United States Court of Appeals
for the Sixth Circuit

CASE NO. 22-3702

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

Plaintiffs/Appellees

v.

FRANK KENDALL, ROBERT MILLER, MARSHALL WEBB, RICHARD SCOBEE, JAMES SLIFE, *all in their official capacities*, and UNITED STATES OF AMERICA

Defendants/Appellants

On Appeal from the U.S. District Court
for the Southern District of Ohio, 1:22-cv-00084

PLAINTIFFS'/APPELLEES' OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL

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INTRODUCTION AND SUMMARY

"This case presents the constitutional collision of brave men and women serving in the Air Force sincerely trying to exercise their religious beliefs and their esteemed superiors who have loaded their weapons against them." *Doster v. Kendall*, 2022 U.S. Dist. LEXIS 59381, --- F.Supp.3d --- (S.D. Ohio 2022).

On August 24, 2021, Defendants implemented a COVID-19 vaccination mandate for all Air and Space Force ("DAF") members. Defendants granted thousands of medical and administrative exceptions to their mandate, but systematically denied over 8,000 well-founded requests for religious accommodation. The few religious exemptions Defendants granted were for those service members in the process of leaving the service (i.e., terminal leave), thus Defendants treated religious beliefs in a second-class manner.

For a year now, Defendants have allowed those seeking religious exemptions to remain in the service, with many continuing to perform their regularly assigned duties, but have kept up a campaign of intimidation including repeated threats of punitive reprisal in order to pressure service members into violating their consciences. At the same time, Defendants have spared the thousands of service members with secular exemptions (medical and administrative) from these same threats.

But now, Defendants claim some sort of emergency over an injunction that does nothing more than preserve the *status quo*. Simply put, the injunction merely

prevents Defendants from punishing (including imprisoning or involuntarily separating) less than two percent of the DAF, all of whom have undergone a rigorous process the DAF set up to ensure that any religious accommodation only goes to those whose beliefs are sincere and substantially burdened (hereafter "the class"). The injunction preserves Defendants' complete authority to "consider[] vaccination status in making deployment, assignment, and other operational decisions" regarding any member of the class. [Doc. 86 at PageID#5014].

Said another way, Defendants seek a stay so that they may resume their unconstitutional religious discrimination. This Court should decline their request and join both the Fifth and Eleventh Circuits in denying the Government's requested stay of similar injunctions against ongoing discrimination in other branches. *See, e.g. U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336 (5th Cir. 2022); *Navy Seal 1 v. Secretary of Defense*, 11th Cir. 22-10645, Order Denying Stay (11th Cir. Mar. 30, 2022). Other courts have granted class certification for nearly identical claims. *See, e.g. U.S. Navy Seals, 1-26 v. Biden*, 2022 U.S. Dist. LEXIS 65937 (March 28, 2022) (Navy Class); *Colonel Financial Management Officer v. Lloyd Austin*, MDFL 8:22-cv-1275, at Doc. 229 (entered 8/18/2022) (Marine Corps). We incorporate the analysis of each due to word limitations.

FACTUAL RECORD BELOW

Much of the evidence below is undisputed and comes from Defendants themselves. The DAF had a vaccine mandate imposed by the Secretary of the Air Force. [Appendix, Doc. 11-1, PageID#327; Doc. 11-2, PageID#328-329]. The DAF implemented a process for handling religious accommodation requests, which consists of the following:[1]

1. A member requests the accommodation by documenting his or her sincerely held religious belief and the substantial burden the vaccination requirement places on that belief.
2. Each member is then subjected to a thorough interview by an Air or Space Force Chaplain who then makes a determination and recommendation about whether (i) the religious belief is sincerely held; and (ii) the religious belief is substantially burdened by the military requirement. *Id.*
3. Members then are interviewed by their commander who makes a recommendation as to whether the request can be accommodated. *Id.*

[1] AFI 52-201, https://static.e-publishing.af.mil/production/1/af_hc/publication/dafi52-201/dafi52-201.pdf (last visited 8/22/2022); DoDI 1300.17, https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130017p.pdf (last visited 8/22/2022); https://www.af.mil/News/Article-Display/Article/2882742/daf-processes-religious-accommodations-requests/ (last visited 8/22/2022). After this process, packets are forwarded up the chain of command for final determinations. The Court can take judicial notice of Government websites. *Twumasi-Ankrah v. Checkr, Inc.*, 954 F.3d 938, 947, fn.3 (6th Cir. 2020).

Each of the 18 original Plaintiffs, and everyone else who requested a religious accommodation, underwent this same process. [Compl., Doc. 1, PageID#1-22; Appendix, Doc. 11-1 through 11-21, PageID#324-573]. While members await a final decision, which can take months or longer,[2] they continue to work and comply with any mitigation measures ordered by Defendants.

Based on COVID-19 statistics published by the DAF on March 8, 2022, it had in effect as of that date 1,102 medical exemptions and 1,407 administrative exemptions to their vaccine mandate.[3] As of that date, they only granted 25 religious accommodations and denied 6,143 (0.4% approval rate), and, as explained below, *all 25 approvals* were to members who otherwise qualified for administrative exemptions *and* were at the end of their term of service.

On May 23, 2022, a date after the class certification motion was submitted for decision, the DAF had in effect 794 medical exemptions and 1,038 administrative exemptions (cumulative numbers of medical and administrative exemption are not published by the DAF).[4] As of that date, it had only granted 85 religious

[2] https://go.usa.gov/xMDMr (last visited 8/22/2022) (at Q&A 18, "Members who submit a religious waiver to not receive the vaccination will be exempt from the requirement while their request is pending.").

[3] https://www.af.mil/News/Article-Display/Article/2959594/daf-covid-19-statistics-march-8-2022/ (last visited 8/22/2022).

[4] https://www.af.mil/News/Article-Display/Article/3018445/daf-covid-19-statistics-may-2022/ (last visited 8/22/2022).

accommodations and denied 8,869 (less than one percent), and, as explained below, *all of the approvals* were to individuals who otherwise qualified for administrative exemptions *and* were at the end of their term of service.

Meanwhile, by May 2022, 98.5% of the active-duty DAF, 93.7% of the Air National Guard, and 94.7% of the reserves were fully vaccinated. *Id.*

Through admission by a Department of Justice Representative in court, *not one single religious exemption* has been granted without that person also being eligible for an administrative exemption (*i.e.*, being at the end of their term of service). [Dec. Wiest, Doc. 30-2, PageID#2084-2090, with transcript attached; Dec. Wiest, Doc. 74-2, PageID#4527].

All of this evidence simply confirmed Plaintiffs' verified complaint, which pled DAF adopted a systemic policy to deny religious accommodation requests other than for members at the end of their term of service, while granting thousands of medical and administrative exemptions. [Ver. Compl. ¶¶ 51-52, 54, Doc. 1, PageID#13-14].

The Government's own witnesses provided proof of the systemic religious discrimination. For instance, Colonel James Poel's testimony documented the systemic denial of religious accommodation requests due to a stated goal of accommodating even more medical exemptions. [Dec. Poel, Doc. 25-17 at ¶7, PageID#1430-1450]. Consequently, the DAF treats medical exemptions as a

protected class at the expense of an actual protected class. *Id.* And, just as fatal to the Government, Colonel Poel also admitted that "both natural and vaccine immunity decrease the risk of infection," and that previous infection likely provides thirteen times greater protection against reinfection or breakthrough infection compared to vaccination alone. *Id.* at ¶23. In short, the DAF's own evidence establishes there is no compelling need to vaccinate those with natural immunity (with the CDC recently advising that over 95% of Americans have immunity to COVID-19).[5]

Further demonstrating systemic discrimination, Colonel Artemio Chapa testified that medical exemptions are granted for various conditions, including pregnancy, adverse reactions, allergies, and the like, yet Defendants grant almost no religious accommodation requests, and the few they do grant would be no different than those granted for medical or administrative reasons alone. [Doc. 25-12, PageID#1395-1403]. For instance, Defendants grant a "temporary medical exemption for allergic reactions to the vaccine or components of the vaccine" for the purpose of allowing time for a new vaccine to become available that would not present these same risks, yet they are not willing to allow time to permit a morally unobjectionable COVID-19 vaccine to be licensed. *Id.*

[5] https://covid.cdc.gov/covid-data-tracker/#nationwide-blood-donor-seroprevalence (last visited 8/25/2022)

Colonel Chapa also testified that persons who receive medical exemptions are determined to be medically fit for duty despite their unvaccinated status; yet those with religious exemptions are determined by the DAF not to be fit for duty. *Id.* at ¶7. Those receiving medical exemptions may not necessarily lose their eligibility for deployment, because such determinations are made on a case-by-case basis by a relevant commander; yet all those with religious exemptions are deemed not fit for deployment. *Id.* at ¶14. Moreover, administrative exemptions are granted for a variety of reasons (*id.* at ¶¶17-18), all of which undermines Defendants' asserted justifications for their discrimination.

One of many routine administrative exemptions is where the DAF grants an administrative exemption to any service member within six months of retirement. Given average terms of service, an estimated five percent of the entire DAF (more senior and seasoned members) are eligible for an automatic exemption. Yet, while the DAF accommodates these automatic administrative exemptions, it claims it cannot accommodate the less than two percent of its members the DAF confirmed as having valid religious accommodation requests.

The case of Major Andrea Corvi [Doc. 53-1, PageID#3762-3789] brings Defendants' unlawful discriminatory treatment into sharp focus. The DAF granted Major Corvi a temporary medical exemption for pregnancy but subsequently denied her a temporary exemption for her well-documented religious accommodation

request once her medical exemption expired. Admittedly, the DAF accommodated her medical exemption by keeping her job duties, assignments and work interactions *the same*,[6] including not limiting in any manner her ongoing interactions with the over 75 people in her squadron, but then refused to temporarily accommodate her well-founded religious accommodation request at all. Record evidence also confirmed a blanket policy of granting medical exemptions for pregnant members – regardless of duty station, job assignment, or any other individual factor − despite the strong recommendation by the CDC for pregnant members to be vaccinated.[7] [Dec. Cox, Doc. 74-1, PageID#4519-4526].

Evidence also documented a clear discernable pattern in how the DAF has treated everyone it has documented as having sincerely held religious beliefs substantially burdened by the mandate. *Id.* at ¶9. [Third Dec. Doster, Doc. 46-1, PageID#3121-3124 at ¶3]. This proof showed that Defendants: (i) use the same general process for handling religious accommodation requests across commands, and across the active-duty, reserve, and guard; (ii) utilize the same regulations for processing religious accommodation requests; (iii) utilize the same criteria for processing religious accommodation requests; (iv) use the same form denial letters;

[6] Her role was not limited in any way as the individual mobilization augmentee within the National Air and Space Intelligence Center, where she assumes the role of her commander when the commander is absent.

[7] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/pregnancy.html (last visited 8/22/2022)

and (v) systemically deny each and every religious accommodation request unless someone is at the end of their term of service and qualifies for an administrative exemption. *Id.* at ¶4. And, these systemic denials occur regardless of (i) job duties; (ii) level of person-to-person interaction in duties; (iii) time in service; (iv) base; (v) future assignments; (vi) whether or not they are likely to deploy; or (vii) any other individual factor (with the exception of those who are at the end of their term of service and qualify for an administrative exemption). *Id.* at ¶5.

Consequently, all 18 named Plaintiffs' scenarios are typical of the treatment of all other members of the class, both in the systemic denials of their exemption requests, and in the claims they all have. *Id.*

ARGUMENT

I. Standard of Review

In order to obtain a stay, Defendants must demonstrate: (1) the likelihood that the party seeking a stay will prevail on the merits of the appeal; (2) the likelihood that the movant 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. *See Grutter v. Bollinger*, 247 F.3d 631, 632 (6th Cir. 2001). As it turns out, those are the same factors that warrant the issuance of an injunction in the first place. *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016); *Dahl v. Bd. of Trs. of Western Mich. Univ.*, 15 F.4th 728, 736 (6th Cir. 2021).

For Plaintiffs, clear Sixth Circuit law establishes that the remaining factors are met where constitutional rights are infringed upon as the other factors collapse. *H.D.V. - Greektown, LLC v. City of Detroit*, 568 F.3d 609 (6th Cir. 2009); *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020). U.S. Supreme Court precedent establishes that the same standards apply to RFRA claims, viz., a collapsing of the standards where the Government is the defendant. *Holt v. Hobbs*, 574 U.S. 352 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). And this Court's precedent clearly compels the same collapsed analysis. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (noting that the issues collapse under Kentucky RFRA statute).

II. Plaintiffs have demonstrated that they, not Defendants, are likely to succeed on appeal

A. Where, as here, Plaintiffs demonstrated a systemic policy of discrimination, Defendants' argument about this matter not being amenable to class-wide resolution is simply wrong

Defendants begin by challenging the District Court's determinations on "commonality" and "typicality." We begin with the standard of review: Defendants must demonstrate that the District Court abused its discretion. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 850 (6th Cir. 2013) (*citing Olden v. LaFarge Corp.*, 383 F.3d 495, 507 (6th Cir. 2004)). A district court has

broad discretion in certifying a class action, but "it must exercise that discretion within the framework of Rule 23." *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 446 (6th Cir. 2002). That occurred here.

1. The District Court properly found commonality and typicality where Defendants engaged in a blanket policy of discrimination

Defendants argue that the FRCP 23(a)(2) requirement of commonality and typicality are not met here. Defendants are wrong.

Commonality requires "the capacity of a class wide proceeding to generate common answers [to common questions] apt to drive the resolution of the litigation." *Zehentbauer Family Land, LP*, 935 F.3d 496, 503 (6th Cir. 2019) (*quoting Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). Said another way, commonality is met when determining the "truth or falsity" of a common contention "that will resolve an issue that is central to the validity of each one of the claims in one stroke," advancing the litigation. *Wal-Mart*, 564 U.S. at 350; *Sprague v. GMC*, 133 F.3d 388, 397 (6th Cir. 1998).

FRCP 23(a)(3) requires plaintiffs to demonstrate that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "Typicality is met if the class members' claims are 'fairly encompassed by the named plaintiffs' claims.'" *Hendricks v. Total Quality Logistics, LLC*, 2019 U.S. Dist. LEXIS 96940 (S.D. Ohio Mar. 22, 2019) (*quoting Sprague*, 133 F.3d at 399).

"Many courts have found typicality if the claims or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory." *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 509 (6th Cir. 2015) (*quoting* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 7A Federal Practice and Procedure § 1764 (3d ed. 2005)).

Here, all the claims are for religious discrimination and are premised on the DAF's granting of thousands of administrative and medical exemptions, and the systemic and discriminatory denial of religious exemptions. Said another way, common elements of proof establish the claims of systemic religious discrimination for each Plaintiff and for the class. And, the class representative Plaintiffs represent both reservists and active-duty members, whether they are pilots, technicians, or students, with job duties in a host of settings. Yet despite these differences, all of them possess common claims with common proof stemming from Defendants' systemic discrimination.

Typicality and commonality do not require an individual showing for each member of the class as Defendants suggest (though the class definition itself demonstrates that each of its members has a sincerely held belief that has been substantially burdened). Rather, it is sufficient that all Plaintiffs, like all others in the class, were subject to the same mandate imposed by Secretary Kendall, all going to the same appeal authority, Lt. General Miller, and all were subject to the same

systemic discrimination. *Coleman v. GM Acceptance Corp.*, 220 F.R.D. 64, 86-90 (M.D. Tenn. 2004) (explaining that class certification is appropriate "as long as the challenged policy or practice was generally applicable to the class as a whole").

Courts have not hesitated to permit certification, and find typicality and commonality, when a class consists of persons who are injured through a policy of discrimination or unconstitutional conduct, as is the case here. *Brown v. Nucor Corp.*, 785 F.3d 895 (4th Cir. 2015); *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014); *EEOC v. Bass Pro Outdoor World, L.L.C.*, 826 F.3d 791 (5th Cir. 2016); *M.D. v. Abbott*, 907 F.3d 237 (5th Cir. 2018); *Augustin v. Jablonsky (In re Nassau County Strip Search Cases)*, 461 F.3d 219 (2d Cir. 2006).

This Court has reached the same conclusion. *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592 (6th Cir. 2007); *People First v. Arlington Developmental Ctr.*, 1998 U.S. App. LEXIS 9537 (6th Cir. 1998); *Eddleman v. Jefferson County*, 1996 U.S. App. LEXIS 25298 (6th Cir. 1996).

Defendants falsely claim that the DAF Chaplains do not make sincerity or burden assessments – but the applicable Air Force Instruction says otherwise. DAF Chaplains must prepare a Memoranda that addresses and makes determinations of

both the sincerity of belief and the substantial burden from the particular requirement.[8]

Commonality may also be demonstrated by showing that the defendants "operated under a general policy of discrimination." *Wal-Mart*, 564 at 353 (*quoting Gen. Tele. Co. of Sw. v. Falcon*, 347 U.S. 147, 159 n.15 (1982)). That is exactly what Plaintiffs have alleged and, through the DAF's own evidence, demonstrated here. This is exactly what the Fifth Circuit recognized concerning another service branch. *U.S. Navy Seals 1-26*, 27 F.4th 336. Common questions and answers apply to all class members.

2. Defendants did not individually analyze requests for religious accommodation

Defendants argue that RFRA requires an individualized analysis of each class member's claim. Although true, it misses the point. Instead, common questions and answers exist as to the class. These include:

First, whether Defendants actually engaged in an individualized analysis of each class member's claim as the law requires?

[8] DAF 52-Attachment/Table 5a at p.29 ("Requestor's religious beliefs seemed honestly, consistently and sincerely held" … "Requester identified the substantial burden which infringes upon religious freedom"). The Chaplain must then prepare a memo that addresses both sincerity and substantial burden. AFI 52-201, https://static.e-publishing.af.mil/production/1/af_hc/publication/dafi52-201/dafi52-201.pdf (last visited 8/22/2022).

Second, given that Plaintiffs (and the class) have established, each by a DAF Chaplain, that all of them have sincerely held religious beliefs, which are substantially burdened, the question then becomes whether Defendants demonstrated they *met their burden* of showing both a compelling need and least restrictive means to burden those religious beliefs? See, e.g., 42 U.S.C. § 2000bb-1(b); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-1297 (2021) ("[N]arrow tailoring **requires the government to show** that measures less restrictive of the First Amendment activity could not address its interest ….").

Third, can Defendants meet their showing of a compelling need, given that the CDC recently issued new COVID-19 guidance providing new recommendations and statements that reflect no discernable difference from infection between the vaccinated and the naturally immune?[9]

Fourth, can Defendants ever make this showing of compelling interest and least restrictive means, in light of their blanket policy of granting medical exemptions and certain administrative exemptions?

Fifth, whether the DAF unconstitutionally discriminated against religious belief by systemically denying almost every religious exemption (except to

[9] *See Summary of Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems — United States, August 2022,* https://www.cdc.gov/mmwr/volumes/71/wr/mm7133e1.htm, (last accessed 08/18/2022).

personnel at their end of service) all while granting, and accommodating, thousands of medical and administrative exemptions?

Defendants cannot dispute that these common *questions* (and there are others) are capable of resolution (with common answers) on a class wide basis.[10]

3. Defendants' ripeness and exhaustion arguments are without merit

Defendants next argue that certain defenses only apply to certain class members because not every class member has gone through the full administrative adjudication, causing Defendants to raise ripeness and exhaustion arguments as to certain class members. The District Court correctly dealt with this argument in light of the unrebutted, publicly available record of the DAF's systemic denials of exemptions for all but end-of-service personnel,[11] finding that they fit well within the futility exception recognized by this and other Circuits. *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418, 1424 (6th Cir. 1994) (futility exception); *see, also, Seepe v. Department of Navy*, 518 F.2d 760, 762 (6th Cir. 1975).

[10] Defendants point to the fact some class members have been able to receive certain vaccines not yet available in the United States that comport with their religious beliefs during the pendency of this matter. Again, that does not change the fact that these members' beliefs were not accommodated by Defendants as requested, nor does it change the fact that these members face punitive actions for failing to comply when told, requiring ongoing relief.

[11] Dec. Wiest, Doc. 30-2, PageID#2084-2090, with transcript attached; Dec. Wiest, Doc. 74-2, PageID#4527

Regardless, several courts have properly come to the conclusion that RFRA claims do not have an exhaustion requirement. *See, e.g.*, *Hitchcock v. Cumberland Univ. 403(b) DC Plan*, 851 F.3d 552 (6th Cir. 2017) (declining to read an exhaustion requirement into a statute not containing such a requirement); *Singh v. Carter*, 168 F. Supp. 3d 216, 226 (D.D.C. 2016) (exhaustion is not required for a RFRA claim); *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012) ("We decline . . . to read an exhaustion requirement into RFRA where the statute contains no such condition, see 42 U.S.C. §§ 2000bb–2000bb–4, and the Supreme Court has not imposed one."); *U.S. Navy Seals 1-26*, 27 F.4th 336.

4. The class can be maintained under FRCP 23(b)

Defendants next contend that certification could not be granted under FRCP 23(b) – for the record, FRCP 23(b)(1) and (b)(2). FRCP 23(b)(1)(A) is triggered where the party is obliged by law or as a matter of practical necessity to treat the members of the class alike. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Defendants' failure to comply with RFRA and the First Amendment presents such a case.

A court may certify a class under FRCP 23(b)(2) 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. A FRCP 23(b)(2) class was also appropriate here, since it

involves claims for declaratory and injunctive relief against official capacity defendants. *Clemons v. Norton Healthcare Inc.*, 890 F.3d 254, 280 (6th Cir. 2018).

In similar contexts, with a pattern of constitutional violations, this Court has not hesitated to find class certification appropriate. *People First*, 1998 U.S. App. LEXIS 9537 (6th Cir. 1998) (First Amendment (b)(2) class); *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006) (pointing out that FRCP (b)(2) class focusses on defendant's violations of the law, not on plaintiffs' claims).

Defendants claim that whether a particular Plaintiff has a sincere belief that is burdened and can be accommodated would turn on a close analysis of his or her individual circumstances. Even assuming this is true in the abstract, here, *the DAF never engaged in that analysis*. Overwhelming evidence of systemic discrimination here refutes any claim Defendants followed such a process. In fact, this Court's (and the United States Supreme Court's) precedents demonstrate that granting thousands of secular exemptions but systemically denying religious exemptions to those in the same position **establishes the violation**. *Dahl*, 15 F.4th 728; *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021); *Maryville Baptist Church*, 957 F.3d 610 at 614-615; *Roberts*, 958 F.3d 409, 413-415; *Tandon*, 141 S. Ct. 1294, 1296.

"Risks of contagion turn on [the failure to receive the vaccine]; the virus does not care why they [did not do so]. So long as that is the case, why do the orders

permit people who [have medical or administrative exemptions to avoid the requirement, but not permit religious exemptions]"? *Maryville*, 957 F.3d 610, 615.

In *Dahl*, as here, the defendant "requires [persons] to be vaccinated against COVID-19, but it considers individual requests for medical and religious exemptions on a discretionary basis. [Plaintiff] applied for religious exemptions. The [defendants] ignored or denied their requests…" *Id.* In *Dahl*, it was merely the denial of participation in team sport activities. *Id.* In contrast, the consequences to Plaintiffs here are far more severe.

Where, as here, the defendant "extends discretionary exemptions to a policy, **it must grant exemptions** for cases of 'religious hardship' **or present compelling reasons not to do so**." *Dahl* 15 F.4th 728, 731 (emphasis added).

In *Dahl*, the governmental actor at least made the argument that it also refused to grant *any* medical exemptions. Even that was insufficient to avoid triggering strict scrutiny. *Id.* at 734-735. In terms of strict scrutiny, and whether the *Dahl* defendants could meet it, this Court found significant that others either were not subject to, **or were exempt from**, the vaccination policy. *Id.* at 735. So too here. Here, the DAF makes, and has approved, thousands of blanket medical and administrative exemptions to carry out all kinds of job descriptions all across the DAF. *Fulton*, 141 S. Ct. 1868, 1882 (the government has no "compelling reason why it has a particular

interest in denying an exception to [plaintiff] while making them available to others.").

Finally, and without explanation, Defendants argue that courts reaching differing conclusions about the merits compels the conclusion that class certification was not proper. Not so. *City of North Royalton v. McKesson Corp. (In re Nat'l Prescription Opiate Litig.)*, 976 F.3d 664, 674 (6th Cir. 2020).

B. The District Court's decision to keep Defendants from engaging in systemic discrimination by limiting certain punitive measures does not invade on core military decision-making, it merely applies the law

Defendants boldly argue that the judiciary should simply stay in what they perceive to be its lane, and not enjoin widespread religious discrimination by the DAF. Defendants then argue that the inability of service members to deploy risks mission failure for the entire DAF. In doing so, Defendants utterly fail to explain 1) why less than two percent of the total force creates this alleged risk, 2) why it has permitted these same individuals to remain unvaccinated but on duty for over a year during exemption processing, and 3) why the thousands of medical and administrative exemptions the DAF permits has not done the same.[12]

Defendants also complain that the order preventing the DAF from punitively removing reservists with religious beliefs from points and pay status (that is,

[12] The Government also takes issue with portions of the Order that the District Court vacated – but this is plainly moot. We question whether a new notice of appeal must be filed.

weekend drill pay, or points towards retirement), is beyond the ken of judicial oversight. Of course, courts routinely reject this argument. *Samma v. United States DOD*, 486 F. Supp. 3d 240, 263 (D.D.C. 2020) (observing that "while courts should exercise caution when adjudicating claims involving matters of military affairs and national security, that caution does not give DOD *carte blanche* authority to act in contravention of . . . applicable statutes"); *Kirwa v. United States DOD*, 285 F. Supp. 3d 257, 265-266 (D.D.C. 2018) (same); *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (reservist claim and directing reinstatement); *Germano v. United States*, 226 Cl. Ct. 1446 (1992) (ordering reservist reinstated).

The record establishes that the DAF does not place reservists with medical or administrative exemptions on a "no points, no pay" status. [Doc. 53-1, PageID#3762-3789]. Consequently, the injunction as to points and pay for reservists is merely a *status quo* injunction. Nothing in the District Court's order directs the DAF to deploy the reservists, to assign them any particular duty, or even requires the DAF to have them report to base – all of those "deployment, assignment, and operational" decisions remain with the DAF. *Austin v. United States Navy Seals*, 142 S. Ct. 1301 (2022). Defendants are simply prohibited from punitively denying reservists drill pay or retirement points during the course of this litigation.

Defendants next argue that they are entitled to extraordinary deference. When applying a parallel statute that "mirrors RFRA" in the prison context, the Supreme

Court unanimously rejected a similar request for "a degree of deference that [wa]s tantamount to unquestioning acceptance." *Holt*, 574 U.S. 352, 357, 364. Instead, the Court applied strict scrutiny to hold that the prison's failure to provide a religious accommodation violated the statute. *Id.* at 369–70. *Holt* provides the proper framework for resolving RFRA claims against the military. *Singh*, 185 F. Supp. 3d at 221-22.

Thus, "military interests do not always trump other considerations." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 26 (2008). Even if military operations require some deference from courts, "'resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board.'" *Adair v. England*, 183 F. Supp. 2d 31, 55 (D.D.C. 2002) (*quoting Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973)). It is "not enough" to simply "defer to [officials'] determination" about when an individual's religious liberties must give way, particularly where history provides good reason to question that determination. *Ramirez v. Collier*, 142 S. Ct. 1264, 1270 (2022). *See, also*, H.R. Rep. No. 103-88 at 8 (even in the military context, "[s]eemingly reasonable regulations" that are based on "speculation," "exaggerated fears," or "thoughtless policies" "cannot stand.").[13]

[13] *See, also*, http://www.supremecourt.gov/DocketPDF/21/21A599/220848/20220412154142789_No.%2021

III. The balance of equities does not warrant a stay

A. Irreparable Harm

Defendants take issue with the analysis in the class preliminary injunction – ignoring the thorough analysis by the District Court in the two orders that preceded it [Doc. 47, PageID#3165-3205; Doc. 72, PageID#4448-4469], and that Court's explanation and modification of the injunction that followed it [Doc. 86, PageID#5007-5014].

While Defendants argue irreparable harm, unquestionably it is the class members who have suffered irreparable harm from the loss of their constitutional and statutory rights. *Dahl*, 15 F.4th 728, 735-736, holds that the loss of constitutional rights is irreparable. The class members face both career-altering and life-altering consequences that extend to "adverse administrative actions, non-judicial punishment, administrative demotions, administrative discharges, and courts-martial." [Dec. Hernandez, Doc. 27-14, PageID#1941]. This includes possible **penalties of up to two years in Leavenworth**. 10 U.S.C. § 1092.

Defendants' mere assertions of irreparable harm are contradicted in light of the record establishing that class members have been permitted to remain unvaccinated for over a year while their exemptions were processed. In fact, the

A599%20Motion%20for%20Leave%20to%20File%20and%20Brief%20of%2023%20States.pdf (last visited 8/22/2022).

record evidence establishes that the DAF has not experienced any mission impairment notwithstanding non-vaccination of certain members. [Doc. 30-3 through Doc. 30-20, PageID#2091-2149].

Defendants' mere assertions are also contradicted by the fact they permitted more than 1,000 medical and administrative exemptions to their vaccination requirement without any acknowledged impairment of the mission. And, unlike Defendants, Plaintiffs submitted live testimony to support their claims, establishing that the DAF is not meeting its pilot or other accession and enlistment goals, yet still is meeting mission requirements. [Doc. 45, PageID#3064-3101].[14] Tellingly, a few days before the District Court's initial preliminary injunction, one of the named Plaintiffs was pulled from aeronautical orders and "grounded." [Declaration Pottinger, Doc. 85-3, PageID#4996-4998]. However, and in light of a known severe shortage of pilots, his Commander later reinstated his flying orders. *Id.* Simply put, the mission was accomplished.

One other point on the equities: for most of these religious believers, the issue isn't whether Plaintiffs or the class will receive a vaccine for COVID-19, but rather, it is a question of ***when***. Covaxin, a traditional vaccine containing inactivated virus,

[14] https://www.airforcetimes.com/news/your-air-force/2022/01/21/air-forces-enlisted-recruitment-pipeline-is-drying-up-general-warns/ (last visited 8/18/2022).

https://www.nbcnews.com/news/military/every-branch-us-military-struggling-meet-2022-recruiting-goals-officia-rcna35078 (last visited 8/18/2022).

has no ties to aborted fetal tissue (which is the most prevalent religious objection), and is under FDA review.[15] We anticipate that upon approval in the United States, a substantial portion of the class will receive this vaccine.[16] In contrast, Defendants argue that rather than await completion of a process solely controlled by the Government, they should be able to imprison, punish, and separate sincere religious believers, while continuing to leave members with medical and administrative exemptions untouched.

Fatally, Defendants failed to document a single instance of how the DAF has been harmed by these unvaccinated Airmen (now class members) for the past *two years*. In fact, for the last 11, now going on 12, months, these same class members have been unable to travel, attend required schooling, and deploy. Not because they were physically unable to travel or deploy, but simply because the DAF made the decision to treat those seeking religious accommodations in this manner once vaccines became available. Yet, in his declaration, Lt. Gen. Schneider[17] could not

[15] https://www.medscape.com/viewarticle/975110 (last visited 8/24/2022).

[16] The Government has argued that Novavax somehow is similar, but evidence showed it was tested with fetal cell lines. [Doc. 30-3 through Doc. 30-20, PageID#2091-2149].

[17] Skepticism of Lt. General Schneider's assertions is warranted – Admiral Lescher who provided declaration in a similar case, later **admitted in deposition** a lack of personal knowledge regarding his declaration. [Doc.85-1, PageID#4666-4969].

cite a single concrete example of alleged irreparable harm.[18] The class he references that would cause this mere assertion of irreparable harm accounts for less than two percent of the entire DAF and is spread out over and between hundreds of thousands of other service members.[19]

Lt. Gen. Schneider's unproven assertion of irreparable harm relies upon the fiction that there are persons who would readily replace members of the class. But at the Preliminary Injunction hearing, unrebutted testimony by Lt. Colonel Stapanon, who was subject to cross-examination, confirmed the long training pipeline and a lack of fungibility, and further established that this is not the zero-sum game the DAF makes it out to be. [Doc. 45, PageID#3064-3101].

B. Harm to Others

Finally, "the limited scope of this preliminary injunction will not cause substantial harm to the Air Force and Space Force because '[Plaintiffs'] religious-based refusal to take a COVID-19 vaccine simply isn't going to halt a nearly fully

[18] Plaintiffs note that although not needed here, there is a large and growing body of evidence that unvaccinated individuals who have had COVID-19 are far more protected than those who are vaccinated. *See, also, Effects of Previous Infection and Vaccination on Symptomatic Omicron Infections*, New England Journal of Medicine, Altarawneh, *et. al.*, June 15, 2022, https://www.nejm.org/doi/full/10.1056/NEJMoa2203965 (last visited 7/25/2022); *Protection of prior natural infection compared to mRNA vaccination against SARS-CoV-2 infection and severe COVID-19 in Qatar* https://www.medrxiv.org/content/10.1101/2022.03.17.22272529v1(last visited 8/24/ 2022).

[19] "Similarly, an injunction expanded to apply to 10,000 or more service members. . ." and "As of March 14, 2022, the Department of the Air Force had approximately 501,000 uniformed Service members - . . ." [Doc # 73-1, PAGEID # 4490, 4493].

vaccinated Air Force's mission to provide a ready national defense.'" *Doster*, --- F. Supp.3d ---, 2022 U.S. Dist. LEXIS 59381 at 48 (S.D. Ohio 2022) (*citing Air Force Officer v. Austin*, --- F. Supp.3d ---, 2022 WL 468799, at *12 (M.D. Ga. 2022)). As in *Dahl*, 15 F.4th 728, 735-736, the harm to others suggested by Defendants can only be considered "speculative." This is particularly true in light of the DAF's ability to conduct its mission prior to the advent of these vaccines, [Doc. 30-3 through Doc. 30-20, PageID#2091-2149], for the many months while exemption requests were pending, and in light of the thousands of granted secular exemptions.

IV. Conclusion

Defendant's Motion for stay of the District Court's class-wide preliminary injunction pending appeal should be denied. This Court should not subject thousands of military members to the acknowledged risk of imprisonment for simply holding to their sincere religious beliefs in the face of systemic religious discrimination by the DAF.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I have served the foregoing upon the Defendants/Appellants, through service of this Response via CM/ECF, this 25 day of August, 2022.

/s/Christopher Wiest
Christopher Wiest (OH 0077931)

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(g), Fed. R. App. P. 27, and 6th Cir. R. 32(a), I certify that this Response contains 5,999 words, excluding items in Fed. R. App. P. 32(f). This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Times New Roman font using Microsoft Word.

/s/ Christopher Wiest
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