**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE SIXTH CIRCUIT**

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| HUNTER DOSTER, et. al. | : | Case Nos. 22-3497; 22-3702 |
| Plaintiffs/Appellees | : | |
| v. | : | |
| HON. FRANK KENDALL, et. al. | : | |
| Defendants/Appellants | : | |

**PLAINTIFFS/APPELLEES REPLY TO DEFENDANT'S OPPOSITION TO SUPPLEMENT THE RECORD**

Plaintiffs/Appellees, through Counsel, moved this Court for an order permitting them to supplement the record with a June 2, 2022, Department of Defense Inspector General Report, and action thereon by the Secretary of Defense on September 2, 2022, which were filed in the District Court. [Doc. 91-1, PageID#5042-5045].

**ARGUMENT**

The Court should permit Plaintiffs to supplement the record in both appeals with the Report.

Defendants argue that this Court should not supplement the record with Memo 1 and Memo 2 stating that these documents are new evidence. Well, that is exactly why we have asked to supplement the record. There is no question but that this evidence is highly relevant to the appeals before this Court – the Government

has persistently denied (in the fact of overwhelming evidence to the contrary) that it has engaged in a systemic pattern of religious discrimination in its handling of religious accommodation requests to the COVID-19 vaccination mandate. Now, a Department of Defense Inspector General report provides yet further damning proof of it having done so.

In deciding whether to exercise the Courts' inherent authority to permit supplementation, this Court in *Davis v. City of Clarksville*, 2011 U.S. App. LEXIS 26534, *2 (6th Cir. 2011) held that, "a primary factor in exercising such inherent authority should be 'whether acceptance of the proffered material into the record would establish beyond any doubt the proper resolution of the pending issues.'" *Id.*, *citing Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1013 (6th Cir. 2003) (*quoting CSX Transp. Inc. v. City of Garden City*, 235 F.3d 1325, 1330 (11th Cir. 2000)). Here the proffered material does.

The Inspector General Reports go straight to the issue of whether Plaintiffs are likely to succeed on these appeals. The findings of the Inspector General in Memo 1 establish "beyond any doubt the proper resolution of the pending issues." *Id.* Notably, the Department of Defense, Inspector General, found:

- ". . . a trend of generalized assessments rather than the individualized assessment that is required by Federal law and DoD and Military Service policies"; and that

- "[T]he denial memorandums we reviewed generally did not reflect an individualized analysis, demonstrating that the Senior Military Official considered the full range of facts and circumstances relevant to the particular religious accommodation request".

These findings demonstrate that Defendants were put on notice by the Inspector General of the Department of Defense, that Defendants were violating Federal law, here RFRA, as early as June 2, 2022. This admission by Defendant's own internal watchdog goes directly to the heart of the issues in these appeals.

As the Defendants correctly note in their opposition to Plaintiff's request to supplement the record, "exceptional circumstances" are necessary to permit the supplementation of evidence. *Vital Pharm., Inc. v. Alfieri*, 23 F.4th 1282, 1288 (11th Cir. 2022). Here, we have such an exceptional circumstance, an admission by the internal military watchdog responsible for policing compliance with law, indicating that Defendants did not comply with the very laws that are at the heart of the claims in this case.

Defendants also argue that this Court should not take judicial notice of the Inspector General Report under Rule 201 of the Federal Rules of Evidence because they argue that they dispute the findings of their own Inspector General (but do not dispute the authenticity of the Inspector General's Report or that it is a public record).

Well, "public records and government documents are generally considered 'not to be subject to reasonable dispute.'" *Total Benefits Planning Agency Inc. v. Anthem Blue Cross & Blue Shield*, 630 F. Supp. 2d 842 at 849, *citing, Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999), *overruled in part on other grounds, Swierkiewicz v. Sorema* N.A., 534 U.S. 506, 508-14 (2002).

Indeed, "[Rule 201] applies to appellate courts taking judicial notice of facts supported by documents not included in the record on appeal." *United States v. Ferguson*, 681 F.3d 826, 834 (6th Cir. 2012). As for the Government's assertions that it disputes the contents, this Court's case law has a response to that: "this court may take judicial notice of public records, and we are not required to accept as true factual allegations that are contradicted by those records." *Hall v. GMS Mgmt. Co.*, No. 21-4210, 2022 U.S. App. LEXIS 22402 (6th Cir. Aug. 11, 2022), *citing Bailey v. City of Ann Arbor*, 860 F.3d 382, 386-87 (6th Cir. 2017).

Judicial notice is thus appropriate.

## CONCLUSION

The motion to supplement the record should be granted. In the alternative, the Court should take judicial notice the Inspector General Report.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I have served a copy of the foregoing upon all Counsel of record via CM/ECF, this 28th day of September, 2022.

/s/Christopher Wiest
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