IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 22-2058

TANNER W. ROTH; JON W. SMITHLEY; LOGAN M. PRIEBE; VICTORIA S. ROBERTS; TIMOTHY C. BEXTEN; ZACHARY R. BRAUM; ARMAND G. FONDREN II; NATHAN P. GAVIC; BRENNAN L. BARLOW; MICHAEL T. EDWARDS; MATTHEW J. CASCARINO; MATTHEW C. DOWNING; KEVIN DUNBAR; CAMERON M. GRIM; AARON F. KARPISEK; IAN C. McGEE; EVAN McMILLAN; ZACHARY MORLEY; MATTHEW L. NELSON; BRYAN STIGALL; KYNAN VALENCIA; MORGAN T. VIAR; DANIEL VERA PONCE; ADAM R. CASSIDY; TRISTAN M. FRIES; AIRMEN 1-11;
Plaintiff-Appellants

v.

LLOYD J. AUSTIN, III, in his official capacity as United States Secretary of Defense; UNITED STATES DEPARTMENT OF DEFENSE; FRANK KENDALL, III, in his official capacity as United States Secretary of the Air Force; ROBERT I. MILLER, in his official capacity as Surgeon General of the United States Air Force; MICHAEL A. LOH, in his official capacity as the Director of the Air National Guard; DAVID A. WEISHAAR, in his official capacity as Adjutant General of the Kansas National Guard; DARYL L. BOHAC, in his official capacity as Adjutant General of the Nebraska National Guard;
Defendant-Appellees

On Appeal from the United States District Court
For the District of Nebraska

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SUMMARY OF THE CASE

This appeal concerns whether a preliminary injunction should be issued enjoining Defendant-Appellees from taking further action to discharge, punish, or prevent the continuing service of, the 36 Plaintiff-Appellant Airmen ("Airmen") in the Air Force, Air Force Reserves, or Air National Guard. All have submitted religious accommodation requests (RARs) seeking exemption from Appellees' COVID-19 vaccine mandate based on their sincerely held religious beliefs. No RARs have been granted. At this time, 22 Airmen have seen their RAR appeals denied as well. The district court denied their motion for preliminary injunction.

This appeal asserts that the district court's denial of the preliminary injunction should be reversed because Appellees' refusal to grant the Airmen's RARs violates the Religious Freedom Restoration Act ("RFRA") and the Free Exercise Clause of the First Amendment. This appeal asserts that the Airmen are likely to prevail on the merits because Appellees cannot meet the statutory and constitutional requirements of demonstrating a compelling government interest in denying religious exemptions when they have granted thousands of exemptions for secular reasons. This appeal also asserts that the Airmen meet the other requirements for the issuance of a preliminary injunction. Oral argument (20 minutes per side) is requested because this case involves significant and complex questions of statutory interpretation and constitutional law.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants hereby make the following disclosures: Appellants are all individual members of the United States Air Force, Air Force Reserve, or Air National Guard. Appellants do not include any nongovernmental corporations. Accordingly, there are no parent corporations; and no publicly traded corporation has any ownership interest in Appellants.

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INTRODUCTION

The 36 Airmen are members of the United States Air Force, United States Air Force Reserve, or Air National Guard. The majority are stationed either at Offutt Air Force Base near Omaha, Nebraska, or at McConnell Air Force Base in Wichita, Kansas. For them, the oath to "support and defend the Constitution of the United States" is not an abstraction. It is a daily vocation.

Unfortunately, the Airmen are now being denied the very liberty they pledged to protect. Each has a sincere religious objection to receiving a COVID-19 vaccination. They are willing to adopt any number of other measures to protect themselves and others from the spread of COVID-19. Indeed, Appellees had successfully employed such alternative measures for many months, during which time vaccines have been widely available. But now, despite 97.1 percent of Air Force members being fully vaccinated, Appellees have nonetheless ordered the Airmen to forfeit their religious beliefs and get the vaccine or forfeit their careers.[1]

The Air Force has made it quite clear that the theoretical availability of religious accommodation is an illusion. Rejection is a certainty. The numbers tell the story. At the time the district court issued its order, the Air Force reported that it had rejected 7,596 religious accommodation requests (RARs) and RAR appeals

[1] Sec. of the Air Force Public Affairs, *DAF COVID-19 Statistics – June 7, 2022*, *available at* https://www.af.mil/News/Article-Display/Article/3055214/daf-covid-19-statistics-june-7-2022/

and had granted only 46. Addendum 11. That is a 99.8 percent rejection rate. However, Appellees conceded in the district court hearing that *it is effectively a 100 percent rejection rate*. The small number of RAR grants are *all* in cases where the airmen were already leaving the Air Force and could therefore qualify for administrative exemptions. "[T]he Air Force had not approved any RARs for service members who were not leaving the Air Force soon." *Id*. This fact is also confirmed by the text of one of the rare RAR grant letters. The letter states: "Specifically, my decision is based on your leave status and entry into a DoD SkillBridge internship that will take you out of your duty section beginning 1 April 2022 and carry you through to your retirement on 1 October 2022. Thus, you will not be returning to your duty section past 1 April 2022." Appx. 173 (R.Doc. 48). Consequently, the denial of all RARs is a foregone conclusion.

Of the 36 Airmen in this litigation, 25 have already received initial denials of their RARs.[2] All of them appealed. At the time the Airmen moved for a preliminary injunction on March 18, 2022, five of the Airmen also had seen their RAR appeals denied. By the time the district court ruled on May 18, 2022, that number had quadrupled to 20 RAR appeal denials. Since then, it has climbed to

[2] The eleven who have not yet received RAR denials are Airmen Cassidy, Downing, Fries, Grim, Karpisek, McGee, Morley, Ponce, Stigall, and Airman #11.

22.[3] Those 22 Airmen face imminent denial of pay and separation from the Air Force. Four of the 22 have already been transferred to No Point/No Pay status in the Air Force Reserve. *See* Appx. 519-22 (R.Docs. 67-2, 67-3, 67-1).[4] They are no longer being paid, they cannot participate in exercises, and they cannot accumulate points toward retirement. They were also required to turn in their sensitive compartmented information facility (SCIF) access security badges and flight line badges. As a result, they are now prohibited from participating in all Air Force Reserve activities. *See id*.

Importantly, Appellees have undermined any claim to a compelling governmental interest in refusing to grant exemptions by their granting of at least 3,781 medical and administrative exemptions while denying all religious exemptions.[5] Appellees' discriminatory policies and actions violate RFRA. They also violate the Free Exercise Clause of the First Amendment because their vaccine

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[3] The 22 are Airmen #1, #2, #3, #4, #5, #6, #7, #8, #9, Barlow, Bexten, Braum,Cascarino, Edwards, Fondren, Gavic, Nelson, Priebe, Roberts, Roth, Smithley, and Valencia. Cascarino's and Valencia's were the most recent appeal denials.

[4] Airmen #1, #4, #5, and #9.

[5] DAF COVID-19 Statistics – January 2022, *available at* https://www.af.mil/News/Article-Display/Article/2831845/ daf-covid-19-statistics-january-2022/. The Department of the Air Force updates the numbers on this website every few weeks. However, the most recent number of administrative exemptions (for airmen about to retire or otherwise leave the service) reflects only those of airmen *currently* in the Air Force; that number declines as they retire. For this reason, the January 2022 number is a closer reflection of the total number of non-religious exemptions that have been granted.

mandate is not neutral and generally applicable. And for the same reasons that they cannot meet RFRA's demanding strict scrutiny standard, they cannot meet the First Amendment's either.

Importantly, the Fifth Circuit has already ruled on precisely the same statutory and constitutional questions presented in this case in *U.S. Navy SEALs 1-26 v. Biden*, 27 F.4th 336 (5th Cir. 2022). The Fifth Circuit ruled in favor of the Plaintiff Navy SEALs that they were likely to prevail on their RFRA and First Amendment claims and declined to stay the preliminary injunction imposed by the district court.

Because multiple Airmen have already been effectively separated from service and because Appellees are continuing to rapidly deny every RAR appeal, the Airmen are already suffering irreparable injury. Preliminary injunctive relief is warranted because the Airmen are likely to prevail on the merits, they are suffering irreparable injury, and the balancing of the equities favors a preliminary injunction.

JURISDICTIONAL STATEMENT

The district court exercised jurisdiction under 28 U.S.C. § 1331. On May 18, 2022, the district court issued its order denying the Airmen's motion for a preliminary injunction. The Airmen timely filed a notice of appeal on May 19, 2022. This Court possesses jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court correctly applied the compelling governmental interest prong of strict scrutiny analysis under RFRA and the First Amendment by asking whether Appellees had a general compelling interest "in preventing COVID-19 from impairing the readiness and health of its forces, including individual service members like Plaintiffs," rather than asking whether Appellees had a compelling interest in denying religious exemptions to the Airmen.

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014);

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006);

U.S. Navy SEALs 1-26 v. Biden;

Air Force Officer v. Austin, 2022 U.S. Dist. LEXIS 26660 (M.D. Ga. 2022).

42 U.S.C. § 2000bb-1(b).

2. Whether the district court erred in failing to recognize that Appellees cannot have a compelling governmental interest in denying religious exemptions when they have granted more than 3,781 medical and administrative exemptions to the vaccine mandate.

U.S. Navy SEALs 1-26 v. Biden;

Navy SEAL 1 v. Austin, 2022 U.S. Dist. LEXIS 31640 (M.D. Fl. 2022)

Air Force Officer v. Austin;

Doster v. Kendall, 2022 U.S. Dist. LEXIS 59381 (S.D. Ohio 2022)

3. Whether the district court erred in concluding that imposing the vaccine mandate and denying the requested religious exemptions is the least restrictive means available to deal with the Airmen's requests for accommodation.

Navy SEAL 1 v. Austin;

Air Force Officer v. Austin;

Poffenbarger v. Kendall, 2022 U.S. Dist. LEXIS 34133 (S.D. Ohio 2022);

Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011).

4. Whether the district court erred in not finding that the other preliminary injunction factors warranted the issuance of an injunction.

U.S. Navy SEALs 1-26 v. Biden;

Air Force Officer v. Austin;

Navy SEAL 1 v. Austin;

Poffenbarger v. Kendall.

STATEMENT OF THE CASE

The Airmen's Position and Training

Half of the Airmen are stationed at Offutt Air Force Base near Omaha, Nebraska; and a large number are stationed at McConnell Air Force Base in Wichita, Kansas. The rest are stationed at various Air Force bases around the country. Every one of them has filed a Religious Accommodation Request (RAR)

to be exempted from the Air Force's COVID-19 vaccination requirement. The Air Force has granted none of these requests.

At the time of this filing, 25 Airmen have seen their RARs denied by the Air Force—with virtually identical denial letters. Each of them has appealed his denials. Of those 25, 22 have had their appeals denied as well. While all of the Airmen face involuntary separation, those 22 face imminent involuntary separation from the Air Force within a period of months. As noted above, four Reservist Airmen have already been transferred to No Points/No Pay status, which is the virtual equivalent of separation from the service.

Seventeen Airmen are pilots, and they have spent many years in training to attain the status they have achieved and to serve their country. *See* Appx. 6-23, (R.Doc. 1 ¶¶26-56). In addition, American taxpayers have spent an extraordinary amount of money training the pilot Airmen to fly sophisticated military aircraft. According to a Rand study commissioned by the Air Force, the cost of training an Air Force pilot of an RC-135 (the principal aircraft at Offutt, which has the same platform as a KC-135, the principal aircraft at McConnell) is approximately $5.5 million for *each* pilot.[6] Using the RC-135 training cost as a figure for each, the Air Force has spent approximately $93.5 million training the pilot subgroup of the

[6] *See* Michael G. Mattock *et al.*, *The Relative Cost-Effectiveness of Retaining Versus Accessing Air Force Pilots*, Rand Research Report, available at https://www.rand.org/pubs/research_reports/RR2415.html.

Airmen. That massive investment of taxpayer dollars, and the pilots' highly-specialized skill in contributing to the defense of this country, will be wasted if Appellees terminate them. Of the 36 Airmen, 29 have already contracted and recovered from COVID-19 and therefore possess natural immunity.

The Airmen's Sincerely Held Religious Beliefs

As a threshold matter, in all but one of the rejection letters received by the Airmen,[7] Appellees conceded the sincerity of the Airman's religious objection to receiving a COVID-19 vaccination. And Appellees did not question their sincerity in the district court below. It is worth noting that Airman Jon Smithley is an Air Force Chaplain whose expression of his religious beliefs is at the very center of his duties in the Air Force. Although each Airman's personal articulation of his religious objection to the vaccine varies somewhat from the others, there are several beliefs that are shared among multiple Airmen.

Multiple Airmen hold to the religious belief that all life is sacred, from conception to natural death, and that abortion is the impermissible taking of innocent life in the womb.[8] *See, e.g.*, Appx. 388; 374; 424-425 (R.Doc. 22A at

[7] The one letter that did not concede the sincerity of the applicant's religious beliefs was that received by Airman #8, which claimed that the fact he had received a vaccine in the past undermined the sincerity of his beliefs. However, the letter did not address the information that Airman #8 had provided, which fully explained why his taking of vaccines in the past did not undermine his present exercise of his faith.
[8] Although the district court did not expressly question the sincerity of the Airmen's beliefs, the court gratuitously stated: "many of those same religions have concluded

¶12; R.Doc. 22B at ¶10; R.Doc. 22K at ¶11). They are unable to receive the COVID-19 vaccine due to what they understand is the use of aborted fetal cell lines in its testing, development, or production. *Id.* They believe that receiving the COVID-19 vaccine would be participating in the abortion enterprise. *Id.*

Multiple Airmen believe that the human body is God's temple and that they must not take anything into their bodies that God has forbidden or that would alter the functions of their body, particularly substances that include messenger RNA. *See, e.g.*, Appx. 388; 444-445; 449 (R.Doc. 22A at ¶13; R.Doc. 22F at ¶12; R.Doc. 22G ¶¶13-15). In accordance with this religious belief, these Airmen carefully monitor what they take into their bodies, and they believe they are compelled to avoid anything that adversely alters their bodies' natural functions in a manner they believe is not designed by God. *Id.*

Several Airmen have also determined that they should not take the COVID-19 vaccination through personal prayer and the seeking of direction from the Holy Spirit. *See, e.g.*, Appx. 405; 449; 400 (R.Doc. 22E at ¶16; R.Doc. 22G at ¶16; R.Doc. 22H at ¶14). Constant prayer and conforming their conduct to divine guidance are central to the practice of their religious faith. Failure to heed the guidance that they have received through prayer would be contrary to their faith.

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that the remote impact of what they deem to be religiously or ethically objectionable research utilized for the vaccines does not support refusal to take the vaccines on religious grounds today." Addendum 2.

Appellees' Vaccine Mandate

Appellees have mandated that the Airmen be vaccinated against COVID-19, have taken interim adverse actions against the Airmen while their RARs are pending, and have initiated the process of terminating their military careers and stripping them of associated benefits.

On July 29, 2021, President Biden announced that he had directed the Department of Defense ("DoD") to add the COVID-19 vaccine to its list of required immunizations for military service members.[9] On August 24, 2021, Appellee Secretary of Defense Lloyd Austin issued a memorandum directing the DoD to vaccinate all active-duty, reserve, and national guard service members against COVID-19. Appx. 70-71 (R.Doc. 1-1A). The memo made clear that service members who have contracted and recovered from COVID-19 must still receive a vaccination. But the memo also exempted from the mandate all service members who were currently participating in a COVID-19 clinical trial, even those given a placebo. *Id*.

On September 3, 2021, Appellee Secretary of the Air Force Frank Kendall adopted and implemented Secretary Austin's August 24, 2021, memorandum as its

[9] The White House, "FACT SHEET: President Biden to Announce New Actions to Get More Americans Vaccinated and Slow the Spread of the Delta Variant" (July 29, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-president-biden-to-announce-new-actions-to-get-more-americans-vaccinated-and-slow-the-spread-of-the-delta-variant/.

mandatory COVID vaccine guidelines, directing active-duty personnel to become vaccinated within 60 days and Air National Guard and Reserve personnel to become vaccinated within 90 days. Secretary Kendall issued his own memorandum for Air Force commanders, stating, "Effective immediately, commanders in the Department of the Air Force shall take all steps necessary to ensure all uniformed Airmen and Guardians receive the COVID-19 vaccine…." He also stated: "Only COVID-19 vaccines that receive full licensure from the Food and Drug Administration (FDA) will be utilized for mandatory vaccinations unless a military member volunteers to receive a vaccine that has obtained U.S. Food and Drug Administration Emergency Use Authorization or is included in the World Health Organization's Emergency Use Listing." Appx. 72 (R.Doc. 1-1B).

On December 7, 2021, Secretary Kendall issued another memorandum stating: "Refusal to comply with the vaccination mandate without an exemption will result in the member being subject to initiation of administrative discharge proceedings." The memorandum also stated: "Service members separated due to refusal of the COVID-19 vaccine will not be eligible for involuntary separation pay and will be subject to recoupment of any unearned special or incentive pays." Appx. 75 (R.Doc. 1-1C). And on November 30, 2021, Secretary Austin issued a memorandum applying all of the requirements and standards of the mandate

applicable to active-duty members of the military to members of the non-federalized Air National Guard. Appx. 80 (R.Doc. 1-1D).

Appellees' Discriminatory Actions in Implementing their Vaccine Mandate

Consistent with their obligations under RFRA and the First Amendment, Appellees' policies and regulations generally require the individualized assessment of RARs by Religious Resolution Teams (RRTs) and efforts to accommodate the expression of religious belief. But Appellees have made clear that, at least with respect to the COVID-19 vaccine mandate, the individualized assessments were a sham. Regardless of the recommendation of any Airman's RRT, every RAR will be denied—without exception.

Although most airmen are not given the opportunity to review the conclusions of their RRT, Airman Fondren was inadvertently provided a copy of his RRT recommendation. Even though Fondren received an effectively unanimous RRT recommendation that his RAR be approved, it was denied. The RRT concluded as follows: "Based on the deliberations of the RRT, we recommend approval. …To further mitigate risk, protocol and procedures which have been proven successful akin to mask wear and social distancing could be implemented as a lesser restrictive means." Appx. 490 (R.Doc. 63-5 at 12). However, the RRT recommendation did not matter. Fondren's initial RAR and his RAR appeal were both denied. Appellees in Washington, D.C., do not consider it

necessary to follow the recommendations of the RRTs. The RRT process is not merely theater; it is theater that wastes the time of everyone involved when Appellees impose a blanket policy of rejecting every RAR.

In addition, in each of the 36 Airmen's cases, their mere requests were met with immediate adverse actions. They were denied official travel within the military, denied the ability to attend training necessary for their advancement, denied the ability to participate in some exercises, delayed promotional upgrades, and made ineligible for selected assignment changes. *See, e.g.*, Appx. 390, 374-375, 394, 416, 405, 450, 400, 397, 425 (R.Docs. 22A at ¶21, 22B at ¶¶13-15, 22C at ¶17, 22D at ¶17, 22E at ¶17, 22G at ¶¶17-19, 22H at ¶15, 22J at ¶¶8-9, and 22K at ¶13.) These adverse actions constitute punishment for the mere assertion of the right to freely exercise one's religion.

As stated above, none of the Airmen's requests have been approved. And 22 have already seen their appeals denied. The Airmen whose initial RARs were denied received boilerplate, near-identical denial letters. The Reservist Airmen received virtually identical letters from Lt. Gen. Richard W. Scobee, Commander of the Air Force Reserve Command, denying their initial requests. The letters did not mention or reflect the consideration of *any* of the specific circumstances of the respective Airmen. The letters did not include any explanation of why the individual circumstances of each Airman warranted rejection.

The virtually identical rejection letters from Lt. Gen. Scobee all state: "After carefully considering the specific facts and circumstances of your request, the recommendation of your chain of command and the MAJCOM Religious Resolution Team, I **disapprove** your request for religious exemption for all immunizations to include the COVID-19 vaccination." *See, e.g.*, Appx. 376, 450-451, 402, 429 (R.Docs. 22B at ¶23, 22G at ¶¶23-24, 22H at ¶24, and 22I ¶20) (emphasis in original). The same language is used, even in those cases where the service member did *not* request a religious exemption for "all immunizations." This indicates that, contrary to the letters' claims, those rejecting the RARs did not, in fact, "consider the specific facts and circumstances" of the request.

Active-duty Airmen received similar boilerplate rejection letters from Gen. Michael A. Minihan, Commander of the Air Mobility Command. Those letters include identical, prewritten "boilerplate" language. The letters include identically-structured fill-in-the-blank sections, which state the following: "I have disapproved your request for accommodation from the aforementioned immunization requirement based on the following: First, due to the nature of your duties and your position as a [insert position], the Air Force has a compelling government interest in ensuring the health and continued mission accomplishment of [insert description of unit]. Second, your duties, which include [insert duties,

using the words 'hands-on' and 'team'] making teleworking not realistically possible." Appx. 37-38 (R.Doc. 1 at ¶¶143-144).

The Airmen's RAR appeals were rejected with similar form letters. Appellee Robert Miller, the Air Force Surgeon General, has denied all appeals with nearly identical, one-page letters. These denial letters contain three paragraphs. The first and third paragraphs in each are identical among all letters. Most of the second paragraph in each letter is also identical. But one or two canned, prewritten sentences are inserted at a specific point depending on the job of the airman. For example, the boilerplate sentences that are inserted include, for any airman who has instructor responsibilities: "Your instructor role [also] requires frequent contact and immersion with multiple individuals, which would significantly impact training accomplishment if you, your trainees, or your fellow instructors were exposed or actively infected." Appx. 465, 503, 502, (R.Docs. 48-5, 48-7, 48-8).

It's a plug-and-chug task for the staff of Appellee Miller to write these letters. Plug in the relevant sentences, press save, press print, and move on to the next letter. The signatures are identical images, so Appellee Miller is evidently not reading them and signing them himself. No Airman's circumstances were "taken into consideration" in any meaningful sense. No conclusions of the RRTs that

recommend granting RARs were followed. The appeals were categorically denied without any particularized review, as RFRA and the First Amendment require.

The Air Force has made it quite clear that the theoretical availability of religious accommodation is illusory. The rejection of every RAR is inevitable where the applicant does not already intend to leave the Air Force. Zero RARs have been granted to airmen who were not already on the verge of leaving the Air Force. This was a finding of the district court below. Addendum 11, 31.

Consistent with the factual record in this case, the U.S. District Court for the Middle District of Georgia similarly found that the Air Force's RAR process was illusory and insincere. "With such a marked record disfavoring religious accommodation requests, the Court easily finds that the Air Force's process to protect religious rights is both illusory and insincere. In short, it's just 'theater.'" *Air Force Officer*, 2022 U.S. Dist. LEXIS 26660, at *28, *quoting U.S. Navy SEALs 1-26 v. Biden*, 2022 U.S. Dist. LEXIS 2268, *1, (N.D. Tex. 2022). As the Fifth Circuit observed regarding the similarly futile RAR process in the Navy, "the Navy has effectively stacked the deck against even those exemptions supported by Plaintiffs' immediate commanding officers and military chaplains." *U.S. Navy SEALs 1-26*, 27 F.4th at 347.

Appellees' disdain for religious accommodations stands in stark contrast to their willingness to grant non-religious exemptions. As noted above, the Air Force

has granted at least 3,781 exemptions from the vaccine mandate for secular reasons—1,570 medical exemptions and 2,211 administrative exemptions.[10]

The Preliminary Injunction Hearing

Three Airmen testified before the district court at the preliminary injunction hearing on May 9, 2022. First, Captain Ian McGee is an RC-135 pilot in the 45th Reconnaissance Squadron at Offutt Air Force Base. He has been deployed three times since the COVID-19 pandemic began and was deployed to Al Udeid, Qatar, when this case was filed. His two deployments before that were to Kadena, Japan, in 2020 and 2021. Appx. 234 (R.Doc. 82 at 12). On his most recent deployment, the Air Force successfully used alternative means to address his unvaccinated status, including weekly testing, social distancing, and mask-wearing while indoors. In addition, unvaccinated service members were ordered to stay on base when not flying. These means were effective in mitigating COVID-19 risk. Moreover, the remain-on-base restriction also served to allow the deployment of unvaccinated airmen if any host nation required foreign nationals to be vaccinated, which none of the relevant host nations do. Appx. 238-241 (R.Doc. 82 at 16-19). In the RC-135 cockpit, the pilots breathe a constant supply of clean, pressurized air that is not recirculated, minimizing any risk of transmitting COVID-19. *Id*.

[10] *See supra* at n.5.

While serving in Qatar, Captain McGee was awarded Company-Grade Officer of the Quarter for the 379th Air Expeditionary Wing. He placed first out of approximately 200 officers in outstanding performance and excellence. Appx. 242 (R.Doc. 82 at 20). In addition, on his previous deployment, in Japan, members of a fully vaccinated crew requested that he fly with them because of his advanced experience level. Appx. 244-245 (R.Doc. 82 at 22-23). In short, he performed his missions with the highest distinction while unvaccinated and utilizing other measures to address COVID-19.

Second, Airman #9 is a Master Sergeant in the Air Force Reserve stationed at Offutt Air Force Base in the 49th Intelligence Wing. He is an airborne cryptologic language analyst ("ACLA") specializing in Arabic and French who operates aboard the RC-135 aircraft. He also serves as an evaluator/instructor for other ACLAs. He testified that his unit has abundant space for social distancing. Appx. 269-275 (R.Doc. 82 at 47-53). Importantly, in his civilian career, he works for a defense contractor on the same base, doing the exact same things, with the same airmen, "just in different clothing." His civilian employer has given him a religious accommodation, and the Air Force respects that accommodation allowing him to work on base. Appx. 277-278 (R.Doc. 82 at 55-56). If he were separated from the Air Force, he would nonetheless be back the next day as a civilian worker

doing the same thing, unvaccinated. This illustrates the hypocrisy and pointlessness of denying his RAR.

Third, Lieutenant Colonel Armand Fondren is a T-6 instructor pilot and assistant director of operations at the 37th Flying Training Squadron at Columbus Air Force Base in Mississippi. He was permitted to see the conclusions of the Religious Resolution Team (RRT) that reviewed his RAR. He learned that the six members all agreed that there were adequate alternative means to address any COVID-19 risk and recommended granting the accommodation. Two of the six recommended a "temporary" grant until such time as a vaccine is developed without the use of aborted fetal cell lines. Appx. 301-304 (R.Doc. 82 at 79-82). Lt. Col. Fondren has plenty of space to social distance in the classrooms; and when he is in the air, the two pilots each have their own oxygen mask with their own oxygen supply. They do not breathe the same air. Appx. 306-307 (R.Doc. 82 at 84-85). Nevertheless, his RAR was denied by Lieutenant General Webb without any explanation of why the RRT's recommendation was ignored. Moreover, after his RAR appeal was denied, he was punitively grounded and prevented from flying (while being permitted to work on the ground without the protection of separate oxygen supply). Appx. 305 (R.Doc. 82 at 83). In addition to being irrational as a COVID-19 precaution, that grounding will cost him $37,000 per year in flight pay and bonuses. *Id.*

It was at the preliminary injunction hearing that Appellees confirmed what the Airmen already knew—that no RARs had been granted to airmen who were not already leaving the Air Force. Appx. 358-359 (R.Doc. 82 at 136-137).

Procedural History

The Complaint in this matter was filed on March 8, 2022. Appx. 1-54 (R.Doc. 1). The Airmen filed a Motion for Preliminary Injunction on March 18, 2022. The district court issued a memorandum and order denying the Airmen's Motion for Preliminary Injunction on May 18, 2022. Addendum 1-61. The Airmen timely filed their notice of interlocutory appeal of the district court order denying the preliminary injunction on May 19, 2022. The Airmen moved in this Court for expedited review of the interlocutory appeal on May 23, 2022. This Court granted that motion in part on May 31, 2022. This interlocutory appeal seeks the review and reversal of the district court order denying the Airmen's Motion for Preliminary Injunction, with the attendant issuance of a preliminary injunction as described below.

SUMMARY OF THE ARGUMENT

In denying the Airmen's motion for preliminary injunction, the district court correctly held that RFRA applies to the military and that no deference is owed to military decision-making under RFRA. Addendum at 22-27. "[T]here is simply no language in RFRA that requires a different level of deference to military

decision-making than courts must apply to decision-making by any other government entity that falls within the scope of RFRA." Addendum at 27. The district court also correctly noted that RFRA imposes a higher hurdle on the government than the First Amendment does, in that strict scrutiny automatically applies regardless of whether the policy in question is neutral and generally applicable. The court, therefore, analyzed only the RFRA claim.[11] However, the court erred in multiple respects in adjudicating the Airmen's RFRA claim and in assessing the other preliminary injunction factors.

First and foremost, in assessing the likelihood of the Airmen succeeding on the merits, the district court erred by asking the wrong question when determining whether a compelling governmental interest exists under the strict scrutiny test imposed by RFRA. Instead of asking whether the government has a compelling interest in not making religious exemptions for the parties before the court, the district court erroneously asked whether the government has a compelling interest in the broad objective of reducing COVID-19. That is a common error. It is not, however, an inconsequential one. It is contrary to the language of RFRA itself and contrary to every Supreme Court precedent on the subject. *See infra* Section I.

[11] Although the district court did not separately review the First Amendment claim, Appellants reassert it here. Section I,B, *infra*, explains why strict scrutiny applies. After that is established, the First Amendment claim tracks the outcome of the RFRA claim.

The district court's second major error was in failing to answer this question: how can the government have a compelling interest in denying all religious exemptions to the vaccine mandate when it has granted at least 3,781 medical and administrative exemptions to the mandate? As the Fifth Circuit and multiple federal district courts that have addressed the DoD vaccine mandate have concluded, this fact is fatal to any assertion of a compelling governmental interest in denying religious exemptions. *See infra* Section II.

Third, the district court erred in applying the second prong of strict scrutiny by failing to recognize that other, less-restrictive means exist. The court incorrectly focused on which of the means were the most effective rather than on whether adequate alternative means were available. The court was particularly dismissive of the evidence presented by the Airman with respect to a regimen of testing and isolating those who test positive for COVID-19, as well as with respect to natural immunity. *See infra* Section III.

Fourth, in considering the other preliminary injunction factors, the district court erred by disregarding the irreparable harm suffered by the Airmen that was nonmonetary in nature. The court also erred by completely neglecting to address the public interests set forth by the Airmen in their briefs. *See infra* Section IV.

ARGUMENT

In order to obtain a preliminary injunction, "'[a] plaintiff… must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.'" *Tumey v. Mycroft AI, Inc*., 27 F.4th 657, 644 (8th Cir. 2022) (bracketed numbers inserted) (*quoting Winter v. Nat. Res. Def. Council, Inc*. 555 U.S. 7, 20 (2008); *Dataphase Sys. v. C L Sys.*, 640 F.2d 109, 113 (8th Cir. 1981). "In balancing the equities no single factor is determinative." *Dataphase Sys.*, 640 F.2d at 113. The district court below erred in holding that the Airmen do not satisfy these factors. In particular, the district court focused on the first factor—the Airmen's likelihood of success on the merits—and erred as follows.

I. The District Court Asked the Wrong Compelling Interest Question

A. RFRA's Compelling Interest Standard

RFRA requires that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). The exception to that rule is that the "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

Appellees do not contest the fact that they have substantially burdened the Airmen's religious exercise, and the district court did not disagree with this substantial burden. Therefore, they must "demonstrate[] that application of the burden to the [Airmen]—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Whether the Appellees have met that burden is a question of law, which this Court reviews *de novo*. *United States v. Ali*, 682 F.3d 705, 708 (8th Cir. 2012) (compliance with RFRA is "a question of law subject to *de novo* review").

B. The District Court's Error in Framing the Question

It is an elementary rule of RFRA analysis, as well as Free Exercise Clause analysis, that the question is not whether the government has a compelling interest in its general policy. The proper question is *whether the government has a compelling interest in not making an exception to that policy for the party before the court*. This rule is spelled out in the text of RFRA: "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden *to the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (emphasis added). The Supreme Court has explained what this means:

> RFRA, however, contemplates a more focused inquiry: It requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened. *This requires us to look beyond broadly formulated interests* and to scrutinize the asserted harm of granting specific exemptions to particular religious claimants—in other words, *to look to the marginal interest in enforcing the [religious burden] in these cases*.

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 726-27, (2014) (internal citations and quotation marks omitted) (emphasis added)). "Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general [interests underlying the policy at issue] cannot carry the day." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432 (2006). Rather, "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id*. at 430-31 (quoting 42 U.S.C. § 2000bb-1(b)). This is a "high bar." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2392 (2020) (Alito, J., concurring). As the Fifth Circuit has pointed out, "This already high bar is raised even higher '[w]here a regulation already provides an exception from the law for a particular group…." *U.S. Navy SEALs 1-26*, 27 F.4th at 350 (*quoting McAllen Grace Brethren Church*

v. Salazar, 764 F.3d 465, 472 (5th Cir. 2014); *see also Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878-83 (2021).

The same framing of the question applies to the First Amendment Free Exercise claim, which the district court did not address, but which yields the same result as the RFRA analysis does. Strict scrutiny applies because the program is not neutral and generally applicable between religious exemptions (which have been universally denied) and medical and administrative exemptions (of which at least 3,781 have been granted). "[W]here the [government] has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990) (quoting *Bowen* v. *Roy*, 476 U.S. 693, 708 (1986); *Doster*, 2022 U.S. Dist. LEXIS 59381 at *42-*43. If strict scrutiny applies, then the question is whether the government has a compelling interest in denying the plaintiffs' exemptions, not whether the government has a compelling interest in implementing the program generally. *O Centro*, 546 U.S. at 435.

The district court did not follow this rule. Instead of correctly asking, "Does the Air Force have a compelling interest in refusing to grant religious exemptions to the plaintiffs before the court," the district court asked a very different (and easily satisfied) question. The district court asked whether the Air Force had a compelling interest "in preventing COVID-19 from impairing the readiness and

health of its forces, including individual service members like Plaintiffs." Addendum 35, 37. The district court's phrasing of the question was a very general one, looking simply at whether the government has a compelling interest in the readiness and health of its armed forces. Indeed, the district court admitted that its articulation of the question was a "somewhat simplified paraphrase of the Air Force's interest in mission accomplishment, including military readiness, unit cohesion, good order and discipline, and health and safety for both the unit and the member." Addendum 35 n.16. It goes without saying that the military has a compelling interest in mission accomplishment and readiness. If that were always the question, then there would be no point in asking it. The broader the framing of the compelling interest question, the easier it usually is for the government to satisfy it.

But that is not what the Supreme Court has instructed. "[T[he Government's mere invocation of the general [interests underlying the policy at issue] cannot carry the day." *O Centro*, 546 U.S. at 432. "This requires us to look beyond broadly formulated interests and to *scrutinize the asserted harm of granting specific exemptions to particular religious claimants*." *Hobby Lobby*, 573 U.S. at 727 (emphasis added). In other words, a court must scrutinize the government's interest against granting specific exemptions to the particular religious claimants before the court. That is what is meant by the RFRA's requirement that the

government must "demonstrate[] that application of the burden to the person—(1) is in furtherance of a compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

But the district court below resisted doing so, complaining that framing the question that way would "confuse" the compelling interest question with whether the chosen means furthers the compelling interest. Addendum at 36. To be sure, there is overlap between the two questions. But they are not the same. More importantly, that is what the text of RFRA and Supreme Court precedents demand.

However, the district court was aware that it needed to ask a narrower question and that the statutory text of RFRA demands the assessment of a compelling interest applied "to the person." Addendum 33. So the district court added the meaningless phrase "including individual service members like Plaintiffs" to its overbroad framing of the compelling interest "in preventing COVID-19 from impairing the readiness and health of its forces." *Id.* at 35, 37. But words inserted by the district court added nothing. The meaning of the described governmental interest remained the same. It is an empty phrase, and consequently the district court's articulation of the governmental interest remained erroneous under RFRA and First Amendment precedents.

Other Article III courts have not made the same mistake when applying RFRA to the DoD vaccine mandate. They had no difficulty framing the compelling interest question correctly. As the Fifth Circuit explained:

> [T]hat general interest is nevertheless insufficient under RFRA. The Navy must instead "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S., at 431. "The question, then, is not whether [the Navy has] a compelling interest in enforcing its [vaccination] policies generally, but whether it has such an interest in denying an exception to [each Plaintiff]." *Fulton*, 141 S. Ct. at 1881.

U.S. Navy Seals 1-26, 27 F.4th at 351 (internal brackets in original). As the Middle District of Georgia put it regarding the same Air Force mandate, "[T]he Court 'must "look beyond broadly formulated interests," [such as maintaining the health and readiness of military force] and instead consider "the asserted harm of granting specific exemptions to particular religious claimants[.]" *Air Force Officer*, 2022 U.S. Dist. LEXIS 26660 at *24-*25 (*quoting Navy SEALs 1-26*, 2022 U.S. Dist. LEXIS 2268 at *10, and *Hobby Lobby*, 573 U.S. at 726-27) (bracketed text in original). The Southern District of Ohio was equally clear in articulating the question: "Regarding the application of strict scrutiny, …the question 'is not whether the [Air Force] has a compelling interest in enforcing its vaccine policies generally, but whether it has such an interest in denying an exception' to plaintiffs…." *Poffenbarger*, 2022 U.S. Dist. LEXIS 34133 at *50. "RFRA precludes Defendants from relying on broadly formulated interests such as 'national security' and 'stemming the spread of COVID-19' to overcome Plaintiffs' claims." *Doster*, 2022 U.S. Dist. LEXIS 59381 at *36 (*quoting Hobby Lobby*, 573 U.S. at 726-27). The district court below clearly erred. And that error

led to an additional error—its conclusion that Appellees have demonstrated the required compelling interest.

II. The District Court Erred in Holding that Appellees Demonstrated a Compelling Interest

Whether Appellees have met their compelling interest burden is a question of law, which this Court reviews *de novo*. *Ali*, 682 F.3d at 708. Because the district court erred by framing the compelling interest question incorrectly, the court also erred in concluding that Appellees had met their burden. As explained above, the correct question as articulated by the Fifth Circuit is "whether it has such an interest in denying an exception to [each Plaintiff]." *U.S. Navy SEALs 1-26*, 27 F.4th at 351 (brackets in original). That is a much higher hurdle to clear.

A. There Can be no Compelling Interest When Thousands of Secular Exemptions Have Been Granted

Perhaps the greatest weakness in Appellees' legal position is the fact that they have denied religious exemptions to the Airmen (and to every other RAR applicant) while they have granted thousands of medical and administrative exemptions. Because they have granted at least 3,781 exemptions from the vaccine mandate for secular reasons, Appellees cannot credibly argue that they have a compelling interest in denying religious exemptions to the 36 Airmen in this case.

It is for this reason that other Article III courts assessing the DoD vaccine mandate have come to the inescapable conclusion that the government fails the compelling interest test:

> This compelling interest as to Plaintiff, though, completely ignores that there are at least 3,300 exempt Air Force service members carrying out their respective duties similarly unvaccinated. At bottom, Defendants simply don't explain why they have a compelling interest in Plaintiff being vaccinated while so many other Air Force service members are not.

Air Force Officer, 2022 U.S. Dist. LEXIS 26660, at *25. "[T]he Air Force offers no compelling reason why it has a particular interest in denying a temporary exemption to [Plaintiff] while granting one for others who, for example, are allergic to the components of the vaccine." *Poffenbarger*, 2022 U.S. Dist. LEXIS 34138 at *50. "[Air Force] Defendants 'must articulate a compelling interest in vaccinating' the Plaintiffs before the Court. Defendants have failed miserably to do so. Defendants provide no specific compelling interests in denying these Plaintiffs' specific religious exemptions while at the same time granting numerous medical and administrative exemptions." *Doster*, 2022 U.S. Dist. LEXIS 59381 at *36-*37 (*quoting Hobby Lobby*, 573 U.S. at 726-27). The same conclusion applies here. Because the Air Force has granted at least 3,781 secular exemptions to the vaccine mandate, they have no compelling interest in refusing to grant religious exemptions to Airmen in this case.

As the Fifth Circuit explained, the problem for Appellees is that their policy is underinclusive:

> The Navy's alleged compelling interest is further undermined by other salient facts. It has granted temporary medical exemptions to 17 Special Warfare members, yet no reason is given for differentiating those service members from Plaintiffs. That renders the vaccine requirements "underinclusive." And "underinclusiveness... is often regarded as a telltale sign that the government's interest in enacting a liberty-restraining pronouncement is not in fact 'compelling.'"

U.S. Navy Seals 1-26, 27 F.4th at 352 (internal citations omitted). *See also BST Holdings v. OSHA*, 17 F.4th 604, 616 (5th Cir. 2021) ("underinclusiveness of this sort is often regarded as a telltale sign that the government's interest in enacting a liberty-restraining pronouncement is not in fact 'compelling." (*citing Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 542–46 (1993)). The same analysis applies with respect to the Air Force. "Thus, by permitting certain types of exemptions significantly more often than others, the Air Force's mandate and related grant of exemptions are under inclusive in furtherance of the alleged compelling interest." *Doster*, 2022 U.S. Dist. 59381 at *37.

In response to the fact that Appellees have granted thousands of exemptions for secular reasons, indicating that there is *no* compelling interest in denying the Airmen's religious exemptions, the district court below answered in a way that completely failed to address the problem. First, the district court acknowledged that unvaccinated airmen with medical exemptions pose the same risk to health

(whatever it may be) that unvaccinated airmen with religious exemptions do: "There can be no dispute that unvaccinated but exempt service members pose exactly the same threats to readiness and health of the Air Force… as other unvaccinated service members if those exempt service members are operating as if they were vaccinated." Addendum 38. But then the district court diverged on a tangent that is irrelevant to the compelling interest question, asking whether those airmen with medical exemptions are operating as if they were unvaccinated. The district court even required the parties to provide supplementary briefing on the subject. Addendum 39. Reviewing the documents provided by the parties, the district court concluded that those airmen with medical exemptions may undertake official travel to complete a permanent change of station and may participate in training if the exemption in question authorizes the airman to attend training. Addendum 40-41. After concluding that there are still some things an airman with a medical exemption is not permitted to do, the district court then declared, "the Air Force's compelling interest is not undermined by the exemptions to the COVID-19 vaccination mandate." Addendum 42.

The district court's declaration missed the point. The Airmen in this matter have never asked for a preliminary injunction that allows them to be treated as if they are unvaccinated. *Rather they only ask to be treated in the same way that those who have received medical exemptions are treated*. Whatever those limits

are, the Airmen will happily accept them. They simply want the same scope of exemptions given to those individuals who have been granted medical or administrative exemptions. As the Airmen have repeatedly stated in their briefs, they do not demand to be deployed or to be stationed in any particular place. They simply want to be able to keep their jobs, continue being paid, not be punished, and travel to and participate in training so that they do not lose the ability to be promoted. *See* Appx. 124-125 (R.Doc. 21 at 44-45); Appx. 217 (R.Doc. 65 at 7). And they have repeatedly stated that they will accept whatever testing, isolation, remote work, social distancing, masking, or other requirements the Air Force imposes upon them as a condition of their remaining unvaccinated. *See* Appx. 113 (R.Doc. 21 at 33). Because exemptions of whatever limited scope have been granted for secular reasons, Appellees have no compelling interest in denying exemptions of similarly limited scope for religious reasons. "Slice it how you will, medical exemptions and religious exemptions are on comparable footing when it comes to the state's asserted interest." *Doe v. Mills*, 142 S. Ct. 17, 20 (2021) (Gorsuch, J., dissenting). The district court's conclusion is therefore erroneous. This Court need not proceed further in assessing the compelling governmental interest prong of strict scrutiny. Appellees' granting of thousands of exemptions for secular reasons is sufficient to conclude that no compelling governmental

interest exists. However, there are other reasons that this Court may wish to consider as well.

B. Other Factors Diminishing the Governmental Interest

A second reason Appellees cannot establish a compelling governmental interest in refusing the Airmen's RARs is that Appellees' own actions in deploying multiple Airmen in this litigation reveal that universal vaccination is not necessary to serve the Air Force's general interest in military readiness. Three of the Airmen have been deployed while unvaccinated after the August 24, 2021, date when Secretary Austin first imposed the mandate. As described *supra*, Major Ian McGee was deployed overseas in Qatar during the first two months of this litigation after completing two other post-COVID-19 deployments before that. While in Qatar, he won the award for Company Grade Officer of the Quarter for the 379th Air Expeditionary Wing, placing first out of approximately 200 officers.

Similarly, Airman Evan McMillan is a Major and pilot of the KC-46A aircraft. After filing his RAR, he was deployed to Qatar for more than six months. During that time, he was awarded Field Grade Officer of the Month twice and was a member of a team that received an award as well. He also served as Chief Flight Safety Officer of the Wing. Appx. 393-394 (R.Doc. 22C at ¶16). And Airman Kynan Valencia is Captain who serves as a Co-Pilot on the KC-135R/T aircraft. He has been deployed overseas twice since March 2020. The second of those

deployments occurred in August-October 2021, beginning in the same month that Secretary Austin announced the vaccine mandate. Indeed, Captain Valencia filed his RAR while overseas. Appx. 423-424 (R.Doc. 22K at ¶¶8-10).

All three pilots took weekly COVID-19 tests while deployed and followed social distancing and other protocols. All performed their duties effectively, without compromising or interrupting their missions, even though they were not vaccinated. And two of the three pilots won awards for their performance while deployed. As the Fifth Circuit observed, the successful deployment of the Navy SEALs in that case, both before and after the vaccines became available, "undermined" the "alleged compelling interest" of the Navy. *U.S. Navy SEALs 1-26*, 2022 U.S. App. LEXIS 5262, at *32.

A third consideration that weakens Appellees' asserted compelling interest in refusing to grant the Airmen's RARs is the diminished ability of the COVID-19 vaccines to accomplish their purpose. It is now well-established that COVID-19 vaccinations do not stop people from becoming infected with, or transmitting, COVID-19. Although that was not widely known on July 29, 2021, when President Biden directed Appellees to issue the vaccine mandate, it is universally accepted now. In early November 2021, the Centers for Disease Control and Prevention ("CDC") acknowledged that the COVID-19 vaccinations did not

prevent the spread of the virus.[12] With the arrival of the Omicron variant, the inefficacy of the vaccines was even more apparent, as expressed by the CDC: "CDC expects that anyone with Omicron infection can spread the virus to others, even if they are vaccinated or don't have symptoms."[13] In December 2021, the CDC acknowledged that 79% of those infected with the Omicron variant had been fully vaccinated. Appx. 454 (R.Doc. 48-2 at ¶9). Given these facts, it strains credulity to assert that the Airmen's non-vaccination—or even the non-vaccination of the less than 2% of Air Force members who have filed RARs—will make or break Appellees' ability to reduce the spread of the virus within the Air Force. This is even more evident when one considers that 29 of the 36 Airmen have already had and recovered from COVID-19 and therefore possess natural immunity.

The district court below considered declarations from both sides regarding the efficacy of vaccines and came down firmly in its conclusion that vaccines were effective. Addendum 42-44. But that is not the relevant inquiry. Neither this Court nor the district court needs to weigh scientific evidence and adjudicate

[12] Ctrs. for Disease Control & Prevention, *Possibility of COVID-19 Illness after Vaccination*, (updated Dec. 17, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthrough-cases.html ("People who get vaccine breakthrough infections can be contagious.").
[13] Ctrs. for Disease Control and Prevention, *Omicron Variant: What You Need to Know*, (Feb. 2, 2022), available at https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html.

precisely how effective the COVID-19 vaccines are in combatting COVID-19. The question is whether the government has a compelling interest in the RARs of the Airmen in this case and forcing them to get vaccinated. That governmental interest is undeniably reduced in light of the widely accepted fact that the vaccines have a *limited* ability to inhibit the spread of the virus (whatever that limited ability might be) and the fact that nearly all the Airman already possess natural immunity.

III. The District Court Erred in Holding That No Less Restrictive Means Exist

Even if Appellees could show a compelling interest in denying the Airmen's RARs, their policy still would not survive strict scrutiny under RFRA and the First Amendment because they cannot demonstrate that requiring the Airmen to become vaccinated against their faith is the least restrictive means available. Whether the Appellees have met this burden is a question of law, which this Court reviews *de novo*. *Ali*, 682 F.3d at 708.

A. Less Restrictive Means Are Available

There are multiple less restrictive means by which the Air Force may mitigate the spread of COVID-19 while allowing the Airmen to remain unvaccinated. Appellees themselves have used combination of some of these measures to reduce the spread of COVID-19 for the past two-and-a-half years. The first and most important of these measures is regular testing for COVID-19, combined with isolation of those who test positive. This is not only less restrictive,

it is likely more effective. An unvaccinated airman who has just tested negative for COVID-19 poses less of a threat of spreading the virus than a vaccinated airman who has not taken a test. "A regime of testing symptomatic airmen and isolating those who test positive would do far more than the current vaccine mandate to slow the transmission of COVID-19 among airmen." Appx. 456 (R.Doc. 48-2 at ¶13). Because the vaccines do not stop the spread of COVID-19, their usefulness in reducing the spread of the virus is limited. A COVID-19 test, on the other hand, is extremely effective in identifying who has the virus and enabling that person to quarantine himself.

A second means that has been used successfully is social distancing. Appellees have employed that measure throughout the pandemic where possible. As the Fifth Circuit observed, "had the Navy been conscientiously adhering to RFRA, it could have adopted least restrictive means to accommodate religious objections against forced vaccination" to include social distancing. *U.S. Navy SEALs 1-26*, 27 F. 4th at 352.

A third measure is masking. Appellees' irrationality in this regard is demonstrated by the circumstances of Airmen Roth and Fondren. While one may debate the effectiveness of various cloth masks in stopping the transmission of COVID-19, there is no question that an oxygen mask with an independent oxygen supply and pressurized air flow does the job. Airmen Roth and Fondren are

instructor pilots who fly the T-6 training aircraft, in which both the instructor and the student pilot wear oxygen masks. Appx. 306-307 (R.Doc. 82 at 84-85). Yet Appellees refused to recognize that the probability of transmitting COVID-19 in that workplace environment is nil. They have denied both Airmen's RAR appeals and have grounded them until their termination is completed. Appx. 405-406 (R.Doc. 22E at ¶¶22-24); Appx. 303 (R.Doc. 82 at 83).

A fourth measure is the recognition of natural immunity as a substitute for vaccination, which could be accomplished easily by testing airmen for antibodies to ensure that their natural immunity remains robust. Evidence was presented to the district court that "[n]atural immunity acquired by contracting and recovering from COVID-19 is superior to any immunity that might be conveyed by a COVID-19 vaccine." Appx. 454 (R.Doc. 48-2 at ¶9). For that reason alone, Appellees cannot justify imposing involuntary vaccination on the 29 Plaintiffs who already possess natural immunity from COVID-19. The Middle District of Georgia's observation on this point is particularly salient:

> Plaintiff's natural immunity coupled with other preventive measures begs the question: Does a COVID-19 vaccine really provide more sufficient protection? This is especially curious given the number of people who have been and continue to be infected after becoming fully vaccinated and receiving a booster—including the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the Commandant of the Marine Corps.

Air Force Officer v. Austin, 2022 U.S. Dist. LEXIS 26660, at *27. As the Fifth Circuit also recognized when adjudicating motions to stay the OSHA vaccine mandate, "[a] naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus." *BST Holdings*, 17 F.4th at 615.

Appellees' refusal to recognize natural immunity is particularly troubling in light of their own regulations and willingness to do so in the past. The Air Force's regulations recognize natural immunity as a substitute for vaccination. Among the numerous medical exemptions previously available to service members, "evidence of immunity based on serologic tests, documented infection, or similar circumstances" provided a basis for a medical exemption.[14] Only for the COVID-19 vaccination has the Air Force departed from its existing policy and refused to recognize natural immunity. Appellees even claimed in the district court below that a person who has already had the virus should get vaccinated thereafter. Nothing could be further from the truth. "Three studies have demonstrated that when COVID-19 recovered patients are either advised or mandated to take a

[14] Sec. of the Air Force, Air Force Instruction 48-110 IP (AFI 48-110 IP) *Immunizations and Chemoprophylaxis for the Prevention of Infectious Disease*, (Feb. 16, 2018) at 6, at https://static.e-publishing.af.mil/production/1/af_sg/publication/afi48-110/afi48-110.pdf.

COVID-19 vaccination, they suffer unacceptably high side-effects including hospitalization." Appx. 455 (R.Doc. 48-2 at ¶12).

In order to survive strict scrutiny, Appellees would have to show that all of these alternatives, less restrictive measures are impossible. This they cannot do. As the District of Georgia observed, regarding the same Air Force Defendants: "the Court agrees with Plaintiff's argument that Defendants haven't 'shown that vaccination is actually necessary by comparison to alternative measures[]' since 'the curtailment of free [exercise] must be actually necessary to the solution.'" *Air Force Officer v. Austin*, 2022 U.S. Dist. LEXIS 26660, at *27-28 (quoting *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011)). The alternative measures are more than sufficient to accomplish the government's interest in slowing the spread of COVID-19. That is especially true with respect to regular testing.

B. The District Court's Errors

The district court below erred in its assessment of the least restrictive means by once again asking the wrong question. The correct question is whether there are other, less-restrictive means available by which the government may further its objective without violating the religious freedom of the plaintiff. However, the district court focused on an entirely different question: what is the "more effective" versus the "less effective" means? Addendum 46, 47. Indeed, the district court spent eight pages comparing the effectiveness of COVID-19 vaccines

to the effectiveness of various other ways of reducing COVID-19 transmission. *Id.* 45-52. The district court's focus on which means is most effective is a legal error in the application of strict scrutiny. "Instead of focusing its argument on the possibility of less restrictive means, the State obscures the analysis by focusing on the 'most effective' means." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 965 (9th Cir. 2009). "Proof that a restriction represents the most effective means of achieving the proffered government interest is insufficient." *McTernan v. City of York*, 564 F.3d 636, 656 (3d Cir. 2009) (*citing Madsen v. Women's Health Ctr.*, 512 U.S. 753, 765 (1994)). Finally, it should be noted that weighing the effectiveness of different approaches to restricting the transmission of COVID-19 is a scientific inquiry that courts are not particularly well suited to perform. However, courts are well suited to answer whether an alternative means that is less restrictive to religious freedom is available.

The district court also erred by ignoring the fact that at least one of the Airmen's RRTs—which are specifically charged with assessing whether less restrictive means exist—concluded that less restrictive means of achieving the Air Force's objectives *were* available. The RRTs consist of the individuals in the chain of command who directly supervise the airman in question, the relevant chaplain, a judge advocate representative, a medical group representative, and a public affairs representative. *See* Appx. 301 (R.Doc. 82 at 79). They are charged

with specifically assessing what alternatives to vaccination are available in each case. Most airmen are not permitted to see the conclusions of their RRT. However, as explained *supra*, Airman Fondren was allowed to see his. As it happens, his RRT concluded that his unvaccinated status could easily be accommodated and recommended approval. Airman Fondren's direct commander agreed with the RRT's assessment: "I have considered the lesser restrictive means… and have determined that lesser restrictive means are feasible…." Appx. 499 (R.Doc. 63-5 at 21 (Thoren 11/14/21 memorandum)). It is likely that discovery in this case will reveal others among the 36 Airmen whose RRTs concluded that less restrictive means were available. It has already been proven that Appellees deem themselves free to ignore the conclusions of those people who are most familiar with the duties and circumstances of the 36 Airmen. By ignoring these RRTs, Appellees have failed to genuinely pursue less restrictive means as RFRA requires. The district court failed to mention this fact.

IV. The Remaining Factors Support a Preliminary Injunction

The district court below addressed the remaining preliminary injunction factors in summary fashion, covering the irreparable injury factor in only three pages and without even addressing most of the particular injuries specified by the Airmen. *See* Addendum 57-59. And the district court spent only one terse page on the balancing of the equities, completely failing to mention any of the arguments

presented by the Airmen. Addendum 60. In so doing, the district court erred. This Court "'review[s] a district court's ultimate ruling on a preliminary injunction for abuse of discretion, though we review its underlying legal conclusions de novo.'" *MPAY Inc. v. Erie Custom Comput. Applications, Inc.*, 970 F.3d 1010, 1015 (8th Cir. 2020) (*quoting Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013)). Accordingly, the standard of review in this instance is *de novo*.

A. The Airmen are Suffering Irreparable Injury.

The Airmen have demonstrated multiple irreparable injuries. The first occurred with the denial of their right to freely exercise their religious faith. As the Supreme Court has recognized, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also Lowry v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008). The same is true of the loss of RFRA rights. *See Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012) ("[The *Elrod v. Burns*] principle applies with equal force to the violation of RLUIPA rights because RLUIPA enforces First Amendment freedoms, and the statute requires courts to construe it broadly to protect religious exercise. In the closely related RFRA context (the predecessor statute to RLUIPA), courts have recognized that this same principle applies."); *Hobby Lobby Stores, Inc. v.*

Sebelius, 723 F.3d 1114, 1146 (10th Cir. 2013). The infringement of the Airmen's religious freedom under RFRA and the First Amendment plainly constitutes irreparable injury as a matter of law. *Id*. (citing *Elrod*, 427 U.S. at 373). This alone is enough to satisfy the irreparable harm requirement for the issuance of a preliminary injunction. As the Middle District of Florida concluded: "[Plaintiff's] choice to adhere to her religious beliefs or modify her behavior to violate beliefs suffices to trigger constitutional protection. Thus, Plaintiff has satisfied the second element to obtain a preliminary injunction." *Air Force Officer v. Austin*, 2022 U.S. Dist. LEXIS 26660, at *32-*33 (citing *Thomas v. Review Bd. of Ind. Employment Sec. Div*., 450 U.S. 707, 718 (1981)). Moreover, even if the denial of the free exercise of religion did not constitute an irreparable injury, the Airmen have demonstrated additional irreparable injuries.

The second injury occurred simply because the Airmen submitted their RARs. The mere assertion of their constitutional rights triggered multiple immediate and adverse consequences—specifically the denial of travel, the denial of training, and the effective denial of promotion. Virtually all of the Airmen were immediately denied the ability to travel, either for temporary duty or for a permanent change of station, when they submitted their RARs and remained unvaccinated. *See, e.g.*, Appx. 374-375, 390, 394, 397, 400, 405, 416, 425, 450 (R.Docs. 22B at ¶¶13-15, 22A at ¶21, 22C at ¶17, 22J at ¶¶8-9, 22H at ¶15, 22E at

¶17, 22D at ¶17, 22K at ¶13, 22G at ¶¶17-19). The only Airmen who did not suffer this punishment were Airmen McGee, McMillan, and Valencia, who were all deployed as described *supra*. According to Appellees' policy, official domestic and international travel for unvaccinated personnel is limited to "mission-critical" service members, and Air Force "personnel who are not vaccinated may be non-deployable based on specific mission circumstances."[15]

Consequently, almost all of the Airmen were also denied training opportunities in the form of classes and other activities that are necessary for them to advance in rank. *See, e.g.*, Appx. 374, 388, 397, 405-406, 425, 450 (R.Docs. 22B at ¶13, 22A at ¶15, 22J at ¶¶8-9, 22E at ¶¶17, 22-23, 22K at ¶13, 22G at ¶18). They are unable to participate in the training necessary to advance in rank, and they are unable to travel to receive that training. Consequently, they are frozen in their current rank. Although a court may be able to enjoin Appellees to provide the Airmen with another opportunity to participate in those training opportunities down the road, the Airmen can never recover the lost time as their military careers have been stalled for nine months or more, thus far. This bar to additional training and promotion presents a devastating blow to the honorable careers that the Airmen have worked so hard to build.

[15] *Department of the Air Force Mandatory COVID-19 Vaccine Implementation Frequently Asked Questions*, https://www.usafa.edu/app/uploads/DAF_Mandatory-COVID-19-Vaccine-FAQ-v14.pdf.

The third form of irreparable injury is the most obvious—the imminent termination of the Airmen's military careers. As explained above, 22 of the Airmen are on the cusp of being discharged. The discharge of the Airmen will unquestionably cause irreparable harm. "Requiring a service member either to follow a direct order contrary to a sincerely held religious belief or to face immediate processing for separation or other punishment undoubtedly causes irreparable harm." *Navy Seal 1*, 2022 U.S. Dist. LEXIS 31640, at *63. "It is clear that a denial of the [preliminary injunctive relief] would do them irreparable harm. For one, the Mandate threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)." *BST Holdings*, 17 F.4th at 618. These injuries—past, ongoing, and imminent—cannot be remedied by a later-issued court order. *See id.* (discussing similar injuries as sufficiently irreparable). Recognizing that any financial loss could be remedied by subsequent court order, the Airmen did not assert that the loss of pay, which four of them are already suffering, is irreparable.

The district court below briefly addressed the first irreparable injury but ignored the second injury and all-but-ignored the third injury. In addressing the first, the district court acknowledged that the coercion of "choosing between the exercise of religious rights and one's employment" would constitute irreparable harm. Addendum 59. But then the district court made the following incongruous

statement: "However, in this case, this Court has concluded above that Plaintiffs are not likely to succeed on the merits of their RFRA claim. This deficiency causes the Plaintiffs to be unable to be unable to demonstrate irreparable harm." Addendum 59-60. The district court's statement confuses Appellee's ability to survive strict scrutiny with Appellees' forcing the Airmen to choose between one's religious beliefs and one's employment. The existence of the former does not erase the latter. In other words, *the Airmen's religious freedom is burdened regardless of whether the Appellees' actions survive strict scrutiny*. It should also be reiterated here that Appellees do not deny that their vaccine mandate substantially burdens the Airmen's free exercise of religion.

Other Article III Courts did not confuse the two issues in assessing irreparable harm with respect to the DoD vaccine mandate. Merely putting a service member in the position of having to choose between obedience to one's faith and obedience to orders causes irreparable harm. As the Fifth Circuit held, "By pitting their consciences against their livelihoods, the vaccine requirements would crush Plaintiffs' free exercise of religion." *U.S. Navy SEALs 1-26*, 27 F.4th at 348. As the Middle District of Florida put it, "the substantial pressure on a religious objecting service member to obey the COVID-19 vaccination order and violate a sincerely held religious belief constitutes an irreparable injury redressable by a preliminary injunction." *Navy SEAL 1*, 2022 U.S. Dist. LEXIS 31640 at *19;

see also Doster, 2022 U.S. Dist. LEXIS 59381 at *46. As the Middle District of Georgia held, the coercion to choose between faith and following the vaccination order "essentially infringed upon the exercise of [the service member's] religion." *Air Force Officer*, 2022 U.S. Dist. LEXIS 26660 at *3. The coercion has occurred; and the subsequent judicial assessment of whether the government had a compelling interest in doing so does not change that.

The district court also erred in its cursory dismissal of the other irreparable harms asserted by the Airmen. The district court failed to even mention the second irreparable harm caused by the deprival of all training and promotion. All of the Airmen's careers have been placed in a holding pattern for approximately nine months at the time of this filing. Although eventual victory in a final order months or years down the road would allow them to resume training and promotion, there is no repairing of the delayed that has occurred, or the limitation that delay has imposed on the overall career of each Airman.

With respect to the third irreparable harm—the discharge of the Airmen and the loss of their careers—the court offers a one-sentence answer. Saying that the Airmen could simply be reinstated, the Court then cites the cases of *Navy SEAL 1*, *Doster*, and *Poffenbarger*. Addendum 58. However, the pages cited by the district court in those three opinions contain no references to reinstatement. The greater problem with the district court's answer is that while it is true that a discharged

airman could be retroactively restored to his position, life does not normally work that way. If they were discharged, the full-time Airmen in this case would have to look for alternate employment immediately and would have to take those jobs in order to support themselves and their families. That may involve moving one's family to a different city or state. An offer to restore one's military career months or years down the road may be of little use.

B. The Balance of Harms and the Public Interest Weigh in Favor of a Preliminary Injunction.

The balance of harms and the public interest likewise strongly favor a preliminary injunction. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). They weigh in favor of the granting of a preliminary injunction in the instant case for four reasons.

First, "'injunctions protecting First Amendment freedoms are always in the public interest.'" *U.S. Navy SEALs 1-26*, 27 F.4th at 353 (*quoting Texans for Free Enter. V. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013). *See also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). An injunction will not disserve the public interest where "it will prevent constitutional deprivations." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (*citing Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.")). This is particularly true in the context of this case. The Airmen are

defending the United States and its Constitution. They stand ready to lay down their lives in defense of the Constitution. Yet Appellees seek to deny the Airmen their constitutional right to freely exercise their faith. "[W]hat real interest can our military leaders have in furthering a requirement that violates the very document they swore to support and defend?" *Air Force Officer*, 2022 U.S. Dist. LEXIS 26660, at *35.

Second, the question with respect to the balancing of the equities is not whether Appellees have a generalized interest in reducing the spread of COVID-19 in the military. They certainly do. The question is whether Appellees have a sufficiently weighty interest in denying religious exemptions. This question must be asked against the factual backdrop of an Air Force that is already 97.1 percent fully vaccinated and the factual backdrop that vaccines have been proven to be of limited utility in preventing the acquisition or spread of COVID-19. Nor can Appellees rely on a claim of military readiness when they deployed three of the Airmen pilots overseas, and those pilots completed their missions with outstanding distinction while being unvaccinated. Other Airmen perform their missions principally in the United States, such as the pilot training missions of Airmen Roth and Fondren. All of the Airmen have been able to perform their duties while undertaking other measures such as weekly testing for COVID-19 and social distancing. And any claim of injury to readiness is further weakened by the fact

that Appellees themselves have already granted at least 3,781 medical and administrative exemptions. As the Middle District of Georgia surmised when making the same inquiry regarding the same Defendants:

> The question isn't whether a public interest exists, of course one does…. The question, instead, focuses on whether Defendants' public interest will be disserved by a preliminary injunction. In short, the Court finds that it's not. Plaintiff's religious-based refusal to take a COVID-19 vaccine simply isn't going to halt a nearly fully vaccinated Air Force's mission to provide a ready national defense.

Air Force Officer, 2022 U.S. Dist. LEXIS 26660, at *34 (citing *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010)). That is equally true in the instant case.

Third, the question at hand is the balancing of interests regarding *temporary* injunctive relief during the months that this case is adjudicated. *See U.S. Navy SEALs 1-26*, 27 F.4th at 353 ("[T]he relevant question is whether the Government will be irreparably harmed *during the pendency of the appeal*") (emphasis in original). Appellees cannot credibly argue that the Air Force or the nation as a whole has a weighty interest in discharging the Airmen *immediately*. Appellees cannot make such an assertion with a straight face because they, themselves, have delayed an extraordinary length of time. They initially waited 11 months after the vaccines became widely available to impose their vaccine mandate. Then they compounded that delay by exceeding their own self-imposed time limits in reviewing the Airmen's RARs. Appx. 387, 392-393, 404, 444, 448 (R.Docs. 22A at ¶9, 22C at ¶¶9-10, 22E at ¶¶10-11, 22F at ¶¶10-11, 22G at ¶¶10-11). Given

Appellees' dilatory approach in imposing the vaccine mandate and in reviewing the Airmen's RARs, it is evident that Appellees are not in a hurry. Delaying the discharge of the Airmen a few additional months will not harm Appellees' interests.

Fourth and finally, there is an additional public interest in this case that weighs strongly in favor of the Airmen. The United States has invested approximately $5.5 million *each* in the training of the 17 Airmen pilots. *Supra* at n.5. That is a total of approximately $93.5 million that taxpayers have spent to produce some of the most highly trained military pilots in the world. Appellees' intended discharge of these pilots would constitute a colossal waste of taxpayer dollars for no good reason. And it must be remembered that Air Force pilots cannot be replaced easily, cheaply, or quickly. Moreover, discharging pilots would be extraordinarily detrimental to the public interest at a time when the Air Force is suffering a severe shortage of pilots. Currently, the Air Force is short 1,650 pilots, according to its own recent report.[16] Discharging the 17 pilot Airmen makes no sense whatsoever, particularly when some of those pilots have been deployed and performed with great distinction, and other Airmen pilots are instructors who are

[16] *See* Kimberly Johnson, *U.S. Air Force is Short 1,650 Pilots Report Says*, Flying (April 5, 2022), available at https://www.flyingmag.com/u-s-air-force-is-short-1650-pilots-report-says/.

desperately needed to help solve the pilot shortage. *See* Appx. 309 (R.Doc. 82 at 87).

In the relevant section of its opinion, the district court did not address any of this. Inexplicably it devoted *only three sentences* to the balancing of the equities after stating the legal standard. The court offered the following conclusory analysis: "[T]he Air Force's interest in preventing COVID-19 from impairing the readiness and health of its forces… is in the public interest. That interest outweighs any countervailing interest of Plaintiffs." Addendum 60. No further explanation. No assessment of each asserted interest. By brushing aside all of the public interests asserted by the Airmen without explanation, the district clearly erred.

In sum, the balance of harms and the public interest weigh heavily in favor of the issuance of a preliminary injunction. There is no public interest in the immediate discharge of the Airmen in violation of their religious convictions, RFRA, and the Constitution, especially when doing so would waste national resources and exacerbate the pilot shortage.

CONCLUSION

For all of the reasons explained above, this Court should reverse the district court's denial of the Airmen's motion for a preliminary injunction. Specifically,

the Airmen requested that Appellees be enjoined from doing the following to the Airmen in this case or to other airmen with a pending or rejected RAR:

1. Proceeding toward the discharge of the airmen.
2. Transferring the airmen to the Individual Ready Reserve or No Points/No Pay status.
3. Issuing Article 15 charges or court martial charges against the airmen for their refusal to take the vaccine.
4. Removing the airmen from leadership positions or demoting them.
5. Prohibiting the airmen from participating in training, including traveling to training.
6. Reducing the pay or compensation of the airmen, including by grounding pilots.
7. Restricting the official travel of the airmen, other than with respect to deployment.
8. Otherwise penalizing or punishing the airmen.

Dated**:** June 17, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2022, I electronically served upon defense counsel the foregoing document through the operation of the Court's ECF system.

s/ Kris W. Kobach
Kris W. Kobach

CERTIFICATE OF COMPLIANCE

I hereby certify that the countable sections of this Brief contain 12,994 words, as calculated by Microsoft Word, and that this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 14 pt. Times New Roman font. I also certify that this Brief and attached Addendum have been scanned for viruses and that both are virus free.

s/ Kris W. Kobach
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