United States Court of Appeals
for the Sixth Circuit

CASE NO. 22-3497

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.

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

Defendants/Appellants

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

PLAINTIFFS/APPELLEES' BRIEF

Christopher Wiest (OH 77931)
Chris Wiest, Atty at Law, PLLC
25 Town Center Blvd, Suite 104
Crestview Hills, KY 41017
Tel: 513/257-1895
chris@cwiestlaw.com

Thomas B. Bruns (OH 51212)
Bruns Connell Vollmar & Armstrong
4555 Lake Forrest Drive, Suite 330
Cincinnati, Ohio 45241
Tel.: 513/312-9890
tbruns@bcvalaw.com

Aaron Siri
Elizabeth A. Brehm
Wendy Cox
Siri and Glimstad LLP
745 Fifth Avenue, Suite 500
New York, NY 10151
Tel: 212/532-1091
wcox@sirillp.com
Counsel for Plaintiffs/Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Plaintiffs/Appellees ("Plaintiffs") are not subsidiaries or affiliates of a publicly owned corporation. There is no publicly owned corporation, not a party to the appeal, which has a financial interest in the outcome.

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INTRODUCTION

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

On August 24, 2021, Appellants (also collectively called "the Government") implemented a COVID-19 vaccine mandate ("Vaccine Mandate") for all Department of the Air Force ("DAF") members.[1] Appellants granted thousands of medical and administrative exemptions from their Vaccine Mandate, but systemically denied over 8,000 well-founded requests for temporary religious exemptions, despite the fact that the thousands of DAF members who received medical or administrative exemptions had the same job duties and tasks as Plaintiffs/Appellees ("Plaintiffs"). Moreover, the few religious exemptions Appellants granted were restricted to service members who also qualified for an administrative exemption, specifically those members at the end of their term of service. Ultimately, no stand-alone religious exemptions were granted. "Thus the record suggests that, at present, the number of exemptions that the Department has granted on religious grounds stands at zero." *Doster v. Kendall,* --- F.4th ---, 2022 U.S. App. LEXIS 25339 (6th Cir. 2022).

[1] The Vaccine Mandate is applicable to members of the Air and Space Force, active and reserve, Air National Guard, and Air Force Academy and ROTC cadets.

Appellants treated DAF members with sincerely held religious beliefs, like each of these eighteen named Plaintiffs, in a second-class manner. As a consequence of this systemic discrimination, Plaintiffs sued under the Religious Freedom Restoration Act ("RFRA") and the First Amendment. The District Court, after an evidentiary hearing, granted Plaintiffs a preliminary injunction, protecting them from being separated or punished due to their sincerely held religious beliefs.

Now on appeal, the Government makes the legally unsupported and highly offensive argument that until it incarcerates Plaintiffs in Leavenworth, or separates them with stigmatizing discharges that will take years to appeal, Plaintiffs' claims are not ripe or justiciable. Because the constitutional violations have already occurred, the Government is wrong. The Government raises this argument despite promising punitive action against Plaintiffs should the injunction be lifted, and despite an uncontradicted factual record demonstrating that appeals of all stand-alone religious accommodation requests have been futile. So, the mere fact Plaintiffs have yet to be jailed is irrelevant as, in Appellants' own words, "past good fortune is no guarantee of future success."

Likewise, Appellants speculate when they argue they should not be "required to wait" until Plaintiffs' unvaccinated status "actually result[s]" in harm to the national defense — "[b]y then it may be too late." In contrast, the harms promised to occur to these Plaintiffs should the injunction be lifted are a certainty. The

Government also disingenuously argues that a few Plaintiffs could still possibly have their religious exemptions granted, even though the Government admitted in Court in a related proceeding that it would not grant religious exemptions to persons such as the Plaintiffs. Substantively, the Government argues Plaintiffs' claims fail on the merits, falsely suggesting that its Vaccine Mandate is absolutely necessary to meet its proffered compelling interests, while entirely ignoring the thousands of DAF members who are permitted to avoid that very requirement for administrative or medical reasons which, for example, in the case of pregnancy, is an absolute entitlement despite the admitted recommendation of the CDC that the pregnant get vaccinated. Likewise, the Government makes no accommodation for those with natural immunity despite its admission below that natural immunity confers thirteen times greater immunity than vaccination alone, and the CDC now supports this conclusion in its most recent guidance.[2] In short, the Government seeks a reversal of the District Court's order to permit it to resume its unconstitutional discrimination against these sincerely religious members in order to persecute and, ultimately, prosecute them or involuntarily separate them with stigmatizing discharges.

[2] *Summary of Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems — United States, August 2022,* https://www.cdc.gov/mmwr/volumes/71/wr/mm7133e1.htm, (last accessed Sept. 21, 2022) ("CDC's COVID-19 prevention recommendations no longer differentiate based on a person's vaccination status because breakthrough infections occur, though they are generally mild, and persons who have had COVID-19 but are not vaccinated have some degree of protection against severe illness from their previous infection.").

STATEMENT OF THE CASE AND FACTS

Much of the evidence below is undisputed and, as noted, comes from the Government itself. The DAF had a Vaccine Mandate for COVID-19 imposed by the Secretary of the Air Force ("SECAF"). [Appendix, Doc.11-1, PageID#327; Doc.11-2, PageID#328-329].

The DAF implemented a process for handling religious accommodation requests to the Vaccine Mandate, which consists of the following:[3]

1. A member requests accommodation by documenting his or her sincerely held religious belief and the substantial burden the Vaccine Mandate places on that belief.

2. Each member is then subjected to a thorough interview by a DAF Chaplain who then makes a determination and recommendation about whether (i) the religious belief is sincerely held; and (ii) the religious belief is substantially burdened by the Vaccine Mandate.

[3] *See* Air Force Instruction 52-201, https://static.e-publishing.af.mil/production/1/af_hc/publication/dafi52-201/dafi52-201.pdf (last accessed 9/21/2022); Department of Defense Instruction 1300.17, https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130017p.pdf (last accessed 9/21/2022); https://www.af.mil/News/Article-Display/Article/2882742/daf-processes-religious-accommodations-requests/ (last accessed 8/22/2022). The Court can take judicial notice of Government websites. *Twumasi-Ankrah v. Checkr, Inc.*, 954 F.3d 938, 947, fn.3 (6th Cir. 2020).

3. Members are then interviewed by their commander who makes a recommendation as to whether the well-founded exemption request can be accommodated.

4. A General Officer (though in some instances this can be a Colonel), usually a Major Component Commander, makes a decision to grant or deny the well-founded exemption request.

5. When the request is denied, the member can appeal that determination to the Surgeon General of the Air Force, who is the final appeal authority. *Id.*

Each of the eighteen original Plaintiffs underwent this process in their pursuit of a temporary religious exemption to the Vaccine Mandate. All timely submitted their religious accommodation requests, and all had a DAF Chaplain confirm the sincerity of their beliefs and the substantial burdening of those beliefs by the Vaccine Mandate. [Compl., Doc.1, PageID#1-22; Appendix, Doc.11-1 through 11-21, PageID#324-573; Declarations of Plaintiffs, Doc.30-3 through 20, PageID#2091-2149]. All but four of the Plaintiffs (Plaintiffs Anderson, Leiby, Norris, and Ruyle whose requests are still pending) received denials by the Surgeon General of their final appeals. [Appendix, Doc.11-1 through 11-21, PageID#324-573; Doc.19-1, PageID#943-947; Notice, Doc.38-1 through 38-6, PageID#2631-2665; Notice, Doc.60-1, PageID#4281-4359]. None of these Plaintiffs are eligible for, nor have any received, an administrative exemption from the Vaccine Mandate.

After denial of their final appeals, every DAF member is subjected to an order from his or her commander to vaccinate or else, as Lt. Doster was, which states: "Failure to comply with this lawful order may result in administrative and/or punitive action for Failing to Obey an Order under Article 92, Uniform Code of Military Justice." [Doster Dec., Doc. 19-1, PageID#943-947].

Based on statistics DAF published on March 28, 2022, Appellants, as of that date, granted 1,102 medical exemptions and 1,407 administrative exemptions to the Vaccine Mandate.[4] As of that same date, the DAF only granted 25 religious accommodations and denied 6,143 (a 99.6% disapproval rate).[5] *Id.*

Through admission by a Department of Justice representative in court, not one single religious exemption has been granted without that member also being eligible for an administrative exemption (i.e., being at the end of their term of service). [Dec. Wiest, Doc.30-2, PageID#2084-2090, with transcript attached; Dec. Wiest, Doc.74-2, PageID#4527]. Lt. Doster likewise testified that Appellants are systemically denying all religious accommodations except for those at the end of service or who otherwise qualify for an administrative exemption. [Fourth Dec. Doster, Doc.46-1, PageID#3121-3124]. Thus, the 25 religious accommodation approvals were for

[4] https://www.af.mil/News/Article-Display/Article/2959594/daf-covid-19-statistics-march-2022/ (last accessed 9/17/2022).

[5] The Government cites data from July 2022, which was after the District Court entered its relief in this case, noting 135 accommodations granted; all of them were within the end-of-service exception, and this still reflects a 98.7% disapproval rate.

members who otherwise qualified for an administrative exemption as all were at the end of their term of service. *Id.*

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

The Government's own witnesses provided proof of the Government's systemic religious discrimination. For instance, Colonel James Poel's testimony documented the systemic denial of religious exemption requests due to a stated goal of accommodating even more medical exemptions. [Dec. Poel, Doc.25-17 at ¶7, PageID#1430-1450]. Consequently, the DAF treats medical exemptions as a protected class at the expense of an actual protected class. *Id.* Just as damning to the Government, Colonel Poel also admitted that "both natural and vaccine immunity decrease the risk of infection," and that **previous infection likely provides thirteen times greater protection against reinfection or breakthrough infection compared to vaccination alone**. *Id.* at ¶23 (emphasis added). In short, the DAF's own evidence established there is no compelling need to vaccinate those with natural immunity (with the CDC recently advising that over 95% of Americans

have immunity to COVID-19).[6] Here, all but one (Theriault) of these Plaintiffs have natural immunity from previous infection.

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

DAF policy allows members who receive medical exemptions to be considered medically fit for duty despite their unvaccinated status; yet those with religious exemptions and those seeking religious exemptions are determined by the DAF to be unfit for duty. *Id.* at ¶7. Further, those receiving medical exemptions may not necessarily lose their eligibility for deployment, because such

[6] https://covid.cdc.gov/covid-data-tracker/#nationwide-blood-donor-seroprevalence (last accessed 9/19/2022).

determinations are made on a case-by-case basis; yet all those with religious exemptions are deemed automatically not fit for deployment. *Id.* at ¶14.

Like medical exemptions, blanket administrative exemptions are granted for a variety of reasons. *Id.* at ¶¶17-18. For example, administrative exemptions are granted to any member who is within six months of retirement. Given average terms of service, an estimated five percent of the entire DAF (which consists of the more senior and experienced members) are eligible for this exemption.

The case of Major Andrea Corvi [Doc.53-1, PageID#3762-3789] brings the Government's unlawful discriminatory practices into sharp focus. The DAF granted Major Corvi a temporary medical exemption for pregnancy, and was able to accommodate her by keeping her job duties, assignments, and work interactions the same, including not limiting in any manner her ongoing interactions with over 75 members in her squadron. *Id.* But it denied her request for a temporary religious exemption, despite confirming the sincerity of her religious beliefs and the substantial burden on those beliefs. *Id.* Admittedly, the DAF was able to and did accommodate Major Corvi during her medical exemption, but then refused to temporarily continue that accommodation for her well-founded religious beliefs.

Major Corvi's example is not unique. Record evidence confirmed a blanket policy by the DAF of granting medical exemptions for pregnant members – regardless of duty station, job assignment, or any other individual factor − despite

the recommendation by the CDC for pregnant members to be vaccinated. [Dec. Cox, Doc.74-1, PageID#4519-4526].

Simply put, the evidence established a clear, unconstitutional pattern in how the DAF treated everyone it documented as having sincerely held religious beliefs substantially burdened by the Vaccine Mandate. [Fourth Dec. Doster, Doc.46-1, PageID#3121-3124 at ¶3]. For instance, Lt. Doster is aware, based upon his interactions and communications with a Telegram group containing thousands of members, that the DAF: (i) uses the same general process for handling religious accommodation requests across commands in the active-duty, reserve, and guard; (ii) utilizes the same regulations for processing religious exemption requests; (iii) utilizes the same criteria for processing religious exemption requests; (iv) uses the same form denial letters; and (v) systemically denies each and every religious exemption request unless a member is at the end of their term of service, thus qualifying for an administrative exemption. *Id.* at ¶4. And, these systemic denials occur regardless of (i) job duties; (ii) level of person-to-person interaction; (iii) time in service; (iv) base; (v) future assignments; (vi) likelihood of deployment; or (vii) any other individual factor. *Id.* at ¶5.

This unconstitutional pattern was never refuted by the Government: the DAF grants medical and administrative exemptions to members performing the same job duties as those denied religious accommodation. For instance, Lt. Doster has an

identical assignment with pregnant members who have been granted medical exemptions, where they all perform similar duties. *Id.* at ¶6. Somehow, the pregnant members can be accommodated in their duties, while Lt. Doster was denied a religious exemption because allegedly he cannot be accommodated in those same duties. *Id.*

To the extent DAF leaders individually consider religious exemption requests, they do so only to look at each person's job duties and interactions in order to fill in the blanks on form denial letters, which are otherwise identical, minus this missing information. *Id.* at ¶8. Every person to whom Lt. Doster has spoken, and every piece of paperwork he has observed, whether concerning these eighteen Plaintiffs, the approximately 40-person group at Wright Patterson Air Force base, or the larger 2,500-person group interacting on Telegram, all of whom have documented, sincerely held religious beliefs substantially burdened by the Vaccine Mandate, confirms that all members seeking religious exemptions have been treated in an identical way (the only difference being where they are in terms of the backlog of processing denials). *Id.* at ¶9. A recent Department of Defense Inspector General Report confirms this systemic discrimination. [Doc.91-1, PageID#5042-5045].

The processing of Lt. Doster's packet highlights the preordained outcome of the DAF's systemically discriminatory record of handling religious exemption requests. *Id.* First, during the base religious resolution team meeting discussing Lt.

Doster's request, the Chaplain dissented from the refusal to grant an accommodation of Lt. Doster's sincerely held religious beliefs by asking: "*There has to be a way for this member to serve their country honorably and hold onto their sincerely held religious beliefs.*" [Doc.36-3, PageID#2411-2412].

In the second step of the process, Lt. Colonel Salvatore admitted that Lt. Doster actually can telework, and there are presently no issues with accommodating Lt. Doster. [Doc.36-3, PageID#2417-2419]. However, at some unknown point in the future, Lt. Doster *may* need to be vaccinated, so Lt. Col. Salvatore recommended a denial of the request even though any accommodation would be temporary. *Id.* In so doing, Lt. Col. Salvatore pointed to the Vaccine Mandate, issued to all commanders in the DAF, which documented the SECAF's expectation that everyone "must be" vaccinated. *Id.* Lt. Col. Salvatore interpreted it the way the District Court interpreted it: everyone will be vaccinated regardless of their sincerely held religious beliefs and regardless of whether they temporarily can be accommodated (even though members getting medical or administrative exemptions can always be accommodated). *Id.*

Colonel Harmer was next in line to review Lt. Doster's request, and he admitted that although Lt. Doster is not deployable, his career field rarely deploys where only 1% of billets are overseas, and he can be accommodated now, he indicated that he may need to be vaccinated in the future so the DAF should deny

his accommodation request now. *Id.* at PageID#2419. Colonel Harmer also plainly understood the expectation of no religious accommodations.

Next, Lt. Doster's well-founded request went to General Webb and his staff. There we see an Air Force Personnel Center "Case Management System" form and process reflecting a bias towards denial. *Id.* at PageID#2476-2479. On February 4, 2022, Colonel Christine Jones asked the questions: "what will Lt. Doster's duties at the Air Force Research lab be? Can he telework? What sorts of interactions will he have with others? Can we really defend this decision?" *Id.* at PageID#2478-2479. Her counterpart at the Pentagon, Colonel Elizabeth Beal next asked the same questions. *Id.* at PageID#2479. Not surprisingly, while we never see answers to these questions in the record, we do see Major Hines' input on February 10, where he recommended denial of the request. PageID#2480. At bottom, Lt. Doster was held to a standard to which no member getting a medical or administrative exemption was held.

The DAF ordered its commanders to actively enforce the Vaccine Mandate. On December 7, 2021, Secretary Kendall issued a Memorandum to the DAF which included the following:

> Commanders **will take** appropriate **administrative and disciplinary** actions consistent with federal law and Department of the Air Force (OAF) policy in addressing service members who refuse to obey a lawful order to receive the COVID-19 vaccine and do not have a pending separation or retirement, or medical, religious or

> administrative exemption. Refusal to comply with the vaccination mandate without an exemption **will result in the member being subject to initiation of administrative discharge proceedings**. [Doc.25-8, PageID#1130-1135 (emphasis added)].

The Government also relied upon the declaration of Colonel Hernandez, who is "responsible for providing counsel on military justice matters to senior leaders" and providing directives to "legal offices at every level of command." [Dec. of Col. Hernandez, Doc.25-14, PageID#1414-1420]. She admitted that the DAF was considering utilizing against religious believers "adverse administrative actions, non-judicial punishment, administration demotions, administrative discharges, and courts-martial." *Id.* at PageID#1941. She further admitted that, "[i]n the case of a refusal to comply with the COVID-19 vaccination mandate, absent an exemption, regular service members **will be** subject to initiation of administrative discharge proceedings." *Id.* at PageID#1943 (emphasis added). And she admitted that court-martialing vaccine refusers, with a punitive discharge sentence, was a potential outcome. *Id.* at PageID#1944-1945. This includes possible **penalties of up to two years in Leavenworth**. 10 U.S.C. § 1092. The message was clear to those with sincerely held religious beliefs: get the shot or you will be punished, possibly imprisoned, and then involuntarily separated.

THE PRELIMINARY INJUNCTION HEARING

On March 25, 2022, the District Court held an evidentiary hearing in this matter. [Tr., Doc.45, 48, PageID#3064-3101, 3206-3348]. Three Plaintiffs testified, as representative of the group of eighteen: Lt. Doster, SRA Dills, and Lt. Colonel Stapanon. [Tr., Doc.45, 48, PageID#3066-3100, 3210-3289].

First, Lt. Doster testified. He recently graduated with a Master's degree and now works as a development engineer inventing, designing and testing new weapons systems at the Air Force Research Lab at Wright-Patterson Air Force base. [Tr., Doc.48, PageID#3210-3212]. Ironically, the night before the hearing, the SECAF attended Lt. Doster's graduation ceremony, exhorting the graduates to stand up to tyranny, to not be "yes men," and claimed that the country needs leaders who will stand up for the Constitution and our freedoms. *Id.* at PageID#3211-3212.

Religious beliefs are the most important part of Lt. Doster's life and his wife works for a pro-life non-profit organization. *Id.* at PageID#3213. He timely submitted a religious exemption request to the Vaccine Mandate due to the ties currently available vaccines have to aborted fetal tissue. *Id.* at PageID#3216-3219. His request was for a temporary exemption, only until a vaccine without ties to aborted fetal tissue is licensed. *Id.*

Lt. Doster was interviewed by a DAF Chaplain who documented the sincerity of his beliefs and their substantial burdening by the Vaccine Mandate. *Id.* at

PageID#3220. Lt. Doster had antibody testing after a prior infection which confirmed his natural immunity to COVID-19. *Id.* at PageID#3220-3221. Significantly, Lt. Doster was unvaccinated but still was deployed from August 16, 2021 through August 20, 2021, traveled with a group where no one got sick, and the mission was accomplished. *Id.* at PageID#3214. In his career field, no one was unable to complete the mission from March 2020 through March 2022, and, in that same period, he always accomplished his job duties. *Id.* at PageID#3215-3223, 3230-3231.

Lt. Doster confirmed he works with multiple pregnant members with his same job duties, who were granted medical exemptions to the Vaccine Mandate. *Id.* at PageID#3215-3216.

Lt. Doster's exemption request was denied by Lt. General Webb. *Id.* at PageID#3221-3225. Lt. Doster's testimony then refuted with specific facts each ground for denial asserted by the General with facts demonstrating the contentions were not true. *Id.* He compared his accommodation denial with others, and they were form denials. *Id.* at PageID#3223-3224. He then appealed to the Surgeon General, noted the high vaccination rate in the DAF, cited the medical and administrative exemptions that were freely granted, confirmed that most of the people he interacts with are vaccinated, and that he had been able to complete his

duties, unvaccinated, for two years. *Id.* at PageID#3225-3227. Despite these facts, he received back a form denial. *Id.* at PageID#3227.

Following the form denial, Lt. Doster was threatened with prison, but he is willing to go to prison rather than violate his faith. *Id.* at PageID#3228-3229.

Lt. Doster also testified that he reviewed the materials of the other 17 Plaintiffs and: (i) all were subjected to the same process; (ii) none of them qualified for administrative exemptions; and (iii) all will have their accommodation requests denied based on admissions by the Government. *Id.* at PageID#3231-3234. Further, all eighteen Plaintiffs were able to perform their duties unvaccinated from March 2020 to present, and all had temporary exemptions during that period while their religious exemption requests were pending. *Id.* at PageID#3234. Lt. Doster was then subjected to a vigorous cross-examination that did not undermine any of his testimony. *Id.* at PageID#3235-3250.

SRA Dills testified to his duties, the process he went through to obtain a temporary religious exemption due to his moral objections concerning the use of aborted fetal tissue, his ability to and history of accomplishing his unit's mission unvaccinated, threats he received for non-compliance, the fact he works with people with administrative or medical exemptions to the Vaccine Mandate, and he otherwise echoed aspects of Lt. Doster's testimony. *Id.* at PageID#3252-3267. Like

Lt. Doster, he was subjected to a vigorous cross-examination that did not undermine his testimony. *Id.* at PageID#3270-3285.

Finally, Lt. Colonel Ed Stapanon testified. [Tr., Doc. 45, PageID#3066]. He is a 21-year decorated instructor and fighter pilot at Randolph Air Force Base in Texas, with 174 combat hours, who now trains new fighter pilots. *Id.* at PageID#3066-3068. He has had multiple deployments including to Iraq and Jordan, and he was deployed without any issues in the fall of 2021, despite being unvaccinated. *Id.* He is a lifelong Catholic and active in the pro-life movement. *Id.* at PageID#3069-3071.

Like Lt. Doster and SRA Dills, Lt. Colonel Stapanon has moral objections to the use of aborted fetal tissue. *Id.* He went through the same process to request a religious exemption including the chaplain interview. *Id.* at PageID#3071. He also has natural immunity and antibody testing to prove it. *Id.* at PageID#3073. Despite the fact his immediate commander recommended approval of his request, he also received a form denial. *Id.* at PageID#3074-3076. Like Lt. Doster, he went point by point and refuted, with facts, the asserted basis of the denial. *Id.* He made similar points as Lt. Doster in his appeal to the Surgeon General, and also received a form denial of his appeal. *Id.* at PageID#3076-3078.

As a fighter pilot, Lt. Colonel Stapanon testified to the pilot shortage the DAF faces, and that he and his unit accomplished their mission from March 2020 to the

present, including while being deployed. *Id.* at PageID#3076-3078. Like Lt. Doster, he was subjected to a vigorous cross-examination that did not undermine his testimony. *Id.* at PageID#3084-3099.

At the hearing, the Government had the burden under RFRA and the First Amendment. Despite this fact, the foregoing Plaintiffs' testimony went unrebutted. The Government called no witnesses to testify, recognizing that their submissions would not hold up to scrutiny or cross-examination. On this record, the District Court appropriately granted the Plaintiffs a preliminary injunction, making findings of fact that relied on this record.

SUMMARY OF THE ARGUMENT

The District Court appropriately entered a preliminary injunction to keep the Government from further punishing or separating these Plaintiffs, all of whom have well documented, sincerely held religious beliefs substantially burdened by the Vaccine Mandate.

First, these claims are justiciable. Fourteen of the eighteen Plaintiffs fully exhausted the administrative appeal process. Next, even if there were an exhaustion requirement under RFRA, which there is not, this Circuit's recognized futility exception applies to the four who've yet to get their final denials.

Next, the Government's contention that Plaintiffs' claims are not ripe is outrageous where the Government's own evidence is that all steps necessary to

punish and separate members have been met, and the Government simply wants this Court's permission to begin doing so again. In fact, the Government's spurious claim of a purported lack of harm to these Plaintiffs if injunctive relief were not granted, when two of these Plaintiffs faced imminent punishment under 10 U.S.C. 915 (to include up to 60 days incarceration), and many others faced career ending discharge boards, flies in the face of this Circuit's case law establishing the appropriateness of injunctive relief where there are ongoing threats of punishment for religious exercise.

Substantively, the Government argues that Plaintiffs' claims fail on the merits because, allegedly, vaccination is absolutely necessary to meet the Government's proffered compelling interests. But this argument is refuted where the Government *blanketly* accommodates thousands of DAF members for certain medical or administrative reasons, and the Government's own witness concedes that members with natural immunity have thirteen times greater protection from reinfection and hospitalization than members whose immunity relies on vaccination alone.

Finally, the Government contends that the equities and public interest support it, and not the Plaintiffs, even though clear case law in this Circuit demonstrates that these factors merge with likelihood of success when the Government is the defendant, and it is violating the statutory and constitutional rights of its citizens.

STANDARD OF REVIEW

There are four factors for the issuance of a preliminary injunction: (1) whether the movant has demonstrated a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable harm; (3) whether issuance would cause substantial harm to others; and (4) whether the public interest would be served by issuance. *Suster v. Marshall*, 149 F.3d 523, 528 (6th Cir. 1998); *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). These "are factors to be balanced, not prerequisites that must be met." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). "When a party seeks a preliminary injunction on the basis of a potential constitutional violation," however, "the likelihood of success on the merits often will be the determinative factor." *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (*en banc*).

U.S. Supreme Court precedent indicates the same standard applies to RFRA claims as applies to constitutional claims where the government is the defendant. *Holt v. Hobbs*, 574 U.S. 352 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Circuit precedent likewise compels merger of the factors for RFRA claims. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020).

In reviewing a district court's decision to grant or deny a preliminary injunction, this court reviews the district court's legal conclusions *de novo*, its findings of fact for clear error, and the ultimate determination on whether to grant a preliminary injunction for abuse of discretion. *Schimmel*, 751 F.3d 427, 430.

Further, because Plaintiffs presented live witnesses at an evidentiary hearing and the Government produced none, instead relying on declarations that were contrary to that live testimony, case law in this circuit suggests that the Government's witnesses may be summarily disregarded and the District Court may (and here did) rely upon the testimony of the Plaintiffs, which was subjected to cross examination. *Detroit & T. S. L. R. Co. v. Bhd. of Locomotive Firemen & Enginemen*, 357 F.2d 152, 153 (6th Cir. 1966); *Curtis v. Story*, 863 F.2d 47 (6th Cir. 1988).

ARGUMENT

I. Plaintiffs Demonstrated a Likelihood of Success

A. Plaintiffs' claims are justiciable, RFRA contains no exhaustion requirement, but to the extent exhaustion applies, the futility and other exceptions apply

Appellants claim that *none* of Plaintiffs' claims were justiciable, because *some* of the Plaintiffs failed to exhaust Appellants' sham religious accommodation process, contrary to circuit precedent that only one Plaintiff must have standing and a justiciable claim to move forward. *Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 710 (6th Cir. 2015).

1. RFRA contains no exhaustion requirement

Exhaustion is not required for a statutory claim that does not contain an exhaustion requirement. *Hitchcock v. Cumberland Univ. 403(b) DC Plan*, 851 F.3d 552 (6th Cir. 2017) (declining to read an exhaustion requirement into a statute that did not contain such a requirement). RFRA does not contain an exhaustion requirement. To the contrary, 42 U.S. Code § 2000bb–1(c) permits an action for any person whose "religious exercise has been burdened in violation of this section," subject only to Article III standing. Several courts have held that administrative exhaustion simply does not apply to RFRA. *Singh v. Carter*, 168 F. Supp.3d 216, 226 (D.D.C. 2016) (exhaustion is not required for a RFRA claim); *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012) ("We decline . . . to read an exhaustion requirement into RFRA where the statute contains no such condition … and the Supreme Court has not imposed one.").

RFRA unquestionably applies to the military. "Congress rendered justiciable Plaintiffs' claims under RFRA, which applies to every 'branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States[.]'" *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 345-346 (5th Cir. 2022), *citing* 42 U.S.C. § 2000bb-2(1). "RFRA, in turn, sets the standards binding every department of the United States to recognize and accommodate sincerely held religious beliefs." *Id*. "It undoubtedly 'applies in the military context.'" *Id.* "This

makes sense because service members 'experience increased needs for religion as the result of being uprooted from their home environments, transported often thousands of miles to territories entirely strange to them, and confronted there with new stresses that would not otherwise have been encountered if they had remained at home.'" *Id.*, *citing Katcoff v. Marsh*, 755 F.2d 223, 227 (2nd Cir. 1985). "Federal courts are therefore empowered to adjudicate RFRA's application to these Plaintiffs." *Id.*

The Fifth Circuit observed that "it is likely that, following RFRA's enactment, abstention based on the *Mindes* test is no longer permissible." 27 F.4th 336, 345-346. That is because "RFRA 'operates as a kind of super statute, displacing the normal operation of other federal laws[.]'" *Id.*, *citing Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020). "It would not be a stretch to conclude that RFRA must also displace a judge-created abstention doctrine." *Id.* "[W]hen Congress addresses a question previously governed by a decision rested on federal common law **the need for such an unusual exercise of lawmaking by federal courts disappears**." *Id.*, *citing City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (emphasis added).

Further, exhaustion of the military administrative process is not required before obtaining relief in the District Court for religious freedom claims. *Parisi v. Davidson*, 405 U.S. 34 (1972). In *Parisi*, as here, the service member had a religious objection to aspects of military service – namely combat duties – and claimed

conscientious objector status. And, like the RFRA statute here, a federal statute gave the service member the right to claim that status. *Id.*

The Supreme Court found that resorting to the Board of Correction for Military Records, or to court martial appeals, or to anything other than claiming the exemption under applicable Army regulations was not necessary. *Id.* at 41-42. The Supreme Court held that "we no more than recognize the historic respect in this Nation for valid [religious accommodation] to military service." *Id.* at 45. "As the Defense Department itself has recognized, 'the Congress . . . has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces.'" *Id.* Considering this pronouncement by the Supreme Court, it is axiomatic that administrative exhaustion should not apply to RFRA claims.

Finally, the Government cites to *Harkness v. Sec'y of the Navy*, 858 F.3d 437 (6th Cir. 2017), in support of its exhaustion argument. As the *Harkness* Court explained, that matter involved a claim under 10 U.S.C. § 14502, which, by that statute's express terms, contained exhaustion requirements. *Id.*; 10 U.S.C. § 14502(g), (h). Consequently, *Harkness* actually further supports Plaintiffs' position that administrative exhaustion does not apply to RFRA claims.

2. Even if RFRA contained an exhaustion requirement, all but four Plaintiffs have fully exhausted, and well-established exceptions apply to them

Presently, fourteen of the eighteen Plaintiffs have fully exhausted the Potemkin[7] process of appealing the guaranteed denial of their requests for religious exemption from Appellants' Vaccine Mandate. *Darby v. Cisneros*, 509 U.S. 137 (1993); *Adair v. England*, 183 F. Supp.2d 31, 55 (DDC 2002).

Even if RFRA contained an exhaustion requirement, it would be futile for the remaining four plaintiffs (Anderson, Leiby, Norris, and Ruyle) to administratively exhaust because unrefuted evidence established their requests will be denied. This Court in *Harkness*, 858 F.3d 437 adopted the Fifth Circuit's reasoning concerning administrative remedy exhaustion. *Id.*, *citing Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). In *Mindes*, the Fifth Circuit held that two initial requirements must be satisfied for justiciability: "(a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures." *Id.* at 201. Both are met here, particularly in light of the futility exception to exhaustion.

This Court recognizes exceptions to exhaustion requirements where administrative remedies are (1) inadequate or not efficacious; (2) where pursuit of

[7] Potemkin villages were erected as façades in Russia and were false and illusory. *Forest Guardians v. Thomas*, 967 F. Supp. 1536, 1561, fn. 22 (D. Az. 1997). It is an adequate descriptor of the Government's consideration of religious exemptions.

administrative remedies would be a futile gesture; or (3) where irreparable injury will result unless immediate judicial review is permitted. *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418, 1424 (6th Cir. 1994); *see, also*, *Seepe v. Department of Navy*, 518 F.2d 760, 762 (6th Cir. 1975) (same, and an additional exception where the complaint involved a matter of law only); *Kentucky, Educ. & Workforce Dev. Cabinet, Office for the Blind v. United States*, 759 F.3d 588, 598 (6th Cir. 2014) (same). The Fifth Circuit likewise has identified similar exceptions for futility, inadequacy of administrative remedies, irreparable injury, and a substantial constitutional question. *Von Hoffburg v. Alexander*, 615 F.2d 633, 638 (5th Cir. 1980). Each exception applies here.

With respect to futility, exhaustion is only necessary where remedies "provide a real opportunity for adequate relief." *Hodges v. Callaway*, 499 F.2d 417, 420 (5th Cir. 1974); *Carr v. Saul*, 141 S. Ct. 1352, 1361 (2021) ("[T]his Court has consistently recognized a futility exception to exhaustion requirements."). Just like the Navy in *U.S. Navy Seals 1-26*, 27 F.4th 336, 347, the DAF "has effectively stacked the deck against even those exemptions supported by Plaintiffs' immediate commanding officers and military chaplains." Or, said another way, "the record suggests that, at present, the number of exemptions that the Department has granted on religious grounds stands at zero." *Doster*, 2022 U.S. App. LEXIS 25339, ---F.4th ---.

Further, the record below confirms that the Government predetermined the denial of religious exemption appeals, thus demonstrating that the entire religious exemption process is nothing more than an exercise in futility. The Government admitted that all stand-alone requests for religious exemption will be denied where, as here, none of the Plaintiffs are end-of-service individuals who otherwise qualify for an administrative exemption. [Dec. Wiest, Doc.30-2, PageID#2084-2090, with transcript attached]. Unrebutted testimony at the evidentiary hearing established the same. [Tr., Doc.48, PageID#3231-3234]. Additionally, the Department of Defense Inspector General recently confirmed futility. [Doc. 91-1, PageID#5042-5045].

Recently, the Fifth Circuit confirmed that "exhaustion is unnecessary if, *inter alia*, the administrative remedy is futile and plaintiffs raise substantial constitutional claims." *U.S. Navy Seals 1-26*, 27 F.4th 336, 347. There, as here:

> The [DAF] has not accommodated any religious request to abstain from any vaccination [other than those who otherwise were eligible for administrative exemptions], and to date it has denied all religiously based claims for exemption from COVID-19 vaccination [other than those who otherwise qualified for administrative exemptions]. … But evidence, recited previously and not meaningfully challenged here, suggests that the [DAF] has effectively stacked the deck against even those exemptions supported by Plaintiffs' immediate commanding officers and military chaplains. This is sufficiently probative of futility. Further, as explained more fully below, Plaintiffs raise substantial, legally clear-cut questions under RFRA. Courts are specifically equipped to address RFRA claims and, by the same token, the issues are less suitable for administrative adjudication.

Ultimately, the Fifth Circuit found justiciability. *Id.* Here, as there, "if the [DAF]'s plan is to ignore RFRA's protections, as it plainly appears to be on the record before us, courts must intervene because '[g]enerals don't make good judges—especially when it comes to nuanced constitutional issues.'" *Id.*, *citing Air Force Officer v. Austin*, --- F. Supp.3d ---, 2022 U.S. Dist. LEXIS 26660 (M.D. Ga. 2022) at *8. Further, given the systemic denial of *every single religious exemption request other than those requests by members who are eligible for an administrative exemption*, the Government hardly comes to this Court with clean hands to argue that there is *any chance* that any request will be granted. That the DAF, hypothetically, could grant a request does not, on this record, "provide a real opportunity for adequate relief." *Hodges*, 499 F.2d at 420. Plaintiffs need not wait for the DAF to rubber stamp "a constitutional violation before seeking relief in court." *Id.* The current record establishes futility.

Second, Plaintiffs need not exhaust military remedies when "available administrative remedies are inadequate" to grant them the relief they seek. *Von Hoffburg*, 615 F.2d at 640. For example, "an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it." *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992). That exception for inadequate remedies is met because, make no mistake, the appeal process here is predetermined and the harm, as explained below, is ongoing.

Third, "exhaustion is not required when the petitioner may suffer irreparable injury if he is compelled to pursue his administrative remedies." *Von Hoffburg,* 615 F.2d at 638; *Mindes,* 453 F.2d at 201. Again, the burdening of Plaintiffs' religious beliefs, which is occurring today, *is* irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Maryville Baptist Church, Inc.*, 957 F.3d 610; *Catholic Diocese of Nashville v. Sebelius*, 2013 U.S. App. LEXIS 25936 (6th Cir. 2013).

In contrast, the Government argues that Plaintiffs' injuries are not irreparable at present. This falsehood ignores this Court's case law that "[t]he Free Exercise Clause, we reiterate, 'protects against indirect coercion or penalties on the free exercise of religion.'" *Dahl v. Bd. of Trs. of Western Mich. Univ.*, 15 F.4th 728, 732 (6th Cir. 2021). Without question, the Government's own evidence is that coercion to violate religious beliefs through the Vaccine Mandate is ever present. Moreover, two Plaintiffs faced imminent and irreparable Article 15 proceedings, including the possibility 60 days confinement, at the time the Complaint was filed. [Ver. Compl., Doc.1, ¶¶ 42-43, PageID#11].

Next, the Government brazenly contends any injury may never be irreparable because confinement in the Leavenworth U.S. Disciplinary Barracks (prison), for not following an order that violates sincerely held religious beliefs, can be appealed over the course of years through the military justice system. Such a contention could only be made by callous individuals who have never been threatened to choose

between their liberty and their sincerely held religious beliefs. Thankfully, such a contention is directly contradicted by applicable case law. *Maryville Baptist Church, Inc.*, 957 F.3d 610; *Parisi*, 405 U.S. 34.

Not surprisingly, the Government entirely ignores the coercive effects of the myriad steps it acknowledges it will take, each designed to coerce members to violate their religious beliefs and cave to the Government's demands, probably because it is well established that the harm here is irreparable and was ongoing prior to the entry of the injunction. *Maryville Baptist Church, Inc.*, 957 F.3d 610; *Dahl*, 15 F.4th 728 at 732.

The fourth exception to exhaustion is when "the plaintiff has raised a substantial constitutional question." *Von Hoffburg*, 615 F.2d at 638. That inquiry raises the same issues as the first *Mindes* factor, the "nature and strength of the plaintiff's challenge to the military determination," which generally favors review of substantial constitutional questions. *Mindes*, 453 F.2d at 201. Here, there is no question a substantial Constitutional question exists.

Also relevant is the DAF's flagrant non-compliance with Department of Defense Instruction 1300.17.[8] That instruction requires mandatory timelines for processing accommodation requests, with action to be taken within 30 days of the

[8] https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130017p.pdf (last accessed 9/17/2022).

submission of a servicemember's appeal to the service secretary, with all review and action taken within 60 days of that date. *Id.* at ¶3.2.c. Consequently, the DAF's failure to comply with processing timeline requirements for the four Plaintiffs' religious exemption requests is sufficient grounds to reject the Government's exhaustion argument. *Mass. Mut. Life Ins. Co. v. Russel*, 473 U.S. 134, 144 (1985) (exhaustion inapplicable where the Defendant fails to comply with its own timely processing rules); *Villegas de la Paz v. Holder*, 614 F.3d 605, 608 (6th Cir. 2010) (same).

Once the threshold step of *Mindes* is satisfied, the next step is weighing the following four factors to determine the justiciability of a claim regarding internal affairs: 1) the nature and strength of the plaintiff's challenge to the military determination; 2) the potential injury to the plaintiff if review is refused; 3) the type and degree of anticipated interference with the military function; and 4) the extent to which the exercise of military expertise or discretion is involved. *Mindes*, 453 F.2d at 201-2. Application of these factors here favors review of the four yet-to-be-exhausted Plaintiffs' claims.

As set forth below, under the first factor, the nature and strength of Plaintiffs' challenge favors judicial review. Second, without review, these four Plaintiffs face serious, irreparable injury. "The loss of First Amendment freedoms, for even

minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. 347, 373.

The third factor, type and degree of anticipated military function, provides a caveat: "[i]nterference *per se* is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief." *Mindes*, 453 F.2d at 201.

Here, granting review of whether the DAF properly followed the Constitution and federal law in its evaluation of religious exemption requests poses no threat to its performance of vital duties. What duty could be more vital than the obligation to follow the Constitution? Further, there is no evidence that the relief requested by these yet-to-be-exhausted four Plaintiffs would cause significant interference with the operations of the DAF. Fourth, the "traditional deference" cited by the Government in applying *Mindes* to "internal military decisions" is inapplicable, as Plaintiffs **make an argument based on legal sufficiency, not military expertise**. The Government suggests that these legal questions are actually military readiness questions, but the application of the Constitution and RFRA are strictly legal, not factual questions. Therefore, because each of the four factors weigh in favor of review, *Mindes* does not serve as a procedural bar to the four yet-to-be-exhausted Plaintiffs' claims.

Other courts have rejected similar arguments raised by the Government, even in cases involving the military. *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979). In fact, "'resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board.'" *Adair,* 183 F. Supp.2d 31, 55 (*quoting Downen v. Warner,* 481 F.2d 642, 643 (9th Cir. 1973)). In *Adair*, the court rejected the military's exhaustion arguments about the Board of Correction of Naval Records. *Id*. Indeed, "the Supreme Court . . . [has] heard numerous [constitutional] challenges to military policies." *Brannum v. Lake,* 311 F.3d 1127, 1130 (D.C. Cir. 2002).

B. Plaintiffs' claims are ripe

The Government next contends that this matter and the claims in it are not ripe. Like other claims, a RFRA or First Amendment claim becomes ripe if the plaintiff faces an "actual or imminent" injury, *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1970), which occurs if the plaintiff confronts an actual or imminent burden on religious practice. Put simply, "one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *see also Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (exposure to prosecution not necessary to challenge statute or practice that deters the exercise of constitutional rights). "If the rule were otherwise, the contours of

regulation would have to be hammered out case by case – and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of the regulation." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). Under that scenario, the First Amendment – "of transcendent value to all society, and not merely those exercising their rights – might be the loser." *Id.*

Where there is an actual and well-founded fear that a requirement will be enforced against a plaintiff, the claim is ripe and they have standing. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). That is true even if they have never been prosecuted or threatened with prosecution. *Doe v. Bolton*, 410 U.S. 179, 188 (1973). Here, the record established both threats and imminent prosecution. [Ver. Compl., Doc.1, ¶¶ 42-43, PageID#11]. And where, as here, a government policy with exemptions vests "unbridled discretion in a government official over whether to permit or deny" First Amendment protected activity, one who is subject to the law or policy may challenge it facially without the necessity of first applying for, **and being denied**, that same exemption. *City of Lakewood v. Plain Dealer Publ'n Co.*, 486 U.S. 750, 755-56 (1988); *see also East Brooks Books, Inc. v. Shelby Cnty. Tenn.*, 588 F.3d 360, 369 (6th Cir. 2009) (finding that plaintiff had standing based on the suppression of his future protected speech even where his license was not actually revoked); *Faith Baptist Church v. Waterford Twp.*, 522 Fed. Appx. 322

(6th Cir. 2013) (mere threat of potential prosecution was sufficient to establish that the claim was ripe and standing existed).

Further, given the Government's failure to grant a single, stand-alone religious exemption, it is a certainty that all such exemption requests and appeals will be denied, and equally certain that harm will occur to every Plaintiff. Further, the Secretary of the Air Force made this threat of harm an actual promise: "Commanders **will take** appropriate **administrative and disciplinary** actions … Refusal to comply with the vaccination mandate without an exemption **will result in the member being subject to initiation of administrative discharge proceedings**." [Doc.25-8, PageID#1130-1135]. So, the patently false suggestion by the Government that a DAF Commander hypothetically may defy the Secretary's directive as to what those Commanders "will" do (which is essentially what the Government argues by stating that separation proceedings have not yet commenced and thus the case is not ripe), is utterly absurd. So too is the suggestion that the DAF's ongoing non-institution of separation proceedings is of some moment, when instituting separation proceedings would defy an ongoing court-ordered injunction.

Next, the Government advances a misreading of *Miles Christi Religious Orver v. Township of Northville*, 629 F.3d 533 (6th Cir. 2010). That case involved a plaintiff that failed to even attempt the process required to obtain a zoning variance – unlike all of the Plaintiffs here who applied for the never-to-be-granted stand-alone

religious exemption and were denied. *Id.*, 629 F.3d at 536. And, in determining that the appellant's claims were not ripe, this Court, in *Miles Christi*, asked and answered in the negative the relevant questions of whether, without administrative exhaustion, the dispute was "likely to come to pass," and were there "risks to the claimant if the federal courts stay their hand." *Id.*, 629 F.3d at 537. Here, and unlike the facts in *Miles Christi*, the record conclusively establishes the futility of exhausting the DAF's Potemkin administrative process, and conclusively establishes what the DAF will do if the injunction is lifted, because Secretary Kendall ordered/promised enforcement. [Doc. 25-8, PageID#1130-1135].

The Government downplays these explicit threats directed at these Plaintiffs, but ignores its own proffered evidence in doing so. [Tr. Doc.45, PageID#3228-3229, 3264, Doc.45, PageID#3076-3077]. Once again, the Government's own evidence, from Colonel Hernandez, reveals that these Plaintiffs undoubtedly face punitive actions for their ongoing refusal to get vaccinated, which includes the prospect of a court martial (i.e., a federal felony conviction) and an administrative discharge. [Dec. Hernandez, Doc.25-14, PageID#1414-1420].

The Government also draws the irrelevant distinction that not all (only fourteen of eighteen) of these Plaintiffs have had criminal proceedings threatened against them personally, rather than collectively. *Kiser v. Reitz*, 765 F.3d 601 (6th Cir. 2014) (threat credible and claim ripe when it has drawn enforcement, including

administrative action in the past against others); *Berry v. Schmitt*, 688 F.3d 290 (6th Cir. 2012). Clearly, we are well beyond that here. *See, also, Winter v. Wolnitzek*, 834 F.3d 681, 687-688 (6th Cir. 2016) (any communication directed at a plaintiff that threatens enforcement, even if it is contingent upon future events, sufficiently establishes ripeness).

C. Plaintiffs have demonstrated a likelihood of success on the merits of their RFRA and First Amendment Claims

1. The Government's policy of granting thousands of medical and administrative exemptions, and its *de facto* policy of denying all stand-alone religious exemption requests, demonstrate that strict scrutiny is triggered for the First Amendment claim

The Government admits it granted thousands of discretionary medical and administrative (secular) exemptions to its Vaccine Mandate, while denying all stand-alone religious exemption requests.[9] That renders its Vaccine Mandate, from a Free Exercise perspective, neither neutral nor generally applicable. *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020); *Maryville Baptist Church, Inc.*, 957 F.3d 610; *Dahl*, 15 F.4th 728, 734. Consequently, the foregoing cases also establish that the Government must demonstrate that its severe burden on religious expression meets strict scrutiny. It can only do so if it articulates "'interests of the highest order'

[9] https://www.af.mil/News/Article-Display/Article/2959594/daf-covid-19-statistics-march-2022/ (last accessed 9/17/2022).

and [its policy] is narrowly tailored to achieve those interests." *Fulton*, 141 S. Ct. at 1881; *Dahl,* 15 F.4th 728 at 734. Likewise, the Government must prove "that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID." *Tandon*, 141 S. Ct. 1294, 1296-1297.

2. The record is unrebutted that Plaintiffs met their initial burden under the First Amendment and RFRA, where the proof below is unrebutted that Plaintiffs' religious beliefs are sincerely held and substantially burdened by the Vaccine Mandate

The record is unrebutted that all eighteen Plaintiffs met their initial burden under their First Amendment and RFRA claims: they all have sincerely held religious beliefs substantially burdened by the Vaccine Mandate. [Compl., Doc.1, PageID#1-22; Appendix, Doc.11-1 through 11-21, PageID#324-573; Declarations of Plaintiffs, Doc.30-3 through Doc. 30-20, PageID#2091-2149; Tr., Doc.45, 48, PageID#3066-3100, 3210-3289]. The Government failed to make any showing rebutting this evidence.

3. The Government failed to meet its burden under strict scrutiny proving a compelling governmental interest

The Government asserted the following governmental interests in furtherance of its mandate: "mitigating the effect of COVID-19 on its missions, units, and personnel." (Br., Doc. 15, at 31-32). The Government also makes generalized arguments about its interests in "military readiness" and the "health" of its personnel. *Id.* In light of these generalized arguments, and inappropriately relying upon *Winter*

v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008), the Government argues for unconditional deference towards its ongoing violations of RFRA and the First Amendment and asserts that these generalized interests are compelling.

The governmental interests in *Winter* involved balancing **the potential harm to marine mammals** against the Navy's ability to continue conducting sonar training. *Winter* did not involve any constitutional rights or any free exercise rights protected by RFRA. Even so, *Winter* wisely acknowledged that "military interests do not always trump **other considerations**." *Winter* 555 U.S. at 26 (emphasis added); *Navy Seal 1 v. Austin*, 2022 U.S. Dist. LEXIS 31640 (M.D. Fla. Feb. 18, 2022) ("[military] officials cannot simply utter the magic words ['military readiness and health of the force'] and as a result receive unlimited deference from those of us charged with resolving the dispute"), *quoting Davila v. Gladden*, 777 F.3d 1198, 1206 (11th Cir. 2015).

The Commander in Chief recently told the American people that the pandemic is over, which makes the Government's assertions of a compelling interest in force-vaccinating Plaintiffs over their sincerely held religious beliefs all the more curious.[10] *See, also, BST Holdings, L.L.C. v Occupational Safety and Health Admin.,*

[10] https://www.cbsnews.com/news/president-joe-biden-60-minutes-interview-transcript-2022-09-18/ (last accessed 9/21/2022).

U.S. Dept. of Labor, 17 F.4th 604, 611 n.10 (5th Cir. 2021) ("society's interesting in slowing the spread of COVID-19 cannot qualify as compelling forever").

In a more analogous situation involving a prison context, and applying a parallel statute that "mirrors RFRA," the Supreme Court unanimously rejected a similar demand for "a degree of deference that [wa]s tantamount to unquestioning acceptance." *Holt*, 574 U.S. 352, 357, 364. If this is the rule pertaining to prisoners, how much more appropriate is it to reject the Government's assertions here of "unquestioning acceptance" of ongoing violations of the constitutional rights of our service members, who defend such rights by risking their very lives? To pose this question is to answer it.

Ultimately, the *Holt* Court applied strict scrutiny to hold that the prison's failure to provide a religious accommodation violated the statute. *Id.* at 369–70. Case law and the legislative history of RFRA supports that *Holt* provides the proper framework for resolving RFRA claims against the military. *Singh v. McHugh*, 109 F. Supp.3d 72, 89 (D.D.C. 2016) (citing House and Senate reports). In enacting RFRA, Congress "expressed its clear understanding that the heightened standard of review" (closely scrutinizing Government action) applies to the military. *Id. See, also*, Religious Freedom Restoration Act of 1993, H.R. Rep. No. 103-88, 103rd Cong. at 8 (1993) (even in the military context, "[s]eemingly reasonable regulations"

that are based on "speculation," "exaggerated fears," or "thoughtless policies" "cannot stand.").

"Where the government permits other activities to proceed with precautions [as the DAF does here], **it must show** that the religious exercise at issue is more dangerous than those [permitted secular] activities even when the same precautions are applied." *Tandon*, 141 S. Ct. 1294, 1296-1297 (emphasis added). "Otherwise, precautions that suffice for other activities suffice for religious exercise too." *Id.*

As in *Dahl*, 15 F.4th at 734-735, the granting of thousands of secular exemptions (here, to the DAF's Vaccine Mandate) undermines any argument of a compelling governmental interest. Moreover, and as the Fifth Circuit observed in *U.S. Navy Seals 1-26*, 27 F.4th at 351, merely asserting generalized interests is "nevertheless insufficient under RFRA." *Id.* Instead, the DAF must "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.*, *citing Gonzales*, 546 U.S., at 431. "The question, then, is not whether [the DAF has] a compelling interest in enforcing its [vaccination] policies generally, but whether it has such an interest in denying an exception to [each Plaintiff]." *U.S. Navy Seals 1-26*, 27 F.4th 336, 351, *citing Fulton*, 141 S. Ct. at 1881.

"RFRA 'demands much more[]' than unconditionally deferring to 'officials' mere say-so that they could not accommodate [a plaintiff's religious accommodation] request.'" *Id.*, *citing Holt*, 574 U.S. at 369. "That is because 'only

the gravest abuses, endangering paramount interests, give occasion for permissible limitation[]' on the free exercise of religion." *Id.*, *citing Sherbert v. Verner*, 374 U.S. 398 (1963). "Defendants have not demonstrated 'paramount interests' that justify vaccinating these [eighteen] Plaintiffs against COVID-19 in violation of their religious beliefs." *Id.* "More specifically, multiple Plaintiffs [performed their assigned duties] before and after the vaccine became available" and did so while they waited months for their religious accommodations to be denied. *Id.*, [Declarations of Plaintiffs, Doc.30-3 through Doc. 30-20, PageID#2091-2149; Tr., Doc.45, 48, PageID#3066-3100; 3210-3289].

"The [DAF's] alleged compelling interest is further undermined by other salient facts." *U.S. Navy Seals 1-26*, 27 F.4th 336 at 352. "It has granted temporary medical [and administrative] exemptions to [thousands of other service members], yet no reason is given for differentiating those service members from Plaintiffs." *Id.*

"Further evidencing that there is a pattern of disregard for RFRA rights rather than individualized consideration of Plaintiffs' requests, the [DOJ has admitted the DAF] has not granted a single [stand-alone] religious accommodation." *Doster*, 2022 U.S. App. LEXIS 25339, ---F.4th ---; [Dec. Wiest, Doc.30-2, PageID#2084-2090, with transcript attached; Dec. Wiest, Doc.74-2, PageID#4527, Tr., Doc.48, PageID#3231-3234]. "Yet surely, had the [DAF] been conscientiously adhering to RFRA, it could have adopted least restrictive means to accommodate religious

objections against forced vaccinations, for instance, to benefit personnel working from desks, warehouses, or remote locations." *Id.*

In *Dahl*, on the subject of narrow tailoring, the defendants also presented the district court with "an affidavit stating that COVID-19 vaccines are 'the most effective and reasonable way to guard against' the virus." 15 F.4th 728 at 735. In contrast, here the Government concedes that "studies vary" insofar as natural immunity is concerned. [Declaration Poel, Doc.25-17 at ¶24, PageID#1429-1450]. However, for purposes of its ruling, this Court in *Dahl* did not "dispute that assessment." 15 F.4th 728 at 735. Nevertheless, this Court found that "the question before us 'is not whether the [defendant] has a compelling interest in enforcing its vaccine policies generally, but whether it has such an interest in denying an exception' to plaintiffs, and whether its conduct is narrowly tailored to achieve that interest." *Id.* That is precisely the issue here with each of these Plaintiffs, and the burden the Government failed to meet in the court below.

To meet its burden, the Government must articulate a compelling interest in vaccinating (1) healthy and fit DAF members, in their 20s to mid-40s, all but one of whom had prior bouts with COVID-19 and now have natural immunity; (2) in a force that is nearly 98% vaccinated; and (3) where pending and granted exemptions (including medical exemptions) account for less than 2% of the total force of nearly 500,000 members on active duty or in the Air Force Reserve. Further, that

"compelling" interest must then hold up to scrutiny where the Government admits that the required vaccines do not prevent either infection or transmission (with the still allowed single-dose of the Johnson & Johnson vaccine providing next to no immunity), that any initial protection quickly and drastically wanes, that the current dominant strain of COVID-19 produces mild cold-like symptoms in the vast majority of healthy individuals, and most recent CDC findings that there is no difference between natural immunity and vaccine-derived immunity.[11] On this record, the Government cannot, and has not, met its burden of establishing a compelling governmental interest.

4. Even if the Government can articulate a compelling governmental interest, it cannot meet its showing under narrow tailoring and least restrictive means under the First Amendment and RFRA

Finally, assuming *arguendo* that the Government has proven compelling interests, it utterly failed to show narrow tailoring under the First Amendment, and that its Vaccine Mandate is the least restrictive means under RFRA and the First Amendment. Clearly, this was and is an impossibility where the Government's own evidence establishes that it granted thousands of medical and administrative exemptions to its Vaccine Mandate and accommodated those individuals, many of whom performed the same job duties and functions as these eighteen Plaintiffs. Again, the Government must show that the religious accommodations at issue are

[11] https://www.cdc.gov/mmwr/volumes/71/wr/mm7133e1.htm (last accessed Aug. 11, 2022).

more dangerous than the secular medical and administrative exemptions it permits. *Tandon*, 141 S. Ct. 1294, 1297. "Otherwise, precautions that suffice for other activities suffice for religious exercise too." *Id.*

The Government presented no evidence that the interests it has articulated are not equally undermined by the medical and administrative exemptions it granted. *See, also, Air Force Officer*, 2022 U.S. Dist. LEXIS 26660, ---F. Supp.3d---; *Poffenbarger v. Kendall*, 2022 U.S. Dist. LEXIS 34133, ---F. Supp.3d--- (SDOH 2022). That is because "[r]isks of contagion turn on [the failure to receive the vaccine]; the virus does not care why they [did not do so]. So long as that is the case, why do the orders permit people who [have medical or administrative exemptions to avoid the requirement, but not permit religious exemptions]?" *Maryville*, 957 F.3d 610, 615. Once again, highlighting the unmoored nature of the Government's argument is the unrebutted proof establishing the DAF temporarily accommodated Major Corvi while she was pregnant, but would not if she obtained a temporary religious exemption, even though it could accommodate her while she waited for the futile process of obtaining that never-to-be-granted stand-alone religious exemption to play out.

Equally unsupportable are the Government's arguments about the DAF's near-to-end-of-service exemptions. *Air Force Officer*, 2022 U.S. Dist. LEXIS 26660, ---F. Supp.3d---. The point is that the Government permits the member who

receives one of these exemptions to remain in service, unvaccinated, all while performing military duties. Recent U.S. Supreme Court precedent rejects governmental claims that religious accommodation can be denied where secular exemptions have been granted to the same policy. *Fulton*, 141 S. Ct. 1868, 1882.

Resolving all doubt, the evidence below established that the Government granted administrative exemptions for participants in vaccine studies who only received a vaccine placebo in studies. Even though the number of those participants may be low, there is no constitutional explanation for allowing those members to continue to perform their military duties unvaccinated, while, allegedly, none of these eighteen Plaintiffs can similarly be accommodated. The government cannot "assume the worst when people [exercise their religion] but assume the best when people [engage in secular activities].'" *Tandon*, 141 S. Ct. 1294, at 1297 (*quoting Roberts*, 958 F.3d 409, 414).

The unrebutted testimony of these eighteen Plaintiffs established each successfully performed their job duties throughout the COVID-19 pandemic, from March 2020 to date, without mission interruption. [Declarations of Plaintiffs, Doc.30-3 through Doc. 30-20, PageID#2091-2149; Tr., Doc.48 at PageID# PageID#3231-3234]. Consequently, the Government's claim of no less restrictive means, other than punitively enforcing its Vaccine Mandate, is nonsensical where the DAF was able to achieve its mission before its Vaccine Mandate, and also

afterwards while these eighteen Plaintiffs waited for the futile religious exemption process to play out. That is especially the case because the Government cannot and has not set forth a convincing rationale that the medical and administrative exemptions it granted do not equally undermine its asserted interests.

"But wait," say Appellants – their favored medical and administrative exemptions are allegedly temporary, while they claim Plaintiffs seek permanent exemptions. This is false. Plaintiffs' position, which they have been clear about from the start, is that they all seek temporary exemptions. And, Air Force Instruction 48-110 *only* allows temporary accommodations for religious and administrative exemptions.[12]

Also significant is the fact the Government, without any convincing rationale, failed to impose its Vaccine Mandate until August 2021, long after vaccines became widely available. That "substantial delay" seriously undermines any "assertion of a compelling interest" in obtaining 100% vaccination of all DAF personnel. *See Cont'l Training Servs., Inc. v. Cavazos*, 709 F. Supp. 1443, 1453 (S.D. Ind. 1989), *aff'd in part, rev'd in part*, 893 F.2d 877 (7th Cir. 1990). *See also BST Holdings, LLC*, 17 F. 4th 604. And, it is now clear that vaccinated individuals can both contract

[12] https://static.e-publishing.af.mil/production/1/af_sg/publication/afi48-110/afi48-110.pdf (at ¶2-6) ("For the Air Force, permanent exemptions for religious reasons are not granted; the MAJCOM commander is the designated approval and revocation authority for temporary immunization exemptions.").

and transmit the disease. S*ee Id.*, 17 F.4th 604, 616 n.19; Eric Sykes, CDC Director: Covid vaccines can't prevent transmission anymore, MSN (Jan. 10, 2022), https://tinyurl.com/uu3h9bs4.

Ultimately, the Government's action of granting thousands of purely secular exceptions to its Vaccine Mandate is an admission that: 1) it does not believe that no exceptions can be granted; and 2) less restrictive means to accomplish its claimed interest are available, but it simply refuses to apply those means to religious believers. Simply put, the Government, admittedly, can and should treat those with a valid religious objection to the vaccine the same way it treats those with a medical or administrative accommodation. So far, and in violation of RFRA and the Constitution, it has chosen not to do so.

Instead, the Government robotically argues that because Plaintiffs perform duties in career fields that require interaction, there is a compelling government interest to achieve 100% vaccination compliance for the sake of overall health and safety. This argument ignores the current science that vaccination does not prevent contracting COVID-19 or transmitting COVID-19, that natural immunity is thirteen times more efficacious than vaccine derived immunity alone, that many vaccinated members' protection has already waned, and that the granting of thousands of medical and administrative exemptions will never allow the Government to achieve 100% compliance.

Given the DAF's blanket denial of 100% of stand-alone religious exemption requests, the Government cannot meet its burden that the Vaccine Mandate is the least restrictive means of achieving its interests. In fact, to justify its argument that there are no lesser restrictive means available, particularly if these eighteen Plaintiffs were to deploy, the Government relies on a series of speculative and highly unlikely events: that Plaintiffs might be deployed on short notice, might become infected with COVID-19 just before or during deployment, possibly resulting in severe illness, possibly without antivirals or other treatments on hand, possibly making them unable to perform their duties, and possibly infecting enough of the other (98% vaccinated) members sufficient to render their units unable to achieve the mission.

Each event is unlikelier than the last (and equally as likely for vaccinated members). First, for most Plaintiffs, their natural immunity makes it unlikely that they will become infected with COVID-19 at all, let alone at a critical time such as a deployment, particularly given recent CDC findings that indicate natural immunity is equivalent to vaccine-derived immunity for COVID-19.[13] Second, given their youth and health, any new infection is unlikely to disable them. Third, oral antivirals – which can be taken at home without access to medical facilities – should be available to a deployed unit. Fourth, for most Plaintiffs, their natural immunity and the 98% vaccination rate (if vaccination is a compelling necessity, it can only be so

[13] https://www.cdc.gov/mmwr/volumes/71/wr/mm7133e1.htm, (last accessed Aug. 11, 2022).

because, according to the Government, it actually works) makes infection of other members of Plaintiffs' units highly unlikely. Fifth, and if one concludes that vaccines work, it is still less likely that a vaccinated member of their unit, if infected by a Plaintiff, would experience more than mild symptoms. And sixth, the military's successful track record before the Vaccine Mandate makes it far-fetched that any unit would fail to complete its mission due a handful of unvaccinated Plaintiffs.

The Government also maintains that Plaintiffs could not be deployed to countries that require vaccination at a time when countries across the globe are dropping COVID-19 restrictions at a rapid pace. Any such restrictions would be subject to a Status of Forces Agreement; those agreements are negotiated and renegotiated as conditions change. *See*, *generally*, U.S. Dep't of State, International Security Advisory Board, Report on Status of Forces Agreements (Jan. 16, 2015), https://tinyurl.com/2ptcs32m. Those agreements cover a variety of regulatory requirements such as "special entry and exit arrangements." *Id.* at 20. The United States could ensure religious protections for the servicemembers it deploys. *Id.* at 8 ("The United States has leverage in SOFA negotiations, and should be prepared to use it.").

Not surprisingly, the Government scoffs at other mitigation and less restrictive measures suggested by Plaintiffs below. That includes, without limitation, COVID-19 testing, temperature checks, accepting demonstrations of natural immunity,

transfers to positions that telework, assignments to units that do not deploy, or, as a last resort, honorably discharging religious believers and waiving service commitments. [Ver. Compl., Doc.1 at ¶58, PageID#14-15]. Perhaps this is all simply further proof of the Government's demonstrated hostility towards Plaintiffs' sincerely held religious beliefs.

Before the rollout of vaccines, the mitigation measures were used successfully throughout the pandemic by ***these Appellants*** as they carried on their normal military responsibilities. Now, during a time when, admittedly, vaccine effectiveness is waning (the reason booster shots are now universally recommended by the CDC, yet not required by the Government), such measures should not be foreclosed and would certainly be a less restrictive means of reducing transmission of COVID-19 than requiring Plaintiffs, most of whom have natural immunity, to violate their deeply held beliefs. "[S]o long as the government can achieve its interests in a manner that does not burden religion, **it must do so**." *Fulton*, 141 S. Ct. at 1881 (emphasis added).

The Government also fails to explain how its rejection of natural immunity as a substitute for the COVID vaccination squares with its acceptance of the Johnson & Johnson vaccine, which during clinical trials – before the rise of the Delta and

Omicron variants – proved only 66.3% effective in preventing infection.[14] The J&J shot now produces "virtually no antibody protection against the omicron coronavirus variant."[15] The Government fails to explain why the **ineffective** Johnson & Johnson vaccine still fulfills the Vaccine Mandate, while natural immunity does not.

Finally, the Government's fallback argument that discrimination against religious exercise is permitted in the military – or at least accorded a more deferential First Amendment review than strict scrutiny – is meritless. Contrary to its unsupported assertion, multiple courts have applied strict First Amendment scrutiny to military regulations and actions that burden the free exercise of religion – including this Court. *See*, *e.g.*, *Hartmann v. Stone*, 68 F.3d 973, 978–79 (6th Cir. 1995) (applying *Lukumi* standard without deference to Army regulation); *accord Singh*, 109 F.Supp.3d at 89 (same); *Adair*, 183 F. Supp. 2d at 53 (same). These decisions align with the Supreme Court's categorically clear instruction that "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993).

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[14] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/janssen.html (last accessed 9/18/2022).

[15] *Lui, et al. Striking Antibody Evasion Manifested by the Omicron Varient of SARS-CoV-2* bioRxiv (Dec. 21, 2021) https://www.biorxiv.org/content/10.1101/2021.12.14.472719v1.full.pdf (last accessed 9/18/2022).

II. Plaintiffs Demonstrated Irreparable Injury, That the Balance of Harms Tilts in Their Favor, and That the Public Interest is Served by the Entry of Injunctive Relief

A. Plaintiffs Face Irreparable Harm

Once again, the Government falsely claims there is no irreparable harm from enforcing its Vaccine Mandate. But there is never an adequate remedy at law for even a brief deprivation of religious liberty rights. This Court has been clear that violations of First Amendment and RFRA rights satisfy the irreparable harm requirement. *Maryville Baptist Church, Inc.*, 957 F.3d 610, 615-616 (finding restriction that burdened religion "assuredly inflicts irreparable harm"); *Dahl*, 15 F.4th 728, 735 (deprivation of First Amendment free exercise rights is an irreparable injury); *Autocam Corp. v. Sebelius*, 2012 U.S. App. LEXIS 26736 (6th Cir. 2012) (same); *Sebelius*, 2013 U.S. App. LEXIS 25936 (same); *Roberts*, 958 F.3d 409, 416 (the restriction "assuredly inflicts irreparable harm by prohibiting them from worshiping how they wish").

The Supreme Court recently echoed this in the context of religious liberty, finding that burdens on Free Exercise rights "for even minimal periods of time" constitute irreparable harm. *Tandon*, 141 S. Ct. 1294, 1297; *Elrod*, 427 U.S. 347, 373 (irreparable harm from violation of rights). U.S. Supreme Court precedent supports a finding of irreparable harm where RFRA has been violated. *Holt*, 574

U.S. 352; *Burwell*, 573 U.S. 682; *Gonzales*, 546 U.S. 418; *Ramirez v. Collier*, 142 S. Ct. 1264 (2022).

The Government argues that *Maryville* (and perhaps *Dahl* as well) are distinguishable, because they involve state, rather than federal violations of RFRA and the First Amendment. But no case law supports the illogical exception the Government argues, namely that there is no irreparable injury when it is the federal government, rather than a state entity, violating RFRA and the First Amendment. In fact, cases support the opposite conclusion. *See, e.g. Burwell*, 573 U.S. 682.

Other Circuits are in accord. *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) (citing *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("[C]ourts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA."); *accord DeOtte v. Azar*, 393 F. Supp.3d 490, 511 (N.D. Tex. 2019).

The Vaccine Mandate causes irreparable harm because of its coercive effect, which forces a "crisis of conscience" that is itself a harm for the religious objector. As Judge Ho said, "it is a quintessentially irreparable injury, warranting preliminary injunctive relief." *Sambrano v. United Airlines, Inc.*, 19 F.4th 839, 841 (5th Cir. 2021) (Ho, J., dissenting from denial of injunction pending appeal). "It is difficult to imagine how a crisis of conscience, whether instigated by government or industry, could be remedied by an award of monetary damages." *Id.*

The Government argues that the harm here is not irreparable because the Plaintiffs can undergo a process with a foregone conclusion: separation. Of course, this is not the usual employment case where damages can be obtained after the fact, while the member is sitting in Leavenworth prison. That is because the Government is likely immune from liability for damages normally compensable in litigation, particularly in the context of the military. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021); *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers); *Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929); *Feres v. United States*, 340 US 135 (1950).

The DAF is engaged in eradication of sincere religious believers in its ranks through coercive tactics and punitive means, all in contravention of RFRA and the First Amendment. Plaintiffs have established irreparable harm.

B. The Equities and Public Interest Warrant the Issuance of Relief

As Plaintiffs already noted, the factors of equities and public interest usually collapse when we deal with the Government's violation of statutory and constitutional law. *Maryville Baptist Church, Inc.*, 957 F.3d 610, 615-616; *Dahl*, 15 F.4th 728, 735; *Nken v. Holder*, 556 U.S. 418, 435 (2009) ("These factors merge when the Government is the opposing party"). This Court has been clear there can be no harm to others as a result of granting an exception for religious liberty when

the Government already allows secular exceptions to its policy, and those secular exceptions impose similar claimed risks. *Roberts*, 958 F.3d 409, 416.

But even more, and cutting against harm to others (and harm the Government alleges it will suffer without continuing to discriminate on the basis of religious belief) is the fact that: 1) the DAF successfully operated without its Vaccine Mandate for over a year and a half into the pandemic, including for eight months after a vaccine was available; 2) the DAF has already achieved an over 98% vaccination rate, belying any claims that granting a religious exemption to a tiny minority of service members could harm its mission when it has already accommodated thousands of medical and administrative exemptions; and 3) other mitigation measures exist, that were previously implemented by the DAF prior to the existence of any vaccine without any disruption of any DAF mission. All of this rebuts any argument of harm to others. As for the final factor, the public interest, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1999).

For months, the Government stayed enforcement of its unconstitutional mandate to permit service members to go through the Potemkin exercise of seeking never-to-be-granted religious exemptions. Consequently, if the Vaccine Mandate is such that 100% compliance must be achieved immediately for critical military objectives, why wouldn't the Government simply announce there would be no

religious, medical, or administrative exemptions rather than staying enforcement to process illusory efforts at never-to-be-granted religious exemptions?

CONCLUSION

The District Court carefully analyzed the facts, correctly applied the law, and appropriately entered injunctive relief for these Plaintiffs to keep their own Government from persecuting and prosecuting them for their sincerely held religious beliefs. Its decision should be affirmed.

Respectfully submitted,

/s/Christopher Wiest

Christopher Wiest (OH 77931)
Chris Wiest, Atty at Law, PLLC
25 Town Center Blvd, Suite 104
Crestview Hills, KY 41017
Tel: 513/257-1895
chris@cwiestlaw.com

Thomas B. Bruns (OH 51212)
Bruns Connell Vollmar & Armstrong
4555 Lake Forrest Drive, Suite 330
Cincinnati, Ohio 45241
Tel.: 513/312-9890
tbruns@bcvalaw.com

Aaron Siri
Elizabeth A. Brehm
Wendy Cox
Siri and Glimstad LLP
745 Fifth Avenue, Suite 500
New York, NY 10151
Tel: 212/532-1091
wcox@sirillp.com
Counsel for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

I have served the foregoing upon the Defendants/Appellees, by electronic mail to their counsel, and through service of this Brief via CM/ECF, this 22nd day of September, 2022.

/s/Christopher Wiest
Christopher Wiest (OH 77931)

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(g) and 6th Cir. R. 32(a), I certify that this Brief contains 12,962 words. This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Times New Roman font using Microsoft Word.

/s/ Christopher Wiest
Christopher Wiest (OH 77931)

APPENDIX -- DESIGNATION OF THE DISTRICT COURT RECORD

Plaintiffs/Appellees, pursuant to Sixth Circuit Rule 30(g), designate the following filings from the district court's electronic record:

Document ID	Date	Description	Page ID
1	2/16/22	Verified Complaint	1-22
11, 11-1	2/17/22	Verified Appendix materials and certification	324-327
11-2	2/17/22	Verified Appendix materials – SECAF Vaccination Mandate	328-329
11-3 through 11-21	2/17/22	Verified Appendix materials	331-573
13	2/22/22	Motion for TRO and Preliminary Injunction	578-599
13-1	2/22/22	Declaration of Hunter Doster	600
13-2	2/22/22	Declaration of Colonel Jason Holbrook	601-603
13-4	2/22/22	Declaration of Peter McCullough, MD	625-809
19-1	2/28/22	Declaration of Hunter Doster	943-947
25-8	3/8/22	SECAF 12/7/21 Memoranda	1130-1135
25-12	3/8/22	Declaration of Col. Artemio Chapa	1394-1403
25-14	3/8/22	Declaration of Elizabeth Hernandez	1414-1420
25-17	3/8/22	Declaration of Col. James Poel	1429-1450
30	3/16/22	Reply to Response to TRO and Preliminary Injunction	2038-2081
30-2	3/16/22	Declaration with Transcript of hearing and DOJ admission in *Poffenbarger v. Kendall* attached.	2084-2090
30-3 through 30-20	3/16/22	Declarations of Plaintiffs in support of TRO and Preliminary Injunction	2091-2149
33-1 through 33-6	3/23/22	Notice of Filing Administrative Materials for Mosher, Stapanon, and McCormick	2159-2193
36-1 through 36-7	3/23/22	Notice of Filing Additional Administrative Materials for Colantanio, Dills, Doster, Mosher, Reineke, Schuldes, Theriault	2326-2627

45	3/30/22	Transcript of 3/25/22 Hearing with testimony of LTC Stapanon transcribed	3064-3101
46-1	3/30/22	Fourth Declaration of Hunter Doster	3121-3124
46-3	3/30/22	Religious Accommodation Denial Comparisons	3152-3161
46-4	3/30/22	Religious Accommodation Denial Comparisons	3162-3164
47	3/31/22	Preliminary Injunction Order	3165-3205
48	4/6/22	Transcript of remainder of 3/25/22 Hearing with testimony transcribed	3206-3348
53-1	5/3/22	Declaration of Andrea Corvi	3762-3789
59-1	5/11/22	Declaration of Wendy Cox	4241-4242
72	7/15/22	Order (including class certification)	4448-4469
74-1	7/25/22	Declaration W. Cox	4519-4526
74-2	7/25/22	Declaration C. Wiest	4527
77	7/27/22	Order on Class Preliminary Injunction	4538-4541
85-1	8/18/22	Deposition Testimony of Adm. Lescher in Navy case demonstrating lack of personal knowledge of Government affiants	4666-4969
85-3	8/18/22	Declaration of P. Pottinger	4996-4998
86	8/19/22	Order modifying class definition, modifying preliminary injunction, denying stay	5007-5014
91-1	9/14/22	Inspector General Report	5042-5045