No. 22-3497

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

BRIEF FOR APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

The government respectfully requests that the Court hear oral argument in this case because the government and the public have weighty interests at stake in this appeal and because the district court made a number of errors in issuing a preliminary injunction.

INTRODUCTION

Plaintiffs, eighteen active-duty and participating reservist members of the Air Force, challenge orders directing them to be vaccinated against COVID-19, alleging that those orders violate the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1, and the Free Exercise Clause. The district court preliminarily enjoined the Air Force from taking any disciplinary or separation measures against plaintiffs because of their refusal to be vaccinated.

The preliminary injunction should be vacated because plaintiffs satisfy none of the requirements for obtaining preliminary relief. To begin, plaintiffs' claims are nonjusticiable—they have not exhausted intramilitary remedies and adjudicating these claims would require second-guessing professional military judgments and impairing the military mission. *Harkness v. Secretary of the Navy*, 858 F.3d 437, 444-45 (6th Cir. 2017). Moreover, all plaintiffs except two (Dills and Schuldes) lack ripe claims because the Air Force has not taken actionable adverse action against them on account of their failure to comply with the vaccination requirement—either the Air Force has not rendered a final decision on their religious-exemption requests or decided whether to separate those plaintiffs from the Service. *Miles Christi Religious Order v. Township of Northville*, 629 F.3d 533, 537 (6th Cir. 2010). Those plaintiffs' exemption requests could still be granted, and they would face no consequences for being unvaccinated. Indeed, as of July 12, 2022, the Air Force had granted 135 religious-exemption requests, including 31 requests the Air Force Surgeon General granted after claims were initially denied.

Plaintiffs also are unlikely to succeed on the merits as a matter of substance. The Supreme Court has held that stemming the spread of COVID-19 is a compelling interest. That interest applies with particular force to each of these plaintiffs, who must be deployable at all times on short notice, and who could jeopardize the effectiveness of their units if they were to become infected with COVID-19 by being unavailable to perform their military duties. The district court discounted the impact plaintiffs' unvaccinated status could have on the military mission because the Air Force allows medical and administrative exemptions, but those other exemptions are temporary and promote the central purpose of the Air Force's COVID-19 vaccination requirement—ensuring a healthy and effective fighting force.

For similar reasons, the balance of equities strongly weighs against preliminary relief. Plaintiffs' alleged harms, which are all employment-related, are not irreparable, and the injunction's threat to military effectiveness outweighs any interim harms plaintiffs could conceivably identify. The preliminary injunction should be vacated.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331, among other statutes. *See* Compl., R. 1, PageID # 6. On March 24, 2022, the district court issued a preliminary injunction barring defendants from taking any disciplinary or separation measures against plaintiffs on the basis of their requests for religious exemptions from the Air Force's COVID-19 vaccination requirement. *See* Order, R. 47, PageID ## 3165, 3203-04. Defendants filed a notice of appeal on May 27, 2022. Notice

of Appeal, R. 62, PageID # 4362. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the preliminary injunction should be vacated because plaintiffs have failed to demonstrate a likelihood of success on the merits of their claims.

2. Whether the preliminary injunction should be vacated because plaintiffs have failed to show irreparable injury or that the balance of equities and the public interest favor preliminary relief.

STATEMENT OF THE CASE

A. The COVID-19 Pandemic

In July 2021, the United States began to experience "a rapid and alarming rise in … COVID-19 case[s] and hospitalization rates," driven by the Delta variant. *See* Ctrs. for Disease Control & Prevention (CDC), *Delta Variant: What We Know About the Science*, https://perma.cc/4RW6-7SGB, (updated Aug. 26, 2021). More recently, the highly transmissible Omicron variant caused a steep rise in cases and a surge in hospitalizations. *See* CDC, *Omicron Variant: What You Need to Know*, https://go.usa.gov/xSNTf (last updated Mar. 29, 2022). Community transmission rates remain high, and daily case rates recently and rapidly surpassed the previous peak. *See* CDC, *COVID Data Tracker*, https://go.usa.gov/xSNTH. More than 83 million Americans have been infected, and over one million have died, from COVID-19. *Id.*

In the Department of Defense (DoD), as of March 1, 2022, "there have been 387,621 cases" of COVID-19 in service members, "which have led to 94 deaths." Stanley Decl., R. 27-11, PageID # 1912. Of those 94 service members, all but five were unvaccinated, and of those five, three had received a single dose of a two-dose mRNA vaccine. *Id.* Moreover, many "otherwise healthy Service members have developed 'long-haul' COVID-19, potentially impacting their long-term ability to perform their missions." Rans Decl., R. 27-10, PageID # 1879.

B. DoD COVID-19 Vaccination Directives

The U.S. military instituted its first immunization program in 1777 when General Washington directed the inoculation of the Continental Army for smallpox. *Protecting Our Forces: Improving Vaccine Acquisition and Availability in the U.S. Military*, 11-12 (Stanley M. Lemon et al. eds., 2002), https://perma.cc/E545-TQ9G. Since that time, military-mandated vaccines have continued to play a key role in reducing infectious disease morbidity and mortality among military personnel. *See* Congressional Research Report, R. 27-4, PageID ## 1564-66.

DoD's current immunization program is governed by DoD Instruction 6205.02 (DoDI 6205.02). As of early 2021, nine vaccines, including the annual influenza vaccine, are required for all service members, and eight others are required when certain elevated risk factors are present, such as deployment to certain parts of the world. *See* Air Force Instruction 48-110_IP (AFI 48-110_IP), Table D-1, R. 27-6, PageID # 1624. DoD generally aligns its immunization requirements and eligibility determinations for service

members with recommendations from the CDC's Advisory Committee on Immunization Practices. DoDI 6205.02, R. 27-5, PageID # 1570. The Military Services have separately issued regulatory guidance for the administration of vaccines, including processes to seek medical and religious exemptions. *See* AFI 48-110_IP, R. 27-6, PageID # 1601.

On August 9, 2021, the Secretary of Defense, noting the impact COVID-19 has on military readiness, announced that he would add the COVID-19 vaccine to the list of vaccines required for all service members, by the earlier of mid-September or upon approval by the Food and Drug Administration (FDA). *See* Sec'y Def. Mem., R. 27-2, PageID # 1559. On August 24, 2021, just after FDA announced its approval of the Pfizer COVID-19 vaccine, *see* Marks Decl., R. 27-9, PageID ## 1665-67, the Secretary directed the Secretaries of the Military Departments to immediately vaccinate all members of the armed forces under DoD authority who were not already fully vaccinated. *See* Sec'y Def. Mem., R. 27-3, PageID # 1561.

C. The Air Force's Implementation of the COVID-19 Vaccination Directive

Shortly after the Secretary of Defense issued his vaccine directive, the Air Force issued implementing guidance. *See* Sec'y Air Force Mem., R. 27-7, PageID # 1632. The Secretary of the Air Force directed all active-duty service members to be fully vaccinated by November 2, 2021 and reservists to be fully vaccinated by December 2, 2021. *Id.*

1. Exemptions

As with other vaccine requirements, DoD and Air Force guidance establishes processes for seeking medical, administrative, and religious exemptions to the COVID-19 vaccine requirement. *See* Chapa Decl., R. 27-12, PageID ## 1921-25; Streett Decl., R. 27-13, PageID ## 1931-32; Little Decl., R. 27-16, PageID ## 1953-54.

Air Force members may seek a temporary medical exemption if, for example, they currently have COVID-19, are pregnant, or are allergic to an ingredient in the vaccine. Chapa Decl., R. 27-12, PageID ## 1922-23. The purpose of a medical exemption is to preserve a healthy, responsive force and medical readiness for duty. *See id.*, PageID # 1927. Accordingly, the decision whether to grant or deny any such request is made by a military medical provider. *See id.*, PageID # 1923. All medical exemptions to the COVID-19 vaccination requirement granted by the Air Force are temporary; the specific duration depends on the underlying reason for the medical exemption. *See id.* Moreover, a service member with a medical exemption is still subject to restrictions and limitations related to their unvaccinated status. *See id.*, PageID ## 1926-27.

Air Force members may seek an administrative exemption to the COVID-19 vaccination requirement if they are on terminal leave (*i.e.*, they are no longer coming into their workspace and are taking leave until the date they retire or separate from service), or if they are otherwise retiring or separating (that is, leaving military service) in the near future. *See* Little Decl., R. 27-16, PageID ## 1953-54. In those special

contexts, the Air Force has determined that vaccination is not necessary for military readiness and mission accomplishment. *See id.*, PageID # 1954.

Air Force members may also seek a religious exemption by submitting a written request. *See* Streett Decl., R. 27-13, PageID # 1932. The service member then consults with a chaplain, his commander, and a military medical provider, who "each provide written memoranda of their respective meetings to include in the request package." *Id.*, PageID ## 1934-35. The package is "then routed through each commander in the chain of command," each of whom provides an endorsement with a recommendation to approve or disapprove the request. *Id.*, PageID # 1936.

Each endorsement must address if there is a compelling government interest in vaccination; any effect an accommodation will have on readiness, unit cohesion, good order and discipline, health, safety, or the member's duties; and whether "less restrictive means can be used to meet the government's compelling government interest." Streett Decl., R. 27-13, PageID # 1936 (quoting Department of Air Force Instruction 52-201 (DAFI 52-201) ¶ 6.6.1.5). A multidisciplinary Religious Resolution Team at the approval authority level then reviews the package and provides a written recommendation to advise the approval authority regarding resolution of religious liberty matters. *Id.*, PageID ## 1933-36. A separate legal review of the package is also conducted. *Id.*, PageID # 1936.

The approval authority indicated in DAFI 52-201 is the Major Command (MAJCOM), Field Command (FIELDCOM), Direct Reporting Unit (DRU), or Field

Operating Agency (FOA) commander over the service member. Streett Decl., R. 27-13, PageID # 1932. The approval authority assesses each request individually to determine "(1) if there is a sincerely held religious … belief, (2) if the vaccination requirement substantially burdens the applicant's religious exercise based upon a sincerely held religious belief, and if so, (3) whether there is a compelling government interest in requiring that specific requestor to be vaccinated, and (4) whether there are less restrictive means in furthering that compelling government interest." *Id.*, PageID ## 1933, 1936-37.

If the approval authority denies the request, the service member may appeal to the Air Force Surgeon General, who reviews each package individually, is advised by another Religious Resolution Team, and renders a final decision on the request, taking into account the same criteria. *See* Streett Decl., R. 27-13, PageID ## 1932-33, 1937-38. A service member is temporarily exempted from the relevant immunization requirement while their religious-accommodation request is pending, including during any appeal from the denial of that request. *See id.*, PageID ## 1937-38. As of July 12, 2022, the Air Force had approved 135 religious-exemption requests to the COVID-19 vaccination requirement, including approving 31 exemptions on appeal that were initially denied. *See* Air Force, *DAF COVID-19 Statistics – July 12, 2022* (July 12, 2022), https://go.usa.gov/xSXwJ.

2. Refusal to Vaccinate

If an exemption request is denied and the service member refuses to take the COVID-19 vaccine, commanders may take a variety of administrative and disciplinary actions. *See* Hernandez Decl., R. 27-14, PageID ## 1941-45. To ensure consistency and uniformity in disposition, a high-ranking official must review the case before any administrative or disciplinary action may be taken based on a COVID-19 vaccine refusal. *See id.*, PageID # 1941. Absent an exemption, active-duty service members who refuse to comply with the COVID-19 vaccination requirement may be subject to administrative discharge proceedings. *See* Hernandez Decl., R. 27-14, PageID # 1943. The processes differ slightly between enlisted and officer members, but the service characterizations and bases for discharge are generally the same. *See id.*

The process begins when the service member's immediate commander notifies the service member of a recommendation for an administrative discharge. *See* Hernandez Decl., R. 27-14, PageID # 1943. The service member may then respond, with the support of free defense counsel provided to service members, before the discharge recommendation goes to the separation authority. *See id.* Depending on the characterization of the separation and the service member's time in service or rank, the decision may move to a higher level and the service member may be entitled to a formal administrative hearing. *See id.*

For members of the Air Force Reserve, discipline for refusing to comply with the COVID-19 vaccination requirement without an exemption may include various

administrative actions, which are "non-punitive tools[] intended to improve, correct, and instruct service members who violate established Department of Air Force standards." Hernandez Decl., R. 27-14, PageID # 1941. If a Letter of Reprimand (or similarly, a Letter of Counseling or Admonishment) is issued, the service member may consult with a free defense counsel, provide a response, and provide other relevant information to the issuing authority. *See id.*, PageID # 1942. If the issuing authority decides to uphold the Letter of Reprimand, the service member may appeal to the issuing authority or superior authority for removal of the reprimand from the personnel record. *See id.*

Air Force Reserve members who refuse to vaccinate without an exemption also may be placed in a "no pay/no points status and involuntarily reassigned to the Individual Ready Reserve" (IRR). Watson Decl., R. 27-15, PageID # 1950; *see also* Sec'y Air Force Mem., R. 27-8, PageID # 1659. Reassigning a member to the IRR is not a discharge or separation. Rather, it places the member in a "resource pool of reservists" who are unable to meet readiness standards or need to manage other commitments in their personal lives. *See* Heyen Decl., R. 27-18, PageID ## 1978-80. The service member remains a member of the Air Force, but is not drilling with his unit, earning pay as a reservist, or getting credit toward retirement. *See id.*; Watson Decl., R. 27-15, PageID # 1950. A member reassigned to the IRR also loses his eligibility for health insurance at a reduced rate. *See* Heyen Decl., R. 27-18, PageID # 1979.

The Air Force has discretion to administratively discharge or court martial any service member who refuses to comply with that requirement absent an exemption. *See* Hernandez Decl., R. 27-14, PageID # 1941. The Air Force has not, however, initiated court martial against any service member because that service member has refused to comply with the vaccination requirement, nor has the Air Force imprisoned any service member on that basis. And service members who have been discharged or reassigned to the Individual Ready Reserve for refusing to adhere to the vaccination requirement may appeal that discharge characterization to the Air Force Discharge Review Board, as well as the Air Force Board for Correction of Military Records. *See id.*, PageID # 1945. The Air Force Board for Correction of Military Records is a statutory board of civilians, which has authority to correct a service member's military record, and its decisions are binding on the Air Force and all other government agencies. *See id.*, PageID # 1946.

D. Procedural History

On February 16, 2022, plaintiffs, eighteen active-duty and active-reservist members of the Air Force, filed their purported class-action complaint. *See* Compl., R. 1, PageID # 1. Plaintiffs sued various military officials in their official capacities, *see id.*, PageID # 6, asserting that the Air Force's failure to grant their requests for religious exemptions from its COVID-19 vaccination requirement violates RFRA and the Free Exercise Clause, *see id.*, PageID ## 17-18. At the time plaintiffs brought suit, only 10 had received initial decisions on their exemption requests, and the Air Force Surgeon

General had denied only six of those requests on appeal; the Air Force had not initiated discharge against any plaintiffs, and had only initiated reassignment of plaintiffs Dills and Schuldes to the Individual Ready Reserve with no final decision or action. *See* Order, R. 47, PageID ## 3172-73.[1]

Shortly thereafter, plaintiffs moved for a temporary restraining order or a preliminary injunction granting their religious-accommodation requests and enjoining defendants from taking punitive action against them. *See* Mot., R. 13, PageID # 578; *see also* Emergency Mot. for Temporary Restraining Order as to Pl. Hunter Doster, R. 19, PageID # 940. Plaintiffs later narrowed their requested relief to a "prohibition against disciplinary or separation measures to these [p]laintiffs under RFRA," Pls.' Resp., R. 44, PageID # 3062, in light of *Austin v. U.S. Navy SEALs 1-26*, 142 S. Ct. 1301 (2022). In that case, the Supreme Court partially stayed another district court's preliminary injunction in a military vaccination case to the extent that injunction "precludes the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions." *Id.* at 1301.

The district court granted plaintiffs' motion, preliminarily enjoining the Air Force from "taking any disciplinary or separation measures against the [named] [p]laintiffs … for their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs." Order, R. 47, PageID # 3203. The court limited that relief to the named

[1] Plaintiff Dills opted not to appeal his assignment to the Individual Ready Reserve, *see* Add'l Materials, R. 42-2, PageID # 2819; Tr., R. 48, PageID # 3276.

plaintiffs here, and did not enjoin the Air Force's "ability to make operational decisions, including deployability decisions." *Id.*, PageID # 3201.

The court first held that plaintiffs' claims are ripe because "potential" dispositions for an unexempted refusal to vaccinate can include, *e.g.*, administrative discharges and court-martials, *see* Order, R. 47, PageID # 3180, and because the three plaintiffs who testified at the preliminary injunction hearing all claimed they were being threatened with imprisonment, *see id.* Regarding justiciability, the court also concluded that exhaustion of administrative remedies would be "futile," *id.*, PageID # 3182; and that there were no concerns counseling against adjudicating plaintiffs' claims, *id.*, PageID ## 3183-85.

The court next held that plaintiffs are likely to succeed on their RFRA and Free Exercise Clause claims because the Air Force grants "numerous medical and administrative exemptions," Order, R. 47, PageID # 3190, 3192-93, and failed to "identif[y] any specific harm resulting from [p]laintiffs' unvaccinated status at any time during the pandemic or since the mandate has been in place," *id.*, PageID # 3191; *see also id.*, PageID ## 3194-97. The court reasoned that "over 2,500 exempt Airmen are carrying out their respective duties unvaccinated," *id.*, PageID # 3191; that plaintiffs successfully performed their duties during the pandemic, *see id.*; and that the Air Force did not require vaccinations until 18 months after the pandemic began, *id.*, PageID # 3192.

Regarding the balance of equities, the court held that the vaccination requirement causes plaintiffs irreparable harm by imposing substantial pressure on them to abandon their religious objections to vaccination. *See* Order, R. 47, PageID ## 3197-98. Conversely, the court concluded that while there is a "strong public interest in national defense, including military readiness," plaintiffs' "'religious-based refusal to take a COVID-19 vaccine simply isn't going to halt a nearly fully vaccinated Air Force's mission to provide a ready national defense.'" *Id.*, PageID # 3199 (quoting *Air Force Officer v. Austin*, No. 5:22-cv-9, 2022 WL 468799, at *12 (M.D. Ga. Feb. 15, 2022)).

On July 14, 2022, the district court also certified a mandatory class action under Rule 23(b)(1)(A) and 23(b)(2). The court defined the class as:

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

Order, R. 72, PageID ## 4466-67. In the same order, the court issued a temporary restraining order prohibiting defendants from enforcing the vaccine mandate against any class member through 14 days from the date of that order, and directed defendants to file a supplemental brief explaining why the court should not grant a class-wide preliminary injunction. *Id.*, PageID # 4469; *see also* Defendants' Supp. Br. Opposing

Class Certification, R. 73, PageID ## 4470-85. On July 14, the district court also denied the Air Force's motion to dismiss the complaint for lack of jurisdiction, *see* Order, R. 71, PageID ## 4437-47.

SUMMARY OF ARGUMENT

The district court abused its discretion in granting the preliminary injunction because plaintiffs cannot satisfy any of the conditions for obtaining preliminary relief. To begin, plaintiffs' claims are nonjusticiable because they have failed to exhaust their intramilitary remedies. Either plaintiffs have not received a final decision on their requested religious exemption, or the Air Force has not made any decision whether to separate them from the Service. *Harkness v. Secretary of the Navy*, 858 F.3d 437, 443-45 (6th Cir. 2017). Plaintiffs' claims are also nonjusticiable because they will not be injured if the Court withholds review; and adjudicating their claims involves significant military expertise and discretion, as well as significant interference with military functions. *Id.* Moreover, all but two of the plaintiffs (Dills and Schuldes) lack ripe claims because the Air Force has not initiated separation proceedings against those plaintiffs; and, in many cases, has not yet made a final determination on those plaintiffs' religious-exemption requests. Indeed, the Air Force has granted numerous other such requests (135 as of July 12, 2022, including 31 appeals of initial denials). Under similar circumstances, this Court has held religious-liberty claims not ripe for review. *See Miles Christi Religious Order v. Township of Northville*, 629 F.3d 533, 537 (6th Cir. 2010).

Plaintiffs' RFRA and Free Exercise Clause claims are also substantively flawed: requiring them to be vaccinated against COVID-19 is the least restrictive means to further the Air Force's compelling interest in fielding an effective fighting force. As members of the Air Force, plaintiffs must be worldwide deployable at all times and on a few days' notice. A member's illness due to COVID-19 could substantially increase the risk of mission failure, and the record amply shows that no alternative furthers the military's compelling interests in readiness and ensuring the health and safety of all service members as well as vaccination. The district court discounted this evidence because the Air Force allows medical and administrative exemptions, but those exemptions (unlike plaintiffs' requested religious exemptions) are only temporary and serve the same purpose as the vaccination requirement—to allow the Air Force to maintain a deployable fighting force that is effective and fit for duty. And at the very least, the record more than sufficiently supports the judgment of military professionals on these core, fact-based military judgments.

The balance of equities also weighs heavily against preliminary relief. The district court correctly noted that any employment-related privileges or benefits plaintiffs may lose absent preliminary relief are not irreparable. Plaintiffs' asserted religious-liberty harms also do not tip the scale in favor of preliminary relief; plaintiffs' RFRA and Free Exercise Clause claims are weak, and outweighed in any measure by the Air Force's compelling interest in national defense.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Plaintiffs must "*by a clear showing*" establish that (1) they have a substantial likelihood of success on the merits; (2) they will suffer irreparable harm without an injunction; (3) the balance of equities tips in their favor; and (4) preliminary relief serves the public interest. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quotations omitted); *Thompson v. DeWine*, 976 F.3d 610, 615 (6th Cir. 2020). This Court reviews the first factor de novo, and the district court's balancing of all the factors for abuse of discretion. *See Speech First, Inc. v. Schlissel*, 939 F.3d 756, 763 (6th Cir. 2019).

ARGUMENT

I. Plaintiffs Failed to Demonstrate a Likelihood of Success on the Merits.

A. Plaintiffs' Claims Are Neither Justiciable Nor Ripe.

As a threshold matter, plaintiffs' claims are unlikely to succeed on the merits because their claims are nonjusticiable and unripe. Plaintiffs have not exhausted their intramilitary remedies, and this Court has plainly held that such unexhausted claims are nonjusticiable in civilian courts. In addition, the Air Force has initiated action only against two plaintiffs (Dill and Schuldes) to reassign them to the Individual Ready Reserve following the Air Force Surgeon General's denial of their requested

exemption; all others have either not received a final decision on their requests or the Air Force has taken no final action against them. Those claims are accordingly unripe.

1. Plaintiffs' Claims Are Not Justiciable.

This Court has explained that claims challenging military personnel decisions are generally not justiciable, noting courts' "lack of expertise" in military personnel matters, "deference to the unique role of the military in our constitutional structure," and the "practical difficulties that would arise if every military duty assignment was open to judicial review." *Harkness v. Secretary of the Navy*, 858 F.3d 437, 443 (6th Cir. 2017) (collecting authorities). The Court has accordingly adopted the exhaustion test the Fifth Circuit announced in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), to analyze the justiciability of service members' claims regarding duty assignments. Under that test, a military personnel decision is not justiciable in civilian courts unless two threshold requirements are satisfied: (1) the plaintiff alleges that the military has violated the constitution, applicable statutes, or its own regulations, and (2) the plaintiff has "exhaust[ed] available intraservice [remedies]." 858 F.3d at 444 (quoting *Mindes*, 453 F.2d at 201). And after satisfying those threshold requirements, the Court weighs four factors to determine if a plaintiff's claim is justiciable: "the nature and strength of the plaintiff's challenge; the potential injury to the plaintiff of withholding review; the

degree of anticipated interference with the military function; and the extent to which military expertise or discretion is involved." *Id.*[2]

Plaintiffs' claims are nonjusticiable because they failed to exhaust their intramilitary remedies and thus do not satisfy the threshold ground this Court recognized in *Harkness*. Plaintiffs' claims are additionally nonjusticiable under *Harkness* because their claims are relatively weak; they will not be injured if the Court withholds review; and adjudicating these claims involves significant military expertise and discretion, as well as significant interference with military functions.

a. No plaintiff has exhausted intramilitary remedies; and no plaintiff has received a decision from the Air Force Discharge Review Board or the Air Force Board for Correction of Military Records that would be subject to this Court's review. "The purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence, to make a factual record, to apply its expertise and to correct its own errors so as to moot judicial controversies." *Detroit Newspaper*

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[2] In *Harkness*, this Court left open the question "whether the *Mindes* framework should apply to non-constitutional claims." 858 F.3d at 444 & n.2; *but see id.* at 444 (recognizing that "other circuits have adopted [the *Mindes*] test for determining the justiciability of claims involving internal military decisions" (first citing *Williams v. Wilson*, 762 F.2d 357, 359-60 (4th Cir. 1985); and then citing *Schlanger v. United States*, 586 F.2d 667, 671 (9th Cir. 1978)). Given the constitutional foundation for plaintiffs' RFRA claims, this framework should apply equally here. But regardless of the rule the Court adopts, it should recognize that civilian courts should not prematurely review claims involving military duty assignments and personnel matters. *See, e.g.*, *Speigner v. Alexander*, 248 F.3d 1292, 1295 n.5, 1297 (11th Cir. 2001) (declining to apply *Mindes* but holding that "discrete [military] personnel decisions" are unreviewable).

Agency v. NLRB, 286 F.3d 391, 396-97 (6th Cir. 2002) (citing *Parisi v. Davidson*, 405 U.S. 34, 37 (1972)). The exhaustion doctrine applies with special force in the military context, where "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs" because "Article II of the Constitution" makes "the President of the United States, not any federal judge, … the Commander in Chief of the Armed Forces." *Austin v. U.S. Navy SEALs 1-26*, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J., concurring) (quotations omitted); *see also Heidman v. United States*, 414 F. Supp. 47, 48 (N.D. Ohio 1976) (similar, "given the judiciary's lack of expertise in areas of military judgment and its long-standing policy of non-intervention in internal military affairs" (citing *Schlesinger v. Councilman*, 420 U.S. 738 (1975))); *accord Harkness*, 858 F.3d at 443.

The Air Force's denial of a service member's religious exemption request—on its own—does not injure that service member, nor impose a substantial burden on the member's religious beliefs. The *consequences* a service member may face for failing comply with the military's vaccination requirement following that denial, however, may give rise to a substantial burden—but those consequences, if any (*e.g.*, separation from the Air Force, demotion of rank), are far from certain and for which administrative remedies must be exhausted (*e.g.*, petitioning the Air Force Discharge Review Board).

Here, no active duty plaintiffs have satisfied this Court's threshold exhaustion requirement because the Air Force has not initiated separation proceedings against any of them. Were the Air Force to do so in the future, plaintiffs would be entitled to

respond, and to challenge any adverse action. *See supra* pp. 9-11. And none of the reservist plaintiffs have petitioned for review from the Air Force Board for Correction of Military Records; those who have been assigned to the Individual Ready Reserve have not been discharged (nor are they being processed for separation). *See* Heyen Decl., R. 27-18, PageID ## 1979-80; Rigsbee Decl., R. 51-2, PageID ## 3400-01.

The district court concluded that exhaustion would be futile here because, as of the date of the court's ruling, the Air Force had granted 21 of the 4,403 religious-exemption requests it had received, and granted only two appeals. *See* Order, R. 47, PageID # 3182. A process cannot be futile, however, where it has resulted in the *granting* of multiple requests. And, as noted, since the time of the district court's order, the Air Force has granted more than triple the number of religious-exemption requests (including several on appeal of initial denials). *See supra* p. 8; Air Force, *DAF COVID-19 Statistics – July 12, 2022*, https://go.usa.gov/xSXwJ; *see also Hodges v. Callaway*, 499 F.2d 417, 422 & n.13 (5th Cir. 1974) (holding that a plaintiff was required to exhaust intramilitary remedies even though "the odds against [the plaintiff] receiving all the relief he desires from the administrative review are unquestionably very heavy").

The military "should be given the opportunity to fully evaluate its position and, within those parameters, review the decision" of an administrative board before a civilian court adjudicates the claim; if the military rejects the plaintiff's position, a civilian court will "at least have a definitive interpretation of the regulation and an explication of the relevant facts from the highest administrative body in the [military's]

own appellate system." *Von Hoffburg v. Alexander*, 615 F.2d 633, 639 (5th Cir. 1980). *See also Schlesinger*, 420 U.S. at 758; *Watson v. Arkansas Nat'l Guard*, 886 F.2d 1004, 1010 (8th Cir. 1989).

The district court also erred in relying on Fifth Circuit motions panel's decision in *U.S. Navy SEALs 1-26 v. Biden*, 27 F.4th 336 (5th Cir. 2022) (per curiam), for the proposition that exhaustion of remedies in the Air Force's administrative process should be excused. That case involved the Navy's process for responding to religious-exemption requests, which had not resulted in any granted requests at the time the district court issued its preliminary injunction. *See id.* at 339. Moreover, even under those facts, the Fifth Circuit had no basis for questioning the bona fides of the Navy's program or other administrative remedies. *Cf. Latif v. Obama*, 677 F.3d 1175, 1178 (D.C. Cir. 2011) ("[C]ourts presume [military officials] have properly discharged their official duties."). That case is still being fully briefed and remains pending. *See U.S. Navy SEALs 1-26 v. Austin*, Nos. 22-10077, 22-10534 (5th Cir.).

b. Exhaustion aside, plaintiffs' claims are additionally nonjusticiable because the four factors adopted in *Harkness* weigh against judicial review here: plaintiffs' RFRA and Free Exercise Clause claims are weak on the merits; plaintiffs face no appreciable hardship if preliminary relief is denied; and the preliminary injunction wrongly requires the Air Force to retain service members who could severely impair the functioning of their units. *See* 858 F.3d at 444-445. The district court reached the wrong conclusion by inappropriately second-guessing the judgments of senior military officials.

The district court's conclusions that plaintiffs' claims are strong and that the "potential injury" plaintiffs may suffer without preliminary relief favor judicial review, Order, R. 47, PageID # 3183, are contradicted by the record. *See infra* pp. 30-45. And plaintiffs will suffer no hardship absent preliminary relief, *see infra* pp. 48-50.

The court's assertion that its preliminary injunction imposes only "minimal" harm on the military mission because 96.4% of the Air Force is fully vaccinated and the Air Force has granted a number of medical and administrative exemptions, Order, R. 47, PageID # 3183, is equally flawed. *See infra* pp. 50-51. The court also opined that "to argue an impediment to military functioning while at the same time threatening disciplinary action to the unvaccinated defies logic and common sense," Order, R. 47, PageID # 3184, but that statement does not withstand scrutiny. If the Air Force ever initiates separation proceedings against any of these plaintiffs, it will be because they have refused to follow a lawful order to ensure they are medically fit and ready for duty. That kind of action plainly facilitates military functioning—plaintiffs' units cannot effectively deploy while those units include unvaccinated service members.

Finally, the court's off-hand dismissal of any "serious concern" about its ability to decide the case without disregarding the "superior knowledge and experience" of military professionals, Order, R. 47, PageID # 3184, is completely misplaced. The preliminary injunction turns on factual issues (including the extent to which plaintiffs would impair the effectiveness of their units if they were to become infected with COVID-19) that directly implicate military expertise, not on any purely legal issues.

Moreover, plaintiffs' claims ultimately involve their duty assignments and their abilities to deploy—decisions that this Court has recognized "lie at the heart of military expertise and discretion," *Harkness*, 858 F.3d at 444-45, and this Court has warned against "intruding upon that sphere of military decision-making," *id.* at 445 (quoting *Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986)).

2. All Plaintiffs' Claims Except Two Are Not Ripe.

Nearly all plaintiffs' claims are not ripe. The ripeness doctrine bars issuing judicial relief before a decision "has been formalized and its effects felt in a concrete way by the challenging parties." *Barber v. Charter Township of Springfield*, 31 F.4th 382, 388 (6th Cir. 2022) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1977)). Many plaintiffs have not even received an initial decision on their religious exemption requests, and only two plaintiffs (Dills and Schuldes) have suffered any actionable adverse employment action due to their refusal to be vaccinated against COVID-19.

This Court and the Supreme Court have made clear that a dispute is constitutionally unripe if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *OverDrive Inc. v. Open E-Book Forum*, 986 F.3d 954, 958 (6th Cir. 2021) (quoting *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (per curiam)). Ripeness is "related" to standing, as both share "a foundation in Article III's case-and-controversy requirement." *Miller v. City of Wickliffe*, 852 F.3d 497, 503 (6th Cir. 2017). The Article III case-or-controversy inquiry is "especially rigorous" when a claim implicates review of actions taken by the political branches of

government. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408-09 (2013) (quotations omitted).

Prudential ripeness, which overlaps with the doctrine's constitutional form, requires examining both"(1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings." *Berry v. Schmitt*, 688 F.3d 290, 298 (6th Cir. 2012) (quotations omitted); *see also Kiser v. Reitz*, 765 F.3d 601, 607 (6th Cir. 2014) (noting that a court may declare a matter unripe for review based on constitutional or prudential grounds).

a. All plaintiffs' claims (save two, Dills and Schuldes) are neither constitutionally nor prudentially ripe because the Air Force Surgeon General has not yet rendered a final decision on their religious-exemption requests and the Air Force has taken no actionable adverse action against them.[3]

When the district court issued its preliminary injunction, four plaintiffs' religious-exemption requests had been denied (McCormick, Reineke, Stapanon, and Pottinger),

[3] Dills and Schuldes are reservists whose religious-exemption requests were denied and who have been notified that the Air Force plans to reassign them to the Individual Ready Reserve (IRR). *See* Rigsbee Decl., R. 51-2, PageID ## 3400-01; *see generally* Heyen Decl., R. 27-18, PageID ## 1978-80 (describing IRR status). Those plaintiffs will likely never face a separation board. *See* Heyen Decl., R. 27-18, PageID ## 1979-80 (transfer to the IRR is not a separation or a discharge, and barring misconduct, individuals assigned to the IRR are honorably discharged once they complete their military service obligation).

with appeals pending before the Air Force Surgeon General. *See* Order, R. 47, PageID ## 3172-73. Four other plaintiffs (Doster, Clement, Theirault, and Mosher) had their religious-exemption requests and appeals denied, but the Air Force had not decided whether those plaintiffs should be separated from the Service. *See id.*, PageID # 3173. Other plaintiffs had not yet received even an initial ruling on their religious-exemptions requests. *See* Compl., R. 1, PageID # 3171-74.

Significantly, the Air Force has not initiated separation proceedings against any of the plaintiffs—at the time of the district court's preliminary injunction order or since. *See* Bannister Decl., R. 51-1, PageID ## 3396-97 (updating status of plaintiffs' religious-exemption requests as of April 25, 2022). Once an Air Force service member receives a notice of separation, the service member is entitled to free defense services and to respond before the discharge recommendation goes to the separation authority for decision. *See* Hernandez Decl., R. 27-14, PageID # 1943. And the Air Force has granted a significant number of religious-exemption requests, including on appeals of initial denials. *See supra* p. 8.

Accordingly, all three of the factors that guide the ripeness inquiry support concluding that those plaintiffs' claims are not ripe. As in *Miles Christi Religious Order v. Township of Northville*, 629 F.3d 533, 538-39 (6th Cir. 2010), the fact that the relevant agency "has [not] reached a final decision regarding the application of the regulations" shows that this case involves neither a "concrete factual context" nor "a dispute that is likely to come to pass." *Id.* at 537-38 (quotations omitted). Other courts have similarly

held that service members' challenges to military COVID-19 vaccination requirements are unripe. *See Roberts v. Roth*, No. 21-cv-1797, 2022 WL 834148, at *2–3 (D.D.C. Mar. 21, 2022) (service member's RFRA challenge not ripe because the "'Air Force ha[d] not yet made a final determination on [the plaintiff's] discharge'"); *Vance v. Wormuth*, No. 3:21-cv-730, 2022 WL 1094665, at *7 (W.D. Ky. Apr. 12, 2022) (similar because "[n]o separation proceedings have been implemented").

The absence of a final decision by the Air Force regarding those plaintiffs' religious-exemption requests—or a decision on separation—also means their claims do not present a "concrete factual context" to fairly adjudicate the merits of those claims. *Miles Christi*, 629 F.3d at 539 (quotations omitted). Again, as in *Miles Christi*, the record "shed[s] [no] light on the material question of what government officials would do in the future" in making a final decision on those plaintiffs' religious-exemption requests or possible separation. *Id.* Indeed, the record here contains declarations from Air Force officials for *only* the five plaintiffs who had received a final decision from the Air Force Surgeon General at the time the Air Force filed its opposition to plaintiffs' motion for a preliminary injunction. *See* Heaslip Decl., R. 27-19, PageID ## 1985-87; Wren Decl., R. 27-20, PageID ## 1995-97; Harmer Decl., R. 27-21, PageID ## 2004-05; Reese Decl., R. 27-22, PageID ## 2014-15; Pulire Decl., R. 27-23, PageID # 2022. But the Air Force's reasons for denying a plaintiff's requested exemption to the vaccination requirement bear directly on that plaintiff's RFRA claim, articulating the military's compelling interest in vaccinating that particular plaintiff, and explaining why no

alternative to vaccination would be equally effective, *see infra* pp. 31-44. Moreover, a final decision from the Air Force would clarify the facts regarding plaintiffs' claims and narrow the grounds of dispute between the parties. *See Miles Christi*, 629 F.3d at 538; *see also Vance*, 2022 WL 1094665 at *7 (holding that the necessity to develop a factual record for why the Air Force denied an exemption "weighs against a finding of ripeness").

Finally, plaintiffs will experience no hardship pending the Air Force's final resolution of their religious-exemption requests. Plaintiffs are not required to be vaccinated while their exemption requests are pending, *see supra* pp. 6-8, and if the Air Force grants their requests, they would face no consequences for being unvaccinated. *See* Motion, R. 51, PageID # 3375 (citing DAFI 52-201 ¶ 2.12). Plaintiffs thus face no "imminent threat of prosecution," *Berry*, 688 F.3d at 298, that might counsel in favor of adjudicating their otherwise unripe claims.

Moreover, two plaintiffs (Ramspberger and McCormick) recently decided to receive two doses of the COVID-19 vaccine Covaxin, bringing them in full compliance with the Air Force's vaccination requirement and only underscoring why plaintiffs' claims are not ripe. *See* Salvatore Decl., R. 65-1, PageID ## 4396-98; Second Ramspberger Decl., R. 66-1, PageID ## 4402-05. Those plaintiffs' claims are now plainly moot because they face no threat of disciplinary action, much less any imminent threat.

b. The district court concluded that plaintiffs would likely experience harm absent preliminary relief because potential dispositions for violating any military

order—including the Air Force's COVID-19 vaccination requirement—include administrative demotions, administrative discharges, and courts-martial, and because several plaintiffs testified that they were purportedly "threatened with imprisonment for refusing the vaccine without an exemption." Order, R. 47, PageID # 3180. The record does not support that conclusion, and the district court failed to explain any such "substantial likelihood" of an adverse action.

The Air Force has not initiated a court martial against any service member based on a refusal to comply with the vaccination requirement, nor has the Air Force "imprisoned" any service member on that basis. *See* Hernandez Decl., R. 27-14, PageID # 1941 (emphasizing that "[g]enerally, more minor misconduct should be addressed at the lowest possible level" of possible disciplinary action). Speculation and conjecture do not show a substantial likelihood of adverse action. *See Miles Christi*, 629 F.3d at 539; *see also Trump v. New York*, 141 S. Ct. at 535.

The record also affords no support for the district court's conclusion that three plaintiffs were threatened with imprisonment for refusing vaccination without an exemption. *See* Order, R. 47, PageID # 3180. While plaintiff Stapanon testified that his commander told him an unexcused refusal to become vaccinated could lead to an involuntary separation without benefits, Tr., R. 45, PageID # 3094, Stapanon said nothing about any threat of imprisonment, and the Air Force has not even yet issued Stapanon a notice of separation. *See supra* pp. 11-12, 27. Plaintiff Doster testified that he received an order to vaccinate that included notice that a refusal could result in

administrative or punitive action, *see* Tr., R. 48, PageID # 3228, but as discussed, the order's inclusion of that boilerplate language does not mean Doster is likely to face a court-martial—much less imprisonment—resulting from his refusal to become vaccinated. *See supra* p. 11. And plaintiff Dills testified that he believes he could face a court-martial for refusing to become vaccinated because his commanders told him the Air Force is not taking the vaccination requirement lightly, *see* Tr., R. 48, PageID # 3271. That testimony is even farther removed from the "threat[] [of] imprisonment" the district court identified. Accordingly, the district court significantly overstated the hardship plaintiffs might face if preliminary relief were denied, by describing that supposed harm as including "severe punitive action," "including prison." Order, R. 47, PageID # 3180; *cf. Schlesinger*, 420 U.S. at 758 (federal courts must refrain from interfering with military courts-martial).

B. Plaintiffs Also Failed to Demonstrate a Likelihood of Success on the Merits of their Claims.

1. Plaintiffs' RFRA Claims Lack Merit.

RFRA provides that the federal government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b). Plaintiffs failed to show a likelihood of success on the merits of their RFRA claims because vaccination of each of these service members is the least-

restrictive means to further the military's compelling interest in mitigating the effect of COVID-19 on its missions, units, and personnel.

a. The COVID-19 Vaccination Requirement Furthers the Air Force's Compelling Interest in Military Readiness.

"Stemming the spread of COVID-19 is unquestionably a compelling interest." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020); *see also Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (noting the "compelling interest in preventing the spread of a novel, highly contagious, sometimes fatal virus"). That interest is, if anything, even more compelling in the military context. The government's interest in "maximum efficiency" of military operations is paramount. *United States v. O'Brien*, 391 U.S. 367, 381 (1968). "Few interests can be more compelling than a nation's need to ensure its own security." *Wayte v. United States*, 470 U.S. 598, 611 (1985).

Vaccination against COVID-19 serves the military's compelling interest in the health of its troops. *See Navy SEAL 1 v. Austin*, No. 22-CV-688, 2022 WL 1294486, at *9 (D.D.C. Apr. 29, 2022); *see also Austin v. U.S. Navy SEALs 1-26*, 142 S. Ct. 1301, 1302 2022) (Kavanaugh, J., concurring) (RFRA does not require "ordering unvaccinated personnel into an environment in which they endanger their lives, the lives of others and compromise accomplishment of essential missions." (quotations omitted)); *id.* at 1305 (Alito, J., dissenting) (acknowledging the military's compelling interest in "minimizing any serious health risk to [military] personnel" and in preventing COVID–19 from "impairing its ability to carry out its vital responsibilities"); *Creaghan v. Austin*,

No. 22-CV-981, 2022 WL 1500544, at *9 (D.D.C. May 12, 2022) ("[T]here can be no greater military interest than in keeping each servicemember fit and healthy enough to accomplish their duties.").

The Supreme Court has repeatedly emphasized that "when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); *see also Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (noting that the judiciary should be "scrupulous not to interfere with legitimate [military] matters"); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (the "complex[,] subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments"); *U.S. Navy SEALs 1-26*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring).

Congress expressly recognized and reaffirmed these long-standing principles of military deference when it enacted RFRA. *See* S. Rep. No. 103-111, at 12 (1993) ("The courts have always recognized the compelling nature of the military's interest in [good order, discipline, and security] in the regulations of our armed services[] … [and] have always extended to military authorities significant deference in effectuating these interests. The committee intends and expects that such deference will continue under this bill."); H.R. Rep. No. 103-88, at 8 (1993) (similar); *see also Cutter v. Wilkinson*, 544 U.S. 709, 723, 725 n.13 (2005) (recognizing the importance of deferring to certain

officials' "expertise" in adjudicating religious-liberty claims). These principles apply with equal or greater force to the military's determinations regarding vaccinations, which "require a higher degree of deference because they 'improve the readiness of the force'" and because "the military relies on complex scientific data to promulgate immunization and medical requirements." *Navy SEAL 1*, 2022 WL 1294486, at *8.

i. After consulting with "medical experts and military leadership," Sec'y Def. Mem., R. 27-3, PageID # 1561, the Secretary of Defense "determined that mandatory vaccination against [COVID-19] is necessary to protect the Force and defend the American people," *id.* (noting that "[t]o defend this Nation, we need a healthy and ready force"). Likewise, in implementing the Secretary's COVID-19 vaccination requirement, the Secretary of the Air Force concluded that vaccination against COVID-19 is an "essential military readiness requirement … to ensure we maintain a healthy force that is mission ready." Sec'y Air Force Mem., R. 27-8, PageID # 1656.

The Air Force has a compelling interest in ensuring that each of the plaintiffs here are vaccinated against COVID-19. Each of the plaintiffs must be "worldwide deployable at all times," on "a few days' notice." Heaslip Decl., R. 27-19, PageID # 1987. And Air Force service members must "stay deployment-ready in the event that not only they get individually tasked with a deployment, but also in the event the entire [unit] gets activated due to current world events." *Id.* A member's illness or an outbreak in a deployed environment "create an unacceptable risk to personnel and substantially increase the risk of mission failure." Pulire Decl., R. 27-23, PageID # 2023. Because

deployments are "by design, minimally manned," "[i]f one service member were to get sick, contract long-COVID, get hospitalized, or die, that section may only have one extra person performing similar duties, leaving little redundancy and backup to support the mission." *Id.*, PageID # 2024.

Moreover, some of our partner nations have vaccine requirements for entry that would preclude an unvaccinated individual from participating in military-to-military engagement with those nations. *See* Stanley Decl., R. 27-11, PageID # 1915. But entry to those countries, *e.g.*, for joint training, is "vital to the preservation of national security and the protection of our foreign interests." *Id.* And plaintiffs' duties also require close physical contact with other individuals, which underscores the need for their vaccination, even when not deployed. *See* Heaslip Decl., R. 27-19, PageID ## 1983-86; Wren Decl., R. 27-20, PageID ## 1994-95; Harmer Decl., R. 27-21, PageID ## 2004-07; Reese Decl., R. 27-22, PageID ## 2013-17; Pulire Decl., R. 27-23, PageID ## 2022-24.

The record also includes abundant evidence showing COVID-19's harmful impact on the military. COVID-19 has "impacted exercises, deployments, redeployments, and other global force management activities," Stanley Decl., R. 27-11, PageID # 1913; caused the cancellation of "19 major training events, many of which involved preparedness and readiness training with our foreign partners," *id.*, PageID # 1914; and "required significant operational oversight" by the most senior military leaders, *id.*, PageID # 1912. In addition, because of the need to care for COVID-19

patients, DoD in the early weeks and months of the pandemic cancelled all non-essential medical procedures and was further limited in its ability to provide medical appointments. *See id.,* PageID # 1915. This had the effect of reducing readiness, as service members were, in some cases, unable to receive the care they needed to maintain medical readiness. *See id.*

"Given the tangible protection the vaccines afford service members against infection, serious illness, hospitalization, and death, it is clear that COVID-19 vaccines improve readiness and preserve the DoD's ability to accomplish its mission." Stanley Decl., R. 27-11, PageID # 1919. Moreover, even if they are asymptomatic or have mild symptoms, service members who test positive for COVID-19 are "required to isolate and are [thus] unavailable to perform their duties"; "put their fellow service members at risk of infection and hospitalization"; and "further degrade the readiness of their units, their service, and the DoD." *Id.* "Between July and November of 2021, non-fully-vaccinated active-duty service members had a 14.6-fold increased risk of being hospitalized when compared to fully vaccinated active-duty service members," and "[i]n December 2021 unvaccinated adults were 16-times more likely to be hospitalized than vaccinated adults." *Id.*, PageID # 1918. Moreover, the "[h]ospitalization rates during Omicron dominance in the unvaccinated active duty population was 65 times higher than the hospitalization rate in those fully vaccinated." Rans Decl., R. 27-10, PageID # 1905.

COVID-19 vaccinations have promoted military readiness by reducing the risk of infections, hospitalizations, and deaths of service members. For example, since the onset of the COVID-19 pandemic and as of March 1, 2021, hundreds of thousands of service members have been infected, thousands have been hospitalized, and 94 have died. *See* Stanley Decl., R. 27-11, PageID # 1912. None of the service members who died had both doses of an mRNA vaccine. *See id.*

The military's judgment that requiring plaintiffs to be vaccinated against COVID-19 furthers the compelling interest in ensuring military readiness and the welfare of service members thus is "supported by a lengthy record," *Church v. Biden*, No. 21-cv-2815, 2021 WL 5179215, at *18 (D.D.C. Nov. 8, 2021), and is entitled to "'great deference.'" *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (quoting *Goldman*, 475 U.S. at 507). As one district court recently observed in denying a preliminary injunction prohibiting enforcement of the Navy's COVID-19 vaccination requirement, "when executive officials 'undertake to act in areas fraught with medical and scientific uncertainties' their judgments 'should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health.'" *Short v. Berger,* No. 22-cv-1151, 2022 WL 1051852, at *5 (C.D. Cal. Mar. 3, 2022) (quoting *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring)). In addition, the Air Force has received thousands of religious-exemption requests, and adopting the district court's conclusions here would require the military to grant many exemptions to others

similarly situated. *See id.* (noting the "cumulative effect" on combat readiness and the health and safety of service members of having to grant religious exemptions to all similarly situated service members).

ii. The district court held that the Air Force's willingness to grant administrative and medical exemptions renders the vaccination requirement "underinclusive," Order, R. 47, PageID # 3191, but secular exemptions do not undermine otherwise compelling interests unless those exemptions are "similar" to denied religious exemptions. *Gonzalez v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006); *cf. Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (noting that a law lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's interests "in a similar way").

Medical exemptions to the COVID-19 vaccination requirement are fundamentally different from the religious exemptions that plaintiffs have requested. The purpose of a medical exemption is to preserve a healthy, responsive force and medical fitness for duty, *see* Chapa Decl., R. 27-12, PageID # 1927. Accordingly, medical exemptions are consistent with, and support the purposes of, the Air Force's COVID-19 vaccination requirement. *See supra* pp. 6-7. Moreover, the decision whether to grant a medical exemption is made by a military medical provider, and a medical exemption (typically offered to service members who currently have COVID-19, are pregnant, or are allergic to an ingredient in the vaccine) is temporary, lasting only as long as the underlying medical reason for the exemption. *See* Chapa Decl., R. 27-12,

PageID ## 1922-23. For example, many medical exemptions have been granted to pregnant service members, which definitionally lapse within a year.

The religious exemptions that plaintiffs request differ from a medical exemption in each of these key respects. Religious exemptions are not granted to protect the service members' health and fitness for duty; are not determined by medical providers; and are permanent rather that temporary. *See Short*, 2022 WL 1051852, at *8 (military medical exemptions are "not a sign of underinclusiveness or discriminatory treatment, but rather is simply a reflection of what is feasible while still maintaining the government's interest"). Moreover, a service member with a medical exemption is still subject to certain limitations related to their unvaccinated status, including restrictions on travel, attending trainings, and being deployed. *See* Chapa Decl., R. 27-12, PageID ## 1926-27.

Based on similar reasoning, other courts of appeals have properly recognized that medical exemptions to COVID-19 vaccination requirements are not similar to religious exemptions. *See Does 1-6 v. Mills*, 16 F.4th 20, 31 (1st Cir. 2021) ("[P]roviding healthcare workers with medically contraindicated vaccines would threaten the health of those workers and thus compromise both their own health and their ability to provide care."), *cert. denied sub nom. Does 1-3 v. Mills*, 142 S. Ct. 1112 (2022); *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 285 (2d Cir. 2021) (explaining that vaccinating a service member "who is known or expected to be injured by the vaccine would harm her health").

Administrative exemptions to the Air Force's COVID-19 vaccination requirement also differ from the religious exemptions that plaintiffs have requested. Administrative exemptions have been granted to service members who are on terminal leave, separating, or retiring, only because the Air Force "has assessed that its interest in military readiness and mission accomplishment is not served by requiring members to be vaccinated when they are no longer anticipated to return to duty." Little Decl., R. 27-16, PageID # 1954; *see also* Long Decl., R. 27-24, PageID # 2029.[4]

The district court also held that the Air Force lacks a compelling interest because it has "identified [no] specific harm resulting from [p]laintiffs' unvaccinated status at any time during the pandemic or since the mandate has been in place." Order, R. 47, PageID # 3191. Past good fortune is no guarantee of future success, however, and there remain significant risks that unvaccinated service members may contract COVID-19, become unfit for duty, and jeopardize military readiness. The Air Force's considered judgment that those risks are intolerable is entitled to deference, *see Winter*, 555 U.S. at 24, and the Air Force is not "required to wait" until plaintiffs' unvaccinated status "actually result[s]" in harm to the national defense—"[b]y then it may be too late." *Id.*

[4] Air Force policy also authorizes granting administrative exemptions for service members actively participating in COVID-19 vaccine clinical trials. *See* Chapa Decl., R. 27-12, PageID ## 1927-28. Participation in a clinical trial does not necessarily mean that the service member is unvaccinated, *id.*, PageID # 1929, however, and the exemption is limited temporarily to the duration of the trial, *id.*, PageID # 1928. The Air Force has assessed that its interest in military readiness and mission accomplishment is best served by allowing those service members to *temporarily* forego vaccination so as to improve the vaccine itself.

at 31; *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010) (recognizing that the government's empirical conclusions are entitled to deference where the government is attempting to prevent harms to national security); *Ramirez v. Collier*, 142 S. Ct. 1264, 1288 n.2 (2022) (Kavanaugh, J., concurring) (noting, in Free Exercise Clause case, that "in assessing risk, a government need not wait for the flood before building the levee").

The district court also erred in asserting that the Air Force failed to identify a compelling interest for each of plaintiffs' individual RFRA claims. Order, R. 47, PageID # 3189. Unlike the government's case in *O Centro*, 546 U.S. at 430, the Air Force is not arguing that religious exemptions are categorically unavailable. In fact, the Air Force has granted numerous such requests, *see supra* p. 8, and individually considers each request as RFRA requires. Moreover, the district court cursorily asserted that the Air Force "failed miserably" to articulate a compelling interest for denying certain plaintiffs' religious exemptions, Order, R. 47, PageID # 3190, without referring to or even acknowledging the detailed declarations and record materials describing plaintiffs' duties, deployment requirements, and other relevant considerations demonstrating why these specific plaintiffs must be vaccinated to be fit to serve and deploy. *See* Heaslip Decl., R. 27-19, PageID ## 1982-92; Wren Decl., R. 27-20, PageID ## 1994-2001; Harmer Decl., R. 27-21, PageID ## 2003-10; Reese Decl., R. 27-22, PageID ## 2012-19; Pulire Decl., R. 27-23, PageID ## 2021-26.

The district court also wrongly criticized the Secretary of Defense for waiting "approximately 12 months after the vaccines had been available to the public" before

issuing the COVID-19 vaccination requirement. Order, R. 47, PageID # 3169. As explained, the Secretary of Defense issued that requirement at essentially the first opportunity, one day after the FDA fully approved the Pfizer COVID-19 vaccine. *See supra* pp. 4-5.

b. Vaccination Against COVID-19 is the Least Restrictive Means of Furthering the Government's Compelling Interest in Military Readiness.

An alternative qualifies as a "less restrictive alternative" under RFRA only if it serves the government's interests "equally well" as the government action that allegedly substantially burdens the claimant's free exercise of religion. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 731 (2014). The record demonstrates that no alternative furthers the military's compelling interests in readiness and ensuring the health and safety of all service members as effectively as vaccination. Regular temperature checks, serial antigen testing for COVID-19, evidence of past infection, masking requirements, and isolating service members simply do not serve the Air Force's interest in ensuring that service members be maximally fit to deploy and in preventing COVID-19 from disrupting the military's missions.

For example, temperature checks only identify whether a person has a fever, not whether a member is infected with COVID-19, and a person who is infected with COVID-19 may be asymptomatic. *See* Poel Decl., R. 27-17, PageID # 1963. And while serial antigen testing will detect most infections, the person tested "will likely be infectious prior to the test becoming positive." *Id.*, PageID # 1965. Thus, unlike

vaccination, serial testing cannot prevent a person from becoming infected in the first place, and "do[es] not reduce the risk of illness, complications (e.g., long COVID, hospitalization), or death." *Id.* Indeed, the military experienced multiple COVID-19 outbreaks when it merely required service members to undergo routine testing requirements rather than vaccination. *See* Stanley Decl., R. 27-11, PageID ## 1913-14; *see also Does 1-6*, 16 F.4th at 33 (noting that testing cannot adequately prevent transmission of COVID-19, given how long accurate testing takes and how quickly an infected person can transmit the virus).

Relying solely on immunity from past infections likewise is not a viable, less-restrictive alternative to vaccination. Current evidence has not determined an antibody threshold indicative of protection from re-infection, either generally or with respect to particular individuals, nor is there an FDA-authorized or FDA-approved test to assess "natural immunity" to COVID-19. Poel Decl., R. 27-17, PageID # 1966. For similar reasons, the CDC currently recommends COVID-19 vaccination for individuals five years of age and over "regardless of a history of symptomatic or asymptomatic [COVID-19] infection," and "serologic[al] testing to assess for prior infection is not recommended for the purpose of vaccine decision-making." CDC, *Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Approved or Authorized in the United States*, https://perma.cc/4KTU-6EZX (last updated Feb. 22, 2022). DoD policy generally mandates vaccination in accordance with the CDC's recommendations. *See* DoDI 6205.02, R. 27-5, PageID # 1570. *See also* Rans Decl., R. 27-10, PageID # 1889

(noting that "vaccination following infection further increases protection from subsequent infection").

Nor is masking an effective alternative to vaccination. The effectiveness of masking depends on the wearer's behavior: masks are less effective if they are not tight-fitting, not double-layered, worn only around the mouth, taken off frequently, or adjusted frequently. *See* Poel Decl., R. 27-17, PageID # 1961. Moreover, even when masks are worn consistently and correctly, extended durations in close contact with an infectious person can still lead to viral transmission. *See id.*, PageID # 1962. Masks also "provide no protection to a service member who is infected with COVID-19." *Id.*, PageID # 1963. Thus, "[u]nlike vaccination, a mask does not decrease the risk of serious illness, complications (e.g., hospitalization, long COVID), or death, and does not shorten recovery time." *Id.* Neither would isolating Air Force service members be equally as effective as vaccination to protect their fitness for duty. Crucially, as explained, all Air Force members must be fit to deploy on a few days' notice, under conditions that place them in close contact with other service members and where health care may be not readily available. Moreover, these plaintiffs work in close contact with others even when not deployed. *See* Heaslip Decl., R. 27-19, PageID ## 1983, 1985; Wren Decl., R. 27-20, PageID # 1995; Harmer Decl., R. 27-21, PageID ## 2004-05; Reese Decl., R. 27-22, PageID ## 2013-15; Pulire Decl., R. 27-23, PageID ## 2022-23; Miller Mem., R. 42-4, PageID # 2940; Rowe Mem., R. 45-5, PageID # 2966; Webb Mem., R. 38-3, PageID # 2635; Webb Mem., R. 38-5, PageID # 2655.

The district court addressed none of this evidence. Instead, it cursorily repeated several points it made in erroneously concluding that the Air Force lacks a compelling interest in requiring plaintiffs to receive the COVID-19 vaccine. Order, R. 47, PageID ## 3192-93. And for reasons already noted, those points fail to identify any less-restrictive alternative that would serve the Air Force's compelling interest as well as vaccination.

For example, even assuming that plaintiffs have successfully performed their duties to date, the record shows that their unvaccinated status poses material and unacceptable risks to their fitness for duty and to the military mission. *See supra* pp. 33-35. That the military did not require vaccinations until 18 months after the pandemic began, *see* Order, R. 47, PageID # 3192, reflects a reasonable decision to wait for the FDA to fully approve an available vaccine, *see supra* pp. 4-6. And that plaintiffs have been granted temporary exemptions while their exemption requests are processed does not mean those exemptions can be made permanent without a significant adverse impact on the military mission. *See supra* pp. 33-35. The Air Force's high vaccination rate for COVID-19, *see* Order, R. 47, PageID # 3172, also does not render vaccination unnecessary. "Herd immunity," even if the Air Force were to achieve it, is not as effective as vaccination at protecting a service member from infection or from spreading the disease. *See* Poel Decl., R. 27-17, PageID ## 1970-71 (noting that Air Force members typically live communities surrounding military bases, which may not have high vaccination rates).

At the very least, the district court had no basis to second-guess the Air Force's judgment—relying on expert public health authorities—that vaccination is the least-restrictive means to further the Air Force's compelling interest in ensuring plaintiffs' fitness for duty. For reasons already explained, the military is best situated to assess whether a specific unvaccinated individual puts the military mission at risk, or whether feasible, less restrictive alternatives are available, and those determinations are entitled to significant deference. Contrary to the district court's suggestion, the Air Force is not asking for "unquestioning acceptance." Order, R. 47, PageID # 3196 (quotations omitted). But where the Air Force's judgments are based on extensive record evidence and are consistent with the best available guidance from expert public health agencies, courts should not generally second-guess and overrule those conclusions. *See Goldman* 475 U.S. at 507; *Orloff*, 345 U.S. at 94 (1953); *Gilligan*, 413 U.S. at 10; *Harkness*, 858 F.3d at 444-45.

c. Plaintiffs' Requested Injunction Would Not Be Appropriate Relief.

Plaintiffs' requested injunction does not represent the "appropriate relief" that Congress authorized in RFRA. 42 U.S.C. § 2000bb-1(c). The Supreme Court has emphasized that the relief contemplated by the statute "is inherently context dependent" and must account for background principles such as sovereign immunity. *Sossamon v. Texas*, 563 U.S. 277, 286 (2011); *see Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 841 (9th Cir. 2012) (holding that money damages are not

"appropriate relief" under RFRA). Likewise here, longstanding principles counseling against interference with the military make clear that the intrusive injunction plaintiffs seek would not be "appropriate." *See, e.g.*, *Gilligan*, 413 U.S. at 10 (admonishing courts against interfering with "professional military judgments" regarding "the composition, training, equipping, and control of a military force"); *Orloff*, 345 U.S. at 94 (finding "no case where [the Supreme] Court ha[d] assumed to revise duty orders as to one lawfully in the service").

2. Plaintiffs' Free Exercise Clause Claim Also Lacks Merit.

If the Court concludes that plaintiffs have not shown that they are likely to succeed on their RFRA claims, it need not separately address plaintiffs' Free Exercise Clause claims because the vaccination requirement would necessarily survive strict scrutiny, the most demanding standard applicable to the First Amendment. Because the district court erroneously held that the Air Force's COVID-19 vaccination requirement is not neutral and generally applicable, however, we explain why that is incorrect.

The Air Force's COVID-19 vaccination requirement is facially neutral toward religion because it requires all non-exempted Air Force service members to be fully vaccinated, rather than applying only to employees who decline vaccination for religious reasons. *Cf. Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1177 (9th Cir. 2021) (same conclusion regarding vaccination requirement for students); *see also Kane v. De Blasio*, 19 F.4th 152, 164 (2d Cir. 2021) (per curiam). Moreover, as explained, the Air Force

adopted that requirement for valid—and indeed compelling—secular interests, not as an intentional effort to target religious objections.

The district court held that the Air Force's COVID-19 vaccination requirement is not generally applicable "because it allows for medical and administrative exemptions as well as religious exemptions." Order, R. 47, PageID # 3195. The fact that the Air Force allows secular *and religious* exemptions, however, establishes that the requirement is neutral and generally applicable. Moreover, as already demonstrated, the administrative and medical exemptions to which the court referred further (or are at the very least consistent with) the Air Force's compelling interest in ensuring its service members' fitness for duty. For that reason, those exemptions also do not render the requirement not generally applicable.

The district court cited *Fulton*, 141 S. Ct. 1868, and *Dahl v. Board of Trustees of Western Michigan University*, 15 F.4th 728 (6th Cir. 2021) (per curiam), to support its holding that the Air Force's denial of plaintiffs' requested exemptions violates the First Amendment, *see* Order, R. 47, PageID # 3195, but those cases are inapposite. Both cases required strict scrutiny because the policies at issue vested the government with standardless discretion to deny religious exemptions. *Fulton*, 141 S. Ct. at 1877; *Dahl*, 15 F.4th at 733. Policies of that kind require strict scrutiny because they "'invite[]' the government to consider the particular reasons for a person's conduct." *Fulton*, 141 S. Ct. at 1877 (quoting *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990)). The Air Force's COVID-19 vaccination program allows decisionmakers no such standardless

discretion; to the contrary, it provides objective criteria and requires decisionmakers to apply the same means-ends test for religious exemption requests that the Free Exercise Clause requires as to government action that is not neutral and generally applicable. *See supra* pp. 6-8.

II. Plaintiffs Also Failed to Show Irreparable Injury, or that the Balance of Harms and the Public Interest Favor Preliminary Relief.

A. Plaintiffs Failed to Demonstrate Irreparable Injury.

Proof of a likelihood of irreparable harm is an "indispensable" requirement for a preliminary injunction. *D.T. v. Sumner Cty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019). "To merit a preliminary injunction, an injury 'must be both certain and immediate,' not 'speculative or theoretical.'" *Id.* (citation omitted).

The district court correctly recognized that "the punitive action that may be taken against [p]laintiffs if they refuse[d] to get vaccinated without an exemption does not, alone, establish irreparable harm." Order, R. 47, PageID # 3197. *See also Short*, 2022 WL 1051852, at *9 (noting that "harms such as lost rank, duties, benefits, and pay" are not irreparable). Employment-related harms do not constitute irreparable injury absent a "genuinely extraordinary situation," *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974), which plaintiffs have not shown exists here. In the military context, "courts have held that the showing of irreparable harm must be *especially strong* before an injunction is warranted, given the national security interests weighing against judicial intervention in military affairs." *Church*, 2021 WL 5179215, at *17 (citation omitted).

Relying on *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020), the district court concluded that "[e]ven if [plaintiffs' asserted] harm is fully compensable by monetary damages," violations of the First Amendment and RFRA rights satisfy the irreparable harm requirement. Order, R. 47, PageID # 3197. But *Maryville Baptist Church* is inapplicable here, as it involved a state Governor's order prohibiting in-person attendance at worship services. That kind of harm is irreparable because future opportunities to congregate for worship do not ameliorate the loss of past worship opportunities. *See Maryville Baptist Church*, 957 F.3d at 616. By contrast, employment-related harms are generally reparable, particularly where (as here) plaintiffs would be entitled to oppose their separation from the military if the Air Force at some future time were to initiate separation proceedings against any of them. *See Hartikka v. United States*, 754 F.2d 1516, 1518 (9th Cir. 1985); *Chilcott v. Orr*, 747 F.2d 29, 34 (1st Cir. 1984); *Guitard v. U.S. Sec'y of Navy*, 967 F.2d 737, 742 (2d Cir. 1992) (discharge from the military does not constitute irreparable injury).

The district court's conclusion that "the substantial pressure on … religious objecting service member[s] to obey the COVID-19 vaccination order and violate a sincerely held religious belief" constitutes irreparable injury is flawed for similar reasons, Order, R. 47, PageID # 3198 (quotations omitted). As explained, none of the plaintiffs are currently being processed for separation, and any discipline taken against them while this case is pending (such as issuing a letter of reprimand) can be reversed later if plaintiffs were to obtain permanent relief in this case, or if plaintiffs received

favorable administrative relief within the Air Force.

Moreover, plaintiffs have failed to establish a likelihood of success on either their Free Exercise Clause or RFRA claims. In such circumstances, "there is no presumption of irreparable harm." *Short*, 2022 WL 1051852, at *9. And as already explained, *see supra* pp. 29-30, the district court's stated concern that plaintiffs could face imprisonment based on their refusal to be vaccinated against COVID-19, *see* Order, R. 47, PageID # 3198, is speculative and unfounded. *See also Schlesinger*, 420 U.S. at 758 (noting that "it must be assumed that the military court system will vindicate service[members'] constitutional rights").

B. The Equities and the Public Interest Also Weigh Against Preliminary Relief.

As the district court observed, the third and fourth requirements for issuance of a preliminary injunction—the balance of harms and whether the requested injunction will disserve the public interest—"'merge when the Government is the opposing party.'" Order, R. 47, PageID # 3199 (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Those factors tilt decisively against granting a preliminary injunction.

The court properly acknowledged "the strong public interest in national defense, including military readiness," Order, R. 47, PageID # 3199 (citing *Winter*, 555 U.S. at 24), but underestimated the weight of that interest here by suggesting that plaintiffs' refusal to be vaccinated "isn't going to halt a nearly fully vaccinated Air Force's mission to provide a ready national defense." *Id.* (quotations omitted). That off-hand statement

on vaccination rates within the Air Force ignores the substantial risks that COVID-19 continues to pose to the military's mission, the superior efficacy of vaccination vis-à-vis other alternatives, and the well-established principle that courts must defer to military judgments regarding fitness-for-duty determinations. *Cf. Gilligan*, 413 U.S. at 10 ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence" than in assessing military judgments.). Moreover, the question is not whether allowing these plaintiffs to go unvaccinated will bring our national defense to a "halt," but whether exempting them from vaccination could impair *their* fitness for duty, in addition to the missions of *their* units. Thus, by asking the wrong question, the court failed to balance the relevant interests and obscured the true impact of its decision on military readiness, and the court substituted its own judgment for senior military leaders' as to the acceptable level of risk to readiness, unit effectiveness, and mission accomplishment.

As explained, the military has a compelling interest in requiring its fighting forces to be vaccinated in order to be maximally healthy and ready to deploy. An injunction that allows plaintiffs to serve in a military setting without being vaccinated against COVID-19 would threaten harm to each plaintiff and to other service members serving alongside them in the execution of their military functions, in training facilities, or on deployment, and risks endangering the accomplishment of each plaintiffs' respective unit's mission.

CONCLUSION

For the foregoing reasons, the preliminary injunction should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,962 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

s/ Casen B. Ross
CASEN B. ROSS

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

s/ Casen B. Ross
CASEN B. ROSS

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 28(b)(1)(A)(i), the government designates the following district court documents as relevant:

Record Entry	Description	PageID # Range
R 1	Compl.	1-22
R 13	Motion for Preliminary Injunction	578-99
R 27	Opposition to Plaintiffs' Motion for Preliminary Injunction	1509-56
R 27-2	Secretary of Defense Memorandum	1559
R 27-3	Secretary of Defense Memorandum	1561-62
R 27-4	Congressional Research Service Report	1564-66
R 27-5	DoD Instruction 6205.02	1568-88
R 27-6	BUMEDINST 6230.15B (Air Force Instruction 48-110_IP)	1590-1630
R 27-7	Secretary of the Air Force Memorandum and Implementing Guidance	1632-54
R 27-8	Secretary of the Air Force Memorandum and Attachments	1656-61
R 27-9	Declaration of Peter Marks	1663-82
R 27-10	Declaration of Colonel Tonya Rans	1872-1909
R 27-11	Declaration of Major Scott Stanley	1911-19
R 27-12	Declaration of Colonel Artemio C. Chapa	1921-29

R 27-13	Declaration of Chaplain, Major Matthew J. Streett	1931-38
R 27-14	Declaration of Colonel Elizabeth M. Hernandez	1940-46
R 27-15	Declaration of Lieutenant Colonel Ethel M. Watson	1948-51
R 27-16	Declaration of Lieutenant Colonel Nekitha M. Little	1953-54
R 27-17	Declaration of Colonel James R. Poel	1956-76
R 27-18	Declaration of Colonel Ashley Heyen	1978-80
R 27-19	Declaration of Colonel Richard M. Heaslip	1982-92
R 27-20	Declaration of Colonel Donald F. Wren	1994-2001
R 27-21	Declaration of Colonel Paul K. Harmer	2003-10
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ADDENDUM

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42 U.S.C. § 2000bb

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb-1

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-2

§ 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. § 2000bb-3

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

42 U.S.C. § 2000bb-4

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.