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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants are determined to shield from judicial review their unlawful Air Force-wide policy of denying religious accommodation requests while they continue to purge religious objectors from the Air Force. With their Motion to Dismiss, Defendants again seek to prevent meaningful review of their unlawful practices, now arguing lack of subject-matter jurisdiction, including ripeness, justiciability, exhaustion, standing, etc.—none of which arguments they asserted at the Air Force Officer preliminary injunction stage. They also rehash their unsuccessful merits arguments and make some other new unsuccessful arguments. All of their arguments fail, and the Court should deny their Motion to Dismiss.

BACKGROUND

Defendants have denied all requests for religious accommodation regarding COVID-19 vaccine mandates (the "Mandates") except for service members already slated for separation, while granting an express, blanket exemption for clinical-trial participants and thousands of medical and other secular exemptions. Plaintiffs, individually and on behalf of a putative class, allege that these denials of religious accommodation are discriminatory and unlawful under the Religious Freedom Restoration Act (RFRA) and the First Amendment. Plaintiffs also allege that Defendants deny the opportunity to seek a medical exemption for natural immunity in violation of the Administrative Procedure Act (APA). All four named Plaintiffs seek relief as to the Mandates applicable to military service members. Air Force Officer, who is both a military and federal civilian employee, also seeks relief as to the Mandates applicable to federal civilian employees.

On January 6, 2022, Air Force Officer filed her original Complaint and a motion for preliminary injunction. Defendants opposed the motion. They did not argue that the Court lacked subject-matter jurisdiction, that the claims were not ripe or non-justiciable, that Air Force Officer failed to exhaust her remedies, or that she lacked standing to bring her claims. The Court held a

hearing on February 3. Defendants sought to delay ruling on the motion for preliminary injunction until discovery had been conducted.

On February 15, the Court granted Air Force Officer's motion for preliminary injunction as to the military Mandates. *Air Force Officer v. Austin*, No. 5:22-CV-00009-TES, 2022 WL 468799 (M.D. Ga. Feb. 15, 2022). The Court "easily f[ound] that the Air Force's process to protect religious rights is both illusory and insincere." The Court did not rule on the claims as to the federal civilian employee Mandates because they were subject to a nationwide injunction in another case, and also did not rule on the APA claim because the Court granted relief on the other claims.

On February 28, Air Force Officer filed a First Amended Complaint ("FAC") adding class-action claims and filed motions for class certification, appointment of class counsel, and class-wide preliminary injunction ("Class-Wide Relief"). On March 10, Defendants moved to strike the FAC.

On March 31, Air Force Officer, joined by Air Force NCO, Air Force Special Agent, and Air Force Engineer (all four plaintiffs, "Plaintiffs"), filed a motion for leave to file a Second Amended Complaint ("SAC"), motions for Class-Wide Relief, and an opposition to the motion to strike the FAC. Defendants opposed the motion for leave. On April 14, Defendants moved to stay proceedings in this Court pending appeal of the February 15 preliminary injunction order. On April 27, the Court granted the motion for leave to file the SAC and denied the motion to stay.

Defendants now move to dismiss the Second Amended Complaint. Defendants raise for the first time here several procedural and other arguments.[1] They all fail.

LEGAL STANDARD

Defendants purport to base their Motion to Dismiss on Federal Rule of Civil Procedure 12(b)(6) (failure to state a claim) as well as (b)(1) (subject-matter jurisdiction), (b)(2) (personal

[1] Defendants have also filed an opposition to the pending motions for Class-Wide Relief to which Plaintiffs will separately file a reply.

jurisdiction), and (b)(3) (venue). With respect to Rule 12(b)(6), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Pro. 8(a)(2); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). "[A]ll facts set forth in the plaintiff's complaint are to be accepted as true and the court limits its consideration to the pleadings and exhibits attached thereto. A complaint may not be dismissed pursuant to Rule 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Grossman v. Nationsbank, N.A.* 225 F.3d 1228, 1231-1232 (11th Cir. 2000) (cleaned up).

The pleading standard is essentially the same for 12(b)(1)-(3) motions to dismiss as for a 12(b)(6) motion to dismiss. *See Lawrence v. Dunbar*, 919 F.2d 1525, 1528-1529 (11th Cir. 1990) (12(b)(1) standard); *Morris v. SSE, Inc.* 843 F.2d 489 (11th Cir. 1988) (12(b)(2)); *Prou v. Giarla* 62 F. Supp.3d 1365 (S.D. Fla. 2014) (12(b)(3)). When a 12(b)(1) motion raises a factual challenge to subject matter jurisdiction, the court may consider certain extrinsic evidence and make factual findings for the limited purpose of assessing jurisdiction. *Lawrence*, 919 F.2d at 1529. But if a 12(b)(1) motion "implicate[s] the merits of a claim," then "the full panoply of protections afforded the party opposing such a motion will apply." *Id.* at 1530. *See also Eaton v. Dorchester Development, Inc.*, 692 F.2d 727, 734 (11th Cir.1982) (reversing district court's dismissal under Rule 12(b)(1) where jurisdiction was "inextricably intertwined" with the merits of the claim). Specifically, where a 12(b)(1) motion implicates the merits, "the proper course of action for the district court... is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case." *Lawrence*, 919 F.2d at 1529 (quoting *Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir. 1981)). As detailed below, the Court should deny Plaintiffs' Motion.

ARGUMENT

I. The Court should not dismiss the civilian Mandate claims.

A. The CSRA doesn't preclude this Court's jurisdiction.

Contrary to Defendants' assertion, the Civil Service Reform Act (CSRA) does not preclude Air Force Officer's right to bring her civilian-employee claims, including her RFRA claim, in this Court. RFRA specifically grants a plaintiff such as Air Force Officer the right to bring her claim here: a plaintiff may assert a violation "in a judicial proceeding and obtain appropriate relief against the government." 42 U.S.C. § 2000bb-1(c). RFRA supersedes any contradictory provision in the CSRA. *See* 42 U.S.C. § 2000bb-3(a) ("This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993."). "RFRA is unusual in that it amends the entire United States Code." *Rweyemamu v. Cote*, 520 F.3d 198, 202 (2d Cir. 2008). Defendants ignore RFRA in their analysis of the CSRA and do not and cannot cite any cases holding the CSRA precludes a RFRA claim or somehow overrides RFRA.[2] For these reasons alone, the CSRA does not preclude assertion of the RFRA claim in this Court.

RFRA aside, Defendants' CSRA-preclusion argument still fails. In scattershot fashion Defendants cite several provisions of the CSRA and do not and cannot explain how they supposedly apply to preclude Air Force Officer's civilian claims. By the terms of the various provisions Defendants cite, the CSRA does not apply here.

Section 7513(b)[3] of the CSRA applies to individual "employees" of an "agency" who receive individualized notice of specific "proposed" discipline, not a general order threatening adverse action applicable to an entire class of employees. *See* § 7513(a), (b), (c), (e). The original and

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[2] In *Am. Fed'n of Gov't Emps. Local 2018 v. Biden*, No. 21-5172, 2022 WL 1089190 (E.D. Pa. Apr. 12, 2022), cited by Defendants, the district court denied employees relief due to lack of standing where their employer agencies *had already granted* them religious exemptions. Plaintiffs in that case did not seek relief under RFRA.

[3] The CSRA is codified in several sections throughout Title 5 of the United States Code.

underlying unlawful order at issue is Executive Order 14043 [SAC ¶ 41] issued by President Biden, who is not an "agency." *Cf. Dalton v. Specter*, 511 U.S. 462, 470 (1994) (President is not an "agency" under the APA). And Air Force Officer is not an "employee" of President Biden but rather is an employee of the Department of Air Force.

Sections 7512 and 7513(d) also do not apply because, as Defendants acknowledge, those sections apply only where "an agency ultimately decides to take a major adverse action," and, as Defendants contend, Defendants have not yet ultimately decided to take any action on Air Force Officer's civilian accommodation request. Def. Memo at 4.

Section 2302 doesn't apply because the Mandate is not any of the 12 "personnel actions" specifically enumerated in the statute. To the extent Defendants would claim the Mandates are a "significant change" in safe and healthful "working conditions" under Section 2302(a)(2)(A)(xii), they are mistaken, because a vaccine Mandate is not a change in "working conditions." *See Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 367 (D.D.C. 2020) ("Working conditions" in Section 2302 "generally refers to the daily, concrete parameters of a job, for example, hours, discrete assignments, and the provision of necessary equipment and resources.").[4] Rather, taking the vaccine is an irreversible medical procedure that effects a physical change in the body and, in the case of Air Force Officer and others, substantially burdens sincerely held religious beliefs. As the Supreme Court recently held, OSHA's vaccine mandate exceeded statutory authority to address occupational risks where the agency's purpose under the OSH Act was to ensure "safe and healthful **working**

[4] *Fort Stewart Schs. v. Fed. Lab. Rels. Auth.*, 495 U.S. 641, 645 (1990) discussed a different definition of "working conditions" in the context of a different, inapplicable, statutory provision. Even if it did somehow apply, the Mandate is not a change in "*working* conditions" and doesn't fit within any conceivable, reasonable definition of "working conditions" in any context.

conditions." *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 663-666 (2022) (emphasis added). "A vaccination, after all, cannot be undone at the end of the workday." *Id.* at 665 (cleaned up).[5]

Even if the language of the CSRA technically applied (though it doesn't), it does not preclude jurisdiction here also because Air Force Officer faces a "constitutionally intolerable choice." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994).[6] As this Court held, Air Force Officer "has faced 'monumental… pressure to violate [her] religious beliefs[,]' and that is prohibited by the Constitution." *Air Force Officer*, 2022 WL 468799, at *12.

The cases Defendants cite are all distinguishable. None involved a RFRA claim. Most involved unrelated claims and unrelated circumstances, they did not involve the DoD and Air Force Mandates at issue here, plaintiffs were already discharged or the terms of CSRA otherwise applied under the circumstances, and they did not involve the same "constitutionally intolerable choice." The three cases involving a civilian mandate at issue, again, do not involve a RFRA claim, are out of circuit, are non-final,[7] and were wrongly decided. The district court and the panel dissent in *Feds for Medical Freedom v. Biden* (No. 3:21-CV-356, 2022 WL 188329, at *2 (S.D. Tex. Jan. 21, 2022); and 30 F.4th 503 (5th Cir. 2022) (Barksdale, J., dissenting)) correctly found no SCRA preclusion.

B. The RFRA and First Amendment claims are ripe and properly stated.

Defendants' arguments that Plaintiffs' RFRA and First Amendment civilian claims are not

[5] The civilian religious accommodation form [Doc. 2-10] cites various other statutes but does not refer to the CSRA or cite to employees' rights thereunder, indicating Defendants themselves did not contemplate that the CSRA applied to preclude judicial review and only now thought to make the argument.

[6] *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012), which recognized CSRA preclusion as to certain plaintiffs who were already "discharged (or constructively discharged) by their employing agencies," did not alter this "constitutionally intolerable choice" rule under *Thunder Basin*.

[7] The F.R.A.P. 41 mandate has not issued in *Feds for Medical Freedom*; on May 21 plaintiffs filed a petition for rehearing; on May 23 the Fifth Circuit requested a response from the government by June 2; pursuant to F.R.A.P. 41(b) the Mandate is stayed pending resolution of the petition for rehearing—and thus the injunction remains in place. In *Rydie v. Biden* (No. 21-2539), on April 2, the Fourth Circuit denied the government's motion to publish the panel decision. In *Am. Fed'n of Gov't Emps. Local 2018 v. Biden*, plaintiffs have the right to appeal the order to the Third Circuit.

ripe or properly stated are mistaken. While Air Force Officer has not received her final denial on her civilian request (unlike her military request; see Section II below), the civilian-request claims are nevertheless ripe and sufficiently stated.[8] Air Force Officer confronts an "actual or imminent" burden on her religious liberty. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As Defendants acknowledge, Air Force Officer expects the Air Force will deny her civilian request based on the Air Force's final denial of her military request. Given that the military and civilian requests involve the same person for the same job and are reviewed by the same military, and are thus essentially the same identical request, it is not "hypothetical," "speculative," or Plaintiffs' "mere say-so" that the military will deny her civilian request. It is a virtual certainty, and in any event it is more than reasonable to assume the Air Force will deny an identical request from her.[9]

Defendants assert that, because EO 14043 says exemptions are allowed as required by law, then Plaintiffs and the Court must accept Defendants' mere say-so that they will properly consider accommodation requests. Def. Memo at 6-8. But the *military* Mandates also must be subject to (the same) exemptions as required by law, and yet, as this Court preliminarily found, the Air Force violated the law by failing to grant Air Force Officer's military request. Again, it is more than reasonable to assume the Air Force will deny an identical accommodation request from the same person for the same job. Further, ripeness "is most loosely applied—particularly in terms of how directly the injury must result from the challenged governmental action—where First Amendment rights are involved, because of the fear that [liberties] will be chilled even before the law, regulation, or policy is enforced." *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1120 (11th Cir. 2022). *See also*

[8] Defendants discuss ripeness and merits in different subsections (Def. Memo §§ I.A.2, II.B.1-2), but the arguments overlap and are largely redundant. Defendants conflate subject-matter jurisdiction and merits throughout their brief.

[9] If the Air Force were to grant her *civilian* request, that would be further proof of the Air Force's unlawful handling of *military* requests. But Plaintiffs do not allege and Defendants do not contend that Defendants assess or would assess civilian requests any differently than they (unlawfully) assess (or fail to assess) military requests.

Navy Seal 1 v. Biden, No. 8:21-CV-2429-SDM-TGW, 2021 WL 5448970, at *12 (M.D. Fla. Nov. 22, 2021) ("the contention that the vaccine requirement is 'effectively without exception' constitutes a 'form of a facial challenge'" (quoting *U.S. v. Friday*, 525 F.3d 938, 952 (10th Cir. 2008)).

Defendants claim it is "undisputed" that the Air Force "instituted a process for evaluating claims for religious exemptions." Def. Memo at 7-8. Not so. As Plaintiffs allege, the "Mandates **invite** service members to apply for accommodations… on the basis of several individualized situations, including religious belief" [SAC ¶ 293; emphasis added], but inviting service members to seek a religious accommodation does not mean the Air Force instituted a process for evaluating the requests, let alone a lawful process that provides anything beyond an illusory protection of rights. Indeed, Plaintiffs expressly plead that Defendants' process is unlawful, and this Court preliminarily found the parallel military-request evaluation process was "illusory and insincere." *Air Force Officer*, 2022 WL 468799, at *10. There is no meaningful distinction between identical civilian and military requests. The civilian Mandate claims are ripe.

II. The military Mandate claims are ripe.

For the first time in this case, Defendants argue that Air Force Officer's and the other Plaintiffs' claims against the military Mandates are not ripe. Despite continuing to argue elsewhere that the Air Force has a compelling interest—nay, a compelling "need"—to ensure that each Plaintiff submits to vaccination (*e.g.*, Doc. 98 at 25-33), they now suggest that Plaintiffs might not face "any" "consequences" whatsoever for remaining unvaccinated. Def. Memo at 11.

Defendants' ripeness arguments hinge on a mischaracterization of the nature of Plaintiffs' injury—*i.e.*, the substantial burden on their religious exercise that already exists (contrary to Defendants' current arguments) at least by virtue of the Air Force's final denial of each of their requests for religious accommodation, thereby putting them to the choice of violating their religious beliefs against COVID vaccination. Indeed, Defendants' newly asserted ripeness arguments (along

with their exhaustion arguments; *see infra*), are merely another tired example of "[g]overnment actors . . . moving the goalposts on pandemic-related sacrifices . . . , adopting new benchmarks that always seem to put restoration of liberty just around the corner." *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021) (Statement of Gorsuch, J.).

"To determine whether a claim is ripe," courts assess "the *fitness* of the issues for judicial decision" (*i.e.*, the "finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed") and the "hardship to the parties of withholding judicial review" (*i.e.*, the "costs to the complaining party of delaying review until conditions for deciding the controversy are ideal."). *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1258 (11th Cir. 2010) (emphasis in original). However, "[i]f a claim is fit for judicial decision, that is the end of the inquiry, and the matter is ripe, given that the absence of a 'hardship' 'cannot tip the balance against judicial review' under those circumstances." *Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1380 (11th Cir. 2019) (quoting *Harrell*, 608 F.3d at 1259). Further, as discussed above, ripeness is more loosely applied in the First Amendment context. *Speech First, Inc.*, 32 F.4th at 1120. And where there is even a "credible threat of enforcement . . . i.e., one that is not chimerical, imaginary, or speculative . . . [courts] favor hearing the challenge." *Harrell*, 608 F.3d at 1259 (cleaned up).

Defendants wrongly argue that "the factual predicate" for Plaintiffs' "injury has not fully materialized," and that Plaintiffs' "claim is dependent on contingent future events that may not occur as anticipated." Def. Memo at 10. This is allegedly because the mere "denial of a religious accommodation request—standing alone—*does not cause injury and is not a substantial burden on Plaintiffs' purported religious beliefs*." Def. Memo at 11 (emphasis added). But Defendants completely misapprehend the nature of Plaintiffs' injury. Indeed, the Supreme Court has held that a "policy" which "puts a [plaintiff] to th[e] choice" of "engag[ing] in conduct that seriously violates his religious beliefs" or otherwise "fac[ing] serious disciplinary action" for remaining true to those beliefs "easily

satisfies" a plaintiff's obligation to show a "substantial burden" on their religious exercise under RLUIPA, the "sister statute" of RFRA. *Holt v. Hobbs*, 574 U.S. 352, 361 (2015). That's because a substantial burden on one's religion exists the moment government imposes "substantial pressure" on one "to modify [her] behavior and to violate [her] religious beliefs," *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981)—as this Court already recognized. *Air Force Officer*, 2022 WL 468799, at *9. *See also Singh v. McHugh*, 185 F. Supp.3d 201, 217 (D.D.C. 2016) ("[T]he Army's refusal to grant plaintiff the accommodation that would enable him to enroll in ROTC while maintaining his religious practice was a government action that required plaintiff to choose between following the tenets of his religion and receiving a government benefit," and "the denial thus constitutes a 'substantial burden' under RFRA.") (cleaned up).[10]

Here, Plaintiffs' injury is not contingent on hypothetical future events, because Defendants' COVID vaccination *policy*, coupled with Defendants' *final denials* of Plaintiffs' requests for religious accommodations, imposes substantial pressure on Plaintiffs to violate their religious beliefs. Moreover, there is far more than a "credible threat" of enforcement here, as Defendants believe Plaintiffs have "refuse[d] to obey a lawful order" against the Air Force's alleged "compelling interest" to ensure total vaccination, and thus admit that Plaintiffs "*will be* subject to initiation of administrative discharge." Def. Memo at 11 (emphasis added). Further, Air Force Special Agent has already received a Letter of Reprimand for refusing to obtain COVID-19 vaccination [SAC ¶¶ 79, 161; Doc. 88-18 ("You are hereby reprimanded!")], confirming that potential disciplinary action is

[10] Because Defendants' ripeness argument is based on their view that the denial of Plaintiffs' religious accommodation requests "is not a substantial burden on Plaintiffs' purported religious beliefs" (Def. Memo at 11), the Court should treat it as a *direct attack on the merits of Plaintiffs' claims* (*i.e.*, whether they have suffered a "substantial burden" on their religious exercise under RFRA and the First Amendment, which burden Defendants did not challenge initially, *Air Force Officer*, 2022 WL 468799, at *9). *Lawrence*, 919 F.2d at 1528-1529; *Morrison v. Amway Corp.*, 323 F.3d 920, 925 (11th Cir. 2003). Accordingly, Defendants' ripeness argument here should be "forced to proceed under Rule 12(b)(6) or Rule 56, both of which place great restrictions on the district court's discretion." *Morrison*, 323 F.3d at 925 (cleaned up).

not purely hypothetical.

Meanwhile, Defendants are *already granting thousands of exemptions* from their COVID-19 vaccination policy for medical and administrative reasons [SAC ¶¶ 242, 269, 273, 295, 310, 338], thus showing Defendants fail both the compelling-interest and least-restrictive-means prongs under RFRA. Plaintiffs thereby "raise an issue that [this Court] can decide without further factual development," rendering their claims "fit for judicial decision." *Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1380 (11th Cir. 2019).

Defendants point to a recent holding to the contrary in *Roberts v. Roth*, No. 21-1797-ABJ, 2022 WL 834148, at *4 (D.D.C. Mar. 21, 2022), but that decision failed to recognize a completed injury on religious exercise *prior to* ultimate discharge, *see id.* (finding no ripeness because "Plaintiff has not been discharged at this point"). *Roberts* did not give serious consideration to RFRA and Free Exercise interests, 2022 WL 834148, at *5, unlike this Court, which has rightly given serious consideration to Air Force Officer's RFRA and Free Exercise interests, *Air Force Officer*, 2022 WL 468799, and should also do so with respect to the other Plaintiffs (and the putative class). Meanwhile, Defendants ignore other recent federal court decisions specifically holding that similar RFRA and First Amendment challenges were ripe. *See, e.g., Doster*, 2022 WL 982299, at *8; *Navy Seal 1*, 2021 WL 5448970, at *14.

For similar reasons, Defendants' citations to cases holding that mere initiation of military separation proceedings does not give rise to ripe federal court actions are also unavailing. Def. Memo at 11-12 (citing *Smith v. Harvey*, 541 F. Supp.2d 8, 13 (D.D.C. 2008) and *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975)). Neither of those cases involved the military's *preceding imposition of substantial pressure on claimants to forgo their religious beliefs*, nor, therefore, a completed substantial burden on religious exercise. Defendants' citation to *Toilet Goods Association v. Gardner* fares no better, since there a "generalized" *pre-enforcement* challenge to a regulation promulgated by

the Commissioner of Food and Drugs *predated* any future "specific application" of the regulation *to anyone*, let alone to the plaintiffs, who were merely *potentially* subject to inspections *potentially* authorized at the Commissioner's *future discretion*. 387 U.S. 158, 163-65 (1967).

Here, as noted, Plaintiffs are suffering *actual* and ongoing irreparable pressure to cave on their unquestionably sincere religious opposition to COVID-19 vaccination. And the Air Force is *actually* authorizing thousands of exemptions to other service members for secular reasons. Thus, Plaintiffs have "easily satisfied [their] obligation" of demonstrating a substantial burden on their religious exercise, *Holt*, 574 U.S. at 361, and thus a ripe injury for federal court review.

III. Forced-to-retire Plaintiffs have justiciable military claims.

Defendants argue that Air Force Officer and Air Force NCO somehow "do not have standing" because their "choice" to retire was allegedly "voluntary." Def. Memo at 12 (emphasis added); *but see* SAC ¶ 118 (Air Force Officer "submitted an early retirement request, *under protest*"); and ¶ 139 (Air Force NCO "submitted an early retirement request, *under duress*") (emphasis added). Defendants' argument is an attempt to misappropriate *entirely separate legal elements* about when a service member's "voluntary" retirement vitiates *a merits claim to benefits under the Tucker Act*, or vitiates a *procedural due process claim* against termination proceedings, neither of which claim is at issue here. The factors for determining "voluntariness" in those contexts have nothing to do with Plaintiffs' standing. The unquestionable and ongoing substantial burden on Plaintiffs' rights, including religious exercise, causes the requisite injury-in-fact to establish standing, thus triggering their right to relief under RFRA, the First Amendment, and the APA—none of which hinge on a multi-factor test for determining "voluntariness" of retirement.

To establish Article III standing, "the plaintiff must have suffered an injury in fact, the defendant must have caused that injury, and a favorable decision must be likely to redress it," with the "foremost" requirement being "injury in fact." *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990,

996 (11th Cir. 2020). Where, as here, a plaintiff "alleg[es] that the Government is compelling [the plaintiff] to violate personal religious beliefs" (thus effectively forcing them to retire "under protest" or "duress"), the plaintiff "states an Article III injury-in-fact." *New Doe Child #1 v. Cong. of United States*, 891 F.3d 578, 585-86 (6th Cir. 2018). Indeed, given that Defendants *admit* that Plaintiffs were *put to the choice* of violating their religious beliefs by either (1) succumbing to COVID-19 vaccination, (2) undergoing discipline, or (3) retiring (*see* Def. Memo at 13), Plaintiffs have unquestionably suffered (and continue to suffer) the requisite injury-in-fact to establish standing.

Defendants attempt to gloss over this reality by invoking entirely inapposite substantive legal frameworks for recovering military or civilian benefits in the Federal Court of Claims, which have nothing to do with Plaintiffs' religious and APA claims here. Specifically, Defendants attempt to argue that when a service member "voluntarily chooses to retire, he does not have standing to challenge that retirement," and "voluntary resignation cannot form the basis of a statutory or constitutional claim." Def. Memo at 12-14. But cases they invoke expose the absurdity of their argument. For instance, in *Scarseth v. United States*, 52 Fed. Cl. 458 (2002), the Court of Claims held that in order for a service member's separation to "serve[] as a basis for Tucker Act jurisdiction" in considering a "military pay claim," the discharge must not be voluntary—otherwise the service member has "no *statutory entitlement* to compensation." *Scarseth*, 52 Fed. Cl. at 467 (emphasis added); *see also Christie v. U.S.*, 207 Ct. Cl. 333, 335-36 (1975) (similar).

In those cases, the issue was effectively whether the plaintiffs fell "within the zone of interests protected by the law invoked"—a question once deemed to be a matter of "prudential standing," but which is now considered a predicate *merits* issue of statutory interpretation, *i.e.*, whether a particular person "has a right to sue under this substantive statute." *Lexmark Int'l, Inc. v. Static Control* Components, Inc., 572 U.S. 118, 126-27 (2014) (cleaned up) (emphasis added). Obviously, therefore, whether one has a substantive right under the Tucker Act or in a civilian

employment action in the Court of Federal Claims has nothing to do with whether Plaintiffs can sue under RFRA, the First Amendment, and the APA, which turn on entirely separate "legal question[s]," *Christie*, 207 Ct. Cl. at 335-36, such as substantial burden on religion, compelling interest, least restrictive means, etc.

The same problem infects Defendants' reliance on *Hargray v. City of Hallandale*, 57 F.3d 1560 (11th Cir. 1995), as there "[t]he only issue on appeal [wa]s whether the City deprived Hargray of [a property] interest [in continued employment] without due process." *Id.* at 1567. "If he resigned of his own free will even though prompted to do so by events set in motion by his employer, he relinquished his property interest *voluntarily* and thus cannot establish that the City 'deprived' him of it *within the meaning of the due process clause*." *Id.* (emphasis added) (cleaned up). Again, "voluntariness" there was an essential component of the *procedural due process claim*, which is entirely separate from the merits claims Plaintiffs raise here.

Defendants similarly err in arguing "the availability of additional administrative processes means the resignation was not involuntary." Def. Memo at 13. That principle makes sense in the two (unpublished) opinions Defendants cite, which consider whether one's retirement vitiates a *procedural due process claim* under the Fourteenth Amendment—*i.e.*, whether someone who *forgoes* a termination proceeding can then raise a *procedural challenge* to the very proceeding they chose to forgo. *See Carpenter v. Univ. of Ala. Health Servs. Found. PC*, 773 F. App'x 507, 512 (11th Cir. 2019); *Ross v. City of Perry*, 396 F. App'x 668, 670 (11th Cir. 2010); *see also Hargray*, 57 F.3d at 1567-68. Here, Plaintiffs do not raise procedural due process challenges to the Air Force's administrative separation proceedings. Instead they challenge the Air Force's *substantive requirement* that they succumb to forced COVID vaccination in violation of RFRA, the First Amendment, and the APA.

Even under the Defendants' misappropriated legal frameworks, Plaintiffs did not "voluntary resign" because an employer's lack of "good cause to believe that grounds for the termination…

existed" is an exception to voluntariness. *Hargray*, 57 F.3d at 1568-69. Defendants lacked such good cause. *See* SAC ¶ 183 ("The Air Force's process purporting to protect religious rights protected by federal law and the Constitution is both illusory and insincere."); *Air Force Officer*, 2022 WL 468799, at *10. Defendants further err in arguing that Plaintiffs' "five days to make a decision" was "much longer than the 'few minutes' the Eleventh Circuit held was sufficient time in *Hargray*," Def. Memo at 14, as there the Court found sufficient time only because the plaintiff knew of his likely impending choice to retire "at least a few weeks before he was called to the police station," *Hargray*, 57 F.3d at 1569 (emphasis added)—much longer than the five days Plaintiffs were given here.

Regardless, Defendants' cases are inapposite and if anything support Plaintiffs' position. Defendants have inarguably caused Plaintiffs the requisite and redressable injury-in-fact giving rise to Article III standing, and Plaintiffs' circumstances as pled are unquestionably within the zone of interests protected by RFRA, the Free Exercise Clause, and the APA.

IV. Plaintiffs did not fail to exhaust any military-Mandate administrative remedies.

As Defendants acknowledge, this Court already found that submitting a religious accommodation request and pursuing it through an internal process resulting in an "ultimate[] deni[al]" on "final appeal" *does* constitute exhaustion of administrative remedies. *Air Force Officer*, 2022 WL 468799, at *6. Each Plaintiff's request for religious accommodation has been denied on final appeal. [SAC ¶¶ 112-14, 134-136, 151-153, 172-174].

Defendants, however, assert Plaintiffs failed to exhaust because "[n]o Plaintiff has received a final decision on any discipline for failure to receive the COVID-19 vaccine." Def. Memo at 16. But that view is based on their mistaken belief, discussed above, that Plaintiffs' relevant harm is the *ultimate* discipline they might receive for remaining unvaccinated, rather than the substantial pressure that already exists to cave on their religious beliefs against COVID vaccination. Indeed, it is the "denial" of Plaintiffs' "accommodation" requests that "thus constitutes a 'substantial burden' under

RFRA," *Singh*, 185 F. Supp.3d at 217, which is why this Court was correct in previously holding that an ultimate denial of an accommodation request on final appeal satisfies administrative exhaustion in these circumstances.[11]

For this reason, any further exhaustion would be "futile" and "inadequate"—which are well-recognized exceptions to administrative exhaustion. *See M.T.V. v. DeKalb Cty. Sch. Dist.*, 446 F.3d 1153, 1159 (11th Cir. 2006). Because Plaintiffs' final denials have imposed the requisite substantial burden on their religious exercise, further exhaustion would be pointless, since Plaintiffs have already been "put to th[e] choice" of violating their religious beliefs and are suffering ongoing irreparable harm, *Holt*, 574 U.S. at 361, regardless of the ultimate discipline they receive.

Moreover, RFRA and the First Amendment do not require administrative exhaustion in the first place—at least beyond the final denials of Plaintiffs' religious accommodation requests that they've already received. RFRA expressly provides that a "person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense *in a judicial proceeding* and obtain appropriate relief against the government." 42 U.S.C. § 2000bb-1(c) (emphasis added). Thus, courts have "decline[d] . . . to read an exhaustion requirement into RFRA where the statute contains no such condition, and the Supreme Court has not imposed one." *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 876 F.3d 829, 838 (9th Cir. 2012) (internal citations omitted). Indeed, courts have held the same in the specific context of a service member's RFRA challenge to a

[11] Defendants also summarily assert in a footnote that "[t]he other *Mindes* factors . . . also support a finding of non-justiciability." Def. Memo at 14 n.6. But this Court has also already determined that the *Mindes* factors supported the justiciability of Air Force Officer's initial Motion for Preliminary Injunction (Air Force Officer, 2022 WL 468799, at *5-8), and Defendants raise absolutely no argument to the contrary here; *see also U.S. Navy SEALs 1-26 v. Austin*, No. 4:21-cv-01236-O, 2022 WL 1025144, at *9-11 (N.D. Texas March. 28, 2022) (continuing to find *Mindes* justiciability notwithstanding the Supreme Court's grant of a "partial stay" in an earlier proceeding in the same case). Given that the Air Force continues to authorize thousands of exemptions from its Mandate for secular reasons while granting zero exemptions to non-separating service members for religious reasons, Plaintiffs still have especially strong RFRA and First Amendment claims. Accordingly, this Court's earlier *Mindes* analysis still holds true here.

military order. *See, e.g.*, *Singh*, 168 F. Supp.3d at 225-26.

The same is true of a Free Exercise Clause challenge to a military requirement. *See id.* at 225 (citing and quoting *Brannum v. Lake*, 311 F.3d 1127, 1130 (D.C. Cir. 2002) and *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979)). As the D.C. Circuit has further explained, "resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board," and thus appeal to a Board for Correction of Military Records is not necessary as a matter of exhaustion where the "gravamen of the plaintiffs' claims resolves around constitutional challenges." *Adair v. England*, 183 F. Supp. 2d 31, 55 (D.D.C. 2002).

For the same reason, contrary to Defendants' argument (Def. Memo at 18), Plaintiffs need not pursue relief through the Air Force Board for Correction of Military Records (AFBCMR). The AFBCMR may possess authority to consider certain military matters, but it possesses no special competence or authority to "resolv[e]" Plaintiffs' claims "founded solely upon a constitutional right" and RFRA. *See Adair*, 183 F. Supp. 2d at 55. Further, "[a]pplying to the AFBCMR does not stay other proceedings." 32 C.F.R. § 865.3(g). And the AFBCMR is not subject to any time limit in resolving an application. *See*, *generally*, 10 U.S.C. § 1552; 32 C.F.R. § 865.0 *et seq.* As Defendants would have it then, while Plaintiffs currently face and would continue to face irreparable harm, Defendants can take an indefinite period of time to resolve an AFBCMR application.

Indeed, one of Defendants' own cited cases acknowledges that while a service member's ultimate discharge for fraudulent entry into the military was not subject to judicial review, his *procedural due process* challenge to the procedures used to discharge him from the military was in fact judicially reviewable. *Rucker v. Sec'y of the Army*, 702 F.2d 966 (11th Cir. 1983). Def. Memo at 18. Defendants also claim that a D.C. Circuit decision requires exhaustion to the BCMR "even for constitutional claims," but that case says the exact opposite. *See Bois v. Marsh*, 801 F.2d 462, 468 (D.C. Cir. 1986) (noting that "exhaustion might not be required if Bois were challenging her

incarceration by the military or the ongoing deprivation of some other liberty interest") (internal citations omitted); *see also Guitard v. U.S. Sec'y of Navy*, 967 F.2d 737, 741-42 (2d Cir. 1992) (noting an exception to military exhaustion where the "plaintiff has raised a substantial constitutional question," but holding that no "substantial constitutional issue [wa]s involved" there).

None of the many remaining cases that Defendants say require exhaustion to the BCMR actually involved Free Exercise Clause and RFRA claims arising from irreparable harm to religious exercise (Def. Memo at 18-19 and n.9)—other than some recent District Court decisions involving similar challenges to the military's COVID-19 vaccine Mandate (Def. Memo at 15-16). But as noted, those courts—unlike this Court in issuing the preliminary injunction in favor of Air Force Officer—failed to recognize the legally cognizable harm at issue, *i.e.*, the irreparable substantial burden on religious exercise posed by the final denial of service members' religious accommodation requests, thus putting them to the choice of violating their religious beliefs. *See Short v. Berger*, No. 22-1151-DMG, 2022 WL 1051852, at *4 (C.D. Cal. Mar. 3, 2022) (wrongly stating that plaintiff "must undergo separation proceedings before any *permanent* adverse consequences are imposed") (emphasis added); *Church v. Biden*, No. 21-2815-CKK, 2021 WL 5179215, at *1, 4, 10-11 (similar; discussing also plaintiffs did not receive a final denial and their requests remained pending). Defendants also fail to acknowledge RFRA's statutory text, and the supporting caselaw to the same effect, authorizing immediate "judicial" relief for RFRA violations. 42 U.S.C. § 2000bb-1(c) (emphasis added); *see Short*, 2022 WL 1051852, at *4; *Church*, 2021 WL 5179215, at *10-11; *but see Roberts*, 2022 WL 834148, at *6, n.4 (refraining from finding no exhaustion after wrongly holding that plaintiff's claim was unripe).

And glaringly, Defendants entirely fail to mention other recent federal court decisions engaging in judicial review of similar RFRA challenges to the military's COVID-19 vaccine Mandate—before any exhaustion through the BCMR. *See, e.g.*, *Doster*, 2022 WL 982299, at *9

(holding that exhaustion would be futile); *U.S. Navy SEALs 1-26 v. Biden*, 27 F.4th 336, 347 (5th Cir. 2022) (same); *U.S. Navy SEALs 1-26 v. Austin*, No. 4:21-cv-01236-O, 2022 WL 1025144 (N.D. Texas March 28, 2022); *Poffenbarger v. Kendall*, No. 3:21-cv-1, 2022 WL 594810 (S.D. Ohio Feb. 28, 2022); *Navy Seal 1 v. Austin*, No. 8:21-cv-2429-SDM-TGW, 2022 WL 534459 (M.D. Fla. Feb. 18, 2022). Plaintiffs have not failed to exhaust their administrative remedies.

V. The Court has jurisdiction over the APA claim, and Plaintiffs properly state the claim.

The APA claim—both as a military and a civilian claim—is ripe and well-pled. The Mandates contradict AFI 48-110, a mandatory Air Force regulation. Defendants' various arguments to the contrary fail. Defendants claim it is not ripe because no Plaintiff sought an exemption based on natural immunity. Def. Memo at 19-20. But Plaintiffs properly plead that Defendants "wrongfully denied Plaintiffs… the *opportunity* to seek" an exemption based on natural immunity. [SAC ¶ 355 (emphasis added)]. The DoD and Air Force Mandates expressly deny service members the opportunity to even *apply* for such a medical exemption based on natural immunity: "Individuals with previous COVID-19 infection or positive serology are not considered fully vaccinated and **are not exempt**." [Doc. 2-8 (emphasis added); *See also* Doc. 2-7, 2-4, 2-3]. Where Defendants expressly deny the *opportunity* to seek an exemption, they cannot argue unripeness for failure to seek it. *See Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 365-66 (1977) ("If an employer should announce his policy of discrimination by a sign reading 'Whites Only' on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs."). Similarly, Defendants mistakenly claim there was no "final agency action." Def. Memo at 9. But Plaintiffs properly plead there was. AFI 48-110 requires consideration of vaccine exemption on the basis of natural immunity. AFI 48-110 §§ 2-6; 1-4. Defendants offer no hope that they will allow service members to apply for a natural-immunity exemption to the COVID-19 vaccine. [SAC ¶ 355; Doc. 2-8]. It is clear no further administrative action is forthcoming. The agency action was final.

Defendants also suggest there is no "law" at issue. Def. Memo at 9, 20. But Air Force Instructions such as AFI 48-110, as regulations prescribed by the Secretary of the Air Force, have the force of law. *See*, *e.g.*, 5 U.S.C. § 301 & 10 U.S.C. §§ 9013(c), (g)(3) (authorizing Secretary of Air Force to prescribe regulations and exercise various other powers). *See also Guam Indus. Servs., Inc. v. Rumsfeld*, 405 F. Supp. 2d 16, 21 (D.D.C. 2005) (based on the above or substantially identical statutory provisions applicable to the Navy, holding Navy Instruction had the "force of law"); *U.S. v. Adcock*, 65 M.J. 18, 24 n.6 (C.A.A.F. 2007) (noting that U.S. government acknowledges that "all Air Force Instructions are mandatory").

Defendants also claim AFI 48-110 doesn't apply because it doesn't specifically mention COVID-19. Def. Memo at 20. But the list of diseases to which it applies is expressly non-exclusive. Section 3-1(a)(3), cited by Defendants, provides that "**[a]t a minimum**" natural immunity should be checked for five listed diseases (measles, rubella, hepatitis A and B, and varicella) as to certain personnel. But COVID-19 does not appear on the Instruction's list of mandatory vaccines in the first place (AFI 48-110, Table D-1), while Defendants concede the Instruction applies to COVID-19. [*See*, *e.g.*, Doc. 2-11, Air Force Religious Accommodation Request form for COVID-19 vaccine (requiring requesters to state they are "requesting a religious accommodation… in accordance with AFI 48-110"); Doc. 2-6, Air Force Order to Receive Mandatory COVID-19 Vaccine (citing AF 48-110 as a "Reference")].[12]

Defendants also contend that the agency action was not "arbitrary and capricious" because an agency action rests on "evaluation of complex scientific data within [an] agency's technical

[12] Defendants also assert that it is "not clear" how AFI 48-110 applies to Air Force Officer in her civilian capacity, but they do not deny that it does apply. Def. Memo at 9. It does apply to her. *See* AFI 48-110. p. i ("Applicability. This regulation applies to… uniformed Departments of the… Air Force... including reserve components…; nonmilitary persons under military jurisdiction," etc.). Defendants cite Section 3-3, but that section simply includes various rules applicable to "Certain civilian employees." It does not change the applicability of the natural immunity exemption under § 2-6(a)(1)(b) to Air Force Officer. Defendants do not explain how it could.

expertise." Def. Memo at 9. But there is no basis for claiming the evaluation of complex scientific data is within *Defendants'* (the agencies') technical expertise, and they do not contend that it is. Instead, Defendants claim to defer to the supposed technical expertise of *another* agency, the CDC, whose guidance they claim is "dispositive." Def. Memo at 9, 21. But the CDC's COVID-19 guidance has been proven not worthy of such absolute deference. *See*, *e.g.*,; *Health Freedom Def. Fund, Inc. v. Biden*, No. 8:21-CV-1693-KKM-AEP, 2022 WL 1134138 (M.D. Fla. Apr. 18, 2022) (holding CDC's mask mandate rule was arbitrary and capricious under APA); *State v. Becerra*, No. 8:21-CV-839-SDM-AAS, 2021 WL 2514138, at *43 (M.D. Fla. June 18, 2021) (holding CDC's conditional sailing order was arbitrary and capricious under the APA); *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (holding CDC's eviction moratorium beyond statutory authority).

In any event, both the CDC and Defendants *do* acknowledge the existence of natural immunity, but in violation of the APA Defendants have wrongfully denied service members the opportunity to seek such an exemption.[13] [*See* Doc. 58-1 at 46, filed in *Doster*]. As Defendants admitted in a submission in a related case, "According to medical personnel… COVID-19 disease does provide some degree of natural protection" and "the duration of protection may differ depending on disease severity, person's age, and changes in the virus." *Id.* While Defendants claim the "length and completeness" of natural-immunity protection is "unclear," *id.*, they do not and cannot establish here that the length and completeness of **vaccine** protection is "clear" (let alone as good as or superior to natural-immunity protection). And Defendants made no effort to consider the natural-immunity factors they concede are relevant—"disease severity, person's age, and changes in the virus"—contrary to the mandatory language of the Instruction that requires that "[h]ealth care providers **will** determine a medical exemption based on the **health of the vaccine candidate** and

[13] Defendants' failure to consider natural immunity is also relevant to the RFRA claims and First Amendment claims.

the nature of the immunization under consideration." AFI 48-110, § 2-6(a) (emphasis added). Rather, they deny altogether the opportunity to seek a medical exemption based on natural immunity under any circumstances.

Regardless, Defendants' claimed deference to the CDC is disingenuous because the Defendants only *selectively* defer to the CDC. For example, the CDC recommends vaccination for pregnant women,[14] but Defendants grant exemptions to pregnant women for at least the term of their pregnancy (while at the same time denying any religious accommodation request from the same women). [*See* Doc. Doc. 53 at 7 & Doc. 53-1 filed in *Doster v. Kendall*, No. 1:22-cv-0008-MWM (S.D. Ohio)]. *Cf. Doe v. San Diego Unified Sch. Dist.*, No. 21-56259, 2021 WL 5600620 (9th Cir. Nov. 28, 2021) (enjoining student COVID-19 vaccine mandate on Free Exercise grounds due to pregnancy exemption); *vacated, after the school district removed the pregnancy exemption, by* 19 F.4th 1173, 1175 (9th Cir. 2021). Defendants have not demonstrated "technical expertise" in picking and choosing which CDC guidance to follow and which to not. The only COVID-19 APA case Defendants cite is *Doe v. Austin*, No. 3:21-cv-1211-AW-HTC, 2021 WL 5816632 (N.D. Fla. Nov. 12, 2021), and that case did not address the same points relevant here including Defendants' manifestly false explanation that it treats the CDC's guidance as "dispositive." Plaintiffs properly state a claim that the Mandates are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and without observance of procedure required by law.

VI. Venue is proper.

Venue is proper under 28 U.S.C. § 1391(e)(1), which provides in part that, in a case against U.S. government defendants, venue is proper in any district where "the plaintiff resides if no real property is involved in the action." § 1391(e)(1)(C). Numerous courts, including courts in the

[14] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/pregnancy.html ("COVID-19 vaccination is recommended for people who are pregnant, breastfeeding, trying to get pregnant now, or might become pregnant in the future.").

Eleventh Circuit, consistently interpret this statutory provision (or its identical predecessor, § 1391(e)(3)) to mean venue is proper in a multi-plaintiff case if *any* plaintiff resides in the district and to not require *all* plaintiffs to reside in it. *See A.J. Taft Coal Co., Inc. v. Barnhart*, 291 F. Supp.2d 1290, 1301 (N.D. Ala. 2003) ("For over thirty years federal courts have conclusively and consistently held that the statutory language in 28 U.S.C. § 1391(e)(3) regarding the residency of 'the plaintiff' should be interpreted to mean *any* plaintiff rather than all plaintiffs"; collecting numerous cases); *Sidney Coal Co. v. Soc. Sec. Admin.*, 427 F.3d 336, 344-45 (6th Cir. 2005) ("Each court faced with the same issue has interpreted 'the plaintiff' to mean 'any plaintiff,' finding that Congress intended to broaden the number of districts in which suits could be brought against government entities"; citing *A.J. Taft Coal* and several other cases). Two Plaintiffs, Air Force Officer and Air Force NCO, undisputedly reside in this district. Therefore venue is proper.

Defendants mistakenly assert, in conclusory fashion, that § 1391(e)(1)(C) does not apply because the other two Plaintiffs, Air Force Special Agent and Air Force Engineer, don't reside in the district. Def. Motion at 22. Defendants cite no cases supporting this interpretation of the statute and ignore the "conclusive[] and consistent[]" authority that venue is proper where *any* plaintiff resides in the district rather all plaintiffs. Venue is proper under § 1391(e)(1)(C).[15]

VII. Plaintiffs are not misjoined, and Air Force Special Agent and Air Force Engineer should not be severed.

As Defendants would have it, "judicial efficiency" requires Plaintiffs and the thousands of putative class members to file their own individual lawsuits and let the "over 670 district court judges throughout the country" handle them. Def. Memo at 25. Plaintiffs have a curious understanding of judicial efficiency.

[15] Venue is also proper under § 1391(e)(1)(B) because "a substantial part of the events or omissions giving rise to the claim"—including those relating to Air Force Officer and Air Force NCO—occurred in this district. § 1391(e)(1)(B); [SAC ¶¶ 21, 62, 72].

Plaintiffs are properly joined. Under the Rules, plaintiffs may join in one action if "(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action." Fed. R. Civ. Pro. 20(a)(1). "The Supreme Court [in *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966)] has instructed the lower courts to employ a liberal approach to permissive joinder of claims *and* parties in the interest of judicial economy." *Alexander v. Fulton Cnty.*, 207 F.3d 1303, 1323 (11th Cir. 2000), *overruled on other grounds by Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003). "[J]oinder of claims, parties, and remedies is strongly encouraged." *United Mine Workers*, 383 U.S. at 724.

Plaintiffs easily satisfy this liberal joinder standard. Plaintiffs' claims arise out of the same transaction or occurrence or series of transactions or occurrences, and involve common questions of law and fact. For example, Plaintiffs all allege sincerely held religious beliefs as a basis for objecting to Defendants' Mandates, that Defendants have a discriminatory policy of denying all religious accommodation requests to the Mandates no matter the circumstances (except for service members already slated for separation), and assert the same RFRA, First Amendment, and APA claims. The key questions of law and fact are not just common, they're identical. Even if not all questions of law and fact are in common, at least *some* certainly are. *See Alexander*, 207 F.3d at 1324 ("The second prong of Rule 20 does not require that *all* questions of law and fact raised by the dispute be common, but only that *some* question of law or fact be common to all parties."). Indeed, Rule 20 is particularly easy to satisfy in class actions alleging a discriminatory policy applicable to many, such as Defendants' policy here. *See Alexander*, 207 F.3d at 1323-24 (citing and discussing *Mosley v. General Motors Corp.*, 497 F.2d 1330 (8th Cir.1974), a "leading case" on joinder).

Defendants assert a lack of commonality because they are required to make individualized assessments of religious accommodation requests so every service member's claims needs to be

litigated in its own lawsuit. But Plaintiffs properly allege that Defendants have an Air Force-wide *policy of failing to make that individualized assessment*. [*See* SAC, *e.g.*, ¶¶ 10, 183, 192-196, 236]. At the very least, some key questions of law and are common to all parties. *Alexander*, 207 F.3d at 1324.

Further, contrary to Defendants' assertion, the interests of judicial economy, case management, prejudice to parties, and fundamental fairness all weigh heavily in favor of joinder and against severance under Rule 21. To force the four Plaintiffs and thousands of other service members to file their own individual lawsuits would result in profound judicial inefficiency, case management morass, and prejudice and fundamental unfairness to thousands of service members who face tremendous challenges obtaining legal representation as it is [*see*, *e.g.*, Doc. 88-2 ¶ 12]. The joinder and class-action mechanisms are designed for cases such as these.[16]

Finally, Defendants' reliance on an unpublished order in *Crosby v. Austin* is misplaced. Unlike Plaintiffs in the present case, the *Crosby* plaintiffs did not all assert religious objections, did not seek relief through a class action, and were 15 service members from five different military services. Feb. 22, 2022 Order, *Crosby v. Austin*, No. 8:21-cv-2730-TPB-CPT (M.D. Fla.), ECF No. 44. Here, Plaintiffs all assert religious objections, seek Class-Wide Relief, and are four service members in one branch of the military, the Air Force. Plaintiffs suggest the *Crosby* court in its discretion could or should still have permitted joinder in that case, but regardless the order is inapposite. Plaintiffs are properly joined.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion to Dismiss.

[16] To the extent Defendants' arguments against joinder are actually arguments against Class-Wide Relief, they are likewise unavailing. [*See* Doc. 88-1 and Plaintiffs' forthcoming Reply in further support of their motions for Class-Wide Relief].

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Respectfully submitted,

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