United States Court of Appeals
for the Sixth Circuit

CASE NO. 22-3702

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

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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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STATEMENT CONCERNING ORAL ARGUMENT

This Court has scheduled oral argument for October 19, 2022, and we welcome same.

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*, --- F.Supp.3d ---, 2022 U.S. Dist. LEXIS 59381, (SDOH 2022).

In August, 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, while systemically denying 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 those seeking religious accommodations. This evidence is proof that Appellants implemented a policy of systemic discrimination against religious belief on a class-wide basis.

Further confirming the implementation of the DAF's unconstitutional policy on a class-wide basis, the few religious exemptions granted by Appellants were granted to service members who also qualified for an administrative exemption, or otherwise at or near the end of their term of service. As this Court confirmed, "the record suggests that, at present, the number of exemptions that the Department has

[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.

granted on religious grounds stands at zero." *Doster v. Kendall,* --- F.4th ---, 2022 U.S. App. LEXIS 25339 (6th Cir. 2022).

As a consequence of this systemic discrimination, Plaintiffs sued under the Religious Freedom Restoration Act ("**RFRA**") and the First Amendment. The district court appropriately granted class certification and a class-wide preliminary injunction after an evidentiary hearing and briefing by all parties. Simply put, Appellants systemically treated DAF members with sincerely held religious beliefs in a second-class manner. Further, Appellants continue to do so despite the fact the President recently declared that the pandemic, the very reason for the Vaccine Mandate, is over.[2]

Now on appeal, the Government challenges the class certification despite its failure to petition for review under FRCP 23(f). Even if review was appropriate, the district court properly analyzed and applied the relevant factors and framework under FRCP 23. And, the record supported the district court's findings of (1) numerosity, (2) commonality, (3) typicality, and (4) adequate representation, under FRCP 23(a)(1) through (4). In addition, the Government, in its pleadings below, made admissions that the FRCP 23(b)(1)(A) factor was met regarding inconsistent

[2] https://www.cbsnews.com/news/president-joe-biden-60-minutes-interview-transcript-2022-09-18/ (last accessed 9/29/2022).

adjudications. Likewise, the admission by the Government of a *de facto* policy of discrimination established the requirements of FRCP 23(b)(2).

With respect to the district court's injunction, that court properly determined that the Government's implementation of its Vaccine Mandate was not neutral and generally applicable in light of the systemic discriminatory treatment between secular and religious exemption requests. Every class member had sincerely held religious beliefs substantially burdened by the Vaccine Mandate, thus placing the burden squarely on the Government to demonstrate both a compelling interest and that the Vaccine Mandate was the least restrictive means of achieving that compelling interest. However, the Government failed to meet that burden.

COUNTERSTATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331, and this Court has jurisdiction over the appeal from the July 27, 2022 preliminary injunction under 28 U.S.C. § 1292(a)(1). We dispute, however, the Government's contention that this Court has jurisdiction over the class certification orders. The Government did not petition for review under FRCP 23(f). Instead, the Government improperly relies on two out-of-circuit cases that suggest class certification orders can meet pendent jurisdiction requirements under "inextricability intertwined" jurisprudence with the appealable order. *Melendres v. Arpaio*, 695 F.3d 990, 999 (9th Cir. 2012); *Jamie S. v. Milwaukie Pub. Sch.*, 668 F.3d 481 (7th Cir. 2012).

First, the default: in *Swint v. Chambers County Commission*, 514 U.S. 35, 51 (1995), the Supreme Court "set out a general rule against exercising pendent jurisdiction over related rulings." "Pendent appellate jurisdiction may be exercised only when the [] issues absolutely cannot be resolved without addressing the non-appealable collateral issues." *Henricks v. Pickaway Corr. Inst.*, 782 F.3d 744, 752 (6th Cir. 2015) (*quoting Archie v. Lanier*, 95 F.3d 438, 443 (6th Cir. 1996)); *Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 797 (6th Cir. 1998) (emphasizing that "pendent appellate jurisdiction is not meant to be loosely applied as a matter of discretion; rather, such jurisdiction only may be exercised when the appealable issue at hand cannot be resolved without addressing the non-appealable collateral issue.").

Contrary to the cases cited by the Government, "[t]his circuit has interpreted 'inextricably intertwined' to mean that the resolution of the appealable issue 'necessarily and unavoidably' decides the non-appealable issue." *Lowe v. Hamilton Cnty. Dep't of Job & Fam. Servs.*, 610 F.3d 321, 323 (6th Cir. 2010). In the context of class certification orders, this Court has found that such orders are not inextricably intertwined with injunctive or other relief. *Musto v. Am. Gen. Corp.*, 861 F.2d 897, 914 (6th Cir. 1988); *Taylor v. Pilot Corp.*, 697 F. App'x 854 (6th Cir. 2017); *see, also, Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). Accordingly, this Court's

own precedent establishes that this Court does not have jurisdiction to consider the class certification order or its modification.

STATEMENT OF THE CASE AND FACTS

Our Appellee Brief in the companion case of *Doster v. Kendall*, 22-3497, recounts, in detail, the factual record, and we incorporate that by reference. For purposes of this appeal, the record establishes that 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 common process for handling religious exemption requests to the Vaccine Mandate, which consists of the following: (1) a request by the member documenting the sincerely held religious belief and the substantial burden; (2) 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) a commander's recommendation; (4) an initial decision by the component commander as to whether the exemption can be accommodated; and (5) for denials, an appeal to the Air Force Surgeon General.[3]

[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

Here, by the class's definition, each member of the class, including the eighteen original Plaintiffs, underwent this process in their pursuit of a temporary religious exemption to the Vaccine Mandate. All class members timely submitted their religious exemption 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].

After denial of their final appeals, every DAF member was subjected to an order from his or her commander to vaccinate "or else." [Doster Dec., Doc. 19-1, PageID#943-947].

Based on DAF statistics published on March 28, 2022, and as of that date, Appellants had 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 exemptions and denied 6,143 (a 99.6% disapproval rate).[5] *Id.*

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).

[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 late July 2022, which was after the district court entered its relief in this case, noting 135 religious exemptions granted; all of them were within the end-of-service exception, and this still reflects a 98.7% disapproval rate.

On May 23, 2022, a date after the class certification motion was submitted for decision, the DAF had approved 794 medical exemptions and 1,038 administrative exemptions (cumulative numbers of medical and administrative exemption are not published by the DAF).[6] As of May, the DAF only granted 85 religious exemptions and denied 8,869 requests, equivalent to less than one percent of the submitted requests. As explained below, all approvals were granted to individuals who also qualified for administrative exemptions or were at the end of their term of service. Meanwhile, by May 2022, 98.5% of the active-duty DAF, 93.7% of the Air National Guard, and 94.7% of the reserves were fully vaccinated. *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 (or were 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 testified that Appellants are systemically denying all religious exemptions 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].

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[6] https://www.af.mil/News/Article-Display/Article/3018445/daf-covid-19-statistics-may-2022/ (last visited 8/22/2022).

All of this substantial proof 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].

Once again, the Government's own witnesses provided substantial proof of the Government's systemic policy of religious discrimination. For instance, Colonel James Poel's testimony revealed 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).[7]

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

Further substantial proof of systemic discrimination was also provided by Colonel Artemio Chapa, who testified that medical exemptions are granted for various conditions, including pregnancy, adverse reactions, allergies, and the like, yet the DAF grants almost no religious exemption requests, and the few they do grant would be no different than those granted for medical or administrative reasons alone. [Dec. Chapa, 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 time for a new vaccine to become available that would not present these same risks to the service member; however, the DAF is unwilling to grant that same accommodation to those requesting a religious exemption until such time as a morally unobjectionable COVID-19 vaccine becomes 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 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. Yet, while the DAF willingly accommodated these members (which can amount to up to 5% of the total force), it refused to accommodate the less than two percent of its members it confirmed as having valid religious exemption requests, claiming an inability to do so.

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

The evidence presented to the district court conclusively 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]. That evidence confirmed that the DAF: (i) uses the same general process for handling religious exemption 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 generally 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, discriminatory pattern was never adequately refuted by the Government in the court below because substantial proof established that the DAF grants medical and administrative exemptions to members performing the same job duties as those denied religious exemptions, accommodating only those getting medical or administrative exemptions. For instance, Lt. Doster has an identical assignment as 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, and he is considered medically unfit and not deployable. *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 for the purpose of filling in the blanks on form denial letters, which are otherwise identical, minus this missing information. *Id.* at ¶8. An unconstitutional pattern was established, demonstrating that all DAF members who have documented, sincerely held religious beliefs substantially burdened by the Vaccine Mandate, were 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]. That report also confirms the DAF's disregard of its own procedures through its insufficient processing effort before denial and its lack of consideration given to well-documented religious exemption requests. *Id.*

Ultimately, the DAF ordered its commanders to actively enforce the Vaccine Mandate. [Doc.25-8, PageID#1130-1135]. And record evidence demonstrated how this enforcement was to be carried out. [Dec. of Col. Hernandez, Doc.25-14,

PageID#1414-1420]. 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: violate your religious beliefs by getting the shot or you will be punished, possibly imprisoned, and then involuntarily separated with a stigmatizing discharge that will affect you the rest of your life.

COUNTERSTATEMENT OF THE GOVERNMENT'S FACTS

Throughout its brief, the Government falsely contends that the requested religious exemptions are permanent, while all medical and administrative exemptions are temporary. Plaintiffs and the class have only sought temporary exemptions. [Declarations of Plaintiffs, Doc.30-3 through 20, PageID#2091-2149]. In fact, Air Force Instruction 48-110 *only* allows for temporary accommodations for religious and administrative exemptions.[8] These religious believers only desire a temporary exemption for the period of time to permit the development of a morally acceptable vaccine, just as those with medical exemptions seek to be accommodated only until the medical need that drives their accommodation ameliorates itself.

The Government also argues that those who are non-deployable are subject to a retention board to remain in the service, but completely ignores the fact that those

[8] 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.").

with medical or administrative exemptions can be deemed deployable and thus not subject to that same board. [Dec. Chapa, Doc.25-12, PageID#1395-1403, ¶¶ 7, 14].[9]

THE PRELIMINARY INJUNCTION HEARING

On March 25, 2022, the district court held an evidentiary hearing. [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]. Their testimony was consistent: all three (i) had sincerely held religious beliefs substantially burdened by the Vaccine Mandate; (ii) went through the DAF's sham religious exemption process; (iii) worked with airmen at their same base and with their same job duties who received medical exemptions but who were accommodated; (iv) performed their duties without incident, unvaccinated, from March 2020 through the date of the hearing; and (v) nevertheless had their religious exemptions denied because, allegedly, they could not be accommodated. *Id.*

Lt. Doster also testified that he reviewed the materials of the other 17 Plaintiffs and, like him: (i) all were subjected to the same process; (ii) none of them qualified

[9] The Government also makes much about General Washington's vaccine mandate in its Introduction, ignoring that the General, unlike DAF, did not subject those with natural immunity to his mandate. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7942582/pdf/annmedhist148632-0054.pdf(General Washington recognized natural immunity and his order to inoculate did not extend to those who already had the disease) (last accessed 9/29/2022).

for administrative exemptions; (iii) all will have or had their exemption requests denied; and (iv) all 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#3231-3234. Lt. Doster was then subjected to a vigorous cross-examination that did not undermine any of his testimony. *Id.* at PageID#3235-3250.

At the hearing, the Government had the burden under RFRA and the First Amendment to prove there was a compelling governmental interest, and that the Vaccine Mandate was the least restrictive means of achieving that compelling interest. Despite this reality, the foregoing Plaintiffs' testimony went unrebutted. And, the Government called no live witnesses.

STANDARD OF REVIEW

With respect to the class certification, Appellants must demonstrate that the district court abused its discretion. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 850 (6th Cir. 2013) (*citing Olden v. LaFarge Corp.*, 383 F.3d 495, 507 (6th Cir. 2004). And, a district court has broad discretion in certifying a class action "within the framework of Rule 23." *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 446 (6th Cir. 2002).

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. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc).

The four factors to consider when issuing a preliminary injunction are: (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). However, "when a party seeks a preliminary injunction on the basis of a potential constitutional violation, … the likelihood of success on the merits often will be the determinative factor." *Schimmel*, 751 F.3d 427, 430.

The same is true for RFRA 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). And, like constitutional claims, circuit precedent likewise compels merger of the factors for RFRA claims turning on likelihood of success on the merits. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020).

Finally, because Plaintiffs presented live witnesses at an evidentiary hearing and the Government produced none, merely relying on declarations that were, in many respects, contrary to that live testimony, case law in this circuit allows the district court to summarily disregard the conflicting evidence from the Government's witnesses. *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). And here, the district court did just that, relying upon the testimony of the Plaintiffs, who were subjected to cross examination.

ARGUMENT

I. The district court did not abuse it discretion in certifying a class

As demonstrated below, the district court appropriately considered the FRCP 23 factors and appropriately certified a class.

A. Plaintiffs established FRCP 23(a)'s commonality and typicality requirements

Commonality, under FRCP 23(a)(2), requires "the capacity of a class wide proceeding to generate common answers [to common questions] apt to drive the resolution of the litigation." *Zehentbauer Family Land, LP*, 935 F.3d 496, 503 (6th Cir. 2019) (*quoting Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). Said another way, commonality is met when determining the "truth or falsity" of a common contention "will resolve an issue that is central to the validity of each one

of the claims in one stroke," advancing the litigation. *Wal-Mart*, 564 U.S. at 350; *Sprague v. GMC*, 133 F.3d 388, 397 (6th Cir. 1998).

Typicality, under FRCP 23(a)(3), requires a demonstration that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "Typicality is met if the class members' claims are 'fairly encompassed by the named plaintiffs' claims.'" *Hendricks v. Total Quality Logistics, LLC*, 2019 U.S. Dist. LEXIS 96940 (S.D. Ohio Mar. 22, 2019) (*quoting Sprague*, 133 F.3d at 399). "Many courts have found typicality if the claims or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory." *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 509 (6th Cir. 2015) (*quoting* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 7A Federal Practice and Procedure § 1764 (3d ed. 2005).

"In cases involving claims of class-wide discrimination, these two requirements 'tend to merge.'" *Doster*, --- F.4th ---, 2022 U.S. App. LEXIS 25339, *quoting General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, n.13 (1982).

1. Plaintiffs demonstrated commonality

As this Court explained just a few weeks ago in *Doster*, --- F.4th ---, 2022 U.S. App. LEXIS 25339:

> The commonality requirement covers most of the relevant Rule 23(a) ground here. "Commonality requires the

plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 349-50, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (cleaned up). That requires more than a showing that "they have all suffered a violation of the same provision of law." *Id.* at 350. Instead, it requires that the class members' claims "depend upon a common contention" whose resolution "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Thus a common question, for purposes of Rule 23(a), is one that is likely to "generate common answers" class-wide. *Id.* (internal quotation marks omitted).

That kind of common question can arise from a contention that the defendant "operated under a general policy of discrimination." *Id.* at 353 (internal quotation marks omitted). And that is precisely the contention the plaintiffs make here. From the very first paragraph of their Complaint, to their briefing in opposition to the Department's motion now, the plaintiffs have alleged the existence of a "systematic effort" by the Department to deny service members' requests for religious exemptions categorically, while granting thousands of medical and administrative exemptions. The district court recognized as much when it thrice referenced what it called "Defendants' clear policy of discrimination against religious accommodation requests" in finding the commonality requirement met. July 14 Order at 8. And we think the district court was likely correct when it held that, on this record, that contention supports litigation of both a RFRA claim and a First Amendment free-exercise claim class-wide.

RFRA provides that the federal government "may substantially burden a person's exercise of religion" only when doing so "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). That restriction, as the Department itself emphasizes throughout its briefing, allows the

> Department to impose that burden on a service member's exercise of her faith only as a last resort, after examining all the circumstances relevant to her individual case. A *de facto* policy to impose that burden upon class members in gross, regardless of their individual circumstances, would seem rather plainly to violate that restriction. Yet that would be the effect of the Department's alleged policy to deny all requests for religious exemptions. Meanwhile, "[t]he Free Exercise Clause protects religious observers against unequal treatment[.]" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (internal quotation marks omitted). A discriminatory policy to deny all requests for religious exemptions, while granting thousands of medical and administrative ones, would seem to violate that guarantee as well. The plaintiffs' contention that the Department operates under such a policy could therefore "resolve an issue that is central to the validity of" the class members' RFRA and First Amendment claims "in one stroke." *Dukes*, 564 U.S. at 350.

Against its own evidence, the Government denies, as it did in *Doster*, that it has a *de facto* policy of discrimination. However, in *Doster*, this Court observed that such an argument "confuses the certification stage with the merits stage." *Id.* "The question for purposes of certification is not whether the Department in fact had a general policy of discrimination against requests for religious exemptions, but instead whether the plaintiffs have 'significant proof' that the Department had such a policy." *Id.*, *citing Dukes*, 564 U.S. at 353.

In *Doster*, this Court then appropriately cited to the record and noted the significant proof of discrimination as a result of the process employed by the DAF:

As an initial matter, though the plaintiffs claim that the Department refuses to grant any exemptions to its vaccination mandate on religious grounds, proof that it is biased against granting such exemptions is enough to support certification. *See Gratz v. Bollinger*, 539 U.S. 244, 267-68, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003) (affirming class certification when race was one of many factors in the University of Michigan's admissions policy); *Dukes*, 564 U.S. at 353 (proof of a biased "evaluation method" can support certification); cf. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731, 201 L. Ed. 2d 35 (2018) ("The Free Exercise Clause bars even subtle departures from neutrality on matters of religion" (internal quotation marks omitted)).

To establish a general policy, therefore, the plaintiffs need not show that the Department rejects 100% of requests for religious exemptions. And the Department's own statistics show that, as of May 23, 2022, it had rejected more than 99% of them. See DAF COVID-19 Statistics - May 2022, U.S. Air Force (May 24, 2022), https://perma.cc/CD2H-5J2G. That the Department has granted only a comparative handful of religious exemptions, while granting thousands of medical and administrative ones, is itself at this stage of the case significant proof of discrimination. See *Washington v. Davis*, 426 U.S. 229, 242, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976) ("discriminatory impact" can be proof of discriminatory intent); *id.* at 253 (Stevens, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor").

Meanwhile, the plaintiffs have contended throughout this litigation that even the handful of exemptions that the Department has approved were granted only to service members who were nearing the end of their service term and thus eligible for an administrative exemption anyway.

> The Department notably has not disputed that contention for purposes of this motion; and a lawyer for the Department appeared to concede the point when questioned by the court in a related case. See Transcript of Preliminary Injunction Hearing at 59:17-25, R. 30-2, *Poffenbarger v. Kendall*, No. 3:22-cv-0001-TMR (S.D. Ohio Feb. 22, 2022) (stating that, as to the nominally religious exemptions granted by the Department, "some service members chose instead to submit their terminal leave request, the admin exemptions for terminal leave, they submitted it as a religious exemption even though they were eligible for a terminal leave [exemption]"). The Department is thus not likely to prevail on this point either.

In response to these well-founded conclusions, the Government now cites to the factually distinguishable case of *Dukes* for the false proposition that statistical disparities don't cut it. 564 U.S. 357-358. But *Dukes* didn't turn on that distinction. Instead, the problem with certification in *Dukes* was that the decision making at issue had been delegated between thousands of Wal-Mart store managers who made millions of decisions, where even plaintiffs' expert couldn't say what percent of those decisions were "determined by stereotypical thinking." *Id.* In addition, the claims in *Dukes* for monetary relief were certified under FRCP 23(b)(2), rather than FRCP 23(b)(3), and monetary relief claims cannot be certified under FRCP 23(b)(2). *Id.* In contrast, the process engaged in by the DAF here involved a *single point of appeal* to the Air Force Surgeon General – a single final decision maker, and unlike *Dukes* where monetary damages was the remedy, this case involves claims and a class certified for declaratory and injunctive relief. Thus, the Government's

argument that the factual record in this case is analogous to the factual record in *Dukes* is misplaced.

In an attempt to avoid this conclusion, the Government mischaracterizes the record and argues that it has granted *a few* religious accommodations. But the undisputed truth is that its representative admitted in Court that the DAF only grants religious exemptions to members who qualify for an administrative exemption. Further, this truth was confirmed in testimony at an evidentiary hearing in March, and there was no evidence before the district court that this blanket policy is no longer the case. [Doc. 30-2, at Tr. 59:17-25, PageID#2084-2090].[10]

Next, the Government hypocritically argues that it individually considered the facts and circumstances of each exemption request, but it simply cannot accommodate any stand-alone religious believers due to alleged readiness and safety concerns. These hypocritically false arguments are refuted by the record in this case, including (i) the DAF's accommodation of Major Corvi while she was pregnant and unvaccinated, but refusing to continue her accommodation when she sought a religious exemption and wished to remain unvaccinated [Doc.53-1, PageID#3762-3789]; (ii) the blanket exemptions for pregnancy resulting in the blanket

[10] The Government has argued that, since March, the number of religious accommodations has increased, but the Government has never subjected that proof to cross-examination or elaboration and there was no evidence before the district court at the time of any of its rulings in this matter that the policy of reserving these for end-of-service personnel had changed.

accommodation of those service members [Dec. Cox, Doc.74-1, PageID#4519-4526]; (iii) the evidence that service members became non-deployable not for being unvaccinated (since a medical exemption did not necessarily render someone undeployable), but rather because the Government deemed those with religious exemptions so [Dec. Chapa, Doc.25-12, PageID#1395-1403, ¶¶ 7, 14]; and (iv) the evidence refuting deployability arguments where the Government itself controls exit and entry requirements to other countries via status of force agreements [U.S. Dep't of State, International Security Advisory Board, Report on Status of Forces Agreements (Jan. 16, 2015), https://tinyurl.com/2ptcs32m].

Next, the Government again falsely argues that religious exemptions are fundamentally different from medical or administrative exemptions because, allegedly, religious exemptions are permanent. (Brief at 24). But Plaintiffs only sought temporary exemptions. [Doc. 30-3 through 20, PageID#2091-2149]. Moreover, Air Force Instruction 48-110 *only* allows temporary accommodations for religious and administrative exemptions.[11] And, as noted above, service members with medical exemptions are not necessarily determined to be undeployable, negating the Government's argument that everyone would somehow be subject to a

[11] 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.").

retention review after 12 months. [Dec. Chapa, Doc.25-12, PageID#1395-1403, ¶¶ 7, 14].

The Government then repeats another of its false mantras by citing to the declarations of certain of its witnesses, including LTG Schneider, to the effect that the Air Force has no "blanket policy of denying [all] religious accommodation requests." [Schneider Dec., Doc. 73-1, PageID#4497]. Of course, Plaintiffs never claimed that the DAF denied all religious exemptions. Instead, Plaintiffs contended there was a blanket policy to deny all religious exemptions to everyone except "service members who were nearing the end of their service term and thus eligible for an administrative exemption anyway." *Doster*, --- F.4th ---, 2022 U.S. App. LEXIS 25339. And these Government witnesses do not dispute that contention or that policy.

Next, the Government repeats another false mantra about the alleged inappropriateness of class certification for RFRA claims because, allegedly, an individual assessment is required for each claimant. (Brief at 29). This Court addressed a similar argument weeks ago in *Doster*, where the Government "argue[d] that RFRA claims categorically cannot be certified for class treatment" and that a RFRA claim "requires the court to determine separately for each service member whether the vaccination mandate is the least restrictive means of furthering a compelling governmental interest." *Doster*, --- F.4th ---, 2022 U.S. App. LEXIS

25339. Even though this Court acknowledged that "most RFRA claims require that kind of individualized analysis," and noted it had "no quarrel with the Department's contention that such an analysis could not be conducted class-wide here," it still rejected the argument. *Id.*

That is because this Court in *Doster* appropriately observed that the Government's "argument misconceives the nature of the RFRA claim that the district court certified." *Id.* "The court's order emphasized on almost every page that the RFRA claim it certified was one based on a class-wide 'clear policy of discrimination against religious accommodation requests.'" *Id.*, *citing* district court's July 14 Certification Order at 8. "That claim, as explained above, does not turn on an analysis of the class members' individual circumstances and likely can be adjudicated class-wide." *Id.*, *see, also*, *Coleman v. GM Acceptance Corp.*, 220 F.R.D. 64, 86-90 (MDTN 2004) (explaining that class certification is appropriate "as long as the challenged policy or practice was generally applicable to the class as a whole); *see, also, Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) (individual Plaintiff differences do not bar class certification in the face of class-wide discrimination).

The district court and this Court in *Doster* did not go out on a judicial limb. Courts have not hesitated to permit certification, and find typicality and commonality, when a class consists of persons who are injured through a unitary

course of discriminatory or unconstitutional conduct, as is the case here. *Brown v. Nucor Corp.*, 785 F.3d 895 (4th Cir. 2015); *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014); *EEOC v. Bass Pro Outdoor World, L.L.C.*, 826 F.3d 791 (5th Cir. 2016); *M.D. v. Abbott*, 907 F.3d 237 (5th Cir. 2018); *Augustin v. Jablonsky (In re Nassau County Strip Search Cases)*, 461 F.3d 219 (2d Cir. 2006). This conclusion is well settled in this Circuit. *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592 (6th Cir. 2007); *People First v. Arlington Developmental Ctr.*, 1998 U.S. App. LEXIS 9537 (6th Cir. 1998); *Eddleman v. Jefferson County*, 1996 U.S. App. LEXIS 25298 (6th Cir. 1996).

In response, and in an argument that has little relevance to the questions of commonality or typicality, the Government repeats another mantra about religious exemptions somehow being different, arguing that such exemptions are permanent (notwithstanding Plaintiffs' demonstration to the contrary) and repeating unsupportable claims about deployability (again, persons with medical or administrative exemptions are not necessarily determined to be non-deployable). (Brief, R. 29, at p. 29-30). The Government also argues that the delta is decreasing over time (that medical and administrative exemptions are decreasing over time) – but we know that a significant number of those seeking religious exemptions (namely those with objections to the vaccines' ties to aborted fetal tissue) will

likewise decrease (substantially) over time upon the Government's approval of Covaxin.[12]

The Government next cites out-of-circuit cases that suggest that medical exemptions by private employers do not violate the law even absent a religious exemption, but it never addresses this Court's decision in *Dahl v. Bd. of Trs. of Western Mich. Univ.*, 15 F.4th 728, 732 (6th Cir. 2021) which found a Free Exercise violation for such disparate treatment by a government actor.

Next, the Government argues that religious beliefs between Plaintiffs differ. But the class definition here established (through determinations by Air Force Chaplains) that each member of the class has a sincerely held belief that is substantially burdened by the Vaccine Mandate.[13] Consequently, the burden is squarely on the Government to demonstrate that it has employed the least restrictive means to further a compelling governmental interest. And the fact that some

[12] Covaxin is a more traditional vaccine developed from inactivated COVID-19 virus and available in certain countries overseas and in Mexico; it is undergoing the FDA approval process currently, and, to date, it has not been developed, produced, or tested with aborted fetal tissues. https://ir.ocugen.com/news-releases/news-release-details/ocugen-announces-fda-removes-clinical-hold-phase-23-clinical (last accessed 9/26/2022).

[13] The Government also falsely claims that DAF Chaplains do not make sincerity or burden assessments – but the applicable Air Force Instruction says otherwise. DAF Chaplains must prepare a Memoranda that addresses and makes determinations of both the sincerity of belief and the substantial burden from the particular requirement. DAF 52-Attachment/Table 5a at p.29 ("Requestor's religious beliefs seemed honestly, consistently and sincerely held" … "Requester identified the substantial burden which infringes upon religious freedom"). AFI 52-201, https://static.e-publishing.af.mil/production/1/af_hc/publication/dafi52-201/dafi52-201.pdf (last accessed 9/22/2022).

members of the class will receive or have received the vaccine over time does not change the fact that the injunctive relief was and remains necessary, since all members of the class face punitive measures for being unvaccinated contrary to the Secretary's directive. *Ramsek v. Beshear*, 989 F.3d 494 (6th Cir. 2021) (case not moot due to possibility of criminal sanctions for past non-compliance). More to the point, all of the Plaintiff class members were subject to the same policy of discrimination and all suffered harm, to include punitive action and threats of further punitive action, as a result of the exercise of their religious beliefs. FRCP 23(b)(2).

At bottom, common questions, with common answers, drive this litigation. First, did the DAF actually engage in an individualized analysis of each class member's religious exemption request as the law requires *or* did it have a policy for deciding religious exemption requests which did not require individualized analysis of each religious exemption request? Second, given that a DAF Chaplain determined that each class member had a sincerely held religious belief that was substantially burdened, did the DAF *meet its burden* of showing both a compelling governmental interest and that the Vaccine Mandate was the least restrictive means of achieving a compelling governmental interest? *See, e.g.*, 42 U.S.C. § 2000bb-1(b); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-1297 (2021) ("[N]arrow tailoring **requires the government to show** that measures less restrictive of the First Amendment activity could not address its interest …."). Third, given that the CDC

recently issued new COVID-19 guidance based on research documenting no discernable difference in the rate of infection or outcomes from infection between vaccinated individuals and naturally immune individuals, can the DAF now prove a compelling interest?[14] Fourth, can the DAF ever make this showing of compelling interest and least restrictive means, in light of its blanket policy of granting medical exemptions and certain administrative exemptions? Fifth, whether the DAF unconstitutionally discriminated against religious beliefs by systemically denying almost every religious exemption (except to personnel at their end of service) all while granting, and accommodating, thousands of medical and administrative exemptions? These are common questions for the class, each of which will have common answers.

2. Plaintiffs demonstrated typicality

Here, the Government baldly contends that Plaintiffs failed to establish typicality. Not so. FRCP 23(a)(3) requires plaintiffs to demonstrate that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "Typicality is met if the class members' claims are 'fairly encompassed by the named plaintiffs' claims.'" *Hendricks*, 2019 U.S. Dist. LEXIS 96940 (*quoting Sprague*, 133 F.3d at 399). "Many courts have found typicality if the claims or

[14] *See 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 10/02/2022).

defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory." *Rikos*, 799 F.3d 497, 509 (*quoting* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 7A Federal Practice and Procedure § 1764 (3d ed. 2005)).

Further, and as shown above, commonality is established, thus also establishing typicality. "[I]n cases involving claims of class-wide discrimination, these two requirements 'tend to merge.'" *Doster*, --- F.4th ---, 2022 U.S. App. LEXIS 25339, *quoting General Telephone Co. of Southwest*, 457 U.S. 147, 157, n.13.

"And the same contention [of class-wide discrimination] would establish typicality, since the same discriminatory policy would account for the failure to grant the named plaintiffs' and class members' requests alike." *Doster*, --- F.4th ---, 2022 U.S. App. LEXIS 25339. This Court has historically found typicality in such circumstances. *Powers*, 501 F.3d 592; *People First*, 1998 U.S. App. LEXIS 9537; *Eddleman*, 1996 U.S. App. LEXIS 25298.

Without coherent explanation, the Government argues that unique defenses regarding exhaustion of remedies apply to certain of the named Plaintiffs and thus class certification was allegedly improper. However, the district court correctly rejected this argument in light of the unrebutted, publicly available record of the DAF's systemic denials of exemptions for all but end-of-service personnel, [Dec.

Wiest, Doc. 30-2, PageID#2084-2090, with transcript attached; Dec. Wiest, Doc. 74-2, PageID#4527; Tr., Doc. 48 at PageID#3231-3234], finding that they fit well within the futility exception recognized by this and other Circuits. *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418, 1424 (6th Cir. 1994).

This Court recognizes exceptions to exhaustion requirements where administrative remedies are (1) inadequate or not efficacious; (2) where pursuit of administrative remedies would be a futile gesture; or (3) where irreparable injury will result unless immediate judicial review is permitted. *Id*; *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). Each of these exceptions apply 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 v. Biden*, 27 F.4th 336, 347 (5th Cir. 2022), 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*, ---F.4th ---, 2022 U.S. App. LEXIS 25339. Further, as here, "where the administrative body is shown to be biased or has otherwise predetermined the issue before it," there is no meaningful administrative remedy. *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992). And, irreparable harm is ongoing due to coercion of the Plaintiffs and the class: "[t]he Free Exercise Clause, we reiterate, 'protects against indirect coercion or penalties on the free exercise of religion.'" *Dahl*, 15 F.4th 728, 732.

We have fully briefed and refuted the Government's exhaustion arguments in the appeal in *Doster v. Kendall*, 22-3497, and incorporate that briefing by reference. In response, the Government cites the handful of religious exemptions it has granted, but refuses to acknowledge the unrebutted proof before the district court that all of these were for persons who qualified for an administrative exemption or were at the end of their term of service, which none of the eighteen named Plaintiffs did. [Tr., Doc. 48 at PageID#3231-3234].

Even if, *arguendo*, exhaustion here was not futile, RFRA claims do not have an exhaustion requirement. *See, e.g.*, *Hitchcock v. Cumberland Univ. 403(b) DC Plan*, 851 F.3d 552 (6th Cir. 2017) (declining to read an exhaustion requirement into a statute not containing such a requirement); *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, see 42 U.S.C. §§ 2000bb–2000bb–4, and the Supreme Court has not imposed one."); *U.S. Navy Seals 1-26*, 27 F.4th 336. There are no unique defenses.

Lastly, the Government challenges the extension of the class to cadets or members of the national guard, because none of the original 18 Plaintiffs were cadets or national guard members.[15] This Court in *Doster* observed that the Supreme Court's decision in *Gratz*, 539 U.S. 244, 263-267, foreclosed that argument. In *Gratz*, the Supreme Court found that the named plaintiff was subjected to the discriminatory policy in the same manner as others in the class and, therefore, the class could include everyone similarly affected. *Id.* The same is true here. In response, the Government again repeats its false mantra that there is no such *de facto* policy, even though its own representative admitted in Court that it had such a policy, and unrebutted testimony at an evidentiary hearing demonstrated the existence of such a policy. [Dec. Wiest, Doc. 30-2, PageID#2084-2090, with transcript attached; Dec. Wiest, Doc. 74-2, PageID#4527; Tr., Doc. 48 at PageID#3231-3234].

[15] If that is a problem, and Appellees submit it is not, it is easily rectified: a motion to intervene by such persons was submitted and denied by the district court, and it would not pose any challenge to have those persons intervene.

B. Plaintiffs established that FRCP 23(b)(1)(A) and (b)(2) were satisfied

The Government's next criticism of the district court's decision is to falsely claim the requirements of FRCP 23(b)(1)(A) or FRCP 23(b)(2) were not met.

1. FRCP 23(b)(1)(A)'s requirements were met

FRCP 23(b)(1)(A) provides that a class may be maintained where "(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." This prong is triggered where the party is obliged by law or as a matter of practical necessity to treat the members of the class in a like manner. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). And, this Court has held that discrimination, particularly where it is widespread in the face of requirements not to discriminate, supports a FRCP 23(b)(1)(A) class. *Clemons v. Norton Healthcare Inc.*, 890 F.3d 254, 280 (6th Cir. 2018).

Here, the DAF's was required to treat class members equally to service members seeking medical or administrative exemptions under RFRA and the First Amendment, demonstrating an obligation by law to treat members of the class alike. Such a class in the military context is not unprecedented. *Larionoff v. United States*, 533 F.2d 1167, 1182 n. 36 (D.C. Cir. 1976) (military was required to treat all class members alike so FRCP 23(B)(1)(A) met).

2. FRCP 23(b)(2)'s requirements were met

A court may certify a class under FRCP 23(b)(2) if 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." A FRCP 23(b)(2) class was also appropriate here, since this case involves claims for declaratory and injunctive relief against official capacity defendants. *Clemons*, 890 F.3d 254, 280. Indeed, the commentary to FRCP 23(b)(2) and the Supreme Court are clear that a (b)(2) class is appropriate where there is widespread discrimination. *Amchem Prods.*, 521 U.S. 591, 614; FRCP 23(b)(2), commentary.

In similar contexts involving a pattern of constitutional violations, this Court has not hesitated to find class certification appropriate. *People First*, 1998 U.S. App. LEXIS 9537 (6th Cir. 1998) (First Amendment (b)(2) class); *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006) (pointing out that FRCP (b)(2) class focusses on defendant's violations of the law, not on plaintiffs' claims).

"Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples of what (b)(2) is meant to capture." *Dukes*, 564 U.S. at 361. As this Court explained, "that is precisely the kind of case we have here." *Doster*, --- F.4th ---, 2022 U.S. App. LEXIS 25339. "As the district court recognized, the ground on which the Department allegedly acted—and the ground

that applies generally to the class—is its alleged policy of discrimination against religious exemptions." *Id.* "The scope of the alleged discrimination in this case is indeed coterminous with the definition of the class." *Id.* "In that respect, this case is akin to Title VII class actions in which the plaintiffs allege a pattern or practice of racial discrimination." *Id.*, *citing Chicago Teachers Union, Local No. 1 v. Board of Education of City of Chicago*, 797 F.3d 426, 441-42 (7th Cir. 2015). "Moreover, if the plaintiffs eventually prove the existence of a discriminatory policy, final injunctive or declaratory relief would be appropriate for the class as a whole." *Id.*, *citing Gratz*, 539 U.S. at 264-67; *Chicago Teachers Union*, 797 F.3d at 442.

The Government claims that whether a particular Plaintiff has a sincere belief that is burdened and can be accommodated turns on a close analysis of his or her individual circumstances. Even assuming this is true in the abstract, substantial proof demonstrates that *the DAF never engaged in that analysis*. In fact, overwhelming evidence of systemic discrimination here refutes any claim the DAF followed such a process. This Court's (and the United States Supreme Court's) precedent demonstrates that granting thousands of secular exemptions but systemically denying religious exemptions to those in the same position **establishes the violation**. *Dahl*, 15 F.4th 728; *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021); *Maryville Baptist Church*, 957 F.3d 610 at 614-615; *Roberts v. Neace*, 958 F.3d 409, 413-415 (6th Cir. 2020); *Tandon*, 141 S. Ct. 1294, 1296. Class

certification is appropriate, minor differences in individual class member circumstances notwithstanding. *Franks*, 424 U.S. 747.

The DAF systemically permits substantial numbers of members to remain unvaccinated for secular reasons. "Risks of contagion turn on [the purported failure to receive the vaccine, but] 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.

In *Dahl*, as here, the defendant "requires [persons] to be vaccinated against COVID-19, but it considers individual requests for medical and religious exemptions on a discretionary basis. [Plaintiff] applied for religious exemptions. The [defendants] ignored or denied their requests…" 15 F.4th at 730. In *Dahl*, it was merely the denial of participation in team sport activities. *Id.* In contrast, the consequences to Plaintiffs here are far more severe.

Where, as here, the governmental actor "extends discretionary exemptions to a policy, **it must grant exemptions** for cases of 'religious hardship' **or present compelling reasons not to do so**." *Dahl* 15 F.4th 728, 731 (emphasis added).

In terms of strict scrutiny, and whether the *Dahl* defendants could meet it, this Court found significant that others either were not subject to, **or were exempt from**, the vaccination policy. *Id.* at 735. So too here. Here, the DAF approved thousands

of blanket medical and administrative exemptions to carry out all kinds of job descriptions all across the DAF. *Fulton*, 141 S. Ct. 1868, 1882 (the government has no "compelling reason why it has a particular interest in denying an exception to [plaintiff] while making them available to others.").

The Government also argues that courts reaching differing conclusions about the merits compels the conclusion that class certification was not proper. Not so. *City of North Royalton v. McKesson Corp. (In re Nat'l Prescription Opiate Litig.)*, 976 F.3d 664, 674 (6th Cir. 2020) (explaining the very purpose of class litigation is to "avoid conflicting judgments in individualized proceedings and can more efficiently resolve the claims of the class through a single lawsuit"). That same argument bolsters certification under FRCP 23(b)(1)(A).

The Government next argues that individualized relief may be in order, but that is no reason not to certify a class. *Reynolds v. National Football League*, 584 F.2d 280 (8th Cir. 1978) (divergences in potential remedy no reason to deny class). As this Court explained regarding its view of final relief in this case: "an 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." *Doster*, --- F.4th ---, 2022 U.S. App. LEXIS 25339. If the discriminatory policy were abolished root and branch (and adverse actions taken pursuant to it enjoined), it would result

in a remand of every religious exemption denial back to the DAF for imposition of a neutral processing that did not have its hand on the scales resulting, as before, in across-the-board denials.

Curiously, the Government next claims that a decision with no explanation from a majority of the Supreme Court, on an injunction pending appeal in another Air Force case, is somehow indicative of the merits. It is not. *See, e.g.*, *Ramsek v. Beshear*, 468 F. Supp.3d 904, 911-913 (EDKY 2020). It also falsely claims, contrary to case law, that an adverse ruling would somehow bind the class and that notice to the class was allegedly inadequate citing to a FRCP 23(b)(3) class case from the Fifth Circuit. Neither contention is true in FRCP 23(b)(1) or (b)(2) cases, such as this case. *Cole v. City of Memphis*, 839 F.3d 530, 541 (6th Cir. 2016) ("notice is not required for a (b)(2) class," and class "members would not be estopped by a final judgment" in a (b)(2) class); *UAW v. GMC*, 497 F.3d 615, 630 (6th Cir. 2007) (same); *See, also*, Fed. R. Civ. P. 23(c)(2)(A).

The Government also alleges error regarding the discretionary opt-out granted by the district court. Admittedly, there is no absolute right to opt-out of a FRCP 23(b)(2) class. *Mitchell v. Dutton*, 865 F.2d 1268 (6th Cir. 1989); *See* 3 Herbert Newberg & Alba Conte, Newberg on Class Actions § 16.17 (3d ed. 1992) ("Under Rule 23(b)(1) or (b)(2), there is no such absolute right [to opt out, t]hough under

Rule 23(d) courts have the discretionary power to allow exclusion in Rule 23(b)(1) and (b)(2) class actions . .” (footnotes omitted)).

That said, the weight of authority supports a district court’s discretion in allowing opt-outs. *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997) (holding that district court has discretion under Rule 23 to grant opt out rights in 23(b)(2) class action); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990) (same); *Penson v. Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981) (same); *Williams v. Burlington Northern, Inc.*, 832 F.2d 100, 103 (7th Cir. 1987), *cert. denied*, 485 U.S. 991 (1988) (same); *Crawford v. Honig*, 37 F.3d 485, 487 n.2 (9th Cir. 1995) (same); *Holmes v. Cont'l Can Co.*, 706 F.2d 1144 (11th Cir. 1983) (same). We have not found any cases establishing it is an abuse of discretion to allow opt-outs and there is no harm to the DAF in doing so as, presumably, it can continue its unconstitutional discrimination against those who chose to opt out.

Next, the Government points to the less than 100 service members who opted out as some reason to withhold class certification. We submit, instead, that this is strong argument that class certification should have come sooner. Here, the Government coerced, punished, stigmatized, and ostracized religious believers for close to a year. At the time the district court’s certification order and class-wide injunction issued, administrative separation boards were underway and, in many cases, discharges were ordered for hundreds of service members. In other words,

and as we understand it, each of these opt-out members had completed punitive discharge boards, had made arrangements to find civilian employment, had made arrangements to move with their families to their home of record, and had made other arrangements to leave their military careers. In such situations it is not surprising that these 100 service members chose to opt-out instead of uprooting their lives again in order to return to a service that discriminated against them simply for having a moral conscience they would not violate. It is instead surprising that the number is not greater. So, rather than aiding the Government's case, it instead underscores the irreparable harm inflicted by the Government's systemic discriminatory policy. The emotional pain and hardship already caused to these class members by the DAF's discriminatory treatment worked to ensure these class members left the service.

Without question, the factual findings by the district court were supported by substantial proof, and the district court applied the correct law in certifying the class. As such, the district court did not abuse its discretion in certifying the class.

II. The District Court Appropriately Granted a Class-Wide Injunction

A. Plaintiffs and the class demonstrated a likelihood of success on the merits

The Government begins its argument on the class-wide injunction by grossly misreading (omitting) the relevant language used by this Court in *Doster*, --- F.4th -

--, 2022 U.S. App. LEXIS 25339. In discussing final relief, this Court specifically noted that not only would such relief require the abolishment of "the discriminatory policy, root and branch," but would also "enjoin any adverse action against the class members on the basis of denials of religious exemptions pursuant to that policy." *Id.* Well, that is exactly what the district court preliminarily enjoined here: "adverse action against the class members on the basis of denials of religious exemptions pursuant to that policy." *Id.*

Next, the Government falsely argues the district court did not consider or base its ruling on the fact that the DAF likely engaged in a systemic, *de facto* discrimination. To reach that completely divorced from reality conclusion, one would have to entirely disregard the language and analysis of each and every ruling issued by the district court in this case. *Doster*, ---F.Supp.3d---, 2022 U.S. Dist. LEXIS 59381 (observing that the DAF denied "virtually all religious exemption requests," observing that the DAF "freely granted medical and administrative exemptions while denying almost all religious exemption requests," citing the DAf's "policy of denying substantially all religious exemptions"); *Doster v. Kendall*, ---F.Supp.3d---, 2022 U.S. Dist. LEXIS 125388, (SDOH July 2022) ("the Air Force 'has effectively stacked the deck' against service members seeking religious exemptions," "overt policy to deny substantially all religious accommodation requests,"); *Doster v. Kendall*, 2022 U.S. Dist. LEXIS 137068 (SDOH July 2022)

(incorporating March, 2022 order and analysis); *Doster v. Kendall*, 2022 U.S. Dist. LEXIS 149799 (SDOH Aug. 2022) ("Defendants appear prepared to separate any airman who objects to getting the COVID-19 vaccine due to sincerely held religious beliefs"). The record is clear that that is exactly why the district court ordered the preliminary injunction.

Next, the Government argues that the district court somehow was incorrect in its determination that all members of the class had shown a likelihood of success on the merits. However, the class definition itself required confirmation by the DAF's own Chaplains of both a sincerely held belief, and a substantial burdening of that belief. *Doster*, ---F.Supp.3d---, 2022 U.S. Dist. LEXIS 125388; *Doster*, 2022 U.S. Dist. LEXIS 149799. Given the evidence of robust exceptions granted on medical and administrative grounds, and the systematic denial of stand-alone religious exemptions, strict scrutiny was triggered under the First Amendment. *Fulton*, 141 S. Ct. 1868; *Tandon*, 141 S. Ct. 1294; *Roberts*, 958 F.3d 409; *Maryville Baptist Church, Inc.*, 957 F.3d 610; *Dahl*, 15 F.4th 728, 734.

To meet its burden under strict scrutiny, the Government had to articulate "'interests of the highest order' and [that 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 had to 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. The plain language of RFRA likewise required the Government to prove a compelling governmental interest, and that there were no less restrictive alternatives available to it, other than its Vaccine Mandate. 42 U.S.C. 2000bb-1(b). The record is unequivocal that the Government could not and did not meet either its First Amendment or RFRA burden.

Previously, we articulated why this analysis can be dispensed with *en masse* in our brief in the companion case, *Doster v. Kendall*, 6th Cir. Case No. 22-3497, to include, without limitation: (i) recent CDC studies that acknowledge waning vaccine immunity and that natural immunity is at least as effective as vaccine immunity (coupled with the DAF's willingness to accept the wholly ineffective Johnson & Johnson vaccination); (ii) the Government's policy of granting numerous medical and administrative exemptions that undermines its arguments of a compelling governmental interest and of narrow tailoring/least restrictive means – if the Government can accommodate medical and administrative exceptions, it can accommodate religious exemptions as well; (iii) the Government's policy of permitting each member of the class to remain unvaccinated for months while it processed their exemptions undermines its arguments of a compelling governmental interest; (iv) that each class member, by definition, remained unvaccinated while performing duties but without impairment to mission, from at least March 2020 through August 2021; and (v) that the DAF has a higher than 98% vaccination rate,

suggesting that almost everyone who the class members interact with are vaccinated, and that should be sufficient protection if the vaccine actually works, which is the assumption upon which the Government's entire case rests. Simply put, all of this substantial proof refutes the Government's purported compelling interest, as well as claims of narrow-tailoring and least restrictive means.

In support of its admitted failure to recognize natural immunity, the Government ridiculously argues that vaccine derived immunity plus natural infection derived immunity is better than natural immunity alone, (Brief, R. 29 at 42). But that is not the proper question: the proper question is whether natural immunity, which the CDC acknowledges is equivalent to vaccine-derived immunity,[16] meets the Government's asserted interests, not whether "it is better." As the Supreme Court has explained, the government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 803 n.9 (2011). Given that 95% of Americans (and thus, presumably, 95% of the class) now have natural immunity, the failure of the Government to recognize natural immunity, which the CDC now says is at least equivalent to vaccine derived immunity, is fatal to the Government's argument.[17]

[16] https://www.cdc.gov/mmwr/volumes/71/wr/mm7133e1.htm , (last accessed 08/18/2022).

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

Significantly, the Government is not forcing 100% of its members to become naturally infected in order for 100% of its members to develop this arguably superior hybrid immunity. Instead, the Government takes the hypocritical and unscientific position that only 100% vaccination meets its purported compelling interest (even if vaccination is demonstrably ineffective, as is the case for the Johnson & Johnson vaccine), but the natural immunity that the CDC says is at least equivalent will not be acknowledged. All this actually proves is that the Government's alleged "compelling interest" is not actually to establish immunity or support military readiness, but instead to force compliance from its members to surrender their sincerely held religious beliefs. "Because I say so," however, is simply not a compelling governmental interest. *Burns v. Sherwin-Williams Co.*, 2022 U.S. Dist. LEXIS 168122, at *66 (NDIL Sep. 18, 2022) ("'Because I said so' isn't a great argument, except in the parenting context.'").

Next, the Government dishonestly takes issue with the purported lack of analysis by the district court in the July and August orders (Brief, R.29 at 39-40), even though both expressly incorporated that court's ruling from March 2022, which included more than 40 pages of analysis.

More shockingly, the Government believes it is above, and not bound by, the Constitution, in boldly arguing for absolute deference to its decisions, citing a number of distinguishable cases. First, *Wayte v. United States*, 470 U.S. 598 (1985),

a case involving content-neutral speech. Its second reference for absolute deference, *Goldman v. Weinberger*, 475 U.S. 503 (1986), involved a neutral and generally applicable regulation (which was "reasonabl[e] and evenhanded[]"), which likewise has no applicability here. Nor do the other cases the Government cites. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (not addressing fundamental constitutional rights or statutory rights at all); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (case challenging Governor's ability to deploy and use national guard in the future was non-justiciable – which is not what this case is at all).

The Government also makes generalized arguments about its interests in "military readiness" and the "health" of its personnel. However, Supreme Court precedent is clear that deference is not, and cannot be, absolute. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 26 (2008) ("military interests do not always trump other considerations"); *Parisi v. Davidson*, 405 U.S. 34, 54-55 (1972) (rejecting deference arguments and noting that "[i]f there is a statutory or constitutional reason why he should not obey the order of the Army, that agency is overreaching when it punishes him for his refusal", that "matters of the mind and spirit, rooted in the First Amendment, are not in the keeping of the military," and "[w]hen the military steps over those bounds, it leaves the area of its expertise and forsakes its domain," and thus "[t]he matter then becomes one for civilian courts to resolve, consistent with the statutes and with the Constitution.").

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?

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."). *See, also, 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); *U.S. Navy Seals 1-26*, 27 F.4th 336, 351 (in the military context, RFRA demands more than simply deferring to military officials' say-so).

"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.* The Government's arguments to the contrary are unavailing.

Finally, and through incorporation of its March 2022 order, the district court rendered findings of fact as to contested issues, which were based upon an evidentiary hearing in which only the Plaintiffs presented proof. The district court's findings of fact were, consequently, supported by the record and no clear error occurred in that regard. *Schimmel*, 751 F.3d 427 at 430. Its legal conclusions, drawn from its findings of fact and well-established law, likewise were correct. On this record, Plaintiffs established they were likely to prevail on the merits, both individually and on a class-wide basis. *Id.*

B. Plaintiffs and the class met the remaining equitable injunctive relief factors

The Government next repeats its false claims that there is no irreparable harm from enforcing its Vaccine Mandate – falsely claiming that the district court did not make a finding of irreparable harm, even though that court expressly incorporated its March 2022 order, which made that finding. *Doster*, ---F.Supp.3d---, 2022 U.S. Dist. LEXIS 59381(finding irreparable harm); *Doster*, 2022 U.S. Dist. LEXIS 137068 (incorporating March, 2022 order and analysis).

There is never an adequate remedy at law and irreparable harm exists for even a brief deprivation of religious liberty rights. *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 v Burns*, 427 U.S. 347, 373 (1976) (irreparable harm from violation of rights). And, 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).

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 (NDTX 2019); *U.S. Navy Seals 1-26*, 27 F.4th 336, 353.

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 disturbingly argues that the harm here is not irreparable because the Plaintiffs can undergo a process with a foregone conclusion: punishment and separation. Not only does that ignore the irreparable harm from violations of RFRA and the First Amendment, it ignores that this case is not the usual employment case where damages are determinable and can be awarded after the fact. That is because the Government may be immune from liability for damages normally

compensable in litigation, such as emotional distress, 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).

And, for the Government, separation appears to be the entire point. Substantial proof establishes that 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.

As for the factors of equities and public interest, they 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.

The Government's claim that it will suffer irreparable harm is based on untested declarations from witnesses it was unwilling to expose to cross-examination at an evidentiary hearing. Under such circumstances, the district court appropriately

discounted such testimony. *Detroit & T. S. L. R. Co.*, 357 F.2d 152, 153; *Curtis*, 863 F.2d 47. On this record, the district court's findings on irreparable harm favoring the Plaintiffs in no way rises to the level of abuse of discretion. *Schimmel*, 751 F.3d 427 at 430.

Finally, this Court in *Doster*, --- F.4th ---, 2022 U.S. App. LEXIS 25339 appropriately observed that the harms the Government complains of are the:

> very same harms that the Department imposed on itself when, to its credit, it chose to grant temporary exemptions to service members during the pendency of their requests for religious exemptions. Moreover, the record shows that the Department routinely takes many months to render a final decision as to those requests, during which time the Department's temporary exemptions remain in place. That suggests that the Department's concerns about these harms are not as urgent as the Department's briefing now says. We therefore do not think the Department has demonstrated that the district court likely abused its discretion when, in effect, it afforded the class members—during the pendency of claims as to which the Department has not yet shown a likelihood it will prevail—the same relief that the Department itself has afforded them. *Id.*

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). *See, also, U.S. Navy Seals 1-26*, 27 F.4th 336, 353.

For months, the Government stayed the enforcement of its unconstitutional Vaccine Mandate to permit service members to go through the Potemkin exercise of

seeking never-to-be-granted religious exemptions. Consequently, if this requirement 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 of its mandate, or asking Plaintiffs and class members to request accommodation through an illusory process for a never-to-be-granted religious exemptions?

CONCLUSION

Reliance upon sincerely held religious beliefs have been the backbone of our military since the early days of the Revolutionary War. Belief in God, and his providence, have sustained our fighting men and women through many conflicts and the most difficult of circumstances and has been a cornerstone of morale, discipline, and the ability to overcome nearly impossible circumstances. These Airmen were entitled to be reasonably and temporarily accommodated for their sincerely held religious beliefs, just as their colleagues who obtained secular exemptions were. The district court properly analyzed the facts and law, properly certified a class, and appropriately entered class-wide preliminary injunctive relief to protect these Airmen. Its decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I have served the foregoing upon the Defendants/Appellants, through service of this Brief via CM/ECF, this 7th day of October, 2022.

/s/Christopher Wiest
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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(g) and 6th Cir. R. 32(a), I certify that this Brief contains 12,996 words. This Brief 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
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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