IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CINCINNATI DIVISION

HUNTER DOSTER, *et al.*,

Plaintiffs,

v.

FRANK KENDALL, *et al.*,

Defendants.

No. 1:22-cv-00084
Hon. Matthew W. McFarland

DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL AND FOR IMMEDIATE ADMINISTRATIVE STAY

Defendants respectfully seek an emergency stay pending appeal of the Court's July 27, 2022, Order Granting Class-wide Preliminary Injunction, ECF No. 77 ("Order"), which modified the definition of the certified class and enjoined the Air Force from "taking, furthering, or continuing any disciplinary or separation measures against the members of the Class for their refusal to receive the COVID-19 vaccine." *Id.* at 2. Defendants respectfully request a ruling by the end of the day Friday August 19, 2022. After that date, if relief has not been granted, Defendants will seek relief from the U.S. Court of Appeals for the Sixth Circuit.

The Court's class-wide preliminary injunction expands the relief that the Court previously granted 18 service member plaintiffs to cover an ever-increasing class of around 10,000, including those who are not even serving in the Air Force. The Order places the Department of the Air Force in an untenable position of choosing between the inherent risk to the mission and force from deploying unvaccinated service members or maintaining a separate class of around 10,000 non-deployable service members and imposing all the hardships and burdens of deployment on the remainder of the Air Force. Either option will cause immediate and lasting harm to the Air Force and its ability to

defend the nation. Moreover, because the injunction requires the commissioning and enlistment of unvaccinated prospective service members, which will continuously expand the number of unvaccinated, non-deployable service members, the harm resulting from the injunction will increase the longer it is in place. It is crucial that Air Force service members are capable of meeting all mission demands—including being medically fit and ready to deploy—and available at a moment's notice. *See* Decl. of Lieutenant General Kevin B. Schneider, ¶ 34, Ex. 1.[1]

As explained below, Defendants seek an emergency stay of the Court's Order pending appeal. A stay would affect only the unnamed class members (some of whom already have their own lawsuits pending) and would not have any effect on the still-in-force preliminary injunction that this Court previously entered with respect to the named plaintiffs. Granting the requested stay would therefore preserve the status quo that has prevailed since this Court's earlier order.

For the reasons set forth below, the Court should stay the effect of its class-wide preliminary injunction until the Defendants have completed their appeal. If the Court is inclined to deny the stay, Defendants request an administrative stay at least until the Sixth Circuit rules on Defendants' request for a stay pending appeal.

ARGUMENT

The court of appeals has set forth four factors that a court should consider in determining whether to grant a stay pending appeal: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent

[1] The Court defined the class as limited to service members who have sought a religious accommodation from September 1, 2021, "to the present." Order 2. Defendants understand the class to be open-ended, allowing service members, including potential new enlistees and appointees, who submit religious accommodation requests after the date of the preliminary injunction to become class members. If the Court instead intended to limit the class to service members who had sought religious accommodations as of the date on which the class was certified or the injunction was entered, Defendants respectfully request that the class definition be clarified. Over 400 religious accommodation requests were submitted between when the court issued its class-wide temporary restraining order and when it issued the class-wide preliminary injunction, and the Air Force has received over 500 new religious accommodation requests since the court issued its class-wide preliminary injunction. Ex. 1, ¶ 16, n.10.

a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Where the federal government is a party, its interests and the public interest overlap. *See Nken v. Holder*, 556 U.S. 418, 420 (2009). Those factors all support granting a stay here.

I. The Government Is Likely To Succeed On The Merits.

Defendants acknowledge that this Court has certified a class and concluded that Plaintiffs are likely to succeed on the merits of their Religious Freedom Restoration Act ("RFRA") and First Amendment claims on a class-wide basis. Defendants nevertheless submit that they are likely to succeed in arguing to the contrary on appeal for two independent reasons: (1) plaintiffs failed to satisfy the Rule 23 requirements for class certification, and (2) the Court erred in concluding that *all* class members, without distinction, had shown a substantial likelihood of success on the merits of their claims under RFRA and the Free Exercise Clause, and that the equities favored class-wide preliminary injunctive relief. When considering the likelihood of success for a stay of a preliminary injunction, courts require the movant "to show, at a minimum, 'serious questions going to the merits.'" *Radioactive Material*, 945 F.2d at 154. That standard is easily met here.

A. Class Certification Was Improper.

The Court's class-certification ruling disregards the basic principle that RFRA requires a highly individualized assessment for each plaintiff. Under RFRA, the question is whether the government has a compelling interest in applying the challenged policy "to the person" who asserts a substantial burden on his religious exercise. *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). Plaintiffs' RFRA claims require plaintiff-specific determinations about whether the military's vaccination requirement substantially burdens each individual service member's exercise of religion; and whether there are less restrictive but equally effective alternatives to vaccination for each service member.

The question of whether "the vaccination policy, *as applied to an individual Plaintiff*, is the least restrictive means available requires a fact-intensive presentation that addresses, among other things, the individual job duties of each Plaintiff, the specific work environment of each Plaintiff, the risk of transmission posed by those job duties and work environment, the potential consequences of a COVID-19 outbreak on the functions of that work area, the practicality and effectiveness of proposed alternatives to mandatory vaccination in regard to each Plaintiff's job duties, the medical history of each Plaintiff, and the nature and sincerity of each Plaintiff's asserted religious beliefs." July 27, 2022 Order, *Clements v. Austin*, C.A. No. 2:22-2069-RMG (D.S.C.) (submitted here at ECF No. 76-1).

Defendants are likely to prevail on appeal because neither Plaintiffs nor the Court identified a "common answer[]" that could resolve these issues for the class. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis omitted). Indeed, Plaintiffs admitted in their request for class certification that "the details of an individual accommodation may differ," and instead premised their commonality argument entirely on the fact that the Air Force has denied many religious accommodation requests. ECF No. 21 at 6.[2] But the very point of RFRA's individualized inquiry is that these questions cannot be resolved in a blunderbuss fashion. Because they do not identify a common answer that justifies relief to every plaintiff, Plaintiffs fail to explain how relief is possible "without individualized review of every [religious accommodation request] that was denied." *Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 433 (6th Cir. 2009). "Nor do they explain how the court could, if it ordered 'a full and fair review . . . of all claims for [religious exemptions] that have been denied,' avoid exposing

[2] Underscoring the lack of commonality and typicality among the class members, class counsel told the *Poffenbarger* court that there are "material differences" between class member Poffenbarger's individual case and the relief sought by the class, including differences in defenses and the status of religious accommodation requests. *Poffenbarger v. Kendall*, 3:22-cv-0001, (S.D. Ohio), ECF No. 50 at PgID #1456. Plaintiffs' counsel argued that there is a lack of "similarity of the issues or claims at stake" between Poffenbarger's RFRA claim and the class in *Doster*. *Id.* at PgID # 1458. Plaintiffs in other cases have also asserted a lack of commonality and typicality. *See e.g., Dunn v. Austin*, 22-15286, ECF No. 46 (9th Cir.) (asserting plaintiff's purported "recover[y] from COVID-19" and purported "natural immunity" provides "additional ground for relief not asserted in *Doster*"); *Spence v. Austin*, 4:22-cv-00452-O, ECF No. 41 (N.D. Tex.) (asserting relief sought by plaintiffs is broader than relief sought in *Doster*).

[Defendants] to . . . 'a one-way ratchet where [Defendants] can lose but never win.'" *Id.* Class certification under these "circumstances was an abuse of discretion." *Id.*

The Court also erred in certifying a class under Rule 23(b)(1) because the Air Force was not facing any conflicting court opinions. "The fact that some plaintiffs may be successful in their suits against a defendant while others may not is clearly not a ground for invoking Rule 23(b)(1)(A)." *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984). The Court's disagreement with the many other courts that have ruled in Defendants' favor is not a proper basis to certify a class under Rule 23(b)(1). ECF No. 73, PgID #4476–77.[3]

Defendants are likely to prevail on appeal in arguing that the Court further erred in certifying a mandatory class under Rule 23(b)(2). The Air Force has not acted on grounds generally applicable to the class—it has instead made individualized determinations (and, in fact, granted at least 135 religious accommodation requests). Nor is the provided relief "indivisible" such that the alleged "conduct . . . can be enjoined or declared unlawful only as to all of the class members or as to none of them," *Wal-Mart*, 564 U.S. at 360, because the Court's order enjoins Defendants from taking individualized actions against each respective class member, Order at 2–3. The Court's wish to accommodate service members by providing them the opportunity to "opt out" of the litigation—a path many service members have already chosen, *see* ECF Nos. 80 and 81, underscores the impropriety of certifying a Rule 23(b)(2) class in this instance.

Expanded Class without Briefing. Without the benefit of adversarial briefing, this Court dramatically expanded the scope of the class to include appointees, inductees, reserves (ostensibly including members in the non-participating reserves), and members of the 54 Air National Guards of

[3] The Court stated that "Defendants do not contest that the proposed class is certifiable under Rule 23(b)(1)(A)." ECF No. 72 at PgID # 4463. But the Government did not forfeit or concede any argument. The Government argued that plaintiffs could not maintain a class under Rule 23(b) and then specifically explained that certification under Rule 23(b)(2) was not appropriate. ECF No. 34 at PgID # 2222. Defendants also explained why a preliminary injunction pursuant to Rule 23(b)(1) would not be proper. *See* ECF No. 73, PgID # 4476–77.

the States, Territories, and the District of Columbia. Plaintiffs' request for class certification covered only "active-duty, and active reserve members of the Air Force." ECF No. 21, PgID # 955. That definition did not include those who were not yet in the Air Force, those who were no longer in the participating reserves, or those in the Air National Guard. *See id.* When the Court first certified a class, it likewise limited the class definition to "active-duty and active reserve members of the United States Air Force and Space Force." ECF No. 72, PgID # 4468. Plaintiff first proposed modifying the class on July 25, 2022, ECF No. 74, PgID # 4516, and just two days later, and without the benefit of any briefing from Defendants, the Court modified and expanded the class to include "reserves" (in addition to just "active reserves") and "national guard, inductees, and appointees of the United States Air Force and Space Force," ECF No. 77, PgID # 4539.

The Court overstepped its authority when it expanded the class to include "appointees" for officer positions and when it ordered the Air Force to commission unvaccinated officers. None of the class representatives fall into these categories, and thus do not have standing to challenge the policy as applied to new recruits or potential officers. Moreover, and as explained further below, expanding the class in this way overstepped the judiciary's constitutional limits because it encroaches upon the Executive's authority to appoint officers. U.S. Const. art II. And by including the Air National Guard in the class and issuing an order that enjoined States—who are not even parties to this action—from disciplining members of their National Guard units, the Court has encroached upon States' authority to appoint National Guard officers and discipline their own National Guard forces. *Id.* art. I, § 8; *see also* Decl. of Brigadier General Wendy Wenke, Ex. 3 (describing impact of the preliminary injunction on the National Guard and States). None of the named Plaintiffs are members of any National Guard or in the non-participating reserves.

B. Class-wide Injunction Was Legal Error.

The Court also likely erred by issuing a class-wide injunction without considering the merits

of any individual's claims or the exponentially greater harms to the military flowing from an injunction applicable to around 10,000 service members. In its four-page preliminary injunction order, the Court provides only one sentence explaining its reasons for issuing a sweeping injunction pertaining to an entire branch of the armed forces. ECF No. 77 ("Thus, due to the systematic nature of what the Court views as violations of Airmen's constitutional rights to practice their religions as they please, the Court is well within its bounds to extend the existing preliminary injunction to all Class Members."). But even this one sentence indicates that the Court misapplied the law.

The Supreme Court has explicitly held that "the First Amendment does not require the military to accommodate [religious] practices in the face of its view that they would detract from the [the military mission]." *Goldman v. Weinberger*, 475 U.S. 503, 509–10 (1986). Similarly, RFRA does not entitle a service member to relief simply upon a showing of a sincerely held belief. Resolving a RFRA claim requires individualized analysis of the burden on a service member's religious belief, the government's compelling interest in implementing the requirement at issue, and the availability of less restrictive alternatives to the person. *See Gonzales,* 546 U.S. at 430–31.[4]

In issuing a preliminary injunction that applies to any member (or prospective member) of the Air Force who submitted or submits a religious exemption to the COVID-19 vaccination, the Court failed to heed both longstanding and recent Supreme Court guidance. *See, e.g.*, *Austin v. United States Navy Seals*, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J. concurring) ("The Court should indulge the widest latitude" to sustain the President's "function to command the instruments of national force, at least when turned against the outside world for the security of our society.") (citing *Youngstown Sheet*

[4] Military chaplains are not required to "confirm[]" that a service members has "a sincerely held religious belief substantially burdened by the Air Force's COVID-19 vaccination requirement." Class-wide Order, ECF No. 77, PgID #4539. Instead, the chaplain's memo confirms that the "[r]equester *identified* the substantial burden which infringes upon religious free exercise." AFI 52-201, Attachment 5 (emphasis added). Moreover, many chaplain interviews before July 19, 2020 (when Novavax was approved) are likely outdated given the recent availability of a COVID-19 vaccine that may not substantially burden some service members' stated religious beliefs. *See* ECF No. 73, PgID # 4474, 4477–79.

& Tube Co. v. *Sawyer*, 343 U. S. 579, 645 (1952) (Jackson, J., concurring)). Moreover, the entry of global class-wide relief is inconsistent with RFRA's requirement that "appropriate relief" be tailored to a claimant's specific injury. 42 U.S.C. § 2000bb-1(c).

The Court also stepped beyond the bounds of its authority in many key respects when it issued this class-wide injunction.

Inconsistent Judicial Orders. Although Defendants were actively litigating numerous cases involving the COVID-19 vaccination requirement, Defendants were not subject to conflicting rulings until this Court issuing its class-wide injunction. Now they are. This Court's injunction effectively nullifies the decisions of other courts, including the Supreme Court. By specifically ordering the Air Force to remove class member Lt. Col. Jonathan Dunn (a member of the Air Force Reserve) from a No Pay/No Points status, the injunction conflicts with the Supreme Court's decision that he is not entitled to an injunction pending his appeal to the Ninth Circuit. *Dunn v. Austin*, 142 S. Ct. 1707 (2022).

Other courts, with the benefit of individualized records, have likewise decided that individual class members are not entitled to preliminary injunctions on their RFRA and First Amendment claims. *See, e.g.*, *Roth v. Austin*, --- F. Supp. 3d ---, 2022 WL 1568830, at *31 (D. Neb. May 18, 2022), *appeal filed*, No. 22-2058 (8th Cir. May 20, 2022); *Knick v. Austin*, No. 22-1267, 2022 WL 2157066, at *3, 31 (D.D.C. June 15, 2022); *Creaghan v. Austin*, --- F. Supp. 3d ---, 2022 WL 1500544 (D.D.C. May 12, 2022), *appeal filed* No. 22-5135 (D.C. Cir. May 20, 2022). The class-wide injunction overturns those individualized decisions.

Still other courts have issued narrower relief, like Judge Rose's opinion in *Poffenbarger v. Kendall*, where the Air Force was enjoined from transferring that plaintiff to the Individual Ready Reserve, but where the court made clear that "Defendants are <u>not required</u> to . . . remove Poffenbarger from 'No Pay / No Points' status." --- F. Supp. 3d ----, 2022 WL 594810, at *20 (S.D. Ohio Feb. 28, 2022) (emphasis in original). This Court's class-wide injunction now requires the Air Force to remove that

plaintiff from No Pay / No Points status, notwithstanding the *Poffenbarger* court's considered decision to the contrary. Further, this Court's class-wide injunction opinion provides no basis or explanation for why its decision should prevail over the reasoned decisions of these other courts who have spent significant time and resources making individualized determinations.

Injunction Requiring Commissioning of Officers or Enlisting of New Service Members Exceeds Courts' Authority. The Court's injunction expanded the scope of the certified class to include prospective service members and to require new officer commissions without regard for vaccination status. However, none of the original 18 Plaintiffs fall into either of these categories, so there is no class representative for this type of relief. *See In re Navy Chaplaincy,* 534 F.3d 756, 760-61 (D.C. Cir. 2008) (Kavanaugh, J.) (current service members do not have standing to challenge military accessions guidelines that apply only to prospective service members).

The class-wide injunction requiring the Air Force to commission certain officers also directly conflicts with the Executive's appointment power. Article II of the Constitution specifies the exclusive mechanisms for the appointment of officers of the United States, including military officers. *See* U.S. Const. art II, § 2, cl. 2; *see also* 10 U.S.C. § 531(a)(1) (providing that the President may appoint Air Force officers in grades up to and including that of captain without the advice and consent of the Senate). The Constitution does not vest the judiciary with any power to order the commissioning of new Air Force officers, so the Court's order exceeds the power of the judiciary. U.S. Const. art. II, § 2, cl. 2; *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1511 (D.C. Cir. 1989) (stating plaintiff's demand for appointment as an officer is "squarely within the realm of nonjusticiable military personnel decisions"); *Fisher v. United States*, 402 F.3d 1167, 1180-81 (Fed. Cir. 2005) (en banc) (noting that the question of "who should be allowed to serve on active duty, and in what capacity" is generally nonjusticiable).

Similarly, the judiciary may not order the enlistment of a prospective service member or reenlistment of a current service member. *Maier v. Orr,* 754 F.2d 973, 983 (Fed. Cir. 1985) ("Federal courts have uniformly declined to order relief beyond a current enlistment."); *see also id.* ("[N]o one has an individual right, constitutional or otherwise, to enlist in the armed forces, the composition of those forces being within the purview of the Congress and the military.") (citing *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973), *Lindenau v. Alexander*, 663 F.2d 68, 72 (10th Cir. 1981)); *DeGroat v. Townsend*, 495 F. Supp. 2d 845, 851 n.7 (S.D. Ohio 2003) ("Several cases have held that a service secretary's determination of fitness for duty of a servicemember is beyond the competence of the judiciary to review and, thus, nonjusticiable.") (citing *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953)).

This aspect of the order also conflicts with the Court's reservation of discretion to make assignment and operational decisions, along with the Supreme Court's order in *Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301 (2022). A decision on whether to enlist or commission a prospective service member in the first instance plainly implicates the same kind of fundamental military judgment as to who may be placed into an assignment in the armed forces. The Supreme Court in *Orloff* held that military assignments are non-justiciable. 345 U.S. at 93 ("[W]e are convinced that it is not within the power of this Court by habeas corpus to determine whether specific assignments to duty fall within the basic classification of petitioner."). The same case also determined that the commissioning of officers is a non-reviewable assignment decision. *Id.* at 90 ("It is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief. Whatever control courts have exerted over tenure or compensation under an appointment, they have never assumed by any process to control the appointing power either in civilian or military positions."). *See* Ex. 1, ¶¶ 16, 35.

The Injunction Purports to Bind Non-party State Officials. By enjoining "people acting

in concert or participation with [Defendants]," the injunction appears to cover States and State officials. State officials work with Defendants to ensure medical readiness of their Air National Guard members and units, so this injunction bars States and State officials from taking any punitive process "against the members of the Class for their refusal to receive the COVID-19 vaccine." ECF No. 77, PgID # 4539; Ex. 3, ¶¶ 5–14 (providing an overview of the Air National Guard); *id.* ¶¶ 15–21 (describing impact of preliminary injunction on National Guard units, including federal- and state-level officials). The class-wide injunction blocks States from disciplining class members in their State National Guard units for non-compliance with COVID-19 vaccine requirements or state orders to vaccinate. And by requiring States to commission specific individuals as Air National Guard officers, the injunction also directly interferes with the constitutional authority governing the appointment of officers in state Air National Guard units. U.S. Const. art. I, § 8, cl. 16.

The Court Lacks Authority to Stay Any Court-Martial. This Court also stepped beyond the limits of its authority when it ordered the Air Force to stay "any court-martials [sic] that are in process" that involve class members. That part of the injunction directly contradicts the Supreme Courts' holding in *Schlesinger v. Councilman* that "when a serviceman . . . can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise." 420 U.S. 738, 758 (1975). Indeed, the injunction has interfered with ongoing proceedings authorized by the Uniform Code of Military Justice. *See* ECF No. 79.

C. The Class-wide Injunction Lacked Meaningful Analysis, and Improperly Ignored Evidence Central to the Class Issues.

The Court's order granting a class-wide preliminary injunction is also unlikely to survive appellate review because it contains minimal factual or legal analysis. Without citing any facts or evidence, the Court stated that it was issuing a class-wide preliminary injunction "due to the systemic nature of what the Court views as violations of Airmen's constitutional rights to practice their religions as they

please." ECF No. 77, PgID # 4539. But "mere allegations of systemic violations of the law . . . will not automatically satisfy Rule 23(a)'s commonality requirement." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 844 (5th Cir. 2012). Nor are mere statistics and anecdotal evidence sufficient to demonstrate commonality or "raise any inference that all the individual, discretionary personnel decisions are discriminatory." *Wal-Mart*, 564 U.S. at 358. No injunctive relief is appropriate without a finding that Plaintiffs have proven, with the requisite evidence, that every member of the class is entitled to injunctive relief. And "the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *See Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). The Court identified no common question, nor did it explain what evidence would require it to answer any common question, to support a finding that every absent class member was likely to prevail on the merits on his or her RFRA or First Amendment claims.

Moreover, the Court's class-wide injunction relies on invalid and outdated factual findings. The order granting a class-wide injunction contains less than a page of analysis and instead incorporates the Court's prior decision issued March 31, 2022, which granted a preliminary injunction to 18 plaintiffs. ECF No. 77, PgID # 4538–39. But, as Defendants explained in their opposition to a class-wide injunction, the facts that the Court cited in March have significantly changed. *See generally* ECF No. 73. When it expanded its injunction to cover around 10,000 individuals, the Court failed to acknowledge that the facts it relied on had changed, much less explain how the facts as of July 2022 could justify such sweeping relief. *See generally* ECF No. 77, PgID # 4538–39 (providing no factual analysis regarding scope of class-wide injunction, no balance of equities, and no analysis of public interest).

The Court Ignored That Novavax COVID-19 Vaccine is Available. In July 2022, the FDA granted emergency use authorization to the Novavax vaccine, which uses traditional vaccine technology. FDA, Coronavirus (COVID-19) Update: FDA Authorizes Emergency Use of Novavax

COVID-19 Vaccine, Adjuvanted (July 13, 2022), https://perma.cc/CJ3N-8SAE. The developer of the vaccine stated that "[n]o human fetal-derived cell lines or tissue, including HEK293 cells, are used in the development, manufacture or production of the Novavax COVID-19 vaccine candidate." J. Jenkins, New Novavax Shot Could Appeal to Pro-Life Christian Skeptics, Christianity Today (Feb. 18, 2022) https://perma.cc/275N-YH8U; *see also* Decl. of Dr. Bruce McClenathan (Ex. 5) (attaching letter from Novavax). Those class members whose religious objections were based on mRNA technology or the use of fetal-derived cell lines are no longer substantially burdened because the Novavax vaccine is now available and satisfies the military's COVID-19 vaccination requirement.

The Court never acknowledged or explained how the sweeping relief it granted in its class-wide injunction aligns with the undisputed fact that at least some class members can comply with the Air Force's COVID-19 vaccination requirement by receiving Novavax without substantially burdening their religious exercise. Plaintiff Adam Theriault, for example, concluded that receiving the Novavax vaccine would be consistent with his faith. ECF No. 30-2 ¶ 3, PgID #2147–48. Plaintiff Joe Dills likewise testified that he "would take [Novavax] if it was available in the United States." ECF No. 48, Hearing Tr., 75:9–14, PgID # 3280.

Since the COVID-19 vaccine requirement does not substantially burden Theriault's or Dills' religious exercise now that Novavax is approved in the United States, there is no basis to grant a preliminary injunction that covers them or similarly situated class members. Since Plaintiffs did not show that every class member's religious beliefs are substantially burdened, they did not make the required showing of likelihood of success on every element of their RFRA and First Amendment claims for each class member, which is necessary for a class-wide injunction. The Court never discussed the implications of Novavax when it ordered a class-wide injunction.

Air Force Exemption Statistics Do Not Support a Class-wide Injunction. The Court also ignored updated exemption statistics. The Court appears to have incorporated its prior finding

that the Air Force had granted "thousands of medical and administrative exemptions" while granting "relatively none" of religious exemption requests as of March 2022. ECF No. 47, PgID #3195. This prior finding was incorrect. But the updated statistics that Defendants provided in July, which the Court did not address, further confirm the error in the Court's original finding. As of July 12, 2022, the Air Force had granted 135 religious exemptions of Active Duty service members, and there were 286 medical exemptions and 22 administrative exemptions in the Active Duty Air Force. ECF No. 73-2, ¶ 3, PgID # 4506–07. The Air Force also had granted 22 religious exemptions for the Air Force Reserves, and there were 145 medical exemptions and 83 administrative exemptions in the Reserves. *Id.*; *see also* DAF COVID-19 Statistics – July 12, 2022, https://perma.cc/AAV7-E7RV.[5]

No named Plaintiff is a member of the Air National Guard, and as discussed above, the Plaintiffs' motion for class certification and the Court's original class definition did not include the National Guard. In any event, statistics for the Air National Guard also do not support the Court's erroneous factual findings. The Air Force has granted four religious exemptions for members of the Air National Guard. *Id.* However, most of the religious accommodation requests that are still pending in the Air Force are from the National Guard (2,467 out of 2,847 total pending requests), where many are awaiting state officials to continue processing (those applications are not waiting for federal officials). ECF No. 73-2, ¶ 3, PgID # 4506–07. As of July 12, 2022, the Guard had 193 temporary medical exemptions and 712 administrative exemptions. DAF COVID-19 Statistics – July 12, 2022, https://perma.cc/AAV7-E7RV. The number of administrative exemptions in the National Guard does not support a class-wide injunction. Three of those administrative exemptions are for Guardsmen who are deceased, 681 are classified as "missing" (which includes members who no longer show up for drill or those pending retirement), 43 are classified as temporary (less than 90 days), and 11 are

[5] The most recent statistics continue to show medical and administrative exemptions are decreasing. *See* DAF COVID-19 Statistics — August 9, 2022, https://perma.cc/2EN7-JP4Y.

Permanent Change of Station (less than 90 days)). *See* Decl. of Colonel Steve L. Bradley, ¶¶ 4–5, Ex. 4. In other words, at least 684 of the 712 administrative exemptions are for Air Guardsmen who no longer participate in the Air Force (and would be required to comply with the COVID-19 vaccine requirement if they returned). *Id.* The rest of the exemptions will expire in less than 90 days. *Id.*

No Analysis of Balance of Equities or Public Interest. The Court's Order contains no analysis whatsoever of the equities or public interest implicated by expanding its original preliminary injunction covering less than two dozen service members to now cover nearly 10,000 service members. That alone is reversible error. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 27 (2008) (finding that the district court abused its discretion in part because "the District Court addressed [the balance of equities and the public interest] in only a cursory fashion.").

II. Defendants Face Irreparable Harm from the Preliminary Injunction.

A. Scope of the Injunction.

As explained in the attached declaration from Three-Star General Kevin Schnieder, the Director of Staff for the Headquarters of the United States Air Force, "[t]he injunction already degrades the Department of the Air Force's lethality and force capabilities by requiring the Department to retain—and enlist or commission—thousands of individuals who are ineligible to deploy." Ex. 1, ¶ 17 (citation omitted). The class-wide injunction covers around 10,000 unvaccinated service members—who are not world-wide deployable, who are limited in their ability to travel for training, exercise, or other operational needs—who the Air Force now cannot separate or even discipline. That number will only grow larger if the Air Force is required to commission and enlist additional unvaccinated individuals.

Every Airman is critical to the accomplishment of the Air Force mission and must be available to perform their duties globally. As has been the case throughout history, the loss of personnel due to illness, disease, or injury diminishes military readiness and effectiveness. The COVID-19 vaccination

is the most effective tool to combat the impact from the COVID-19 virus. Airmen and Guardians who are unvaccinated or partially vaccinated against COVID-19 are substantially more likely to develop severe symptoms from the disease, resulting in delayed recovery, hospitalization, or death. These risks, compounded by this injunction endangers the military mission and degrades the effectiveness of the fighting force.

The injunction places the Department of the Air Force in an untenable position. This order forces the Air Force to choose between (1) deploying unvaccinated Airmen and Guardians who are at greater risk of serious illness, causing avoidable risks to the service member, their peers, the mission, and the force; or (2) maintaining a separate class of nearly 10,000 non-deployable Airmen and Guardians, shifting all the hardships and burdens of global deployment on the remainder of the Air Force that meets medical readiness requirements. Both scenarios cause immediate and lasting harm to the Air Force, its Airmen, and its ability to defend the nation. Ex. 1, ¶¶ 16–22

The Order "is particularly harmful because the end-strength of the Department [of the Air Force] is congressionally mandated," so "the Department cannot simply enlist or commission more members to make up for the thousands of permanently non-deployable, non-combat-ready members that the Court's order forces the Department to retain, enlist, or commission." Ex. 1, ¶ 17. Those who seek to enter military service must meet strict medical readiness standards, including being tree of contagious diseases; free of medical conditions or physical defects that could require treatment, hospitalization, or eventual separation from service for medical unfitness; medically capable of satisfactorily completing required training; medically adaptable to the military environment; and medically capable of performing duties without aggravation of existing physical defects or medical conditions. *Id.* ¶¶ 23–25. To force the Air Force to enlist new Airmen who may not be able to complete training and who cannot deploy would cause irreparable and lasting harm to the Air Force's ability to defend the nation. A requirement to access new Airmen who are non-deployable from day one irreparably

harms the Air Force's ability to meet mission demands. "The longer the injunction remains in place, the more unvaccinated members can join the ranks, decreasing operational readiness." *Id.* ¶ 17. "The order effectively degrades the Department's ability to maintain a cohesive fighting force by both barring removal of unvaccinated members and requiring accession of more unvaccinated members," so that "large percentage of the Department's non-worldwide-deployable population will only continue to grow." *Id.*[6]

B. Harm from Forcing the Air Force to Commission Officers and Enlist Non-Deployable Airmen and Guardians.

Without the benefit of any briefing from Defendants on the issue, the Court expanded the class definition to include individuals seeking to be commissioned as officers and those seeking to enlist, and its injunction requires the Air Force to commission officers and enlist Airmen and Guardians who do not meet the Air Force's minimum medical readiness standards and who are not world-wide deployable. This causes irreparable harm to the Air Force. Enlistment and commissioning are generally irreversible decisions and forcing the Air Force to absorb potentially thousands of individuals who cannot deploy will have devastating impacts on our military's readiness. Ex. 1, ¶¶ 26–31.

Once a service member is in the military, they must go through formal separation procedures to be separated, which can take up to a year or longer. In the meantime, the Department of the Air Force is forced to fill a billet with an officer who, due to their unvaccinated status, is generally not permitted to travel, may not be able to train, and who cannot deploy to many places around the world. Already the Air Force has identified nearly 300 new officers it will now be required to commission in

[6] The Order causes additional irreparable harm by forcing the Air Force to take members of the Reserves off of No Pay / No Points status. *See* Decl. of Major General Matthew Burger, Ex. 2. First, that part of the preliminary injunction is an operational decision because it forces the Air Force to return unvaccinated individuals to a training status and back into certain assignments and operational positions. *Id.* at ¶¶ 12–13, 16. That conflicts with the Court's claim that the Order was not to interfere with assignment or operational decisions, and with the Supreme Court's decision in *Austin v. Navy SEALs 1–26*, 142 S. Ct. at 1301. Second, forcing the Air Force to either reinstate or keep in participating status around 1,000 individuals will reduce the percentage of world-wide deployable Reservists, pushing the burden on those who satisfy the medical readiness requirements. Ex. 2, ¶ 14; *see also* Ex. 1, ¶¶ 32–35. The Order also degrades good order and discipline. Ex. 1, ¶¶ 36–42.

the near future unless the injunction is stayed. Forcing the Department of the Air Force to commission hundreds of officers who cannot travel or deploy with their units severely undermines the defense of our nation.

III. The Balance Of Harms And Public Interest Warrant A Stay Pending Appeal.

The harms from the injunction strongly weigh in favor of staying the class-wide injunction pending appeal. The harms to the Air Force's military readiness are described in detail above. The Air Force's military leaders have decided that having a large portion of their fighting force unvaccinated against COVID-19 is an unacceptable operational risk. *See generally*, Exs. 1, 2, and 3. As Justice Kavanaugh recently explained when the Supreme Court granted a stay in a similar case involving the Navy, there is no basis "for employing the judicial power in a manner that military commanders believe would impair the military of the United States as it defends the American people." *Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J., concurring).

The only impact the stay would have on the class is limited to those who are not currently participating as named Plaintiffs in this lawsuit. The existing preliminary injunction covering the named Plaintiffs is not included in this request for a stay. Although the harm from requiring the Air Force to retain 16 of the 18 original Plaintiffs[7] is significant, the harm from this class-wide injunction is orders of magnitude larger and "pose[s] a significant and unprecedented risk to military readiness and our ability to defend the nation." *See* ECF No. 73-1

CONCLUSION

Defendants respectfully request that the Court stay its order pending appeal.[8]

Dated: August 15, 2022 Respectfully submitted,

[7] Two plaintiffs, who are members of the class and covered by class-wide injunction, are already in full compliance with the Air Force's COVID-19 vaccination requirement. *See* ECF No. 68 at PgID #4423–24.

[8] In the alternative, Defendants respectfully request that the Court at least stay the preliminary injunction in part, to the extent the injunction goes beyond forbidding Defendants from issuing final discipline or separating current service members who are members of the class based on their refusal to be vaccinated against COVID-19 on religious grounds.

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CERTIFICATE OF SERVICE

On August 15, 2022, I electronically submitted the foregoing document using the Court's electronic case filing system. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

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