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' EMERGENCY MOTION FOR STAY PENDING APPEAL AND FOR IMMEDIATE ADMINISTRATIVE STAY

Defendants respectfully seek an emergency stay pending appeal of the Court's July 27, 2022, Order Granting Class-wide Preliminary Injunction, ECF No. 77 ("Order"), which modified the definition of the certified class and enjoined the Air Force from "taking, furthering, or continuing any disciplinary or separation measures against the members of the Class for their refusal to receive the COVID-19 vaccine." *Id.* at 2. Defendants respectfully request a ruling by the end of the day Friday August 19, 2022. After that date, if relief has not been granted, Defendants will seek relief from the U.S. Court of Appeals for the Sixth Circuit.

The Court's class-wide preliminary injunction expands the relief that the Court previously granted 18 service member plaintiffs to cover an ever-increasing class of around 10,000, including those who are not even serving in the Air Force. The Order places the Department of the Air Force in an untenable position of choosing between the inherent risk to the mission and force from deploying unvaccinated service members or maintaining a separate class of around 10,000 non-deployable service members and imposing all the hardships and burdens of deployment on the remainder of the Air Force. Either option will cause immediate and lasting harm to the Air Force and its ability to

defend the nation. Moreover, because the injunction requires the commissioning and enlistment of unvaccinated prospective service members, which will continuously expand the number of unvaccinated, non-deployable service members, the harm resulting from the injunction will increase the longer it is in place. It is crucial that Air Force service members are capable of meeting all mission demands—including being medically fit and ready to deploy—and available at a moment's notice. *See* Decl. of Lieutenant General Kevin B. Schneider, ¶ 34, Ex. 1.[1]

As explained below, Defendants seek an emergency stay of the Court's Order pending appeal. A stay would affect only the unnamed class members (some of whom already have their own lawsuits pending) and would not have any effect on the still-in-force preliminary injunction that this Court previously entered with respect to the named plaintiffs. Granting the requested stay would therefore preserve the status quo that has prevailed since this Court's earlier order.

For the reasons set forth below, the Court should stay the effect of its class-wide preliminary injunction until the Defendants have completed their appeal. If the Court is inclined to deny the stay, Defendants request an administrative stay at least until the Sixth Circuit rules on Defendants' request for a stay pending appeal.

ARGUMENT

The court of appeals has set forth four factors that a court should consider in determining whether to grant a stay pending appeal: "(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

[1] The Court defined the class as limited to service members who have sought a religious accommodation from September 1, 2021, "to the present." Order 2. Defendants understand the class to be open-ended, allowing service members, including potential new enlistees and appointees, who submit religious accommodation requests after the date of the preliminary injunction to become class members. If the Court instead intended to limit the class to service members who had sought religious accommodations as of the date on which the class was certified or the injunction was entered, Defendants respectfully request that the class definition be clarified. Over 400 religious accommodation requests were submitted between when the court issued its class-wide temporary restraining order and when it issued the class-wide preliminary injunction, and the Air Force has received over 500 new religious accommodation requests since the court issued its class-wide preliminary injunction. Ex. 1, ¶ 16, n.10.

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." *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Where the federal government is a party, its interests and the public interest overlap. *See Nken v. Holder*, 556 U.S. 418, 420 (2009). Those factors all support granting a stay here.

I. The Government Is Likely To Succeed On The Merits.

Defendants acknowledge that this Court has certified a class and concluded that Plaintiffs are likely to succeed on the merits of their Religious Freedom Restoration Act ("RFRA") and First Amendment claims on a class-wide basis. Defendants nevertheless submit that they are likely to succeed in arguing to the contrary on appeal for two independent reasons: (1) plaintiffs failed to satisfy the Rule 23 requirements for class certification, and (2) the Court erred in concluding that *all* class members, without distinction, had shown a substantial likelihood of success on the merits of their claims under RFRA and the Free Exercise Clause, and that the equities favored class-wide preliminary injunctive relief. When considering the likelihood of success for a stay of a preliminary injunction, courts require the movant "to show, at a minimum, 'serious questions going to the merits.'" *Radioactive Material*, 945 F.2d at 154. That standard is easily met here.

A. Class Certification Was Improper.

The Court's class-certification ruling disregards the basic principle that RFRA requires a highly individualized assessment for each plaintiff. Under RFRA, the question is whether the government has a compelling interest in applying the challenged policy "to the person" who asserts a substantial burden on his religious exercise. *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). Plaintiffs' RFRA claims require plaintiff-specific determinations about whether the military's vaccination requirement substantially burdens each individual service member's exercise of religion; and whether there are less restrictive but equally effective alternatives to vaccination for each service member.

The question of whether "the vaccination policy, *as applied to an individual Plaintiff*, is the least restrictive means available requires a fact-intensive presentation that addresses, among other things, the individual job duties of each Plaintiff, the specific work environment of each Plaintiff, the risk of transmission posed by those job duties and work environment, the potential consequences of a COVID-19 outbreak on the functions of that work area, the practicality and effectiveness of proposed alternatives to mandatory vaccination in regard to each Plaintiff's job duties, the medical history of each Plaintiff, and the nature and sincerity of each Plaintiff's asserted religious beliefs." July 27, 2022 Order, *Clements v. Austin*, C.A. No. 2:22-2069-RMG (D.S.C.) (submitted here at ECF No. 76-1).

Defendants are likely to prevail on appeal because neither Plaintiffs nor the Court identified a "common answer[]" that could resolve these issues for the class. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis omitted). Indeed, Plaintiffs admitted in their request for class certification that "the details of an individual accommodation may differ," and instead premised their commonality argument entirely on the fact that the Air Force has denied many religious accommodation requests. ECF No. 21 at 6.[2] But the very point of RFRA's individualized inquiry is that these questions cannot be resolved in a blunderbuss fashion. Because they do not identify a common answer that justifies relief to every plaintiff, Plaintiffs fail to explain how relief is possible "without individualized review of every [religious accommodation request] that was denied." *Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 433 (6th Cir. 2009). "Nor do they explain how the court could, if it ordered 'a full and fair review . . . of all claims for [religious exemptions] that have been denied,' avoid exposing

[2] Underscoring the lack of commonality and typicality among the class members, class counsel told the *Poffenbarger* court that there are "material differences" between class member Poffenbarger's individual case and the relief sought by the class, including differences in defenses and the status of religious accommodation requests. *Poffenbarger v. Kendall*, 3:22-cv-0001, (S.D. Ohio), ECF No. 50 at PgID #1456. Plaintiffs' counsel argued that there is a lack of "similarity of the issues or claims at stake" between Poffenbarger's RFRA claim and the class in *Doster*. *Id.* at PgID # 1458. Plaintiffs in other cases have also asserted a lack of commonality and typicality. *See e.g., Dunn v. Austin*, 22-15286, ECF No. 46 (9th Cir.) (asserting plaintiff's purported "recover[y] from COVID-19" and purported "natural immunity" provides "additional ground for relief not asserted in *Doster*"); *Spence v. Austin*, 4:22-cv-00452-O, ECF No. 41 (N.D. Tex.) (asserting relief sought by plaintiffs is broader than relief sought in *Doster*).

[Defendants] to . . . 'a one-way ratchet where [Defendants] can lose but never win.'" *Id.* Class certification under these "circumstances was an abuse of discretion." *Id.*

The Court also erred in certifying a class under Rule 23(b)(1) because the Air Force was not facing any conflicting court opinions. "The fact that some plaintiffs may be successful in their suits against a defendant while others may not is clearly not a ground for invoking Rule 23(b)(1)(A)." *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984). The Court's disagreement with the many other courts that have ruled in Defendants' favor is not a proper basis to certify a class under Rule 23(b)(1). ECF No. 73, PgID #4476–77.[3]

Defendants are likely to prevail on appeal in arguing that the Court further erred in certifying a mandatory class under Rule 23(b)(2). The Air Force has not acted on grounds generally applicable to the class—it has instead made individualized determinations (and, in fact, granted at least 135 religious accommodation requests). Nor is the provided relief "indivisible" such that the alleged "conduct . . . can be enjoined or declared unlawful only as to all of the class members or as to none of them," *Wal-Mart*, 564 U.S. at 360, because the Court's order enjoins Defendants from taking individualized actions against each respective class member, Order at 2–3. The Court's wish to accommodate service members by providing them the opportunity to "opt out" of the litigation—a path many service members have already chosen, *see* ECF Nos. 80 and 81, underscores the impropriety of certifying a Rule 23(b)(2) class in this instance.

Expanded Class without Briefing. Without the benefit of adversarial briefing, this Court dramatically expanded the scope of the class to include appointees, inductees, reserves (ostensibly including members in the non-participating reserves), and members of the 54 Air National Guards of

[3] The Court stated that "Defendants do not contest that the proposed class is certifiable under Rule 23(b)(1)(A)." ECF No. 72 at PgID # 4463. But the Government did not forfeit or concede any argument. The Government argued that plaintiffs could not maintain a class under Rule 23(b) and then specifically explained that certification under Rule 23(b)(2) was not appropriate. ECF No. 34 at PgID # 2222. Defendants also explained why a preliminary injunction pursuant to Rule 23(b)(1) would not be proper. *See* ECF No. 73, PgID # 4476–77.

the States, Territories, and the District of Columbia. Plaintiffs' request for class certification covered only "active-duty, and active reserve members of the Air Force." ECF No. 21, PgID # 955. That definition did not include those who were not yet in the Air Force, those who were no longer in the participating reserves, or those in the Air National Guard. *See id.* When the Court first certified a class, it likewise limited the class definition to "active-duty and active reserve members of the United States Air Force and Space Force." ECF No. 72, PgID # 4468. Plaintiff first proposed modifying the class on July 25, 2022, ECF No. 74, PgID # 4516, and just two days later, and without the benefit of any briefing from Defendants, the Court modified and expanded the class to include "reserves" (in addition to just "active reserves") and "national guard, inductees, and appointees of the United States Air Force and Space Force," ECF No. 77, PgID # 4539.

The Court overstepped its authority when it expanded the class to include "appointees" for officer positions and when it ordered the Air Force to commission unvaccinated officers. None of the class representatives fall into these categories, and thus do not have standing to challenge the policy as applied to new recruits or potential officers. Moreover, and as explained further below, expanding the class in this way overstepped the judiciary's constitutional limits because it encroaches upon the Executive's authority to appoint officers. U.S. Const. art II. And by including the Air National Guard in the class and issuing an order that enjoined States—who are not even parties to this action—from disciplining members of their National Guard units, the Court has encroached upon States' authority to appoint National Guard officers and discipline their own National Guard forces. *Id.* art. I, § 8; *see also* Decl. of Brigadier General Wendy Wenke, Ex. 3 (describing impact of the preliminary injunction on the National Guard and States). None of the named Plaintiffs are members of any National Guard or in the non-participating reserves.

B. Class-wide Injunction Was Legal Error.

The Court also likely erred by issuing a class-wide injunction without considering the merits

of any individual's claims or the exponentially greater harms to the military flowing from an injunction applicable to around 10,000 service members. In its four-page preliminary injunction order, the Court provides only one sentence explaining its reasons for issuing a sweeping injunction pertaining to an entire branch of the armed forces. ECF No. 77 ("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."). But even this one sentence indicates that the Court misapplied the law.

The Supreme Court has explicitly held that "the First Amendment does not require the military to accommodate [religious] practices in the face of its view that they would detract from the [the military mission]." *Goldman v. Weinberger*, 475 U.S. 503, 509–10 (1986). Similarly, RFRA does not entitle a service member to relief simply upon a showing of a sincerely held belief. Resolving a RFRA claim requires individualized analysis of the burden on a service member's religious belief, the government's compelling interest in implementing the requirement at issue, and the availability of less restrictive alternatives to the person. *See Gonzales,* 546 U.S. at 430–31.[4]

In issuing a preliminary injunction that applies to any member (or prospective member) of the Air Force who submitted or submits a religious exemption to the COVID-19 vaccination, the Court failed to heed both longstanding and recent Supreme Court guidance. *See, e.g.*, *Austin v. United States Navy Seals*, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J. concurring) ("The Court should indulge the widest latitude" to sustain the President's "function to command the instruments of national force, at least when turned against the outside world for the security of our society.") (citing *Youngstown Sheet*

[4] Military chaplains are not required to "confirm[]" that a service members has "a sincerely held religious belief substantially burdened by the Air Force's COVID-19 vaccination requirement." Class-wide Order, ECF No. 77, PgID #4539. Instead, the chaplain's memo confirms that the "[r]equester *identified* the substantial burden which infringes upon religious free exercise." AFI 52-201, Attachment 5 (emphasis added). Moreover, many chaplain interviews before July 19, 2020 (when Novavax was approved) are likely outdated given the recent availability of a COVID-19 vaccine that may not substantially burden some service members' stated religious beliefs. *See* ECF No. 73, PgID # 4474, 4477–79.

& Tube Co. v. *Sawyer*, 343 U. S. 579, 645 (1952) (Jackson, J., concurring)). Moreover, the entry of global class-wide relief is inconsistent with RFRA's requirement that "appropriate relief" be tailored to a claimant's specific injury. 42 U.S.C. § 2000bb-1(c).

The Court also stepped beyond the bounds of its authority in many key respects when it issued this class-wide injunction.

Inconsistent Judicial Orders. Although Defendants were actively litigating numerous cases involving the COVID-19 vaccination requirement, Defendants were not subject to conflicting rulings until this Court issuing its class-wide injunction. Now they are. This Court's injunction effectively nullifies the decisions of other courts, including the Supreme Court. By specifically ordering the Air Force to remove class member Lt. Col. Jonathan Dunn (a member of the Air Force Reserve) from a No Pay/No Points status, the injunction conflicts with the Supreme Court's decision that he is not entitled to an injunction pending his appeal to the Ninth Circuit. *Dunn v. Austin*, 142 S. Ct. 1707 (2022).

Other courts, with the benefit of individualized records, have likewise decided that individual class members are not entitled to preliminary injunctions on their RFRA and First Amendment claims. *See, e.g.*, *Roth v. Austin*, --- F. Supp. 3d ---, 2022 WL 1568830, at *31 (D. Neb. May 18, 2022), *appeal filed*, No. 22-2058 (8th Cir. May 20, 2022); *Knick v. Austin*, No. 22-1267, 2022 WL 2157066, at *3, 31 (D.D.C. June 15, 2022); *Creaghan v. Austin*, --- F. Supp. 3d ---, 2022 WL 1500544 (D.D.C. May 12, 2022), *appeal filed* No. 22-5135 (D.C. Cir. May 20, 2022). The class-wide injunction overturns those individualized decisions.

Still other courts have issued narrower relief, like Judge Rose's opinion in *Poffenbarger v. Kendall*, where the Air Force was enjoined from transferring that plaintiff to the Individual Ready Reserve, but where the court made clear that "Defendants are <u>not required</u> to . . . remove Poffenbarger from 'No Pay / No Points' status." --- F. Supp. 3d ----, 2022 WL 594810, at *20 (S.D. Ohio Feb. 28, 2022) (emphasis in original). This Court's class-wide injunction now requires the Air Force to remove that

plaintiff from No Pay / No Points status, notwithstanding the *Poffenbarger* court's considered decision to the contrary. Further, this Court's class-wide injunction opinion provides no basis or explanation for why its decision should prevail over the reasoned decisions of these other courts who have spent significant time and resources making individualized determinations.

Injunction Requiring Commissioning of Officers or Enlisting of New Service Members Exceeds Courts' Authority. The Court's injunction expanded the scope of the certified class to include prospective service members and to require new officer commissions without regard for vaccination status. However, none of the original 18 Plaintiffs fall into either of these categories, so there is no class representative for this type of relief. *See In re Navy Chaplaincy,* 534 F.3d 756, 760-61 (D.C. Cir. 2008) (Kavanaugh, J.) (current service members do not have standing to challenge military accessions guidelines that apply only to prospective service members).

The class-wide injunction requiring the Air Force to commission certain officers also directly conflicts with the Executive's appointment power. Article II of the Constitution specifies the exclusive mechanisms for the appointment of officers of the United States, including military officers. *See* U.S. Const. art II, § 2, cl. 2; *see also* 10 U.S.C. § 531(a)(1) (providing that the President may appoint Air Force officers in grades up to and including that of captain without the advice and consent of the Senate). The Constitution does not vest the judiciary with any power to order the commissioning of new Air Force officers, so the Court's order exceeds the power of the judiciary. U.S. Const. art. II, § 2, cl. 2; *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1511 (D.C. Cir. 1989) (stating plaintiff's demand for appointment as an officer is "squarely within the realm of nonjusticiable military personnel decisions"); *Fisher v. United States*, 402 F.3d 1167, 1180-81 (Fed. Cir. 2005) (en banc) (noting that the question of "who should be allowed to serve on active duty, and in what capacity" is generally nonjusticiable).

Similarly, the judiciary may not order the enlistment of a prospective service member or reenlistment of a current service member. *Maier v. Orr,* 754 F.2d 973, 983 (Fed. Cir. 1985) ("Federal courts have uniformly declined to order relief beyond a current enlistment."); *see also id.* ("[N]o one has an individual right, constitutional or otherwise, to enlist in the armed forces, the composition of those forces being within the purview of the Congress and the military.") (citing *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973), *Lindenau v. Alexander*, 663 F.2d 68, 72 (10th Cir. 1981)); *DeGroat v. Townsend*, 495 F. Supp. 2d 845, 851 n.7 (S.D. Ohio 2003) ("Several cases have held that a service secretary's determination of fitness for duty of a servicemember is beyond the competence of the judiciary to review and, thus, nonjusticiable.") (citing *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953)).

This aspect of the order also conflicts with the Court's reservation of discretion to make assignment and operational decisions, along with the Supreme Court's order in *Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301 (2022). A decision on whether to enlist or commission a prospective service member in the first instance plainly implicates the same kind of fundamental military judgment as to who may be placed into an assignment in the armed forces. The Supreme Court in *Orloff* held that military assignments are non-justiciable. 345 U.S. at 93 ("[W]e are convinced that it is not within the power of this Court by habeas corpus to determine whether specific assignments to duty fall within the basic classification of petitioner."). The same case also determined that the commissioning of officers is a non-reviewable assignment decision. *Id.* at 90 ("It is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief. Whatever control courts have exerted over tenure or compensation under an appointment, they have never assumed by any process to control the appointing power either in civilian or military positions."). *See* Ex. 1, ¶¶ 16, 35.

The Injunction Purports to Bind Non-party State Officials. By enjoining "people acting

in concert or participation with [Defendants]," the injunction appears to cover States and State officials. State officials work with Defendants to ensure medical readiness of their Air National Guard members and units, so this injunction bars States and State officials from taking any punitive process "against the members of the Class for their refusal to receive the COVID-19 vaccine." ECF No. 77, PgID # 4539; Ex. 3, ¶¶ 5–14 (providing an overview of the Air National Guard); *id.* ¶¶ 15–21 (describing impact of preliminary injunction on National Guard units, including federal- and state-level officials). The class-wide injunction blocks States from disciplining class members in their State National Guard units for non-compliance with COVID-19 vaccine requirements or state orders to vaccinate. And by requiring States to commission specific individuals as Air National Guard officers, the injunction also directly interferes with the constitutional authority governing the appointment of officers in state Air National Guard units. U.S. Const. art. I, § 8, cl. 16.

The Court Lacks Authority to Stay Any Court-Martial. This Court also stepped beyond the limits of its authority when it ordered the Air Force to stay "any court-martials [sic] that are in process" that involve class members. That part of the injunction directly contradicts the Supreme Courts' holding in *Schlesinger v. Councilman* that "when a serviceman . . . can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise." 420 U.S. 738, 758 (1975). Indeed, the injunction has interfered with ongoing proceedings authorized by the Uniform Code of Military Justice. *See* ECF No. 79.

C. The Class-wide Injunction Lacked Meaningful Analysis, and Improperly Ignored Evidence Central to the Class Issues.

The Court's order granting a class-wide preliminary injunction is also unlikely to survive appellate review because it contains minimal factual or legal analysis. Without citing any facts or evidence, the Court stated that it was issuing a class-wide preliminary injunction "due to the systemic nature of what the Court views as violations of Airmen's constitutional rights to practice their religions as they

please." ECF No. 77, PgID # 4539. But "mere allegations of systemic violations of the law . . . will not automatically satisfy Rule 23(a)'s commonality requirement." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 844 (5th Cir. 2012). Nor are mere statistics and anecdotal evidence sufficient to demonstrate commonality or "raise any inference that all the individual, discretionary personnel decisions are discriminatory." *Wal-Mart*, 564 U.S. at 358. No injunctive relief is appropriate without a finding that Plaintiffs have proven, with the requisite evidence, that every member of the class is entitled to injunctive relief. And "the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *See Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). The Court identified no common question, nor did it explain what evidence would require it to answer any common question, to support a finding that every absent class member was likely to prevail on the merits on his or her RFRA or First Amendment claims.

Moreover, the Court's class-wide injunction relies on invalid and outdated factual findings. The order granting a class-wide injunction contains less than a page of analysis and instead incorporates the Court's prior decision issued March 31, 2022, which granted a preliminary injunction to 18 plaintiffs. ECF No. 77, PgID # 4538–39. But, as Defendants explained in their opposition to a class-wide injunction, the facts that the Court cited in March have significantly changed. *See generally* ECF No. 73. When it expanded its injunction to cover around 10,000 individuals, the Court failed to acknowledge that the facts it relied on had changed, much less explain how the facts as of July 2022 could justify such sweeping relief. *See generally* ECF No. 77, PgID # 4538–39 (providing no factual analysis regarding scope of class-wide injunction, no balance of equities, and no analysis of public interest).

The Court Ignored That Novavax COVID-19 Vaccine is Available. In July 2022, the FDA granted emergency use authorization to the Novavax vaccine, which uses traditional vaccine technology. FDA, Coronavirus (COVID-19) Update: FDA Authorizes Emergency Use of Novavax

COVID-19 Vaccine, Adjuvanted (July 13, 2022), https://perma.cc/CJ3N-8SAE. The developer of the vaccine stated that "[n]o human fetal-derived cell lines or tissue, including HEK293 cells, are used in the development, manufacture or production of the Novavax COVID-19 vaccine candidate." J. Jenkins, New Novavax Shot Could Appeal to Pro-Life Christian Skeptics, Christianity Today (Feb. 18, 2022) https://perma.cc/275N-YH8U; *see also* Decl. of Dr. Bruce McClenathan (Ex. 5) (attaching letter from Novavax). Those class members whose religious objections were based on mRNA technology or the use of fetal-derived cell lines are no longer substantially burdened because the Novavax vaccine is now available and satisfies the military's COVID-19 vaccination requirement.

The Court never acknowledged or explained how the sweeping relief it granted in its class-wide injunction aligns with the undisputed fact that at least some class members can comply with the Air Force's COVID-19 vaccination requirement by receiving Novavax without substantially burdening their religious exercise. Plaintiff Adam Theriault, for example, concluded that receiving the Novavax vaccine would be consistent with his faith. ECF No. 30-2 ¶ 3, PgID #2147–48. Plaintiff Joe Dills likewise testified that he "would take [Novavax] if it was available in the United States." ECF No. 48, Hearing Tr., 75:9–14, PgID # 3280.

Since the COVID-19 vaccine requirement does not substantially burden Theriault's or Dills' religious exercise now that Novavax is approved in the United States, there is no basis to grant a preliminary injunction that covers them or similarly situated class members. Since Plaintiffs did not show that every class member's religious beliefs are substantially burdened, they did not make the required showing of likelihood of success on every element of their RFRA and First Amendment claims for each class member, which is necessary for a class-wide injunction. The Court never discussed the implications of Novavax when it ordered a class-wide injunction.

Air Force Exemption Statistics Do Not Support a Class-wide Injunction. The Court also ignored updated exemption statistics. The Court appears to have incorporated its prior finding

that the Air Force had granted "thousands of medical and administrative exemptions" while granting "relatively none" of religious exemption requests as of March 2022. ECF No. 47, PgID #3195. This prior finding was incorrect. But the updated statistics that Defendants provided in July, which the Court did not address, further confirm the error in the Court's original finding. As of July 12, 2022, the Air Force had granted 135 religious exemptions of Active Duty service members, and there were 286 medical exemptions and 22 administrative exemptions in the Active Duty Air Force. ECF No. 73-2, ¶ 3, PgID # 4506–07. The Air Force also had granted 22 religious exemptions for the Air Force Reserves, and there were 145 medical exemptions and 83 administrative exemptions in the Reserves. *Id.*; *see also* DAF COVID-19 Statistics – July 12, 2022, https://perma.cc/AAV7-E7RV.[5]

No named Plaintiff is a member of the Air National Guard, and as discussed above, the Plaintiffs' motion for class certification and the Court's original class definition did not include the National Guard. In any event, statistics for the Air National Guard also do not support the Court's erroneous factual findings. The Air Force has granted four religious exemptions for members of the Air National Guard. *Id.* However, most of the religious accommodation requests that are still pending in the Air Force are from the National Guard (2,467 out of 2,847 total pending requests), where many are awaiting state officials to continue processing (those applications are not waiting for federal officials). ECF No. 73-2, ¶ 3, PgID # 4506–07. As of July 12, 2022, the Guard had 193 temporary medical exemptions and 712 administrative exemptions. DAF COVID-19 Statistics – July 12, 2022, https://perma.cc/AAV7-E7RV. The number of administrative exemptions in the National Guard does not support a class-wide injunction. Three of those administrative exemptions are for Guardsmen who are deceased, 681 are classified as "missing" (which includes members who no longer show up for drill or those pending retirement), 43 are classified as temporary (less than 90 days), and 11 are

[5] The most recent statistics continue to show medical and administrative exemptions are decreasing. *See* DAF COVID-19 Statistics — August 9, 2022, https://perma.cc/2EN7-JP4Y.

Permanent Change of Station (less than 90 days)). *See* Decl. of Colonel Steve L. Bradley, ¶¶ 4–5, Ex. 4. In other words, at least 684 of the 712 administrative exemptions are for Air Guardsmen who no longer participate in the Air Force (and would be required to comply with the COVID-19 vaccine requirement if they returned). *Id.* The rest of the exemptions will expire in less than 90 days. *Id.*

No Analysis of Balance of Equities or Public Interest. The Court's Order contains no analysis whatsoever of the equities or public interest implicated by expanding its original preliminary injunction covering less than two dozen service members to now cover nearly 10,000 service members. That alone is reversible error. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 27 (2008) (finding that the district court abused its discretion in part because "the District Court addressed [the balance of equities and the public interest] in only a cursory fashion.").

II. Defendants Face Irreparable Harm from the Preliminary Injunction.

A. Scope of the Injunction.

As explained in the attached declaration from Three-Star General Kevin Schnieder, the Director of Staff for the Headquarters of the United States Air Force, "[t]he injunction already degrades the Department of the Air Force's lethality and force capabilities by requiring the Department to retain—and enlist or commission—thousands of individuals who are ineligible to deploy." Ex. 1, ¶ 17 (citation omitted). The class-wide injunction covers around 10,000 unvaccinated service members—who are not world-wide deployable, who are limited in their ability to travel for training, exercise, or other operational needs—who the Air Force now cannot separate or even discipline. That number will only grow larger if the Air Force is required to commission and enlist additional unvaccinated individuals.

Every Airman is critical to the accomplishment of the Air Force mission and must be available to perform their duties globally. As has been the case throughout history, the loss of personnel due to illness, disease, or injury diminishes military readiness and effectiveness. The COVID-19 vaccination

is the most effective tool to combat the impact from the COVID-19 virus. Airmen and Guardians who are unvaccinated or partially vaccinated against COVID-19 are substantially more likely to develop severe symptoms from the disease, resulting in delayed recovery, hospitalization, or death. These risks, compounded by this injunction endangers the military mission and degrades the effectiveness of the fighting force.

The injunction places the Department of the Air Force in an untenable position. This order forces the Air Force to choose between (1) deploying unvaccinated Airmen and Guardians who are at greater risk of serious illness, causing avoidable risks to the service member, their peers, the mission, and the force; or (2) maintaining a separate class of nearly 10,000 non-deployable Airmen and Guardians, shifting all the hardships and burdens of global deployment on the remainder of the Air Force that meets medical readiness requirements. Both scenarios cause immediate and lasting harm to the Air Force, its Airmen, and its ability to defend the nation. Ex. 1, ¶¶ 16–22

The Order "is particularly harmful because the end-strength of the Department [of the Air Force] is congressionally mandated," so "the Department cannot simply enlist or commission more members to make up for the thousands of permanently non-deployable, non-combat-ready members that the Court's order forces the Department to retain, enlist, or commission." Ex. 1, ¶ 17. Those who seek to enter military service must meet strict medical readiness standards, including being tree of contagious diseases; free of medical conditions or physical defects that could require treatment, hospitalization, or eventual separation from service for medical unfitness; medically capable of satisfactorily completing required training; medically adaptable to the military environment; and medically capable of performing duties without aggravation of existing physical defects or medical conditions. *Id.* ¶¶ 23–25. To force the Air Force to enlist new Airmen who may not be able to complete training and who cannot deploy would cause irreparable and lasting harm to the Air Force's ability to defend the nation. A requirement to access new Airmen who are non-deployable from day one irreparably

harms the Air Force's ability to meet mission demands. "The longer the injunction remains in place, the more unvaccinated members can join the ranks, decreasing operational readiness." *Id.* ¶ 17. "The order effectively degrades the Department's ability to maintain a cohesive fighting force by both barring removal of unvaccinated members and requiring accession of more unvaccinated members," so that "large percentage of the Department's non-worldwide-deployable population will only continue to grow." *Id.*[6]

B. Harm from Forcing the Air Force to Commission Officers and Enlist Non-Deployable Airmen and Guardians.

Without the benefit of any briefing from Defendants on the issue, the Court expanded the class definition to include individuals seeking to be commissioned as officers and those seeking to enlist, and its injunction requires the Air Force to commission officers and enlist Airmen and Guardians who do not meet the Air Force's minimum medical readiness standards and who are not world-wide deployable. This causes irreparable harm to the Air Force. Enlistment and commissioning are generally irreversible decisions and forcing the Air Force to absorb potentially thousands of individuals who cannot deploy will have devastating impacts on our military's readiness. Ex. 1, ¶¶ 26–31.

Once a service member is in the military, they must go through formal separation procedures to be separated, which can take up to a year or longer. In the meantime, the Department of the Air Force is forced to fill a billet with an officer who, due to their unvaccinated status, is generally not permitted to travel, may not be able to train, and who cannot deploy to many places around the world. Already the Air Force has identified nearly 300 new officers it will now be required to commission in

[6] The Order causes additional irreparable harm by forcing the Air Force to take members of the Reserves off of No Pay / No Points status. *See* Decl. of Major General Matthew Burger, Ex. 2. First, that part of the preliminary injunction is an operational decision because it forces the Air Force to return unvaccinated individuals to a training status and back into certain assignments and operational positions. *Id.* at ¶¶ 12–13, 16. That conflicts with the Court's claim that the Order was not to interfere with assignment or operational decisions, and with the Supreme Court's decision in *Austin v. Navy SEALs 1–26*, 142 S. Ct. at 1301. Second, forcing the Air Force to either reinstate or keep in participating status around 1,000 individuals will reduce the percentage of world-wide deployable Reservists, pushing the burden on those who satisfy the medical readiness requirements. Ex. 2, ¶ 14; *see also* Ex. 1, ¶¶ 32–35. The Order also degrades good order and discipline. Ex. 1, ¶¶ 36–42.

the near future unless the injunction is stayed. Forcing the Department of the Air Force to commission hundreds of officers who cannot travel or deploy with their units severely undermines the defense of our nation.

III. The Balance Of Harms And Public Interest Warrant A Stay Pending Appeal.

The harms from the injunction strongly weigh in favor of staying the class-wide injunction pending appeal. The harms to the Air Force's military readiness are described in detail above. The Air Force's military leaders have decided that having a large portion of their fighting force unvaccinated against COVID-19 is an unacceptable operational risk. *See generally*, Exs. 1, 2, and 3. As Justice Kavanaugh recently explained when the Supreme Court granted a stay in a similar case involving the Navy, there is no basis "for employing the judicial power in a manner that military commanders believe would impair the military of the United States as it defends the American people." *Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J., concurring).

The only impact the stay would have on the class is limited to those who are not currently participating as named Plaintiffs in this lawsuit. The existing preliminary injunction covering the named Plaintiffs is not included in this request for a stay. Although the harm from requiring the Air Force to retain 16 of the 18 original Plaintiffs[7] is significant, the harm from this class-wide injunction is orders of magnitude larger and "pose[s] a significant and unprecedented risk to military readiness and our ability to defend the nation." *See* ECF No. 73-1

CONCLUSION

Defendants respectfully request that the Court stay its order pending appeal.[8]

Dated: August 15, 2022 Respectfully submitted,

[7] Two plaintiffs, who are members of the class and covered by class-wide injunction, are already in full compliance with the Air Force's COVID-19 vaccination requirement. *See* ECF No. 68 at PgID #4423–24.

[8] In the alternative, Defendants respectfully request that the Court at least stay the preliminary injunction in part, to the extent the injunction 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.

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CERTIFICATE OF SERVICE

On August 15, 2022, I electronically submitted the foregoing document using the Court's electronic case filing system. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Zachary A. Avallone
Zachary A. Avallone
Trial Attorney
U.S. Department of Justice

Exhibit 1

DECLARATION OF LIEUTENANT GENERAL KEVIN B. SCHNEIDER

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

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

2. I am generally aware of the various lawsuits—and kept apprised of new lawsuits—filed throughout the United States concerning the Coronavirus Disease 2019 (COVID-19) vaccination mandates issued by the Secretary of Defense and the Secretary of the Air Force, that require all Department of the Air Force Service members on active duty, in the Air Force Reserve, and Air National Guard, to be fully vaccinated against COVID-19. I make this declaration in support of the Government's motion for a stay of this Court's preliminary injunction pending appeal. The statements made in this declaration are based on my personal knowledge, my military judgment and experience, and on information that has been provided to me in the course of my official duties.

Preliminary Statement

3. Military vaccine requirements are integral to the military's continual effort to minimize avoidable risks to personnel, the units, and the mission while maximizing the chances for success in battle. Every Airman and Guardian is critical to the accomplishment of the Department of the Air Force mission and must be available to perform their duties globally whenever called upon. The loss of personnel due to illness, disease, or injury diminishes military readiness and effectiveness across the spectrum of deployment, assignments, and operations. As I read and understand it, the Southern District of Ohio's order, which preliminarily enjoins the Department

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

of the Air Force's COVID-19 vaccination mandate regarding the certified and modified class, will cause immediate and irreparable harm to operations of the United States Air Force and the United States Space Force, especially to our operational capabilities. The order purports not to "preclude [] the Department of the Air Force from considering vaccination status in making deployment, assignment, and other operational decisions." But the order's specific terms and practical effect invade those very decisions and on a scale that vitiates Air Force and Space Force commanders' vital decision-making authority for the health and safety of the men and women under their command. Because the injunction and class certification would reach any current or prospective military member who could be considered under the Department of the Air Force now or in the future, the harm permeates all ranks of the Air Force and Space Force and will only increase the longer it remains in effect.

Department of the Air Force Background and Experience

4. I am a 1988 graduate of the U.S. Air Force Academy and have continuously served in the U.S. Air Force for 34 years. My experience includes multiple assignments in senior leadership and operational positions. As Commander of the 380th Air Expeditionary Wing, I led one of the most diverse combat wings in the U.S. Air Force and conducted combat operations to include close air support and strike missions as well as intelligence, surveillance, reconnaissance, and aerial refueling. In my duties as Assistant Deputy Commander of U.S. Air Forces Central Command and Vice Commander of the 9th Air Expeditionary Task Force, I was responsible for the command and control of all air operations in a 20-nation area of responsibility covering Central and Southwest Asia. While serving as the Chief of Staff for the Headquarters of the Pacific Air Force, I coordinated a command staff directing 46,000 personnel across sixteen time zones. As Chief of Staff for the U.S. Indo-Pacific Command, I coordinated a joint force staff

providing combat capabilities to the Secretary of Defense across 52% of the globe. Most recently, as Commander of U.S. Forces Japan and the 5th Air Force, I was responsible for overseeing joint and bilateral exercises and improving combat readiness for 54,000 military and Department of Defense civilian personnel. I am also a command pilot with more than 4,000 flying hours in the F-16C *Fighting Falcon*, F-15E *Strike Eagle*, T-38C *Talon*, and UH-1N *Iroquois*; which includes 530 combat flying hours, serving in Operations SOUTHERN WATCH, ENDURING FREEDOM, IRAQI FREEDOM, and INHERENT RESOLVE.

5. I currently serve as the Director of Staff for the Air Force Headquarters. In that role, I assist the Secretary of the Air Force in his statutory duties and responsibilities as they pertain to the U.S. Air Force. Under 10 U.S.C. § 9032, those duties include "prepar[ing] for such employment of the Air Force" and "recruiting, organizing, supplying, equipping . . . , training, servicing, mobilizing, demobilizing, administering, and maintaining of the Air Force." Additionally, I synchronize and integrate policy, plans, positions, procedures, and cross functional issues for the headquarters staff. In that role, I work with my counterpart in the U.S. Space Force, Lieutenant General Nina M. Armagno, and am aware of the overall impact of COVID-19 on both the U.S. Air Force and U.S. Space Force. Specifically, as related to COVID-19, I am responsible for providing oversight to the Air Force COVID-19 Team, which has implemented the Secretary of Air Force vaccination mandate across both services within the Department of the Air Force.

Function and Mission of the Department of the Air Force

6. The Department of the Air Force's mission is to fly, fight, and win the nation's wars. In that vein, the Air Force and Space Force "provide the Nation with global vigilance, global reach, and global power in the form of in-place, forward-based, and expeditionary forces possessing the

capacity to deter aggression and violence by state, non-state, and individual actors to prevent conflict, and should deterrence fail, prosecute the full range of military operations in support of U.S. national interests."[2] To accomplish this, the Department trains, equips, and provides forces for nuclear operations; offensive and defensive operations; global precision attack; timely, global integrated intelligence, surveillance, and reconnaissance; rapid global mobility; agile combat support; global personnel recovery operations; and global integrated command and control for air and space operations.[3]

7. The full panoply of Airmen and Guardians—from chaplains to medical personnel to communications teams to explosive ordinance disposal to chemical, biological, radiological, nuclear, and explosives teams to air traffic controllers and radar approach controllers to the host of all Department of the Air Force Specialty Codes—fulfill vital roles with assigned units all to accomplish our nation's call, above and beyond the demands normally found in civilian occupations. The military duties necessary to fulfill these functions involve a wide range of demands. In deployed and non-deployed positions, many Airmen and Guardians must operate in sensitive compartmented information facilities (SCIFs) to handle dangerous, sensitive, or classified equipment and information. The Service members in these positions are charged with the responsibility of providing critical intelligence analysis for Combatant Commanders to assess persistent threats posed by our adversaries. To fulfill these positions, military members must be thoroughly vetted in processes that usually take several months. Assignment decisions for these positions are extremely rigorous to ensure qualified members are able to perform their duties for the entirety of their time on station. SCIFs often have no windows, limited airflow, and, in many

[2] *See* Department of Defense Directive (DoDD) 5100.01, Change 1, 09/17/2020, Encl. 6, ¶ 6.a.
[3] *Id.* at ¶ 6.b.

cases, close quarters where communication between personnel is paramount and social distancing is not possible. For certain positions such as aircrew for fixed wing aircraft, remotely piloted aircraft pilots and sensor operators, and personnel in nuclear missile silos, members work as teams in close quarters conditions for several hours. Aircrew members are frequently limited on their ability to socially distance as they complete tasks and phases required for effective air operations, including but not limited to planning, execution, and debriefing. These confined spaces create a significant risk for the spread of a highly contagious respiratory virus. If an unvaccinated service member contracts COVID-19 they are more likely to develop severe symptoms requiring hospitalizations that remove them from their units and impact mission execution. In deployment, a member who becomes ill generally cannot perform their role, cannot telework, and is often put on quarters in order to contain the disease. Severe illness may remove the member from that location, and a backfill can take weeks, if not months, to arrive because manning takes coordination either within the Department, and if unfillable, with a separate Service. This can drastically impede a unit's capability. The Department of the Air Force must maintain the ability to project airpower anytime, anywhere across the globe and losing critical billets unexpectedly and for possibly extended periods of time, because a member was avoidably unvaccinated, seriously undermines the Department's ability to provide this vital capability.

8. Particularly in Air Force special operations, our members employ unique tactics, techniques, procedures, and equipment. They often conduct these in hostile, austere, or diplomatically sensitive environments, and are characterized by time-sensitivity, clandestine nature, low visibility, working with or through host-nation forces, greater requirements for regional orientation and cultural expertise, and a higher degree of risk. These missions often require our members to travel for extended duration in aircraft or other vehicles that are less than six feet

across and or which have limited ventilation. Service members may be in such close quarters while traveling or executing the mission that they must sit or operate shoulder-to-shoulder. Again, these are ideal conditions for the spread of a respiratory virus. Most forward deployed locations do not have extensive medical facilities like those we are accustomed to in garrison. Accordingly, if a service member were to develop severe symptoms from COVID-19 they may need to be evacuated to a medical facility with the capability, capacity, and training to intubate a patient or use a ventilator. Ultimately, if a special operations member gets COVID-19 during mission preparation or execution, the entire operation risks getting canceled completely.

The Military's Compelling Interest in Vaccination to Protect Operational Readiness

9. While illness is always a hazard in deployed environments, COVID-19 has already had tangible impacts on military readiness and operations that necessitate a duty to mitigate that impact and ongoing risk to the greatest extent possible. We have seen how the disease's impacts have grounded entire units, depleted medical resources, and strained the Department's ability to function at minimal manning levels. We have seen how its outbreaks in members deployed to the field, where everyone is in close contact and living within the same area for months at a time, have overwhelmed local medical capacity, taking away from the ability to effectively treat frontline battle injuries and other illnesses. In the most severe cases, our members have experienced hospitalization, extended delayed recovery, and—to the distress of the Department and the families of those effected—died battling COVID-19. In the judgment of the Department of the Air Force, the COVID-19 vaccination is the most effective tool available to counteract the disease. Accordingly, a force fully vaccinated against COVID-19 is necessary to combat the disease's proven ability to degrade the readiness and effectiveness for our Airmen and Guardians to fulfill the Department's mandated functions.

10. The order issued by the Southern District of Ohio that imposes a class-wide injunction on the vaccination requirement with respect to current and future members of the Department of the Air Force places the Department in an untenable position. My understanding is that there are at least 10,000 members of the Department who have not been vaccinated subject to the Court's injunction—a number that will grow since the injunction covers new accessions. Because of this order, the Department must choose between deploying unvaccinated Airmen and Guardians and thereby cause avoidable risks to the service member, their peers, the mission, and the force or avoiding that risk by maintaining a separate class of nearly 10,000 non-deployable Airmen and Guardians while imposing all the hardships and burdens of deployment and other operational requirements on the remainder of the Department of the Air Force. Both scenarios will cause immediate and lasting harm to the Department and its ability to defend the nation. While those same risks are inherent in the Department's considerations for most travel and trainings, their scrutiny only intensifies under the dynamic and often unpredictable demands of national security. In the event of a mass mobilization, the shear breadth of the Court's order may necessitate the Department to deploy unvaccinated Airmen and Guardians (contrary to its military judgment and potentially contrary to host nations' health standards) in order to meet Combatant Commander requirements.

11. "To maximize the lethality and readiness of the joint force, *all* Service members are expected to be deployable."[4] The Department would be negligent in its responsibility to provide for the national defense if its military standards permitted admission of applicants with medical limitations that could cause harm to themselves or others or compromise the military mission.

[4] DoD Instruction (DoDI) 1332.45, *Retention Determinations for Non-Deployable Service Members*, Change I, paragraph 1.2(a) (emphasis added).

Those who seek to enter military service must meet strict medical readiness standards to ensure that every Airman and Guardian is deployable worldwide from day one. To meet these standards the Department of the Air Force requires new accessions to receive, or show proof that they have received, ten vaccinations, including the COVID-19 vaccine. The harm of the injunction is magnified by its requirement to commission and enlist those who are unvaccinated against COVID-19. Moreover, to access new Airmen and Guardians who are permanently non-deployable from the moment they start their military career thrusts a heavier burden on other Airmen and Guardians who must deploy in their absence. In an environment where the operational requirements can develop faster than available resources, it is imperative that the Department be manned with individuals capable of meeting their mission demands. A requirement to enlist those who are non-deployable from day one, or who if deployed will risk significant harm to their own health and the health of the force, irreparably harms the Department of the Air Force's ability to meet the demands of protecting the national security of the United States.

12. The Department of the Air Force has a compelling interest in ensuring that each and every Airman and Guardian is ready to execute the mission at a moment's notice wherever the fight may take us. The current global threat and security situation facing the United States is more complex and volatile than we have experienced in decades. The Department of the Air Force is a key component of the Department of Defense's Joint Force, comprised of Soldiers from the Department of the Army, Sailors and Marines from the Department of the Navy, Airmen and Guardians from the Department of the Air Force, as well as members of our Army and Air Force Reserves and National Guard forces. The military's priority is to field and protect a lethal Joint Force that will overcome threats posed to United States security. Maintaining and developing our lethal force depends upon the fulfillment of a number of implied tasks, including but not limited

to: recruitment of talented American warfighters; the provision of the highest-quality training, both for our Service members and our leaders; ensuring that all members of the force are assigned, developed, and managed accordingly; and taking all reasonable measures to minimize risk to the health and safety of service members. The Department's role is to organize, train, and equip Airmen and Guardians who are fully mission capable in order to successfully conduct global military operations that advance U.S. policies and objectives. Based on operational requirements, these Service members and equipment (e.g., aircraft such as F-35s, C-130s, etc.) are then assigned to Combatant Commands[5] to execute military operations within their area of responsibility. The unprovoked Russian invasion of Ukraine is a perfect example. In this environment, complacency is not an option, and within days, the United States mobilized its forces, including key Air Force assets as part of the North Atlantic Treaty Organization's response.

13. The Department of the Air Force has a compelling interest in maintaining the health and safety of its forces worldwide. To the best of my knowledge, each individual request is reviewed independently, considering the specific circumstances of the requestor and taking into account their career fields, duties, and work environment. Contrary to the Court's conclusion, I state emphatically that there is no overt or covert policy to deny religious accommodation requests in the Department. Rather, the low number of granted religious accommodation requests reflects the compelling government interest the Department has in maintaining a healthy and ready fighting

[5] Joint commanders are the Combatant Commanders vested with authority and responsibility for military operations within their area of responsibility. The military services of the Armed Forces provide forces to the Combatant Commanders to execute those responsibilities and functions. The Combatant Commanders exercise authority, direction, and control over the commands and forces assigned to them and employ those forces to accomplish missions assigned to the Combatant Commander. Department of Defense Directive (DoDD) 5100.0 I, Change I, 09/17 *no20,* Encl. I, Cf I .a through d. There are 11 combatant commands, each of which provides command and control of military forces, regardless of branch of Service, in peace and war. Some combatant commands are geographic, such as Central Command (CENTCOM), whose area of responsibility includes the Middle East. Others are functional, such as Special Operations Command (SOCOM), which utilizes the special operations units within the Services to carry out special operations worldwide.

force. To illustrate, it would be unsurprising and uncontroversial if the Department denied the vast majority of religious accommodation requests to be excused from wearing body armor in combat. The Department views COVID-19 vaccination in a similar light. Vaccination against COVID-19 is especially necessary to protect the health and readiness of the Air Force and Space Force from COVID-19 considering its toll in killing over a million U.S. citizens—including nearly 100 service members.[6] To allow up to 10,000 service members to continue serving without vaccination would be a dereliction of the Department's duty to maintain a force capable of defending the nation. There may be individual circumstances that warrant an exemption from the COVID-19 vaccine, but exemptions are the exception and not the rule when that rule is generally applicable and the exemption can be granted without risk to the military and the compelling governmental interest.

14. The Department of the Air Force's compelling interest in vaccination is also guided by the Combatant Commanders who establish immunization requirements to enter their respective geographic areas of responsibility.[7] These requirements are separate from standard Service immunization requirements.[8] These include vaccination requirements, based on the findings of the Combatant Command Surgeon Generals. These Combatant Command vaccination requirements are imposed for various reasons, including the risk posed to other service members, the risk to operations if service members contract a disease or are unable to perform their duties, avoidance of the burden of caring for someone who becomes ill, potential lack of sufficient medical resources in the region, and the need for cooperation with our allies. These situations are not unique to the COVID-19 vaccination. Medical requirements have long been imposed by

[6] Coronavirus: DoD Response

[7] *See* AFI 48-110, § 3-2(d)(3).

[8] Combatant Commanders have the authority to waive deployment requirements.

Combatant Commands. For example, some Combatant Commands require service members to receive additional immunizations (e.g., anthrax, yellow fever, smallpox) before deploying to certain locations within their areas of responsibility. This has been common military practice for centuries, with General George Washington ordering troops to be inoculated against smallpox in 1777 and General Dwight D. Eisenhower ordering Army soldiers to receive the flu vaccine in 1945 for worldwide deployment during World War II.

15. Service members who do not meet standard vaccination requirements are generally non-deployable because, in the Air Force's judgment, those service members are not medically fit to deploy. Moreover, exemptions (e.g., medical, administrative, religious) from any vaccination requirement, not just the COVID-19 vaccination requirement, do not automatically render a service member deployable. The entire military vaccination program is premised on the professional judgment of the senior-most military professionals—myself included—that sending unvaccinated Service members into deployed locations is an unnecessary and unwarranted risk to operations. Although exceptions can be made, those are decisions made by Combatant Commanders who are entrusted with the responsibility of weighing the operational needs of their geographical or functional command with the risks posed by unvaccinated Service members. This is a risk assessment made by experienced military leaders informed about the amount of risk they are willing to accept into their theater of operations.[9] Service members who are non-deployable undermine the Department of the Air Force's readiness to support military operations throughout the world.

[9] A vaccination exemption — whether based on medical, administrative, or religious reasons — is separate from a medical waiver to deploy. The medical waiver to deploy is at the discretion of combatant commands.

Irreparable Harm Caused by the Class-Wide Preliminary Injunction

16. The class-wide injunction will cause severe harm to the operational readiness of the Department of the Air Force. The order requires the Department to retain up to 10,000 class members (and counting[10]) who are non-deployable and, absent mission critical needs, restricted from traveling for operational needs. Thus, although the Court states the Department may consider vaccination status "in making deployment, assignment, and other operational decisions," the effect of the order will be to severely degrade military readiness and the ability for the Department of the Air Force's obligation to "organize, train, [and] equip" forces "for the conduct of prompt and sustained combat operations, military engagement, and security cooperation in defense of the Nation, and to support the other military services and joint forces."[11]

17. The injunction already degrades the Department of the Air Force's lethality and force capabilities by requiring the Department to retain—and enlist or commission, *see infra* ¶¶ 26–31—thousands of individuals who are ineligible to deploy. This is particularly harmful because the end-strength of the Department is congressionally mandated.[12] Thus, the Department cannot simply enlist or commission more members to make up for the thousands of permanently non-deployable, non-combat-ready members that the Court's order forces the Department to retain, enlist, or commission. The order effectively degrades the Department's ability to maintain a cohesive fighting force by both barring removal of unvaccinated members and requiring accession

[10] Since approximately June 13, 2022, there have been over 1,000 new religious accommodation requests received by decision authorities. Over 400 had been submitted between the court issuing a temporary restraining order and its subsequent preliminary injunction. Since the court issued its preliminary injunction over 500 new requests were submitted.

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

[12] The most recent National Defense Authorization Act limits the Active Air Force to 329,000; Space Force to 8,400, Air National Guard to 108,300, and Air Force Reserve to 70,300.

of more unvaccinated members; with the preliminary injunction, that large percentage of the Department's non-worldwide-deployable population will only continue to grow. To put this into perspective, the Department will lose over 2,000 service members, including officers and enlisted members, who are most likely vaccinated, on average each month to retirement or separation. However, solely considering the enlisted force, *see infra* ¶¶29-31, currently an average of up to 1,080 new enlisted members out of approximately 2,700 enter basic military training unvaccinated each month. Prior to the injunction, absent an approved exemption or accommodation, the unvaccinated members would be required to vaccinate or would be expeditiously separated from the service. The longer the injunction remains in place, the more unvaccinated members can join the ranks, decreasing operational readiness. The Department cannot successfully function to defend the Nation and our national interests with such a sizeable, growing hole in its end-strength. Such an untenable situation places the security of the United States in grave danger. The longer the Department is enjoined, the more unvaccinated members the Department of the Air Force will have in its ranks, further diminishing the operational readiness of the force and risking harm to the health of service members.

18. The injunction causes irreparable harm by making force planning and force projections nearly impossible. For example, the Department of the Air Force's inability to know what percentage of service members will be non-deployable at any given time paralyzes force management planning projections for subsequent fiscal years, which are closely monitored down to the single digits and meticulously evaluated for each and every Air Force Specialty Code. It can lead to delays in identifying, preparing, and deploying service members to take the place of their unvaccinated counterparts, impacting the Combatant Command's mission. Considering the interoperability of our services, this planning problem severely hampers our sister services who

must determine whether the Department of the Air Force can fulfill its role in the Joint Force or sustain the burden of filling the vacuum the Department of the Air Force is unable to fill because of non-deployable members mandated within its ranks.

19. The Court's order exacerbates this problem by allowing class members to "cancel or amend" their requests to voluntarily retire or separate. There are currently up to 2,000 class members who have submitted requests to voluntarily retire or separate. The order prevents the Department of the Air Force from replacing those members with vaccinated individuals to ensure continued military success.

20. The pool of unvaccinated and non-deployable individuals will only continue to expand under the terms of the injunction. This harm will have an ongoing ripple effect on military readiness, including decreasing the number of personnel available to counter significant threats posed across the globe, especially within the Indo-Pacific region and Europe. Not only are those who are not vaccinated non-deployable, they will likely be unable to fulfill many essential roles at assignments within the United States or fulfill positions in strategic OCONUS (outside of the continental United States) duty stations, such as South Korea, Guam, Japan, Turkey, or Germany. In addition to Department of Defense travel restrictions for unvaccinated service members—even for service members with a medical, administrative, or religious exemption—and Combatant Command imposed restrictions, host nations can and do impose vaccine/testing restrictions.[13] As sovereign nations, a vast majority of host nations require all travelers (including DoD personnel) to meet certain vaccine requirements in order to enter their country. For example, some countries

[13] These restrictions are separate and apart from any Status of Forces Agreement (SOFA). Although SOFAs can address the terms in which Service Members may enter the country, entry requirements are not exclusively addressed in SOFAs. Additionally, the United States does not have SOFAs covering every country.

require proof of vaccination for Yellow Fever for entry. With regard to the COVID-19 vaccine, there are certain countries that require travelers, including DoD personnel, to be fully vaccinated.

21. Other nations' requirements, however, are fluid. For example, during the height of the pandemic multiple countries had stringent vaccination requirements. Some of those countries have loosened their vaccination requirement, but others, after experiencing COVID-19 surges, have tightened restrictions. For mitigation measures alone, the Japanese government, for example, requested that the United States "strengthen measures to prevent an expansion in infections."[14] Service members who remain unvaccinated degrade the Department's readiness to support military operations, exercises, and needs throughout the world.

22. Moreover, not all deployments or operational needs follow a predictable pattern, further preventing the Department of the Air Force from adjusting based on the unavailability of unvaccinated members. The Department of the Air Force's unexpected need to respond to Ukraine and Operation Allies Welcome (airlift and support of Afghan civilians during Afghanistan retrograde) are prime examples of situations where the need to deploy is immediate and medical readiness cannot wait.

Harmful Impact on Accessions

23. The Court's order also overrides the opinions of military and medical professionals about the baseline medical qualifications required for entry into military service. Baseline standards for entering service in the United States Armed Forces are set by the Department of Defense. It is long-standing policy that individuals being considered for entry into the military services meet specific medical qualifications based on the operational needs of the Department of Defense. The

[14] Justin McCurry, "US Troops in Okinawa Placed Under Tighter Covid Rules As Cases Arise," *The Guardian* (Jan. 6, 2022), https://www.theguardian.com/world/2022/jan/06/us-troops-okinawa-masks-covid-cases-rise.

standards are designed to ensure all individuals entering service meet the statutory requirement to be physically "qualified, effective, and able-bodied persons" capable of performing the rigors of military service.[15] Those standards are set by military and medical subject matter experts, who are uniquely informed by the operational needs of the force.

24. In order to access into the military, individuals must meet five medical qualifications: "(1) Free of contagious diseases that may endanger the health of other personnel;" "(2) Free of medical conditions or physical defects that may reasonably be expected to require excessive time lost from duty for necessary treatment or hospitalization, or may result in separation from the Military Service for medical unfitness;" "(3) Medically capable of satisfactorily completing required training and initial period of contracted service;" "(4) Medically adaptable to the military environment without geographical area limitations;" and "(5) Medically capable of performing duties without aggravating existing physical defects or medical conditions."[16]

25. The Court's order disregards and overrides those medical qualifications by requiring the Department of the Air Force to access into service individuals despite being unvaccinated against a known deadly communicable disease. To commission or enlist individuals who are potentially permanently non-deployable puts a heavier burden on the rest of the force who would have to backfill and deploy more often and decreases overall mission readiness and effectiveness. While personal circumstances sometimes require a member to be non-deployable for a period of time (e.g., pregnancy, surgical operations, other health issues), that status is temporary, and such

[15] 10 U.S.C. § 505.

[16] DoDI 6130.03, vol. 1.

Service members are required to return to a deployable status in as little time as possible.[17] Determining *whether* someone should serve in the military is inextricably intertwined with determining *how* and *where* they serve. In this way, the Court forecloses the judgment of the military and its medical professionals on such a critical threshold for the fundamentally military decision of entry into service.

Harmful Impact on Commissioning and Enlisting

26. The Court's order will also cause irreparable harm by forcing the Department of the Air Force to commission hundreds of officers that do not meet minimum health readiness standards. The order directly interferes with the Department of Defense's authority to set standards for admission into the Armed Services and standards for who may become an officer. Only the President of the United States and, where delegated through executive order, the Secretary of Defense are authorized to commission an officer into the Armed Forces. The Department of Defense, Department of the Air Force, and other services have set specific medical, fitness, and other qualifications standards for individuals attempting to join the military, including the requirement to be vaccinated against COVID-19. These standards are based on the need to have a healthy fighting force capable of accomplishing the mission and defending our nation. The Court's order encroaches upon the President's authority by forcing the Department of the Air Force to commission unvaccinated class members.

27. Dictating the terms on which the Department of the Air Force must commission officers will cause particularly significant harm because commissioning is generally not reversible. Once the Department commissions an officer, only formal separation procedures can remove the officer.

[17] There are also some assignments that are coded as non-deployable for the period of time the period the member is assigned to that position.

There is no statutory or regulatory method to reverse an otherwise lawful commissioning. For example, if the vaccination mandate is ultimately upheld and newly commissioned officers who refused to be vaccinated when commissioned later decline a lawful order to vaccinate, they will be subject to separation proceedings. In the meantime, the Department will be forced to fill a billet with an officer who, due to their unvaccinated status, is generally limited in their ability to support the Department's worldwide responsibilities, especially with respect to deployments. Forcing the Department to commission hundreds of officers who cannot deploy with their units, and who risk harm to their own health and others, will severely undermine the Department's ability to defend the nation.

28. The irreparable harm from forced commissioning of officers is not hypothetical. The injunction will force the Department of the Air Force to keep nearly 300 cadets in training and/or commission them into the Department of the Air Force despite their unvaccinated status. There are currently approximately 32 U.S. Air Force Academy (USAFA) and Air Force Reserve Officer Training Corps (AFROTC) cadet class members who have graduated or are about to graduate and the Department would be required to commission them within just a matter of weeks. As the school year progresses, more and more AFROTC cadets will graduate, requiring the Department to commission even more unvaccinated officers.[18] Additionally, there are approximately 130 USAFA and AFROTC cadets currently under contract or whom the Department will be required

[18] Additionally, there are another approximately 16 unvaccinated officers who had already commissioned, but were immediately placed into the individual ready reserve (IRR) where they are not assigned to a unit and do not receive pay or retirement credit, leaving those billets available for vaccinated officers who can travel and deploy with their units. These sixteen officers are not yet class members, but could become so if they submitted religious accommodation requests and met the other class requirements.

to place under contract[19] at the end of August who either have submitted or plan to submit a religious accommodation request. And the Department anticipates it would be required to keep hundreds more first- or second-year cadets (not under contract) in USAFA or AFROTC if the preliminary injunction remains in place.

29. The Court order causes similar irreparable harm by forcing the Department to enlist individuals who do not meet the minimum medical readiness standards. Enlisted personnel are the backbone of military service. From aircraft maintenance to base protection to operational aircrew, enlisted personnel make up the bulk of the Department of the Air Force's personnel and are crucial to operational success.

30. The Court has prohibited the Department of the Air Force from refusing enlistment to any "appointee" or "inductee"[20] who has a sincerely held belief.[21] Recruits are not required to have all required vaccinations prior to joining; rather, recruits are notified they are required to receive any outstanding immunizations during basic military training. They are also made aware of their right to submit a religious accommodation request. If the religious accommodation request is denied,

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[19] Cadets in their first two years of college are not under contract. Accordingly, they do not owe a military service obligation nor would they owe any money for their education if they were disenrolled. At the beginning of their junior year (i.e., third year of college or "second-class" year), they incur a military service obligation, requiring them to serve in the military. Alternatively, the military may choose to recoup educational costs in lieu of military service, or may waive both.

[20] "Inductee" is not a term typically used within the Air Force. Induction generally refers to individuals entering military service under a draft. *See* DoDI 3130.03, vol. 1. (Defining induction as "[t]ransition from civilian to military status for a period of definite military obligation under Chapter 49 of Title 50, U.S.C. also known as the 'Military Selective Service Act.'")

[21] The Court's order also appears to misunderstand the role of the chaplain after an Airman submits a religious accommodation request. *See* DAFI 52-201. The chaplain does not make any final decisions about sincerity, the religious nature of the requestor's beliefs, or whether the requestor's beliefs are substantially burdened. The chaplain's role is to interview the requestor and prepare a memo noting his or her observations and "making a recommendation to the decision authority." *Id.* Att. 5. The decision authority is the one who makes a final decision on behalf of the Air Force.

the member is still obligated to vaccinate or will be removed from service.[22] The Court's order severely harms the ability of the Department to maintain a healthy force by limiting the ability to ensure that these new recruits are vaccinated against COVID-19. Currently there are at least four new enlistees who are awaiting or already in basic military training who have requested a religious accommodation. Once an enlisted member starts basic military training, they count toward the Department's total end-strength numbers. However, because the class definition is open-ended, new recruits can submit religious accommodation requests at any time and the Department would be prohibited from removing them from basic training under the Court's order.[23]

31. As a practical matter, the Court's order requires the Department of the Air Force to accept an unknown, increasing number of new unvaccinated service members, without regard to how large that number might end up being for as long as the injunction remains in place. For example, currently up to forty percent of 2,700 new enlisted members arrive at basic military training unvaccinated every month. If every new unvaccinated enlisted member entering basic military training submitted a religious accommodation request and was found to have a sincerely held belief, the Department of the Air Force would be required to keep on average about 1,080 new unvaccinated members each month, or 12,960 new unvaccinated members in just one year. At the same time, the Court's order prohibits the Air Force from separating unvaccinated service members who have sought a religious exemption. But as with newly commissioned officers noted above, newly enlisted personnel will be limited in their ability to travel, train, or deploy in support of the mission. This leaves their units short-handed—or, depending on how long the injunction

[22] Entry-level separations are able to be accomplished expeditiously.

[23] Similarly, even current service members who had not yet submitted a religious accommodation request (e.g., a member with an expiring medical exemption) can submit a religious accommodation request and become part of the class.

remains in place, could render entire units non-deployable, hobbling the Department of the Air Force's ability to defend the nation.

Harms to the Reserve

32. The success of the Department of the Air Force's mission depends not only on our full-time active component forces, but also on our Reserve component forces. The Reserve provides ready, trained units and personnel to be called upon when needed. This may occur during a war or unexpected national emergency. Reserve personnel are required to maintain the same individual medical readiness standards as their active-duty counterparts because Reservists may be mobilized voluntarily or, if the circumstances warrant it, involuntarily.[24]

33. Although a full-scale activation of the entire Reserve force has not happened since the fateful events of September 11, 2001, Reserve units and personnel have consistently been called upon to mobilize in support of contingency operations throughout the last several decades. Some Service members deploy with a high operational tempo — that is, they deploy frequently. Others may have never deployed. All, however, must be ready to perform the mission in garrison or deployed, as the mission dictates. Being ready to deploy in support of our national defense is the core purpose of the Reserves.

34. The military needs to be prepared to respond to unexpected and volatile situations. We cannot wait until the danger is upon us. Our forces must be ready today because we do not know

[24] Unlike voluntary activation, involuntary activation does not require the consent of the member. There are various statutory provisions that address when a reserve may be activated voluntarily and/or involuntarily. *Compare* 10 U.S.C. § 12301(d) ("At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member") *with* 10 U.S.C. § 12304b ("When the Secretary of a military department determines that it is necessary to augment the active forces for a preplanned mission in support of a combatant command, the Secretary may . . . order any unit of the Selected Reserve . . . , without the consent of the members, to active duty for not more than 365 consecutive days.").

where the fight will take us tomorrow. From an active-duty Service member performing special operations to a Reservist performing administrative duties (e.g., finance), individual medical readiness is critical to ensure every career field and Service member remains ready to deploy when called upon.

35. The Court's order requires Reservist Class members previously placed in a non-participating status (i.e., No Pay / No Points) to be placed back into a participating status to regularly drill[25] with their units and other normal operational duties. Contrary to the purported discretion allowed by the order over operational decisions, the decision as to who should participate in the Reserve, however, is itself an operational decision. Individual Ready Reserve units already have limited billets. Requiring a member to come back into the unit who is not medically qualified to perform the job—and pay them—hamstrings the unit into being unable to fill a billet. By forcing the Department of the Air Force to remove class member from a No Pay / No Points status or not place class members into a No Pay / No Points status, the order requires the Department of the Air Force to allow approximately 950 class members who have failed to meet medical readiness standards to participate in Reserve duties, overriding the operational decision to not utilize them for Reserve duty. This requirement risks the health and mission readiness of reserve units.

Good Order and Discipline

36. The Court's class-wide injunction also poses a serious threat to good order and discipline.

[25] "Drill" is a term of art referring to required training periods for Reserve members. The term derives from 37 U.S.C. § 206, setting "compensation, at the rate of 1/30 of the basic pay authorized for a member of a uniformed service of a corresponding grade entitled to basic pay . . . for each regular period of instruction, or period of appropriate duty, at which the member is engaged for at least two hours, including that performed on a Sunday or holiday," as prescribed by the Secretary of the Air Force. The Air Force extends the 2-hour statutory minimum to 4 hours, generally to compensate for unforeseen interruptions, such as inclement weather. *See* AFMAN 36-2136, *Terms*, "Training Period," & paras. 4.1.1, 4.9.

No armed force can successfully function where its members are free to define the terms of their own service, including which orders they will choose to follow, which makes good order and discipline a key role to maintaining a combat ready force. Failure to follow a lawful order undermines the military's ability to maintain good order and discipline within its ranks. Leaders must be able to trust their subordinates will unflinchingly follow their lawful orders, both at the frontlines and home station. When that trust begins to erode, our ability to defend our Nation suffers. While the Department of the Air Force respects the religious beliefs of all Airmen and Guardians, it cannot always accommodate those beliefs when they conflict with the compelling needs of the force. When that happens, members must comply with the lawful orders of the Secretary of Defense, the Secretary of the Air Force, and their commanders. Here, that means the order to receive the COVID-19 vaccine.

37. Congress itself enshrined that principle when it enacted Article 92 of the Uniform Code of Military Justice, which makes failure to obey an order or regulation a criminal offense. Military leaders must be able to trust that an order to "take the hill" will not be met with hesitation or refusal. An order to take the COVID-19 vaccine is a lawful order to ensure the member is medically ready to "take the hill," wherever that "hill" may be.

38. Similarly, Service members in leadership positions who refuse to follow a lawful order undermine the trust of both their superior officers and subordinates. Military leaders—from commanders to Senior Enlisted Leaders to non-commissioned officers in charge of a section—are expected to enforce good order and discipline within their organization. It is inherently corrosive to the necessary trust in leaders for a Service member to enforce a standard with which the member himself or herself is unwilling to comply.

39. In the context of religious freedom, Service members do not have a right to violate a lawful

order after the military has made a determination it has a compelling government interest and there are no less restrictive means to warrant an accommodation. Although we value the experience, expertise, skills, and leadership each Airman and Guardian brings to the fight, it is my professional judgment—and the professional judgment of other senior Department of the Air Force officials—that allowing members to refuse to follow lawful orders will have a devastating impact on the health, readiness, unit cohesion, and good order and discipline of the Armed Services.

40. The Court's injunction prevents the Department of the Air Force from enforcing lawful orders by preventing not only administrative actions, including administrative discharge from the Service, but also halting and preventing the exercise of authority under the Uniform Code of Military Justice. The Court's order stays any on-going court-martial and prevents the exercise of authority for potential future cases. While there are no current on-going courts-martial, the order has halted actions under 10 U.S.C. § 815, known as Article 15.[26] Commanders' authority under Article 15 was created by Congress as part of the comprehensive military justice system. It is a means of addressing alleged criminal misconduct, such as refusal to follow a lawful order, without resorting to trial by court-martial. Under Article 15, a member is given the option to accept nonjudicial punishment, in which case the commander (or higher-ranking commander to whom it is sent) will review the evidence, determine whether the member committed the offense, and impose punishment if appropriate. The member's other option is to turn down nonjudicial punishment and "demand trial by court-martial in lieu of nonjudicial punishment."[27] In other

[26] Article 15s are also known as Nonjudicial Punishments or "NJP" for short.

[27] Service members offered an Article 15 are provided the evidence which will be considered by the commander, the right to consult with counsel, provide evidence in their own defense, and other due process rights. If a member is found to have committed the alleged offense(s), the commander is limited in the type of punishment it may impose, based on the rank of the commander and rank of the member. Regardless of rank, Article 15 cannot result in

words, this choice for a member is a forum choice, with real potential for court-martial. Though nonjudicial punishment is not often turned down, it is a member's Due Process right to demand trial by court-martial. Currently, for up to twenty Article 15s, the Article 15 process had already been initiated and is now impacted by the preliminary injunction. In almost all of them, commanders had already made their determination whether to impose punishment and the Court has irreversibly prevented those punishments from being effectuated.[28]

41. Finally, I note that under Chapter 79 of Title 10 of the United States Code, military corrections boards are capable of rectifying erroneous or unjust discharges and discharge characterizations. This includes the ability to upgrade discharge characterizations from either an administrative board or a special court-martial, change the basis for discharge, to correct any military record when necessary to fix an error or remove an injustice. The ability of Airmen and Guardians to seek correction of their records means that if the preliminary injunction is stayed and a member is subject to an action which is later determined to be impermissible, there is a procedure to allow that member to be made whole.

42. I respectfully but strongly disagree with the view implicit in the Court's order that the military justice system will de facto violate Service members' constitutional or statutory rights. The military justice system was created by Congress with the intent of protecting both the interests of the military and Service members. It must be left to the professional military judgment of the Department of the Air Force to weigh the harms of allowing a member to continue to serve while refusing to follow orders or to take administrative or disciplinary action.

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imprisonment, administrative discharge, or punitive discharge (i.e., Bad Conduct Discharge, Dishonorable Discharge, or Dismissal for officers).

[28] For example, 10 U.S.C. §815 limits certain restrictions to *consecutive* days.

Conclusion

43. It is my highest honor to answer my nation's call and execute the mission of the Department of the Air Force. Throughout my career, I have been proud to join the men and women whom we ask to fulfill valuable roles in sustaining vigilance, projecting power, and maintaining America's global reach. In the informed judgment of the Department of the Air Force, mandating the COVID-19 vaccines is critical to mitigating the disease's risks and galvanizing our force against the impacts it has already sustained against us. The Court's order barring enforcement and requiring the Department of the Air Force not only to keep Service members it has determined are not medically fit for deployment in a ready to deploy status but also commission and enlist those who will be unfit from the very beginning, undermines the very aspects of readiness that we are required to maintain and causes immediate, irreparable harm to military operations by allowing unvaccinated Service members to remain in an unvaccinated status.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 15th day of August 2022.

KEVIN B. SCHNEIDER
Lieutenant General, USAF
Director of Staff

Exhibit 2

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

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

DECLARATION OF MAJOR GENERAL MATTHEW BURGER

I, Mathew J. Burger, hereby state and declare as follows:

1. I am a Major General in the United States Air Force currently assigned as the Deputy to the Chief of Air Force Reserve effective August 8, 2022. The office of the Chief of Air Force Reserve is located at Headquarters, United States Air Force at The Pentagon. The office is responsible as the principal advisor to The Secretary and Chief of Staff of the Air Force and their respective staffs on all matters affecting the Air Force Reserve. Immediately previous to this assignment, from July 2020 to August 2022, I was the Deputy Commander of Air Force Reserve Command headquartered at Robins Air Force Base, Georgia. That office has full responsibility for the supervision of all Air Force Reserve units around the world with approximately 70,000 personnel.

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

3. The class-wide injunction harms the lethality, readiness, health and safety, good order

and discipline, and unit cohesion of the Air Force Reserve by forcing it to remove individuals from No Pay / No Points status and place them back into a command's units without the protection afforded to meet medical qualification standards.

4. The preliminary injunction degrades lethality because unvaccinated members are more likely to develop serious illness and others will have to cover their duty.

5. The injunction harms readiness, health, and safety because unvaccinated personnel are at a higher risk of developing serious illness or death. Units require members to be healthy and require members to be vaccinated for at least nine different diseases (and sometimes more depending on circumstances). These medical requirements minimize risk, and on the battlefield, mission success depends on minimizing as much risk as possible. Forcing the Air Force Reserve to bear the risk of either returning to duty or preventing imposition of NPNP status of approximately 950 unvaccinated Airmen indefinitely will increase the risk to those Airmen and their units.

6. In my military judgment, special treatment for so many class members will undermine unit cohesion and good order and discipline. Current Air Force policy prevents unvaccinated personnel from certain deployments and other responsibilities, in order to protect the force and minimize risk to the mission. This injunction converted an individualized exemption into an extensive category of either returned-to-duty or preventing imposition of NPNP status of approximately 950 members for an indefinite period of time. Moreover, the injunction forces the Air Force to remove individuals from No Pay / No Points and back into the command's units. Having members of the unit who cannot deploy and leaving others to take on more responsibility will burden vaccinated Airmen who must pick up the slack and will naturally lead other members of the unit to resent class members' special treatment and status.

7. The order purports that "[n]othing in this Order precludes the Department of the Air Force from considering vaccination status in making deployment, assignment, and other operational decisions." But, in self-contradiction, the order commands the Air Force to remove individuals from a No Pay / No Points status which itself is a core operational decision, as explained more below.

8. Air Force Reserve personnel are divided into several different statuses based on mission and individual needs. The majority of personnel serve in a part-time status as Traditional Reservists (TR). TRs serve during Unit Training Assemblies (UTA) to accrue Inactive Duty Training (IDT) credit for pay, promotion, and/or retirement. UTAs are defined as a "planned period of training, duty, instruction, or test alert completed by a Reserve Unit." UTAs are commonly performed one weekend per month in order for personnel to fulfill mandatory minimum training and proficiency requirements to meet national security needs. Air Force Reserve personnel may also serve in part-time status as an Individual Mobilization Augmentee (IMA). IMAs are attached to Regular Air Force units and perform duties based on schedules coordinated with the Regular Air Force commands. IMAs also perform duties for pay, promotion, and/or retirement while meeting minimum training requirements. Both statuses also have requirements to perform Annual Training, which is two weeks per year.

9. The Air Force Reserve must ensure qualified personnel with needed skill sets are performing the right duty at the right time to meet the Air Force mission. To do so, local unit commanders must ensure that appropriate funding is available for performance of all duties. Annual UTAs are scheduled in advance and are funded based on the unit's manpower authorizations. Local unit commanders are the authority for determining whether personnel are qualified to report for and perform duty or be excused. Reasons that personnel in a

participating status might not drill include failure to meet minimum qualifications, unexcused failure to report, or excusal from expected attendance (typically for personal reasons). To meet minimum qualifications, personnel must meet specific training requirements along with dress and appearance, fitness, and medical standards and qualifications.

10. Personnel who meet minimum requirements satisfactorily participate in the Air Force Reserve by earning "good years." Personnel may earn a good year by accruing at least 50 creditable points in a Retention/Retirement year (R/R year). Personnel may accrue creditable points by attending scheduled UTAs. Because UTA periods are scheduled (and funded) in advance, personnel who meet minimum requirements generally have the opportunity to earn a good year by simply reporting for duty as scheduled. The start date of an individual's R/R year is determined by the date the individual entered the Reserve. Accordingly, all personnel have different R/R year start dates.

11. Pursuant to the Secretary of the Air Force's Supplemental Coronavirus Disease 2019 Vaccination Policy, effective as of April 14, 2022, TRs and IMAs without a pending or approved medical exemption request or religious accommodation request who fail to be vaccinated are required to be placed in a "no pay/no points" (NPNP) status and eventually transferred to the Individual Ready Reserve (IRR).

12. NPNP status is a non-drilling status, meaning the member does not perform duty and does not receive credit for pay, promotion, or retirement. For failure to vaccinate, NPNP status can be a transitory precursor to transfer to the IRR. For that purpose, NPNP status immediately takes a member out of drilling status before full transfer to the IRR can be effected—which generally takes a few months—if the member does not rectify the reason for NPNP. NPNP status is an essential step because while a member is in a drilling status (*e.g.*,

TR or IMA), command generally cannot prevent that member participating in drills. The effect of the order allows these members to drill despite a member not meeting minimum qualifications or prevents them from entering that status without being medically qualified.[1] However, should a member be unqualified to perform duty, command must be able to make operational decisions regarding that member's duty, including whether to prevent them from performing duty. Accordingly, in order for command to have authority to make such operational decisions, unqualified members are placed in NPNP status until the disqualifying condition or status is remedied or potentially transferred to the IRR.

13. The Court's order therefore interferes with command's ability to make operational decisions by forcing the Air Force Reserve to remove members from NPNP status or prevent that action. When a member is taken out of NPNP status and placed back into drilling status, command generally cannot prevent that member from performing duty. Accordingly, by forcing the Air Force Reserve to remove members from NPNP status, the court's order forces command to place unqualified members back into operational positions.

14. The Court's order forces the Air Force Reserve to either re-instate or prevent imposition of NPNP status of approximately 950 personnel. Across the command, members currently in or subject to NPNP status due to COVID-19 vaccine refusal span the gamut of duty responsibilities for the Air Force Reserve. Many of these members had primary duties that must be performed hands-on and in person with little potential to social distance, such as security forces officers and medical personnel to pilots and aircraft maintainers. Work

[1] Command may only prevent a member from completing a good year if there are budgetary limits on the relevant units or they are otherwise unqualified to perform duty. As noted, most duty is scheduled (and therefore also funded) in advance, so members generally have the ability to complete a good year by simply attending their scheduled duty. Depending on when their R/R year began and how long they have already been in NPNP status, however, some members may have already missed too much scheduled duty to complete a good year for 2022.

facilities within the command include flightlines, hangars, maintenance shops, traditional office space, medical clinics, and Sensitive Compartmentalized Information Facilities (SCIF) where classified information can be discussed and handled. Many work centers are not conducive to social distancing mitigation measures. Many members serve in leadership positions and perform supervisory duties, which are particularly important to conduct in person within the military setting. By forcing the Air Force Reserve to take these members out of NPNP status and place them back in their normal duties or prevent entrance in NPNP status, the court's order makes operational decisions on behalf of the Air Force Reserve.

15. COVID-19 presents a real, not theoretical, danger to the enterprise. Members can become infected themselves and spread the virus to other uniformed members or civilian counterparts. Outbreaks across the force can and has led to quarantine, mission degradation, and mission failure, in addition to increased risk for long-term medical complications to individual members. Over the past 30 days, approximately 18 Air Force installations have revised upward their Health Protection Conditions and implemented stricter mitigation measures due to increased local community transmission. Personnel stationed at Robins Air Force Base are back in masks in indoor settings. Many Reserve units are co-located with partnering Regular Air Force units, furthering the risk of COVID outbreak to the full-time standing Air Force. Based on prevailing medical opinion, the readily-available COVID-19 vaccination is the most effective measure to prevent "long COVID," other medical complications caused by COVID-19, and severe individual illness. Our people are our essential resource and we must effectively protect them for the future fight to accomplish our mission.

16. I must consider the compelling government issues at stake: mission accomplishment,

readiness, health and safety, good order and discipline, and unit cohesion. These are not merely generic buzzwords but rather are the foundational military principles needed to preserve American liberties and achieve national security objectives through integrated deterrence or armed conflict. Each one of these compelling interests can be the difference between success or failure, life or death. The COVID-19 vaccine advances all of these interests in an increasingly complex global national security environment. Reservists must be trained and ready to respond to global contingencies at a moment's notice and be prepared to deploy—generally within 72 hours. Over the past calendar year, the United States Armed Forces successfully conducted Operation Allies Refuge in Afghanistan (the largest non-combatant evacuation in U.S. history) and re-postured deterrent forces in the European Theater in the wake of Russia's invasion of Ukraine. The Air Force Reserve was an integral part of these efforts. This is not a theoretical exercise. For these reasons and given the unique nature of this pandemic, in my professional military judgment I consider wholesale, worldwide reintegration of unvaccinated NPNP personnel or prevention of that status to be an operational matter that will have significant negative impact across the enterprise.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of August 2022.

BURGER.MATTHEW.J.1139535797 Digitally signed by BURGER.MATTHEW.J.1139535797 Date: 2022.08.12 16:31:02 -04'00'

MATTHEW J. BURGER
MAJOR GENERAL, USAF
DEPUTY TO CHIEF OF AIR FORCE RESERVE

Exhibit 3

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

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

DECLARATION OF BRIGADIER GENERAL WENDY WENKE

I, Wendy Wenke, hereby state and declare as follows:

1. I am the Director for Manpower, Personnel, Recruiting and Services for the Air National Guard (ANG) Readiness Center, National Guard Bureau, Joint Base Andrews, Maryland. As the Director, I provide leadership, management, and oversight of all policy and resource management for manpower, personnel, recruiting and services for the 90 wings and 54 States, Territories, and the District of Columbia. I have been in this position since June 1, 2021.

2. I am generally aware of the allegations set forth in the pleadings filed in this matter. I base this declaration upon my personal knowledge and upon information that has been provided to me in the course of my official duties, and I make this declaration on behalf of the Air National Guard of the United States.

3. On July 14, 2022, the U.S District Court for the Southern District of Ohio certified a class that includes "all active-duty and active reserve members of the United States Air Force and Space Force." The Court also issued a temporary restraining order (TRO) prohibiting Defendants from enforcing the vaccine mandated against the class members. While there are no Air National Guard (ANG) named plaintiffs in *Doster*, out of an abundance of caution, the

Defendants tentatively included the Air National Guard of the United States (i.e., "active reserve members of the United States Air Force") in its implementation of the TRO. Then on July 27, 2022, the Court modified that class to expressly include the "national guard" and issued a preliminary injunction enjoining the "national guard" from: (1) "taking, furthering, or continuing any disciplinary or separation measures" against class members based on their COVID-19 vaccine status. ECF 77 at 2. The Court defines "disciplinary or separation measures [to] include, but are not limited to, 'adverse administrative actions, non-judicial punishment, administrative demotions, administrative discharges, and courts-martial;" (2) placing or continuing "active reservists on no points, no pay status for their refusal to get vaccinated for COVID-19;" and (3) refusing to "accept for commissioning or enlistment any inductee or appointee due to their refusal to get vaccinated for COVID-19…" *Id.* at 2–3. Lastly, the Court specifies that class 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." *Id.* at 3. The injunction binds the named Defendants, their "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." *Id.* at 4.

4. There are no named Air National Guard plaintiffs and no named State defendants. However, as explained more below, state governors and state Adjutant Generals "act[] in concert with Defendants" to maintain the health and readiness of National Guard units, including ensuring that Air National Guard members comply with COVID-19 vaccination requirements, and thus state governors and state Adjutant Generals appear to fall within the scope of the injunction. *Id.* The injunction will cause irreparable harm to the 90 wings in the 54 States, Territories, and District of Columbia Air National Guard.

Overview of the "Air National Guard"

5. Although the Court modified the class to now include the "national guard" in the class definition, it is not clear how the Court is using the term "national guard" or how the injunction is applied to the "national guard" because such terms have been used to describe the Army and Air National Guard of the United States, as well as the Air and Army National Guard of each of the 54 States, Territories, and the District Columbia (i.e., the militia of each state). "The National Guard is a component of the organized militia of the United States and incorporates both the Army National Guard and the Air National Guard. The National Guard is an 'unique military force in that each unit within the Guard is responsible to two governments, one local [the state government], and the other federal, i.e., that of the United States…That is, the National Guard consists of two overlapping but distinct organizations (1) the National Guard of the various states and (2) the National Guard of the United States. *Ass'n of Civilian Technicians, Inc. v. United States*, 601 F. Supp. 2d 146, 151-52 (D.D.C., 2009) (internal citations and quotation marks omitted); 32 U.S.C. § 101(3), (6)-(7). Defendants understand the "national guard" in the Order to refer to the Air National Guard of the United States.

6. The Air National Guard of the United States and each of the 54 state Air National Guards are separate and distinct legal entities. The Air National Guard of the United States "means the reserve component of the Air Force all of whose members are members of the Air National Guard," 32 U.S.C. § 101 (7), and the Air National Guard refers to the "organized militia of several States, [Guam and the Virgin Island], Puerto Rico, and the District of Columbia," that is federally recognized and funded in whole or in part, and with officers "appointed under the sixteenth clause of section 8, article I of the Constitution." 32 U.S.C. § 101(1), (6). The fifteenth

and the sixteenth clauses of Section 8, Article I of the Constitution are known as the Militia clause.

7. The Militia Clause gives Congress the power to provide for "organizing, arming, and disciplining" the militia and for governing federally recognized National Guard units so that such units may be called into the federal service. U.S. Const. art. I, § 8, cl. 16. Congress in 32 U.S.C. § 110 provides that "[t]he President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard."

8. The Secretary of Defense serves as the principal assistant to the President on military matters and, consistent with his authorities under 10 U.S.C. § 113(b), may assist the President in carrying out the responsibilities of 32 U.S.C. § 110 with respect to the National Guard. The Under Secretary of Defense for Personnel and Readiness assists the Secretary of Defense in carrying out the Secretary's responsibilities and, under 10 U.S.C. § 138, "shall perform such duties and exercise such powers as the Secretary of Defense may prescribe in the areas of military readiness, total force management, [and] . . . National Guard and reserve components, and health affairs." 10 U.S.C. § 136(b).

9. The Chief, National Guard Bureau, is charged with carrying out the National Guard Bureau's statutory function of "[p]rescribing training discipline and training requirements for the . . . Air National Guard" and with "[i]ssuing directives, regulations, and publications consistent with approved policies of the . . . Air Force." *See* 10 U.S.C. §§ 10502, 10503; *see also* Department of Defense Directive 5105.77, *The National Guard Bureau*, October 15, 2015 (with change 1, October 10, 2017). Such approved policies of the Air Force are prescribed by the Secretary of the Air Force according to 10 U.S.C. §§ 9013, 10202.

10. Congress has further authorized the Secretary of the Air Force to prescribe regulations relating to the reserve components under his or her jurisdiction, including the Air National Guard. "Subject to standards, policies, and procedures prescribed by the Secretary of Defense, the Secretary of each military department shall prescribe such regulations as the Secretary considers necessary to carry out provisions of law relating to the reserve components under the Secretary's jurisdiction." 10 U.S.C. § 10202(a).

11. National Guard units and members are subject to these federal military regulations when they are engaged in federal training functions and other authorized duty under title 32, U.S. Code, even though they are subject to state command authority at these times. All federal training under 32 U.S.C. § 502 is regulated by the Secretaries of the Army and Air Force. "The discipline, including training, of the Air National Guard shall conform to that of the Air Force." 32 U.S.C. § 501(a).

12. States are generally in charge of Air National Guard training when units are not in federal service. "The training of the National Guard shall be conducted by the several States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands." 32 U.S.C. § 501(b). This framework of state-federal shared responsibilities for training federally recognized and funded National Guard units is consistent with the objective that "the strength and organization of the…Air National Guard as an integral part of the first line defense[] of the United States be maintained and assured at all times….[T]he Air National Guard of the United States…shall be ordered to active Federal duty and retained as long as so needed." 32 U.S.C. § 102.

13. When a National Guard is not called into federal service, "the Appointment of the Officers, the Authority of training the Militia according to the discipline prescribed by Congress"

are reserved to the States. U.S. Const. art. I, § 8, cl. 16. Indeed, "[i]n each state, the Guard is a state agency, under state authority and control…The governor and his or her appointee, the Adjutant General, command the Guard in each state." *Ass'n of Civilian Technicians, Inc.*, 601 F. Supp. 2d at 152 (citing *Jorden v. Nat'l Guard Bureau*, 799 F.2d 99, 101 (3rd Cir. 1989) and *Charles v. Rice*, 28 F.3d 1312, 1315 (1st Cir. 1994)) (internal quotation marks omitted); *Ass'n of Civilian Technicians, Inc. v. United States*, 603 F.3d 989, 993 (D.C. Cir., 2010).

14. When National Guard units or members are not in federal service with the United States Air Force, courts-martial, including non-judicial punishment, are conducted by duly authorized title 32 commanders and state military officials (e.g., TAG and Governor as the Commander-in-Chief of the state National Guard), prescribed by the state code of military justice, not the federal Uniform Code of Military Justice. 32 U.S.C. §§ 326, 327 (For National Guard not in federal services, "general, special and summary courts-martial may be convened as provided by the law of the respective States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands").

Enforceability of the Preliminary Injunction on National Guard

15. The Court preliminarily enjoined the Secretary of the Air Force, the Surgeon General of the Air Force, the Commander of Air Education and Training Command, the Commander of Air Force Reserve Command, the Commander of Air Force Special Operations Command, and the United States of America from taking, furthering, or continuing disciplinary or separation measures against national guard class members. As explained above, when National Guard units or members are not in federal services, they are under the command and control of the state governor and the state Adjutant General. No state governors nor state Adjutant Generals are named defendants in this case. State governors and Adjutant Generals are also not "officers,

agents, servants, employees, and attorneys" of the named federal defendants. However, state governments and Adjutant Generals "act[] in concert with Defendants" to maintain the health and readiness of National Guard units, and thus appear to fall within the scope of the injunction.

16. Additionally, when National Guard units and members are not in federal service with the United States Air Force, non-judicial punishment and courts-martial are conducted in accordance with state code of military justice, by duly authorized title 32 commanders and state military officials. For example, the West Virginia state code of military justice authorizes commanding officers, including the Governor and the Adjutant General, to impose disciplinary punishment for minor offenses under WV Code § 15-1E-15, Commanding Officer's Nonjudicial Punishment. Types of punishment authorized under § 15-1E-15 include an admonition, a reprimand, reduction in grade, among others. The scope of the preliminary injunction issued by a federal district court in Cincinnati, Ohio, enjoins West Virginia state military officials or commanding officers from taking disciplinary actions otherwise authorized under the West Virginia state code of military justice against class members for non-compliance with COVID-19 vaccine requirements.

17. The Court also preliminarily enjoined the federal defendants from "plac[ing] or continu[ing] active reservists on no points, no pay status" for their refusal to receive the COVID-19 vaccines due to their sincerely held religious belief. Most members of the National Guard are Drill Status Guardsmen, who are required to attend military training under the title 32 authority. one weekend a month and two weeks a year. *See* 32 U.S.C. § 502(a). As discussed above, title 32 training is conducted by states, but subject to regulation by Congress and the federal military. *See* 32 U.S.C. § 501 ("The training of the National Guard of the several states…shall be conducted in conformity with this title."). By requiring state Air National Guard units to remove class members from No Pay / No Points status, the injunction restricts state military officials'

(i.e., the state Adjutant Generals) discretion in spending federal funds to pay or not to pay for military duty performed under title 32 in the National Guard. The preliminary injunction also directs state Governors and Adjutant Generals to provide class member inductees and appointees with membership in a state militia because National Guard members must have a concurrent membership in the National Guard of the United States and in each state militia or state National Guard. The court's order enjoined federal defendants from refusing "to accept for commissioning or enlistment" any individuals due to their COVID-19 vaccine refusal based on their sincerely held religious belief.

18. Under the Militia Clause, enlistment and appointment of individuals to the National Guard is reserved to the State and processed in accordance with applicable state rules and regulations. While the Department of the Air Force has the authority under 32 U.S.C. §§ 301, 302 to prescribe regulations for the qualifications (and duration) of enlistments in the National Guard in order for a state national guard member to receive "federal recognition" of the enlisted grade, branch, position, and unit of assignment, it is the State that enlists, commissions, reenlists, or retains an individual in the state militia. *See* 32 U.S.C. § 305; 10 U.S.C. § 10105. Because of the hybrid nature of the National Guard under the Militia Clause, to enlist or commission in a state's militia that is federally recognized and funded in whole or in part, an individual must also enlist or commission at the same time in the Air National Guard of the United States. Since the Order requires the Air Force to accept enlistees and to commission officers if they are members of the class, regardless of their vaccination status, it operatively extends that requirement to state officials and intrudes upon their constitutional authority to commission officers of their choosing.

19. Under the court's Order, National Guard class members may also cancel or amend previous voluntary retirement or separation requests or requests to transfer to the Air Force Reserve. To date, the Air National Guard is expecting 3,284 RARs from members from across the 90 wings and 54 state National Guard units.[1] From January 1 to June 30, 2022, 3,660 Air National Guard members either separated or retired from military service. Sixty-six of the 3,660 members who have separated had submitted a religious accommodation request. As of July 7, 2022, 681 Air National Guard members who refused to receive the COVID-19 vaccine are either on terminal leave, have already separated or retired, or have their separation or retirement application pending processing by the Air Force Personnel Center. These 681 Air National Guard members are given an administrative exemption from receiving the vaccine pending the completion of the underlying administrative actions. Thus, an unknown number of 3,284 members with a religious accommodation request and 681 members with an administrative exemption may now request retention or reenlistment, which will require various state National Guard units to retain or reinstate their state National Guard or militia membership. The court's order thus seeks to enjoin state officials (i.e., Governors and state Adjutant Generals) who are not named defendants in the case.

20. Lastly, the injunction would cause irreparable harm to the 90 wings across the 54 state National Guard units. Specifically, the injunction obligates the 54 state National Guards to enlist/reenlist, commission and retain greater number of unvaccinated members who are subject to training, assignment, and deployment restrictions. Unit- or installation-wide readiness will

[1] As of August 8, 2022, the Air National Guard Directorate of the National Guard Bureau has received 2,869 religious accommodation requests. 1,212 of those requests were returned to the state National Guard units for additional information and 1,649 requests were accepted for review. To date, the Director of the Air National Guard has approved 10 religious accommodation requests and disapproved 944 requests. Six hundred and ninety-four requests are pending review.

suffer as unvaccinated members will not be fully trained, readied, and capable of accepting operational assignments and deployments. State National Guard units support state and federal homeland defense operations, with many emergencies requiring 24 to 72 hours recalls of National Guard members. At any given time, National Guard members may be recalled for state active duty under state laws or mobilized for federal service for domestic operations or defense support of civil authorities under 32 U.S.C. §§ 328, 502(f). Indeed, National Guard members need to be prepared to deploy or be mobilized in an emergency with little to no notice. For some deployments, Guardsmen and Airmen receive months of lead time to prepare. However, that is not true for unplanned deployments or mobilization, which can range from natural (e.g., hurricanes, earthquakes, forest fires) or manmade disasters (e.g., oil spills like Deepwater Horizon, civil unrest). Similarly, terrorist attacks (conventional, chemical, nuclear, or biological) are rarely telegraphed by the responsible organization beforehand. Disaster deployments or mobilization routinely begin hours or days after notice is received by the activation of National Guard members. Unvaccinated National Guard members will not have sufficient time to be fully vaccinated to support unplanned operations.

21. It is also foreseeable that an increased number of unvaccinated members who are untrained and without meeting all military readiness requirements will hamper any surge and rapid response forces required in a domestic emergency. The 90 wings across the 54 state National Guard units are small when compared to the size of an active-duty Air Force military installation. However, state Air National Guard units provide outsized domestic air defense for the protection of life, property and preservation of peace, order, and public safety under state law. For example, Air National Guard units maintain 94 percent of the U.S. alert sites for air defense, and provide tactical airlift, air refueling tankers, general purpose fighters, rescue and

recovery capabilities, tactical air support, weather flights, strategic airlift, special operation capabilities and aeromedical evacuation units, to name a few. Air National Guard units accomplish these critical missions and air defense operations with limited billets and a nimble fighting force. Thus, when Air National Guard units are required to (re)enlist, commission, or retain an increasing number of unvaccinated members who are subject to training, assignment, and deployment restrictions and with an elevate health risk to themselves and others, unit commanders are left with the burden of having to direct vaccinated members to do more, knowing that repeated mission tasking increases burnout and risk to safety in operations. Further, most Air National Guard members are Traditional Drill Status guardsmen who have a civilian career outside of the military training periods (i.e., one weekend a month and two weeks a year). Increasing the military demand on vaccinated guardsmen will consequently challenge their ability to balance their military and civilian careers. Similarly, many Air National Guard units also maintain specialty assets, such as HH-60 helicopters and HC-130 aircraft, which provide important lifesaving capabilities and services to civilian and military agencies. Flying these specialty assets requires a team of at least two to four members with different Air Force Specialty Codes working in close quarter and long hours to ensure mission success. When one of the four required members for the specialty team is not a deployable member due to his/her vaccine status, then the team is unable to readily answer the call of duty. The Order directing the state Air National Guard units to encumber already limited number of billets with unvaccinated members essentially robs unit commanders the deployment, operations, and assignments decision on when, who, how to utilize a small cadre of surge and rapid response force.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of August 2022.

WENKE.WENDY.B.1023293630

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Date: 2022.08.12 10:25:48 -04'00'

WENDY WENKE
Brigadier General, USAF
Director for Manpower, Personnel, Recruiting and Services

Exhibit 4

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

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

DECLARATION OF COLONEL STEVE L. BRADLEY

I, Colonel Steve L. Bradley, hereby state and declare as follows:

1. I am currently employed by the U.S. Air Force as the Deputy Director of Air National Guard Medical Service at the Air National Guard Readiness Center (ANGRC), located at Joint Base Andrews, Maryland. I have held this position since June 1, 2021. I previously served as Chief, Medical Readiness Division, Air National Guard Medical Service at ANGRC for five years since January 19, 2016. I am generally aware of the allegations set forth in the pleadings filed in this matter. I make this declaration in my official capacity and based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. After the Secretary of Defense mandated the COVID-19 vaccine for all service members, the Department of the Air Force developed and promulgated a department-wide implementation guide, which included guidance on administrative exemptions available. The Air National Guard has access to tracking data for administrative exemptions for the 54 States, Territories, and District of Columbia Air National Guard units. The system of record that tracks this information

is called the Aeromedical Services Information Management System (ASIMS), which is a web-based application that provides the Air Force (including the Air National Guard) the capability to track medical readiness, including immunization data, through a web portal for all personnel both in fixed and deployed facilities.

4. As of July 7, 2022, the ASIMS tracking report shows the following numbers of administrative exemption for the Air National Guard:

ASIMS Personal Exemption List: 7/7/2022 11:05

Nbr Assigned	Admin (Deceased)	Admin (Missing)	Admin (PCS)	Admin (Temp)
104621	3	681	11	43

5. The majority of administrative exemptions provided in the Air National Guard falls under the "Missing" category. The Air National Guard is authorized to use this exemption category for members who are currently on terminal leave, have already separated or retired, or have their separation or retirement applications pending processing by the Air Force Personnel Center (AFPC). The duration for the "Deceased" and "Missing" administrative exemption categories is indefinite because members in these two categories will not return to active service (i.e., performing federal military duty on a Title 32 or Title 10, U.S.C. status) in the Air National Guard. Specifically, once a member is on terminal leave, they are no longer considered on active service in the Air National Guard, and thus members are provided an administrative exemption under AFI 48-110, *Immunizations and Chemoprophylaxis for the Prevention of Infections Diseases*, 16 February 2018. Similarly, when members have separated or retired, or have their

separation or retirement applications pending complete processing by the AFPC, there is no expectation that such members will return to active service in the Air National Guard. The "PCS" category is used for members who have permanently changed their duty station or pending permanent change of duty station orders. The "Temp" category is for members who are absent without leave and might have pending administrative voluntary or involuntary separation action. The duration for the "PCS" and "Temp" categories is up to 90 days to provide sufficient time for members to complete the underlying personnel or administrative actions.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 2nd day of August 2022.

BRADLEY.STEVE.LAURENCE.1178536547

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Date: 2022.08.09 12:17:08 -04'00'

Steve L. Bradley
Colonel, U.S. Air Force
Deputy Director, Medical Services
Air National Guard Readiness Center
Joint Base Andrews, Maryland

Exhibit 5

DECLARATION OF DR. BRUCE M. MCCLENATHAN

I, Bruce M. McClenathan, hereby state and declare as follows:

1. I am a regional medical director of the Defense Health Agency-Immunization Healthcare Division (DHA-IHD) stationed at Fort Bragg, North Carolina. During the development of the Novavax NVX-CoV2373 vaccine, I was a member of the DHA and Preventive Medicine Services' COVID-19 Vaccine Implementation Plan Team.

2. I am generally aware of the allegations set forth in the pleadings filed in this matter. I make this declaration in my official capacity as DHA-IHD regional director and based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

3. Attached as Exhibit A is a true and correct copy of the memorandum, titled "Novavax COVID-19 Vaccine (NVX-CoV2373)-Information on Fetal Cell/Fetal Tissue," that I received from Dr. Gale Smith, PhD, Senior Vice President for Discovery and Pre-clinical Research, and Chief Scientist at Novavax, on or about 12 January 2022 in the course of my work on the COVID-19 Vaccine Implementation Plan Team.

4. Novavax is available across the Department of Defense.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 5th day of August 2022.

MCCLENATHAN.BRUCE.M.1075595715 Digitally signed by MCCLENATHAN.BRUCE.M.1075595715 Date: 2022.08.05 14:47:19 -04'00'

BRUCE M. MCCLENATHAN
Regional Director
Immunization Healthcare Division

Exhibit A

novavax

Novavax COVID-19 Vaccine (NVX-CoV2373)-Information on Fetal Cell/Fetal Tissue

Novavax Medical Information is providing you this information in response to your request for medical information. You requested information regarding the use of fetal tissue or fetal cell lines in the development, confirmation, or production stages of the Novavax COVID-19 vaccine (NVX-CoV2373).

Novavax COVID-19 Vaccine Development

Novavax' NVX-CoV2373 vaccine is a recombinant protein vaccine, comprised of the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) spike glycoproteins and a saponin based Matrix-M adjuvant.[2] The Novavax NVX-CoV2373 is produced in insect cells, not mammalian cells.

A genetic sequence for the coronavirus spike protein is cloned into the baculovirus and then infects the Sf9 insect cells to produce the spike protein antigen that is subsequently purified by filtration and chromatography. The saponin based Matrix-M adjuvant is based on the Quillaja saponaria Molina bark together with cholesterol and phospholipids. The adjuvant is designed to increase the immune response to the rSARS-CoV-2 protein.[2]

Animal or fetal-derived cell lines/tissue are not used in the manufacturing, testing, or production of the Novavax COVID-19 vaccine (NVX-CoV2373) administered in the clinical trials.

In early development, pre-clinical evaluation was conducted to compare the structural integrity of the SARS-CoV-2 spike protein produced in the Sf9 insect cells versus the spike protein produced in the mammalian immortalized human embryonic kidney HEK 293F cells. The comparison determined the Sf9 cell technology produced spike proteins that were comparable in structural integrity as the spike proteins produced in the HEK 293F cell.[4] These pre-clinical experiments were conducted using purified SARS CoV-2 spike protein produced by a vendor separate from Novavax in a facility separate from where NVX-CoV2373 is manufactured and the assays did not employ fetal cells or tissues. Thus, no fetal cells or tissues are utilized at any time during the production or testing of NVX-CoV2373.

REFERENCE(S):

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2. Recombinant Nanoparticle Vaccine Technology. Novavax. https://www.novavax.com/our-unique-technology#recombinant-nanoparticle-vaccine-technology. Accessed December 18, 2020.
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4. Bangaru S, Ozorowski G, Turner HL, et al. Structural Analysis of Full-Length SARS-CoV-2 Spike Protein From an Advanced Vaccine Candidate. *Science*. 2020 Nov 27;370(6520):1089-1094. doi: 10.1126/science.abe1502. Epub 2020 Oct 20. PMID: 33082295.

Dr. Gale Smith, PhD
Senior Vice President
Discovery and Pre-clinical Research
Chief Scientist

novavax
Creating tomorrow's vaccines today.