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

AIR FORCE OFFICER , on behalf of herself	
and all others similarly situated,	
•) Case No. 5:22-cv-00009-TES
Plaintiff,)
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.)

PLAINTIFFS' MOTION FOR LEAVE TO FILE SURREPLY

Pursuant to Local Rule 7.3.1(C), Air Force Officer, Air Force NCO, Air Force Special Agent, and Air Force Engineer ("Plaintiffs") hereby move for permission to file a surreply in further opposition to Defendants' motion for stay, to address a new argument Defendants raise for the first time in their *reply* brief [Doc. 78]. Specifically, Defendants now assert that **Plaintiffs must apply to the Air Force Board for Correction of Military Records** (BCMR or AFBCMR) as a matter of exhaustion of remedies. Defendants have never made this argument before. Plaintiffs should have the opportunity to respond to this new argument. *See Baker v. Upson Reg'l Med. Ctr.*, No. 5:20-CV-00283-TES, 2022 WL 816470, at *11 (M.D. Ga. Mar. 17, 2022) (Self, J.) ("Plaintiff... had the option of filing a motion asking the Court to allow her to file a surreply addressing the exhaustion issue under Local Rule 7.3.1. *See* MDGa LR 7.3.1(C)").

Additional briefing is necessary. In its surreply, Plaintiffs would explain that this new argument is inconsistent with this Court's preliminary injunction order [Doc. 51], and

Defendants have waived it; the Religious Freedom Restoration Act and the First Amendment claims (Counts I and II) do not require exhaustion; this AFBCMR argument is yet another delay tactic; applicable regulations, procedures, and policies do not require that Plaintiffs apply to the AFBCMR; even if application to the AFBCMR were in some sense required (which it is not), it would be futile to do so; the caselaw does not support Defendants' position; and Defendants do not and cannot claim Plaintiffs failed to exhaust as to their Administrative Procedure Act (APA) natural-immunity claim (Count III).

In accordance with Local Rule 7.3.1(C), the proposed surreply does not accompany this motion, but Plaintiffs are prepared to file the surreply promptly if the Court grants the motion.¹

WHEREFORE, Plaintiffs request that the Court grant them permission to file their proposed surreply pursuant to Local Rule 7.3.1(C).

¹ The full text of Local Rule 7.3.1(C) is: "A party desiring to file a surreply brief must move in writing for permission to do so within fourteen (14) days of the filing of the brief to which reply is desired, succinctly specifying the reasons why additional briefing is necessary. The proposed surreply brief shall not accompany the motion and no response to the motion by the opposing party shall be allowed."

Dated: April 27, 2022

Respectfully submitted,

/s/ Adam S. Hochschild

Stephen Crampton, pro hac vice
THOMAS MORE SOCIETY – Senior Counsel
PO Box 4506
Tupelo, MS 38803
(662)255-9439
scrampton@thomasmoresociety.org

Adam S. Hochschild, *pro hac vice*Hochschild Law Firm
THOMAS MORE SOCIETY – Special Counsel
PO Box 401
Plainfield, VT 05667
(314)503-0326
adam@hochschildlaw.com

Mary Catherine Hodes, *pro hac vice*THOMAS MORE SOCIETY – Special Counsel
112 S. Hanley Rd., Second Floor
Clayton, MO 63105
(314)825-5725
mchodes@thomasmoresociety.org

Michael McHale, pro hac vice THOMAS MORE SOCIETY – Counsel 10506 Burt Circle, Ste. 110 Omaha, NE 68114 (402)501-8586 mmchale@thomasmoresociety.org

Paul M. Jonna, pro hac vice LiMandri & Jonna LLP THOMAS MORE SOCIETY – Special Counsel P.O. Box 9520 Rancho Santa Fe, CA 92067 (858)759-994 pjonna@limandri.com Michael R. Hirsh, GA #357220 Hirsh Law Office, LLC 2295 Towne Lake Parkway Suite 116-181 Woodstock, GA 30189 (678)653-9907 michael@hirsh.law

Counsel for Plaintiffs