, various service members might bring “[s]imilar claims” in other courts, such that “[o]ne court may find that [DAF] may enforce its vaccine mandate over ... religious objections, and another court may find the opposite.” Order, R. 72, Page ID # 4464. That statement ignores RFRA’s individualized nature and the exception for a compelling government interest when there is no less restrictive alternative for that particular person. But the prospect “that some plaintiffs may be successful in their suits against a defendant while others may not” is also “clearly not a ground for invoking Rule 23(b)(1)(A).” *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984). Courts may reach different conclusions about different service members’ likelihood of success on their RFRA claims. But those variations are an intentional feature of the individualized assessment required to determine whether a RFRA violation has occurred.

Plaintiffs’ class also cannot be maintained under Rule 23(b)(2), which applies when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief ... is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). The district court concluded that this requirement was satisfied because all class members seek the “same” relief, a religious exemption to the COVID-19 vaccination requirement, and “they have been harmed in ‘essentially the same way.’” Order, R. 72, Page ID # 4466. The Supreme Court rejected that approach to class certification in *Wal-Mart v. Dukes*, when it held that employees’ potential Title VII claims were not suitable for certification because the success of each employee’s claim depended on the specific circumstances surrounding each individual employment action. 564 U.S. at 360. Similarly here, each claim depends on the factual circumstances peculiar to each service member. *See supra* pp. 11-15.

3. The impropriety of the district court’s overbroad approach is underscored by the fact that other courts have concluded that individual members of this class are unlikely to succeed on their individual claims. *See, e.g., Dunn v. Austin*, 142 S. Ct. 1707 (2022) (mem.) (denying injunction pending appeal).³ Class certification prevents a similar plaintiff-specific focus here, and the injunction effectively nullifies the decisions those other courts—including the Supreme Court—already have made. The

³ *Roth v. Austin*, 2022 WL 1568830 (D. Neb. May 18, 2022); *Knick v. Austin*, 2022 WL 2157066 (D.D.C. June 15, 2022); *Creaghan v. Austin*, 2022 WL 1685006 (D.D.C. May 26, 2022).

district court's apparent attempt to avoid conflicts with those other cases by permitting class members to opt out, Order, R. 77, Page ID # 4539, was not an adequate solution. Class members generally may not opt out of Rule 23(b)(1) or (b)(2) classes, and even if they could, the district court failed to require that plaintiffs give absent class members notice of the certification.

B. The Class-Wide Injunction Second-Guesses Military Judgment and Intrudes on Core Military Decisionmaking

1. In granting class-wide relief, the district court offered no independent analysis of the class members' claims. But the relevant equitable considerations are very different for an order enjoining DAF from applying its COVID-19 vaccination requirement to 10,000 class members rather than 18 individual plaintiffs. Indeed, the court itself relied on the relatively small number of named plaintiffs as a reason for granting its original injunction. *See* Order, R. 47, Page ID # 3184. That original injunction, moreover, was itself flawed in numerous respects, including because it inappropriately second-guessed core military judgments about what is necessary to maintain a deployable fighting force that is effective and fit for duty. *See* Brief for Appellants at 30-48, *Doster v. Kendall*, No. 22-3497 (6th Cir.).

Senior military officers have attested that DAF members must be “worldwide deployable at all times” and on “a few days” notice. Heaslip Decl., R. 27-19, Page ID # 1987. They have also explained why a member's illness due to COVID-19 threatens the member's ability to deploy and substantially increases the risk of mission failure.

Pulire Decl., R. 27-23, Page ID # 2023-24. The Secretary of the Air Force has thus determined that vaccination against COVID-19 is an “essential military readiness requirement.” Sec’y Air Force Mem., R. 27-8, Page ID # 1656. In nevertheless concluding that DAF did not have a compelling interest in requiring the named plaintiffs to be vaccinated, the district court substituted its own view for that of the military and failed to afford these core, fact-based military judgments the “great deference” to which they are entitled. *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

2. The district court independently erred when it expanded the scope of the class-wide injunction to intrude on areas of core military decisionmaking. The Supreme Court recently reiterated—in partially staying another preliminary injunction—that the military is permitted to consider vaccination status “in making deployment, assignment, and other operational decisions.” *Austin v. U.S. Navy SEALs* 1-26, 142 S. Ct. 1301 (2022) (mem.). The district court apparently recognized that its class-wide injunction violated that order, and the precedent underlying it, because the court later “*rescinded*” the portions of the injunction that purported to control DAF’s appointment of officers and enlistment of prospective new members. Order, R. 86, Page ID # 5013; see *Orloff v. Willoughby*, 345 U.S. 83, 90 (1953) (courts “have never assumed ... to control the appointing power [in] ... military positions”); *Maier v. Orr*,

754 F.2d 973, 983 (Fed. Cir. 1985) (“Federal courts have uniformly declined ... to order relief beyond a current enlistment.”).⁴

At the same time, however, the court maintained the portion of its injunction that precludes DAF from placing reservists in a no pay/no points status. Order, R. 86, Page ID # 5013. That portion of the injunction requires DAF to return reservist class members to their operational units and pay them, even though they do not meet medical readiness standards required for participating in the reserve and may not be able to effectively perform their military duties. The district court has thus dictated DAF’s operational decision about which reservists to use, Burger Decl., R. 83-2, Page ID # 4620-23, despite purporting not to do so. Accordingly, if the Court does not stay the class-wide injunction in full, it should, at a minimum, stay the injunction to the extent it goes beyond forbidding defendants from issuing final discipline or separating current service members who are members of the class based on their refusal to be vaccinated against COVID-19 on religious grounds.

II. The Balance of Equities Warrants a Stay

The district court’s failure even to mention the equitable factors when it granted the class-wide injunction, *see* Order, R. 77, Page ID # 4538-41, demonstrates that the injunction was flawed and should be stayed pending appeal. *See Winter v.*

⁴ The government understands the district court’s rescission to operate, at a minimum, as a stay of these provisions of the injunction and requests that this Court state as much. To the extent this Court disagrees and believes those portions remain in effect, this Court should itself immediately stay those provisions.

Natural Res. Def. Council, Inc., 555 U.S. 7, 26 (2008) (abuse of discretion to “address [equitable factors] in only a cursory fashion”). The district court’s belated, perfunctory attempts to address those factors in its stay order cannot substitute for analysis in granting injunctive relief. And the equitable factors heavily favor the government, in any event.

As explained by Lieutenant General Kevin Schneider, the Director of Staff for the Headquarters of the Air Force, DAF suffers irreparable harm each day the class-wide injunction remains in place. The injunction requires DAF to retain nearly 10,000 unvaccinated service members who, in the judgment of professional military commanders, are ineligible to deploy and are limited in their ability to travel for training, exercise, or other operational needs. Schneider Decl., R. 83-1, Page ID # 4601. Because DAF’s end-strength—*i.e.*, the maximum number of personnel—is congressionally mandated, “the Department cannot simply enlist or commission more members to make up for the thousands of permanently non-deployable, non-combat-ready members.” *Id.* The class-wide injunction thus places DAF in the untenable situation of either treating unvaccinated service members as deployable or maintaining nearly 10,000 non-deployable service members. The former option contradicts the “professional military judgment,” *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), of senior commanders that COVID-19 vaccination is necessary for military readiness, *see* Schneider Decl., R. 83-1, Page ID # 4595-96. And the latter option “degrades” DAF’s “lethality and force capabilities,” by limiting the number of deployable service

members; shifting the hardships and burdens of global deployment to vaccinated members; and undermining unit cohesion, good order, and discipline. *Id.*, Page ID # 4596, 4601-02, 4611-14.

In denying the government’s stay motion, the district court relied on its own judgment that “it is in the public’s interest for the armed services to remain at full strength, rather than separating thousands of Airmen due to their refusal to get the COVID-19 vaccine.” Order, R. 86, Page ID # 5010. But decisions related to manning of DAF service members have been specifically delegated to the Secretary of the Air Force. *See* 10 U.S.C. § 9013. By adopting its own view of the requirements for DAF staffing and military readiness, the district court impermissibly “inserted itself into the [military’s] chain of command, overriding military commanders’ professional military judgments.” *U.S. Navy SEALs 1-26*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring); *see Rostker v. Goldberg*, 453 U.S. 57, 59, 70 (1981).

The district court also pointed to harms class members would suffer absent the class-wide injunction—namely, being separated from DAF and “losing their entire military careers.” Order, R. 86, Page ID # 5009. But the named plaintiffs will not suffer any harm, as DAF will still be subject to the named-plaintiffs injunction. Order, R. 47, Page ID # 3203. It is not clear that any other class member will suffer such harms, either. Some may have their pending religious-exemption requests granted, others may obtain a vaccine that conforms with their beliefs, and others may prevail during their disciplinary or separation proceedings and be retained by DAF. And even

when they do occur, such employment-related harms do not constitute irreparable injury, particularly, where, as here, a class member can challenge any adverse action in court and if successful, receive backpay, retroactive promotion, or reimbursement for lost benefits. *Guitard v. U.S. Sec’y of Navy*, 967 F.2d 737, 742 (2d Cir. 1992) (citing *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974)); *see* 10 U.S.C. § 1552 (military departments can “correct any military record” to “correct an error” or “remove an injustice”).

CONCLUSION

The Court should stay the district court's class-wide preliminary injunction pending appeal.

Respectfully submitted,

BRIAN M. BOYNTON

Principal Deputy Assistant Attorney General

KENNETH L. PARKER

United States Attorney

CHARLES W. SCARBOROUGH

LOWELL V. STURGILL JR.

CASEN B. ROSS

SARAH J. CLARK

/s/ Anna O. Mohan

ANNA O. MOHAN

Attorneys, Appellate Staff

Civil Division, Room 7533

U.S. Department of Justice

950 Pennsylvania Avenue NW

Washington, D.C. 20530

(202) 514-3159

anna.mohan@usdoj.gov

AUGUST 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because the motion contains 5,193 words. The motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (6) because it has been prepared using Microsoft Word 2016 in proportionally spaced 14-point Garamond typeface.

/s/ Anna O. Mohan
ANNA O. MOHAN

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2022, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Anna O. Mohan
ANNA O. MOHAN

ADDENDUM

TABLE OF CONTENTS

District Court Docket.....	A1
Notice of Appeal (Aug. 15, 2022) (ECF 82, Page ID #4566-4568).....	A29
District Court Order Denying Emergency Motion for Stay Pending Appeal, Modifying Class Definition, And Modifying Preliminary Injunction (August 19, 2022) (ECF 86, Page ID # 5007-5014)	A32
District Court Order Granting Class-Wide Preliminary Injunction (July 27, 2022) (ECF 77, Page ID # 4538-4541).....	A40
District Court Opinion & Order Granting Class Certification Motion & Temporary Restraining Order (July 14, 2022) (ECF 72, Page ID # 4448- 4469)	A44

[Query](#) [Reports](#) [Utilities](#) [Help](#) [Log Out](#)

APPEAL

**U.S. District Court
Southern District of Ohio (Cincinnati)
CIVIL DOCKET FOR CASE #: 1:22-cv-00084-MWM**

Doster et al v. Secretary of the Airforce et al
Assigned to: Judge Matthew W. McFarland
Case in other court: Sixth Circuit, 22-03497
Sixth Circuit Court of Appeals, 22-03702
Cause: 28:2201 Injunction

Date Filed: 02/15/2022
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: U.S. Government Defendant

Plaintiff**Hunter Doster**

represented by **Christopher David Wiest**
25 Town Center Blvd, STE 104
Crestview Hills, KY 41017
513-257-1895
Email: chris@cwiestlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas B Bruns
Bruns, Connell, Vollmar & Armstrong, LLC
4555 Lake Forest Drive
Suite 330
Cincinnati, OH 45242
513-312-9890
Fax: 513-800-1263
Email: tbruns@bcvalaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Aaron Siri
Siri & Glimstad LLP
745 Fifth Avenue
Suite 500
New York, NY 10151
212-532-1091
Email: aaron@sirillp.com
ATTORNEY TO BE NOTICED

Elizabeth Ann Brehm
Siri & Glimstad LLP
745 Fifth Avenue
Suite 500
New York, NY 10151
212-532-1091
Fax: 646-417-5967
Email: ebrehm@sirillp.com

PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Cox
Siri & Glimstad LLP
100 Congress Avenue
Suite 2000-4590
Austin, TX 78701
512-265-5622
Email: wcox@sirillp.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

Jason Anderson

represented by **Christopher David Wiest**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas B Bruns
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Aaron Siri
(See above for address)
ATTORNEY TO BE NOTICED

Elizabeth Ann Brehm
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Cox
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

McKenna Colantanio

represented by **Christopher David Wiest**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas B Bruns
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Aaron Siri
(See above for address)
ATTORNEY TO BE NOTICED

Elizabeth Ann Brehm

(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Cox
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

Paul Clement

represented by **Christopher David Wiest**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas B Bruns
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Aaron Siri
(See above for address)
ATTORNEY TO BE NOTICED

Elizabeth Ann Brehm
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Cox
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

Joe Dills

represented by **Christopher David Wiest**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas B Bruns
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Aaron Siri
(See above for address)
ATTORNEY TO BE NOTICED

Elizabeth Ann Brehm
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Cox
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

Benjamin Leiby

represented by **Christopher David Wiest**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas B Bruns
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Aaron Siri
(See above for address)
ATTORNEY TO BE NOTICED

Elizabeth Ann Brehm
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Cox
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

Brett Martin

represented by **Christopher David Wiest**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas B Bruns
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Aaron Siri
(See above for address)
ATTORNEY TO BE NOTICED

Elizabeth Ann Brehm
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Cox
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff**Connor McCormick**

represented by **Christopher David Wiest**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas B Bruns
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Aaron Siri
(See above for address)
ATTORNEY TO BE NOTICED

Elizabeth Ann Brehm
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Cox
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff**Heidi Mosher**

represented by **Christopher David Wiest**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas B Bruns
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Aaron Siri
(See above for address)
ATTORNEY TO BE NOTICED

Elizabeth Ann Brehm
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Cox
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff**Peter Norris**

represented by **Christopher David Wiest**
(See above for address)

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas B Brun
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Aaron Siri
(See above for address)
ATTORNEY TO BE NOTICED

Elizabeth Ann Brehm
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Cox
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

Patrick Pottinger

represented by **Christopher David Wiest**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas B Brun
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Aaron Siri
(See above for address)
ATTORNEY TO BE NOTICED

Elizabeth Ann Brehm
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Cox
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

Alex Ramsperger

represented by **Christopher David Wiest**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas B Brun

(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Aaron Siri
(See above for address)
ATTORNEY TO BE NOTICED

Elizabeth Ann Brehm
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Cox
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

Benjamin Rinaldi

represented by **Christopher David Wiest**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas B Bruns
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Aaron Siri
(See above for address)
ATTORNEY TO BE NOTICED

Elizabeth Ann Brehm
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Cox
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

Douglas Ruyle

represented by **Christopher David Wiest**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas B Bruns
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Aaron Siri

(See above for address)

*ATTORNEY TO BE NOTICED***Elizabeth Ann Brehm**

(See above for address)

*PRO HAC VICE**ATTORNEY TO BE NOTICED***Wendy Cox**

(See above for address)

*PRO HAC VICE**ATTORNEY TO BE NOTICED***Plaintiff****Christopher Schuldes**represented by **Christopher David Wiest**

(See above for address)

*LEAD ATTORNEY**ATTORNEY TO BE NOTICED***Thomas B Bruns**

(See above for address)

*LEAD ATTORNEY**ATTORNEY TO BE NOTICED***Aaron Siri**

(See above for address)

*ATTORNEY TO BE NOTICED***Elizabeth Ann Brehm**

(See above for address)

*PRO HAC VICE**ATTORNEY TO BE NOTICED***Wendy Cox**

(See above for address)

*PRO HAC VICE**ATTORNEY TO BE NOTICED***Plaintiff****Edward Stapanon, III**represented by **Christopher David Wiest**

(See above for address)

*LEAD ATTORNEY**ATTORNEY TO BE NOTICED***Thomas B Bruns**

(See above for address)

*LEAD ATTORNEY**ATTORNEY TO BE NOTICED***Aaron Siri**

(See above for address)

ATTORNEY TO BE NOTICED

Elizabeth Ann Brehm
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Cox
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

Adam Theriault

represented by **Christopher David Wiest**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas B Brun
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Aaron Siri
(See above for address)
ATTORNEY TO BE NOTICED

Elizabeth Ann Brehm
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Cox
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

Daniel Reineke
On behalf of themselves and others
similarly situated

represented by **Christopher David Wiest**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas B Brun
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Aaron Siri
(See above for address)
ATTORNEY TO BE NOTICED

Elizabeth Ann Brehm
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Cox
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

V.

Intervenor Plaintiff

Andrea Corvi

represented by **Christopher David Wiest**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Intervenor Plaintiff

Jonathan Oberg

represented by **Christopher David Wiest**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Intervenor Plaintiff

Johnathan Nipp

represented by **Christopher David Wiest**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

Secretary of the Airforce
In his official capacity

represented by **Andrew Evan Carmichael**
DOJ-Civ
Civil Division, Federal Programs Branch
1100 L. St. NW
Washington, DC 20003
202-514-3346
Email: andrew.e.carmichael@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Cassie Snyder
DOJ-Civ
Department of Justice
1100 L Street NW
Washington, DC 20005
202-451-7729
Email: cassandra.m.snyder@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Catherine Yang
DOJ-Civ
1100 L St NW

Washington, DC 20530
 202-514-4336
 Email: catherine.m.yang@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Courtney Danielle Enlow
 DOJ-Civ
 1100 L Street, NW
 Washington, DC 20530
 202-616-8467
 Email: courtney.d.enlow@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Zach A. Avallone
 DOJ-Civ
 Civil Division, Federal Programs Branch
 1100 L Street NW
 Washington, DC 20005
 202-514-2705
 Email: zachary.a.avallone@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Surgeon General of the Airforce
In his official capacity

represented by **Andrew Evan Carmichael**
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Catherine Yang
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Courtney Danielle Enlow
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Zach A. Avallone
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Cassie Snyder
 (See above for address)
ATTORNEY TO BE NOTICED

Defendant

**Commander, Air Education and Training
 Command**
In his official capacity

represented by **Andrew Evan Carmichael**
 (See above for address)
LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Cassie Snyder

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Catherine Yang

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Courtney Danielle Enlow

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Zach A. Avallone

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Defendant

**Commander, Air Force Reserve
Command**

In his official capacity

represented by **Andrew Evan Carmichael**

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Cassie Snyder

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Catherine Yang

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Courtney Danielle Enlow

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Zach A. Avallone

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Defendant

**Commander, Air Force Special
Operations Command**

In his official capacity

represented by **Andrew Evan Carmichael**

(See above for address)

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Cassie Snyder
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Catherine Yang
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Courtney Danielle Enlow
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Zach A. Avallone
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

United States of America

represented by **Andrew Evan Carmichael**
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Cassie Snyder
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Catherine Yang
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Courtney Danielle Enlow
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Zach A. Avallone
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
02/16/2022	1	VERIFIED CLASS ACTION COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF against All Defendants (Filing fee \$ 402 paid - receipt number: AOHSDC-8726892), filed by Patrick Pottinger, Brett Martin, Adam Theriault, Jason Anderson, Hunter Doster, Edward Stapanon, Benjamin Rinaldi, Benjamin Leiby, McKenna Colantanio, Heidi Mosher, Alex Ramsperger, Douglas Ruyle, Christopher

		Schuldes, McCormick Connor, Paul Clement, Peter Norris, Joe Dills. (Attachments: # 1 Civil Cover Sheet Civil Cover Sheet, # 2 Summons Form Summons Form) (Wiest, Christopher) Modified docket text on 2/16/2022 (kl). (Entered: 02/16/2022)
02/16/2022	2	MOTION for Leave to Appear Pro Hac Vice (Filing fee of \$200 paid, receipt number AOHSDC-8726958) of Aaron Siri by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantanio, McCormick Connor, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, Adam Theriault. (Attachments: # 1 Text of Proposed Order Proposed Order) (Wiest, Christopher) (Entered: 02/16/2022)
02/16/2022	3	MOTION for Leave to Appear Pro Hac Vice (Filing fee of \$200 paid, receipt number AOHSDC-8726965) of Elizabeth Brehm by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantanio, McCormick Connor, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, Adam Theriault. (Attachments: # 1 Text of Proposed Order) (Wiest, Christopher) (Entered: 02/16/2022)
02/16/2022	4	MOTION for Leave to Appear Pro Hac Vice (Filing fee of \$200 paid, receipt number AOHSDC-8726976) of Wendy Cox by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantanio, McCormick Connor, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, Adam Theriault. (Attachments: # 1 Text of Proposed Order Proposed Order) (Wiest, Christopher) (Entered: 02/16/2022)
02/16/2022		If this case is referred, it will be to Magistrate Judge Karen L. Litkovitz. (kl) (Entered: 02/16/2022)
02/16/2022	5	Summons Issued as to Commander, Air Education and Training Command; Commander, Air Force Reserve Command; Commander, Air Force Special Operations Command; Secretary of the Airforce; Surgeon General of the Airforce; U.S. Attorney and U.S. Attorney General. (kl) (Entered: 02/16/2022)
02/16/2022	6	Clerk's Notice of Non-Compliance Local Rule 5.1 (c): The Clerk's Office has reviewed your filing, docket 2 MOTION for Leave to Appear Pro Hac Vice, and it appears that one or more of the PDFs are not text searchable and therefore is not in compliance with Local Rule 5.1 (c). You shall refile docket 2 MOTION for Leave to Appear Pro Hac Vice as a text searchable document(s), linking the document back to the original entry within 24-hours. Non-Compliance Deadline due by 2/17/2022. (kl) (Entered: 02/16/2022)
02/16/2022	7	Amended MOTION for Leave to Appear Pro Hac Vice (Filing fee of \$200 paid, receipt number AOHSDC-8726958) of Aaron Siri by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantanio, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III, Adam Theriault. (Attachments: # 1 Text of Proposed Order) (Wiest, Christopher) Modified on 2/17/2022 (eh). (Entered: 02/16/2022)
02/16/2022	8	NOTICE by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantanio, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III, Adam Theriault <i>of filing Appendix with certified records relating to accomodation requests</i> (Attachments: # 1 Affidavit Declaration certifying records, # 2 Exhibit SECAF 9/3/21 Memo, # 3 Exhibit PCS Change 12/1/21, # 4 Exhibit Accomodation Materials - Doster, # 5 Exhibit Accomodation Materials - Dills, # 6 Exhibit Accomodation Materials - Anderson, # 7 Exhibit Accomodation Materials - Colantonio, # 8 Exhibit Accomodation Materials - Clement, # 9

		Exhibit Accomodation Materials - Leiby, # 10 Exhibit Accomodation Materials - Martin, # 11 Exhibit Accomodation Materials - McCormick, # 12 Exhibit Accomodation Materials - Mosher, # 13 Exhibit Accomodation Materials - Norris, # 14 Exhibit Accomodation Materials - Pottinger, # 15 Exhibit Accomodation Materials - Ramsperger, # 16 Exhibit Accomodation Materials - Reineke, # 17 Exhibit Accomodation Materials - Rinaldi, # 18 Exhibit Accomodation Materials - Ruyle, # 19 Exhibit Accomodation Materials - Schuldes, # 20 Exhibit Accomodation Materials - Stapanon, # 21 Exhibit Accomodation Materials - Theriault) (Wiest, Christopher) (Entered: 02/16/2022)
02/17/2022	9	Clerk's Notice of Non-Compliance Local Rule 5.1 (c): The Clerk's Office has reviewed your filing, docket 8 Notice (Other),,,,, filed by McKenna Colantano, Jason Anderson, Paul Clement, Christopher Schuldes, Benjamin Leiby, Adam Theriault, Douglas Ruyle, Edward Stapanon, III, Daniel Reineke, Alex Ramsperger, Patrick Pottinger, Joe Dills, Peter Norris, Benjamin Rinaldi, Brett Martin, Heidi Mosher, Hunter Doster, Connor McCormick., and it appears that one or more of the PDFs are not text searchable and therefore is not in compliance with Local Rule 5.1 (c). You shall refile docket 8 Notice (Other),,,,, filed by McKenna Colantano, Jason Anderson, Paul Clement, Christopher Schuldes, Benjamin Leiby, Adam Theriault, Douglas Ruyle, Edward Stapanon, III, Daniel Reineke, Alex Ramsperger, Patrick Pottinger, Peter Norris, Joe Dills, Benjamin Rinaldi, Brett Martin, Heidi Mosher, Hunter Doster, Connor McCormick. as a text searchable document(s), linking the document back to the original entry within 24-hours. Non-Compliance Deadline due by 2/18/2022. (bjc) (Entered: 02/17/2022)
02/17/2022		NOTATION ORDER granting 2 Motion for Leave to Appear Pro Hac Vice of Aaron Siri as Co-Counsel (re-filed at doc. 7 as a searchable pdf); granting 3 Motion for Leave to Appear Pro Hac Vice of Elizabeth Brehm as Co-Counsel. Co-Counsels are directed to register for e-filing through PACER unless they have done so previously. Signed by Judge Matthew W. McFarland on 2/17/2022. (eh) (Entered: 02/17/2022)
02/17/2022	10	Notice of Deficiency re: 4 MOTION for Leave to Appear Pro Hac Vice of Wendy Cox. The submitted certificate is not from the highest court of a State. Deficiency Deadline by 3/3/2022. (eh) (Entered: 02/17/2022)
02/17/2022	11	Notice of Filing of Appendix re 8 Notice (Other),,,,, (<i>correction per clerk order</i>) by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantano, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III, Adam Theriault. (Attachments: # 1 Affidavit Declaration certifying records, # 2 Exhibit Exhibit 1- SECAF 9/3/21 Memo, # 3 Exhibit Exhibit 2 - PCS Change 12/1/21, # 4 Exhibit Exhibit 3 - Accomodation Materials - Doster, # 5 Exhibit Exhibit 4 - Accomodation Materials - Dills, # 6 Exhibit Exhibit 5 - Accomodation Materials - Anderson, # 7 Exhibit Exhibit 6 - Accomodation Materials - Colantonio, # 8 Exhibit Exhibit 7 - Accomodation Materials - Clement, # 9 Exhibit Exhibit 8 - Accomodation Materials - Leiby, # 10 Exhibit Exhibit 9 - Accomodation Materials - Martin, # 11 Exhibit Exhibit 10 - Accomodation Materials - McCormick, # 12 Exhibit Exhibit 11 - Accomodation Materials - Mosher, # 13 Exhibit Exhibit 12 - Accomodation Materials - Norris, # 14 Exhibit Exhibit 13 - Accomodation Materials - Pottinger, # 15 Exhibit Exhibit 14 - Accomodation Materials - Ramsperger, # 16 Exhibit Exhibit 15 - Accomodation Materials - Reineke, # 17 Exhibit Exhibit 16 - Accomodation Materials - Rinaldi, # 18 Exhibit Exhibit 17 - Accomodation Materials - Ruyle, # 19 Exhibit Exhibit 18 - Accomodation Materials - Schuldes, # 20 Exhibit Exhibit 19 - Accomodation Materials - Stapanon, # 21 Exhibit Exhibit 20 - Accomodation Materials - Theriault) (Wiest, Christopher) Modified on 4/5/2022 to correct Title of Pleading (kaf). (Entered: 02/17/2022)
02/19/2022	12	MOTION for Leave to Appear Pro Hac Vice (Filing fee of \$200 paid, receipt number A15

		AOHSDC-8726976) of Wendy Cox by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantano, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III, Adam Theriault. (Attachments: # 1 Text of Proposed Order) (Wiest, Christopher) (Entered: 02/19/2022)
02/22/2022	13	Emergency MOTION for Temporary Restraining Order , MOTION for Preliminary Injunction (Responses due by 3/15/2022) by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantano, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III, Adam Theriault. (Attachments: # 1 Affidavit Declaration of Hunter Doster, # 2 Affidavit Declaration of Col. Jason Holbrook, # 3 Affidavit Declaration of Col. James Poel, # 4 Affidavit Declaration of Peter McCullough, MD MPH, # 5 Text of Proposed Order Proposed Order - TRO, # 6 Text of Proposed Order Proposed order - Preliminary Injunction, # 7 Exhibit Exhibit: Air Force Officer v. Austin decision, # 8 Exhibit Exhibit: Navy Seals 1-20 v. Austin, # 9 Exhibit Exhibit Navy Seal 1 v. Austin, TRO granted, # 10 Exhibit Exhibit: Navy Seal 1 v. Austin, PI Granted) (Wiest, Christopher) (Entered: 02/22/2022)
02/22/2022	14	CERTIFICATE OF MAILING BY CLERK - Certified mail service has been done by the Clerk, U.S. District Court on February 22, 2022. A copy of the complaint and issued summons were sent to the following locations: LTG. Robert Miller 1780 Air Force Pentagon Washington, D.C. 20310-1780 (Article Number 9502 7065 6331 2052 2023 89; LTG. James C. Slife 100 Bartley St., Ste. 301 Hurlburt Field, FL 32254 Article Number 9502 7065 6331 2052 2024 40; Hon. Frank Kendall 1670 Air Force Pentagon Washington, D.C. 20310-1780 Article Number 9502 7065 6331 2052 2023 65; U.S. Attorney General 950 Pennsylvania Avenue, NW Washington, D.C. 20530-0001 Article Number 9502 7065 6331 2052 202464; U.S. Attorney S.D.O.H. 303 Marconi Blvd. St. 200 Columbus, Ohio 43215 Article Number 9502 7065 6331 2052 2023 41 (pb) (Entered: 02/22/2022)
02/22/2022	15	CERTIFICATE of Clerk: Certified mailing of Summons and Complaint to Commander, Air Education and Training Command and Commander, Air Force Reserve Command. (Attachments: # 1 Certified Mail Envelopes) (kl) (Entered: 02/22/2022)
02/24/2022		NOTATION ORDER granting 4 Motion for Leave to Appear Pro Hac Vice of Wendy Cox (re-filed at doc. 12) as Co-Counsel. Co-Counsel is directed to register for e-filing through PACER unless they have done so previously. Signed by Judge Matthew W. McFarland on 2/24/2022. (eh) (Entered: 02/24/2022)
02/24/2022		Minute Entry for proceedings held before Judge Matthew W. McFarland: Telephone Conference held on 02/24/2022. Counsel for Plaintiffs and Defendants present by phone. Matters discussed. Follow-up Telephone Conference set for 02/28/2022 at 12:00PM before Judge Matthew W. McFarland. Counsel shall refer to 02/23/2022 docket entry for dial-in instructions. (kaf) (Entered: 02/24/2022)
02/25/2022	16	NOTICE of Appearance by Zach A. Avallone for Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America (Avallone, Zach) (Entered: 02/25/2022)
02/28/2022	17	Clerk's Notice of Non-Compliance Local Rule 5.1 (c): The Clerk's Office has reviewed your filing, docket 16 Notice of Appearance, and it appears that one or more of the PDFs are not text searchable and therefore is not in compliance with Local Rule 5.1 (c). You shall refile docket 16 Notice of Appearance as a text searchable document(s), linking the

		document back to the original entry within 24-hours. Non-Compliance Deadline due by 3/1/2022. (kh) (Entered: 02/28/2022)
02/28/2022	18	NOTICE by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America re 17 Notice of Non-Compliance of Local Rule 5.1(c) (Clerk's Notice), 16 Notice of Appearance, <i>re-filed as a text-searchable PDF</i> (Avallone, Zach) (Entered: 02/28/2022)
02/28/2022		Minute Entry for proceedings held before Judge Matthew W. McFarland: Status Conference held on 02/28/2022. Counsel for Plaintiffs and Defendants present by phone. Case discussed and stipulated briefing schedule set. Status Conference set for 03/07/2022 at 1:30PM via Teleconference before Judge Matthew W. McFarland. Hearing on 13 Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction set for 03/25/2022 at 1:30PM in Courtroom 7 - Cincinnati before Judge Matthew W. McFarland. (Court Reporter: Julie Wolfer) (kaf) (Entered: 02/28/2022)
02/28/2022	19	Emergency MOTION for Temporary Restraining Order <i>as to Hunter Doster</i> by Plaintiff Hunter Doster. (Attachments: # 1 Affidavit Declaration of Hunter Doster with Admin materials (SG Appeal denial and order) attached, # 2 Text of Proposed Order Proposed Order) (Wiest, Christopher) (Entered: 02/28/2022)
02/28/2022	20	SUMMONS Returned Executed (Not Effectuated related to COVID19) as to Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command (U.S. Attorney). (bjc) Modified File Date on 3/1/2022 (bjc). (Entered: 03/01/2022)
03/02/2022	21	MOTION to Certify Class by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantano, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III. (Attachments: # 1 Affidavit Declaration of C Wiest with C.V.s attached, # 2 Text of Proposed Order Proposed Order) (Wiest, Christopher) (Entered: 03/02/2022)
03/04/2022	22	NOTICE of Appearance by Cassie Snyder for Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America (Snyder, Cassie) (Entered: 03/04/2022)
03/04/2022	23	MOTION for Leave to File Excess Pages by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America. (Snyder, Cassie) (Entered: 03/04/2022)
03/07/2022		NOTATION ORDER: At the joint request of the parties and for good cause shown, the status conference set for 03/07/2022 is VACATED. Signed by Judge Matthew W. McFarland on 03/07/2022. (kaf) (Entered: 03/07/2022)
03/07/2022		NOTATION ORDER: This matter is before the Court on the Defendants' Motion for Leave to File Excess Pages (Doc. 23). For good cause shown, the Motion is GRANTED. Defendants' response in opposition to Plaintiffs' Motion for a Preliminary Injunction (Doc. 13) shall not exceed 37 pages. IT IS SO ORDERED. Signed by Judge Matthew W. McFarland on 03/07/2022. (kaf) (Entered: 03/07/2022)
03/07/2022	24	SUMMONS Returned Executed as to Defendants Commander, Air Force Reserve Command, United States of America. Commander, Air Force Reserve Command served on 2/25/2022, answer due 4/26/2022; United States of America served on 2/28/2022, answer due 4/29/2022. (kh) (Entered: 03/07/2022)

03/08/2022	25	RESPONSE in Opposition re 13 Emergency MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America. (Attachments: # 1 Exhibit Table of Exhibits, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9, # 11 Exhibit 10, # 12 Exhibit 11, # 13 Exhibit 12, # 14 Exhibit 13, # 15 Exhibit 14, # 16 Exhibit 15, # 17 Exhibit 16, # 18 Exhibit 17, # 19 Exhibit 18, # 20 Exhibit 19, # 21 Exhibit 20, # 22 Exhibit 21, # 23 Exhibit 22, # 24 Exhibit 23, # 25 Exhibit 24) (Snyder, Cassie) (Entered: 03/08/2022)
03/09/2022	26	Clerk's Notice of Non-Compliance Local Rule 5.1 (c): The Clerk's Office has reviewed your filing, docket 25 Response in Opposition to Motion, filed by Commander, Air Force Special Operations Command, Commander, Air Force Reserve Command, Surgeon General of the Airforce, Commander, Air Education and Training Command, Secretary of the Airforce, United States of America, and it appears that one or more of the PDFs are not text searchable and therefore is not in compliance with Local Rule 5.1 (c). You shall refile docket 25 Response in Opposition to Motion, filed by Commander, Air Force Special Operations Command, Commander, Air Force Reserve Command, Surgeon General of the Airforce, Commander, Air Education and Training Command, Secretary of the Airforce, United States of America as a text searchable document(s), linking the document back to the original entry within 24-hours. Non-Compliance Deadline due by 3/10/2022. (kl) (Entered: 03/09/2022)
03/09/2022	27	RESPONSE in Opposition re 13 Emergency MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America. (Attachments: # 1 Exhibit Table, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9, # 11 Exhibit 10, # 12 Exhibit 11, # 13 Exhibit 12, # 14 Exhibit 13, # 15 Exhibit 14, # 16 Exhibit 15, # 17 Exhibit 16, # 18 Exhibit 17, # 19 Exhibit 18, # 20 Exhibit 19, # 21 Exhibit 20, # 22 Exhibit 21, # 23 Exhibit 22, # 24 Exhibit 23, # 25 Exhibit 24) (Snyder, Cassie) (Entered: 03/09/2022)
03/10/2022	28	SUMMONS Returned Executed as to Defendant Commander, Air Force Special Operations Command served on 3/4/2022, answer due 5/3/2022. (eh) (Entered: 03/10/2022)
03/14/2022	29	MOTION for Leave to File Excess Pages <i>for Plaintiffs Reply in Support of Plaintiffs Preliminary Injunction</i> by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantano, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III, Adam Theriault. (Wiest, Christopher) (Entered: 03/14/2022)
03/15/2022		NOTATION ORDER: This matter is before the Court on Plaintiffs' Motion for Leave to File Excess Pages (Doc. 29). For good cause shown, the Motion is GRANTED. Plaintiffs' Reply in Support of Plaintiffs' Motion for a Preliminary Injunction (Doc. 35) shall not exceed 35 pages. IT IS SO ORDERED. Signed by Judge Matthew W. McFarland on 03/14/2022. (kaf) (Entered: 03/15/2022)
03/16/2022	30	REPLY to Response to Motion re 13 Emergency MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantano, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger,

		Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III, Adam Theriault. (Attachments: # 1 Exhibit Ex. 1 - Order, Dunn v. Austin, # 2 Affidavit Ex. 2 - Declaration Wiest, # 3 Affidavit Ex. 3 - Declaration Anderson, # 4 Affidavit Ex. 4 - Declaration Clement, # 5 Affidavit Ex. 5 - Declaration Colantano, # 6 Affidavit Ex. 6 - Declaration Dills, # 7 Affidavit Ex. 7 - Declaration Doster, # 8 Affidavit Ex. 8 - Declaration Leiby, # 9 Affidavit Ex. 9 - Declaration Martin, # 10 Affidavit Ex. 10 - Declaration McCormick, # 11 Affidavit Ex. 11 - Declaration Mosher, # 12 Affidavit Ex. 12 - Declaration Norris, # 13 Affidavit Ex. 13 - Declaration Pottinger, # 14 Affidavit Ex. 14 - Declaration Ramsperger, # 15 Affidavit Ex. 15 - Declaration Reineke, # 16 Affidavit Ex. 16 - Declaration Rinaldi, # 17 Affidavit Ex. 17 - Declaration Ruyle, # 18 Affidavit Ex. 18 - Declaration Schuldes, # 19 Affidavit Ex. 19 - Declaration Stapanon, # 20 Affidavit Ex. 20 - Declaration Theriault) (Wiest, Christopher) (Entered: 03/16/2022)
03/21/2022	31	Consent MOTION for Leave to File Excess Pages <i>in Response to Plaintiffs' Motion for Class Certification</i> by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America. (Snyder, Cassie) (Entered: 03/21/2022)
03/23/2022	32	NOTICE by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America re 27 Response in Opposition to Motion,, <i>Notice of Supplemental Authority</i> (Snyder, Cassie) (Entered: 03/23/2022)
03/23/2022		NOTATION ORDER: This matter is before the Court on Defendants' Consent Motion for Leave to File Excess Pages (Doc. 31). For good cause shown, the Motion is GRANTED. Defendants' response in opposition of Plaintiffs' Motion to Certify Class (Doc. 21) shall not exceed twenty-five (25) pages. IT IS SO ORDERED. Signed by Judge Matthew W. McFarland on 03/23/2022. (kaf) (Entered: 03/23/2022)
03/23/2022	33	NOTICE by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantano, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III, Adam Theriault <i>of additional factual developments</i> (Attachments: # 1 Exhibit Exhibit 1 - Mosher SG Appeal denied, # 2 Exhibit Exhibit 2 - Mosher Order to Vaccinate or face UCMJ, # 3 Exhibit Exhibit 3 - Stapanon RAR Denied, # 4 Exhibit Exhibit 4 - Stapanon Appeal to AF/SG, # 5 Exhibit Exhibit 5 - McCormick RAR Denied, # 6 Exhibit Exhibit 6 - McCormick Appeal to AF/S) (Wiest, Christopher) (Entered: 03/23/2022)
03/23/2022	34	RESPONSE in Opposition re 21 MOTION to Certify Class filed by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America. (Attachments: # 1 Exhibit Table, # 2 Exhibit 1 - Bannister Decl., # 3 Exhibit 2 - Schneider Decl., # 4 Exhibit 3 - Chapa Decl., # 5 Exhibit 4 - DoDI 1332.45, # 6 Exhibit 5 - AF COVID-19 Stats, # 7 Exhibit 6 - Shaffer Decl.) (Snyder, Cassie) (Entered: 03/23/2022)
03/23/2022	35	MOTION to Sever by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America. (Snyder, Cassie) (Entered: 03/23/2022)
03/23/2022	36	NOTICE by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America <i>of</i>

		<i>Additional Materials</i> (Attachments: # 1 Exhibit 1 - Colantanio, # 2 Exhibit 2 - Dills, # 3 Exhibit 3 - Doster, # 4 Exhibit 4 - Mosher, # 5 Exhibit 5 - Reineke, # 6 Exhibit 6 - Schuldes, # 7 Exhibit 7 - Theriault) (Snyder, Cassie) (Entered: 03/23/2022)
03/24/2022	37	Clerk's Notice of Non-Compliance Local Rule 5.1 (c): The Clerk's Office has reviewed your filing, docket 33 Notice (Other), filed by McKenna Colantanio, Jason Anderson, Paul Clement, Christopher Schuldes, Benjamin Leiby, Adam Theriault, Douglas Ruyle, Edward Stapanon, III, Daniel Reineke, Alex Ramsperger, Patrick Pottinger, Joe Dills, Peter Norris, Benjamin Rinaldi, Brett Martin, Heidi Mosher, Hunter Doster, Connor McCormick, and it appears that one or more of the PDFs are not text searchable and therefore is not in compliance with Local Rule 5.1 (c). You shall refile docket 33 Notice (Other), filed by McKenna Colantanio, Jason Anderson, Paul Clement, Christopher Schuldes, Benjamin Leiby, Adam Theriault, Douglas Ruyle, Edward Stapanon, III, Daniel Reineke, Alex Ramsperger, Patrick Pottinger, Peter Norris, Joe Dills, Benjamin Rinaldi, Brett Martin, Heidi Mosher, Hunter Doster, Connor McCormick as a text searchable document(s), linking the document back to the original entry within 24-hours. Non-Compliance Deadline due by 3/25/2022. (kl) (Entered: 03/24/2022)
03/24/2022	38	NOTICE by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantanio, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III, Adam Theriault re 33 Notice (Other),, (Attachments: # 1 Exhibit Exhibit 1 - Mosher SG Appeal denied, # 2 Exhibit Exhibit 2 - Mosher Order, # 3 Exhibit Exhibit 3 - Stapanon RAR Denial, # 4 Exhibit Exhibit 4 - Stapanon Appeal to SG, # 5 Exhibit Exhibit 5 - McCormick RAR Denial, # 6 Exhibit Exhibit 6 - McCormick Appeal to SG) (Wiest, Christopher) (Entered: 03/24/2022)
03/24/2022	39	RESPONSE in Opposition re 35 MOTION to Sever filed by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantanio, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III, Adam Theriault. (Attachments: # 1 Exhibit Exhibit - Order, Navy Seal 1 v. Austin, # 2 Text of Proposed Order) (Wiest, Christopher) (Entered: 03/24/2022)
03/25/2022	40	Clerk's Notice of Non-Compliance Local Rule 5.1 (c): The Clerk's Office has reviewed your filing, docket 36 Notice (Other), and it appears that one or more of the PDFs are not text searchable and therefore is not in compliance with Local Rule 5.1 (c). You shall refile docket 36 Notice (Other) as a text searchable document(s), within 24-hours. Non-Compliance Deadline due by 3/28/2022. (eh) (Entered: 03/25/2022)
03/25/2022	41	NOTICE by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantanio, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III, Adam Theriault <i>of Supplemental Authority</i> (Attachments: # 1 Exhibit Ramirez v. Collier) (Wiest, Christopher) (Entered: 03/25/2022)
03/27/2022	42	NOTICE by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America re 34 Response in Opposition to Motion,, 27 Response in Opposition to Motion,, <i>of Additional Materials</i> (Attachments: # 1 Exhibit 1 - Colantonio, # 2 Exhibit 2 - Dills, # 3 Exhibit 3 - Doster, # 4 Exhibit 4 - Mosher, # 5 Exhibit 5 - Reineke, # 6 Exhibit 6 - Schuldes, # 7 Exhibit 7 - Theriault) (Snyder, Cassie) (Entered: 03/27/2022)
03/28/2022		Minute Entry for proceedings held before Judge Matthew W. McFarland:

		Hearing on 13 Plaintiffs' Motion for an Emergency Temporary Restraining Order and Preliminary Injunction and 19 Plaintiffs' Motion for an Emergency Restraining Order for Plaintiff Hunter Doster held on 03/25/2022. Present in Court were Attorneys Christopher David Wiest, Thomas B. Bruns, and Wendy Cox on behalf of Plaintiffs, and Attorneys Zach A. Avallone, Cassie Snyder, and Matthew Horwitz on behalf of Defendants. The Court heard testimony and admitted Plaintiffs' exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25. The Court then took the matter under advisement and will issue a written opinion at a later date. (Court Reporter: Julie Wolfer) (kaf) (Entered: 03/28/2022)
03/28/2022	43	NOTICE by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America re 27 Response in Opposition to Motion,,, of <i>Supplemental Authority</i> (Snyder, Cassie) (Entered: 03/28/2022)
03/28/2022	44	NOTICE by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantano, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III, Adam Theriault re 43 Notice (Other), (<i>Response to Government's Supplemental Authority</i>) (Wiest, Christopher) (Entered: 03/28/2022)
03/30/2022	45	<p>Transcript of Excerpt of Preliminary Injunction Hearing, Testimony of Edward Joseph Stapanon, III held on March 25, 2022, before Judge Matthew W. McFarland. Court Reporter: Julie Wolfer (Official). Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.</p> <p>NOTICE RE: REDACTION OF TRANSCRIPTS: Within 5 business days of this filing, each party shall inform the Court, by filing a Notice of Redaction, of the party's intent to redact personal data identifiers from the electronic transcript of the court proceeding. The policy is located on our website at www.ohsd.uscourts.gov (Forms - Electronic Availability of Transcripts). Please read this policy carefully.</p> <p>For a complete copy of a transcript, please contact the Court Reporter or the Clerk's Office.. Redaction Request due 4/20/2022. Redacted Transcript Deadline set for 5/2/2022. Release of Transcript Restriction set for 6/28/2022. (Wolfer, Julie) (Entered: 03/30/2022)</p>
03/30/2022	46	REPLY to Response to Motion re 21 MOTION to Certify Class filed by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantano, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III, Adam Theriault. (Attachments: # 1 Affidavit Third Declaration of Hunter Doster, # 2 Exhibit Class Certification Order, U.S. Navy Seals 1-26, et. al. v. Biden, 4:21-cv-01236, DE#140, # 3 Exhibit Comparison of Command Religious Accommodation Denials, # 4 Exhibit Comparison of AF Surgeon General Religious Accommodation Denials) (Wiest, Christopher) (Entered: 03/30/2022)
03/31/2022	47	<p>ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (Doc. 13) AND ISSUING A PRELIMINARY INJUNCTION:</p> <p>1. Defendants, as well as any persons acting in concert with Defendants, are enjoined and restrained from taking any disciplinary or separation measures against the Plaintiffs named in this action for their refusal to get vaccinated for COVID-19 due to their sincerely held</p>

		<p>religious beliefs. Such disciplinary or separation measures include, but are not limited to, "adverse administrative actions, non-judicial punishment, administration demotions, administrative discharges, and courts-martial." (Dec. of Col. Hernandez, Doc. 27-14, Pg. ID 1941);</p> <p>2. Defendants, as well as any person acting in concert with Defendants, are enjoined and restrained from taking any adverse action against Plaintiffs on the basis of this lawsuit or their request for religious accommodation from the COVID-19 vaccine;</p> <p>3. Thus, the temporary exemptions from taking the COVID-19 vaccine currently in place for these Plaintiffs shall remain in place during the resolution of this litigation;</p> <p>4. In accordance with Federal Rule of Civil Procedure 65(d)(2), this Order binds the following who receive actional notice of it by personal service or otherwise: the parties; the parties' officers, agents, servants, employees, and attorneys; and other persons who are in active concert or participation with the parties or the parties' officers, agents, servants, employees, and attorneys;</p> <p>5. Pursuant to Federal Rule of Civil Procedure 65(c), the Court has considered the need for Defendants to post security and concludes that no sum is required under the facts of this case; and</p> <p>6. Plaintiffs' Emergency Motion for Temporary Restraining Order as to Hunter Doster (Doc. 19) is DENIED AS MOOT.</p> <p>IT IS SO ORDERED this 31st day of March, 2022.</p> <p>Signed by Judge Matthew W. McFarland on 03/31/2022. (kaf) (Entered: 03/31/2022)</p>
04/06/2022	48	<p>Transcript of Preliminary Injunction Hearing Proceedings held on March 25, 2022, before Judge Matthew W. McFarland. Court Reporter: Julie Wolfer (Official). Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.</p> <p>NOTICE RE: REDACTION OF TRANSCRIPTS: Within 5 business days of this filing, each party shall inform the Court, by filing a Notice of Redaction, of the party's intent to redact personal data identifiers from the electronic transcript of the court proceeding. The policy is located on our website at www.ohsd.uscourts.gov (Forms - Electronic Availability of Transcripts). Please read this policy carefully.</p> <p>For a complete copy of a transcript, please contact the Court Reporter or the Clerk's Office.. Redaction Request due 4/27/2022. Redacted Transcript Deadline set for 5/9/2022. Release of Transcript Restriction set for 7/5/2022. (Wolfer, Julie) (Entered: 04/06/2022)</p>
04/07/2022	49	<p>REPLY to Response to Motion re 35 MOTION to Sever filed by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America. (Snyder, Cassie) (Entered: 04/07/2022)</p>
04/20/2022	50	<p>NOTICE by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America (Attachments: # 1 Exhibit Ex. 1 - Dunn Supreme Court Order) (Avallone, Zach) (Entered: 04/20/2022)</p>

04/25/2022	51	MOTION to Dismiss for Lack of Jurisdiction (Responses due by 5/16/2022), MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America. (Attachments: # 1 Exhibit Ex. 1 - Bannister Decl., # 2 Exhibit Ex. 2 - Rigsbee Decl., # 3 Exhibit Ex. 3 - Schermerhorn Decl., # 4 Exhibit Ex. 4 - Moschella Decl., # 5 Exhibit Ex. 5 - Bowers Decl., # 6 Exhibit Ex. 6 - Salvatore Decl.) (Avallone, Zach) (Entered: 04/25/2022)
05/03/2022	52	MOTION to Intervene <i>by Andrea Corvi and 229 other Intervening Plaintiffs</i> by Intervenor Plaintiff Andrea Corvi. (Attachments: # 1 Exhibit Tendered Intervening Complaint, # 2 Text of Proposed Order Tendered Proposed Order) (Wiest, Christopher) (Entered: 05/03/2022)
05/03/2022	53	MOTION for Preliminary Injunction <i>on behalf of Andrea Corvi and 229 other Intervening Plaintiffs</i> by Intervenor Plaintiff Andrea Corvi. (Attachments: # 1 Affidavit Declaration of Andrea Corvi with Administrative Materials attached, # 2 Text of Proposed Order Proposed Order) (Wiest, Christopher) (Entered: 05/03/2022)
05/04/2022	54	Emergency MOTION for Temporary Restraining Order by Intervenor Plaintiffs Jonathan Oberg, Johnathan Nipp. (Attachments: # 1 Affidavit Affidavit - Declaration of Oberg, # 2 Affidavit Affidavit - Declaration of Nipp, # 3 Exhibit Exhibit A - Emails between Counsel to attempt to resolve TRO extrajudicially, # 4 Text of Proposed Order Proposed Order) (Wiest, Christopher) (Entered: 05/04/2022)
05/05/2022		<p>Minute Entry for proceedings held before Judge Matthew W. McFarland:</p> <p>Present by phone were Attorneys Christopher David Wiest, Wendy Cox, and Thomas B. Bruns, counsel for Plaintiffs, and Attorneys Zach A. Avallone, Cassie Snyder, and Andrew Evan Carmichael, counsel for Defendants. The Motion to Intervene (Doc. 52), Motion for a Preliminary Injunction by the Proposed Intervenor (Doc. 53), and Emergency Motion for Temporary Restraining Order (TRO) by Proposed Intervenor Jonathan Oberg and Jonathan Nipp (Doc. 54) were discussed.</p> <p>As to the Motion to Intervene (Doc. 52) and Emergency Motion for a Temporary Restraining Order (Doc. 54), Defendants SHALL FILE a single 20-page response to the Motion to Intervene and the Motion for a Temporary Restraining Order by May 6, 2022. Proposed Intervenor generally and Proposed Intervenor Johnathan Oberg and Johnathan Nipp MAY FILE a single, joint 20-page reply in support of the Motion to Intervene and Oberg and Nipp's Emergency Motion for TRO by May 8, 2022. Lastly, Defendants SHALL FILE a response to the Motion for a Preliminary Injunction (Doc. 53) by May 9, 2022. Proposed Intervenor MAY FILE a reply to the Motion for a Preliminary Injunction by May 11, 2022. IT IS SO ORDERED. (kaf) (Entered: 05/05/2022)</p>
05/06/2022		Deadline set as to 53 Motion for Preliminary Injunction per 05/05/2022 Minute Entry: Proposed Intervenor's Reply due by 05/11/2022. (kaf) (Entered: 05/06/2022)
05/06/2022	55	RESPONSE in Opposition re 52 MOTION to Intervene <i>by Andrea Corvi and 229 other Intervening Plaintiffs</i> , 54 Emergency MOTION for Temporary Restraining Order filed by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America. (Attachments: # 1 Ex. 1 - Oberg Docs, # 2 Ex 2 - Nipp Docs, # 3 Ex. 3 - Chapa) (Avallone, Zach) (Entered: 05/06/2022)
05/08/2022	56	REPLY to Response to Motion re 54 Emergency MOTION for Temporary Restraining Order , 52 MOTION to Intervene <i>by Andrea Corvi and 229 other Intervening Plaintiffs</i>

		filed by Intervenor Plaintiffs Andrea Corvi, Johnathan Nipp, Jonathan Oberg. (Wiest, Christopher) (Entered: 05/08/2022)
05/09/2022	57	NOTICE by Intervenor Plaintiffs Andrea Corvi, Johnathan Nipp, Jonathan Oberg of <i>subsequent factual development re: imminent punishment to Oberg</i> (Attachments: # 1 Affidavit Declaration of Oberg) (Wiest, Christopher) (Entered: 05/09/2022)
05/09/2022	58	RESPONSE in Opposition re 53 MOTION for Preliminary Injunction <i>on behalf of Andrea Corvi and 229 other Intervening Plaintiffs</i> filed by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America. (Attachments: # 1 Exhibit Ex. 1 - Cori Documents (Redacted), # 2 Exhibit Ex. 2 - Hernandez Decl.) (Avallone, Zach) (Entered: 05/09/2022)
05/11/2022	59	REPLY to Response to Motion re 53 MOTION for Preliminary Injunction <i>on behalf of Andrea Corvi and 229 other Intervening Plaintiffs</i> filed by Intervenor Plaintiffs Andrea Corvi, Johnathan Nipp, Jonathan Oberg. (Attachments: # 1 Affidavit Declaration of Wendy Cox) (Wiest, Christopher) (Entered: 05/11/2022)
05/16/2022	60	RESPONSE in Opposition re 51 MOTION to Dismiss for Lack of Jurisdiction MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantano, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III, Adam Theriault. (Attachments: # 1 Affidavit Declaration of Christopher Wiest, with Exhibits) (Wiest, Christopher) (Entered: 05/16/2022)
05/17/2022	61	<p>ORDER CONCERNING FILING AND SEALING:</p> <p>The parties have advised the Court that a dispute has arisen between the Intervening Plaintiffs and the Defendants concerning portions of the document attached to Intervening Plaintiffs' Motion for Preliminary Injunction (Doc. 53 -1). The parties are discussing the circumstances under which those portions of the document were disclosed and whether any privilege concerning those portions has been waived. In the meantime, in order to protect the materials at issue while the parties continue these discussions, the parties have jointly requested that Doc. 53 -1 be sealed at the present time to prevent any further dissemination of the materials at issue pending resolution of the privilege and waiver issues.</p> <p>Having considered the parties' request, and for good cause shown, Doc. 53 -1 shall be temporarily placed under seal for thirty days from the date of this Order. Absent the filing of a Motion to Seal by either party prior to that thirtieth day, the document shall be automatically unsealed without further order of the Court. If a Motion to Seal is filed, the document shall remain under seal until the Court rules on any pending Motion to Seal. Either party may file a motion for further relief, including for a determination on the issues of privilege and waiver.</p> <p>IT IS SO ORDERED. Signed by Judge Matthew W. McFarland on 05/17/2022. (kaf) (Entered: 05/17/2022)</p>
05/27/2022	62	NOTICE OF APPEAL re 47 Order on Motion for TRO,,,,,,,,, Order on Motion for Preliminary Injunction,,,,,,,,, (ifp status requested) by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America. (Avallone, Zach) (Entered: 05/27/2022)
05/31/2022	63	REPLY to Response to Motion re 51 MOTION to Dismiss for Lack of Jurisdiction MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Defendants

		Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America. (Avallone, Zach) (Entered: 05/31/2022)
05/31/2022	64	USCA Case Number 22-3497 for 62 Notice of Appeal, filed by Commander, Air Force Special Operations Command, Commander, Air Force Reserve Command, Surgeon General of the Airforce, Commander, Air Education and Training Command, Secretary of the Airforce & United States of America; case manager Virginia Lee Padgett, 513-564-7032. (er) (Entered: 06/01/2022)
06/08/2022	65	NOTICE by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America (Attachments: # 1 Exhibit Ex. A - Salvatore Decl.) (Avallone, Zach) (Entered: 06/08/2022)
06/09/2022	66	NOTICE by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantano, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III, Adam Theriault, Intervenor Plaintiffs Andrea Corvi, Johnathan Nipp, Jonathan Oberg <i>of subsequent factual developments</i> (Attachments: # 1 Affidavit Declaration of Alex Ramsperger) (Wiest, Christopher) (Entered: 06/09/2022)
06/17/2022	67	NOTICE by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America re 58 Response in Opposition to Motion,, 51 MOTION to Dismiss for Lack of Jurisdiction MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM , 55 Response in Opposition to Motion,, <i>of Supplemental Authority</i> (Attachments: # 1 Exhibit 1 - Knick Opinion) (Snyder, Cassie) (Entered: 06/17/2022)
07/01/2022	68	NOTICE of SUPPLEMENTAL DEVELOPMENTS by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America (Avallone, Zach) Modified docket text on 7/1/2022 (eh). (Entered: 07/01/2022)
07/08/2022	69	STATUS REPORT - <i>LETTER NOTIFYING COURT OF ACCELERATED ACTIONS BY DEFENDANTS AND REQUEST FOR PROMPT COURT DECISION RE: MOTION TO INTERVENE</i> by Intervenor Plaintiffs Andrea Corvi, Johnathan Nipp, Jonathan Oberg. (Cox, Wendy) (Entered: 07/08/2022)
07/08/2022	70	Defendants' Response to Plaintiffs' Letter and Notice of Supplemental Authority by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America re 69 Status Report (Attachments: # 1 Exhibit Order - Colonel v. Austin, # 2 Exhibit Order - Guardsman v. Austin, # 3 Exhibit Order - Pilot v. Austin) (Avallone, Zach) Modified document title on 7/8/2022 (kh). (Entered: 07/08/2022)
07/14/2022	71	ORDER DENYING DEFENDANTS' MOTION TO DISMISS (Doc. 51). Signed by Judge Matthew W. McFarland on 07/14/2022. (kaf) (Entered: 07/14/2022)
07/14/2022	72	ORDER REGARDING PENDING MOTIONS (Docs. 21 , 35 , 52 , 53 , 54): 1. Plaintiffs' Motion for Class Certification (Doc. 21) is GRANTED.

		<p>2. Such class SHALL consist of active-duty and active reserve members of the United States Air Force and Space Force, including but not limited to Air Force Academy Cadets, Air Force Reserve Officer Training Corps (AFROTC) Cadets, Members of the Air Force Reserve Command, and any Airman who has sworn or affirmed the United States Uniformed Services Oath of Office and is currently under command and could be deployed, who: (i) submitted a religious accommodation request to the Air Force from the Air Force's COVID-19 vaccination requirement, where the request was submitted or was pending, from September 1, 2021 to the present; (ii) were confirmed as having had a sincerely held religious belief by or through Air Force Chaplains; and (iii) either had their requested accommodation denied or have not had action on that request.</p> <p>3. Defendants' Motion to Sever (Doc. 35) is DENIED AS MOOT.</p> <p>4. Proposed Intervenor's Motion to Intervene (Doc. 52), Proposed Intervenor's Motion for Preliminary Injunction (Doc. 53), and Emergency Motion for Temporary Restraining Order by Proposed Intervenor Johnathan Oberg and Johnathan Nipp (Doc. 54) are DENIED WITHOUT PREJUDICE.</p> <p>5. Plaintiffs' counsel is APPOINTED as class counsel in this matter.</p> <p>6. The Court ISSUES a TEMPORARY RESTRAINING ORDER prohibiting Defendants from enforcing the vaccine mandate against any Class Member, to expire 14 days from the entry of this Order.</p> <p>7. Defendants are ORDERED to file a supplemental brief, no later than July 21, 2022 and no more than ten (10) pages in length identifying why this Court should not grant a class-wide preliminary injunction. Plaintiffs may file a response, limited to ten (10) pages, to Defendants' supplemental brief by July 25, 2022.</p> <p>IT IS SO ORDERED. Signed by Judge Matthew W. McFarland on 07/14/2022. (kaf) (Entered: 07/14/2022)</p>
07/21/2022	73	Supplemental Brief Opposing Class-wide Preliminary Injunction by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America. (Attachments: # 1 Exhibit Ex. 1 - Declaration of Lt. Gen. Kevin B. Schneider, # 2 Exhibit Ex. 2 - Updated COVID-19 Exemption Statistics) (Avallone, Zach) Modified docket text on 7/22/2022 (eh). (Entered: 07/21/2022)
07/25/2022	74	Supplemental BRIEF regarding Class-Wide Preliminary Injunctive Relief by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantano, Joe Dills, Hunter Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III, Adam Theriault. (Attachments: # 1 Affidavit Declaration W. Cox with Exhibits, # 2 Affidavit Declaration C. Wiest) (Wiest, Christopher) Modified docket text and docket relationships on 7/26/2022 (kl). (Entered: 07/25/2022)
07/27/2022	75	NOTICE by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America of <i>Supplemental Authority</i> (Avallone, Zach) (Entered: 07/27/2022)
07/27/2022	76	NOTICE by Defendants Commander, Air Education and Training Command, Commander,

		Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America <i>CORRECTED Notice of Supplemental Authority (with attachment)</i> (Attachments: # 1 Exhibit Ex. A - Clements Opinion) (Avallone, Zach) (Entered: 07/27/2022)
07/27/2022	77	ORDER GRANTING CLASS-WIDE PRELIMINARY INJUNCTION. Signed by Judge Matthew W. McFarland on 07/27/2022. (kaf) (Entered: 07/27/2022)
07/28/2022	78	<i>Defendants'</i> ANSWER to 1 Complaint,, filed by All Defendants. (Avallone, Zach) (Entered: 07/28/2022)
08/03/2022	79	Response by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America. (Avallone, Zach) (Entered: 08/03/2022)
08/08/2022	80	NOTICE <i>Regarding Individuals Who Have Opted Out</i> by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America (Avallone, Zach) Modified docket text on 8/8/2022 (eh). (Entered: 08/08/2022)
08/15/2022	81	Updated NOTICE <i>to the Court Regarding Class Members Who Have Opted Out of the Class</i> re 77 Order by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America (Avallone, Zach) Modified docket text on 8/15/2022 (eh). (Entered: 08/15/2022)
08/15/2022	82	NOTICE OF APPEAL re 77 Order, 72 Order on Motion to Certify Class,,,,,,, Order on Motion to Sever,,,,,,, Order on Motion to Intervene,,,,,,, Order on Motion for Preliminary Injunction,,,,,,, Order on Motion for TRO,,,,,,, (ifp status requested) by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America. (Avallone, Zach) (Entered: 08/15/2022)
08/15/2022	83	Emergency MOTION to Stay re 77 Order <i>Defendants' Emergency Motion for a Stay Pending Appeal and for Immediate Administrative Stay</i> by Defendants Commander, Air Education and Training Command, Commander, Air Force Reserve Command, Commander, Air Force Special Operations Command, Secretary of the Airforce, Surgeon General of the Airforce, United States of America. (Attachments: # 1 Exhibit Ex. 1 - Decl. of Lt. Gen. Schneider, # 2 Exhibit Ex. 2 - Decl. of Maj. Gen. Burger, # 3 Exhibit Ex. 3 - Decl. of Brig. Gen. Wenke, # 4 Exhibit Ex. 4 - Decl. of Col. Bradley, # 5 Exhibit Ex. 5 - Decl. of Dr. McClenathan) (Avallone, Zach) (Entered: 08/15/2022)
08/17/2022	84	USCA Case Number 22-3702 for 82 Notice of Appeal,, filed by Commander, Air Force Special Operations Command, Commander, Air Force Reserve Command, Surgeon General of the Airforce, Commander, Air Education and Training Command, Secretary of the Airforce, United States of America. (pb) (Entered: 08/17/2022)
08/17/2022		NOTATION ORDER: The Court DIRECTS Plaintiffs to respond to 83 Defendants' Emergency Motion for Stay Pending Appeal and For Immediate Administrative Stay no later than Thursday, August 18, 2022, at 11:59 PM. IT IS SO ORDERED. Signed by Judge Matthew W. McFarland on 08/17/2022. (kaf) (Entered: 08/17/2022)
08/18/2022	85	RESPONSE to Motion re 83 Emergency MOTION to Stay re 77 Order <i>Defendants' Emergency Motion for a Stay Pending Appeal and for Immediate Administrative Stay</i> filed by Plaintiffs Jason Anderson, Paul Clement, McKenna Colantanio, Joe Dills, Hunter

		Doster, Benjamin Leiby, Brett Martin, Connor McCormick, Heidi Mosher, Peter Norris, Patrick Pottinger, Alex Ramsperger, Daniel Reineke, Benjamin Rinaldi, Douglas Ruyle, Christopher Schuldes, Edward Stapanon, III, Adam Theriault. (Attachments: # 1 Exhibit Exhibit A - filing with Deposition of Adm. Lescher, # 2 Exhibit Exhibit B - Declaration of C. Wiest with attachments, # 3 Exhibit Exhibit C - Pottinger Declaration, # 4 Text of Proposed Order Exhibit D - Proposed Order) (Wiest, Christopher) (Entered: 08/18/2022)
08/19/2022	86	ORDER DENYING 83 EMERGENCY MOTION FOR STAY PENDING APPEAL AND FOR IMMEDIATE ADMINISTRATIVE STAY, MODIFYING CLASS DEFINITION, AND MODIFYING PRELIMINARY INJUNCTION. Signed by Judge Matthew W. McFarland on 08/19/2022. (kaf) (Entered: 08/19/2022)

PACER Service Center			
Transaction Receipt			
08/21/2022 16:33:56			
PACER Login:	annaomohan	Client Code:	
Description:	Docket Report	Search Criteria:	1:22-cv-00084-MWM
Billable Pages:	29	Cost:	2.90

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

HUNTER DOSTER, *et al.*,

Plaintiffs,

v.

FRANK KENDALL, *et al.*,

Defendants.

No. 1:22-cv-00084
Hon. Matthew W. McFarland

DEFENDANTS' NOTICE OF APPEAL

PLEASE TAKE NOTICE that all Defendants hereby appeal to the United States Court of Appeals for the Sixth Circuit from this Court's Order certifying a class and granting a class-wide preliminary injunction, ECF Nos. 72, 77.

Dated: August 15, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
Civil Division

ALEXANDER K. HAAS
Director, Federal Programs Branch

ANTHONY J. COPPOLINO
Deputy Branch Director
Federal Programs Branch

/s/ Zachary A. Avallone
ANDREW E. CARMICHAEL
AMY E. POWELL
Senior Trial Counsel
STUART J. ROBINSON
Senior Counsel
ZACHARY A. AVALLONE
LIAM HOLLAND

CATHERINE YANG
CASSANDRA SNYDER
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel: (202) 514-2705
Email: zachary.a.avallone@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2022, I electronically filed the foregoing paper with the Clerk of Court using this Court's CM/ECF system, which will notify all counsel of record of such filing.

/s/ Zachary A. Avallone
ZACHARY A. AVALLONE
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel: (202) 514-2705
Email: zachary.a.avallone@usdoj.gov

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

HUNTER DOSTER, et. al.,	:	Case No. 1:22-cv-84
	:	
Plaintiffs,	:	Judge Matthew W. McFarland
	:	
v.	:	
	:	
Hon. FRANK KENDALL, et. al.,	:	
	:	
Defendants.	:	

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

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

A. The matter will not be stayed

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

(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court

grants the stay; and (4) the public interest in granting the stay.

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

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

Likelihood of success. Defendants do not have a likelihood to prevail on the merits of their appeal. Plaintiffs satisfied the Fed. R. Civ. P. 23(a) prerequisites of numerosity, commonality, typicality, and adequacy of representation, as well as Fed. R. Civ. P. 23(b)(1)(A) and (b)(2), therefore warranting class certification. Such certification was consistent with similar litigation in this country involving service members from other branches of the military, including the Navy, see *U.S. Navy SEALs 1-26 v. Austin*, --- F. Supp. 3d ---, 2022 WL 1025144 (N.D. Tex. Mar. 28, 2022) (O’Connor, J.), and the Marines, see *Colonel Financial Mgmt. Officer, et al. v. Austin, et al.*, No. 8:22-cv-1275 (M.D. Fla., Aug. 18, 2022), ECF No. 229 (Merryday, J.). Additionally, Plaintiffs established that a class-wide preliminary injunction is proper. The class has a strong likelihood of success on the merits of the First Amendment Free Exercise Clause violation claim, as well as the

Religious Freedom Restoration Act claim. Plaintiffs established that the class would face irreparable harm without a class-wide preliminary injunction, as Defendants appear prepared to separate any airman who objects to getting the COVID-19 vaccine due to sincerely held religious beliefs—a practice, incidentally, that seems to work at cross-purposes to Defendants’ stated goal of military readiness. Thus, the first consideration weighs against a stay.

Irreparable harm. Defendants, on the one hand, seek to separate thousands of Airmen who remain unvaccinated while admitting that “[e]very Airman is critical to the accomplishment of the Air Force mission[,]” on the other. (Defendants’ Emergency Motion for Stay Pending Appeal, Doc. 83, Pg. ID 4583.) To the extent Defendants face irreparable harm in the form of having fewer Airmen to deploy, Airmen within the class face far more comprehensive irreparable harm, in the form of losing their entire military careers. Accordingly, the second factor weighs against issuing a stay.

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

Public interest. Lastly, the public interest weighs heavily against issuing a stay. As

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

In summary, after over two years of living with COVID-19 and its many variants, this record, the law, and common sense require the preliminary injunction, as modified below and applied to the modified class, to remain in effect. Lieutenant Colonel Edward Stapanon, an Air Force pilot and almost 21-year veteran, testified that as long as he has been a pilot, the Air Force has had a shortage of pilots. (Transcript, Doc. 45, Pg. ID 3067, 3079-80.) And yet Defendants maintain the untenable position that it somehow promotes military readiness to separate and discipline pilots and other Airmen because they object to the vaccine mandate. This, despite the increasingly clear reality that “the vaccines do not prevent transmission of the disease, but can only be claimed to reduce symptom severity.”¹ Moreover, Defendants’ blanket vaccine mandate across all groups is increasingly out of touch with the Center for Disease Control’s own recognition that the risk of severe cases of COVID-19 is a risk faced by specific groups.² All things considered,

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

² “Factors That Affect Your Risk of Getting Very Sick from COVID-19,” CENTERS FOR DISEASE CONTROL

it remains this Court's conclusion that the most prudent way forward is to proceed with this litigation with the class-wide preliminary injunction in effect. Moving forward will permit the adversarial process to achieve its truth-seeking function. *See Gardner v. Florida*, 430 U.S. 349, 360 (1977). Accordingly, Defendants' Emergency Motion for Stay Pending Appeal and for Immediate Administrative Stay (Doc. 83) is **DENIED**.

B. Modified Class Definition

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

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

AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/your-health/risks-getting-very-sick.html> (last visited August 19, 2022). *See also* "COVID-19: vulnerable and high risk groups," WORLD HEALTH ORGANIZATION, <https://www.who.int/westernpacific/emergencies/covid-19/information/high-risk-groups> (last visited August 19, 2022).

each instance of “to the present” with “July 27, 2022”:

All active-duty, active reserve, reserve, national guard, inductees, and appointees of the United States Air Force and Space Force, including but not limited to Air Force Academy Cadets, Air Force Reserve Officer Training Corps (AFROTC) Cadets, Members of the Air Force Reserve Command, and any Airman who has sworn or affirmed the United States Uniformed Services Oath of Office or Enlistment and is currently under command and could be deployed, as of July 27, 2022, who: (i) submitted a religious accommodation request to the Air Force from the Air Force’s COVID-19 vaccination requirement, where the request was submitted or was pending, from September 1, 2021 to July 27, 2022; (ii) were confirmed as having had a sincerely held religious belief substantially burdened by the Air Force’s COVID-19 vaccination requirement by or through Air Force Chaplains; and (iii) either had their requested accommodation denied or have not had action on that request.

Excluded from this definition shall be any person within the above class who: (i) opts out, by delivering notice to the Government and Class Counsel in writing of their election to opt out, to the electronic mail addresses of Counsel, which will be filed with Court.

C. Modified preliminary injunction

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

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

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

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

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

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

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

(iv) Members who submitted requests for religious accommodation may cancel or amend previous voluntary retirement or separation requests or requests to

transfer to the Air Force Reserve.

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

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

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

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

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

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

By: 
JUDGE MATTHEW W. McFARLAND

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

HUNTER DOSTER, et. al.,	:	Case No. 1:22-cv-84
	:	
Plaintiffs,	:	Judge Matthew W. McFarland
	:	
v.	:	
	:	
Hon. FRANK KENDALL, et. al.,	:	
	:	
Defendants.	:	

ORDER GRANTING CLASS-WIDE PRELIMINARY INJUNCTION

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

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

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

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

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

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

2. Defendants, and their officers, agents, servants, employees, and attorneys, and other people acting in concert or participation with them, who receive notice of this preliminary injunction, are **PRELIMINARILY ENJOINED** from: (i) taking, furthering, or continuing any disciplinary or separation measures against the members of the Class for their refusal to receive the COVID-19 vaccine, while keeping in place the current temporary exemption; such disciplinary or separation measures include, but are not limited to, “adverse administrative actions, non-

judicial punishment, administrative demotions, administrative discharges, and courts-martial;" for the benefit of Defendants, this includes continuing any administrative separation or punitive processes or initiating the same. However, if there are any court-martials that are in process with members in which the members have been sworn or a witness having been sworn such that jeopardy has attached, those actions shall be stayed, and the Government shall provide notice to this Court of a listing of any such actions within 7 days for further consideration or resolution of this issue; (ii) Defendants shall not place or continue active reservists on no points, no pay status for their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs; and (iii) Defendants shall not refuse to accept for commissioning or enlistment any inductee or appointee due to their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs. Further, Members who submitted requests for religious accommodation may cancel or amend previous voluntary retirement or separation requests or requests to transfer to the Air Force Reserve. Nothing in this Order precludes the Department of the Air Force from considering vaccination status in making deployment, assignment, and other operational decisions.

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

for all Class Members shall remain in place during the resolution of this litigation.

5. In accordance with Federal Rule of Civil Procedure 65(d)(2), this Order binds the following who receive notice of it by personal service or otherwise: the parties; the parties' officers, agents, servants, employees, and attorneys; and other persons who act in concert or participate with the parties or the parties' officers, agents, servants, employees, and attorneys.
6. Pursuant to Federal Rule of Civil Procedure 65(c), the Court has considered the need for Defendants to post security and concludes that no sum is required under the facts of this case.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

By: 
JUDGE MATTHEW W. McFARLAND

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

HUNTER DOSTER, et. al.,	:	Case No. 1:22-cv-84
	:	
Plaintiffs,	:	Judge Matthew W. McFarland
	:	
v.	:	
	:	
Hon. FRANK KENDALL, et. al.,	:	
	:	
Defendants.	:	

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

This matter is before the Court on several pending motions, including Plaintiffs’ Motion for Class Certification (Doc. 21), Defendants’ Motion to Sever (Doc. 35), Proposed Intervenor’s Motion to Intervene (Doc. 52), Proposed Intervenor’s Motion for a Preliminary Injunction (Doc. 53), and Emergency Motion for a Temporary Restraining Order by Proposed Intervenor Johnathan Oberg and Johnathan Nipp (Doc. 54). All motions are fully briefed and ripe for review. The Court’s disposition of the Motion for Class Certification resolves these pending motions.¹ As explained below, Plaintiffs’ Motion for Class Certification is **GRANTED**.

BACKGROUND

Plaintiffs in this action are United States Air Force servicemen. Plaintiffs brought this case, on behalf of themselves and those similarly situated, against multiple Air Force superiors in their official capacity, including, but not limited to, the Secretary of the Air

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

Force and the Surgeon General of the Air Force, as well as the United States of America (collectively, "Defendants"). They seek redress for "the systematic efforts of the Defendants, and those who report to them, to flagrantly violate" the Religious Freedom and Restoration Act ("RFRA") and the Free Exercise Clause of the First Amendment by requiring all Airmen to obtain the COVID-19 vaccination without granting religious accommodation requests for those who oppose receiving the vaccine due to their sincerely held religious beliefs. (Verified Complaint ("Ver. Compl."), Doc. 1, Pg. ID 1.) This Court granted in part Plaintiffs' Motion for a Preliminary Injunction (Doc. 13) on March 31, 2022. The Court ordered the following:

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

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

As of June 6, 2022, the Air Force had received 9,062 religious accommodation requests, granting 86 of those requests while denying 6,343 requests. (DAF COVID-19 Statistics - June 7, 2022, <https://www.af.mil/News/Article-Display/Article/3055214/daf-covid-19-statistics-june-7-2022/> (last visited June 30,

2022.)) Following such denials, the Air Force had received 3,837 appeals from Airmen whose initial religious accommodation requests were denied. (*Id.*) As of June 6, 2022, the Air Force has granted only 23 of those appeals, denying 2,978. (*Id.*) A quick calculation shows that the Air Force, either through initial requests or appeals, have granted approximately 1% of religious accommodation requests between September 1, 2021, when the Air Force vaccine requirement went into effect, and June 6, 2022. Despite the Air Force's apparent policy and practice of denying virtually all religious accommodation requests, the Air Force has granted 729 medical exemption requests and 1,006 administrative exemption requests since implementing its COVID-19 vaccination requirement policy September 1, 2021. (*Id.*)

Plaintiffs now seek class certification on behalf of:

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

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

LAW

This Court "maintains substantial discretion in determining whether to certify a class." *In re Countrywide Fin. Corp. Mort. Lending Practices Litig.*, 708 F.3d 704, 707 (6th Cir. 2013). "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citation omitted). "In order to justify a departure from that rule, a

class representative must be part of the class and possess the same interest and suffer the same injury as the class members.” *Zehentbauer Family Land, LP v. Chesapeake Expl., L.L.C.*, 935 F.3d 496, 503 (6th Cir. 2019).

Class certification first requires the moving party to satisfy the Rule 23(a) prerequisites. *Dukes*, 564 U.S. at 345. These prerequisites are known as “numerosity, commonality, typicality, and adequate representation[.]” *Id.* at 349. Such prerequisites “effectively limit the class claims to those fairly encompassed by the named plaintiff’s claims.” *Id.*

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

When determining whether class certification is appropriate, courts must “probe behind the pleadings[.]” because certification is only proper after “a rigorous analysis” into whether Rule 23’s prerequisites are met. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Such rigorous analysis “will frequently entail overlap with the merits of the plaintiff’s underlying claim . . . because a class determination generally involves

considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 33-34 (cleaned up). However, this "rigorous analysis is not . . . a 'license to engage in free-ranging merits inquiries at the certification stage.'" *Zehentbauer Family Land*, 935 F.3d at 504 (quoting *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013)).

ANALYSIS

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

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

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

a. Numerosity

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

such requirement. *Id.*

Here, the Government does not contest that Plaintiffs satisfy Rule 23(a)'s numerosity requirement, and the Court finds that Plaintiffs clearly demonstrate that the putative class is numerous enough to merit certification. In their reply, "Plaintiffs seek a class of: 'All active-duty, and active reserve members of the United States Air Force and Space Force who: (i) submitted a religious accommodation request to the Air Force from the Air Force's COVID-19 vaccination requirement, where the request was submitted or was pending, from September 1, 2021 to the present; (ii) were confirmed as having had a sincerely held religious belief by or through Air Force Chaplains; and (iii) either had their requested accommodation denied or have not had action on that request.'" (Reply in Support, Doc. 46, Pg. ID 3105.) Plaintiffs contend that such class would include, at the time Plaintiffs filed this motion, over 12,000 Airmen. (Motion for Class Cert., Doc. 21, Pg. ID 955.) Thus, a substantial number of Airmen are affected in this case and joinder of all Airmen seeking religious accommodations is impracticable. Plaintiffs' proposed class clearly satisfies the numerosity requirement.

b. Commonality

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

“Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury[,]’ not merely demonstrate that the class members ‘have all suffered a violation of the same provision of law.’” *Dukes*, 564 U.S. at 349-50 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Thus, “their claims must depend upon a common contention.” *Id.* at 350. And the common contention “must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.*

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

Here, Plaintiffs and the putative class members have all allegedly suffered the same injury: violation of their constitutional rights. A putative class would consist only of Airmen who have submitted religious accommodation requests, had an Air Force Chaplain define their religious beliefs as sincerely held, and yet their religious

accommodation requests have been denied or delayed. The facts show Defendants have engaged in a pattern of denying religious accommodation requests. Indeed, of the over nine thousand religious exemption requests, only 109 have been granted by either initial determination or appeal. ((DAF COVID-19 Statistics – June 7, 2022, <https://www.af.mil/News/Article-Display/Article/3055214/daf-covid-19-statistics-june-7-2022/> (last visited June 30, 2022)).) This amounts to only 1% of religious accommodation requests being granted. (*Id.*) “[I]t is hard to imagine a more consistent display of discrimination.” *U.S. Navy SEALs 1-26 v. Austin*, No. 4:21-cv-01236-O, 2022 WL 1025144, *5 (N.D. Tex. Mar. 28, 2022).

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

Additionally, Plaintiffs’ claims are capable of class-wide resolution. A finding in favor of Plaintiffs on the RFRA or Free Exercise claims also resolves such claims by the putative class because they involve the same common analysis: Does Defendants’ policy and practice of discrimination by denying substantially all religious accommodation

requests by Airmen who maintain sincerely held religious beliefs further a compelling governmental interest and is such policy and practice the least restrictive means to achieve compelling governmental interests, if any exist? A finding for Plaintiffs or Defendants would result in class-wide resolution, satisfying the commonality requirement.

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

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

c. Typicality

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

for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.*

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

As the *Sprague* court explained:

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

Id. (quotations omitted).

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

Plaintiffs argue that typicality is established here for the exact reasons that commonality is established: because the class claims would all involve "claims of religious discrimination and [would be] centered upon the Government's granting of

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

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

Defendants’ argument that factual differences between putative class members disallow a finding of typicality is not persuasive. Defendants appear to again argue that the Court must individually analyze each Airmen’s claims on the one hand, while systematically denying all religious accommodation requests despite the factual differences Defendants claim the Court should consider on the other. The Court appreciates there may be minor factual differences between the members of the class,

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

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

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

d. Adequacy of Representation

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

Plaintiffs argue that the two-prong adequacy-of-representation test is satisfied here. First, Plaintiffs argue that “Plaintiffs and the Class Members possess the same interest and suffered the same injury: each of them requested a religious accommodation and have either had it denied, or have not had it acted upon . . .” (Motion for Class Cert., Doc. 21, Pg. ID 958.) Second, Plaintiffs argue that the second prong is met because “Plaintiffs are represented by qualified counsel with extensive experience prosecuting class actions, constitutional matters, and religious freedoms cases.” (*Id.*) However, Defendants argue that adequacy-of-representation is not satisfied because Plaintiffs and the proposed putative class possess conflicts of interests due to separately filed lawsuits “around the country challenging the COVID vaccine requirements for members of the

Air Force[.]” especially considering three separate lawsuits brought by Airmen also purport to bring class action claims.² (Response in Opp., Doc. 24, Pg. ID 2219.)

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

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

The Court is not persuaded by Defendants’ conflicts of interest argument. The

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

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

This Court agrees with the Northern District of Texas's ruling in *U.S. Navy SEALs 1-26*. Simultaneous litigation does not present a conflict of interest for the class representatives or counsel. This is because the injunctive relief would benefit all religiously opposed Airmen who are currently pursuing litigation for the same purpose as Plaintiffs. And Plaintiffs would benefit from injunctive relief granted in other courts. Thus, Defendants' argument that Plaintiffs cannot establish adequacy of representation is unavailing.

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

II. Plaintiffs Have Satisfied Rule 23(b).

In order for the Court to grant class certification, Plaintiffs must also show that

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

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

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

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

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

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

To start, Defendants do not contest that the proposed class is certifiable under Rule 23(b)(1)(A). And, upon examination, the class may proceed under that provision. Rule 23(b)(1)(A) serves to prevent defendants from being legally bound by contradictory

rulings. It is designed to avoid injunctive or declaratory “whipsawing” where different courts require the same defendant to abide by incompatible or contradictory rulings. *Payne v. Tri-State CareFlight, LLC*, 332 F.R.D. 611, 664 (D.N.M. 2019). The concern under this provision is not primarily that different lawsuits would yield different results for different plaintiffs; rather, the concern is that different judicial outcomes would impose conflicting obligations on the same defendant or group of defendants. *See id.*; *see also Snead v. CoreCivic of Tennessee, LLC*, No. 3:17-CV-0949, 2018 WL 3157283, at *14 (M.D. Tenn. June 27, 2018).

This case presents just such a risk. Similar claims may be brought in another court. That court and this Court may arrive at incompatible conclusions with respect to Airmen who seek religious exemptions from the vaccine mandate. One court may find that Defendants may enforce its vaccine mandate over and against religious objections, and another court may find the opposite. Such a scenario would prevent Defendants from pursuing a uniform course of conduct towards servicemembers. *Compare Clemons v. Norton Healthcare Inc. Ret. Plan*, 890 F.3d 254, 280 (6th Cir. 2018) (affirming certification under Rule 23(b)(1)(A) for purposes of interpreting a retirement plan, because individual actions would have risked establishing incompatible standards of conduct for the defendant); *Spurlock v. Fox*, No. 3:09-CV-00756, 2012 WL 1461361, at *3 (M.D. Tenn. Apr. 27, 2012) (finding Rule 23(b)(1)(A) certification appropriate so that defendants could pursue a uniform course of conduct regarding a re-zoning plan) *with Pipefitters Loc. 636 Ins. Fund v. Blue Cross Blue Shield of Michigan*, 654 F.3d 618, 633 (6th Cir. 2011) (finding Rule 23(b)(1)(A) certification inappropriate because there was no indication that

individual adjudications would subject defendant to conflicting affirmative duties).

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

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

Plaintiffs also maintain that a Rule 23(b)(2) class is appropriate, because Defendants' policy on vaccines applies to the class as a whole such that the entire class is entitled to declaratory and injunctive relief. Defendants, on the other hand, argue that Plaintiffs seek individualized determinations with regard to their religious accommodation requests, rather than relief that addresses a singular, discrete issue that affects the entire putative class. They contend that the analysis in religion cases is individualized and specific, requiring a court to determine whether each and every class member holds a sincerely held religious belief that precludes the use of a vaccine. The Court agrees with Plaintiffs on this point and concludes that the proposed class may also proceed under Rule 23(b)(2).

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

predominate over monetary damages. *U.S. Navy SEALs* 1-26, 2022 WL 1025144, at *8.

The proposed class satisfies the (b)(2) requirement. Defendants' attempt to characterize the relief sought as hinging on individualized determinations concerning their religious accommodation requests and sincerely held religious beliefs. But the relief the proposed class seeks is the same: a religious accommodation relating to the COVID-19 vaccine mandate. And they have been harmed in "essentially the same way." *Id.* They face separation from the Air Force and other disciplinary measures. A single injunction would provide relief to the entire class. *See Dukes*, 564 U.S. at 360. Indeed, the main purpose of a (b)(2) class is to provide relief through a single injunction or declaratory judgment. *Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016). Because Defendants have uniformly maintained a policy of overriding Airmen's religious objections to the COVID-19 vaccine, they have acted "on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2). Moreover, the class definition requires that a Chaplain certify that the airman's religious beliefs are sincerely held. Finally, a single injunction would provide the proposed class with the relief they seek from the harm they stand to suffer. *U.S. Navy SEALs*, 2022 WL 1025144 at *9. Accordingly, the class may be certified under Rule 23(b)(2).

III. Temporary Restraining Order Covering the Class

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

All active-duty and active reserve members of the United States Air Force and Space Force, including but not limited to Air Force Academy Cadets, Air Force Reserve Officer Training Corps (AFROTC) Cadets, Members of

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

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

IV. Rule 23(g)

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

court . . . may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class[.]” Fed. R. Civ. P. 23(g)(1)(B).

As demonstrated by the Declaration of Christopher Wiest and its exhibits, each counsel for Plaintiffs has experience in handling complex litigation and constitutional rights violation cases. (*See* Declaration of Christopher Weist, Doc. 21-1.) Additionally, such experience demonstrates that counsel all have knowledge of the applicable law in this case. Lastly, based on the advocacy of Plaintiffs’ counsel thus far, each have exhibited that they are willing to commit the necessary resources to adequately represent the Plaintiffs’ and putative class members’ interests in this case. Accordingly, the Court will appoint Plaintiffs’ counsel as class counsel in this matter.

CONCLUSION

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

1. Plaintiffs’ Motion for Class Certification (Doc. 21) is **GRANTED**.
2. Such class **SHALL** consist of active-duty and active reserve members of the United States Air Force and Space Force, including but not limited to Air Force Academy Cadets, Air Force Reserve Officer Training Corps (AFROTC) Cadets, Members of the Air Force Reserve Command, and any Airman who has sworn or affirmed the United States Uniformed Services Oath of Office and is currently under command and could be deployed, who: (i) submitted a religious accommodation request to the Air Force from the Air Force’s COVID-19 vaccination requirement, where the request was submitted or was pending, from September 1, 2021 to the present; (ii) were confirmed as having had a sincerely

held religious belief by or through Air Force Chaplains; and (iii) either had their requested accommodation denied or have not had action on that request.

3. Defendants' Motion to Sever (Doc. 35) is **DENIED AS MOOT**.
4. Proposed Intervenor's Motion to Intervene (Doc. 52), Proposed Intervenor's Motion for Preliminary Injunction (Doc. 53), and Emergency Motion for Temporary Restraining Order by Proposed Intervenor Johnathan Oberg and Johnathan Nipp (Doc. 54) are **DENIED WITHOUT PREJUDICE**.
5. Plaintiffs' counsel is **APPOINTED** as class counsel in this matter.
6. The Court **ISSUES** a **TEMPORARY RESTRAINING ORDER** prohibiting Defendants from enforcing the vaccine mandate against any Class Member, to expire 14 days from the entry of this Order.
7. Defendants are **ORDERED** to file a supplemental brief, no later than July 21, 2022 and no more than ten (10) pages in length identifying why this Court should not grant a class-wide preliminary injunction. Plaintiffs may file a response, limited to ten (10) pages, to Defendants' supplemental brief by July 25, 2022.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

By: 
JUDGE MATTHEW W. McFARLAND