No. 22-3702

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION AND SUMMARY

The district court abused its discretion by certifying a class and issuing a class-wide preliminary injunction, prohibiting the Air Force from enforcing its COVID-19 vaccination requirement for roughly 10,000 service members. Plaintiffs' attempts to defend the district court's extraordinary injunction fail at every turn. Plaintiffs effectively concede, as they must, that individual service members' claims for religious accommodations cannot be yoked together and must be adjudicated "to the person." 42 U.S.C. § 2000bb-1(b)(1). In an attempt to avoid that fundamental problem, plaintiffs recast their claims as seeking "process-based" relief, contending that the Air Force has a "blanket policy" to deny religious accommodations. That argument fails for three reasons.

First, plaintiffs failed to show that the Air Force has any such policy. To the contrary, the Air Force has granted over 180 religious exemptions. And the relatively few religious exemption requests the Air Force has granted is not evidence of religious discrimination—much less "'[s]ignificant proof'" of a discriminatory policy sufficient for class certification, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 353 (2011). It simply reflects the military's compelling interest in ensuring all airmen and guardians are maximally protected against serious illness from COVID-19 and fit to deploy worldwide. *See Austin v. U.S. Navy SEALs 1-26*, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J., concurring).

Second, neither the Religious Freedom Restoration Act (RFRA) nor the First Amendment support "process-based" relief even if plaintiffs' assertions were true. A

RFRA claim turns on whether a government policy that substantially burdens the exercise of sincerely held religious beliefs actually advances a compelling governmental interest. RFRA cases do not turn on "record" review; the statute does not provide a cause of action to challenge a purported deficiency in the government's decision-making whether to grant a religious exemption. Indeed, RFRA does not require *any* administrative exemption process. And although the First Amendment prohibits the Air Force from discriminating between exemption requests on religious and secular grounds, plaintiffs have shown no such discrimination. The Air Force does not permit service members to be non-deployable *in the long run* for any reason, secular or religious.

Finally, even if plaintiffs' arguments could justify some form of relief, they certainly cannot justify the injunction the district court entered here. As the motions panel recognized, a more "appropriate remedy" for supposed deficiencies in the Air Force's administrative process would "leave open the possibility" for the Air Force to deny a religious exemption request after appropriate consideration. *Doster v. Kendall*, 48 F.4th 608, 615 (6th Cir. 2022). But the district court flatly forbade the Air Force from applying its COVID-19 vaccination requirement to *any* of the roughly 10,000 class members. And it did so without considering any of the harms from doing so—harms exponentially greater than those flowing from the district court's prior, narrower injunction. *See* Schneider Decl., R. 73-1, PageID# 4489-90, 4501-04.

This Court should accordingly vacate the class-wide preliminary injunction.

ARGUMENT

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

Because plaintiffs cannot satisfy either Rule 23(a) or Rule 23(b), the district court erred in certifying a class. Plaintiffs' contrary arguments are factually and legally flawed.

A. The Court Has Appellate Jurisdiction To Review Class Certification

As an initial matter, plaintiffs are incorrect that this Court lacks jurisdiction to review the propriety of class certification. The Court has appellate jurisdiction to review the class-wide preliminary injunction, 28 U.S.C. § 1292(a)(1); and review of the class-certification ruling is "necessarily and unavoidably" bound up with the Court's review of that injunction, *Vakilian v. Shaw*, 335 F.3d 509, 521-22 (6th Cir. 2003).

Because the class-certification decision provided the basis for granting class-wide relief, review of the scope of that relief is "inextricably intertwined" with review of the class-certification order. *Hidden Vill., LLC v. City of Lakewood*, 734 F.3d 519, 524 (6th Cir. 2013). Appellate review of the class-wide preliminary injunction "cannot be conducted in isolation from" review of the order certifying the class, *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 492 (7th Cir. 2012), because the Court cannot uphold the class-wide injunctive relief "without also upholding" class certification, *Immigrant Assistance Project of L.A. Cty. Fed'n of Labor v. INS*, 306 F.3d 842, 868-69 (9th Cir. 2002). Appellate review of the injunction that excluded review of the underlying class certification would thus "deprive the [Air Force] of [its] congressionally mandated right to a section

1292(a)(1) interlocutory appeal." *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 209 (3d Cir. 1990) (quotations omitted).

Plaintiffs' cited cases (at 4) do not articulate a different rule. In *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), this Court reversed an order granting a class-wide preliminary injunction and declined to "address[] the class certification issue," *id.* at 914; by reversing the injunction on the merits, the Court obviated the need to address class certification. The Court could take the same approach here. In *Taylor v. Pilot Corp.*, 697 F. App'x 854, 858 (6th Cir. 2017) (unpublished), the issue that was immediately appealable was not intertwined with class certification. And in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 464-67 (1978), the district court had not granted any preliminary injunctive relief that would have provided a basis for appellate jurisdiction.

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

Plaintiffs failed to satisfy Rule 23(a)'s commonality and typicality requirements because they did not identify any common issues of law or fact that "will resolve" their claims "in one stroke." *Davis v. Cintas Corp.*, 717 F.3d 476, 487 (6th Cir. 2013) (quotations omitted). Plaintiffs sought individual exemptions from the Air Force's vaccination requirement, and as the motions panel recognized, those claims require an "individualized analysis" that "could not be conducted class-wide." *Doster v. Kendall*, 48 F.4th 608, 613 (6th Cir. 2022). Plaintiffs now essentially concede as much.

Plaintiffs have now recast their claims for relief as being "process based," predicated on the theory that the Air Force violated RFRA because the process for considering religious exemption requests was inadequate. That argument fails both because plaintiffs provided no "'[s]ignificant proof'" of any "'general policy of discrimination,'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 353 (2011), and because neither RFRA nor the First Amendment would support that process-based relief, even if plaintiffs were factually correct.

1. Plaintiffs are incorrect to contend (at 20, 23-24) that they provided "significant proof" of any discriminatory policy. As explained in our opening brief (at 22-25), the Air Force has granted nearly 200 religious exemptions, and that number is growing. The fact that it has granted a relatively small proportion of all such requests reflects the Air Force's compelling interest in readiness, not any discriminatory animus. *See, e.g.*, Schneider Decl., R. 34-3, PageID# 2244.[1] And the fact that there are currently more service members subject to administrative and medical exemptions simply reflects the fundamentally different nature of those exemptions—particularly that they are temporary. Chapa Decl., R. 27-12, PageID# 1922-27.

[1] If the Court grants plaintiffs' pending motion to supplement the record on appeal, which the government has opposed, then the Court could also consider the September 26, 2022, declaration of Major General John DeGoes, R. 96-1, PageID# 5090, which notes that as of September 19, 2022, the Air Force had granted 183 exemptions from the COVID-19 vaccination requirement on religious grounds.

Plaintiffs suggest that these arguments "confuse[] the certification stage with the merits stage," Resp. Br. 20 (quotations omitted). But the Supreme Court has held that the "'rigorous analysis'" required to determine commonality will frequently "entail some overlap with the merits of the plaintiff's underlying claim," as class certification "'generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Wal-Mart*, 564 U.S. at 351. That is why the Supreme Court explained in *Wal-Mart* that—where plaintiffs allege "a general policy of discrimination"—they must offer "'[s]ignificant proof'" that such a policy actually exists in order to proceed with the litigation as a class. *Id.* at 353.

To the extent plaintiffs attempt to identify any such proof, their argument is premised on the incorrect notion that the Air Force must be discriminating against religion because the number of medical and administrative exemptions currently exceeds the number of religious exemptions. That argument misunderstands the record.

For example, plaintiffs attempt to refute a basic distinction—that religious exemptions are permanent, while medical and administrative exemptions are temporary—by asserting that they "only *sought* temporary" religious exemptions. Resp. Br. 24 (emphasis added). But the Air Force considers any religious exemption presumptively permanent: the current guidance provides that "[a]pproved accommodations will continue unless the member's commander determines a compelling government interest exists requiring a temporary or permanent withdrawal of the approval." U.S. Dep't of Air Force, Instruction 52-201, *Religious Freedom in the Department of the Air Force* ¶ 5.7.4 (June

23, 2021), https://perma.cc/NXE3-XPD3 (DAFI 52-201). Plaintiffs cite (Resp. Br. 13 & n.8, 24 & n.11) a previous Air Force Instruction, DAFI 48-110, but that Instruction "does not reflect the recent, significant changes" to Department of Defense (DoD) policy. Streett Decl., 27-13, PageID# 1932 n.3. The current policy states that religious accommodations "will remain in effect … for the duration of a Service member's military career." DoD Instruction (DoDI) 1300.17, *Religious Liberty in the Military Services* ¶ 3.2(g) (Sept. 1, 2020), https://perma.cc/5NLG-SL2G. As explained (Opening Br. 8, 23-24), the Air Force has only granted temporary administrative and medical exemptions.

Plaintiffs also misunderstand Air Force policy in arguing (*e.g.*, at 24, 27) that medical exemptions do not necessarily render a service member nondeployable. Any service member's failure to comply with the vaccination requirement, for any reason, renders that service member nondeployable. *See* Schneider Decl., R. 34-3, PageID# 2252; *see also* Chapa Decl., R. 34-4, PageID# 2268 ("[A]ll unvaccinated service members are treated the same for purposes of determining whether they should travel or deploy."). Generally, service members who are nondeployable for more than 12 consecutive months are evaluated for discharge, regardless of the reason for their non-deployability. DoDI 1332.45, R. 34-5, PageID# 2276, 2278-79. Contrary to plaintiffs' assertions (at 39, 43), moreover, medical exemptions are not "freely granted" or granted on a "blanket" basis. Military medical providers grant medical exemptions only after assessing a service member's specific "medical situation." Chapa Decl., R. 27-12, PageID# 1922;

see also id., PageID# 1923 (evolving science may result in "remov[ing] a medical exemption").

The Air Force may grant a "medical waiver" for an unvaccinated service member "to deploy … or engage in other special duties or assignments," Chapa Decl., R. 27-12, PageID# 1926-27. There is no evidence suggesting that the Air Force more readily grants waivers authorizing deployment to service members with temporary medical exemptions than those with religious exemptions; but even assuming the Air Force does as plaintiffs imply, that is not evidence of discrimination. It may be possible to accommodate a service member's short-term unvaccinated status—for example, for a temporary medical condition—in a way that it is not possible to accommodate an unvaccinated service member in the long term.

Plaintiffs further miss the point by suggesting (at 22) that every denied religious exemption request involves a "single final decision maker," the Air Force Surgeon General. But the Surgeon General only resolves contested appeals; he does not adjudicate exemption requests that are initially denied and not appealed. And plaintiffs' theory of discrimination, as noted, rests on the premise that the Air Force grants medical and administrative exemptions more readily than religious exemptions. But the Air Force Surgeon General has no involvement in granting medical or administrative exemptions. *See* Chapa Decl., R. 27-12, PageID# 1922 (individual medical providers grant medical exemptions); Little Decl., R. 27-16, PageID# 1954 ("unit commanders" approve terminal-leave requests, rendering a service member eligible for an administrative exemption).

Even if religious exemptions were more comparable to medical and administrative exemptions, plaintiffs do not take issue with the argument (Opening Br. 25-26) that their "statistical evidence" is insufficient to establish a general policy of discrimination. As explained, courts have rejected much more sophisticated regression models to establish a pattern of discrimination; any difference in the number of granted exemptions, on its own, thus cannot establish a discriminatory pattern. *See, e.g.*, *Rodriguez v. National City Bank*, 726 F.3d 372, 384-85 (3d Cir. 2013); *see also Davis*, 717 F.3d at 488. In any event, the number of service members currently subject to an administrative or medical exemption continues to decrease, and service members whose medical exemptions have lapsed are required to become fully vaccinated. Meanwhile, the number of granted religious exemptions continues to increase.[2]

Finally, the named plaintiffs' anecdotal experiences cannot raise an inference that the Air Force "operates under a general policy of discrimination." *Wal-Mart*, 564 U.S. at 358. In *Wal-Mart*, the Supreme Court found that the plaintiffs' anecdotal evidence, including "some 120 affidavits," could not establish commonality because it was concentrated in certain locations and failed to address many others. *Id.* Here, the 18 named

[2] The number of temporary medical exemptions for active-duty service members decreased from over 1,700 in early January 2022 to over 500 in March 2022, Chapa Decl., R. 34-4, PageID# 2264-65. And as of September 19, 2022, the Air Force had granted 183 religious exemptions, DeGoes Decl., R. 96-1, PageID# 5090; *cf.* DAF COVID-19 Statistics – March 22, 2022, R. 34-6, PageID# 2297 (Air Force granted 23 religious exemptions as of March 22, 2022).

plaintiffs represent only five Air Force bases, Compl., R. 1, PageID# 3-6, out of more than 170 around the world, *see* U.S. Air Force, *Installations*, https://perma.cc/BYX3-RBMF.

2. Even if plaintiffs had shown some deficiencies in the Air Force's administrative consideration of exemption requests, those deficiencies could not establish a violation of either RFRA or the First Amendment.

a. As explained in the opening brief (at 27-29), unlike the Administrative Procedure Act, RFRA does not provide a cause of action to review an agency's decision-making process whether to exempt someone from a generally applicable policy. Instead, the question in a RFRA case is whether—as a de novo matter to be resolved in court—applying a particular policy to the claimant is the least restrictive means of advancing a compelling government interest. It is irrelevant to that question whether the government sufficiently articulated its conclusion in a prior administrative proceeding. Indeed, it is irrelevant whether the relevant agency even *has* an administrative process for granting religious exemptions.

Plaintiffs offer no response to this argument and fail to identify any instance in which a court endorsed a "process-based" RFRA claim. Nor is this the theory that plaintiffs pursued in the district court, or the theory on which the district court actually certified a class. Plaintiffs brought this suit to seek an injunction against being required to comply with the COVID-19 vaccination requirement, *see* Compl., R. 1, PageID# 18-19; Mot., R. 13, PageID# 578, 598, and sought class certification on the basis that they

all "either had their requested accommodation denied or have not had action on that request," Mot., R. 21, PageID# 955; *see also id.*, PageID# 958. The district court then certified a class on the ground that "the relief the proposed class seeks is the same: a religious accommodation relating to the COVID-19 vaccine mandate." Order, R. 72, PageID# 4466. Plaintiffs did not seek, and the district court did not grant, class certification on any "process-based" claim.

Plaintiffs fail to recognize the inconsistency between their new RFRA theory and their argument (at 33-34) that RFRA imposes no exhaustion requirement. If an inadequate administrative religious-exemption process could itself constitute a RFRA violation, plaintiffs surely would be required to exhaust that claim with the agency—affording the agency an opportunity to correct the problem—before proceeding to federal court. But as courts have explained, in decisions plaintiffs cite, RFRA "plainly contemplates that *courts*" are ultimately responsible for determining whether a religious exception to a generally applicable requirement is required. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 434 (2006). Thus, for example, the Supreme Court in *O Centro* "reviewed a RFRA-based challenge to the [Controlled Substances Act] with-

out requiring that the plaintiffs first seek a religious use exemption from the" responsible agency. *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012).[3]

In short, plaintiffs' efforts to salvage the district court's commonality analysis rest on an illusory new type of RFRA claim—one that plaintiffs never pleaded, failed to prove, and that provides no basis for the relief the district court granted. Under *Wal-Mart*, commonality can be established only by identifying common issues necessary to "resolve an issue that [are] central to the validity of" *cognizable claims* that provide a basis for the relief plaintiffs are seeking, and which actually "drive the resolution of the litigation." 564 U.S. at 350 (quotations omitted). Courts have subsequently explained that determining commonality "often requires a precise understanding of the nature of the plaintiffs' claims," *Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 552 (7th Cir. 2016), including examining "the elements and defenses" for the underlying cause of action, *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 843-44 (5th Cir. 2012); *see also Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890, 901, 903 (3d Cir. 2022) (reversing class certification because class definition included bases that "do[] not give rise to a common injury" for the underlying cause of action); *Soseeah v. Sentry Ins.*, 808 F.3d 800, 809 (10th Cir. 2015)

[3] As explained in No. 22-3497, the government has not argued that RFRA itself has an exhaustion requirement. Rather, prudential justiciability principles in claims implicating the military generally require service members to exhaust their intra-service remedies before civilian courts will review those claims. RFRA does not displace those principles. *See* No. 22-3497 Reply Br. 4-6.

(similar, where plaintiffs failed to demonstrate "common and legally cognizable injury").

Even prior to *Wal-Mart*, the D.C. Circuit affirmed the denial of class certification in a case where the plaintiffs sought to establish commonality among claims of credit discrimination under the Equal Credit Opportunity Act (ECOA), by alleging that the Department of Agriculture failed to investigate complaints of discrimination in the agency's administrative process. *See Garcia v. Johanns*, 444 F.3d 625, 630, 636-37 (D.C. Cir. 2006) (holding that "failure to investigate" claims were not cognizable under ECOA and thus could not establish commonality); *see also, e.g.*, *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022-23 (9th Cir. 2003) (holding that lack of a cognizable claim under a statute precludes certifying class claims under that statute); *Griffin v. Dugger*, 823 F.2d 1476, 1482-84 (11th Cir. 1987) (reversing class certification where named plaintiffs did not have cognizable claims). The reasoning in *Garcia* and other cases applies equally here. Plaintiffs' newly minted claim that the Air Force's process for considering requests for exemptions from the COVID-19 vaccination requirement is discriminatory or otherwise unlawful (because, according to plaintiffs, it does not yield a sufficiently high number of religious exemptions) is not a cognizable RFRA claim and, thus, cannot provide a common issue suitable for class certification.

b. A showing that the Air Force systematically denies religious exemption claims is also insufficient to support relief under the First Amendment's Free Exercise clause, and likewise provides no basis for class certification. To establish a Free Exercise

claim, plaintiffs would need to show that the Air Force grants medical and administrative exemptions more frequently than religious exemptions *because it disfavors religion* by, for example, granting exemptions for secular reasons but denying exemptions for religious reasons in similar circumstances. But as our opening brief explained (at 29-30), religious exemptions to the vaccination requirement are fundamentally different from medical exemptions, and plaintiffs acknowledge that religious exemptions have been granted under circumstances comparable to administrative exemptions. Medical exemptions are temporary and pose different risks to service members, who must still become vaccinated once the medical condition necessitating the exemption lapses—or they will be reviewed for possible separation. DoDI 1332.45, R. 34-5, PageID# 2276. But because religious exemptions are presumptively permanent, a religious exemption to the vaccination requirement would render a service member permanently non-deployable.

Contrary to plaintiffs' cursory argument (at 28), the motions panel's decision in *Dahl v. Board of Trustees of Western Michigan University*, 15 F.4th 728, 732 (6th Cir. 2021) (per curiam), does not support class certification. To the extent *Dahl* is relevant here—as a preliminary, per curiam decision denying a motion for stay pending appeal in a case that does not address class-certification requirements—it suggests that, where a vaccination requirement subject to individualized exceptions allegedly burdens religious exercise, courts must conduct an individualized analysis of whether the requirement survives strict scrutiny as applied to a specific person. That is the same inquiry RFRA

requires. Nothing in *Dahl* suggests that the alleged inadequacy of an agency's *process* for considering religious exemption requests could itself violate the First Amendment.

3. Plaintiffs' additional arguments that the class satisfies Rule 23(a)'s commonality and typicality requirements are meritless.

First, plaintiffs do not contest that the class members have a wide range of personal religious beliefs and that only some of those beliefs are substantially burdened by the vaccination requirement. The need for an individual evaluation of those beliefs, and the burdens imposed by vaccination (if any), should have precluded class certification. Plaintiffs misunderstand the role of Air Force chaplains in asserting (at 28 & n.13, 29, 44) that chaplains determine "the sincerity of [a service member's] belief and the substantial burden from the [vaccination] requirement." A chaplain makes an *initial* assessment whether a service member's religious beliefs seem sincere, but that assessment is not binding on the ultimate decisionmaker. Streett Decl., R. 27-13, PageID# 1935-36. Furthermore, a chaplain merely indicates whether a "[r]equester identified the substantial burden"; the chaplain's role is not to evaluate that burden. DAFI 52-201, *supra* tbl. A5.1. More fundamentally, a chaplain's assessment of these issues is not binding on a *court* that must address them in adjudicating a RFRA claim. A chaplain's determination thus does not solve the commonality problem that service members have a wide variety of personal beliefs that may be substantially burdened in many ways, particularly with the increasing availability of vaccines that do not use fetal cell or mRNA technology. *See Livingston Christian Sch. v. Genoa Charter Twp.*, 858 F.3d 996, 1003 (6th Cir. 2017) ("not

just any imposition on religious exercise will constitute" a substantial burden); Opening Br. 31 (noting that four named plaintiffs are willing to take certain vaccines or have opted to comply with the vaccination requirement).

Nor do plaintiffs offer a persuasive response to our argument (Opening Br. 32-33) that several named plaintiffs have not exhausted their intramilitary remedies, making their claims atypical of the class. *See* No. 22-3497 Resp. Br. 5, 25-26. Plaintiffs contend that these differences do not matter because exhaustion was futile. That is factually incorrect, and courts have rejected futility arguments even where a favorable result before the military was highly unlikely, *see, e.g.*, *Von Hoffburg v. Alexander*, 615 F.2d 633, 639 (5th Cir. 1980). This Court has also confirmed that district courts lack jurisdiction over religious liberty claims where service members failed to exhaust administrative remedies, *see Harkness v. Secretary of the Navy*, 858 F.3d 437, 446 (6th Cir. 2017). Plaintiffs provide no basis for a different result here. Moreover, plaintiffs' argument (at 32-34) that exhaustion is futile (or not required under RFRA) only underscores that this defense is central to the litigation and should have precluded finding that plaintiffs' claims are typical of the class. *Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 431 (6th Cir. 2009) (unpublished) ("[D]efenses unique to the individual claims of the class members [undercut] the typicality premise.") (citation omitted).

Finally, plaintiffs concede that they represent only reservists and active-duty members—"none of the original 18 Plaintiffs were cadets or national guard members," Resp. Br. 34; *cf.* Order, R. 86, PageID# 5012 (class definition). Plaintiffs suggest that

the district court should have permitted representative service members to intervene, Resp. Br. 34 n. 15. But the court did not do so, *see* Order, R. 72, PageID# 4469. Because plaintiffs failed to show that the Air Force maintains a discriminatory policy or a "biased" procedure, *Gratz v. Bollinger*, 539 U.S. 244, 267 (2003), is inapplicable here. At minimum, therefore, the Court should vacate the preliminary injunction to the extent it includes National Guard members and cadets.

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

Plaintiffs also failed to demonstrate that a class action could properly be certified under Rules 23(b)(1)(A) or 23(b)(2).

1. Plaintiffs make no real attempt to defend the district court's decision to certify the class under Rule 23(b)(1)(A), and for good reason. *See* Resp. Br. 35. The motions panel correctly noted that the district court failed to "provide an adequate explanation for its decision to certify a class under Rule 23(b)(1)(A)." *Doster*, 48 F.4th at 615. Because RFRA requires courts to consider "application of the challenged law 'to the person,'" *O Centro*, 546 U.S. at 430-31, courts may properly reach different conclusions about different service members' likelihood of success on their RFRA claims. Those variations among individual cases do not create the prospect of conflicting obligations for the Air Force. *See In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984).

2. Plaintiffs' arguments that the class was properly certified under Rule 23(b)(2) fail for largely the same reasons that plaintiffs failed to establish commonality

and typicality. Rule 23(b)(2) requires the Air Force to have acted "on grounds that apply generally to the class," where only "a single injunction" would provide relief to all class members. *Wal-Mart*, 564 U.S. at 360. To the extent plaintiffs sought class certification of RFRA or First Amendment claims requesting individual exemptions, those claims could not be properly certified under Rule 23(b)(2) because they require scrutinizing whether a policy substantially burdens a particular claimant's religious exercise and whether the government has a "marginal [compelling] interest in enforcing" that policy "in [the] particular context" of the claimant at issue. *Ackerman v. Washington*, 16 F.4th 170, 187 (6th Cir. 2021).

Plaintiffs appear not to dispute 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." Resp. Br. 37. But they appear to believe that individual analysis *in court* is not necessary here, on the theory that the Air Force "never engaged in that analysis." *Id.* (emphasis omitted). That view is factually and legally wrong. As a factual matter, plaintiffs ignore declarations from the named plaintiffs' commanders, explaining in detail why the Air Force denied several requested exemptions. *See, e.g.*, Wren Decl., R. 27-20, PageID# 1994-2000; Harmer Decl., R. 27-21, PageID# 2003-09; *see also Roth v. Austin*, No. 8:22-cv-3038, 2022 WL 1568830, at *13-15 (D. Neb. May 18, 2022) (finding that the Air Force made "individualized determinations" for each plaintiff's requested religious exemption). And as a legal matter, the adequacy or inadequacy of the Air Force's administrative process is irrelevant to whether plaintiffs can succeed

on their RFRA claim, *see supra* pp. 10-13. In short, plaintiffs' attempt to manufacture claims suitable for certification under Rule 23(b)(2) disregards the individualized assessments RFRA requires.

Nor is Rule 23(b)(2) certification appropriate for plaintiffs' claims under the Free Exercise Clause. Plaintiffs again rely (at 38) on *Dahl*, but as discussed above, that motions-panel decision does not suggest that supposed shortcomings in the Air Force's administrative process for considering religious exemption requests could constitute a First Amendment violation redressable through a single injunction with respect to the class. Rather, *Dahl* confirms the need to individually consider whether applying the vaccination requirement to each plaintiff satisfies strict scrutiny—the same inquiry RFRA requires. By certifying a class under Rule 23(b)(2), and granting a class-wide injunction, the district court pretermitted any individualized inquiry and overrode contrary determinations made by other courts that have properly engaged in those inquiries.

Plaintiffs have no meaningful response to the fact that the mandatory class certified here largely forecloses, or at a minimum substantially impedes, efforts by individual service members to obtain uniquely tailored relief. In a "mandatory" Rule 23(b)(2) class, *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 645 (6th Cir. 2006), "all class members generally will be bound" by the judgment, 7AA Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1775 (3d ed.); *see also Ahmad v. City of St. Louis*, 995 F.3d 635, 644 (8th Cir. 2021). Plaintiffs' assertion that "an adverse ruling would [not] bind the class," Resp. Br. 40, is baseless. The fact that maintaining this suit as a

class action directly undermines the interests of certain class members underscores that the class is not amenable to certification under Rule 23(b)(2). *See Coleman v. General Motors Acceptance Corp.*, 296 F.3d 443, 447-48 (6th Cir. 2002) (collecting authorities).

The district court's odd opt-out provision further demonstrates that the class was improperly certified under Rule 23(b)(2). *See Wal-Mart*, 564 U.S. at 362 ("The Rule provides no opportunity for … (b)(2) class members to opt out[.]"). This Court has explained that Rule 23(b)(2) is "designed to permit only classes with homogenous interests," *Coleman*, 296 F.3d at 447. But the need for provisions allowing class members to opt-out of the class demonstrates the opposite—a lack of homogeneity and divergent interests among class members. Those divergent interests are pellucid here: over 100 service members have now opted out of the class in an effort to pursue individualized relief, Notice, R. 97, PageID# 5092-97; and several named plaintiffs have opted to comply with the vaccination requirement, *see supra* pp. 15-16. The district court erred in certifying a class and purporting to bind all Air Force service members to the results in this case unless they "opt out" of the class it certified.[4]

[4] The district court's class-wide injunction has also caused considerable confusion among courts considering RFRA and Free Exercise claims brought by individual Air Force service members. Following oral argument, both the Eighth and Ninth Circuits requested supplemental briefing to clarify whether individual service members' appeals should be dismissed as a result of this class certification. *See* Order, *Roth v. Austin*, No. 22-2058 (8th Cir. Oct. 5, 2022); Order, *Dunn v. Austin*, No. 22-15286 (9th Cir. Aug. 31, 2022); *see also* Plaintiff Supplemental Brief 2-3, *Dunn*, No. 22-15286 (9th Cir. Sept. 30, 2022) (plaintiff urging the court not to dismiss his appeal and disclaiming any intention to opt-out of the *Doster* class).

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

Having improperly certified a class, the district court compounded its error by expanding its prior injunction (limited to 18 individuals) to apply to a class of roughly 10,000 service members, without ever considering how the equitable factors might apply differently to such sweeping relief. And, as the motions panel recognized, the district court's injunction—forbidding the Air Force from enforcing the vaccination requirement against the class members—is not remotely tailored to the theory of "process-based" injury that plaintiffs now pursue. *Doster*, 48 F.4th at 615. Even if the Court declines to reverse the class-certification order, it should vacate the class-wide preliminary injunction.

1. Without ever considering any plaintiff's individual circumstances, and without any legal analysis other than a bare citation to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), the district court determined that roughly 10,000 service members were likely to succeed on the merits of their RFRA and Free Exercise claims. As our opening brief explains (at 40-43), that conclusion was unsupported and wrong. The Air Force indisputably has a compelling interest in ensuring maximal readiness to deploy worldwide, *e.g.*, Schneider Decl., R. 73-1, PageID# 4489-90, and no less burdensome alternatives could equally further that interest, *e.g.*, Poel Decl., R. 27-17, PageID# 1961-75.

Plaintiffs recapitulate (at 45-47) a number of arguments more fully briefed in our appeal from the prior, narrower preliminary injunction—arguments that the vaccination requirement satisfies neither RFRA's means-ends test nor strict scrutiny under the First Amendment. For the reasons discussed in our briefs in that appeal, those arguments fail. The Centers for Disease Control and Prevention (CDC) has never stated that infection-acquired immunity provides protection against COVID-19 "equivalent" to that of vaccination. *See* CDC, *Benefits of Getting a COVID-19 Vaccine*, https://perma.cc/W66Y-3GU7 (last updated Aug. 17, 2022). To the contrary, the CDC continues to recommend vaccination against COVID-19 even for individuals who have previously been infected. *See* CDC, *Frequently Asked Questions About COVID-19 Vaccination*, https://perma.cc/49FJ-99EL (last updated Oct. 3, 2022). The fact that the Air Force grants medical and administrative exemptions from the COVID-19 vaccination requirement does not undermine its compelling interest in readiness, because (as discussed above) those exemptions are fundamentally different from religious exemptions. The fact that plaintiffs successfully performed their duties before vaccines were available does not undermine the Air Force's interest in requiring service members to take the precaution against serious illness that is now available, *see, e.g.*, *Ramirez v. Collier*, 142 S. Ct. 1264, 1288 n.2 (2022) (Kavanaugh, J., concurring) (The "government need not wait for the flood before building the levee."); *Roth*, 2022 WL 1568830, at *28. Finally, high rates of vaccination among Air Force service members do not detract from the

Air Force's interest in ensuring that every service member is maximally prepared to deploy anywhere in the world, *see, e.g.*, Heaslip Decl., R. 27-19, PageID# 1987.

Plaintiffs suggest (at 47-49) that the Air Force seeks "absolute deference to its decisions." Not so. Subject to justiciability requirements, service members can bring, and courts can adjudicate, Free-Exercise or RFRA challenges to Air Force policies. But as this Court and the Supreme Court have long recognized, courts should afford significant weight to the military's judgments as to what measures are necessary for effective operations. *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)). Plaintiffs attempt to distinguish a number of Supreme Court decisions articulating principles of judicial deference to military decision-making, but even if those various cases concerned different factual circumstances or legal issues, the underlying principles apply here. *See, e.g.*, *Austin v. U.S. Navy SEALs 1-26*, 142 S. Ct. 1301, 1302 (Kavanaugh, J., concurring) (citing *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), in case challenging the Navy's COVID-19 vaccination requirement).

Plaintiffs' reliance (at 49) on *Holt v. Hobbs*, 574 U.S. 352 (2015)—suggesting that the Supreme Court rejected "deference … tantamount to unquestioning acceptance" in religious-liberty cases—is also wide of the mark. There, the Court explained that it was "hard to swallow" the government's argument that denying the plaintiff's religious accommodation to grow a half-inch beard would "prevent[] prisoners from hiding contraband," *id.* at 363-64; *see also id.* at 365 (identifying less restrictive means to satisfy the

government's "security concerns"); *cf. Cutter v. Wilkinson*, 544 U.S. 709, 723, 725 n.13 (2005) (recognizing officials' "expertise" in religious-liberty cases). Here, by contrast, the Air Force has provided declarations from military officials both identifying compelling interests in vaccination, *see, e.g.*, Stanley Decl., R. 27-11, PageID# 1912-16; Schneider Decl., R. 34-3, PageID# 2250-54, and explaining why less restrictive alternatives are insufficiently protective, *see, e.g.*, Poel Decl., R. 27-17, PageID# 1961-75. Those determinations merit substantial deference. *See Navy SEAL 1 v. Austin*, No. 22-cv-688, 2022 WL 1294486, at *7, *9 (D.D.C. Apr. 29, 2022).

2. Plaintiffs also failed to satisfy the equitable requirements for a class-wide preliminary injunction. The district court abnegated its role by failing to evaluate these requirements.

First, plaintiffs failed to establish any irreparable injury absent injunctive relief. Plaintiffs do not identify any irreparable injury to the class distinct from any purported injury to the named plaintiffs—injuries that are, at base, employment-related harms, which do not constitute irreparable injury absent a "genuinely extraordinary situation." *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974); *Overstreet v. Lexington-Fayette Urb. Cty. Gov't*, 305 F.3d 566, 579 (6th Cir. 2002); *see also* Order, R. 47, PageID# 3197 (recognizing that discipline for refusing to comply with the vaccination requirement "does not, alone, establish irreparable harm"). In part because the Board for the Correction of Military Records has broad authority to adjudicate many claims, 10 U.S.C. § 1552(a)(1), (c)(1), courts have held that even discharge from the military does not constitute irreparable

injury. *E.g.*, *Chilcott v. Orr*, 747 F.2d 29, 34 (1st Cir. 1984). Plaintiffs are also incorrect that "punishment and separation" are foregone conclusions. Resp. Br. 52. It is far from certain that a service member will be separated for failing to comply with the vaccination requirement. Hernandez Decl., R. 27-14, PageID# 1943 (describing separation proceedings).

Plaintiffs assert (at 51-53) that "irreparable harm exists for even a brief deprivation of religious liberty rights." But that is a harm only if plaintiffs choose to *comply* with the vaccination requirement, which they have not. As long as they maintain that choice, plaintiffs suffer no injury to their freedom of conscience. *Cf. Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam). The only harms they could suffer as a result of that choice are discipline or separation proceedings—harms that are quintessentially reparable. *See Khalsa v. Weinberger*, 779 F.2d 1393, 1399-1400 (9th Cir. 1985).

Second, plaintiffs failed to demonstrate that the balance of harms and the public interest weigh in favor of class-wide relief. To the contrary, Lieutenant General Schneider attested that the class-wide preliminary injunction would cause "exponentially greater" harms to the Air Force, including "significant and irreparable harm to good order and discipline, force health protection, and military readiness[,] seriously endangering the Department of the Air Force's ability to decisively execute its mission." Schneider Decl., R. 73-1, PageID# 4490, 4502. And given the "sheer volume" of religious exemption requests, the class-wide injunction "would seriously threaten [the Air

Force's] readiness," requiring the Air Force "to keep in service a large number of personnel who are non-deployable." *Id.*, PageID# 4502. That would "diminish the true strength of the Force" and "severely undermine military readiness." *Id.*, PageID# 4503-04.

Like the district court, plaintiffs never acknowledge these harms. Instead, they reiterate their merits-based argument that granting a preliminary injunction is in the public interest "to prevent the violation of a party's constitutional rights." Resp. Br. 54. But plaintiffs' arguments fail on the merits—and even if the merits were a closer call, Lieutenant General Schneider's assessments are precisely the sort of "judgments concerning military operations and needs" that "unquestionably" require deference, and weigh against preliminary relief pending final adjudication. *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981); *see also U.S. Navy SEALs 1-26*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring) (criticizing the district court for "overriding military commanders' professional military judgments"). The district court's failure to afford "sufficient weight" to those expert military judgements was itself an abuse of discretion. *Winter v. NRDC, Inc.*, 555 U.S. 7, 28 (2008).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,488 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 14, 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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