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

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

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INTRODUCTION AND SUMMARY

The district court wrongly overruled the expert judgment of military commanders and intruded into core military affairs by certifying a class of roughly 10,000 Department of the Air Force (DAF) service members and enjoining DAF from enforcing its COVID-19 vaccination requirement as to that class. The court did so without conducting the individualized analysis the Religious Freedom Restoration Act (RFRA) demands and without even mentioning the equitable factors necessary for granting injunctive relief.

Plaintiffs retreat from the reasoning in those orders and advance other theories to defend the extraordinary result the court reached. But those theories are equally meritless. Plaintiffs argue, for example, that class-wide adjudication of RFRA claims is appropriate because DAF purportedly has a "blanket policy" of denying all religious exemption requests. DAF has no such policy, *see* Mot. 14; Schneider Decl., R. 75-2, PageID# 4507, so the injunction cannot be sustained on that theory. But even if, contrary to fact, DAF had a policy of denying all religious-exemption requests rather than giving each one individualized consideration (and granting some, where appropriate), RFRA itself would still require individualized judicial consideration before any plaintiff could succeed in showing a statutory violation. Put differently, no RFRA violation has occurred if DAF is able to "demonstrate[]" in court that applying its policy *to a particular person* furthers a compelling governmental interest and is the least restrictive means of doing so. 42 U.S.C. § 2000bb-1(b)(1), (2). Those questions

are not amenable to class-wide resolution, as the district court has already demonstrated by granting a sweeping injunction with no apparent consideration of the unnamed class members' individual circumstances. Plaintiffs also suggest that the district court was entitled to substitute its own view of military readiness for that of senior DAF commanders, but Congress and the Supreme Court have confirmed that longstanding principles of military deference apply equally to RFRA.

Plaintiffs' arguments on the equities fare no better. A three-star general explained how the injunction causes "immediate and lasting harm to [DAF] and its ability to defend the nation" by degrading lethality and force capabilities, eroding good order and discipline, and risking mission failures. Schneider Decl., R. 83-1, PageID# 4596, 4600-01, 4611-12. Plaintiffs' "[s]kepticism of Lt. General Schneider's assertions," Opp'n 25 n.17, underscores their complete disregard for the appropriate deference owed to senior military officials' assessments of risks and harms. And plaintiffs identify no harm to class members beyond employment-related injuries that the Supreme Court and this Court have long held are not irreparable.

ARGUMENT

I. The Government Is Likely to Succeed on the Merits of its Appeal

A. Plaintiffs' RFRA Claims Cannot Be Resolved Class-Wide

The district court erred in granting class-wide injunctive relief to roughly 10,000 DAF service members. *See* Mot. 11-17. The court's four-page order makes no express finding that all 10,000 class members are likely to succeed, nor has the court

attempted to explain how it could have made such a finding absent any evidence about, for example, the military duties of each class member and the feasibility of alternative mitigation measures. The court's blunderbuss approach fails to comport with RFRA's requirement to assess the application of a challenged governmental policy "to the person" whose religious belief is purportedly burdened. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (quoting 42 U.S.C. § 2000bb-1(b)). The court's orders also override the denials of preliminary relief to class members by other courts—including the Supreme Court, *Dunn v. Austin*, 142 S. Ct. 1707 (2022) (mem.)—with the benefit of individualized records. Plaintiffs (and the district court) nowhere acknowledge or attempt to justify this anomalous result. Nor do plaintiffs respond to the argument (Mot. 16-17) that the district court's unprecedented "opt-out" mechanism was not authorized and did not provide a sufficient solution to the problem of parallel litigation. *Cf. Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) ("Rule [23] provides no opportunity for (b)(1) or (b)(2) class members to opt out.").

Plaintiffs suggest (Opp'n 2) that this Court should "join both the Fifth and Eleventh Circuits in denying the Government's requested stay." That grossly mischaracterizes the results in those circuits: The Supreme Court overruled the Fifth Circuit by granting the partial stay the Fifth Circuit denied, *see Austin v. U.S. Navy SEALs 1-26*, 142 S. Ct. 1301 (2022) (mem.); and the Eleventh Circuit *granted* a stay in the very order plaintiffs cite, *see* Order, *Navy SEAL #1 v. Secretary of the U.S. Dep't of*

Def., No. 22-10645 (11th Cir. Mar. 30, 2022).

1. As previously explained (Mot. 11-15), plaintiffs' class does not satisfy Rule 23(a)'s commonality and typicality requirements. Plaintiffs purport to identify questions common to the class, but identify no "common *answers* apt to drive the resolution of the litigation." *Davis v. Cintas Corp.*, 717 F.3d 476, 487 (6th Cir. 2013) (quotations omitted). And plaintiffs never explain how a court can evaluate whether DAF is required to "grant[] specific exemptions to particular religious claimants" in a class of 10,000 claimants. *Holt v. Hobbs*, 574 U.S. 352, 363 (2015) (quotations omitted).

a. Plaintiffs principally argue (Opp'n 11-16) that DAF's purported "blanket policy" of denials somehow justifies granting relief without the individualized inquiry that plaintiffs concede (Opp'n 14) RFRA requires. That argument fundamentally mischaracterizes DAF's assessment of service members' religious-exemption requests and misunderstands RFRA's requirements.

For one, that DAF has granted a limited number of religious exemptions is not evidence of religious discrimination; it simply underscores the military's compelling interest in ensuring "a force fully vaccinated against COVID-19 … to fulfill the Department's mandated function." *See* Schneider Decl., R. 83-1, PageID# 4595; *U.S. Navy SEALs 1-26*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring). That more service members are currently subject to temporary medical and administrative exemptions (562 and 757, respectively) than have been granted a religious exemption (135) does not undermine that compelling interest. U.S. Air Force, *DAF COVID-19 Statistics* –

Aug. 23, 2022 (Aug. 23, 2022), https://go.usa.gov/xhTxr; Schneider Decl., R. 73-2, PageID# 4507. Medical exemptions are granted based on concerns that a COVID-19 vaccine will place the individual service member at a heightened health risk. Chapa Decl., R. 55-3, PageID# 4032. Requiring vaccination in those special circumstances degrades—rather than promotes—the military's interests in readiness and force health protection. *Id.*, PageID# 4033. Moreover, the number of medical exemptions (because they are temporary) has been steadily declining, allowing those service members to return to full deployability, *id.,* PageID# 4030-31, while religious exemptions may result in permanent non-deployability, Schneider Decl., R. 83-1, PageID# 4600. And administrative exemptions, for their part, have been granted only to service members who "are [not] anticipated to return to duty," Little Decl., R. 27-16, PageID# 1954. Service members with medical and administrative exemptions—like service members with a religious exemption—are "non-deployable just as any other unvaccinated person with or without a pending religious accommodation." Chapa Decl., R. 55-3, PageID# 4033.

In any event, plaintiffs cannot rely on allegedly "systemic" denials of religious exemptions to establish commonality because they have not sought an injunction requiring DAF to reassess their religious exemption requests. *See* Compl., R. 1, PageID# 19 (requesting that the district court enjoin DAF to "grant Plaintiffs' [religious] accommodation requests"). The mere fact that each plaintiff unsuccessfully sought a religious exemption does not satisfy commonality; RFRA claims cannot be

resolved using such "broad generalities." *Haight v. Thompson*, 763 F.3d 554, 564 (6th Cir. 2014). And no RFRA violation has occurred if DAF can "demonstrate[]" in court that applying its COVID-19 vaccination requirement "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). Plaintiffs offer no response to the argument (Mot. 13-14) that DAF's purported "policy of discrimination" in the administrative process is not a common question that advances the resolution of their RFRA claims in court. *Cf. Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 645 (6th Cir. 2006) ("a general policy of discrimination is not sufficient to allow a court to find commonality").

Rather than meaningfully grapple with RFRA's substantive requirements or address the requirements of Rule 23(a), plaintiffs identify (Opp'n 14-16) a number of rhetorical questions untethered to the elements of their RFRA claims. But their exclusive focus on purported deficiencies in the administrative process does not excuse them (or the district court) from making the claimant-specific inquiry that RFRA demands. As noted (Mot. 2), 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. Plaintiffs nowhere explain how these individualized assessments can be made on a class-wide basis; they simply ignore that statutory requirement.

b. Plaintiffs' additional arguments that the class satisfies the commonality and typicality requirements of Rule 23(a) are meritless.

First, plaintiffs mischaracterize (Opp'n 13-14) a chaplain's role in the exemption process. A chaplain's role is not to "confirm" the sincerity of a service member's beliefs; a chaplain makes an *initial* assessment whether a service member's religious beliefs seem sincere, which is not binding on the ultimate decisionmaker. Streett Decl., R. 27-13, PageID# 1935-36; *see* Mot. 12. And a chaplain merely indicates whether a "[r]equester identified the substantial burden"—the chaplain's role is not to independently assess that burden. DAF, Instr. 52-201, *Religious Freedom in the DAF* tbl. A5.1 (June 23, 2021), https://go.usa.gov/xh2UB. A chaplain's "certification" thus does not solve the commonality problem that service members have a wide variety of personal beliefs that may be substantially burdened in a range of ways, particularly with the increasing availability of new vaccines that do not use fetal cell or mRNA technology. *See* Mot. 13 & n.2.

Next, plaintiffs effectively admit (Opp'n 16-17) that several named plaintiffs have not exhausted their intramilitary remedies, demonstrating that their claims are atypical of the class. *See* Mot. 14-15. Plaintiffs contend that these differences do not affect the class-certification inquiry because exhaustion was futile. But DAF has granted numerous religious exemptions, *see supra* pp. 4-5, and courts have rejected plaintiffs' futility argument even in contexts where a favorable result was highly unlikely. *See e.g.*, *Von Hoffburg v. Alexander*, 615 F.2d 633, 639 (5th Cir. 1980). This

Court has likewise confirmed that district courts lack jurisdiction over religious liberty claims where military service members failed to exhaust administrative remedies, *see Harkness v. Secretary of the Navy*, 858 F.3d 437, 446 (6th Cir. 2017), and plaintiffs provide no basis for a different result here.

Finally, plaintiffs concede (Opp'n 12) that they "represent both reservists and active-duty members"—but not cadets or the National Guard, *cf.* Order, R. 86, PageID# 5012 (class definition). Because plaintiffs offer no response to the argument (Mot. 15) that they lack standing to challenge requirements applied to those groups, the Court should, at minimum, partially stay the class-wide injunction insofar as it applies to cadets and the National Guard.

2. Plaintiffs' arguments that the class was properly certified under Rule 23(b) likewise fail.

First, plaintiffs all but abandon their reliance on certification under Rule 23(b)(1)(A), and for good reason. RFRA requires courts to consider "application of the challenged law 'to the person,'" *O Centro*, 546 U.S. at 430-31, and the fact "that some plaintiffs may be successful in their [RFRA] suits against [DAF] while others may not is 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); *see also* Mot. 15.

Second, plaintiffs offer no response to the argument (Mot. 16) that *Wal-Mart v. Dukes* precludes class certification under Rule 23(b)(2). As in *Wal-Mart*, plaintiffs' RFRA claims depend on factual circumstances particular to each service member, as

underscored by the many other cases brought by individual DAF service members. Plaintiffs appear to concede 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." Opp'n 18. But they also appear to believe that the individual analysis required for a RFRA claim to succeed *in court* is not necessary here because, in their view, DAF failed to perform that analysis in the administrative process. *Id.* (arguing that even if individual analysis is required "in the abstract, here *the DAF never engaged in that analysis*"). That view is both factually and legally wrong. As a factual matter, plaintiffs ignore declarations from the named plaintiffs' commanders, explaining *why* DAF denied each of their requested exemptions.[1] And as a legal matter, plaintiffs' (spurious) allegation that DAF failed to perform a sufficiently individualized assessment of religious exemption requests in the administrative process does not obviate RFRA's requirement to conduct a rigorous, plaintiff-specific inquiry before a court may determine that a statutory violation has occurred. In short, plaintiffs' attempt to manufacture claims suitable for certification under Rule 23(b)(2) disregards the individualized assessments RFRA requires.

[1] *See* Heaslip Decl., R. 27-19, PageID# 1983-91; Wren Decl., R. 27-20, PageID# 1994-2000; Harmer Decl., R. 27-21, PageID# 2004-08; Reese Decl., R. 27-22, PageID# 2012-18; Pulire Decl., R. 27-23, PageID# 2021-25.

B. The Injunction Improperly Overrides Expert Military Judgments

The government also established (Mot. 17-19) that the district court's injunction impermissibly second-guesses military judgment and intrudes on core areas of military decisionmaking. The Secretary of the Air Force determined, after consulting with senior military officers, that vaccination against COVID-19 is an "essential military readiness requirement." Sec'y Air Force Mem., R. 27-8, PageID# 1656. The district court largely ignored that judgment, substituting its own view of military readiness. Because military judgments are entitled to "great deference," *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986), the district court's failure to even acknowledge the declarations of senior military officials explaining why vaccination is necessary to maintain a deployable fighting force was an abuse of discretion. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 28 (2008) (finding abuse of discretion where court failed to "give sufficient weight to the views of several top Navy officers").

Plaintiffs mistakenly argue (Opp'n 21-22) that the military is not entitled to significant deference under RFRA. To the contrary, Congress reaffirmed long-standing principles of military deference when enacting RFRA. *See* S. Rep. No. 103-111, at 12 (1993) ("The courts … have always extended to military authorities significant deference in effectuating [the military's] interests. … [S]uch deference will continue."); H.R. Rep. No. 103-88, at 8 (1993) (similar). And the Supreme Court has

confirmed that "deference is due to institutional officials' expertise"—including military commanders' professional judgments—when evaluating RFRA claims. *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005).

Plaintiffs are wrong to suggest (Opp'n 20) that the military's judgment is undermined by DAF's high vaccination rates. DAF commanders have explained why *all* service members must be "worldwide deployable at all times." *See, e.g.*, Heaslip Decl., R. 27-19, PageID# 1987. Because deployments are, "by design, minimally manned," even a single seriously infected service member could jeopardize the mission. *See, e.g.*, Pulire Decl., R. 27-23, PageID# 2024. Nor does DAF's granting of medical and administrative exemptions undermine the military's judgment. *See supra* pp. 4-5. There is also no basis for concluding that DAF could grant roughly 10,000 presumably permanent religious exemptions without a significant adverse impact on its mission. Unvaccinated service members could contract SARS-CoV-2 and become seriously ill with COVID-19, jeopardizing military readiness; courts must defer to DAF's judgment that those risks are intolerable. *See Winter*, 555 U.S. at 24. DAF is not "required to wait" until plaintiffs' unvaccinated status "actually result[s]" in harm to the national defense—"[b]y then it may be too late." *Id.* at 31 (quotations omitted); *see also Ramirez v. Collier*, 142 S. Ct. 1264, 1288 n.2 (2022) (Kavanaugh, J., concurring) ("in assessing risk, a government need not wait for the flood before building the levee").

The district court further erred in expanding its injunction to intrude on the military's "deployment, assignment, and other operational decisions," *U.S. Navy*

SEALs 1-26, 142 S. Ct. at 1301, despite claiming not to do so. The district court (and plaintiffs) recognized as much: at plaintiffs' invitation, the court later "rescinded" the portions of the injunction that purported to dictate DAF's appointment and enlistment decisions. Order, R. 86, PageID# 5013 (emphasis omitted).[2]

Plaintiffs' assertion (Opp'n 21) that assigning reservists to a no pay/no points status is not an operational decision is squarely refuted by the Deputy to the Chief of the Air Force Reserve. Burger Decl., R. 83-2, PageID# 4620-22. Plaintiffs cite no case purporting to direct that a reservist be placed in a particular operational status.

II. The Equitable Factors Favor a Stay

Plaintiffs do not dispute that the district court failed to address the equitable factors when it granted a class-wide injunction. Instead, they suggest (Opp'n 23) that the court's prior orders granting the named-plaintiff injunction and certifying a class provide an adequate basis for the court's action. But those orders, which themselves are erroneous, do not address the distinct equitable considerations relevant to an order that applies to 10,000 class members versus one that applies to 18 individuals. And the district court's belated attempts to resuscitate its analysis in its stay order

[2] In light of the district court's action, plaintiffs "question whether a new notice of appeal must be filed," Opp'n 20 n. 12, but the government is not challenging the rescinded portions of the injunction insofar as they are no longer in effect. Mot. 19 n.4. Nevertheless, we reiterate our request for this Court to stay those parts of the injunction to the extent the Court believes the district court lacked jurisdiction to modify the injunction after the government noticed this appeal. *See Basicomputer Corp. v. Scott*, 973 F.2d 507, 513-14 (6th Cir. 1992).

cannot substitute for the requisite analysis in granting preliminary relief. *Cf. Glover v. Johnson*, 855 F.2d 277, 284 (6th Cir. 1988) (district court abused discretion in granting preliminary injunction by inadequately addressing the equitable factors).

Properly considered, the equitable factors heavily favor a stay. Lieutenant General Schneider explained at length how the injunction "cause[s] immediate and irreparable harm to operations of [DAF]" and "vitiates [DAF] commanders' vital decision-making authority for the health and safety of the men and women under their command." Schneider Decl., R. 83-1, PageID# 4591. Plaintiffs brazenly assert (Opp'n 25 n.17) that Lieutenant General Schneider's sworn statements warrant "[s]kepticism" because a Navy Admiral purportedly lacked personal knowledge of certain statements in a separate case. But a different officer's statements in a different case have no bearing on the validity of Lieutenant General Schneider's declaration here, and in any event, the Supreme Court has relied on the same declaration plaintiffs now disparage. *See U.S. Navy SEALs 1-26*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring). Plaintiffs are likewise wrong to suggest (Opp'n 26) that Lieutenant General Schneider's declaration should be ignored because a much lower-ranking officer suggests there is a pilot shortage. Decisions about balancing recruitment goals and military readiness requirements quintessentially implicate expert military judgments. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

The documented harms to DAF far outweigh any harms that plaintiffs might experience. As explained (Mot. 21-22), it is not clear that class members will suffer the

potential employment-related harms alleged, and plaintiffs do not dispute that any such injury would be compensable. *Guitard v. U.S. Sec'y of Navy*, 967 F.2d 737, 742 (2d Cir. 1992). Class members potentially facing discharge may yet prevail during administrative proceedings, including a possible administrative hearing, and may be retained. And plaintiffs' assertion (Opp'n 23) that class members are likely to be court-martialed or imprisoned is baseless. *See Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975) ("the military court system will vindicate service[members'] constitutional rights").

Finally, plaintiffs' reliance (Opp'n 27) on *Dahl v. Board of Trustees of Western Michigan University*, 15 F.4th 728 (6th Cir. 2021) (per curiam), is likewise mistaken. There, the Court compared the harms faced by a university that had imposed a vaccination requirement and those faced by 16 student-athletes with religious objections to that requirement. *Id.* at 735-36. The balancing is markedly different here: the district court's injunction places the military in an "untenable position" that its commanders have determined will compromise the nation's defense. Schneider Decl., R. 83-1, PageID# 4596.

CONCLUSION

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

Respectfully submitted,

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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)(C) and the Court's order granting the government's motion to exceed the word limit because the motion contains 3,389 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/ Casen B. Ross
CASEN B. ROSS

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 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/ Casen B. Ross
CASEN B. ROSS