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**, in his official capacity as Secretary of Defense; **FRANK KENDALL, III**, in his official capacity as Secretary of the Air Force; and **ROBERT I. MILLER**, in his official capacity as Surgeon General of the Air Force, Defendants.	)	Case No. 5:22-cv-00009-TES

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO STAY

Plaintiffs and Defendants agree that certain proceedings should be stayed, but disagree on the length and scope of a stay.

Defendants' Position on Civilian Claims in Counts I and II. Defendants agree that the civilian claims under Counts I and II should be stayed pending the outcome of ***Feds for Med. Freedom v. Biden***, No. 3:21-CV-356 (S.D. Tex.), No. 22-40043 (5th Cir.). Because the impact of that case on the civilian claims in this case is uncertain, the Court should simply stay the civilian claims pending the outcome of the case, without addressing the impact of the outcome on this case.

Defendants' Position on Military Claims in Counts I and II. Defendants, however, believe that only a temporary stay of the military claims in Counts I and II is warranted. The *Doster* court certified a mandatory class under Rule 23(b)(1)(A) and (b)(2) of Air Force service members, including reservists, who have requested religious exemptions from the military's COVID-19 vaccination requirement. The *Doster* court also issued a class-wide preliminary injunction prohibiting

the Air Force from, among other things, "taking, furthering, or continuing any disciplinary or separation measures against the members of the Class for their refusal to receive the COVID-19 vaccine" and "plac[ing] or continu[ing] active reservists on no points, no pay status for their refusal to get vaccinated for COVID-19 due to their sincerely held religious beliefs." *Doster*, No. 22-cv-84, Dkt. 77, at 2–3 (S.D. Ohio July 27, 2022).

Until the class-wide injunction in *Doster* is vacated or stayed, it purports to provide broad relief to all Air Force service members, including plaintiffs, who have challenged the COVID-19 vaccination requirement on religious grounds. Moreover, the *Doster* court asserted that its injunction binds all putative class members unless a service member "opts out, by delivering notice to the Government and Class Counsel in writing." *Id.* Thus, Plaintiffs now must decide whether (1) to opt out of the *Doster* class and continue pursuing their individual claims in this action, or (2) to dismiss their claims here and accept the outcome in the *Doster* litigation as a member of the class certified there. *See id.* Defendants propose that this Court stay the military claims under Counts I and II for 14 days, which should give Plaintiffs sufficient time to make that decision.

Defendants also note that if the Government ultimately prevails on the in *Doster* on the merits, principles of *res judicata* may prevent Plaintiffs from relitigating the merits of any claim resolved in *Doster* by again seeking to pursue individual claims in this case. If Plaintiffs want to maintain their individual cases in this District, Plaintiffs must avail themselves of the opt-out provisions provided by the *Doster* court to avoid being subject to preclusion. *See Juris v. Inamed Corp.*, 685 F.3d 1294, 1335 (11th Cir. 2012) (res judicata barred later suit by absent class member who never challenged non-opt-out class certified under Rule 23(b)(1)); *see id.* at 1330 (discussing opting out). Thus, Plaintiffs must make a choice where they want their claims to be heard—either they can proceed as class members in *Doster* or they can proceed individually in this court. They cannot do both.

Defendants' Position on Count III (prepared by Defendants only). Defendants also believe that a stay of Count III is appropriate so long as Plaintiffs are members of the *Doster* class. Count III involves an APA challenge to the military's COVID-19 vaccination requirement and so long as the *Doster* class-wide preliminary injunction is in place and Plaintiffs remain class members, no Plaintiff is subject to the military's COVID-19 vaccination requirement. Furthermore, if the *Doster* class-wide injunction remains in place through final judgment in favor of the *Doster* class, then class members like Plaintiffs will *never* be required to comply with the military's COVID-19 vaccine requirement. In other words, no Plaintiff is currently facing any harm from the challenged policy, and, depending on the outcome of the *Doster* litigation, may not ever face harm from the challenged policy. Any harm to Plaintiffs thus "depend[s] on contingent future events that may not occur as anticipated, or indeed may not occur at all." *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (internal quotation marks omitted). Plaintiffs' suggestion of piecemeal adjudication of one claim concerning the vaccine mandate thus makes little sense. Defendants propose that the best course to preserve party and judicial resources is to stay Count III unless and until Plaintiffs either opt out of the *Doster* class or otherwise are required to comply with the military's COVID-19 vaccine requirement.

If the Court decides not to stay Count III, it should dismiss that claim. *See* Mot. to Dismiss, ECF No. 92; Reply ISO Mot. to Dismiss, ECF No. 107. If Count III survives the pending motion to dismiss, the Court should set a deadline for the production of the administrative record—no other discovery is proper in this case. *See Chiayu Chang v. United States Citizenship & Immigr. Servs.*, 254 F. Supp. 3d 160, 161 (D.D.C. 2017) ("In order to obtain even 'limited discovery' [in an APA case], a party must make 'a significant showing—variously described as a strong, substantial, or prima facie showing—that it will find material in the agency's possession indicative of bad faith or an incomplete record.'" (quoting *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487–88 (D.C. Cir.

2011)). The Court should also set a briefing schedule for summary judgment that begins shortly after the administrative record is produced.

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Respectfully submitted,

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