

No. 22-11200

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

AIR FORCE OFFICER,

Plaintiff–Appellee,

v.

LLOYD J. AUSTIN, III, et al.,

Defendants–Appellants

On Appeal from the United States District Court
for the Middle District of Georgia

**PLAINTIFF-APPELLEE’S MOTION TO STAY APPEAL PENDING
RESOLUTION OF RELATED PROCEEDINGS**

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

Plaintiff Air Force Officer hereby certifies that the following individuals and entities are known to have an interest in the outcome of this case:

Abernethy, Kevin D.

Air Force Engineer*

Air Force NCO*

Air Force Officer*

Air Force Special Agent*

Austin, III, Lloyd J.

Avallone, Zachary A.

Boynton, Brian M.

Carmichael, Andrew E.

Coppolino, Anthony J.

Crampton, Stephen

Haas, Alexander K.

Hirsh, Michael

Hochschild, Adam

Hodes, Mary Catherine

Jonna, Paul Michael

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Grantham, Jr., Roger C.

Kendall, III, Frank

Knapp, Cody T.

Leary, Peter D.

McHale, Michael

Miller, Robert I.

Self, Hon. Tilman E.

Simon, Lance

Snyder, Cassandra M.

Thomas More Society

No publicly traded company or corporation has an interest in the outcome of this case.

*The District Court granted Air Force Officer and the other three plaintiffs (Air Force Engineer, Air Force NCO, and Air Force Special Agent) leave to proceed under pseudonyms. *Air Force Officer v. Austin*, No. 5:22-cv-00009-TES (M.D. Ga.), Dkt. 52 & 83. They are willing to provide their legal names to this Court under seal for *in camera* review, if the Court so requests.

/s/ Adam S. Hochschild
Counsel for Air Force Officer

**MOTION TO STAY APPEAL PENDING RESOLUTION OF
RELATED PROCEEDINGS**

Pursuant to Federal Rule of Appellate Procedure 27 and Eleventh Circuit Rule 27-1, Plaintiff-Appellee Air Force Officer hereby moves for a stay of this appeal, pending final judgment after exhaustion of all appeal rights as to class-wide relief in *Doster v. Kendall*, No. 1:22-cv-84 (S.D. Ohio). As discussed below, a stay of the appeal—consistent with the Middle District of Georgia’s recent order (Exhibit 1) similarly staying all District Court proceedings—would serve the interests of judicial economy and of justice.

BACKGROUND

On January 6, 2022, Plaintiff Air Force Officer filed her original complaint in the Middle District of Georgia. On February 15, 2022, the District Court entered a preliminary injunction in her favor on Count I (Religious Freedom Restoration Act) and Count II (First Amendment), enjoining Defendants from enforcing the military COVID-19 vaccine mandate against her. District Court Dkt. 51. This was the first such injunction issued in any court in favor of any Air Force service member.

The next day, February 16, 2022, the *Doster* plaintiffs filed their case in the Southern District of Ohio. On March 31, the *Doster* court entered a preliminary injunction in favor of the *Doster* named plaintiffs.

On April 12, 2022, Defendants appealed the preliminary injunction entered in favor of Plaintiff Air Force Officer—the present appeal—56 days after the Middle District of Georgia entered that order. On June 14, Defendants sought and obtained a 30-day extension of their deadline to file their opening brief in this appeal. On July 27, Defendants filed their opening brief.

Later that day, on July 27, the *Doster* court entered the class-wide preliminary injunction. *See* Ex. B to Defendants’ August 4 letter. The order preliminarily enjoins enforcement of the military vaccine mandate against a class of Air Force service members who challenge the military COVID-19 vaccine mandate on religious grounds, enjoining Defendants from “taking any adverse action against any Class Member on the basis of this lawsuit or his request for religious accommodation from the COVID-19 vaccine.” *See Doster* order at 3. As Defendants acknowledge, “Until the class-wide injunction in *Doster* is vacated or stayed..., it purports to provide broad relief to all Air Force service members, including plaintiff Air Force Officer, who challenge the vaccination requirement on religious grounds.” *See* August 4 letter at 1. The *Doster* order allows service members to opt out and sets no opt-out deadline for anyone. *See Doster* order at 2.

In light of the *Doster* class-wide injunction, on August 4, 2022 Air Force Officer and her three co-plaintiffs (added to the case on April 27, 2022) filed a motion in the Middle District of Georgia for a stay as to Counts I and II in the

District Court proceedings, including their pending motions for class-wide relief under those Counts. District Court Dkt. 121. Defendants in part opposed that motion and asserted, without explanation or citation to any authority, that Plaintiffs should be forced to decide whether to opt out of the *Doster* class “now,” *i.e.*, within “14 days.” District Court Dkt. 122. Plaintiffs maintained (and continue to maintain) that forcing them to decide whether to opt out of the *Doster* class “now” would defy the terms of the *Doster* order and interfere with Plaintiffs’ rights as *Doster* class members. District Court Dkt. 121 & 123.

Also on August 4, Defendants filed a Rule 28(j) letter in this appeal, notifying the Court of the *Doster* class-wide injunction. In that letter Defendants again asserted without explanation or citation to any authority that Air Force Officer should be forced to decide whether to opt out of the *Doster* class “now”: “under the *Doster* order, plaintiff must now make a choice: either (1) opt out of the *Doster* class and continue pursuing her individual claims in this action, or (2) dismiss her claims here and accept the outcome in the *Doster* litigation as members of the class certified there.”

On August 5, 2022, the Middle District of Georgia entered an order staying all District Court proceedings. *See* Order, attached hereto as Exhibit 1. The Court ruled that “if the relief preliminarily granted to Plaintiffs in *Doster* is vacated, reversed, stayed, or significantly altered to interfere with the relief to which they

contend they are entitled,” they may seek to lift the stay. See Order at 2. The District Court further noted, in response to Defendants’ request that Plaintiffs be forced to decide “now,” within “14 days,” whether to opt out of *Doster*: “Plaintiffs are undoubtedly represented by competent and capable counsel, and their counsel can advise them as to how to proceed with respect to the class certification and preliminary injunctive relief from *Doster*.... This Court will not impede, interfere, intimate, or attempt to interpret the orders issued by the Southern District of Ohio.” See Order at 2 n.3.

After the Middle District of Georgia issued its stay order, Air Force Officer asked Defendants if they would consent to a similar stay of this appeal. In response, Defendants stated, “please indicate in your motion that defendants oppose the request for a stay for the reasons stated in our August 4 letter to the Court.”

Air Force Officer’s response brief on the merits is currently due September 2, 2022. See Aug. 3, 2022 order.

DISCUSSION

It is well-established that “[a] court has control over its own docket.... In the exercise of a sound discretion it may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same.” *Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937). The parties and the issues are

the same here: Air Force Officer, the Plaintiff here, is a class member in *Doster*; many of the Defendants are the same; the core legal issues are the same. A stay of the present appeal pending final resolution of *Doster*, consistent with the Middle District of Georgia's recent order staying District Court proceedings in this action, would serve the interests of judicial economy and of justice.

Without a stay of the appeal, the parties and this Court may expend significant time and resources addressing issues that do not currently need to be resolved as long as the *Doster* class-wide injunction is in place. The issues here may ultimately be moot depending on how *Doster* is resolved. As Defendants themselves acknowledge, "Until the class-wide injunction in *Doster* is vacated or stayed..., it purports to provide broad relief to all Air Force service members, including plaintiff Air Force Officer...."

A stay of the appeal would not prejudice Defendants. It would be in all parties' interests that *Doster* be resolved first, and then, if necessary, for the present appeal to proceed. If the class-wide relief in *Doster* is ultimately affirmed, then Air Force Officer would no longer need to protect her interests with respect to the military vaccine mandate in this case, either in this appeal or in the District Court proceedings (and thus reversing the District Court would be futile). If the class-wide relief in *Doster* were ultimately vacated or reversed, Air Force Officer's own injunction, which issued on multiple grounds, may still warrant appellate

review, despite Defendants’ assertion (*see* District Court Dkt. 122 and 123) that *res judicata* would potentially apply. In any event, it makes most sense to see first how *Doster* is resolved. A stay of this appeal pending resolution of *Doster* is appropriate, just as a stay of the District Court proceedings was appropriate.

Defendants, however, object to a stay and assert that Air Force Officer must decide “now” whether to opt out of *Doster*. Such a restriction would defy the terms of the *Doster* order and interfere with Plaintiff’s rights as a *Doster* class member. The *Doster* order allows service members to opt out and sets ***no opt-out deadline for anyone***. If Defendants want to modify the *Doster* order, they can seek to do so in the *Doster* case, not here. Plaintiffs stand to ultimately benefit—or not benefit—from a final judgment in one or more cases. But Air Force Officer cannot be forced, through this case, to decide “now” whether to opt out of the preliminary, non-final relief entered in *Doster* before any other class members have to decide and before any appeal in *Doster* is resolved. Indeed, Defendants’ continuing demand that Air Force Officer decide whether to opt out of the *Doster* class “now”—contrary to the terms of the *Doster* order—may be an “adverse action” in violation of the *Doster* order. *See Doster* order at 3.¹

¹ Defendants’ continuing demand also disregards the District Court’s August 5 stay order because Defendants assert Air Force Officer must now opt out of *Doster* or “dismiss her claims” in this action.

Defendants are mistaken to the extent they claim Air Force Officer's status as a *Doster* class member is somehow unfair such that she must choose "now" which single case to be a part of. Air Force Officer filed her case more than a month before the *Doster* plaintiffs filed theirs. Air Force Officer obtained preliminary injunctive relief against the military COVID-19 vaccine mandate before the *Doster* plaintiffs, the *Doster* class, or any other Air Force service member did. She should not be forced to choose "now" between two pending cases in which she has only preliminarily obtained relief, and Defendants do not and cannot point to any authority or equitable principle that requires her to do so. Air Force Officer's proposed stay would simply put the present appeal on hold, consistent with the District Court's stay order, pending final resolution of *Doster*, in the interests of judicial economy and of justice. Accordingly, the Court should stay the appeal pending final judgment after exhaustion of all appeal rights as to class-wide relief in *Doster*.

WHEREFORE, Plaintiffs request that the Court stay the present appeal pending final judgment after exhaustion of all appeal rights as to class-wide relief in *Doster*.

Dated: August 12, 2022

/s/ Adam S. Hochschild

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Counsel for Air Force Officer

CERTIFICATE OF COMPLIANCE

1. This document complies with the length-limit requirements of Fed. R. App. P. 27(d)(2). Not counting the cover page, certificates, and signature page, this document contains 1,652 words.

1. This document complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E). This document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/Adam S. Hochschild
Counsel for Air Force Officer

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

**AIR FORCE OFFICER, AIR FORCE NCO,
AIR FORCE SPECIAL AGENT, and AIR
FORCE ENGINEER** *on behalf of themselves
and all others similarly situated,*

Plaintiffs,

v.

LLOYD J. AUSTIN, III, *individually and in his
official capacity as Secretary of Defense;*

FRANK KENDALL, III, *individually and his
official capacity as Secretary of the Air Force; and*

ROBERT I. MILLER, *individually and his
official capacity as Surgeon General of the Air Force,*

Defendants.

**CIVIL ACTION NO.
5:22-cv-00009-TES**

ORDER ADMINISTRATIVELY CLOSING CASE

Before the Court is Plaintiffs' Motion to Stay [Doc. 121] pending (1) final judgment, after exhaustion of all appeal rights, as to the class-wide relief preliminary granted in the Southern District of Ohio¹ and (2) final judgment, after exhaustion of all appeal rights, as to the nationwide injunctive relief preliminarily granted in the

¹ See Order Granting Motion for Class Certification & Order Granting Class-wide Preliminary Injunction, *Doster v. Kendall*, No. 1:22-cv-00084-MWM (S.D. Ohio Feb. 16, 2022), ECF Nos. 72 & 77.

Southern District of Texas² as to the federal civilian mandate claims asserted in Counts I and II of Amended Complaint [Doc. 84].

The Court **GRANTS** Plaintiffs' Motion to Stay [Doc. 121], and it **STAYS** this case as to Counts I and II of the Amended Complaint.³ Because a district court's "stay must not be 'immoderate[,]'" if the relief preliminarily granted to Plaintiffs in *Doster* is vacated, reversed, stayed, or significantly altered to interfere with the relief to which they contend they are entitled, they may file a motion to reopen this case. *CTI-Container Leasing Corp. v. Uiterwyk Corp.*, 685 F.2d 1284, 1288 (11th Cir. 1982). If the relief preliminarily granted to Air Force Officer in *Feds for Medical Freedom* is vacated, reversed, stayed, or significantly altered to interfere with the relief to which she contends she is entitled, she may file a motion to reopen this case.

The Court also **STAYS** this case as to Count III of the Amended Complaint. At this time, all Plaintiffs are completely protected from receiving the COVID-19 vaccine or other adverse actions from the above-captioned defendants by the preliminary relief granted in the Southern District of Ohio. Further, Air Force Officer—as to her federal civilian mandate claims—is completely protected in the same manner by the

² See Memorandum Opinion and Order & Notice of Appeal, *Feds for Med. Freedom v. Biden*, No. 3:21-cv00356, (S.D. Tex. Dec. 21, 2021), No. 22-40043 (5th Cir.), ECF Nos. 36–37.

³ Regarding Defendants' request that the Court stay Counts I and II for 14 days, Plaintiffs are undoubtedly represented by competent and capable counsel, and their counsel can advise them as to how to proceed with respect to the class certification and preliminary injunctive relief from *Doster*. [Doc. 122, p. 2]. This Court will not impede, interfere, intimate, or attempt to interpret the orders issued by the Southern District of Ohio.

preliminary relief granted in the Southern District of Texas. Therefore, with deference to judicial efficiency and an eye towards avoiding piecemeal litigation, the Court also **STAYS** this case as to Count III of the Amended Complaint. *See, e.g., Clinton v. Jones*, 520 U.S. 681, 683 (1997) (discussing district court’s “broad discretion to stay proceedings as an incident to its power to control its own docket”). In the event the protections currently afforded in *Dotson* and *Feds for Medical Freedom* are vacated, reversed, stayed, or significantly altered to interfere with the relief Plaintiffs contend they are entitled, they may file a motion to reopen this case.

Based on the Court’s stay with respect to Counts I, II, and III of the Amended Complaint, the Court **DIRECTS** the Clerk of Court to **ADMINISTRATIVELY CLOSE** this case.⁴

SO ORDERED, this 5th day of August, 2022.

S/ Tilman E. Self, III

TILMAN E. SELF, III, JUDGE
UNITED STATES DISTRICT COURT

⁴ The Telephone Conference scheduled for August 8, 2022, is **CANCELED**.