No. 22-3497

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION AND SUMMARY

The district court abused its discretion in preliminarily enjoining the Air Force from taking any adverse action against the 18 plaintiffs because of their refusal to be vaccinated against COVID-19. Plaintiffs failed to satisfy any of the requirements for preliminary relief.

First, plaintiffs failed to demonstrate a likelihood of success on the merits. At the threshold, plaintiffs' claims are nonjusticiable and generally unripe. Plaintiffs have not exhausted intra-military remedies, and the Air Force has not taken actionable adverse action against the vast majority of the named plaintiffs for their refusal to comply with the vaccination requirement. Plaintiffs also cannot show a likelihood of success on their Religious Freedom Restoration Act (RFRA) and Free Exercise Clause claims. The Air Force has a compelling interest in ensuring that these plaintiffs—who must be deployable on short notice—remain fit for duty and in protecting them against severe illness that could jeopardize missions and military readiness. And the Air Force has determined that vaccination of each of the plaintiffs is the least restrictive means of advancing that compelling interest. Those determinations are supported by sworn declarations from numerous high-ranking military officials, and plaintiffs have identified no valid basis to second-guess those expert judgments.

Plaintiffs primarily contend that the vaccination requirement fails RFRA's means-ends test because the Air Force has granted "thousands" of temporary medical and administrative exemptions, and because plaintiffs' prior SARS-CoV-2 infections

(the virus that causes COVID-19) purportedly give them "natural immunity" from subsequent infection. These contentions fail. Temporary medical exemptions—unlike plaintiffs' requested religious exemptions—serve the same purpose as the vaccination requirement: they ensure that service members are maximally fit to deploy. And administrative exemptions are generally limited to service members who are about to exit the military. The Air Force has now granted over 130 religious exemptions, which have been not granted to service members who would qualify for an administrative exemption (but have been granted under similar circumstances). Moreover, "natural immunity" is not a viable alternative. There is no recognized way to measure an individual's protection from subsequent infection, and the Centers for Disease Control and Prevention (CDC) continues to recommend vaccination as the most effective way to prevent severe illness and hospitalization.

Plaintiffs also failed to show that the balance of equities favors preliminary relief. The Air Force's interest in fielding a healthy and effective fighting force outweighs any interests plaintiffs may have in avoiding discipline or other consequences from their refusal to be vaccinated during the pendency of this litigation, especially since plaintiffs could obtain full relief on their employment-related claims even if they were ultimately separated from the military.

ARGUMENT

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

A. Plaintiffs' Claims Are Neither Justiciable nor Ripe.

As the opening brief explained (at 17-30), plaintiffs' claims are not justiciable because plaintiffs have not exhausted their intra-service remedies, and most of plaintiffs' claims are not ripe. The Air Force had only initiated action against two of the 18 named plaintiffs—Dills and Schuldes—assigning them to the Individual Ready Reserve. Plaintiffs' arguments mischaracterize the Air Force's position and cannot be squared with this Court's justiciability and ripeness precedents.

Plaintiffs contend (at 22) that "only one Plaintiff must have standing and a justiciable claim to move forward," but "'standing is not dispensed in gross,'" *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250, 253 (6th Cir. 2018). Even assuming one plaintiff had a justiciable claim, that would not provide a basis to adjudicate all 18 plaintiffs' individual RFRA claims—RFRA requires each claim be analyzed "to the person." 42 U.S.C. § 2000bb-1(b); *see also EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 590 (6th Cir. 2018) (RFRA requires considering application of "the challenged law [to] ... the particular claimant.") (quotations omitted). And plaintiffs offer no response to the Air Force's argument (Opening Br. 45-46) that the preliminary injunction is not "appropriate relief" under RFRA, 42 U.S.C. § 2000bb-1(c)—relief which the Supreme Court has emphasized is "inherently context dependent." *Tanzin v.*

Tanvir, 141 S. Ct. 486, 491 (2020) (quotations omitted). Because the preliminary injunction infringes on professional military judgments about operational needs and assignments, it also is not consonant with "traditional principles of equity jurisdiction," *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund Inc.,* 527 U.S. 308, 318-19 (1999) (quotations omitted).

1. Plaintiffs' Claims Are Not Justiciable.

Plaintiffs' claims are nonjusticiable because they have not exhausted intra-service military remedies. This Court has recognized its relative "lack of expertise" to review claims involving military duty assignments, as well as the "practical difficulties" from subjecting every military assignment decision to judicial review. *Harkness v. Secretary of the Navy*, 858 F.3d 437, 443 (6th Cir. 2017). Exhaustion is particularly important in the military context because it provides courts with "a definitive interpretation" of the relevant policy and a well-developed factual record from the military's "own appellate system." *Von Hoffburg v. Alexander*, 615 F.2d 633, 639 (5th Cir. 1980); *see also Horn v. Schlesinger*, 514 F.2d 549, 553 (8th Cir. 1975) ("A failure to exhaust [intra-service] remedies … will inevitably upset the balance, carefully struck, between military authority and the power of the federal courts.").

Plaintiffs' contention that "RFRA contains no exhaustion requirement," Resp. Br. 23, misses the point. While RFRA itself does not require exhaustion, *see, e.g.*, *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012), well-established justiciability and abstention principles apply to claims challenging

military decision-making, which RFRA does not displace. As explained (Opening Br. 32-33), Congress intended for RFRA to incorporate longstanding principles of military deference. *See* S. Rep. No. 103-111, at 12 (1993); H.R. Rep. No. 103-88, at 8 (1993). Indeed, the exhaustion and nonjusticiability principles articulated in *Harkness* derive from the same line of military-deference decisions cited in RFRA's legislative history: courts abstain from deciding cases when doing so would be prudentially inappropriate for separation-of-powers concerns. *Mindes v. Seamen*, 453 F.2d 197, 199 (5th Cir. 1971) (articulating a "judicial policy akin to comity"); *Harkness*, 858 F.3d at 444-45 (adopting *Mindes*). This Court has specifically held that RFRA does not abrogate principles of prudential standing, *see Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013); RFRA similarly does not preempt other prudential abstention doctrines grounded in deference to military judgments.

Plaintiffs erroneously contend (Resp. Br. 25) that *Harkness* is limited to military promotion-related claims under 10 U.S.C. § 14502. But this Court specifically applied exhaustion requirements to the plaintiff's First Amendment religious-liberty claim in that case. *Harkness*, 858 F.3d at 444. Additionally, several district courts have held that RFRA claims challenging the denial of religious exemption requests from military COVID-19 vaccination requirements are likely not justiciable, *see, e.g.*, *Navy SEAL 1 v. Austin*, No. 22-cv-688, 2022 WL 1294486, at *5-6 (D.D.C. Apr. 29, 2022); *Short v. Berger*, No. 22-cv-1151, 2022 WL 1051852, at *5-6 (C.D. Cal. Mar. 3, 2022), and courts have held that other religious-liberty claims are nonjusticiable in the military context, *see, e.g.*,

Von Hoffburg, 615 F.2d at 637-38 (claims that included a constitutional religious-freedom claim were nonjusticiable); *Khalsa v. Weinberger*, 779 F.2d 1393, 1398-1400 (9th Cir. 1985) (similar for Sikh plaintiff's religious-liberty claims).

Plaintiffs' reliance (Resp. Br. 24-25) on *Parisi v. Davidson*, 405 U.S. 34 (1972), is similarly misplaced. In contrast to plaintiffs here, the plaintiff in *Parisi* had fully exhausted his remedies before the relevant Board for Correction of Military Records. *Id.* at 37. The Supreme Court simply explained that, for a service member asserting a habeas corpus claim for discharge from the military, pending court-martial proceedings would not preclude a court from adjudicating the "claim of a serviceman who has exhausted all administrative remedies." *Id.* at 45.

Plaintiffs also incorrectly assert (at 25-26) that most of them have exhausted intra-service military remedies. When the district court entered the preliminary injunction, only eight plaintiffs had received a final appeal decision, *see* Opening Br. 25-26. Moreover, because the Air Force has not initiated separation proceedings against any plaintiff, none has received a decision from an Air Force corrections board reviewable here. *Cf. Fuller v. Secretary of Def. of the U.S.*, 30 F.3d 86, 89 (8th Cir. 1994).

Plaintiffs' narrow focus on the Air Force's process for adjudicating religious exemption requests fundamentally misapprehends the exhaustion requirement. While the disposition of a religious exemption request is the first step to exhausting intra-military remedies, no service member is injured merely because an exemption is denied. It is only when the Air Force takes an adverse employment action (*e.g.*, discharge) that

a service member suffers injury—that is the reviewable action, first before an Air Force board and subsequently in civilian court. Plaintiffs identify no reason why seeking relief from those boards would be futile or inadequate. Indeed, the Air Force Board for Correction of Military Records has wide-ranging authority to "correct any military record … necessary to correct an error or remove an injustice," 10 U.S.C. § 1552(a)(1).

Moreover, plaintiffs' arguments (at 26-29) that the religious exemption process is futile lack merit. As explained, the Air Force has granted more than 130 religious exemptions (including dozens on appeal), which rebuts plaintiffs' argument (at 28-29) that any outcome from that process is "predetermined." Air Force, *DAF COVID-19 Statistics – July 12, 2022* (July 12, 2022), https://go.usa.gov/xSXwJ. Like the district court, plaintiffs primarily rely (*e.g.*, Resp. Br. 27) on the decision by a Fifth Circuit motions panel in *U.S. Navy SEALs 1-26 v. Biden*, 27 F.4th 336 (5th Cir. 2022) (per curiam). However, as explained in the opening brief (at 22), that case involved *the Navy's* process for adjudicating religious exemption requests, and thus has no bearing on the Air Force's process. More fundamentally, the aggregate number of exemptions granted by the Air Force is irrelevant to resolving plaintiffs' RFRA claims, where the government must demonstrate *in court* that requiring each plaintiff to be vaccinated is the least restrictive means of advancing the Air Force's compelling interest in

maximizing troop readiness.[1]

Plaintiffs' contention (at 31-32) that the Air Force's purported delay in processing religious exemption requests justifies a departure from normal justiciability requirements is not persuasive. The Air Force has made every effort to process the many religious exemption requests it has received (roughly 10,000) as expeditiously as possible. That process is time-intensive and requires review by at least five different officials. *See, e.g.*, Streett Decl., R. 27-13, PageID# 1934-36; Bannister Decl., R. 34-2, PageID# 2230-31. The unprecedented number of exemption requests has necessitated an enormous resource commitment to individually evaluate each request. DAF COVID-19 Statistics – March 22, 2022, R. 34-6, PageID# 2297; *see also* Bannister Decl., R. 51-1, PageID# 3395.

Plaintiffs' erroneous suggestion that the Air Force will incarcerate service members who do not comply with the vaccination requirement, *see* Resp. Br. 14, 30, likewise provides no basis for ignoring established exhaustion and justiciability rules. As explained (Opening Br. 11, 29-30), the Air Force has not court-martialed any service member who refuses to comply with the requirement absent an exemption, nor has the

[1] Plaintiffs also point (Resp. Br. 11, 28) to a memo from the Department of Defense (DoD) Inspector General that purportedly "confirms [the Air Force's] systemic discrimination" against religious exemption requests. This memo was not before the district court at the time it entered the preliminary injunction and is thus not properly part of the record on appeal, Fed. R. App. P. 10(a). Moreover, the preliminary assertions in that memo are subject to further internal investigation within DoD. Accordingly, they are not judicially noticeable, Fed. R. Evid. 201(b).

Air Force imprisoned any service member on that basis. *See* Hernandez Decl., R. 27-14, PageID# 1941. Plaintiffs offer no sound basis for speculating that the Air Force might change course.

Even assuming plaintiffs had fully exhausted their intra-military remedies, their claims would not be justiciable under the remaining *Harkness* factors. Contrary to plaintiffs' arguments (Resp. Br. 32-34), plaintiffs face no irreparable hardship that would warrant relief. *See* Part II.A. By contrast, the preliminary injunction harms the Air Force by requiring it to retain service members who could impair the functioning of their units. *See Harkness*, 858 F.3d at 444-45. Nor do plaintiffs meaningfully contest that the relief they seek would require the Air Force to assign them to certain positions and potentially be deployed, without accounting for their vaccination status—contrary to senior military leaders' judgments that doing so poses significant risks to service members and their missions. Such interference with military affairs is extraordinary, *cf. Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *Harkness*, 858 F.3d at 443-44, and should render their premature claims nonjusticiable. *See Austin v. U.S. Navy SEALs 1-26*, 142 S. Ct. 1301, 1301 (2022) (staying injunction insofar as it interfered with military "deployment, assignment, and other operational decisions").

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

Most of the plaintiffs' claims are also not ripe. The Air Force has not initiated separation proceedings against any of the plaintiffs, and at the time the district court entered the preliminary injunction at issue, only eight plaintiffs had received a final

appeal denial for their requested exemptions. *See* Bannister Decl., R. 51-1, PageID# 3396-97. Indeed, plaintiffs concede (Resp. Br. 26) that four plaintiffs have still not received a final decision on their exemption requests. Demonstrating the unripe claims, the record here contains declarations from the commanders of only those plaintiffs who had received a final decision from the Air Force Surgeon General at the time the Air Force filed its opposition to plaintiffs' motion for a preliminary injunction. *See* Opening Br. 27 (citing relevant declarations). Those declarations are of central importance to resolving plaintiffs' RFRA claims, as they articulate the military's compelling interest in vaccinating a particular service member and explain why no alternative to vaccination would be equally effective, *see infra* pp. 12-22. Without a final decision from the Air Force on whether to separate a particular plaintiff, or a final decision denying a requested religious exemption, there is no "concrete factual context" to fairly adjudicate plaintiffs' claims. *Miles Christi Religious Order v. Township of Northville*, 629 F.3d 533, 539 (6th Cir. 2010) (quotations omitted). Further, two plaintiffs have mooted their claims by opting to comply with the vaccination requirement, accentuating why these claims should not be adjudicated prematurely. *See* Salvatore Decl., R. 65-1, PageID# 4395-97; Second Ramsperger Decl., R. 66-1, PageID# 4402-05.

In arguing that their claims are ripe, plaintiffs conflate (Resp. Br. 36) the initiation of administrative discharge proceedings with an actual discharge order. Merely initiating a discharge proceeding does not constitute an actionable injury, nor will such a proceeding inevitably result in discharge. *See Ammex, Inc. v. Cox*, 351 F.3d 697, 708 (6th

Cir. 2003) (holding that pre-enforcement challenge based on regulator's "initiation of proceedings" is not ripe for review). Once a discharge recommendation is issued, a service member proceeds to a "separation authority" for subsequent decision—which "may move to a higher level review"—"before a decision is made regarding [a service member's] discharge from the service." Hernandez Decl., R. 27-14, PageID# 1943. Plaintiffs' claims thus currently rest upon "contingent future events" that "may not occur at all." *OverDrive Inc. v. Open E-Book Forum*, 986 F.3d 954, 958 (6th Cir. 2021) (quotations omitted).

Plaintiffs also err in asserting that they have been threatened with "imminent prosecution." Resp. Br. 35, 37-38. As noted, no Air Force service member has been court-martialed for refusing to comply with the vaccination requirement, and plaintiffs' speculation that "criminal proceedings" might be initiated against them does not amount to a substantial likelihood of adverse action. *See Miles Christi*, 629 F.3d at 539; Opening Br. 29-30.

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

The preliminary injunction as to the 18 plaintiffs should be vacated because their RFRA and First Amendment claims are unlikely to succeed on the merits. The Air Force has a compelling interest in mitigating the effect of COVID-19 on its missions and personnel and, therefore, in reducing risks that the plaintiffs could become seriously ill and unable to perform their deployed missions. Requiring plaintiffs to be vaccinated

against COVID-19 is the least restrictive means to mitigate those risks.

1. Plaintiffs' RFRA Claims Lack Merit.

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

The record demonstrates that the military has a compelling interest in preventing COVID-19 from impairing the readiness and health of its forces and, therefore, in ensuring that its service members are vaccinated. Unvaccinated service members are at heightened risk of suffering severe health consequences if they contract SARS-CoV-2. *See* Opening Br. 35-36. And even one service member becoming seriously ill from COVID-19—especially a service member entrusted with piloting or servicing critical aircraft—could derail a mission, endangering other service members. Schneider Decl., R. 34-3, PageID# 2256.

As Lieutenant General Schneider explained, vaccination is an essential component of maximizing the chances of mission success, and "is necessary to … maintain a credible fighting force able to deter our adversaries, protect our nation, and—if necessary—prosecute our wars and other military operations." Schneider Decl., R. 34-3, PageID# 2244. Global affairs are "volatile, uncertain, and complex," and service members must "be in a constant state of readiness[] … medically ready to deter conflict and aggressively execute the mission." *Id.*, PageID# 2245; *see also* Heaslip Decl., R. 27-19, PageID# 1987. Deploying unvaccinated service members "significantly increase[s] risk to accomplishing the Air Force mission while causing substantial and

lasting harm to military order and discipline," Schneider Decl., R. 34-3, PageID# 2259; *see also* Pulire Decl., R. 27-23, PageID# 2023-24.

Several courts have accordingly recognized that vaccination against COVID-19 serves the military's compelling interest in ensuring the health of its troops. *See, e.g.*, *Roth v. Austin*, No. 8:22-cv-3038, 2022 WL 1568830, at *28 (D. Neb. May 18, 2022); *U.S. Navy SEALs 1-26*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring) (RFRA does not require "ordering unvaccinated personnel into an environment in which they endanger their lives, the lives of others and compromise accomplishment of essential missions." (quotations omitted)).

i. Plaintiffs argue (at 39-40) that the military cannot rely on "generalized arguments" concerning its interests in "'military readiness' and the 'health' of its personnel," but the Air Force has demonstrated, through extensive declarations, that these compelling interests apply specifically to plaintiffs. *See* Opening Br. 33-34, 40. For example, plaintiff Schuldes provides "contingency response guidance and coordinat[es] staff to fulfill worldwide response requirements" determined by deployed commanders, Heaslip Decl., R. 27-19, PageID# 1984; and plaintiff Dills "is responsible for preparing and processing passengers for transportation" on Air Force aircraft, Wren Decl., R. 27-20, PageID# 1995. Next, several plaintiffs are assigned to Air Force special operations groups: plaintiff Colantanio is responsible for maintaining the fuel systems for special operations transport aircraft, Reese Decl., R. 27-22, PageID# 2013; and plaintiff Theriault is a staff sergeant in charge of "emergency response plans" for the 1st Special

Operations Command Civil Engineer Squadron, Pulire Decl., R. 27-23, PageID# 2021. Each of these plaintiffs must be "worldwide deployable," ready to deploy "on a few days' notice." *See, e.g.*, Wren Decl., R. 27-20, PageID# 1996; Harmer Decl., R. 27-21, PageID# 2005; Reese Decl., R. 27-22, PageID# 2015.

Plaintiffs are incorrect that the Air Force asks the Court to afford "unconditional deference" and "'unquestioning acceptance'" to determinations that vaccination serves compelling military interests. Resp. Br. 40-41 (quoting *Holt v. Hobbs*, 574 U.S. 352, 364 (2015)). The Air Force simply contends that military judgments concerning the most effective measures to mitigate mission-deployment risks are subject to deference, which this Court and the Supreme Court have long recognized that separation-of-powers principles demand. *See, e.g.*, *Bolton v. Department of the Navy Bd. for Corr. of Naval Records*, 914 F.3d 401, 407 (6th Cir. 2019) (citing *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)). That deference applies equally to religious-liberty claims, where courts must accede to military officials' "expertise," *Cutter v. Wilkinson*, 544 U.S. 709, 723, 725 n.13 (2005), consistent with Congress's statement that courts "have always extended to military authorities['] significant deference in effectuating" national security interests, S. Rep. No. 103-111, at 12 ; H.R. Rep. No. 103-88, at 8 (similar). The district court addressed no plaintiffs' individual circumstances in granting preliminary relief.

Plaintiffs also argue (at 43) that the military lacks a compelling interest in their vaccination because they allegedly performed their assigned duties before vaccines were available and while afforded a temporary exemption to the vaccination requirement.

Those arguments are unpersuasive.[2] Were plaintiffs to become seriously ill or barred from entering a country on a deployment because of a COVID-19 vaccination requirement, their missions would be severely impacted, with dire consequences to military readiness. Moreover, although the President has stated that "the pandemic is over," Resp. Br. 40, he simultaneously acknowledged that "[w]e still have a problem with COVID," which remains a real risk and threat to readiness.[3] And service members must be maximally prepared to deploy worldwide. *See* Schneider Decl., R. 34-3, PageID# 2245 (describing the Air Force's rapid deployment in response to Russia's invasion of Ukraine). The CDC also continues to recommend vaccination as the most effective way to prevent severe illness and hospitalization, *see infra* pp. 20-21.

ii. Plaintiffs further contend (at 42-44) that the Air Force lacks a compelling interest in their being vaccinated because it has granted "thousands" of temporary medical and administrative exemptions. That contention is misleading—most exemptions have expired, and those service members are now vaccinated—and as explained (Opening Br. 6-7, 37-38), medical and religious exemptions are fundamentally different in kind. First, medical exemptions are temporary, lasting only as long as the

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[2] Plaintiffs also contend (at 44-45) that, because they are "healthy and fit" and previously contracted COVID-19, the Air Force lacks a compelling interest in requiring vaccination. These contentions are incorrect and misplaced—they are relevant, if at all, to whether vaccination is the least restrictive means to further the military's compelling interests, *infra* pp. 20-22.

[3] CBS News, *President Joe Biden: The 2022 60 Minutes Interview* (Sept. 18, 2022), https://perma.cc/PK7S-6KPS.

medical condition at issue (*e.g.*, pregnancy), and generally cannot exceed one year. *See* Chapa Decl., R. 27-12, PageID# 1922-23. In contrast, religious exemptions are presumptively permanent. DoDI 1300.17, *Religious Liberty in the Military Services* ¶ 3.2(g) (Sept. 1, 2020), https://perma.cc/5NLG-SL2G.

Second, medical and religious exemptions serve different purposes. Unlike religious exemptions, medical exemptions facilitate service members' health and, therefore, fitness for duty—the same interest underlying the military's COVID-19 vaccination requirement. And the Air Force considers the condition necessitating the medical exemption in making decisions as to that service member's training, assignments, and ability to continue serving. *See* Chapa Decl., R. 27-12, PageID# 1922-23, 1927; *see also Roth*, 2022 WL 1568830, at *20. If a service member is nondeployable for more than 12 consecutive months—even for medical reasons—he is evaluated for potential discharge. DoDI 1332.45, R. 34-5, PageID# 2276, 2278-79, 2292. Put simply, medical exemptions promote the health of the force, whereas religious exemptions undermine it. *See Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1179 (9th Cir. 2021) (concluding that a 30-day vaccination exemption did not "undermine [a school district's] asserted interests in student health and safety the way a religious exemption would"). And the fact that there are currently more medical than religious exemptions simply reflects compelling military interests in a healthy force. *See* Schneider Decl., R. 34-3, PageID# 2257-58.

Administrative exemptions are also different from plaintiffs' requested religious

exemptions. Virtually all administrative exemptions have been granted to service members who are on terminal leave, separating, or retiring—who are never anticipated to "return to duty." Little Decl., R. 27-16, PageID# 1954; *see also* Long Decl., R. 27-24, PageID# 2029. To the extent administrative exemptions are comparable to religious exemptions, the Air Force has granted religious exemptions for those comparable situations.[4]

b. Requiring Plaintiffs Be Vaccinated Against COVID-19 Is the Least Restrictive Means of Furthering Compelling Military Interests.

The Air Force has determined that requiring plaintiffs to be vaccinated is the least restrictive means of ensuring military readiness and furthering the military's compelling interests. Those determinations were the result of particularized assessments, weighing plaintiffs' experience and circumstances against the military's interests in their vaccination. *See* Opening Br. 41-44. As Lieutenant General Schneider explained, "vaccination against COVID-19 is the most effective way to combat the disease." Schneider Decl., R. 34-3, PageID# 2244.

Plaintiffs suggest (Resp. Br. 50, 52-53) that the Air Force should rely exclusively on other COVID-19 mitigation measures and on "natural immunity." But the Air Force

[4] Plaintiffs also point to temporary exemptions granted to service members participating in vaccine clinical trials. *See* Resp. Br. 47. But a participant in a clinical trial is not necessarily unvaccinated, and the exemption is limited to the trial's duration, in any event. Chapa Decl., R. 27-12, PageID# 1928-29.

has reasonably determined that such measures do not effectively mitigate the risks from COVID-19, and plaintiffs identify no meaningful evidence supporting a contrary conclusion. The Air Force's judgments are based on the consensus view in the scientific and public health communities that vaccination is the most effective way to mitigate the severe effects of COVID-19. Those judgments are, at minimum, entitled to substantial deference.

Plaintiffs surmise (Resp. Br. 50) that only "a series of speculative and highly unlikely events" would lead to an adverse outcome during one of plaintiffs' deployments. But preventing those "unlikely events" is precisely the sort of risk mitigation central to the military's mission, and for which courts have afforded deference to expertise-laden judgments. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (deferring to "the professional judgment of military authorities concerning the relative importance of a particular military interest") (quotations omitted). As Justice Kavanaugh recently observed, the "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments." *U.S. Navy SEALs 1-26*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring) (quoting *Gilligan*, 413 U.S. at 10).

i. Plaintiffs argue (at 47-48, 51-52) that vaccination is not the least restrictive means of advancing the Air Force's compelling interests because plaintiffs "successfully performed their job duties throughout the COVID-19 pandemic[] … without mission interruption," while the Air Force did not issue the vaccination requirement until

August 2021, "long after vaccines became widely available." Even assuming plaintiffs' self-interested claim is accurate, it misses the point. For purposes of RFRA, the question is whether—now that safe and effective vaccines are available—other mitigation measures are as effective as vaccines in furthering the military's compelling interests. The Air Force has determined that vaccination is the most effective way of furthering those interests, and missions conducted before the vaccine was available were severely constrained. *See, e.g.*, Stanley Decl., R. 27-11, PageID# 1912-15 (noting how COVID-19 impacted "global force management activities," including cancelling "19 major training events").

Furthermore, even assuming plaintiffs successfully completed missions before COVID-19 vaccines were developed or approved, that does not mean that requiring plaintiffs to be vaccinated is not the least restrictive means to mitigate the effects of COVID-19 now. *See, e.g.*, *MacWade v. Kelly*, 460 F.3d 260, 272 (2d Cir. 2006) (deferring to the government's harm-reduction interests and not requiring any "express threat or special imminence"); *Roth*, 2022 WL 1568830, at *28 ("The [military] simply was not required to continue to 'muddle through' with less effective means once superior means of furthering its compelling interest, in the form of FDA-approved vaccines, were available."). The Secretary of Defense also issued the vaccination requirement one day after the FDA approved the Pfizer COVID-19 vaccine. *See* Sec'y Def. Mem., R. 27-3, PageID# 1561; Marks Decl., R. 27-9, PageID# 1665-67; Opening Br. 4-5.

ii. Plaintiffs wrongly suggest (Resp. Br. 50, 51-52) that "natural immunity is equivalent to vaccine-derived immunity for COVID-19." Their contention that vaccines do not prevent transmission or infection (Resp. Br. 48-49) mischaracterizes the scientific consensus both at the time the district court issued the preliminary injunction and now. The CDC maintains—based on its ongoing assessment of new scientific evidence—that "[p]eople who already had COVID-19 and do not get vaccinated after their recovery are more likely to get COVID-19 again than those who get vaccinated after their recovery." CDC, *Frequently Asked Questions About COVID-19 Vaccination*, https://go.usa.gov/xSYPr (last updated Oct. 3, 2022). And the CDC continues to recommend vaccination for individuals with a history of infection: "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# 1893-94 (similar, summarizing key findings from 96 publications). Finally, the CDC has explained that "vaccination provides a transient period of increased protection against infection and transmission after the most recent dose," even if protection against infection and transmission "can wane over time." CDC, *Summary of Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems*, https://perma.cc/3PFQ-VHZF (updated Aug. 19, 2022).

As understanding of COVID-19 continues to evolve, the military is best-

positioned to determine the optimal risk-mitigation measures based on expert guidance from scientific and public health agencies. Deference to those determinations is warranted, and the district court fundamentally erred in second-guessing the Air Force's reasonable reliance on the scientific and public health communities' consensus that vaccination is the most effective way to mitigate the effects of COVID-19. *Navy SEAL 1*, 2022 WL 1294486, at *7 (recognizing the "everchanging nature of SARS-CoV-2's variants and subvariants"); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010) (deferring to the government's national security-related empirical conclusions).

Moreover, while plaintiffs repeatedly rely on "their natural immunity," it is not clear when most plaintiffs were infected, much less what level of protection (if any) they might still have from their prior infections. *Cf.* Tr., R. 45, PageID# 3073 (plaintiff Stapanon infected in August 2021); Tr., R. 48, PageID# 3221 (plaintiff Doster possibly infected before July 2021). And the record reveals nothing about how any prior infection might protect plaintiffs from infection now. As explained in the opening brief (at 42-43), there is no scientific consensus as to what antibody threshold would indicate protection from re-infection from COVID-19; nor has the FDA approved any test to measure injection-acquired immunity to COVID-19. Poel Decl., R. 27-17, PageID# 1966; *see also* CDC, *Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Approved or Authorized in the United States*, https://perma.cc/5JPZ-M5SD (last updated Sept. 23, 2022) ("[S]erologic[al] testing to assess for prior infection is not recommended for the purpose of vaccine decision-making."). Plaintiffs' "youth and

health" (Resp. Br. 50) are not any kind of meaningful less restrictive alternative to vaccination.

iii. Finally, plaintiffs' cursory argument (at 51) that some combination of "COVID-19 testing, [and] temperature checks" would be less restrictive alternatives to vaccination fails. Testing and temperature checks are not viable alternatives: "testing … does not prevent the [s]ervice member from becoming infected in the first place," nor does it "reduce the risk of illness, complications (e.g., long COVID, hospitalization), or death." Poel Decl., R. 27-17, PageID# 1965; *see also Roth*, 2022 WL 1568830, at *24 (rejecting testing as a viable alternative to vaccination); *Does 1-6 v. Mills*, 16 F.4th 20, 33 (1st Cir. 2021) (similar). Regular testing also would not solve the problem that unvaccinated service members are not deployable to countries with vaccination-entry requirements. Stanley Decl., R. 27-11, PageID# 1915. Plaintiffs also assert (at 50) that "oral antivirals … should be available to a deployed unit." Plaintiffs cite no record evidence supporting that assertion, and the Air Force should not be required to bear the risk that plaintiffs could become severely ill while deployed, potentially derailing missions because therapeutics failed to quickly ameliorate their symptoms. And plaintiffs' suggestions (Resp. Br. 52) that they could be "transfer[red] to positions that telework" or "assign[ed] to units that do not deploy" are foreclosed by well-established authority that military-assignment decisions are not justiciable. *Gilligan*,

413 U.S. at 10-11; *see supra* pp. 4-9.[5]

2. Plaintiffs' Free Exercise Clause Claim Lacks Merit.

Plaintiffs argue (at 38-39) that the Air Force's COVID-19 vaccination requirement is not neutral or generally applicable and is therefore subject to strict scrutiny under the Free Exercise Clause. Strict scrutiny involves the same means-ends test as RFRA, and because the Air Force satisfies that test, *see supra* Part I.B.1, the Court need not independently address plaintiffs' First Amendment arguments. If the Court were to reach the issue, however, it should conclude that the vaccination requirement is neutral and generally applicable, subject only to rational-basis review—which the requirement easily satisfies. *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018).

The Air Force's vaccination requirements are facially neutral toward religion: they require all non-exempted active-duty and reservist service members to be fully vaccinated, not just service members who hold particular religious views. *See* Streett Decl., R. 27-13, PageID# 1932-33; *cf. San Diego Unified Sch. Dist.*, 19 F.4th at 1177; *Kane v. De Blasio*, 19 F.4th 152, 164 (2d Cir. 2021) (per curiam).

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[5] Plaintiffs also suggest (at 51) that the Air Force could "ensure religious protections for the servicemembers it deploys" to other countries by negotiating a waiver of certain vaccination-entry requirements in a Status of Forces Agreement. The military and the U.S. government have a strong interest in respecting foreign nations' sovereignty and their judgments about the public-health measures that are necessary to keep their residents safe from a highly contagious disease, as we expect them to respect ours. Those agreements vary depending on the needs of the forces and the host nations. This purportedly less restrictive means also ignores the military's determination that plaintiffs' unvaccinated status would jeopardize their units' operations in various additional ways, beyond their inability to enter foreign countries.

Plaintiffs chiefly assert that the Air Force has discriminated against service members' religious views because there are currently more service members with a temporary medical exemptions than a religious exemption, *see* Resp. Br. 53 (suggesting that the Air Force contends that "discrimination … is permitted in the military"). But as explained, medical exemptions are different in kind from religious exemptions both in terms of the purposes they serve and the effect they have on the health of the force. *See supra* pp. 15-17. While medical exemptions are temporary, religious exemptions are presumptively permanent. *See San Diego Unified Sch. Dist.*, 19 F.4th at 1178; *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). The fact that the Air Force currently has more service members with medical exemptions than religious exemptions is accordingly not evidence of religious discrimination.

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

A. Plaintiffs Failed to Demonstrate Irreparable Injury.

The district court further erred in issuing this preliminary injunction because the plaintiffs failed to establish any irreparable injury absent injunctive relief. Plaintiffs' alleged harms are, at base, employment-related injuries. But this Court and the Supreme Court have repeatedly held that such harms do not constitute irreparable injury except for a "genuinely extraordinary situation." *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974); *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 579 (6th Cir. 2002). This standard is particularly demanding in the military context, *see Pitcher v. Laird*, 415 F.2d

743, 745 (5th Cir. 1969) (per curiam). And even if plaintiffs are discharged (a process that is neither certain nor imminent) they could be reinstated and receive back pay, 10 U.S.C. § 1552(a)(1), (c)(1). A number of courts have accordingly held that discharge alone does not constitute irreparable injury. *See, e.g.*, *Guitard v. U.S. Sec'y of the Navy*, 967 F.2d 737, 742 (2d Cir. 1992).

Plaintiffs assert (at 54) that they are at risk of irreparable constitutional and RFRA-based injuries. But that assertion fails where, as here, plaintiffs' constitutional and RFRA claims lack merit. *See supra* Part I.B; *Short*, 2022 WL 1051852, at *9. Nor can plaintiffs establish irreparable harm merely by alleging they are subjected to religious "pressure." *Cf. Khalsa*, 779 F.2d at 1399-400 (holding that a plaintiff failed to demonstrate irreparable harm based on religious-liberty claims against the Army). Plaintiffs are free to adhere to their stated religious beliefs by declining vaccination and then seek appropriate relief if they are discharged or disciplined—the government has not foreclosed plaintiffs' religious exercise. *Cf. Tandon*, 141 S. Ct. at 1297. This Court has never endorsed the "coercive effect" theory of irreparable injury, Resp. Br. 55, and plaintiffs identify no basis for such a broad holding here. The Supreme Court has also not held that a RFRA violation, on its own, constitutes an irreparable injury. *Cf.* Resp. Br. 55-56.

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

Plaintiffs also have not demonstrated that the public interest and the balance of harms—which "merge" here, *Nken v. Holder*, 556 U.S. 418, 435 (2009)—favor preliminary relief.

The preliminary injunction risks substantially undermining the national defense and the public interest—a grave harm that outweighs any interest plaintiffs might have in avoiding reassignment or other reparable, employment-related consequences. *See Winter*, 555 U.S. at 24-26. The preliminary injunction also undermines good order and discipline and requires the Air Force to accept a level of risk of illness and mission disruption that senior military leaders have determined to be unacceptable and contrary to the national security. *See* Schneider Decl., R. 34-3, PageID# 2255-56, 2258. These harms to military readiness are not in the public interest and contravene the "strong judicial policy against interfering with the internal affairs of the armed forces." *Chilcott v. Orr*, 747 F.2d 29, 33 (1st Cir. 1984).

Plaintiffs' only substantive response (at 57) is that the preliminary injunction definitionally serves the public interest because it vindicates their alleged constitutional rights and enforces a federal statute. That is incorrect, *see supra* Part I.B. But even if plaintiffs were correct on the merits, the Court must still weigh the serious harms that the injunction inflicts on the public. *See* Opening Br. 41-44; *Winter*, 555 U.S. at 23-24, 32 (holding that the public interest precluded a preliminary injunction, regardless of the

merits). Plaintiffs fail to engage with those harms and instead contend that the equities weigh in their favor based on high levels of vaccination across the Air Force and the Air Force's ostensible "delay" in issuing the vaccination requirement. These arguments simply recycle plaintiffs' merits arguments, which fail for the reasons discussed.

The Air Force has a compelling interest in requiring its fighting forces to be vaccinated in order to be maximally healthy and ready to deploy. That "judgment[] concerning military operations and needs" "unquestionably" requires deference. *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981). The district court fundamentally erred in disregarding the Air Force's determination that allowing the plaintiffs to serve while unvaccinated poses a threat to military readiness, displacing the judgment of senior Air Force officials with its own assessment of acceptable risks.

CONCLUSION

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

Respectfully submitted,

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October 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,494 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.

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 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.

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