UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

TANNER W. ROTH; JON W. SMITHLEY; LOGAN M. PRIEBE; VICTORIA S. ROBERTS; TIMOTHY C. BEXTEN; ZACHARY R. BRAUM; ARMAND G. FONDREN II; NATHAN P. GAVIC; BRENNAN L. BARLOW; MICHAEL T. EDWARDS; MATTHEW J. CASCARINO; MATTHEW C. DOWNING; KEVIN DUNBAR; CAMERON M. GRIM; AARON F. KARPISEK; IAN C. McGEE; EVAN McMILLAN; ZACHARY MORLEY; MATTHEW L. NELSON; BRYAN STIGALL; KYNAN VALENCIA; MORGAN T. VIAR; DANIEL VERA PONCE; ADAM R. CASSIDY; TRISTAN M. FRIES; AIRMEN 1-11;	)	Civil Action No. 8:22-cv-3038
Plaintiffs,	)	
v.	)	
LLOYD J. AUSTIN, III, in his official capacity as United States Secretary of Defense; UNITED STATES DEPARTMENT OF DEFENSE; FRANK KENDALL, III, in his official capacity as United States Secretary of the Air Force; ROBERT I. MILLER, in his official capacity as Surgeon General of the United States Air Force; MICHAEL A. LOH, in his official capacity as the Director of the Air National Guard; DAVID A. WEISHAAR, in his official capacity as Adjutant General of the Kansas National Guard; DARYL L. BOHAC, in his official capacity as Adjutant General of the Nebraska National Guard;	)	
Defendants.	)	

BRIEF OF PLAINTIFFS IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

Plaintiffs are 36 members of the United States Air Force (active duty), United States Air Force Reserve, or the Air National Guard. The vast majority are stationed either at Offutt Air Force Base near Omaha, Nebraska, or at McConnell Air Force Base in Wichita, Kansas. They have sacrificed selflessly for the sake of our country and our freedom. For them, the oath to "support and defend the Constitution of the United States" is not an abstraction. It is a daily vocation.

Unfortunately, Plaintiffs are now being denied the very liberty they pledged to protect. Each has a sincere religious objection to receiving a COVID-19 vaccination. Each is willing to adopt any number of other measures to protect themselves and others from the spread of COVID-19. Indeed, Defendants had successfully employed such alternative measures for many months, during which time vaccines have been widely available. But now, despite 96.4% of Air Force members being fully vaccinated, Defendants have nonetheless ordered Plaintiffs to forfeit their religious beliefs and get the vaccine, or forfeit their careers. DAF COVID-19 Statistics, Mar. 15, 2022, https://www.amc.af.mil/News/Article-Display/Article/2959594/daf-covid-19-statistics-march-15-2022/.

The Air Force has made it quite clear that the theoretical availability of religious accommodation is little more than an illusion. Rejection is all but certain. The numbers tell the story. As of March 15, 2022, the Air Force reported that it had rejected 5,259 religious accommodation requests and appeals and had granted only 23. *Id.* That is a 99.6% rejection rate. When their discharge from military service occurs, Plaintiffs will lose the honor of serving their country, lose the careers they have built (and the attendant health care and educational benefits for

themselves and their family), and in cases where they are forced out prior to qualifying for retirement benefits, they will lose the pensions they have been working toward.

It is regrettable that litigation against the military they serve so loyally is necessary to protect Plaintiffs' religious liberty. While the Air Force's policies generally recognize its obligation to individually assess Plaintiffs' accommodation requests and its duty to offer a compelling justification for any substantial burden on their religious exercise, the Air Force's stated commitment to religious freedom—at least with respect to vaccine accommodations—is mere lip service. Simply because Plaintiffs *requested* a religious accommodation, they have suffered adverse employment actions, including denial of opportunities to attend military training schools, loss of leadership positions, possible placement in non-deployable status, and loss of leave and travel privileges for both official and unofficial purposes. These interim adverse actions foreshadow the predetermined outcome of Plaintiffs' requests.

None of Plaintiffs' requests have been approved. Of the 36 Plaintiffs, 19 have already received denials. Others have been informed that denial is inevitable. All 19 Plaintiffs who received their denials appealed. Of those, five have already seen their appeals denied. Those five Plaintiffs face termination within weeks. A preliminary injunction is necessary for all Plaintiffs, but it is most urgent with respect to those five. Although there are steps that usually occur prior to final discharge—including the issuance of a letter of reprimand and the creation of an unfavorable information file—those steps can occur quickly, often in only a few weeks. At that point, they are discharged. It is essential that Defendants (who have taken, on average, about six months to process these religious accommodation claims issuing what are essentially identical rejection letters) not be permitted to rush the final stage of discharging these Airmen. As will be

demonstrated below, Defendants are not injured in any way by being enjoined for the period while this case is being adjudicated.

Moreover, Defendants have undermined their stated justifications for the vaccine mandate by broadly exempting all service members who are participating in vaccine trials—regardless of whether they have any kind of immunity from COVID-19—and by granting at least 3,781 medical and administrative exemptions while denying virtually all religious exemptions. DAF COVID-19 Statistics – January 2022, *available at* https://www.af.mil/News/Article-Display/Article/2831845/daf-covid-19-statistics-january-2022/. Defendants' discriminatory policies and actions plainly violate the Religious Freedom Restoration Act of 1993 ("RFRA"). Defendants' policies and actions also violate the Free Exercise Clause of the First Amendment because their vaccine mandate is not neutral and generally applicable. And for the same reasons that they cannot meet RFRA's demanding strict scrutiny standard, they cannot meet the First Amendment's either. The Court should grant Plaintiffs' request for a preliminary injunction to protect their religious liberty rights and maintain the status quo of their active service, reserve service, and guard service.

Importantly, the Fifth Circuit of the United States Court of Appeals has already ruled on the same statutory and constitutional questions presented in this case in *U.S. Navy SEALs 1-26 v. Biden*, 2022 U.S. App. LEXIS 5262, ___ F.4th ___ (Feb. 28, 2022). The Fifth Circuit ruled in favor of the Plaintiff Navy SEALs that they were likely to prevail on their RFRA and First Amendment claims and declined to stay the Preliminary Injunction imposed by the district court. In addition, the U.S. District Court for the Middle District of Georgia ruled on the same statutory and constitutional question presented in this case—against the same Air Force Defendants—in *Air Force Officer v. Austin*, 2022 U.S. Dist. LEXIS 26660 (Feb. 15, 2022). The Georgia court ruled in favor of the Plaintiff Air Force officer and issued a Preliminary Injunction. Also, the U.S.

District Court for the Middle District of Florida ruled on the same statutory and constitutional questions presented in this case in *Navy SEAL 1 v. Austin*, 2022 U.S. Dist. LEXIS 31640 (Feb. 18, 2022). The Florida court ruled in favor of the Plaintiff Navy SEAL and issued a Preliminary Injunction. Although these precedents are not binding on this Court, they offer significant persuasive authority in demonstrating the likelihood that Plaintiffs in the instant matter will prevail on the merits.

STATEMENT OF FACTS

I. Plaintiffs' Position and Training

Plaintiffs are 36 members of the active duty United States Air Force, United States Air Force Reserve, or the Air National Guard. The majority are stationed in Nebraska—18 at Offutt Air Force Base near Omaha, and one at the Lincoln Air National Guard Base. In addition, nine are stationed at McConnell Air Force Base in Wichita, Kansas. The rest are stationed at various Air Force Bases around the country. Every one of them has filed a Religious Accommodation Request (RAR) to be exempted from the Air Force's COVID-19 vaccination requirement. The Air Force has granted none of these requests.

At the time of this filing, 19 Plaintiffs have had their RARs denied by the Air Force—with virtually identical denial letters. Each of them has appealed the denials. Of those 19, five have had their appeals denied as well. While all Plaintiffs face involuntary separation in short order, those five Plaintiffs face imminent involuntary separation from the Air Force within a period of weeks.

Specifically, Plaintiffs Tanner Roth, Jon W. Smithley, Logan Priebe, Victoria Roberts, and Airman #1[1] face impending discharge for refusing the COVID-19 vaccination on religious grounds. *See* Decls. of Pl. Tanner Roth ¶¶ 18-22, Jon W. Smithley ¶¶ 21-27, Logan Priebe ¶ 11, Victoria Roberts ¶ 18, and Airman #1 ¶ 15. Moreover, the denial of additional Plaintiffs' initial requests and appeals have been mounting.

Seventeen Plaintiffs are pilots, and they have spent many years in training, at tremendous personal cost and sacrifice, to attain the status they have achieved and to serve their country. In addition, American taxpayers have spent an extraordinary amount of money to provide the highly specialized training Plaintiffs need to fly sophisticated military aircraft. According to a Rand study commissioned by the Air Force, the cost of training an Air Force pilot of an RC-135 (the principal aircraft at Offutt, which has the same platform as a KC-135, the principal aircraft at McConnell) is approximately $5.5 million for *each* pilot. *See* Michael G. Mattock, *et al*., *The Relative Cost-Effectiveness of Retaining Versus Accessing Air Force Pilots*, Rand Research Report, available at https://www.rand.org/pubs/research_reports/RR2415.html. Using the RC-135 training cost as a figure for each, the Air Force has spent approximately $93.5 million training that subgroup of Plaintiffs. That massive investment of taxpayer dollars, and those pilots' immense contributions to the defense of this country, will be wasted if Defendants terminate them.

Of the 36 Plaintiffs, 29 have already contracted and recovered from COVID-19 and therefore possess natural immunity.

[1] Airman 1-11 have requested anonymity because they are in possession of sensitive, top-secret intelligence; and revealing their names would expose to them potential counter-intelligence operations. Therefore, Plaintiffs will file a motion for protective order and for authorization to proceed under pseudonyms.

II. Plaintiffs' sincerely held religious beliefs regarding COVID-19 vaccination

As a threshold matter, in all but one of the rejection letters received by Plaintiffs so far,[2] Defendants conceded the sincerity of Plaintiffs' religious objection to receiving a COVID-19 vaccination. It is important to point out that Plaintiff Jon W. Smithley is an Air Force Chaplain—whose expression of sincerely held religious beliefs is at the very center of his duties in the Air Force. It may also be helpful to summarize herein what Plaintiffs' believe. Plaintiffs sincerely held religious beliefs forbid each of them from receiving the COVID-19 vaccine for deeply rooted reasons grounded in their Christian faith. *See,* Decls. of Pl. Ian McGee ¶¶ 9-14, Matthew Cascarino ¶¶ 7-12, Evan McMillan ¶¶ 8, 11-15, 20, Jon W. Smithley ¶¶ 15-16, Tanner Roth ¶¶ 10, 12-16, Airman #10 ¶¶ 10, 12-16, Airman #11 ¶¶ 10-16, Victoria Roberts ¶¶ 9-14, Airman #1 ¶¶ 10-12, Logan Priebe ¶¶ 6-7, and Kynan Valencia ¶¶ 10-11. Although each Plaintiff's RAR and personal articulation of his religious objection to the vaccine varies somewhat from the others, there are several particular beliefs that are shared among multiple plaintiffs.

Multiple plaintiffs hold to the sincere religious belief that all life is sacred, from conception to natural death, and that abortion is the impermissible taking of an innocent life in the womb. *See, e.g.,* Decls. of Pl. Ian McGee ¶ 12, Matthew Cascarino ¶ 10, Evan McMillan ¶

[2] The one letter that did not concede the sincerity of the applicant's religious beliefs was that received by Airman #8, which claimed that the fact he had received a vaccine in the past undermined the sincerity of his beliefs. However, the letter did not address the information that Airman #8 had provided, which fully explained why his taking of vaccines in the past did not undermine his present exercise of his faith.

14, Tanner Roth ¶ 14, Airman #10 ¶ 13, Victoria Robert ¶ 12, Airman #1 ¶ 12, Logan Priebe ¶ 7, and Kynan Valencia ¶ 11. They are unable to receive the COVID-19 vaccine due to what they understand is the use of aborted fetal cell lines in its testing, development, or production. *Id.* Plaintiffs believe that receiving the COVID-19 vaccine would be participating in the abortion enterprise. *Id.* Some of them did not learn of the vaccine's connection to aborted fetal cell lines until it became a prominent point of public discourse over the COVID-19 vaccine, but they object to being complicit in the moral evil of abortion based on their sincerely held beliefs and cannot consent to benefiting from the vaccine in the light of that information. *Id.* This objection has caused those Plaintiffs to forgo the use of other products that use aborted fetal cell lines in their testing, development, or production. *Id.*

Multiple Plaintiffs believe that the human body is God's temple, and that they must not take anything into their bodies that God has forbidden or that would alter the functions of their body, particularly substances that include messenger RNA (mRNA). *See, e.g.*, Decls. of Pl. Ian McGee ¶ 13, Matthew Cascarino ¶ 11, Evan McMillan ¶ 14, Tanner Roth ¶ 15, Airman #10 ¶ 12, Airman #11 ¶ 13-14, and Victoria Roberts ¶ 13. In accordance with this religious belief, multiple plaintiffs carefully monitor what they take into their bodies, and they believe they are compelled to avoid anything that adversely alters, or may modify, their bodies' natural functions in a manner they believe is not designed by God. *Id.* It is well documented that the COVID-19 vaccine uses mRNA technology, which causes cells to produce a spike protein that they would not normally produce. *See* Ctrs. for Disease Control & Prevention, "Understanding mRNA COVID-19 Vaccines," http://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/mrna.html (Mar. 4, 2021). It is also well-documented that the COVID-19 vaccine has resulted in a statistically significant number of serious adverse reactions, including myocarditis, a potentially fatal

inflammation of the heart muscles, and pericarditis, a potentially fatal inflammation of the heart tissue, especially in men. *See* App. 697-700, Patricia Kime, *DoD Confirms: Rare Heart Inflammation Cases Linked to COVID-19 Vaccines*, Military.com (June 30, 2021), https://www.military.com/daily-news/2021/06/30/dod-confirms-rare-heart-inflammation-caseslinked-covid-19-vaccines.html. These are follow-on consequences that can compound the initial defilement of one's body through the injection of the COVID-19 vaccine itself.

Several Plaintiffs have also determined that they should not take the COVID-19 vaccination through personal prayer and the seeking of direction from the Holy Spirit. *See, e.g.*, Decl. of Pl. Ian McGee ¶ 15, Matthew Cascarino ¶ 12, Evan McMillan ¶ 15, Tanner Roth ¶ 16, Airman #11 ¶ 16, and Victoria Roberts ¶ 14. Constant prayer and conforming their conduct to the divine guidance are central to the exercise of their religious beliefs. Failure to heed the guidance that they have been given through prayer would be contrary to their religious beliefs.

III. Defendants' Vaccine Mandate

Defendants have mandated that Plaintiffs be vaccinated against COVID-19; have taken interim adverse actions against Plaintiffs while their RARs remain pending; and have initiated the process of terminating Plaintiffs' military careers and stripping them of associated benefits.

On July 29, 2021, President Biden announced that he had directed the Department of Defense ("DoD") to add the COVID-19 vaccine to its list of required immunizations for military service members.[3] Less than one month later, on August 24, 2021, Defendant Secretary of Defense Lloyd J. Austin issued a memorandum directing the DoD to vaccinate all active-duty, reserve, and

[3] The White House, "FACT SHEET: President Biden to Announce New Actions to Get More Americans Vaccinated and Slow the Spread of the Delta Variant" (July 29, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-president-biden-to-announce-new-actions-to-get-more-americans-vaccinated-and-slow-the-spread-of-the-delta-variant/.

national guard service members against COVID-19.[4] The memo made clear that service members who have contracted and recovered from COVID-19 must still receive a vaccination. But the memo also exempted from the mandate all service members who were currently participating in a COVID-19 clinical trial—even those given a placebo. *Id.* And the memo specified that the mandate "will be subject to any identified contraindications and any administrative or other exemptions established in Military Department policy." *Id.*

On September 3, 2021, Defendant Secretary of the Air Force Frank Kendall announced that the "Department of Air Force is in lockstep with Secretary Austin's order to vaccinate service members against COVID-19."[5] The Air Force adopted and implemented Secretary Austin's August 24 memorandum as its mandatory COVID vaccine guidelines, directing active duty personnel to become vaccinated within 60 days and Air National Guard and Air Force Reserve personnel to become to become vaccinated within 90 days. Defendant Kendall issued his own memorandum for Department of the Air Force commanders, stating, "Effective immediately, commanders in the Department of the Air Force shall take all steps necessary to ensure all uniformed Airmen and Guardians receive the COVID-19 vaccine . . . ." He also stated: "Only COVID-19 vaccines that receive full licensure from the Food and Drug Administration (FDA) will be utilized for mandatory vaccinations unless a military member volunteers to receive a vaccine

[4] Secretary of Defense, Memorandum, "Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members" (Aug. 24, 2021), Exhibit A to Complaint (Doc. 1), also available at https://media.defense.gov/2021/Aug/25/2002838826/-1/-1/0/MEMORANDUM-FOR-MANDATORY-CORONAVIRUS-DISEASE-2019-VACCINATION-OF-DEPARTMENT-OF-DEFENSE-SERVICE-MEMBERS.PDF

[5] Office of the Secretary of the Air Force (@SecAFOfficial) Twitter, https://twitter.com/SecAFOfficial/status/1430631668893814795/photo/1.

that has obtained U.S. Food and Drug Administration Emergency Use Authorization or is included in the World Health Organization's Emergency Use Listing."[6]

On December 7, 2021, Defendant Kendall issued another Memorandum on the Subject of Supplemental Coronavirus Disease 2019 Vaccination Policy stating: "Refusal to comply with the vaccination mandate without an exemption will result in the member being subject to initiation of administrative discharge proceedings." The Memorandum also stated: "Service members separated due to refusal of the COVID-19 vaccine will not be eligible for involuntary separation pay and will be subject to recoupment of any unearned special or incentive pays."[7] And on November 30, 2021, Defendant Austin issued a Memorandum applying all of the requirements and standards of the mandate applicable to active duty members of the military to members of the non-federalized National Guard.[8]

IV. Defendants' Discriminatory Actions in Implementing their Vaccine Mandate

Consistent with their obligations under the Religious Freedom Restoration Act of 1993 and the First Amendment, Defendants' policies and regulations generally require an individualized assessment of RARs, and the regulations place the burden on the government to demonstrate a compelling justification for denials. *See* Department of Defense Instruction (DODI) 1300.17, "Religious Liberty in the Military Services" (Sept. 1, 2020); *see also* Secretary of the Air Force Instruction 52-201, "Religious Freedom in the Department of the Air Force" (June 23, 2021). But

[6] Secretary of the Air Force, Memorandum for Department of the Air Force Commanders, Sept. 3, 2021, Exhibit B to Complaint (Doc. 1).
[7] Secretary of the Air Force, Memorandum for ALMAJCOM-FLDCOM-FOA-DRU/CC DISTRIBUTION C, Subject: Supplemental Coronavirus Disease 2019 Vaccination Policy, Dec. 7, 2021, Exhibit C to Complaint (Doc. 1).
[8] Secretary of Defense, Memorandum for Secretaries of the Military Services, Chairman of the Joint Chiefs of Staff, Under Secretary of Defense for Personnel and Readiness, Chiefs of the National Guard Bureau, Nov. 30, 2021, Complaint (Doc. 1, Exhibit D).

Defendants have made clear that, at least with respect to the COVID-19 vaccine mandate, the individualized assessments and burden on the government were a sham.

In every one of the 36 Plaintiffs' cases, their mere requests were met with immediate adverse actions. Plaintiffs have been denied the ability to attend training necessary for their advancement, denied the ability to participate in some exercises, denied official travel within the military, delayed promotional upgrade, and made ineligible for selected assignment changes. *See, e.g.*, Decls. of Pl. Ian McGee ¶ 21, Matthew Cascarino ¶¶ 13-15, Evan McMillan ¶ 17, Jon W. Smithley ¶ 17, Tanner Roth ¶ 17, Airman #11 ¶¶ 17-19, Victoria Robert ¶ 15, Logan Priebe ¶¶ 8-9, and Kynan Valencia ¶ 13. These adverse actions constitute punishment for the mere assertion of the right to freely exercise one's religion.

As stated above, none of Plaintiffs' requests have been approved. Of the 36 Plaintiffs, 19 have already received denials. All 19 Plaintiffs who received their denials appealed. Of those, five have already seen their appeals denied. Those five Plaintiffs face termination within weeks. The 19 Plaintiffs whose RARs have already been denied received boilerplate, near-identical denial letters. The Air Force Reserve Plaintiffs received virtually identical letters from Lt. Gen. Richard W. Scobee, Commander of the Air Force Reserve Command, denying their initial requests. The letters did not mention or reflect the consideration of *any* of the specific circumstances of respective Plaintiffs. The letters did not include any explanation of why the individual circumstances of each Plaintiff warranted rejection.

The virtually identical rejection letters from Lt. Gen. Scobee all state: "After carefully considering the specific facts and circumstances of your request, the recommendation of your chain of command and the MAJCOM Religious Resolution Team, I **disapprove** your request for religious exemption for all immunizations to include the COVID-19 vaccination." *See e.g.*, Decl.

of Pl. Matthew Cascarino ¶ 23, Airman #11 ¶¶ 23-24; Victoria Roberts ¶ 24, and Airman #1 ¶ 20. (emphasis in original). The same language is used, even in those cases where the service member did *not* request a religious exemption for "all immunizations." This indicates that, contrary to the letters' claims, those rejecting the RARs did not in fact "consider the specific facts and circumstances" of the request. The virtually identical rejection letters from Defendant Lt. Gen. Scobee also state: "I do not doubt the sincerity of your beliefs. However, when evaluating your request for religious exemption, I also had to consider the risk to our mission." *Id.* None of the Air Force Reserve Plaintiffs have received an *individualized* explanation for why their initial RARs were *specifically* rejected.

Interestingly, eight Plaintiffs—Michael T. Edwards, Airman #1, Airman #3, Airman #4, Airman #5, Airman #6, Airman #7, and Airman #9—saw their respective RARs indiscriminately denied on the same date: January 7, 2022. Each of these Plaintiffs is an Air Force Reservist stationed at Offutt Air Force Base in Nebraska. These Plaintiffs submitted their requests for religious accommodation on a variety of dates – e.g., October 2, 2021, October 7, 2021, November 6, 2022, etc. Nevertheless, Lt. Gen. Scobee denied all of their requests on the *same* day, January 7, 2022. This strongly suggests—certainly in the context of everything else Plaintiffs have come to understand about the process—that the Air Force Reserve Command reviewed their RARs as a part of a batch, and categorically denied that batch without a particularized review, as the Religious Freedoms Restoration Act and the First Amendment require.

The active duty Air Force Plaintiffs received similar boilerplate rejection letters from Gen. Michael A. Minihan, Commander of the Air Mobility Command. Those letters include identical, pre-written "boilerplate" language. Similar to the Air Force Reserve letters, they all state: "After careful consideration of the specific facts and circumstances, I disapprove your request for

accommodation. Regardless of whether you have a sincerely held religious belief, the Air Force has compelling government interests in ensuring mission accomplishment, of which health and safety are necessary elements, and the prevention of COVID-19." The rejection letters that active duty Air Force Plaintiffs have received from Gen. Minihan also include identically-structured fill-in-the blank sections, which state the following: "I have disapproved your request for accommodation from the aforementioned immunization requirement based on the following: First, due to the nature of your duties and your position as a [insert position], the Air Force has a compelling government interest in ensuring the health and continued mission accomplishment of [insert description of unit]. Second, your duties, which include [insert duties, using the words 'hands-on' and 'team'] making teleworking not realistically possible."

The Air National Guard Plaintiffs have faced a different, but equally oppressive, barrier. Defendants have been sitting on their RARs for months—more than five months in some cases. *See* Decls. of Pl. Ian McGee ¶ 9, Matthew Cascarino ¶ 18, Evan McMillan ¶ 10, Airman #10 ¶ 11, Airman #11, ¶ 11, and Kynan Valencia ¶ 12. Defendants refuse to grant Air National Guard Plaintiffs their requested accommodations; meanwhile Defendants impose punishment upon them in the form of denials of travel, denials of training, and other adverse actions. *See* Decls. of Pl. Ian McGee ¶ 21, Matthew Cascarino ¶¶ 13-15, Evan McMillan ¶ 17, Airman #11 ¶¶ 17-19, and Kynan Valencia ¶¶ 13-14. The Air National Guard, aware that its forthcoming blanket denials would likely violate RFRA and the First Amendment, has instead pursued a strategy of preparing for litigation. Air National Guard leadership apparently realized that boilerplate-style recommendations of denial of Air National Guard Plaintiffs' RARs would be legally indefensible. This strategy was revealed in a February 10, 2022, email advisory to Air Force Commanders and Directors. The email, which was received by Plaintiff Airman #11 in his capacity as a Squadron

Superintendent, contains the following language: "To improve your memorandums, I recommend that each command/endorsement level address the real (vice theoretical) adverse impacts that a religious accommodation would have on readiness, cohesion, good order and discipline, health, and safety, or other similar tangible factors impacting your mission and people. See attached example." Decl. of Airman #11 ¶ 24. It should be noted that the Air National Guard has shown no sense of urgency in responding to Plaintiffs' RARs. This lack of urgency strongly suggests that temporary injunctive relief in this matter would not impair their interests.

The Air Force has made it quite clear that the theoretical availability of religious accommodation is illusory. The process is overwhelmingly tilted toward rejection. Indeed, the rejection of virtually every RAR is inevitable. The numbers make this clear. As of March 15, 2022, the Air Force reported that it had rejected 5,259 RAR and had granted only 23. DAF COVID-19 Statistics - March 15, 2022, https://www.afrc.af.mil/News/Article/2959594/daf-covid-19-statistics-march-15-2022/. That is a 99.6% rejection rate. Moreover, Plaintiffs have been informed and believe that the 23 cases in which the RAR was granted were instances in which the applicant was nearing retirement or other circumstances made the grant of the RAR a relatively meaningless gesture intended to obscure the near-universal denial of requests for exemption based on religious beliefs.

The U.S. District Court for the Middle District of Georgia recently issued a factual finding that the Air Force's RAR process was "illusory and insincere:"

> Moreover, one must keep in mind that the Air Force has rejected 99.76% of all religious accommodation requests, and until about two weeks ago, it had rejected every single one it "carefully considered." … With such a marked record disfavoring religious accommodation requests, the Court easily finds that the Air Force's process to protect religious rights is both illusory and insincere. In short, it's just "theater."

Air Force Officer v. Austin, 2022 U.S. Dist. LEXIS 26660, at *28, *quoting U.S. Navy SEALs 1-26 v. Biden*, 2022 U.S. Dist. LEXIS 2268, ___ F.Supp.3d ___ at *1, (Jan. 3, 2022). As the Fifth Circuit recently observed regarding the similarly futile RAR process for Navy service members, "the Navy has effectively stacked the deck against even those exemptions supported by Plaintiffs' immediate commanding officers and military chaplains." *U.S. Navy SEALs 1-26*, 2022 U.S. App. LEXIS 5262, at *23.

The Air Force's disdain for religious accommodations stands in stark contrast to Defendants' granting of non-religious exemptions. As of January 24, 2022, Defendants had granted at least 3,781 exemptions from the vaccine mandate for secular reason—1,570 medical exemptions and 2,211 administrative exemptions. DAF COVID-19 Statistics – January 2022, *available at* https://www.af.mil/News/Article-Display/Article/2831845/daf-covid-19-statistics-january-2022/.[9] And Defendants' policies also exempt wholesale all personnel who participated in a COVID-19 vaccine trial, regardless of whether their participation resulted in any protection from the virus.

LEGAL STANDARD

"Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys. v. C L Sys.*, 640 F.2d 109, 113 (8th Cir. 1981). "In balancing the equities no single factor is determinative. The likelihood

[9] The older, January 24, 2022, numbers are used for comparison because the number of administrative exemption recipients in the Air Force shrinks each week as recipients of the exemption retire. The more current numbers do not reflect those individuals who were granted the administrative exemption but subsequently retired.

that plaintiff ultimately will prevail is meaningless in isolation. In every case, it must be examined in the context of the relative injuries to the parties and the public." *Id*. Plaintiffs satisfy each of these factors.

ARGUMENT

I. Plaintiffs Are Likely to Succeed on Their Claims that Denial of Their Religious Accommodation Requests Violates RFRA and Violates the First Amendment.

A. Defendants' Vaccine Mandate Violates RFRA by Substantially Burdening Plaintiffs' Religious Exercise Without Satisfying RFRA's Demanding Compelling Interest Standard.

No Plaintiff has received an exemption or accommodation from the vaccine mandate; 19 have been denied, and of those 19, five are about to be discharged. With respect to the others, Defendants have made clear that no accommodation is forthcoming. Indeed, Defendants have already subjected Plaintiffs to adverse treatment simply for submitting their accommodation requests. Plaintiffs have been informed that holding to their religious convictions will cost them their careers and that they may incur potentially crippling debt in the form of recouped payments. Meanwhile, Defendants have granted thousands of exemptions to the vaccine mandate for secular reasons. Defendants' actions fall far short of the demanding standards of RFRA, 42 U.S.C. § 2000bb-1.

RFRA requires that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). The solitary exception to that statutory rule is that the "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

1. Defendants' COVID-19 Vaccine Mandate Substantially Burdens Plaintiffs' Sincerely Held Religious Beliefs.

As described above, each Plaintiff sincerely believes that it would violate his religious convictions for him to receive a COVID-19 vaccine. Defendants may not second-guess the reasonableness or the scriptural basis of these religious beliefs. Nor may they question Plaintiffs' convictions regarding how their beliefs apply to vaccination. *Burwell v. Hobby Lobby*, 573 U.S. 682, 724–25 (2014); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981). Doing so would impermissibly entangle Defendants with religion, in violation of the Establishment Clause of the First Amendment. *See Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 396 (1990). Defendants' vaccine mandate thus offers Plaintiffs a "choice" that is not really a choice: violate your religious beliefs or forfeit the honor of serving your country, suffer the stigma of involuntary separation, lose your livelihood, and potentially incur significant debt. This plainly constitutes a substantial burden on the exercise of religion.

The government substantially burdens the exercise of religion when it forces a choice "between following the precepts of [one's] religion and forfeiting benefits," as well as when it forces a choice between "abandoning one of the precepts of [one]s religion in order to accept work." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020) ("RFRA sought to . . . restore the pre-*Smith* 'compelling interest test' by 'provid[ing] a claim . . . to persons whose religious exercise is substantially burdened by government."); *see also Holt v. Hobbs*, 574 U.S. 352, 361 (2015) (Choice between engaging in conduct that violates religious beliefs or facing discipline "easily satisfied" substantial burden test). More broadly formulated, it imposes a substantial burden whenever it "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs[.]" *Thomas*, 450 U.S. at 718; *accord Hobbie v. Unemp't Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987). The threatened loss of a job—not

to mention the denial of training necessary to promotion and the denial of travel otherwise accorded to airmen—clearly fits this rubric. As the Fifth Circuit summarized, "Accepting the vaccine would directly burden their respective faiths by forcing them to inject an unremovable substance at odds with their most profound convictions. This injury would outlast their military service…. These circumstances impose a substantial burden on Plaintiffs." *U.S. Navy Seals 1-26*, 2022 U.S. App. LEXIS 5262, at *29.

2. Defendants Cannot Demonstrate a Compelling Interest in Refusing to Grant Plaintiffs' Accommodation Requests.

Because Defendants have substantially burdened Plaintiffs' religious exercise, they must "demonstrate[] that application of the burden to the [Plaintiffs]—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The burden of proof is on the government. *See id. at* § 2000bb-2(3). Importantly, RFRA requires the government to demonstrate not simply a generalized necessity of applying its vaccine mandate to service members, but rather to demonstrate that imposing its mandate *on these particular plaintiffs* is the least restrictive means to further a compelling governmental interest. 42 U.S.C. § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden *to the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." (emphasis added)); *see Hobby Lobby*, 573 U.S. at 726–27; *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

Stated differently, Defendants cannot simply assert a generalized interest in stemming the spread of COVID-19 or a generalized interest in the health and readiness of the military in the abstract; they must establish a compelling interest *in not making exceptions for these Plaintiffs*.

They must demonstrate that they have a compelling interest in refusing to grant an exemption *to the person* before the court. 42 U.S.C. § 2000bb-1(b). The Supreme Court has made this clear:

> RFRA, however, contemplates a more focused inquiry: It requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened. This requires us to look beyond broadly formulated interests and to scrutinize the asserted harm of granting specific exemptions to particular religious claimants—in other words, to look to the marginal interest in enforcing the [religious burden] in these cases.

Hobby Lobby, 573 U.S. at 726 (internal citations and quotation marks omitted)). Defendants have not articulated a compelling interest in denying each individual Plaintiff in this matter an RAR. Nor can they. Their uncompromising and draconian vaccine mandate fails to clear the first hurdle of strict scrutiny. This has been the holding of the Article III Courts that have already answered this question. There are at least five reasons why Defendants fail to establish a compelling governmental interest.

The first and most important reason why Defendants cannot establish a compelling interest in refusing to make exemptions for Plaintiffs is *because they have already granted thousands of exemption*. As the Middle District of Georgia succinctly put it:

> This compelling interest as to Plaintiff, though, completely ignores that there are at least 3,300 exempt Air Force service members carrying out their respective duties similarly unvaccinated. At bottom, Defendants simply don't explain why they have a compelling interest in Plaintiff being vaccinated while so many other Air Force service members are not.

Air Force Officer v. Austin, 2022 U.S. Dist. LEXIS 26660, at *25. The Fifth Circuit echoed this point with respect to the Navy defendants in that case, explaining that the vaccine requirement is underinclusive; therefore, the asserted interest cannot be deemed compelling:

> The Navy's alleged compelling interest is further undermined by other salient facts. It has granted temporary medical exemptions to 17 Special Warfare members, yet no reason is given for differentiating those service members from Plaintiffs. That renders the vaccine requirements "underinclusive." And

> "underinclusiveness ... is often regarded as a telltale sign that the government's interest in enacting a liberty-restraining pronouncement is not in fact 'compelling.'"

U.S. Navy Seals 1-26 v. Biden, 2022 U.S. App. LEXIS 5262, at *32-33 (internal citations omitted). *See BST Holdings v. OSHA*, 17 F.4th 604, 616 (5th Cir. 2021) ("underinclusiveness of this sort is often regarded as a telltale sign that the government's interest in enacting a liberty-restraining pronouncement is not in fact 'compelling.'" (citing *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 542–46 (1993)). In the instant case, Defendants have granted at least 3,781 medical and administrative exemptions to the vaccine mandate to Air Force personnel performing every duty in the Air Force. They cannot plausibly claim that they have a compelling interest in refusing to grant religious exemptions to the 36 Plaintiffs.

A second reason Defendants cannot establish a compelling governmental interest in refusing Plaintiffs' requests for religious accommodation is that Defendants' own actions in deploying multiple Plaintiffs reveal that universal vaccination is not necessary to serve Defendants' interest in military readiness. Three of the Plaintiffs have already been deployed while unvaccinated, after the August 24, 2021, date when Defendant Austin first imposed the mandate. One of Plaintiffs is deployed overseas *right now*. All of these Plaintiffs have performed their duties effectively, without compromising their missions, even though they are not vaccinated. Consider the three cases. Plaintiff Evan McMillan is an active duty Air Force Major and Aircraft Commander who flies the KC-46A aircraft. He is currently deployed overseas. He is flying missions on his deployment without any difficulty and without compromising the health of his fellow airmen. He has been directed to wear a mask at times, and he has also been prevented from travelling off-base on the ground. Those measures are acceptable to Plaintiff McMillan, and they are sufficient in the eyes of his commanding officer to make his deployment safe and effective. Decl. of Pl. Evan McMillan ¶¶ 16-17.

Plaintiff Ian McGee is also a pilot. An active duty Air Force Major, he has regularly deployed to fly the RC-135 Cobra Ball. Three of those deployments have occurred since March 2020 (the start of military efforts to address COVID-19). On his most recent deployment from June 12, 2021, to August 18, 2021, it was demonstrated just how essential his deployment was. On that deployment, initially no unvaccinated pilots were allowed to fly on weather evacuations. However, this resulted in the two of the most inexperienced, yet vaccinated, pilots being paired together to conduct missions in international airspace. Out of concern for their own safety, the inexperienced pilots asked for the more experienced, unvaccinated pilots to fly the missions with them. That request was granted, and Plaintiff McGee was paired with an inexperienced, but vaccinated, pilot to ensure the safety of the missions during the deployment. They completed their missions safely and effectively without any transmission of COVID-19. This demonstrates how kicking experienced pilots like Plaintiff McGee out of the Air Force would *undermine*, not enhance, Air Force readiness. Plaintiff McGee has been taking weekly COVID-19 tests and has been required to wear a mask while indoors. Those measures are acceptable to Plaintiff McGee. Decl. of Pl. Ian McGee ¶¶ 4, 16-18.

Plaintiff Kynan Valencia is also a pilot. He is an active duty Air Force Captain who serves as a Co-Pilot on the KC-135R/T aircraft. He has been deployed overseas twice since March 2020. The second of those deployments occurred during August-October 2021, beginning in the same month that Defendant Austin announced the vaccine mandate. Plaintiff Valencia continued his deployment unvaccinated without any difficulty and without in any way compromising his missions. It was while he was deployed overseas, on October 13, 2021, that Plaintiff Valencia filed his RAR. He too has been taking weekly COVID-19 tests. Decl. of Pl. Kynan Valencia ¶¶ 8-10. As the Fifth Circuit observed, the successful deployment of the Navy SEALs in that case,

both before and after the vaccines became available, undermined the defendant's claim of any compelling governmental interest. *U.S. Navy SEALs 1-26*, 2022 U.S. App. LEXIS 5262, at *32.

The third reason Defendants cannot establish a compelling governmental interest in refusing to grant Plaintiffs' RAR is that the marginal impact that the denial of Plaintiffs' RARs would have does not constitute a compelling governmental interest. As the Supreme Court explained, RFRA requires the reviewing court "to scrutinize the asserted harm of granting specific exemptions to particular religious claimants—in other words, to look to the marginal interest in enforcing the [religious burden] in these cases." *Hobby Lobby*, 573 U.S. at 726. As of March 15, 2022, 96.4% of Air Force personnel were fully vaccinated. DAF COVID-19 Statistics - March 15, 2022, available at https://www.afrc.af.mil/News/Article/2959594/daf-covid-19-statistics-march-15-2022/. Defendants must explain why it is necessary to violate Plaintiffs' religious freedom in order to eke out another fraction of a percentage point. Defendants will never reach 100% because Defendants have been so generous in handing out exemptions for secular reasons. Defendants know they do not need a 100% vaccination rate to protect their forces because they already granted thousands of medical exemptions for the COVID-19 vaccination with no accompanying detriment to those service members, who remain fully deployable. Defendants also chose at the outset of their mandate to categorically exempt all personnel participating in vaccine trials, regardless of whether they received the vaccine or a placebo. This group is another entire class of exempted service members, including some who lack any COVID-19 immunity.

The fourth reason Defendants cannot establish a compelling governmental interest in refusing to grant religious exemptions to the vaccine mandate is that it is now well-established that COVID-19 vaccinations do not stop people from becoming infected with, or transmitting, COVID-19. Although that was not widely known on July 29, 2021, when President Biden directed

Defendants to issue a vaccine mandate, it is universally accepted now. In early November 2021, the Centers for Disease Control and Prevention acknowledged that the COVID-19 vaccinations did not prevent the spread of the virus. *See* Ctrs. for Disease Control & Prevention, "Possibility of COVID-19 Illness after Vaccination" (updated Nov. 9, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthrough-cases.html ("People who get vaccine breakthrough infections can be contagious."). With the arrival of the Omicron variant, the inefficacy of the vaccines was even more apparent. "CDC expects that anyone with Omicron infection can spread the virus to others, even if they are vaccinated or don't have symptoms." Ctrs. for Disease Control and Prevention, *Omicron Variant: What You Need to Know*, (Feb. 2, 2022), available at https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html. Given that fact, it strains credulity to assert that Plaintiffs' non-vaccination—or even the non-vaccination of the less than 2% of Air Force members who have filed RARs, for that matter—will make or break Defendants' ability to reduce the spread of the virus within the Air Force. *See BST Holdings*, 17 F.4th at 616 n.19 ("the [OSHA vaccine] Mandate cannot prevent vaccinated employees from spreading the virus in the workplace, or prevent unvaccinated employees from spreading the virus in between weekly tests.").

If Defendants attempt to revise their rationale for refusing to grant religious exemptions, claiming that the vaccine may reduce the severity of COVID-19, then that rationale too would fail. Fully 29 of the 36 Plaintiffs have already recovered from COVID-19 without difficulty. Moreover, the federal government has authorized numerous effective treatments for hospitalized and non-

hospitalized COVID patients.[10] Monoclonal antibody infusions are perhaps the best-known of these treatments. Additional promising treatments, including treatments that, like vaccines, substantially reduce severe symptoms that may accompany COVID-19 infection, are constantly being developed.[11]

The fifth reason that Defendants cannot establish a compelling governmental interest is that their own delay undermined their subsequent claim that their interest was compelling. During the first eight months of 2021, multiple COVID-19 vaccines were widely available under Emergency Use Authorizations ("EUA").[12] But Defendants did not impose their vaccine mandate until *11 months after* the first EUA was announced—a time period during which service members' immunity increased due to rising vaccination and natural immunity, and the need for additional vaccination decreased. This inaction undercuts the assertion that an urgent and compelling governmental interest requires Plaintiffs to violate their sincere religious convictions. *See BST Holdings,* 17 F.4th 611, n.11 (noting that the President's and OHSA's equivocation and delay in issuing a national vaccine mandate for some employers undercut any interest the government had

[10] *See* U.S. Dep't of Health and Human Servs., "Possible Treatment Options for COVID-19," https://combatcovid.hhs.gov/possible-treatment-options-covid-19; App. 304-08, U.S. Food and Drug Admin., "Know Your Treatment Options for COVID-19," https://www.fda.gov/consumers/consumer-updates/know-your-treatment-options-covid-19.

[11] Press Release, "Pfizer's Novel COVID-19 Oral Antiviral Treatment Candidate Reduced Risk of Hospitalization or Death by 89% in Interim Analysis of Phase 2/3 Epic-HR Study" (Nov. 5, 2021), https://www.pfizer.com/news/press-release/press-release-detail/pfizers-novel-covid-19-oral-antiviral-treatment-candidate.

[12] U.S. Food and Drug Admin., "Emergency Use Authorization (EUA) for an Unapproved Product: Review Memorandum" (Dec. 11, 2020), https://www.fda.gov/media/ 144416/download (EUA for Pfizer vaccine); U.S. Food and Drug Admin., "Emergency Use Authorization (EUA) for an Unapproved Product: Review Memorandum" (Dec. 18, 2020), https://www.fda.gov/media/144673/download (EUA for Moderna vaccine); U.S. Food and Drug Admin., "Emergency Use Authorization (EUA) for an Unapproved Product: Review Memorandum" (Feb. 27, 2021), https://www.fda.gov/media/146338/download (EUA for Johnson & Johnson vaccine).

in imposing the mandate); *Cont'l Training Servs., Inc. v. Cavazos*, 709 F. Supp. 1443, 1453 (S.D. Ind. 1989) (concluding that a federal department's "substantial delay of over a year" had undermined its "assertion of a compelling interest"), *aff'd in part, rev'd in part*, 893 F.2d 877 (7th Cir. 1990). For all five of these reasons, Defendants' refusal to grant religious exemptions is not justified by a compelling governmental interest.

3. Defendants' Refusal to Grant Religious Exemptions is not the Least Restrictive Means Available.

Even if Defendants could show a compelling interest in continued efforts to reduce the spread of COVID-19 among service members, they would not be able demonstrate that requiring Plaintiffs to undergo vaccination in violation of their religious beliefs is the least restrictive means to achieve it. There are multiple less restrictive means by which the Air Force may mitigate the spread of COVID-19 and ensure force readiness. Defendants' own actions make this clear.

The first less restrictive means that is available is the combination of various other measures to reduce the spread of COVID-19 that Defendants themselves have been using for the past two years. The most important of these measures is regular testing for COVID-19, which all Plaintiffs are undertaking. This is not only less restrictive, but it is also more effective. *An unvaccinated airman who has just tested negative for COVID-19 poses far less of a threat of spreading the virus than a vaccinated airman who has not taken a test*. Because the vaccines do not stop the spread of COVID-19, their usefulness in reducing the spread of the virus is nugatory. A COVID-19 test, on the other hand, is extremely effective in identifying who has the virus and enabling that person to quarantine himself. Another measure that can, and has been, used for some airmen is social distancing. Defendants have employed that measure throughout the pandemic where possible. As the Fifth Circuit observed, "had the Navy been conscientiously adhering to RFRA, it could have adopted least restrictive means to accommodate religious objections against

forced vaccination" to include social distancing. *U.S. Navy SEALs 1-26*, 2022 U.S. App. LEXIS 5262, at *33. A third measure is masking. Defendants' irrationality in this regard is demonstrated by the circumstances of Plaintiff Roth. While one may debate the effectiveness of various cloth masks in stopping the transmission of COVID-19, there is no question that an on-board oxygen generating system attached to a pilot's oxygen mask does the job. Plaintiff Roth is an instructor pilot who flies the T-6B training aircraft, in which both he and the student pilot are in ejection seats; therefore, each is required to wear an oxygen mask attached to his own on-board oxygen generating system. Yet Defendants refuse to recognize that the probability of transmitting COVID-19 in that situation is nil. They have denied Plaintiff Roth's appeal and have grounded him until his termination is completed. Decl. of Pl. Tanner Roth ¶¶ 22-24.

In order to survive strict scrutiny, Defendants would have to show that all of these alternative, less restrictive measures are impossible. This they cannot do. As the District of Georgia observed, regarding the same Air Force Defendants: "the Court agrees with Plaintiff's argument that Defendants haven't 'shown that vaccination is actually necessary by comparison to alternative measures[]' since 'the curtailment of free [exercise] must be actually necessary to the solution.'" *Air Force Officer v. Austin*, 2022 U.S. Dist. LEXIS 26660, at *27-28 (quoting *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011)). The alternative measures are more than sufficient to accomplish the government's interest in slowing the spread of COVID-19. That is especially true with respect to regular testing.

A second less restrictive means is the recognition of natural immunity, which could be accomplished easily by testing airmen for antibodies to ensure that their natural immunity remains robust. Defendants simply cannot justify imposing involuntary vaccination on the 29 Plaintiffs

who already possess natural immunity from COVID-19. The Middle District of Georgia's observation on this point is a particularly salient one:

> Plaintiff's natural immunity coupled with other preventive measures begs the question: Does a COVID-19 vaccine really provide more sufficient protection? This is especially curious given the number of people who have been and continue to be infected after becoming fully vaccinated and receiving a booster—including the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the Commandant of the Marine Corps.

Air Force Officer v. Austin, 2022 U.S. Dist. LEXIS 26660, at *27. Defendants cannot deny that confirming the natural immunity of Plaintiffs (and thousands of other airmen) would be an equally effective, but less restrictive means. As the Fifth Circuit recognized when adjudicating motions to stay the OSHA vaccine mandate, "[a] naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus." *BST Holdings*, 17 F.4th at 615.

Defendants' refusal to recognize natural immunity is particularly troubling, in light of their own regulations and willingness to do so in the past. The Air Force's own regulations recognize natural immunity as a substitute for vaccination. Among the numerous medical exemptions previously available to service members, "evidence of immunity based on serologic tests, documented infection, or similar circumstances" provided a basis for a medical exemption. Air Force Instruction 48-110_IP (AFI 48-110_IP) "Immunizations and Chemoprophylaxis for the Prevention of Infectious Disease," (Feb. 16, 2018). Despite the AFI 48-110_IP provision that allows for natural immunity, the Air Force singled out the COVID-19 vaccine in a manner that does not allow for natural immunity. Under the DoD Vaccine Mandate, a service member can only satisfy the mandate and be considered "fully vaccinated" two weeks after receiving the final dose of an FDA-approved COVID-19 vaccine, or an FDA Emergency Use Authorized and World Health Organization Emergency Use Listed COVID-19 vaccines. Thus, only for the COVID-19

vaccination has the Air Force departed from its existing policy and refused to recognize natural immunity. Given this aberration among existing policies recognizing natural immunity, the Air Force cannot show that requiring even Plaintiffs with natural immunity to receive the COVID-19 vaccination in violation of their religious beliefs is the least restrictive means for achieving COVID-19 immunity among service members.

B. Defendants' Vaccine Mandate Violates the Free Exercise Clause of the First Amendment.

"[E]ven in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 68 (2020). As the Fifth Circuit held with respect to the same DoD vaccine mandate at issue here, "By pitting their consciences against their livelihoods, the vaccine requirements would crush Plaintiffs' free exercise of religion." *U.S. Navy Seals 1-26 v. Biden*, 2022 U.S. App. LEXIS 5262, at *25. In assessing any Free Exercise Clause claim, the first question is whether Defendants' vaccine triggers strict scrutiny or not. The second question is whether it survives that level of scrutiny.

1. The Vaccine Mandate is Neither Neutral nor Generally Applicable and is Therefore Subject to Strict Scrutiny.

A government law or policy triggers strict scrutiny under the Free Exercise Clause of the First Amendment if it is not neutral and generally applicable. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 881-884 (1990). "A law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021) (quoting *Smith*, 494 U.S. at 884). "'[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason.'" *Id.* (quoting *Smith*, 494 U.S. at 884). "A law also lacks general applicability if it prohibits religious

conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* In addition, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (emphasis in original). Defendants' vaccine mandate fails all three of these tests for neutrality and general applicability.

First, it provides "a mechanism for individualized exemptions" that "invites the government to consider the particular reasons for a person's conduct." *Fulton*, 141 S. Ct. at 1877. It does so by inviting individual applications for exemptions. Clearly, Defendants' vaccine mandate meets that criterion by creating a process whereby airmen may apply for medical, administrative, or religious exemptions. The Middle District of Georgia so held with respect to the same vaccine mandate at issue in the instant case: "[A] vaccination requirement, 'is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions.'" *Air Force Officer v. Austin*, 2022 U.S. Dist. LEXIS 26660, at *29 (quoting *Fulton*, 141 S. Ct. at 1877).

Second, Defendants' vaccine mandate prohibits religious conduct (abstaining from a vaccine due to religious convictions) while permitting secular conduct (abstaining from a vaccine for medical reasons, administrative reasons, or for participation in a clinical trial). Fully 99.6% of RARs that have been decided have been denied, with 5,259 denied and only 23 granted. Plaintiffs are well aware of how illusory the process of seeking a religious accommodation is; all Plaintiffs fully expect to be discharged from the Air Force at the end of the RAR process. In sharp contrast, Defendants have granted an across-the-board exemption to vaccine trial participants and have granted at least 3,781 medical and administrative exemptions. "Thus, with respect to her First

Amendment claim, … '*any* favorable treatment' for service members exempted for any secular reason over those seeking exemption for religious reasons 'defeats neutrality.'" *Air Force Officer v. Austin*, 2022 U.S. Dist. LEXIS 26660, at *31 (quoting *Navy SEALs 1-26*, 2022 U.S. Dist. LEXIS 2268, at *11) (emphasis in original).

Third, Defendants' mandate treats comparable secular activity—non-receipt of the vaccine due to receiving a medical or administrative exemption or due to participation in a clinical trial—more favorably than non-receipt of a vaccine for religious reasons. And "[i]t is no answer that [the government] treats some comparable secular … activities as poorly as or even less favorably than the religious exercise at issue." *Tandon*, 141 S. Ct. at 1296. "Comparability is concerned with the risks various activities pose, not the reasons why" people engage in those activities. *Id*. Here, the activities are precisely the same: non-vaccination. Only the reasons for the activities differ. And "[w]here the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied." *Id.* Because Defendants cannot do so here, "precautions that suffice for" those with medical and administrative exemptions "suffice for religious exercise too." *Id.* at 1297. "The [government] cannot 'assume the worst when people [exercise their religion] but assume the best when people [engage in secular activities].'" *Id.* (quoting *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (per curiam)). The Middle District of Georgia applied this test as well to Defendants' vaccine mandate and found that the mandate could not be considered neutral: "Defendants' COVID-19 vaccination requirement allows service members to refuse vaccination for secular reasons while disallowing refusal based on religious reasons. . . . No matter whether one service member is unvaccinated for a medical reason and another unvaccinated for a religious reason, one thing remains the same for both of these service members—they're both

unvaccinated." *Air Force Officer v. Austin*, 2022 U.S. Dist. LEXIS 26660, at *29-30. Under all three tests, Defendants' vaccine mandate is not neutral and not generally applicable.

2. Defendants' Vaccine Mandate Fails Strict Scrutiny.

"Because the challenged restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest." *Roman Catholic Diocese*, 141 S. Ct. at 67 (quoting *Church of Lukumi*, 508 U. S., at 546). *See also Fulton*, 141 S. Ct. at 1877. As the Middle District of Georgia held with respect to the same Defendants and the same vaccine mandate:

> Since Defendants' COVID-19 vaccination requirement is neither neutral toward religion nor generally applicable, it is unlikely to pass strict scrutiny—'the most demanding test known to constitutional law.' And because Defendants' COVID-19 vaccination requirement is unlikely to pass strict scrutiny, it is '*likely* or probable' that Plaintiff will prevail on her First Amendment claim.

Air Force Officer v. Austin, 2022 U.S. Dist. LEXIS 26660, at *31 (emphasis in original, internal citations omitted). The same conclusion applies in the instant case as well. In the interest of brevity, Plaintiffs will not repeat the strict scrutiny analysis already presented in the RFRA section above. Plaintiffs hereby incorporate those arguments by reference. Defendants' refusal to grant Plaintiffs' RARs is not supported by a compelling governmental interest for the same five reasons, and Defendants' vaccine mandate is not the least restrictive means available for the same two reasons. For all of the reasons stated above, Plaintiffs are likely to succeed on the merits of their claims.

II. The Remaining Preliminary Injunction Factors Favor Relief.

A. Plaintiffs are Suffering Irreparable Injury.

Plaintiffs have demonstrated multiple irreparable injuries. The first occurred with the denial of their right to freely exercise their religious faith. As the Supreme Court has recognized,

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also Lowry v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008). The same is true of the loss of RFRA rights. *See Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012) ("[The *Elrod v. Burns*] principle applies with equal force to the violation of RLUIPA rights because RLUIPA enforces First Amendment freedoms, and the statute requires courts to construe it broadly to protect religious exercise. In the closely related RFRA context (the predecessor statute to RLUIPA), courts have recognized that this same principle applies."); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013) ("Hobby Lobby and Mardel have established a likely violation of RFRA. We have explicitly held—by analogy to First Amendment cases—that establishing a likely RFRA violation satisfies the irreparable harm factor."). The infringement of Plaintiffs' religious liberty rights under RFRA and the First Amendment plainly constitute irreparable injuries as a matter of law. *Id.* (citing *Elrod*, 427 U.S. at 373). This alone is enough to satisfy the irreparable harm requirement for the issuance of a preliminary injunction. As the Middle District of Florida concluded: "[Plaintiff's] choice to adhere to her religious beliefs or modify her behavior to violate beliefs suffices to trigger constitutional protection. Thus, Plaintiff has satisfied the second element to obtain a preliminary injunction." *Air Force Officer v. Austin*, 2022 U.S. Dist. LEXIS 26660, at *32-*33 (citing *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981)).

Even if their injuries were not irreparable because of the denial of their First Amendment freedoms, Plaintiffs have demonstrated irreparable injury. That injury has occurred in several forms. First, it occurred simply because Plaintiffs *submitted* RARs. The mere assertion of their

constitutional rights triggered multiple immediate and adverse consequences—specifically the denial of travel, the denial of training, and the effective denial of promotion.

Virtually all of the Plaintiffs were immediately denied the ability to travel, either for temporary duty or for a permanent change of station, when they submitted their RAR and remained unvaccinated. *See, e.g.*, Decls. of Pl. Ian McGee ¶ 21, Matthew Cascarino ¶¶ 13-15, Evan McMillan ¶ 17, Jon W. Smithley ¶ 17, Tanner Roth ¶ 17, Airman #11 ¶¶ 17-19, Victoria Robert ¶ 15, Logan Priebe ¶¶ 8-9, and Kynan Valencia ¶ 13. The only Plaintiffs who did not suffer this punishment were Plaintiffs McGee, McMillan, and Valencia, who were all deployed as described *supra* in Section I.A.2. According to Defendants' policy, official domestic and international travel for unvaccinated personnel is limited to "mission-critical" service members, and Air Force "personnel who are not vaccinated may be non-deployable based on specific mission circumstances."[13]

Almost all of the Plaintiffs were also denied training opportunities in the form of classes and other activities that are necessary for them to advance in rank. *See e.g.*, Decls. of Pl. Ian McGee ¶ 15, Matthew Cascarino ¶ 13, Tanner Roth ¶¶ 17, 22-23, Airman #11 ¶ 18, Logan Priebe ¶¶ 8-9, and Kynan Valencia ¶ 13. Although the Court may be able to enjoin Defendants to provide Plaintiffs with another opportunity to participate in those training opportunities down the road, Plaintiffs can never recover the lost time as their military careers have been stalled for six months or more, thus far, during the RAR process. In addition, Plaintiffs have been denied the opportunity to be promoted. They are unable to participate in training necessary to advance in rank, and they are unable to travel to receive that training. Consequently, they are frozen in their current rank

[13] This Air Force policy is posted at https://www.usafa.edu/app/uploads/DAF_Mandatory-COVID-19-Vaccine-FAQ-v14.pdf.

until they are discharged. *Id*. This bar to additional training, and promotion presents a devastating blow to the honorable careers that Plaintiffs have worked tirelessly to build.

The third form of irreparable injury is the most obvious—the imminent termination of Plaintiffs' military careers. Defendants' official policy confirms what Plaintiffs are experiencing: Defendants will involuntarily separate Plaintiffs from service upon the ultimate denial of their accommodation requests.[14] As explained above, five Plaintiffs—Roth, Smithley, Priebe, Roberts, and Airman #1—are on the cusp of being discharged. And the terms of their involuntary separation are not favorable. They have received letters of reprimand that rebuke them severely:

> "You are hereby reprimanded! … Your refusal to receive the vaccine not only constitutes a willful failure to comply with a lawful order, it demonstrates a disregard for the well-being of your fellow Airmen and our mission. Your actions put your dedication to service in question and has undermined the trust placed in you as an Airman."

Decl. of Pl. Tanner Roth ¶ 24, Victoria Roberts ¶ 19, and Logan Priebe ¶ 13. The discharge of Plaintiffs and disrespect afforded Plaintiffs in the process of discharging them unquestionably cause irreparable harm. "Requiring a service member either to follow a direct order contrary to a sincerely held religious belief or to face immediate processing for separation or other punishment undoubtedly causes irreparable harm." *Navy Seal 1 v. Austin*, 2022 U.S. Dist. LEXIS 31640, at *63 (M.D. Fla. Feb. 18, 2022). "It is clear that a denial of the [preliminary injunctive relief] would do them irreparable harm. For one, the Mandate threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th at 618. These injuries—past, ongoing, and imminent—

[14] Secretary of the Air Force, "Supplemental Coronavirus Disease 2019 Vaccine Policy," (Dec. 7, 2021), Exhibit C to Complt.

cannot be remedied by a later-issued court order. *See id.* (discussing similar injuries as sufficiently irreparable).

B. The Balance of Harms and the Public Interest Weigh in Favor of a Preliminary Injunction.

The balance of harms and the public interest likewise strongly favor a preliminary injunction. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). They weigh in favor the granting of a preliminary injunction in the instant case for multiple reasons.

First, "injunctions protecting First Amendment freedoms are always in the public interest." *U.S. Navy SEALs 1-26*, 2022 U.S. App. LEXIS 5262 at *36. *See also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). An injunction will not disserve the public interest where "it will prevent constitutional deprivations." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (citing *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.")). This is particularly true in the context of this case. Plaintiffs are defending the United States and its Constitution. They stand ready to lay down their lives in defense of the Constitution. Yet Defendants seek to deny Plaintiffs their constitutional right to freely exercise their faith. "[W]hat real interest can our military leaders have in furthering a requirement that violates the very document they swore to support and defend?" *Air Force Officer v. Austin*, 2022 U.S. Dist. LEXIS 26660, at *35.

Second, the question is not whether Defendants have a generalized interest in reducing the spread of COVID-19 in the military. They certainly do. The question is whether Defendants have a sufficiently weighty interest in denying exceptions to these 36 Plaintiffs. This question must be asked against the factual backdrop of an Air Force that is already 96.4% fully vaccinated and the

factual backdrop that vaccines have been proven ineffective in preventing the acquisition or spready of COVID-19. Nor can Defendants resort to a claim of military readiness when Defendants themselves deployed three of Plaintiff pilots overseas, and those pilots completed their missions perfectly well while being unvaccinated. *See supra* in Section I.A.2. Other Plaintiffs perform their missions principally in the United States, such as the pilot training mission of Plaintiff Roth. All Plaintiffs have been able to perform their duties for the past two years while undertaking other measures such as weekly testing for COVID-19. And any claim of injury to readiness is further weakened by the fact that Defendants themselves have already granted at least 3,781 medical and administrative exemptions. As the Middle District of Georgia surmised when making the same inquiry regarding the same Defendants:

> The question isn't whether a public interest exists, of course one does…. The question, instead, focuses on whether Defendants' public interest will be disserved by a preliminary injunction. In short, the Court finds that it's not. Plaintiff's religious-based refusal to take a COVID-19 vaccine simply isn't going to halt a nearly fully vaccinated Air Force's mission to provide a ready national defense.

Air Force Officer v. Austin, 2022 U.S. Dist. LEXIS 26660, at *34 (citing *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010)). That is equally true in the instant case.

Third, the question at hand is the balancing of interests regarding *temporary* injunctive relief during the few months that this Court adjudicates this matter. Defendants cannot credibly argue that the Air Force, or the nation as a whole, has a weighty interest in discharging Plaintiffs *immediately*. Defendants cannot make such an assertion with a straight face because they, themselves, have delayed an extraordinary length of time. They initially waited 11 months to impose their vaccine mandate. Then they compounded their delay by exceeding their own self-imposed time limits in reviewing Plaintiffs' RARs. Decls. of Pl. Ian McGee ¶ 9, Evan McMillan ¶¶ 9-10, Tanner Roth ¶¶ 10-11, Airman #10 ¶¶ 10-11, and Airman #11 ¶¶ 10-11. And in the case

of Air National Guard Plaintiffs, Defendants have provided no response whatsoever to Plaintiffs' RARs—an inexplicable delay that exceeds six months in some cases. Given Defendants' dilatory approach in imposing the vaccine mandate and reviewing Plaintiffs' RARs, it is evident that Defendants are not in a hurry. Delaying the discharge of Plaintiffs a few additional months will not harm Defendants' interests.

Fourth and finally, there is an additional public interest in this case that weighs strongly in favor of Plaintiffs. As explained *supra* in the Plaintiffs Section, the United States has invested approximately $5.5 million *each* in the training of the 17 Plaintiff pilots. That is a total of approximately $93.5 million that taxpayers have spent to produce some of the most highly trained military pilots in the world. Defendants' intended discharge of these pilots would constitute a colossal waste of taxpayer dollars for no good reason. And it must be remembered that Plaintiff pilots cannot be replaced easily, cheaply, or quickly. Moreover, Defendants' irrational effort to discharge them comes at the wrong time. With active international threats in several areas of the world, now is not the time for the Air Force to be terminating senior pilots who are clearly deployable—as evidenced by Defendants' repeated deployment of them.

In sum, the balance of harms and the public interest weighs heavily in favor of the issuance of a preliminary injunction. There is no public interest in the immediate discharge of Plaintiffs in violation of their religious convictions, the Constitution, and federal statutory law.

CONCLUSION

For all of the reasons explained herein, the Court should grant Plaintiffs' motion for a preliminary injunction. Specifically, Plaintiffs request that the Court issue:

(A) A preliminary injunction prohibiting Defendants, their agents, officials, servants, employees, and any other persons acting on their behalf from taking further steps toward the

discharge of Plaintiffs or any member the Air Force, Air Force Reserve, or Air National Guard who has filed a RAR;

(B) A preliminary injunction compelling Defendants, their agents, officials, servants, employees, and any other persons acting on their behalf to restore the training and other career opportunities that Plaintiffs have been denied as a result of Plaintiffs' filing of RARs; and

(C) A preliminary injunction prohibiting Defendants, their agents, officials, servants, employees, and any other persons acting on their behalf from denying travel, training, or other career opportunities to any member of the Air Force, Air Force Reserve, or Air National Guard who has filed or received a RAR.

HEARING REQUESTED

Dated**:** March 18, 2022

Respectfully submitted,

/s/ Kris W. Kobach

Kris W. Kobach
Plaintiffs' Counsel of Record
Nebraska Bar No. 23356
Alliance for Free Citizens
P.O. Box 155
Lecompton, KS 66050
(913) 638-5567
kkobach@gmail.com

Pam Bondi, *pro hac vice app. pending*
Jessica Hart Steinmann, *pro hac vice app. pending*
Rachel Jag, *admitted pro hac vice*
Craig Trainor, *admitted pro hac vice*
America First Policy Institute
1001 Pennsylvania Ave., NW
Suite 530
Washington, DC 20004
(571) 348-1802
pbondi@americafirstpolicy.com
jsteinmann@americafirstpolicy.com
rjag@americafirstpolicy.com
ctrainor@americafirstpolicy.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2022, I electronically served upon defense counsel the foregoing document through the operation of the Court's ECF system. In addition, a copy has been sent via electronic mail to defense counsel at the following email addresses:

Stuart J. Robinson
Johnny H. Walker
Courtney D. Enlow
U.S. Department of Justice
Civil Division
950 Pennsylvania Ave.
Washington, D.C. 20530
Stuart.J.Robinson@usdoj.gov
Johnny.H.Walker@usdoj.gov
Courtney.D.Enlow@usdoj.gov

Steve Russell
Lynnett M. Wagner
Tom Hook
U.S. Attorney's Office, District of Nebraska
487 Federal Building
100 Centennial Mall North
Lincoln, NE 68508
Steve.Russell@usdoj.gov
Lynnett.M.Wagner@usdoj.gov
Tim.Hook@usdoj.gov

s/ Kris W. Kobach
KRIS W. KOBACH

CERTIFICATE OF COMPLIANCE

I hereby certify that the countable sections of this Motion for Preliminary Injunction contain 11,578 words, as calculated by Microsoft Word.

s/ Kris W. Kobach
KRIS W. KOBACH