No. 22-3702

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

BRIEF FOR APPELLANTS

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

KENNETH L. PARKER
United States Attorney

CHARLES W. SCARBOROUGH
LOWELL V. STURGILL JR.
CASEN B. ROSS
DANIEL WINIK
ANNA O. MOHAN
SARAH J. CLARK
Attorneys, Appellate Staff
U.S. Department of Justice, Civil Division
950 Pennsylvania Avenue, NW, Room 7270
Washington, DC 20530
202.514.1923

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STATEMENT REGARDING ORAL ARGUMENT

The Court has calendared this appeal for oral argument on October 19, 2022.

INTRODUCTION

The Air Force has long imposed requirements designed to ensure service members' readiness to serve, including requiring that they be vaccinated against numerous illnesses. In 2021, the Air Force added COVID-19 vaccination to those requirements, after concluding that the vaccine is critical to operational success and ensuring service members remain fit to deploy and train. The named plaintiffs—18 service members in the Air Force and Air Force Reserve—challenged this requirement on behalf of themselves and a putative class, asserting that the Air Force's "blanket" denial of religious exemptions is rooted in a discriminatory policy that violates the Religious Freedom Restoration Act (RFRA) and the First Amendment.

Plaintiffs failed, however, to carry their burden of presenting "[s]ignificant proof" that the Air Force "operated under a general policy of discrimination" in its handling of religious exemption requests. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 353 (2011) (alteration in original) (quotations omitted). Plaintiffs' evidence, boiled down, is that the Air Force has granted only a very small fraction of such requests. But that does not mean the Air Force denies those requests on a "blanket" basis. It simply reflects the Air Force's overwhelming interest in maintaining a worldwide-deployable force such that, when the Air Force considers individual exemption requests, it will nearly always conclude that vaccination is the least restrictive means of advancing compelling military interests. *See Austin v. U.S. Navy SEALs 1-26*, 142 S. Ct. 1301, 1302

(2022) (Kavanaugh, J., concurring). Air Force officials have explained as much in many sworn declarations.

Even if plaintiffs' "blanket policy" claim were supported by the facts, it would not be a proper basis for relief under RFRA or the First Amendment. The First Amendment would not prevent the Air Force from denying all requests for religious exemptions from the COVID-19 vaccination requirement; it would prevent the Air Force from discriminating between exemption requests on religious and secular grounds. But the fact that the Air Force grants religious exemptions less frequently than medical exemptions does not establish such discrimination—medical exemptions are granted to ensure service members' fitness, and are temporary. To the extent administrative exemptions are comparable, the Air Force has granted religious accommodations for comparable situations. The Air Force is no more willing to tolerate long-term non-deployability based on vaccination status for secular than for religious reasons.

Nor does RFRA forbid the sort of policy that plaintiffs allege. Unlike claims under the Administrative Procedure Act, RFRA claims do not provide judicial review of the process an agency uses to determine whether to grant religious exemptions; indeed, RFRA does not create any right to an administrative exemption process at all. Rather, when a government policy substantially burdens the exercise of sincerely held religious beliefs, RFRA establishes a right to a de novo *judicial* determination whether the policy, as applied to a specific individual, is the least restrictive means of advancing

a compelling government interest. The quality of an agency's prior decisionmaking is not relevant to that determination.

Aside from the unsupported "blanket policy" allegations, which fail for the reasons discussed above, plaintiffs' claims are inappropriate for resolution on a class-wide basis. As courts routinely recognize, the question whether a government policy is the least restrictive means of advancing a compelling interest is highly individualized and fact-specific. As to any given member of the Air Force, for example, the analysis would require consideration of the member's specific role and responsibilities. Thus, in denying the government's motion for a stay pending appeal, the motions panel properly recognized that such "individualized analysis[] … could not be conducted" on a "class-wide" basis. *Doster v. Kendall*, No. 22-3702, 2022 WL 4115768, at *4 (6th Cir. Sept. 9, 2022).

Finally, even if plaintiffs' "blanket policy" claim were factually supported, and even if a class could properly be certified to adjudicate that claim, the motions panel correctly noted that such a claim would not justify the relief the district court entered. As the motions panel explained, any appropriate relief on that claim would not require the Air Force to grant religious exemptions to the class; rather, it would "leave open the possibility for the" Air Force to "establish a need to apply the vaccine mandate to individual service members" without reliance on the purported policy of blanket denials. *Doster*, 2022 WL 4115768, at *5. At a minimum then, the district court's class-wide

preliminary injunction should be vacated and this case remanded for the entry of appropriately tailored relief.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331, among other statutes. *See* Compl., R. 1, PageID# 6. On July 14, 2022, the district court certified a class including all Air Force service members who have requested a religious exemption from the COVID-19 vaccination requirement and issued a class-wide temporary restraining order barring the Air Force from taking any adverse action against class members based on their exemption requests. Order, R. 72, PageID# 4448-69. On July 27, the district court issued a class-wide preliminary injunction with a similar scope of relief. Order, R. 77, PageID# 4538-41. The Air Force filed a timely notice of appeal on August 15. Notice of Appeal, R. 82, PageID# 4566; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction to review the preliminary injunction under 28 U.S.C. § 1292(a)(1). And because that injunction is "inextricably intertwined" with the class-certification ruling, this Court has jurisdiction to consider the propriety of class certification. *See Melendres v. Arpaio*, 695 F.3d 990, 999 (9th Cir. 2012); *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 492 (7th Cir. 2012).

STATEMENT OF THE ISSUE

Whether the district court abused its discretion by granting a class-wide preliminary injunction barring application of the Air Force's COVID-19 vaccination requirement to all service members in the Air Force and Air Force reserves (among others) who have requested a religious exemption from that requirement.

STATEMENT OF THE CASE

A. Military Immunization and COVID-19

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

To "maximize the lethality and readiness," the Department of Defense (DoD) has long required all service members to be deployable, including complying with the military's immunization requirements. DoD Instruction (DoDI) 1332.45, R. 34-5, PageID# 2276. And service members who are non-deployable for more than twelve consecutive months—for any reason, even based on a medical exemption—are evaluated for retention in military service. *Id.*; *see also id.*, PageID# 2278-79, 2292. The military's current immunization program is governed by Department of Defense (DoD)

Instruction 6205.02 (DoDI 6205.02). As of early 2021, nine vaccines, including the annual influenza vaccine, were required for all service members, and eight others were required when certain elevated risk factors were present, such as deployment to certain parts of the world. *See* Air Force Instruction 48-110_IP (AFI 48-110_IP), Table D-1, R. 27-6, PageID# 1624.DoD generally aligns its immunization requirements and eligibility determinations for service members with recommendations from the Centers for Disease Control & Prevention (CDC) Advisory Committee on Immunization Practices. DoDI 6205.02, R. 27-5, PageID# 1570. As directed by DoD, the military services have each issued regulatory guidance for the administration of vaccines, including processes to seek medical and religious exemptions. *See* AFI 48-110_IP, R. 27-6, PageID# 1601.

2. In July 2021, the United States began to experience "a rapid and alarming rise in … COVID-19 case[s] and hospitalization rates" driven by the Delta variant of SARS-CoV-2, the virus that causes COVID-19. *See* CDC, *Delta Variant: What We Know About the Science*, https://perma.cc/4RW6-7SGB. More recently, the highly transmissible Omicron variant caused a steep rise in cases and a surge in hospitalizations. *See* CDC, *Variants of the Virus*, https://go.usa.gov/xSNTf (last updated Aug. 11, 2022). More than 95 million Americans have been infected and over one million have died from COVID-19. CDC, *COVID Data Tracker*, https://go.usa.gov/xSNTH (last visited Sept. 22, 2022).

The military has not been exempt from those sobering figures. As of March 1, 2022, nearly 400,000 service members had been infected and 94 had died of COVID-

19. Stanley Decl., R. 27-11, PageID# 1912. Of those 94 service members, just two had received both doses of a primary series of an mRNA vaccine; three had received only a single such dose, and the remaining 89 were unvaccinated. *Id.* Moreover, many "otherwise healthy Service members have developed 'long-haul' COVID-19, potentially impacting their long-term ability to perform their missions." Rans Decl., R. 27-10, PageID# 1879.

On August 9, 2021, the Secretary of Defense, noting the adverse effects COVID-19 has had on military readiness, announced that he would add the COVID-19 vaccine to the list of vaccines required for all service members no later than mid-September. *See* Sec'y Def. Mem., R. 27-2, PageID# 1559. On August 24, 2021, the day after the Food and Drug Administration (FDA) announced its approval of a biologics license for the Pfizer -BioNTech COVID-19 vaccine, *see* Marks Decl., R. 27-9, PageID# 1665-67, the Secretary directed the secretaries of the military departments (the Army, Navy, and Air Force) to require all members of the armed forces under DoD authority to be fully vaccinated. *See* Sec'y Def. Mem., R. 27-3, PageID# 1561.

3.a. The Secretary of the Air Force subsequently directed active-duty service members to be fully vaccinated by November 2, 2021, and reservists to be fully vaccinated by December 2, 2021. Sec'y Air Force Mem., R. 27-7, PageID# 1632.

As with other vaccination requirements, DoD and Air Force guidance establishes processes for seeking medical, administrative, and religious exemptions from the COVID-19 vaccination requirement. *See* Chapa Decl., R. 27-12, PageID# 1921-25;

Streett Decl., R. 27-13, PageID# 1931-32; Little Decl., R. 27-16, PageID# 1953-54. Air Force service members must comply with the COVID-19 vaccination requirement to be deployable, and any service member who is not deployable for more than twelve consecutive months because he is not vaccinated against COVID-19—for any reason, including for a medical exemption (other than for pregnancy-related reasons, which are limited to the term of pregnancy and the post-partum period)—will be evaluated to determine whether he should be retained or discharged. *See* DoDI 1332.45, R. 34-5, PageID# 2276, 2278, 2292.

Air Force service members may seek a temporary medical exemption if, for example, they currently have COVID-19, are pregnant, or are allergic to an ingredient in available vaccines. Chapa Decl., R. 27-12, PageID# 1922-23. The Air Force has granted only temporary medical exemptions from the COVID-19 vaccination requirement; the specific duration depends on the underlying reason for the exemption. *See id.* As of September 7, 541 service members were temporarily exempt from the vaccination requirement for medical reasons. Air Force, *DAF COVID-19 Statistics – Sept. 7, 2022*, https://perma.cc/R7AH-7VG7. Once a medical exemption expires, the member must become vaccinated, unless another exemption is granted. Chapa Decl., R. 27-12, PageID# 1926.

Air Force service members may seek an administrative exemption from the COVID-19 vaccination requirement if they are on terminal leave (*i.e.*, they are no longer coming into their workspace and are taking leave until the date they retire or separate

from service), or if they are otherwise retiring or separating (*i.e.*, leaving military service) within a specified period (*e.g.*, within 5 months for active-duty service members). *See* Little Decl., R. 27-16, PageID# 1953-54; *see also* Long Decl., R. 27-24, PageID# 2029-30. In those special contexts, the Air Force has determined that vaccination is not necessary for military readiness and mission accomplishment because those service members "are no longer anticipated to return to duty." *Id.*, PageID# 1954. As of September 7, 53 active-duty and reservist service members had an administrative exemption. Air Force, *DAF COVID-19 Statistics – Sept. 7, 2022*, https://perma.cc/R7AH-7VG7.[1]

An Air Force service member may seek a religious exemption by submitting a written request, *see* Streett Decl., R. 27-13, PageID# 1932, which the military considers presumptively permanent, *see* DoDI 1300.17, *Religious Liberty in the Military Services* ¶ 3.2(g), https://perma.cc/5NLG-SL2G. The service member then consults with a chaplain, his commander, and a military medical provider, who all "provide written memoranda … to include in the request package." *Id.*, PageID# 1934-35. The package is "routed through each commander in the chain of command," each of whom provides an endorsement with a recommendation to approve or disapprove the request. *Id.*, PageID# 1936. Each endorsement must address whether there is a compelling

[1] The Air Force's vaccination statistics note that over 600 administrative exemptions have been granted to members of the National Guard. Most of these exemptions simply account for individuals who have left the active service in the National Guard. *See* Bradley Decl., R. 83-4, PageID# 4639.

government interest in vaccination; any effect an accommodation will have on readiness, unit cohesion, good order and discipline, health, safety, or the member's duties; and whether "less restrictive means can be used to meet the government's compelling government interest." Streett Decl., R. 27-13, PageID# 1936 (quoting U.S. Dep't of Air Force, Instruction 52-201, *Religious Freedom in the Department of the Air Force* ¶ 6.6.1.5 (June 23, 2021) (DAFI 52-201)). A multidisciplinary Religious Resolution Team then reviews the package and provides a written recommendation, and a legal review of the package is conducted. *Id.*, PageID# 1933-36.

The approval authority—the service member's commander, Streett Decl., R. 27-13, PageID# 1932—then assesses each request individually to determine "(1) if there is a sincerely held religious … belief, (2) if the vaccination requirement substantially burdens the applicant's religious exercise based upon a sincerely held religious belief, and if so, (3) whether there is a compelling government interest in requiring that specific requestor to be vaccinated, and (4) whether there are less restrictive means in furthering that compelling government interest." *Id.*, PageID# 1933, 1936-37. If the approval authority denies the request, the service member may appeal to the Air Force Surgeon General, who is advised by another Religious Resolution Team and renders a decision on the request, taking into account the same criteria. *See* Streett Decl., R. 27-13, PageID# 1932-33, 1937-38. A service member is temporarily exempted from the requirement while his or her religious-accommodation request is pending, including during any appeal from the denial of that request. *See id.*, PageID# 1937-38.

As of July 12, 2022, the Air Force had approved 135 requests for religious exemptions from the COVID-19 vaccination requirement, including 31 exemptions approved on appeal after initially being denied. *See* Air Force, *DAF COVID-19 Statistics – July 2022* (July 12, 2022), https://go.usa.gov/xSXwJ.

b. If a medical, religious, or administrative exemption request is denied and the service member refuses to take the COVID-19 vaccine, commanders may take a variety of administrative and disciplinary actions. *See* Hernandez Decl., R. 27-14, PageID# 1941-45. A high-ranking official must review the case before any administrative or disciplinary action may be taken based on refusal to be vaccinated against COVID-19. *See id.*, PageID# 1941. Active-duty service members who refuse to comply with the COVID-19 vaccination requirement may be subject to administrative discharge proceedings. *See id.*, PageID# 1943. And members of the Air Force Reserve who refuse to comply will be involuntarily reassigned to the Individual Ready Reserve. Heyen Decl., R. 27-18, PageID# 1978-80.

B. Procedural History

1. Plaintiffs—18 active-duty and active-reservist members of the Air Force—filed this putative class action in February 2022. *See* Compl., R. 1, PageID# 1. Plaintiffs asserted that the Air Force's failure to grant their requests for religious exemptions from its COVID-19 vaccination requirement violates RFRA and the Free Exercise Clause of the First Amendment, *see id.*, PageID# 17-18.

Shortly thereafter, plaintiffs sought preliminary relief requiring the Air Force to grant their religious-accommodation requests and prohibiting the Air Force from taking punitive action against them. *See* Mot., R. 13, PageID# 578; *see also* Emergency Mot. for Temporary Restraining Order as to Pl. Hunter Doster, R. 19, PageID# 940; Pls.' Resp., R. 44, PageID# 3062.

On March 31, 2022, the district court granted plaintiffs' motion, preliminarily enjoining the Air Force from "taking any disciplinary or separation measures against the [named] [p]laintiffs … for their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs." Order, R. 47, PageID# 3203. The court limited that relief to the named plaintiffs and did not enjoin the Air Force from "mak[ing] operational decisions, including deployability decisions." *Id.*, PageID# 3201. The Air Force appealed (No. 22-3497).

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

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

Order, R. 72, PageID# 4466-67.

The court concluded that plaintiffs satisfied Rule 23(a)'s commonality requirement because they "have all allegedly suffered the same injury," namely a "violation of their constitutional rights," and their claims all "involve the same common analysis"—which the district court described as whether the Air Force's denials of "substantially all religious accommodation requests by Airmen who maintain sincerely held religious beliefs further a compelling governmental interest" and whether any "such policy and practice [is] the least restrictive means to achieve compelling governmental interests, if any exist." Order, R. 72, PageID# 4454-56. The court held that the proposed class satisfied Rule 23(a)'s typicality requirement "for the exact reasons that commonality is established." *Id.*, PageID# 4457-58, 4459.

The court also found that plaintiffs' class could be certified under Rules 23(b)(1)(A) and 23(b)(2). As to Rule 23(b)(1)(A), the court expressed concern that different courts "may arrive at incompatible conclusions with respect to Airmen who seek religious exemptions from the vaccine mandate." Order, R. 72, PageID# 4464. The court stated that certification was also appropriate under Rule 23(b)(2) because "the relief the proposed class seeks is the same: a religious accommodation relating to the COVID-19 vaccine mandate," and all class members "have been harmed in 'essentially the same way.'" *Id.*, PageID# 4466.

In the same order, the court temporarily restrained defendants from enforcing the vaccination requirement against any class member through 14 days, and directed the

parties to file supplemental briefs explaining whether to grant a class-wide preliminary injunction. Order, R. 72, PageID# 4469.

3. On July 27, the district court entered a class-wide preliminary injunction in a four-page order that contained no meaningful legal analysis and discussed none of the preliminary injunction factors. Instead, the court stated that "due to the systematic nature of what the Court views as violations of Airmen's constitutional rights to practice their religions as they please, the Court is well within its bounds to extend the existing preliminary injunction to all Class Members." Order, R. 77, PageID# 4539.

At plaintiffs' urging, the district court also expanded the class to include "inductees[]" (presumably referring to prospective enlisted members); "appointees" (*i.e.*, individuals, including civilians, who are not yet officers); the National Guard; cadets; and all of the Air Force Reserve (not just the "active reserve"). Order, R. 77, PageID# 4539. The district court prohibited the Air Force from "refus[ing] to accept for commissioning or enlistment any inductee or appointee due to their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs." *Id.*, PageID# 4539-40. And the court enjoined the Air Force from "plac[ing] or continu[ing] active reservists on no points, no pay status for their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs." *Id.*, PageID# 4540. Finally, the court excluded from the mandatory class any member who "opts out, by delivering notice to the Government and Class Counsel in writing of their election to opt out." *Id.*, PageID# 4539.

4.a. The Air Force appealed and moved to stay the class-wide preliminary injunction pending appeal. In response, plaintiffs conceded that the aspects of the injunction related to the "commissioning of [new] officers" and "enlisting of new service members" needed to be withdrawn in light of the Executive's constitutionally established authority to appoint military officers and the military's exclusive power over its enlistment decisions. Opp'n, R. 85, PageID# 4654-55.

The district court denied the government's request for a stay. Order, R. 86, PageID# 5008-10. The district court modified the class definition, however, so that the injunction applied only to individuals who satisfied that definition as of the date of the class-wide injunction. *Id.*, PageID# 5011-12. And "in light of separation of powers issues and the President's unreviewable appointment power under Article II," the court "rescinded" and "withdr[ew]" the portion of the injunction that prohibited the Air Force from "refus[ing] to accept for commissioning or enlistment any inductee or appointee" who refuses a COVID-19 vaccine for religious reasons. *Id.*, PageID# 5013 (emphases omitted); *see also id.* (with respect to the National Guard, clarifying that the class-wide injunction "would not apply to any vaccine requirement that was separately imposed by any … separate state authority").

b. A motions panel of this Court then denied a stay pending appeal. *Doster v. Kendall*, No. 22-3702, 2022 WL 4115768 (6th Cir. Sept. 9, 2022). The panel determined that plaintiffs likely established commonality and typicality by alleging "a 'sys-

tematic effort' by the [Air Force] to deny service members' requests for religious exemptions categorically, while granting thousands of medical and administrative exemptions." *Id.* at *3. The panel dismissed the Air Force's response—that no such policy exists—as an issue for "the merits stage," not "the certification stage," even as it recognized that certification would not be proper absent "significant proof" that the Air Force actually maintains the alleged policy. *Id.* at *4 (quotations omitted). The panel "differ[ed] with the district court," however, as to what sort of relief could be proper if plaintiffs were to prevail on the claim alleging a systematic policy to deny religious exemption claims. *Id.* at *5. Rather than the relief the district court actually entered—an order "broadly enjoin[ing] the [Air Force] to provide a class-wide 'religious accommodation"'—the panel stated that a more "appropriate remedy" would be to "narrowly enjoin the [Air Force] to abolish the discriminatory policy, … and to enjoin any adverse action against the class members on the basis of denials of religious exemptions pursuant to that policy." *Id.*

SUMMARY OF ARGUMENT

I. The district court abused its discretion in certifying a class. That is a sufficient basis, by itself, to vacate the class-wide injunction.

A. Plaintiffs failed to satisfy the commonality and typicality requirements of Rule 23(a). The district court found those requirements established on the theory that plaintiffs are challenging a supposed "policy and practice of … denying substantially all religious accommodation requests." Order, R. 72, PageID# 4455-56. But plaintiffs

failed to supply the "'[s]ignificant proof'" of a "'policy of discrimination'" that would be required to certify a class under that theory. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 353 (2011). The fact that the Air Force has granted relatively fewer religious exemption requests than other types is no basis to conclude that the Air Force is discriminating on the basis of religion: requests for administrative exemptions are treated comparably for similarly situated individuals, and medical exemption requests are fundamentally different. Senior Air Force officers have explained in sworn declarations that the Air Force uses an individualized process to determine service members' eligibility for religious exemptions. And it is unsurprising that this individualized process would yield few approvals: the Air Force has an overwhelming interest in maintaining a force that can deploy worldwide at a moment's notice, and the Air Force has reasonably concluded that unvaccinated service members are not deployable in the manner required by its operational needs. Service members subject to an administrative or medical exemption are not deployable only temporarily.

In any event, even if plaintiffs' assertion of a de facto "policy" against approving religious exemption requests were factually supported (which it is not), it would not support relief under either RFRA or the First Amendment. The question in a RFRA proceeding is whether—as a matter to be resolved by the court de novo—a substantial burden placed by the government on the exercise of religion is the least restrictive means of advancing a compelling interest. It is irrelevant whether the government sufficiently articulated that conclusion in a prior administrative proceeding. Whether

or not the First Amendment might be violated if the Air Force were treating exemption requests on secular grounds more favorably than those on religious grounds, there is no basis for that conclusion here, where comparable administrative exemptions are treated similarly and the medical exemptions that have been granted are so dissimilar from religious exemptions. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2420 & n.5 (2018) (rejecting First Amendment challenge to national security policy, and suggesting that a military policy should be upheld "so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds").

To the extent plaintiffs seek to maintain RFRA or First Amendment claims that are not predicated on the supposed existence of a systemic discriminatory policy, the motions panel rightly recognized that those claims are highly individualized in nature, such that they cannot be litigated on a class-wide basis.

Finally, even if plaintiffs had satisfied the commonality requirement, they could not show that their claims are typical of the class's because they are susceptible to unique defenses—several plaintiffs' claims are moot because they are now fully vaccinated and many others have not received a final decision on their requested exemption.

B. Plaintiffs also failed to establish that the putative class is properly certified under any of the provisions of Rule 23(b). As the motions panel recognized, the district court did not adequately explain why plaintiffs' class could be maintained under Rule 23(b)(1)(A), which allows class treatment when "prosecuting separate actions … would

create a risk of" "inconsistent or varying adjudications … that would establish incompatible standards of conduct for the party opposing the class." It is well established that Rule 23(b)(1)(A) treatment is not proper simply because some individual plaintiffs may prevail while others may not prevail in parallel suits. And to the extent plaintiffs seek to litigate RFRA or First Amendment claims other than those based on the purported existence of a systematic policy of denying religious exemption requests, such individualized claims could not properly be maintained under Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief … is appropriate respecting the class as a whole."

II. The district court also abused its discretion in granting a class-wide preliminary injunction.

A. To the extent it is possible to litigate plaintiffs' claim that the Air Force is systematically denying religious exemption requests on a class-wide basis, the appropriate relief on such a claim would not be the sort of injunction the district court entered. Rather, as the motions panel explained, it would be a much narrower injunction requiring the Air Force to reconsider religious exemption requests without applying the supposedly discriminatory policy.

B. The injunction is equally indefensible to the extent it rests on claims not based solely on the existence of a purported policy to discriminate against religious

exception requests. Vaccination against COVID-19 serves the military's compelling interest in the health and readiness of its troops. There are no less restrictive means by which the military could achieve that compelling interest equally well. Nor did plaintiffs establish that they would be irreparably harmed in the absence of an injunction, because employment-related harms are quintessentially reparable. And the balance of harms and public-interest factors weigh decisively against the preliminary injunction, which imposes significant burdens on military readiness.

STANDARD OF REVIEW

The district court's decision to certify a class is reviewed for abuse of discretion. *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 351 (6th Cir. 2011). Applying the wrong legal standard or misapplying the correct legal standard constitutes an abuse of discretion. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 850 (6th Cir. 2013).

To obtain a preliminary injunction, plaintiffs must establish (1) a substantial likelihood of success on the merits; (2) they will suffer irreparable harm without an injunction; (3) the balance of equities tips in their favor; and (4) preliminary relief serves the public interest. *Thompson v. DeWine*, 976 F.3d 610, 615 (6th Cir. 2020) (per curiam). This Court reviews the first factor de novo and reviews the district court's balancing of the factors for abuse of discretion. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 763 (6th Cir. 2019).

ARGUMENT

I. The District Court Abused Its Discretion By Certifying A Class

The district court erred in certifying a class both because plaintiffs failed to establish the commonality and typicality requirements of Rule 23(a) and because they failed to establish that the putative class is properly certified under any of the provisions of Rule 23(b). The district court's class-certification errors are a sufficient basis to vacate the class-wide injunction even aside from the merits of the injunction.

A. Plaintiffs Failed To Satisfy Rule 23(a)'s Commonality And Typicality Requirements

As the motions panel explained, "[c]ommonality means that 'there are questions of law or fact common to the class'; typicality means that 'the claims or defenses of the representative parties are typical of the claims or defenses of the class'"; and "[i]n cases involving claims of class-wide discrimination, these two requirements 'tend to merge.'" *Doster v. Kendall*, No. 22-3702, 2022 WL 4115768, at *3 (6th Cir. Sept. 9, 2022). Here, plaintiffs established neither.

1. The district court concluded that plaintiffs had established commonality and typicality on the theory that plaintiffs are all asserting harm arising from the Air Force's purported "policy and practice of … denying substantially all religious accommodation requests." Order, R. 72, PageID# 4455-56. But class certification on that theory would need to be supported by "'[s]ignificant proof'" that the Air Force actually

"'operated under a general policy of discrimination,'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 353 (2011). Plaintiffs supplied no such proof.

The sole basis plaintiffs offered for their "systemic discriminatory policy" allegation is that the Air Force has granted a very small proportion of requests for a religious exemption, while granting a higher number of requests for administrative and medical exemptions. Pls.' Class Cert. Mot., R. 21, PageID# 957; *see also* Pls.' Resp., R. 74, PageID# 4508 (providing no additional evidence of discrimination). But that evidence—statistics and various anecdotes—is indistinguishable from the evidence the Supreme Court held "does not suffice" to establish commonality. *Wal-Mart*, 564 U.S. at 357-58. And that evidence provides no basis to conclude that the Air Force is operating under a policy of denying all religious exemption claims—much less a policy that discriminates against religious exemption claims relative to claims for an exemption from the COVID-19 vaccination requirement on secular grounds.

First, the Air Force has already granted more than 100 religious exemptions. Air Force, *DAF COVID-19 Statistics – July 2022* (July 12, 2022), https://go.usa.gov/xSXwJ. By itself, that provides a sufficient basis to reject plaintiffs' assertion of a blanket policy of denying such requests.

Second, the fact that the Air Force has overwhelmingly denied religious exemption requests is consistent with what senior Air Force officials have described as an individualized process that accounts for facts particular to each service member. *See* Streett Decl., R. 27-13, PageID# 1932-34; Bannister Decl., R. 34-2, PageID# 2233-39. The

Air Force has an overwhelming interest in maintaining a force that can deploy worldwide on very short notice. *See, e.g.*, Heaslip Decl., R. 27-19, PageID# 1987; Wren Decl., R. 27-20, PageID# 1995-96; Harmer Decl., R. 27-21, PageID# 2004-05. And the Air Force has concluded that unvaccinated service members are not deployable in the manner required by the Air Force's operational needs. *See* U.S. Dep't of Air Force, Air Force Instruction 10-250, *Individual Medical Readiness*, ¶ 2.1 (July 22, 2020), https://go.usa.gov/xSY4v (listing, among "[i]ndividual medical readiness requirements" for deployment, that service members must "complete all required immunizations"); *see also* Stanley Decl., R. 27-11, PageID# 1915 (explaining that various partner nations may require vaccination for entry). It is therefore unsurprising that, in most instances, the Air Force has found no way of advancing that compelling interest short of requiring individual service members to become vaccinated. *See, e.g.*, Schneider Decl., R. 73-1, PageID# 4489.

Third, the fact that the Air Force has granted medical and administrative exemptions more frequently than religious exemptions is no basis to conclude that the Air Force has a policy of discriminating against religious exemption requests because the various types of exemptions are fundamentally different. Whereas religious exemptions are presumptively permanent (barring a change in the service member's religious views) *see* DoDI 1300.17, *Religious Liberty in the Military Services* ¶ 3.2(g), https://perma.cc/5NLG-SL2G; medical and administrative exemptions are temporary. Medical exemptions are typically granted only to service members who currently have

COVID-19, are pregnant, or have a contraindication (*e.g.*, unresolved myocarditis, allergic reaction). Chapa Decl., R. 27-12, PageID# 1922-23. The exemption lasts only as long as the underlying medical reason for the exemption, with "the majority of medical conditions" being "temporary in nature." *Id.*, PageID# 1925. And service members with chronic medical conditions must still meet the military's deployment requirements; service members who are non-deployable for more than twelve consecutive months will be evaluated for retention in military service. DoDI 1332.45, R. 34-5, PageID# 2276, 2278-79, 2292. Moreover, requiring a service member with a contraindication to a vaccine to receive the vaccine undermines the government's interest in protecting the health and readiness of that member. And administrative exemptions are generally granted only to service members who are on terminal leave, separating, or retiring, in instances in which the service member is "no longer anticipated to return to duty." Little Decl., R. 27-16, PageID# 1954; *see also* Long Decl., R. 27-24, PageID# 2029.[2]

Medical and administrative exemptions thus do not undermine the Air Force's interest in maintaining a worldwide-deployable force to nearly the same degree as permanent religious exemptions. Many of the underlying medical conditions warranting a

[2] As noted *supra* p. 9 n.1, over 600 administrative exemptions have been granted to members of the National Guard, generally for those who have already left active service. *See* Bradley Decl., R. 83-4, PageID# 4639.

medical exemption would separately make the member non-deployable until the medical issue is resolved (*e.g.*, pregnancy). And service members with chronic medical issues (*e.g.*, allergy to a vaccine) will be evaluated for potential discharge if they are non-deployable for more than twelve consecutive months. As one district court adjudicating a RFRA challenge to a military COVID-19 vaccination requirement explained, military medical exemptions are "not a sign of … discriminatory treatment, but rather is simply a reflection of what is feasible while still maintaining the government's interest." *Short v. Berger*, No. 22-cv-1151, 2022 WL 1051852, at *8 (C.D. Cal. Mar. 3, 2022); *see also Navy SEAL 1 v. Austin*, No. 22-cv-688, 2022 WL 1294486, at *12 (D.D.C. Apr. 29, 2022) (similar).

There are also more general problems with establishing a policy of discrimination, even at the class-certification stage, on the sole basis of statistical and anecdotal evidence. In *Wal-Mart v. Dukes*, the plaintiffs provided sophisticated regression analyses that ostensibly identified "statistically significant disparities" in promotions awarded to women as compared to men, which plaintiffs' experts concluded could "be explained only by gender discrimination." 564 U.S. at 356 (quotations omitted). But the Supreme Court explained that those statistics were "insufficient" to establish class-wide gender discrimination across Wal-Mart's stores, because statistical "disparities" did not "raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level." *Id.* at 356-57 (quotations omitted); *see also id.* at 353-54 (rejecting evidence from plaintiffs' sociological expert, who could not

"determine with any specificity" how discriminatory stereotypes played a "meaningful role in employment decisions"); *Davis v. Cintas Corp.*, 717 F.3d 476, 488 (6th Cir. 2013) ("[S]tatistical evidence, sociological analysis, and anecdotal accounts did not satisfy Rule 23(a)(2)."); *In re Countrywide Fin. Corp. Mortg. Lending Practices Litig.*, 708 F.3d 704, 709 (6th Cir. 2013) ("[S]tatistical correlation, no matter how robust, cannot substitute for a specific finding of class-action commonality.").

The Supreme Court in *Wal-Mart* held that commonality could not be established by relying on the sort of limited anecdotal evidence plaintiffs offer here. Plaintiffs' declarations assert that the Air Force's enforcement of the vaccination requirement discriminates against religion based on a handful of accounts from only a few locations (in most cases, a single Air Force Base in Ohio). But plaintiffs provide no account of the Air Force's operations at more than 200 bases around the world. As in *Wal-Mart*, plaintiffs' anecdotal evidence is "is too weak to raise any inference that all the [Air Force's] individual, discretionary personnel decisions are discriminatory." *Wal-Mart*, 564 U.S. at 358. Even assuming "every single one of [plaintiffs'] accounts" is true, that would not demonstrate that the Air Force "operates under a general policy of discrimination." *Id.* (quotations omitted).

Finally, even if plaintiffs' statistics had any bearing on whether the Air Force has a systematic policy of denying religious exemption requests, they could not reasonably outweigh the contrary evidence. A three-star Air Force general expressly disavowed the existence of any "blanket policy of denying religious accommodation requests."

Schneider Decl., R. 73-1, PageID# 4497; *see also* Streett Decl., R. 27-13, PageID# 1936-37; Bannister Decl., R. 34-2, PageID# 2235-37; *cf. Wal-Mart*, 564 U.S. at 353 ("Wal-Mart's announced policy forbids sex discrimination."). To accept plaintiffs' negative characterization of the Air Force's process would require a finding that various sworn declarations were submitted in bad faith. No evidence supports that conclusion. *Cf. Latif v. Obama*, 677 F.3d 1175, 1178 (D.C. Cir. 2011) ("[C]ourts presume that [military officials] have properly discharged their official duties." (quotations omitted)). To the contrary, the Air Force has granted more than 100 religious exemptions.

2. Moreover, even if plaintiffs had provided "'[s]ignificant proof'" that the Air Force actually "'operated under a general policy of discrimination'" in reviewing religious exemption requests, *Wal-Mart*, 564 U.S. at 353, that would not provide a basis for relief under either RFRA or the First Amendment, and it accordingly could not support certification of a class to pursue those claims.

a. In holding that a policy of denying religious exemption requests would constitute a RFRA violation, the district court fundamentally misunderstood the nature of a RFRA claim. RFRA does not provide a cause of action for judicial review of an agency's generally applicable policy on the ground that it burdens a claimant's religious exercise. Instead, the question in a RFRA proceeding is whether—as a de novo matter, to be resolved by a court—the *application* of a particular policy *to the claimant* is the least restrictive means of advancing a compelling government interest. It is irrelevant whether the government sufficiently articulated that conclusion in a prior administrative

proceeding, which is why the record for a RFRA claim is not limited to the administrative record before the agency. *See, e.g.*, *National Capital Presbytery v. Mayorkas*, 567 F. Supp. 3d 230, 247 (D.D.C. 2021) ("RFRA review is not limited to an administrative record."); *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928, 942 n.6 (N.D. Tex. 2019) (similar and collecting authorities).

Indeed, it is routine—and wholly appropriate—for the government not to create *any* administrative process for allowing exemptions on religious grounds from generally applicable requirements. Because RFRA does not require any specific administrative process, the statute provides no cause of action for a court to pass judgment on an agency's decision-making process. The Internal Revenue Service does not, for example, have an administrative process to consider claims that paying income taxes substantially burdens a particular taxpayer's religious exercise. Anyone who contends that RFRA entitles him to not pay taxes is free to bring suit under RFRA to challenge those requirements in federal court. *See, e.g.*, *Adams v. Commissioner*, 170 F.3d 173, 175, 177, 179 (3d Cir. 1999) (rejecting taxpayer's RFRA challenge to paying income taxes brought directly in federal court). But the lack of an administrative exemption process would itself have no bearing on the court's RFRA analysis. Rather, the court would make a de novo determination whether—to the extent the policy in question substantially burdens the plaintiff's exercise of sincerely held religious beliefs—it is the least restrictive means of advancing a compelling government interest. And the Air Force has made those specific showings in individual cases throughout the country, explaining why denying

an individual plaintiff's religious exemption request would not violate RFRA or the First Amendment. *See, e.g.*, *Roth v. Austin*, No. 8:22-cv-3038, 2022 WL 1568830, at *13-15 (D. Neb. May 18, 2022) (finding that the Air Force "made individualized determinations … of granting specific exemptions to particular religious claimants"), *appeal pending*, No. 22-2058 (8th Cir.).

b. A showing that the Air Force had a systematic policy of denying religious exemption requests would be no more sufficient to establish a right to relief under the First Amendment's bar against intentional religious discrimination. Plaintiffs' theory under the First Amendment is that the Air Force has treated religious exemption requests less favorably than requests for exemptions on secular grounds—*i.e.*, medical or administrative exemptions. But for the reasons discussed above, religious exemptions are wholly unlike medical or administrative exemptions. The latter exemptions are temporary and meant to apply to service members who would not be deployable, or at least would be very unlikely to deploy, in any case. And service members who receive such exemptions either must be vaccinated to be deployable once the exemption lapses or will be reviewed for potential separation from the service. In contrast, religious exemptions are presumptively permanent and thus render a service member unable to meet the Air Force's requirement of worldwide deployability over the long term. Thus, even assuming the Air Force systematically denies religious exemption requests more frequently than it denies medical or administrative exemption requests, that does not mean

the Air Force is intentionally discriminating on the basis of religion; it means that medical and administrative exemptions, which render a service member temporarily non-deployable, interfere less with the Air Force's interests than religious exemptions, which presumptively render a service member permanently non-deployable. Moreover, because medical exemptions are temporary while religious exemptions are presumptively permanent, the delta between the two types of exemptions has been steadily declining. *See, e.g.*, Chapa Decl., R. 27-12, PageID# 1924-25 (explaining how the number of medical exemptions has continually decreased).

Other courts of appeals have properly recognized that medical exemptions from COVID-19 vaccination requirements are different from religious exemptions and thus do not call into question a requirement's general applicability. *See Does 1-6 v. Mills*, 16 F.4th 20, 31 (1st Cir. 2021) ("[P]roviding healthcare workers with medically contraindicated vaccines would threaten the health of those workers and thus compromise both their own health and their ability to provide care."), *cert. denied sub nom. Does 1-3 v. Mills*, 142 S. Ct. 1112 (2022); *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 285 (2d Cir. 2021) (per curiam) (explaining that vaccinating a service member "who is known or expected to be injured by the vaccine would harm her health"); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2420 & n.5 (2018) (suggesting that a military policy should be upheld "so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds")..

3. As the motions panel properly recognized, any claims in this case *other* than those based on the purported existence of a systematic policy of denying religious exemption requests are plainly inappropriate for class-wide treatment. In order to determine whether the vaccination requirement would violate RFRA as applied to a particular member of the plaintiff class, a court would have to determine whether the requirement substantially burdens the plaintiff's exercise of sincerely held religious beliefs; whether any such burden furthers a compelling government interest; and whether the policy is the least restrictive means of furthering that interest as to that particular person. *See* 42 U.S.C. § 2000bb-1(b). Resolution of those issues requires considering the individual circumstances of each service member in several ways.

First, service members have a range of personal religious beliefs, only some of which are substantially burdened by the vaccination requirement. *See* Bannister Decl., R. 34-2, PageID# 2232 (summarizing service members' "wide range of religious beliefs"). Since filing suit, for example, two named plaintiffs have testified that they are willing to receive a newly authorized vaccine that does not use fetal cell or mRNA technology, and two others have traveled internationally to receive a vaccine that they regard as acceptable; other plaintiffs are unwilling for religious reasons to accept those vaccines. *See* Theriault Decl., R. 30-20, PageID# 2147-48; Hearing Tr., R. 48, PageID# 3280; Salvatore Decl., R. 65-1, PageID# 4396-97; Second Ramsperger Decl., R. 66-1, PageID# 4403-04.

Second, RFRA requires an individualized inquiry into each service member's circumstances to assess the Air Force's compelling interest in ensuring *that particular* service member be vaccinated, and the availability of any less restrictive alternatives to vaccination that would be equally effective for *that* service member. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430-31 (2006). The relevant question in the compelling-interest analysis is not whether the government has an interest in "enforcing … policies generally," but whether it has "an interest in denying an exception" to a specific claimant. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021); *see also Roth*, 2022 WL 1568830, at *18 (similar, in challenge to military vaccination requirement). And that interest must be weighed against the availability of less-burdensome alternatives for that claimant. *Holt v. Hobbs*, 574 U.S. 352, 365 (2015).

The motions panel thus correctly recognized that it would be improper to certify a class to litigate RFRA claims *other* than those based on the purported existence of a systematic policy of denying religious exemption requests. *Doster*, 2022 WL 4115768, at *4.

4. Finally, even if plaintiffs had satisfied the commonality requirement, they could not show that their claims are typical of the class.

Several of the named plaintiffs have not completed the appeal process for their requested religious exemptions, and none have been separated or reassigned to the Individual Ready Reserve. They accordingly do not have ripe or exhausted claims. *See Harkness v. Secretary of the Navy*, 858 F.3d 437, 443 (6th Cir. 2017). Moreover, several

plaintiffs have opted to comply with the vaccination requirement—arguably mooting their claims. *See* Salvatore Decl., R. 65-1, PageID# 4396; Second Ramsperger Decl., R. 66-1, PageID# 4403-04.

The availability of "unique defense[s]" as to the named plaintiffs prevents them from satisfying the typicality requirement. *Beck v. Maximus, Inc.*, 457 F.3d 291, 301 (3d Cir. 2006); *see also Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 431 (6th Cir. 2009) (unpublished). When the district court certified the class, 16 had received initial decisions on their exemption requests, and the Air Force Surgeon General had denied only 12 of those requests on appeal. *See* Order, R. 47, PageID# 3172-73. As plaintiffs themselves acknowledged, the other plaintiffs had not yet received even an initial ruling on their religious-exemptions requests. *See* Compl., R. 1, PageID# 7-12. Nor would exhaustion be futile (*cf.* Stay Op. 8), as the Air Force has *granted* a number of exemptions—including a number on appeal of an initial denial. *See supra* p. 22; *Hodges v. Callaway*, 499 F.2d 417, 422 & n.13 (5th Cir. 1974) (requiring exhaustion of intramilitary remedies even if the odds against receiving the requested relief "are unquestionably very heavy"); *Horn v. Schlesinger*, 514 F.2d 549, 553 (8th Cir. 1975) (suggesting that "[a] failure to exhaust the remedies available within the service itself will inevitably upset the balance, carefully struck, between military authority and the power of the federal courts").

Additionally, because none of the named plaintiffs is a cadet or member of the National Guard, they lack standing to challenge requirements applied to those groups.

The D.C. Circuit has explained that the military-service-member plaintiffs could not establish standing based on injury to a category of "*other*" service members to which the plaintiffs themselves did not belong. *In re Navy Chaplaincy*, 534 F.3d 756, 760 (D.C. Cir. 2008) (Kavanaugh, J.). Nevertheless, the motions panel suggested that *Gratz v. Bollinger*, 539 U.S. 244, 267 (2003), "likely refutes" the government's typicality argument based on the lack of representative named plaintiffs. *Doster*, 2022 WL 4115768, at *5. But *Gratz* is inapposite because it turned on the use of "a biased … procedure" that affected all plaintiffs equally. *Gratz*, 539 U.S. at 267 (quotations omitted). As explained above, there is no basis here to believe that the Air Force used any generally applicable discriminatory procedure here.

B. Plaintiffs Failed To Satisfy The Requirements Of Rule 23(b)

The district court also erred in concluding that the class could be maintained under Rule 23(b).

1. Plaintiffs' class cannot be maintained under Rule 23(b)(1)(A), which allows class treatment when "prosecuting separate actions … would create a risk of … inconsistent or varying adjudications … that would establish incompatible standards of conduct for the party opposing the class." The district court expressed concern that, absent class treatment, various service members might bring "[s]imilar claims" in other courts, such that "[o]ne court may find that [the Air Force] may enforce its vaccine mandate over … religious objections, and another court may find the opposite." Order, R. 72, PageID# 4464. But the fact "that some plaintiffs may be successful in their suits against

a defendant while others may not" is "clearly not a ground for invoking Rule 23(b)(1)(A)." *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984); *see also Pipefitters Loc. 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F.3d 618, 633 (6th Cir. 2011) (reversing class certification under Rule 23(b)(1)(A) when there was "no prospect that individual adjudications would subject [the defendant] to conflicting affirmative duties"). For that reason, the motions panel was correct to state "that the district court did not provide an adequate explanation for its decision to certify a class under Rule 23(b)(1)(A)." *Doster*, 2022 WL 4115768, at *5.

2. To the extent plaintiffs seek to litigate RFRA or First Amendment claims that are not based on the purported existence of a systematic policy of denying religious exemption requests, such claims could not properly be maintained under Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief … is appropriate respecting the class as a whole."

As explained above (at 22, 32), RFRA requires a reviewing court to make an individual assessment of a policy's alleged burden on a specific person's exercise of religion, the government's compelling interest in implementing the challenged policy as to that person, and the availability of less restrictive and equally effective alternatives as to that person. But just as the need to resolve such questions individually precludes any finding of commonality or typicality, it likewise precludes any finding that the claims of approximately 10,000 Air Force service members could be adjudicated en masse under

Rule 23(b)(2). As this Court has recognized, the "underlying premise of (b)(2) certification" that class members suffer from a common injury "break[s] down" when the class seeks to recover "based on individual injuries." *Coleman v. General Motors Acceptance Corp.*, 296 F.3d 443, 448 (6th Cir. 2002) (quoting *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997)); *see also M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 847 (5th Cir. 2012) (a class "alleg[ing] individual injuries that are not uniform across the class[] … lacks cohesiveness to proceed as a 23(b)(2) class.").

And even if the merits of every class member's RFRA claim could be adjudicated "in one stroke," *Wal-Mart*, 564 U.S. at 350, RFRA would entitle each claimant to individualized relief, depending on miliary assignment, deployment status, and responsibilities. Thus, individual service members have sought to vindicate their own interests by separately litigating claims in other courts. By certifying a mandatory class in this case, however, the district court improperly bound service members with widely divergent interests to this case's disposition.

The mandatory class certified here largely forecloses, or at a minimum substantially impedes, efforts by individual service members to obtain uniquely tailored relief. The impropriety of the district court's overbroad approach is underscored by the fact that other courts—including the Supreme Court—have concluded that individual members of this class are unlikely to succeed on their individual claims. *See, e.g.*, *Dunn*

v. Austin, 142 S. Ct. 1707 (2022) (denying injunction pending appeal).[3] The district court's class-certification order essentially nullifies those decisions.

Certification under Rule 23(b)(2) is also inappropriate because individual class members would be bound by an adverse ruling on a class-wide basis, barring any otherwise meritorious claims their individual circumstances might support. *See Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 820-21 (7th Cir. 2011). The district court endeavored to avoid that problem by permitting class members to opt out, Order, R. 77, PageID# 4539, but this Court has repeatedly explained that "class members may not opt out" of a class certified under Rule 23(b)(2). *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 433 (6th Cir. 2012); *see also, e.g.*, *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716 (6th Cir. 2013) (plaintiffs sought class certification "under Rule 23(b)(2), under which absent class members cannot opt out"); *Doster*, 2022 WL 4115768, at *6 (motions panel order, recognizing that the government "might be correct" about this point). In any event, even if class members could opt out, the certification of a Rule 23(b)(2) class could not be appropriate absent notice to class members, which district court failed to require the plaintiffs to give. *See In re Monumental Life Ins. Co.*, 365 F.3d 408, 417 (5th Cir. 2004) ("[C]lass members must be provided adequate notice.").

[3] *Roth*, 2022 WL 1568830; *Knick v. Austin*, No. 22-cv-1267, 2022 WL 2157066 (D.D.C. June 15, 2022); *Creaghan v. Austin*, No. 22-cv-981, 2022 WL 1685006 (D.D.C. May 26, 2022).

Individual service members' actions only underscore the class members' heterogeneous interests that should have precluded certifying a Rule 23(b)(2) class. For one, dozens of service members have sought to opt-out of the class. *See* Updated Notice, R. 92, PageID# 5046-51 (more than 90 service members requesting to opt-out of the class). And as noted *supra* pp. 31, 33, several of the named plaintiffs have chosen to comply with the vaccination requirement. These disparate circumstances underscore the class members' divergent interests and the impropriety of certifying a mandatory class under Rule 23(b)(2). *Cf. Barnes v. American Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) ("[I]t is well established that [Rule 23(b)(2)] class claims must be cohesive.").

II. The District Court Abused Its Discretion By Issuing A Class-Wide Injunction

As the motions panel has already recognized, moreover, it cannot possibly have been proper for the district court to prohibit the Air Force from enforcing the vaccination requirement against any member of the putative class.

1. To the extent it is possible to litigate plaintiffs' claim that the Air Force is systematically denying religious exemption requests on a class-wide basis—even though, for the reasons discussed above, that claim does not state a violation of either RFRA or the First Amendment—the appropriate relief on that claim would not be the sort of injunction the district court entered. Rather, as the motions panel explained, it would be an injunction requiring the Air Force to reconsider religious exemption requests without applying the supposedly discriminatory policy. *See Doster*, 2022 WL 4115768,

at *5 ("[A]n appropriate remedy might more narrowly enjoin the Department to abolish the discriminatory policy, root and branch, and to enjoin any adverse action against the class members on the basis of denials of religious exemptions pursuant to that policy."); *but see* Compl., R. 1, PageID# 18-19 (plaintiffs' requested relief). Unlike the injunction the district court entered, relief of that nature would "leave open the possibility for the Department to establish a need to apply the vaccine mandate to individual service members," even those whose religious exercise is substantially burdened by the requirement, so long as the Department could show to the satisfaction of a court that doing so is the least restrictive means of advancing compelling interests. *Id.*

2. The district court's injunction is equally indefensible to the extent it rests on broader RFRA or First Amendment claims—that is, those not based solely on the existence of a purported "policy" of denying all religious exemption requests. The district court effectively concluded that *all* class members had shown a likelihood of success on the merits, and that the balance of equities weighed in favor of each and every class member, but the court failed to address *any* of the factors for preliminary relief. Order, R. 72, PageID# 4466-69; Order, R. 77, PageID# 4538-41. That failure alone was an abuse of discretion. *Gordon v. Holder*, 632 F.3d 722, 725 (D.C. Cir. 2011) (holding that a district court's failure to "fully analyze" preliminary injunction factors was abuse of discretion); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (describing the four factors a plaintiff *must* establish for preliminary relief). And had

the district court actually considered the relevant factors, it could not properly have issued a class-wide injunction.

a. For the reasons discussed more fully in the government's brief on appeal from the initial preliminary injunction, No. 22-3497, plaintiffs are unlikely to succeed on the merits. The district court effectively concluded that the Air Force could not enforce the vaccination requirement against *any* service member who objects to it for religious reasons. But the court reached that conclusion without actually considering a single service member's RFRA claim, and in the face of extensive evidence demonstrating the Air Force's compelling interest in maximizing force readiness, which could not be furthered as effectively by any means other than vaccination. The district court's four-page order granting a preliminary injunction cites only *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), for the court's prerogative to "say what the law is." Order, R. 77, PageID# 4539 (quotations omitted).

"Few interests can be more compelling than a nation's need to ensure its own security." *Wayte v. United States*, 470 U.S. 598, 611 (1985). Vaccination against COVID-19 serves the military's compelling interest in the health of its troops. The Secretary of Defense "determined that mandatory vaccination against [COVID-19] is necessary to protect the Force and defend the American people," Sec'y Def. Mem., R. 27-3, PageID# 1561, and the Secretary of the Air Force similarly concluded that vaccination

against COVID-19 is an "essential military readiness requirement … to ensure we maintain a healthy force that is mission ready," Sec'y Air Force Mem., R. 27-8, PageID# 1656.

The Air Force has a particularly compelling interest in ensuring that all of the class members are vaccinated against COVID-19 to ensure that they are maximally prepared to deploy anywhere in the world on "a few days' notice." Heaslip Decl., R. 27-19, PageID# 1987. A member's severe illness or an outbreak in a deployed environment could "create an unacceptable risk to personnel and substantially increase the risk of mission failure." Pulire Decl., R. 27-23, PageID# 2023. Because deployments are "by design, minimally manned," "[i]f one service member were to get sick, contract long-COVID, get hospitalized, or die, that section may only have one extra person performing similar duties, leaving little redundancy and backup to support the mission." *Id.*, PageID# 2024.

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

professional military judgments."). A number of courts have accordingly determined that the military's COVID-19 vaccination requirement furthers the compelling interest in ensuring military readiness, as demonstrated "by a lengthy record," *Church v. Biden*, 573 F. Supp. 3d 118, 147 (D.D.C. 2021); *see also Creaghan v. Austin*, No. 22-cv-981, 2022 WL 1500544, at *9 (D.D.C. May 12, 2022); *Navy SEAL 1*, 2022 WL 1294486, at *9; *Short*, 2022 WL 1051852, at *5. As Justice Kavanagh recently observed, RFRA does not require "ordering unvaccinated personnel into an environment in which they endanger their lives, the lives of others and compromise accomplishment of essential missions." *Austin v. U.S. Navy SEALs 1-26*, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J., concurring) (quotations omitted). The district court here articulated no basis for overriding the military's judgment on this issue.

Nor is there a less restrictive means by which the military could achieve that compelling interest "equally well." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 731 (2014). Regular testing for COVID-19 infection cannot prevent a person from becoming infected in the first place and cannot "reduce the risk of illness, complications (*e.g.*, long COVID, hospitalization), or death" from an infection. Poel Decl., R. 27-17, PageID# 1965. Although immunity from past infection may offer some protection against serious illness or death from a future infection, the CDC has repeatedly emphasized that "COVID-19 vaccines can *offer added protection* to people who had COVID-19, including protection against being hospitalized from a new infection, especially as variants continue to emerge." CDC, *Benefits of Getting a COVID-19 Vaccine*,

https://perma.cc/W66Y-3GU7 (updated Aug. 17, 2022); *see also* Rans Decl., R. 27-10, PageID# 1889 (noting that "vaccination following infection further increases protection from subsequent infection"). Masks "provide no protection to a service member who is infected with COVID-19," and "[u]nlike vaccination, a mask does not decrease the risk of serious illness, complications (*e.g.*, hospitalization, long COVID), or death, and does not shorten recovery time." Poel Decl., R. 27-17, PageID# 1963. And isolating infected individuals is obviously not a means of ensuring their fitness for duty; to the contrary, it makes them unavailable to deploy or perform their job duties during a deployment. *Cf., e.g.*, Heaslip Decl., R. 27-19, PageID# 1983, 1985; Wren Decl., R. 27-20, PageID# 1995. To the extent there is room for debate on any of these points, the military is best situated to assess whether any available alternatives could equally well serve its operational needs, and it has reasonably answered that question in the negative. That determination is entitled to significant deference. *See Goldman*, 475 U.S. at 507; *Orloff*, 345 U.S. at 94; *Gilligan*, 413 U.S. at 10; *Harkness*, 858 F.3d at 444-45.

b. Plaintiffs equally cannot establish the equitable requirements for a preliminary injunction—requirements the district court failed even to consider.

Proof of a likelihood of irreparable harm is an "indispensable" requirement for a preliminary injunction. *D.T. v. Sumner Cty. Sch.*, 942 F.3d 324, 327 (6th Cir. 2019). "To merit a preliminary injunction, an injury 'must be both certain and immediate,' not 'speculative or theoretical.'" *Id.* Indeed, in the military context, "courts have held that

the showing of irreparable harm must be *especially strong* before an injunction is warranted, given the national security interests weighing against judicial intervention in military affairs." *Church*, 573 F. Supp. 3d at 145 (citation omitted). But the district court made no finding that the class members would be irreparably harmed absent preliminary relief.

When granting the preliminary injunction limited to the named plaintiffs, the district court correctly recognized that "the punitive action that may be taken against [p]laintiffs if they refuse[d] to get vaccinated without an exemption does not, alone, establish irreparable harm." Order, R. 47, PageID# 3197; *but see id.*, PageID# 3197-98 (finding irreparable harm, having concluded plaintiffs were likely to succeed on their RFRA and First Amendment claims). And plaintiffs have not identified any irreparable injury to the class separate from the purported injury to the named plaintiffs. To the contrary, employment-related harms do not constitute irreparable injury absent a "genuinely extraordinary situation," *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974), and any employment-related harms here are quintessentially reparable. *See* 10 U.S.C. § 1552(a)(1), (c)(1) (providing broad authority for a Board for the Correction of Military Records to "pay … a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits" to correct a service member's military record); *Hodges*, 499 F.2d at 422 (recognizing that a Board for the Corrections of Military Records could grant a service member "full reinstatement and restoration of all rights"). And class members would be entitled to oppose their separation from the military if the Air Force

at some future time were to initiate separation proceedings against any of them. *See Hartikka v. United States*, 754 F.2d 1516, 1518 (9th Cir. 1985); *Chilcott v. Orr*, 747 F.2d 29, 34 (1st Cir. 1984); *Guitard v. U.S. Sec'y of Navy*, 967 F.2d 737, 742 (2d Cir. 1992) (discharge from the military does not constitute irreparable injury).

The balance of harms and the public interest—which "merge" here, *Nken v. Holder*, 556 U.S. 418, 435 (2009)—also weigh decisively against granting a preliminary injunction. The district court previously acknowledged "the strong public interest in national defense, including military readiness," Order, R. 47, PageID# 3199, but the court did not even consider—much less defer to—the Air Force's judgment that COVID-19 continues to pose risks to the military's mission, and that vaccines are the most effective way to mitigate the effects of the virus by maximizing service members' readiness to deploy. *Cf. Gilligan*, 413 U.S. at 10.

Nor did the court acknowledge how the class-wide preliminary injunction would impose significantly greater harms to the Air Force, and thus the public, than the narrower injunction the court initially issued. Lieutenant General Kevin Schneider, the Director of Staff for the Headquarters of the Air Force, explained that if a large number of service members were exempt from the vaccination requirement, "it would pose a significant and unprecedented risk to military readiness and our ability to defend the nation." Schneider Decl., R. 73-1, PageID# 4490. General Schneider added that the "volatile, uncertain, and complex environment" of global affairs requires service members "to be in a constant state of readiness" "to deter conflict and aggressively execute

the mission." *Id.* (noting that, in response to Russia's invasion of Ukraine, the Air Force "rapidly deploy[ed] aircraft, equipment, and thousands of Service members, many within only 24 to 48 hours of notification"). And he explained that a class-wide injunction would "creat[e] significant and irreparable harm to good order and discipline, force health protection, and military readiness[,] seriously endangering the Department of the Air Force's ability to decisively execute its mission." *Id.*; *see also* Schneider Decl., R. 83-1, PageID# 4596, 4601-02, 4611-14 (further noting that retaining nearly 10,000 non-deployable service members "degrades" the Air Force's "lethality and force capabilities," by limiting the number of deployable service members and shifts the hardships and burdens of global deployment to vaccinated members). The district court nowhere considered any of these significant additional harms.

Far from recognizing the much greater harms flowing from a class-wide injunction, the district court has displayed a consistent willingness to substitute its own views about military readiness for those of senior military leaders—despite the Supreme Court foreclosing courts from doing so. *E.g.*, *North Dakota v. United States*, 495 U.S. 423, 443 (1990). In denying the Air Force's stay motion, for example, the court asserted that "in today's global climate, it is in the public's interest for the armed services to remain at full strength, rather than separating thousands of Airmen due to their refusal to get the COVID-19 vaccine." Order, R. 86, PageID# 5010. The motions panel correctly described that statement as "well outside" the district court's "judicial role." *Doster*, 2022 WL 4115768, at *6. And that statement merely exemplifies the degree to which

the district court has "inserted itself into the [military's] chain of command, overriding military commanders' professional military judgments," *U.S. Navy SEALs 1-26*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring). The court had no authority to replace the military's "reasonable evaluation" of the evidence with its own. *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981).

Indeed, the Supreme Court has held that it is an abuse of discretion to balance the equities "in only a cursory fashion" or fail to "properly … defer to senior [military] officers' specific, predictive judgments about how [a] preliminary injunction" would interfere with military operations. *Winter*, 555 U.S. at 26-27. The district court committed both errors here.

CONCLUSION

The class-wide preliminary injunction should be vacated and the class-certification order reversed.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

KENNETH L. PARKER
United States Attorney

CHARLES W. SCARBOROUGH
LOWELL V. STURGILL JR.

/s/ Casen B. Ross
CASEN B. ROSS
DANIEL WINIK
SARAH J. CLARK
ANNA O. MOHAN
Attorneys, Appellate Staff
Civil Division, Room 7270
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
202.514.1923
casen.ross@usdoj.gov

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,753 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Casen B. Ross
CASEN B. ROSS

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

/s/ Casen B. Ross
CASEN B. ROSS

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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

Record Entry	Description	Page ID # Range
R 1	Complaint	1-22
R 13	Motion for Preliminary Injunction	578-99
R 21	Plaintiffs' Motion for Class Certification	952-58
R 27	Opposition to Plaintiffs' Motion for Preliminary Injunction	1509-56
R 27-2	Secretary of Defense Memorandum	1559
R 27-3	Secretary of Defense Memorandum	1561-62
R 27-4	Congressional Research Service Report	1564-66
R 27-5	DoD Instruction 6205.02	1568-88
R 27-6	BUMEDINST 6230.15B (Air Force Instruction 48-110_IP)	1590-1630
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R 27-8	Secretary of the Air Force Memorandum and Attachments	1656-61
R 27-9	Declaration of Peter Marks	1663-82
R 27-10	Declaration of Colonel Tonya Rans	1872-1909
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R 27-13	Declaration of Chaplain, Major Matthew J. Streett	1931-38
R 27-14	Declaration of Colonel Elizabeth M. Hernandez	1940-46
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R 27-17	Declaration of Colonel James R. Poel	1956-76

R 27-18	Declaration of Colonel Ashley Heyen	1978-80
R 27-19	Declaration of Colonel Richard M. Heaslip	1982-92
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R 27-21	Declaration of Colonel Paul K. Harmer	2003-10
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ADDENDUM

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42 U.S.C. § 2000bb

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

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

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

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

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

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

(b) Purposes

The purposes of this chapter are—

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

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

42 U.S.C. § 2000bb-1

§ 2000bb-1. Free exercise of religion protected

(a) In general

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

(b) Exception

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

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

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

(c) Judicial relief

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

42 U.S.C. § 2000bb-2

§ 2000bb-2. Definitions

As used in this chapter—

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

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

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

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

42 U.S.C. § 2000bb-3

§ 2000bb-3. Applicability

(a) In general

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

(b) Rule of construction

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

(c) Religious belief unaffected

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

42 U.S.C. § 2000bb-4

§ 2000bb-4. Establishment clause unaffected

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

Federal Rule of Civil Procedure 23

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

* * *

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.