Case No. 22-3497

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HUNTER DOSTER, *et al.*,

Plaintiffs-Appellees

v.

HON. FRANK KENDALL, in his official capacity as Secretary of the Air Force, *et al.*,

Defendants-Appellants

On Appeal from the United States District Court for the Southern District of Ohio
Case No. 1:22-cv-00084

BRIEF OF THE STATES OF KENTUCKY, ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF APPELLEES

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This appeal is about whether the Air Force violated 18 Airmen's statutory and constitutional rights by not granting them religious exemptions to its COVID-19 vaccine mandate. The Amici States' interests in the appeal are two-fold. First, they have a specific interest in protecting the religious-liberty rights of those Airmen and others like them who are their citizens. And second, they have a more general interest in the proper balance being struck between religious liberty and important government interests such as those in play here. The Amici States are well acquainted with the challenge of striking that balance—particularly in light of COVID-19. So the States submit this brief to ensure that the Airmen's rights are protected. *See* Fed. R. App. P. 29(a)(2).

INTRODUCTION

An Airman may sacrifice much in serving his country. That should not include his right to religious liberty. And indeed, it doesn't. We have protections in place to ensure that an Airman enjoys largely the same rights to religious liberty as his fellow citizens. Those include the Free Exercise Clause and the Religious Freedom Restoration Act, both of which apply in the military context.

Of course, neither takes away the Air Force's decision-making authority necessary to carry out its mission. Nor do they necessarily do away with the traditional deference given to such decision making. Instead, the protections simply ensure that in making those and other decisions the Air Force does not infringe on an Airman's religious-liberty rights.

That's all this appeal is about. The district court granted a narrow preliminary injunction ensuring that the 18 Airmen are not punished for refusing the COVID-19 vaccination because of their religious beliefs.[1] The injunction in no way dictates deployment decisions or inhibits the Air Force's decision-making authority necessary to carry out its mission. In fact, it mirrors the relief that the Supreme Court left intact when it granted a partial stay pending appeal of another district court's order as to the Navy's vaccine mandate. *See Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301 (2022).

The district court correctly determined that the Airmen are likely to succeed on their claims that the Air Force violated both RFRA and the Free Exercise

[1] Later, the district court certified a class and granted a class-wide preliminary injunction. The Air Force also appeals that ruling, and so far this Court has denied a stay pending appeal. *Doster v. Kendall*, --- F.4th ---, 2022 WL 4115768 (6th Cir. Sept. 9, 2022). This amicus brief addresses only the injunction granted to the 18 named Airmen.

Clause by not granting their religious exemptions. Put simply, the Air Force has not met its burden under RFRA to show that denying these 18 Airmen's religious exemptions is the least restrictive means of furthering a compelling government interest. And it has not met the same burden under the Free Exercise Clause (necessary because the mandate is not generally applicable). Because the Air Force is violating the Airmen's religious-liberty rights, the Court should affirm.

STATEMENT OF THE CASE

In September 2021, the Secretary of the Air Force mandated that all Airmen receive a COVID-19 vaccine unless exempted. Sec'y Air Force Mem., R.27-7, PageID#1632. There are three types of exemptions: medical, administrative, and religious.

A medical exemption can be granted for several reasons, such as if an Airman is pregnant or allergic to an ingredient in the approved vaccines. Chapa Decl., R.27-12, PageID#1922–23. Such exemptions last only as long as needed. For example, if an allergy-based exemption is at first granted and a new vaccine is approved without the allergy-causing ingredient, the exemption no longer applies. *Id.* at PageID#1925. And an Airman granted a medical exemption still faces restrictions such as extended quarantine requirements, foreign-country-entry restrictions, and limited deployment eligibility. *Id.* at PageID#1926.

An administrative exemption can be granted for an Airman on terminal leave, who is slated to retire or separate soon, or who is participating in a vaccine clinical trial. *Id.* at PageID#1927–28; Little Decl., R.27-16, PageID#1954; Long Decl., R.27-24, PageID#2029. Like the medical exemption, the clinical-trial exemption is temporary, lasting only as long as the trial. Chapa Decl., R.27-12, PageID#1928.

And a religious exemption can be granted if an Airman has a sincerely held religious objection to receiving a vaccine and exempting him does not adversely affect "military readiness, unit cohesion, good order and discipline, or health and safety." Streett Decl., R.27-13, PageID#1932. An initial approval authority first decides whether to grant an exemption. *Id.* If denied, an Airman may then appeal to the Air Force Surgeon General who makes a final determination. *Id.* While his request and appeal are pending, the Airman is temporarily exempted from the vaccine mandate. *Id.* at PageID#1937. During that time, he is subject to restrictions such as masking and social distancing. *See* Tr., R.48, PageID#3222, 3266. If the Airman's appeal is denied and he refuses to comply with the mandate, he could face disciplinary measures ranging from receiving a letter of reprimand to being court-martialed. Hernandez Decl., R.27-14, PageID#1941.

Each of the 18 Airmen here applied for a religious exemption. Each submitted written materials including a chaplain's confirmation that the vaccine mandate substantially burdens his sincerely held religious beliefs. Yet none have received an exemption. At least 10 of the Airmen have received a final denial from the Air Force Surgeon General. Bannister Decl. 51-1, PageID#3396 (listing 9 final denials); Wiest Decl., R.60-1, PageID#4359 (showing another final denial). Of those, two (Senior Airman Dills and Senior Master Sergeant Schuldes) have received letters of reprimand and been placed in the Individual Ready Reserve. Tr., R.48, PageID#3262–64; Schuldes Accom. Materials, R.11-19, PageID#551, 554. In the IRR, they receive no pay or points toward retirement and lose certain health-insurance benefits. Tr., R.48, PageID#3264; Heyen Decl., R.27-18, PageID#1979. And the rest of the Airmen have been awaiting either an initial or final decision for over a year. *See, e.g.*, Anderson Accom. Materials, R.11-6, PageID#391 (showing the still-pending exemption request submitted on September 25, 2021).

The Air Force's failure to grant religious exemptions to the 18 Airmen does not make them outliers. Although the Air Force points to some granted religious exemptions, the Airmen have alleged—and the Air Force has not disputed—that each of those exemptions was granted to an Airman who was also eligible for an

administrative one. *See* Tr., R.48, PageID#3233. As this Court recently noted, "[t]he record suggests that, at present, the number of exemptions that the Department has granted on religious grounds stands at zero." *Doster*, 2022 WL 4115768, at *1.

For each of the 18 Airmen, the district court granted a preliminary injunction. But it did so only to prevent the Air Force from "taking any disciplinary or separation measures" against them based on their refusal to vaccinate because of their sincerely held religious beliefs. Order, R.47, PageID#3203. And the district court expressly noted that the injunction "does not affect the Air Force's ability to make operational decisions, including deployability decisions." *Id.* at PageID#3201.

The Air Force appeals that injunction. It advances four main arguments—two procedural and two substantive. Procedurally, it argues that most of the Airmen's claims are not ripe and that none exhausted their administrative remedies. And substantively, the Air Force argues that there is no RFRA or free-exercise violation. Underlying each is the assertion that the Air Force is due significant deference and that the Court would be intruding on military decision making if it rules for the Airmen.

ARGUMENT

The Court should affirm. Neither of the Air Force's procedural arguments prevent the Court from reaching the RFRA and free-exercise claims. And any deference due cannot bar consideration of those claims or justify the Air Force not granting religious exemptions to the 18 Airmen.

I. There is no improper infringement on military decision making.

From the outset, it is important to dispel the Air Force's repeated suggestion that ruling for the Airmen would improperly infringe on military decision making. *See, e.g.*, Appellant Br. 46. Such a claim is just not true. And that is because of the limited relief that the district court granted. The injunction prevents the Air Force only from punishing the Airmen. It in no way dictates operational or deployment decisions. Under the injunction, the Air Force retains its authority to make decisions necessary to fulfill its mission.

Importantly, the relief mirrors what the Supreme Court left intact in *Austin*. There, the Court granted a partial stay pending appeal of a preliminary injunction issued to protect Navy Seals who were denied a religious exemption to the Navy's vaccine mandate. *Austin*, 142 S. Ct. at 1301. But it did so only to the extent that the injunction "preclude[d] the Navy from considering [the Seals'] vaccination status in making deployment, assignment, and other operational decisions." *Id.*

The Court did not stay the injunction to the extent that it prevented the Navy from taking disciplinary actions against the Seals.

The Navy did not even ask for a stay of that part of the injunction. It requested only the partial stay—for good reason. There is no credible claim that preventing the Navy from punishing service members who refuse to comply with a vaccine mandate on religious grounds would improperly infringe on military decision making. Neither is there such a claim here. And Justice Kavanaugh's concurrence does not suggest otherwise.

In Justice Kavanaugh's view, RFRA could not support infringing on military decision making in directing operational decisions. *Id.* at 1302 (Kavanaugh, J., concurring). He found that the Navy had a compelling interest in "maintaining strategic and operational control over the assignment and deployment of all Special Warfare personnel—including control over decisions about military readiness." *Id.* And he found that there were no less restrictive means to satisfy that interest. *Id.* But Justice Kavanaugh was concurring in the *partial* stay. So he necessarily was speaking only of the relief that the Court granted: staying the injunction to the extent that it limited the Navy's operational decision-making authority. His concurrence makes no mention of his thoughts on the injunction preventing the Navy from punishing the Seals.

And of course, Justice Alito's dissent (joined by Justice Gorsuch) does not suggest that preventing such punishment would improperly infringe on military decision making. It suggests just the opposite. Justice Alito would have granted much narrower relief than the Court. In his view, the Navy had not shown it was likely to succeed on the RFRA or free-exercise claims. *Id.* at 1305–07 (Alito, J., dissenting). He agreed that the Navy had a compelling interest in "preventing COVID-19 infection from impairing its ability to carry out its vital responsibilities" and "in minimizing any serious health risk to Navy personnel." *Id.* at 1305. But Justice Alito determined that the Navy had not satisfied the least-restrictive-means requirement. *Id.* So if an injunction broader than merely stopping punishment was proper, then the injunction here is too.

In short, none of the *Austin* opinions suggest that preventing the Air Force from punishing the Airmen would unduly infringe on its military decision making. To be sure, at times this Court has been wary of intruding on duty assignments and other like military decisions. *See Harkness v. Sec'y of Navy*, 858 F.3d 437, 444–46 (6th Cir. 2017). But any deference due on duty or deployment decisions is simply not at issue in this appeal.

II. The Air Force's procedural arguments come up short.

Now consider the Air Force's procedural arguments. There are two: that none of the Airmen's claims are justiciable under *Harkness* and that, for most of the Airmen, their claims are not ripe. Neither prevents this Court from reaching the merits.

1. Take justiciability first. In *Harkness*, the Court adopted the Fifth Circuit's test for determining whether military duty assignments are reviewable. *Id.* at 444. The judge-made abstention doctrine asks two preliminary questions: is there an allegation of a constitutional, statutory, or regulatory violation and has the service member exhausted intra-service corrective measures? *Id.* If yes to both, then a court weighs four factors: the nature and strength of the challenge, the potential injury from not reviewing the issue, the degree of military interference, and the extent military expertise is involved. *Id.*

But nothing suggests that this judge-made doctrine applies to RFRA. Indeed, this Court just noted that "whether RFRA claims are even subject to an exhaustion requirement is an open question." *Doster*, 2022 WL 4115768, at *5. The statute contains no exhaustion or abstention requirement. *See Oklevueha Na-*

tive Am. Church of Haw., Inc. v. Holder, 676 F.3d 829, 838 (9th Cir. 2012). And Congress's decision not to include one should displace any prior judge-made doctrine. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 313–14 (1981).

In this exact context, the Fifth Circuit has suggested as much. *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 346 (5th Cir. 2022). And that makes sense: the traditional reluctance to intrude on military affairs goes away when "Congress specifically has provided otherwise." *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988). So the *Harkness* factors should not apply to RFRA.

Still, if the Court disagrees (and in any event, for the free-exercise claim), the factors are met. There is no dispute over the first: the Airmen allege violations of constitutional and statutory rights. There is a dispute over the second: the Air Force argues that none of the Airmen exhausted their intra-military remedies. Appellant Br. 19.

But that exhaustion argument is forfeited for two of the Airmen. Below, the Air Force did not argue that Senior Airman Dills and Senior Master Sergeant Schuldes had failed to exhaust. *See* Resp. TRO & Prelim. Inj., R.27, PageID#1528 & n.10. And the exhaustion argument is wrong for those issued a final denial by the Air Force Surgeon General. *See* Bannister Decl. 51-1, PageID#3396 (listing 9

Airmen with their final appeal denied); Wiest Decl., R.60-1, PageID#4359 (showing another final denial). The Air Force tries to argue that these Airmen have not exhausted their claims because it has yet to take adverse action against them after their final denials (and so the Airmen have been unable to appeal any such action). Appellant Br. 20. In its view, there can be no injury or substantial burden on their religious beliefs until that happens. *Id.* But that makes no sense.

The constitutional injury under the Free Exercise Clause occurs when the Airmen are denied the religious accommodation when others similarly situated have been granted it. That is the moment of discrimination. It does not happen at a later date when an Airman is punished for refusing to comply with the final ruling. And the same is true under RFRA. The substantial burden occurs when an Airman is ordered to comply with the mandate in violation of his sincerely held religious beliefs. It is at that point that he must comply or disobey a direct order and await whatever punishment the Air Force might dole out. He need not be punished for disobeying before there is a substantial burden on his beliefs. *See Holt v. Hobbs*, 574 U.S. 352, 361 (2015) (not requiring an inmate to be punished for violating a prison policy before bringing a claim). That the Air Force later declines to argue under RFRA that there has yet to be a substantial burden on the Airmen's beliefs only drives the point home. Put simply, once the Air Force has

issued its final denial of the request, an Airman has exhausted his intra-military remedies.

Many of the Airmen have done so. At the very least, that means that exhaustion cannot bar the Court from reaching the merits. It may also remove any need to consider exhaustion for the others. Just as only one plaintiff need show standing, *see Mays v. LaRose*, 951 F.3d 775, 782 (6th Cir. 2020), it makes some sense that only one need show exhaustion.

Even so, as to the remaining Airmen, the Court would be well within its right to hold that on this record exhaustion is futile. That is because the Airmen have alleged—and the Air Force has not disputed—that so far each granted religious exemption was to an Airman who was also eligible for an administrative one. *See* Tr., R.48, PageID#3233; *Doster*, 2022 WL 4115768, at *4. There is no suggestion that the Air Force has granted even one Airman a purely religious exemption.

All in all, however the Court resolves it, the exhaustion prong is met. That means (assuming the Court is applying *Harkness*) it must weigh the remaining factors. None suggest that the Court should decline to reach the merits. First, the Airmen have strong claims that their rights have been violated as discussed below. And those claims are of the highest order: constitutional and statutory religious-

liberty violations. Second, the injury is significant and irreparable. That is unquestionably true for the constitutional violations. *See Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021). And RFRA violations should fall in the same boat. *See U.S. Navy Seals 1-26*, 27 F.4th at 348. Third, the degree of military interference is minimal because of the limited scope of the injunction. And fourth, the decision whether to punish an Airman for violating an unlawful order to take the COVID-19 vaccine depends little on military expertise. In sum, *Harkness* does not counsel against reaching the merits.

2. Turn to ripeness. The Air Force argues that, for all but Senior Airman Dills and Senior Master Sergeant Schuldes (who have been issued letters of reprimand and placed in the IRR), the Airmen's claims are not ripe. The reasons being that the Air Force has either not rendered a final decision or taken adverse action against them. Appellant Br. 25.

But the admission that two Airmen's claims are ripe means the Court will reach the merits. And it likely resolves the issue for others too. Because ripeness is tied to standing, if only one plaintiff needs standing, then it likely follows that only one needs a ripe claim. *See Mays*, 951 F.3d at 782. At any rate, it is easy to conclude that the other Airmen's claims are also ripe.

A claim is unripe if the alleged injury has not yet occurred. The Air Force's main argument here is no different than its exhaustion argument. It contends that 16 of the Airmen's claims are not ripe because it has not taken adverse action against them or issued a final decision on their exemptions. But the Airmen do not have to wait for the Air Force to take adverse action for their refusal to comply with an order. The injury has already occurred under both RFRA and the Free Exercise Clause. And the latter argument is wrong—for many of the Airmen, the Air Force Surgeon General has denied their final appeals. *See* Bannister Decl. 51-1, PageID#3396; Wiest Decl., R.60-1, PageID#4359. That means that *Miles Christi Religious Order v. Township of Northville*, 629 F.3d 533 (6th Cir. 2010), is not on point. There, the agency had not reached a final decision. *Id.* at 538. Here, it has.

III. The Air Force has not met its burden on the merits.

Finally, consider the merits. There are two separate but overlapping claims: that the Air Force's refusal to grant the 18 Airmen's religious exemptions violated RFRA and the Free Exercise Clause. The Airmen are likely to succeed on both.

1. By its plain terms, RFRA applies to the Air Force. *See* 42 U.S.C. § 2000bb-2(1); *United States v. Sterling*, 75 M.J. 407, 410 (C.A.A.F. 2016). And to its credit, the Air Force never argues differently. The statute prohibits the Air Force from

substantially burdening the Airmen's sincerely held religious beliefs unless it can show that doing so is the least restrictive means of furthering a compelling government interest. *Ramirez v. Collier*, 142 S. Ct. 1264, 1277 (2022).[2] Such an interest cannot be stated broadly or at a high level of generality. Rather, it must independently justify denying each Airman's exemption on the ground level.[3] *Id.* at 1278; *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021). And the burden to show that and narrow tailoring is on the Air Force—even in the preliminary-injunction context. *Ramirez*, 142 S. Ct. at 1277.

The Air Force does not dispute that the mandate substantially burdens the Airmen's sincere religious beliefs. It argues only the compelling-interest and narrow-tailoring prongs. For the former, it puts forward a bevy of interests: stopping the spread of COVID-19, ensuring military readiness, keeping its troops healthy, allowing each Airman to be world-wide deployable, and even "ensuring that each

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[2] *Ramirez* concerned the Religious Land Use and Institutionalized Persons Act, not RFRA. But the "sister statute[s]" allow plaintiffs to seek religious accommodations under the same standards and apply the same inquiry. *Holt*, 574 U.S. at 356–58.

[3] Of course, if the Air Force has a discriminatory policy to deny religious exemptions, then by default RFRA is violated. *See Doster*, 2022 WL 4115768, at *3 ("A de facto policy to impose that burden upon class members in gross, regardless of their individual circumstances, would seem rather plainly to violate [RFRA].").

of the plaintiffs here are vaccinated against COVID-19." Appellant Br. 33. But before examining those alleged interests, take a step back to consider *Austin* again.

There, between them Justices Kavanaugh and Alito identified three compelling interests. Justice Kavanaugh mentioned maintaining control over the assignment and deployment of military personnel. *Austin*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring). Because the limited relief here does not affect such decisions, this interest is not in play. And Justice Alito identified preventing COVID-19 from impairing the Navy carrying out its mission and minimizing any serious health risk to military personnel. *Id.* at 1305 (Alito, J., dissenting). Those latter two cover most of the Air Force's asserted interests here (apart from ensuring that each Airman is vaccinated and perhaps that each be world-wide deployable).

Of course, those interests are broadly stated. So the burden is still on the Air Force to show that they are furthered by denying each Airman's exemption. Whether or not the Air Force has carried its burden on that point, it has not shown narrow tailoring. The Air Force has not proved that requiring the 18 Airmen to be vaccinated is the least restrictive means of furthering its interests in stopping the spread of COVID-19 and ensuring the health of its troops.

That is most easily seen by the Air Force's own actions. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730 (2014) ("HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs."). First, the Air Force allows for religious exemptions—at least on paper. That means the Air Force acknowledges that less restrictive measures than vaccination could serve its interests. Why allow for an exemption that is impossible to grant?

Second, the Air Force has allowed the 18 Airmen—and every other with a pending religious exemption—to be temporarily exempted from the vaccine mandate. Streett Decl., R.27-13, PageID#1937. For many, that temporary exemption has lasted over a year now. *See, e.g.*, Anderson Accom. Materials, R.11-6, PageID#391. As this Court recently recognized in its class-related decision, the harms that the Air Force complains of "are all the very same harms that the Department imposed on itself when, to its credit, it chose to grant temporary exemptions to service members during the pendency of their requests for religious exemptions." *Doster*, 2022 WL 4115768, at *6.

And third, the Air Force has granted many medical and administrative exemptions. For all those exemptions, it has imposed other restrictions instead of a vaccine. *See* Chapa Decl., R.27-12, PageID#1926 (listing other restrictions like

extended quarantine requirements, foreign-country-entry restrictions, and limited deployment eligibility); Tr., R.48, PageID#3222, 3266 (listing other restrictions such as masking and social distancing).

If those restrictions work to further the Air Force's interests in stopping the spread of COVID-19 and ensuring its troops' health for Airmen with pending exemption requests or granted medical and administrative exemptions, then refusing to grant these 18 Airmen's exemptions is not the least restrictive means. *See Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) ("The way the orders treat comparable religious and non-religious activities suggests that they do not amount to the least restrictive way of regulating the churches.").

For example, Lieutenant Doster performed various duties while his request was pending and after it was denied for over a year without being vaccinated. Tr., R.48, PageID#3214, 3217. During that time, he was subject to requirements such as masking and social distancing. *Id.* at PageID#3222. On top of that, multiple Airmen with a medical exemption perform the same duties. *Id.* at PageID#3215. Similarly, Senior Airman Dills (before he was placed in the IRR) performed his duties without being vaccinated, subject instead to requirements like masking, social distancing, and regular sanitizing. *Id.* at PageID#3266. And his job was the same as several Airmen with administrative or medical exemptions. *Id.* at

PageID#3261. If those less restrictive means worked for both Airmen and still work for the other Airmen performing the same duties, then requiring Lieutenant Doster and Senior Airman Dills to vaccinate cannot be the least restrictive means of furthering the Air Force's interests.

The Air Force's responses come up short. As to the temporary exemption while the Airmen's requests are pending, the Air Force argues only that extending those exemptions could significantly affect its mission. Appellant Br. 44. But that is not enough to satisfy its burden to show the least restrictive means. Conjecture and speculation are insufficient. *Ramirez*, 142 S. Ct. at 1280. If the temporary (year-long) exemptions have been working, then the Air Force would need to show that continuing them would not sufficiently further its interests. It has not done so.

And as to the medical and administrative exemptions, the Air Force argues that they are not comparable to the religious. Appellant Br. 37–39. But that is incorrect. Whether the exemptions are comparable is judged against the Air Force's asserted interests. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). And importantly, there need be but one comparable exemption. *Id.*

Here, at the very least, the administrative exemptions are comparable. Recall two possible reasons for that exemption: because a service member is nearing the time to retire or is participating in a clinical trial. Neither is different from a

religious exemption when judged against the interests of preventing COVID-19 from impairing the Air Force carrying out its mission or minimizing any serious health risk to military personnel.

For the second, there is no difference. It does not matter whether an Airman is unvaccinated for religious reasons or because he is participating in a clinical trial or leaving service soon—in each he faces the same risk of contracting or spreading COVID-19 that the Air Force seeks to avoid. The health risk is identical. And likewise for the first. If the Airman has COVID-19, he is limited in fulfilling his duties no matter why he is not vaccinated. That the administrative exemption is temporary (when clinical-trial based) or perhaps short lived (when end-of-service based) does not change that. The risk to the Airman's health and potential impairment of his duties is the same.

Besides, the religious exemption is also temporary. If a new vaccine is approved that the Airman does not have a religious objection to, then he will no longer be exempted. Lieutenant Doster testified that he was looking for a temporary exemption "[u]ntil there was an ethical vaccine that fits [his] beliefs made in the U.S." Tr., R.48, PageID#3219. And Senior Airman Dills said similarly. *Id.* at PageID#3260. That is temporary just as the Air Force argues medical exemptions

based on allergies are temporary. *See* Chapa Decl., R.27-12, PageID#1925. In short, the other exemptions are comparable.

So the Air Force has not shown that denying the 18 Airmen's religious exemptions is the least restrictive means of furthering its interests. It can simply impose the same restrictions that it already has been imposing on them or that it imposes on other exempted Airmen without substantially burdening their sincerely held beliefs.[4] And that cuts through the Air Force's various arguments about temperature checks, masks, and the like being less effective than vaccination. *See* Appellant Br. 41–43. There is no need for the Court to determine that because the Air Force has not shown that such measures do not adequately serve its interests in stopping COVID-19 from impairing its mission and keeping its troops healthy.

All that leaves only two asserted interests: ensuring each Airman is vaccinated and that each is world-wide deployable. As to the first, it is not a compelling interest. True, courts must be deferential "to the professional judgment of

[4] To be clear, the preliminary injunction leaves the extent and necessity of such restrictions entirely to the Air Force. For example, it could well decide that the unvaccinated Airmen are still deployable and other measures sufficiently further its interests. *See, e.g.*, Tr., R.48, PageID#3267 (Senior Airman Dills discussing how he was deployable when his exemption was pending and that he knew several unvaccinated Airmen who did deploy).

military authorities concerning the relative importance of a particular military interest." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). But that cannot amount to "unquestioning acceptance." *Holt*, 574 U.S. at 364. The Air Force cannot try to show that *having the Airmen vaccinated* is the least restrictive means of furthering its compelling interest in *having the Airmen vaccinated*.

And as to the second asserted interest—that the Air Force has a compelling interest in having each Airman be world-wide deployable—that is too broadly stated even if true. It is precisely the type of general interest that is insufficient under RFRA. *See Ramirez*, 142 S. Ct. at 1278; *Fulton*, 141 S. Ct. at 1881. The Air Force had to show that each specific Airman must be world-wide deployable (along with then showing that vaccination was the least restrictive means of furthering that). It has not even tried to meet that showing. Nowhere does it argue specifically why each Airman must be deployable.

Perhaps if a specific Airman performed some essential duty, was practically irreplaceable, and was likely to deploy, then the Air Force could make that showing as to that Airman. *See Doster*, 2022 WL 4115768, at *5 (suggesting that down the line the Air Force could "establish a need to apply the vaccine mandate to individual service members"). But the Air Force has not done so here.

All that to say: the Air Force has not met its burden under RFRA.

2. Nor has it done so under the Free Exercise Clause. That discussion covers much the same ground as the RFRA one. For starters, the protection also applies in the military context. No doubt, the free-exercise analysis is sometimes different in that context than in others because of the need for greater limits on individual autonomy. *Goldman*, 475 U.S. at 507. But nothing suggests any difference when examining whether a policy is neutral and generally applicable. *See Austin*, 142 S. Ct. at 1306–07 (Alito, J., dissenting). Indeed, no limit on personal freedom could justify a policy that discriminates against religion. And here, again to its credit, the Air Force does not argue otherwise.

Similarly, on this claim too the burden is on the Air Force, even in the preliminary-injunction context. *See Tandon*, 141 S. Ct. at 1296. To avoid strict scrutiny, the Air Force must show that the vaccine mandate is neutral and generally applicable.[5] *Fulton*, 141 S. Ct. at 1876–77. It has not shown the latter.

[5] Like with the RFRA claim, if the Air Force has a discriminatory policy to deny religious exemptions, then the free-exercise claim would be met too. *See Doster*, 2022 WL 4115768, at *3 ("A discriminatory policy to deny all requests for religious exemptions, while granting thousands of medical and administrative ones, would seem to violate [the Free Exercise Clause] guarantee as well.").

The Air Force's mandate cannot be generally applicable if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 1877; *accord Tandon*, 141 S. Ct. at 1296. That is true even if it permits just one comparable type of secular conduct. *Tandon*, 141 S. Ct. at 1296. And as discussed above, there is at least one comparable exemption. So the mandate is not generally applicable. That means it must satisfy strict scrutiny, "which is essentially the same as the standard imposed by RFRA." *Austin*, 142 S. Ct. at 1306–07 (Alito, J., dissenting). Because it fails RFRA, the vaccine mandate also fails strict scrutiny.

The Air Force does not argue otherwise. It largely concedes that if RFRA is violated so is the Free Exercise Clause provided that the policy is not generally applicable. Appellant Br. 46. And it is not. But two more points are worth making here.

First, the Air Force contends that allowing both secular and religious exemptions shows that its policy is neutral and generally applicable. *Id.* at 47. That suggestion, however, would have force only if both types of exemptions were granted at a similar rate. And only then if there was no discretion that could be exercised to deny an exemption based on the requester's reason. *See Fulton*, 141 S.

Ct. at 1879 ("The creation of a formal mechanism for granting exemptions renders a policy not generally applicable . . . because it 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude." (alteration in original) (citation omitted)). Yet the record suggests neither here.

Second, the Air Force argues that, because it has received many religious-exemption requests, if it exempts the 18 Airmen, then it will have to exempt all the rest too. Appellant Br. 36. But that is insufficient under both the Free Exercise Clause and RFRA. The argument "is but another formulation of the 'classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions.'" *Holt*, 574 U.S. at 368 (citation omitted). And the Supreme Court has squarely rejected it. In this appeal, the Court should consider only the 18 Airmen and whether their rights have been violated. *Ramirez*, 142 S. Ct. at 1281. And they have.

* * *

Whatever difficult case may be out there involving military decision making, COVID-19, and religious-liberty rights, this appeal isn't it. The preliminary injunction does not dictate deployment decisions or otherwise interfere with key military decisions. It merely protects 18 Airmen from being punished for their sincerely held religious objections to taking a COVID-19 vaccine when the Air

Force has not shown that the vaccine is the least restrictive means of furthering a compelling interest. No doubt, each of those Airmen serves his country for various reasons. But likely one, perhaps common to all, is to help protect others' rights—including those of religious liberty. Surely, the Airmen do not do that at the expense of their own such rights.

CONCLUSION

The Court should affirm.

Respectfully submitted by,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,851 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

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CERTIFICATE OF SERVICE

I certify that on September 29, 2022, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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