

**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	)	Civil Action No. 4:22-cv-3038
M. FRIES; AIRMEN 1-11;	)	
	)	
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.	)	

**COMPLAINT**

Plaintiffs, by and through counsel, and for their Complaint against the Defendants, hereby state the following:

## INTRODUCTION

1. 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.

2. Defendants are trying to force Plaintiffs and thousands of other Air Force service members to submit to a COVID-19 vaccine injection. All Plaintiffs object to receiving a COVID-19 vaccination based on their sincerely held religious beliefs. Defendants are implementing a policy that forces Plaintiffs to submit to the COVID-19 vaccination in violation of their religious beliefs or face involuntary separation from the military service.

3. All Plaintiffs have filed for a religious accommodation to be exempted from the Air Force's COVID-19 vaccination requirement. None have had their requests for religious accommodation granted.

4. At the time of this filing, 19 Plaintiffs have already had their requests denied with virtually identical denial letters. Each of those Plaintiffs appealed his or her denial.

5. At the time of this filing, five of those 19 Plaintiffs have had their appeal denied as well. Those five Plaintiffs—Tanner W. Roth, Jon W. Smithley, Logan M. Priebe, Victoria S. Roberts, and Airman #1—face imminent involuntary separation from the Air Force within a period of weeks.

6. In the weeks preceding this filing, the denials of additional Plaintiffs' initial requests and appeals have been mounting. It is expected that all Plaintiffs soon will be at the stage of imminent involuntary separation from the Air Force.

7. In nearly all of the denial letters, Defendants have conceded the sincerity of Plaintiffs' religious objections to receiving a COVID-19 vaccination.

8. Defendants have implemented an accommodation request process that is intended to deny all, or virtually all, religious exemptions from the vaccine mandate. At the time of this filing, 99.6% of religious accommodation requests that have been decided have been denied. As is detailed below, more than 4,637 religious accommodation requests have been denied, and only 17 have been granted.

9. However, those few granted requests are illusory and intended to create a false impression. In most instances, Defendants granted them in cases where the applicants were already nearing retirement or voluntary separation from the Air Force.

10. This action is based upon Defendants' violation of the First Amendment to the Constitution of the United States and the Religious Freedom Restoration Act ("RFRA"). Plaintiffs' have been denied their fundamental right to the free exercise of religion; and they seek protection from agency action that is unlawful, contrary to law, and arbitrary and capricious.

11. Defendants committed each and every act alleged herein under the color of law.

12. Plaintiffs challenge the policies and actions detailed below on their face and as applied to Plaintiffs.

13. Defendants' policies and actions have deprived and will continue to deprive Plaintiffs of their rights and guarantees under the Constitution of the United States, federal law, and state law.

14. As is explained in full below, Defendants' policies and actions violate RFRA and are unconstitutional under the First Amendment of the Constitution because their policies are not supported by a compelling government interest and are not the least restrictive means of serving such a purported interest.

15. Not only do Defendants' policies and actions fail to serve a compelling government interest, the involuntary separation of Plaintiffs from the Air Force would be extremely detrimental to the interests of the United States. The Air Force has invested more than \$93 million in the training of the 17 pilots among the Plaintiffs, as is explained below. Those highly-trained pilots cannot be replaced quickly or easily. Defendants' policies and actions are particularly troubling because they undermine American military strength at a time when the country faces three geopolitical crises—the Russian invasion of Ukraine, Chinese ambitions regarding Taiwan, and an Iran armed with nuclear weapons.

#### **JURISDICTION AND VENUE**

16. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under the Constitution of the United States and federal law.

17. The Court also has jurisdiction under 28 U.S.C. § 1346 because this is a civil action against the United States.

18. The Court also has jurisdiction under 28 U.S.C. § 1361 to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

19. The Court also has jurisdiction pursuant to 42 U.S.C. § 2000bb-1(c) because Plaintiffs' religious exercise has been burdened by Defendants.

20. This Court also has jurisdiction to review Defendants' unlawful actions and inactions and enter appropriate relief under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

21. The Court also has jurisdiction to review and enjoin ultra vires or unconstitutional agency action through an equitable cause of action. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-92 (1949).

22. This Court has authority to award the requested relief pursuant to 42 U.S.C. § 2000bb-1 and *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020); the requested declaratory relief pursuant to 28 U.S.C. §§ 2201-02; the requested injunctive relief pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 2202; and costs and attorneys' fees pursuant to 42 U.S.C. § 1988(b).

23. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e) because Defendants are officers and employees of the United States and agencies of the United States, and the military workplace and the location in which a substantial part of the events or omissions giving rise to the claims of a significant percentage of Plaintiffs is in the vicinity of Omaha, Nebraska. The plurality of Plaintiffs are also residents of the state of Nebraska, with most serving at Offutt Air Force Base. The proximity of the Omaha courthouse to their base of operations makes that venue the most convenient venue for Plaintiffs.

#### **PLAINTIFFS**

24. The name, rank, position, station, and religious accommodation request status of each Plaintiff follows. The first five plaintiffs listed below have already had their appeals denied and face imminent involuntary separation from the Air Force.

25. The Airmen who are proceeding anonymously are doing so because they are in possession of sensitive, top-secret intelligence, and revealing their names would expose them to potential counterintelligence operations. Male pronouns are used in describing all of them, regardless of their sex.

**Plaintiffs Whose Appeals Have Been Denied**

26. Plaintiff Tanner W. Roth is a Major in the active duty Air Force who is a KC-135 and T-6 Instructor Pilot at Randolph Air Force Base in Universal City, Texas. He serves as Assistant Director of Operations in the 12th Operational Support Squadron and assists in overseeing the flight missions of the 12th Flying Training Wing. He helps manage operations for three runways, two air traffic towers, aircrew flight equipment, egress, and 18,647 square miles of airspace. As a KC-135 and T-6 Evaluator and Instructor pilot, he teaches and evaluates skills, techniques, and procedures for new pilots. He filed a Religious Accommodation Request (“RAR”) on September 27, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. On January 28, 2022, his request was denied, and he appealed on February 7, 2022. On February 25, 2022, his appeal was denied. On March 2, 2022, he was formally ordered to receive the mandatory COVID-19 vaccine or face discharge. On March 7, 2022, the discharge process was initiated by his Squadron Commander. He has been prohibited from flying as of that date. Earlier, he was prohibited from attending the National Character and Leadership Symposium at the Air Force Academy, losing out on a crucial leadership and skills training opportunity. Since filing his RAR, he has undergone weekly COVID-19 testing. He expects to be involuntarily separated from the Air Force within weeks.

27. Plaintiff Jon W. Smithley is a Lieutenant Colonel in the active duty Air Force who serves the spiritual needs of fellow airmen as a chaplain. He has served in the Air Force

for 30 years, 17 years in active duty and 13 years in the Air National Guard. He is the only chaplain in the Air Force Office of Special Operations and is currently stationed at the Quantico Marine Corps Base in Virginia. Plaintiff Smithley filed an RAR on September 23, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. This request was denied on December 13, 2021. He submitted his appeal to that denial on December 18, 2021. His appeal was rejected on January 24, 2022. Plaintiff Smithley was informed that he had three options: (1) file for retirement; (2) file for separation; or (3) violate his sincerely held religious beliefs and comply with the mandated COVID-19 vaccine regimen. Despite serving 30 years, Plaintiff Smithley does not qualify for retirement because only 17 of those years have been in the active duty Air Force. Likewise, he does not qualify for separation because he has more than two years remaining in his active duty service commitment. Therefore, Plaintiff Smithley is faced with either violating his sincerely held religious beliefs or being other than honorably discharged. On March 1, 2022, Plaintiff Smithley received a letter of reprimand for adhering to his beliefs. He expects to be terminated from his position within weeks.

28. Plaintiff Logan M. Priebe is a First Lieutenant in the Air Force Reserve in the 931st Aerospace Medical Squadron and is a clinical nurse. She oversees the basic life support program as well as the infection control program. She is stationed at McConnell Air Force base in Wichita, Kansas. Plaintiff Priebe filed an RAR on October 2, 2021, because taking the COVID-19 vaccine conflicts with her sincerely held religious beliefs. Her request for religious accommodation was denied on November 5, 2021, and she appealed on November 9, 2021. On January 31, 2022, her appeal was denied, and on February 5, 2022, she submitted her notice of official refusal to take any COVID-19 vaccine. She received a letter of reprimand on March

6, 2022. She expects to be involuntarily removed from the Air Force within weeks. After returning from maternity leave in March of 2021, her commander would not allow her to submit for officer training school (OTS) until she received the COVID-19 vaccine. She was also told that even with an approved RAR, she would still not be allowed to attend OTS without a vaccination.

29. Plaintiff Victoria S. Roberts is a Staff Sergeant in the Air Force Reserve who is a Combat Crew Communications (CCC) Technician for the KC-46 and KC-135 aircraft. She serves at McConnell Air Force Base in Wichita, Kansas. She objects to receiving the COVID-19 vaccine because of her sincerely held religious beliefs. On October 1, 2021, she submitted her RAR. It was rejected on November 6, 2021. She submitted her appeal three days later. Her appeal was rejected on February 6, 2022, and she received her letter of reprimand on March 1, 2022. She expects to be involuntarily removed from the Air Force within weeks. Since filing her RAR, she has been required to take a COVID-19 test twice a week. As a result of her RAR, she has been informed that she will not be able to travel or deploy.

30. Plaintiff Airman #1 is a Staff Sergeant in the 49th Intelligence Squadron and an Airborne Cryptologic Language Analyst (ACLA) in the United States Air Force Reserve at Offutt Air Force Base in Nebraska. His language specialty is Chinese Mandarin. As an ACLA, he flies aboard the RC-135 and translates intercepted intelligence in real time. His job includes working alongside civilian contractors who perform the exact same duties as military members yet are not subject to vaccination requirements. He submitted an RAR on October 2, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. He received a letter denying his request on January 7, 2022, and filed an appeal on January 9, 2022. His appeal was denied on March 1, 2022. He was informed by his squadron commander on

March 6, 2022, that the commander was exercising his discretion to skip the steps of progressive discipline (including the letter of reprimand). Instead, the commander is already beginning the involuntary-separation process. From that date forward, Plaintiff Airman #1 is being excused from drills and is not receiving drill pay. His final separation is imminent.

**Plaintiffs Whose Initial RARs Have Been Denied**

31. Plaintiff Timothy C. Bexten is a major in the active duty Air Force in the 22nd Operations Support Squadron. He is an Aircraft Commander in the C-130 aircraft, an Evaluator Pilot in the KC-135 and the KC-46A aircraft, and an Instructor Pilot in the T-1 aircraft. He has flown more than 3,100 hours in these four major weapons systems. He has been on active duty in the United States Air Force for 15 years. He is the Aircrew Training Detachment Deputy Chief at McConnell Air Force Base in Wichita, Kansas. Additionally, he has deployed multiple times in multiple locations during Operation Iraqi Freedom, Operation Enduring Freedom, and Operation Inherent Resolve. He filed a Religious Accommodation Request (“RAR”) on September 23, 2021, because taking the vaccine conflicts with his sincerely held religious beliefs. On February 18, 2022, he received a denial of his RAR, and he appealed on February 23, 2022. Because he has remained unvaccinated while seeking a religious accommodation, he has not been allowed to go outside of a 70-mile radius of the base. He is being tested weekly for COVID-19.

32. Plaintiff Zachary R. Braum is an active duty Air Force Captain in the 344th Air Refueling Squadron (“344 ARS”) and is a Pilot on the KC-135 and KC-46A aircraft at McConnell Air Force Base, Kansas. He also works directly for the Commander of the 344 ARS as Chief of the Commander’s Action Group. He filed his RAR on September 23, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. On February

28, 2022, his RAR was denied. He has been mission-critical to the operations of the 344 ARS throughout the pandemic. He has graduate level pilot training in the KC-135 and KC-46, and he has helped build processes to make the KC-46 safer and improve the 344 ARS. While waiting for his religious accommodation to be granted, he has been subject to adverse personnel actions and restricted in his duties. His travel has been restricted, and he has been prevented from deploying. He has been subject to weekly COVID-19 testing.

33. Plaintiff Armand G. Fondren II is a Lieutenant Colonel in the active duty Air Force and an Instructor Pilot in the T-6 aircraft. He is also an Evaluator Pilot in the RC-135, WC-135, and OC-135 aircraft. He is Assistant Director of Operations in the 37th Flying Training Squadron, stationed at Columbus Air Force Base in Columbus, Mississippi. Plaintiff Fondren filed an RAR on September 9, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. On February 3, 2022, Air Education and Training Command denied his request, and he appealed on February 9, 2022. Plaintiff Fondren approached Major General Wills in an open forum inquiring whether his unvaccinated students would be put on administrative leave. Merely because of his inquiry, Plaintiff Fondren was submitted to Commander Directed Investigation for disrespecting a superior officer and conduct unbecoming an airman. While Plaintiff Fondren was found not guilty, he was nonetheless removed from his position as Director of Operations and transferred to a different squadron. Because he filed for religious accommodation, he has been prohibited from accepting a permanent change of station, despite having a previously approved permanent change of station scheduled for May.

34. Plaintiff Nathan P. Gavic is a Major and full-time Air Force Reservist (“AGR”) assigned to the 39th Flying Training Squadron. He is an Instructor Pilot in the T-38C, B-1B,

and T-6A aircraft. His reserve squadron supports the Air Force active duty training mission of pilot instructor training at Randolph Air Force Base in Texas. On October 13, 2021, he submitted his RAR because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. On December 14, 2021, he received a denial letter from the Air Force Reserve Commander. He submitted his appeal on December 19, 2021, and is awaiting a response. His Squadron Commander threatened to withhold his pay the moment the mandate deadline passed in order to coerce him into taking the vaccine. He has been required to test weekly for COVID-19 while his RAR has been pending.

35. Plaintiff Brennan L. Barlow is an active duty Airman First Class Aerospace Maintenance Apprentice in the 22nd Maintenance Squadron. His responsibilities include launching and recovering, ground handling, performing maintenance inspections, and troubleshooting and replacing failed components on KC-135 aircraft. He is stationed at McConnell Air Force Base in Wichita, Kansas. Plaintiff Barlow filed an RAR in September 2021 because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. His request for religious accommodation was denied on February 16, 2022, and he filed an appeal on February 22, 2022.

36. Plaintiff Michael T. Edwards is a Senior Master Sergeant and Air Force Reservist in the 820th Intelligence Squadron ("820 IS" who is stationed at Offutt Air Force Base in Nebraska. He is the superintendent of the 820 IS, and as the senior enlisted advisor to the Squadron Commander, informs the Commander on all squadron matters. He filed an RAR on October 7, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. His request was denied on January 7, 2022. He appealed the denial on January 11, 2022.

37. Plaintiff Airman #2 is a Captain in the 38th Reconnaissance Squadron and is an Electronic Warfare Officer in the RC-135V/W aircraft, stationed at Offutt Air Force Base in Nebraska. He provides near real-time on-scene intelligence collection, analysis, and dissemination. On September 12, 2021, he submitted an RAR because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. His request was denied on February 25, 2022, and he appealed on March 2, 2022. Since he has remained unvaccinated, he has been denied travel by the Air Force. He was also removed from his upcoming deployment.

38. Plaintiff Airman #3 is a Master Sergeant and Intelligence Branch Chief of the 820th Intelligence Squadron in the Air Force Reserve on Offutt Air Force Base in Nebraska. He is an intelligence analyst who performs Target Systems Analysis and Joint Intermediate Target Development. He filed an RAR on October 3, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. His request for religious accommodation was denied on January 7, 2022, and he filed an appeal on January 9, 2022. He is severely disabled due to his military service, and the loss of his military pension and VA benefits would amount to a tremendous financial burden for his healthcare.

39. Plaintiff Airman #4 is a Technical Sergeant of the 49th Intelligence Squadron and an Airborne Cryptologic Language Analyst (ACLA) aboard the RC-135 aircraft. He is a Farsi/Dari Cryptologic Operator who is an Instructor and Evaluator in the Air Force Reserve, stationed at Offutt Air Force Base in Nebraska. As a language analyst, he provides threat warnings and actionable intelligence that can assist in future mission planning. On October 2, 2021, he filed an RAR because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. His request was denied on January 7, 2022. He appealed on January 9, 2022. Because of his filing an RAR and remaining unvaccinated, he has been denied access to use

Ground Training Periods and Flight Training Periods. He has been required to provide proof of a negative COVID-19 test before entering any Department of Defense building.

40. Plaintiff Airman #5 is a Senior Airman in the 49th Intelligence Squadron of the Air Force Reserve and serves as an ACLA aboard the RC-135 aircraft. He is stationed at Offutt Air Force Base in Nebraska. He supports airborne Intelligence, Surveillance, and Reconnaissance missions, transcribing valuable information as a Chinese Mandarin Cryptologic Operator. He submitted an RAR on November 6, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. On January 7, 2022, his request was denied, and he appealed the denial shortly thereafter. Because of his filing an RAR and remaining unvaccinated, he has been denied access to use Ground Training Periods and Flight Training Periods.

41. Plaintiff Airman #6 is a Technical Sergeant in the 49th Intelligence Squadron of the Air Force Reserve at Offutt Air Force Base in Nebraska. He is an ACLA specializing in Korean who operates aboard the RC-135 aircraft. He performs the exact same duties in his job as an employee of the Air Force's civilian contractor Leidos as he does in his job in the Air Force Reserve. In his civilian capacity, he is an ACLA Instructor operating on the same aircraft that he operates on in the Air Force. However, his civilian employer allowed him a religious exemption to the COVID-19 vaccine, because masking and social distancing were acceptable alternatives. He filed an RAR on October 2, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. He met with a chaplain of the Air Force, and this meeting determined that his beliefs are indeed sincere and that he is willing to take medicine, practice social distancing, and wear a mask in order to accommodate the Air Force. On January 7, 2022, his RAR was denied, and on January 9, 2022, he appealed the decision.

Because of his filing an RAR and remaining unvaccinated, he has been denied access to use Ground Training Periods and Flight Training Periods.

42. Plaintiff Airman #7 is an Air Force Reserve Staff Sergeant in the 49th Intelligence Squadron stationed at Offutt Air Force Base in Nebraska. He serves as an ACLA on the RC-135 aircraft. He is a Russian Cryptologic Operator and is required to translate intelligence communications and provide threat warnings and actionable intelligence that can assist in future mission planning. He filed an RAR on or about October 2, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. His request for religious accommodation was denied on or about January 7, 2022, and he appealed the denial on January 22, 2022. Because of his filing an RAR and remaining unvaccinated, he has been denied access to use Ground Training Periods and Flight Training Periods.

43. Plaintiff Airman #8 is a Major in the active duty Air Force in the 343rd Reconnaissance Squadron and is an Electronic Warfare Officer and Mission Crew Commander on the RC-135 aircraft. He is stationed at Offutt Air Force Base in Nebraska. He filed an RAR on September 14, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. He received a denial on February 25, 2022, and appealed the denial on March 4, 2022. The denial letter that he received was identical to the letter received by eight other airmen in the same unit. A stated reason for the denial was that the Air Force did not find that his religious beliefs were sincere because he had received other vaccinations in the past. However, the denial letter did not take into account other information he had provided that addressed that issue. Because he has filed an RAR, he has been forced to turn down requests to deploy due to the Air Force's current policy restricting official travel for any unvaccinated airmen.

44. Plaintiff Airman #9 is a Master Sergeant in the Air Force Reserve stationed at Offutt Air Force Base in Nebraska. He is an ACLA specializing in Arabic and French who operates aboard the RC-135 aircraft. He also serves as an Evaluator/Instructor for other ACLAs. He filed an RAR on October 2, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. On January 7, 2022, his request for a religious accommodation was denied. He appealed on January 9, 2022. Because he filed for a religious accommodation, he was relieved of his flight leadership duties without cause. He also received an Enlisted Performance Review rating of 3, his first rating below 5 in his 15-year career, following his submission of his request for a religious accommodation. Upon information and belief, he considers that rating to be an adverse employment action taken against him because he filed an RAR.

**Plaintiffs Whose Religious Accommodation Requests Have Not Been Answered**

45. Plaintiff Matthew J. Cascarino is a Major in the active duty Air Force in the 349th Air Refueling Squadron, stationed at McConnell Air Force Base in Wichita, Kansas. He is a pilot and Aircraft Commander of the KC-46A aircraft and works directly for the Squadron's Director of Operations. He is also an Instructor Pilot on the E-3 aircraft. He is a rated Senior Pilot and is a certified Mission Pilot with worldwide deployable status. He is an Assistant Director of Operations and manages five squadron departments to keep operations running. He also authorizes flight orders for aircrews to execute global tasks. Plaintiff Cascarino filed a Religious Accommodation Request ("RAR") on September 21, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. Because he filed for a religious accommodation, he has been restricted from attending instructor upgrade classes at Air Education and Training Command bases.

46. Plaintiff Matthew C. Downing is Major in the 238th Combat Training Squadron of the Nebraska Air National Guard. He is an Instructor and Evaluator Pilot on the RC-135V/W/U/S and the TC-135 aircraft. He is one of the few lead instructors on base qualified to teach the instructor upgrade course when Aircraft Commanders come through the program to upgrade to instructor pilots. He is also the Chief of Safety for the 170th Group, and the Deputy Chief of Safety for the 55th Wing. Plaintiff Downing filed his RAR on August 8, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. Seven months later, he has yet to receive a response. Because he filed for a religious accommodation, he has been restricted from traveling. He is one of relatively few evaluator pilots, and he has been prohibited from flying to the newest avionics suite located in Arlington, Texas. He has been taking weekly COVID-19 tests.

47. Plaintiff Kevin Dunbar is a Major in the active duty Air Force with the 344th Air Refueling Squadron at McConnell Air Force Base in Wichita, Kansas. He is a pilot and Aircraft Commander in the KC-46A and C-17 aircraft and is the Squadron's Chief of Scheduling. He is also an Instructor/Evaluator Pilot on the T-1 aircraft. Plaintiff Dunbar filed an RAR on September 17, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. Nearly six months later, he has yet to receive a response. Because he filed for a religious accommodation, he was removed from training exercises, removed from travel duty, delayed promotional upgrade, and made ineligible for selected assignment changes. He has been taking weekly COVID-19 tests.

48. Plaintiff Cameron M. Grim is an active duty Air Force Captain in the 45th Reconnaissance Squadron, stationed at Offutt Air Force Base in Nebraska. He is a pilot and Assistant Flight Commander on the RC-135V/W/U/S/T aircraft who deploys on a regular basis

with the RC-135S Cobra Ball and RC-135U Combat Sent. He submitted an RAR on September 24, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. Nearly six months later, he has not received a decision on his request for accommodation. As a result of his RAR, he was denied training for his aircraft's updated cockpit, was removed from his two upcoming deployments, and will be unable to attend Squadron Officer School, which is required for all Captains to be promoted to the rank of Major.

49. Plaintiff Aaron F. Karpisek is a Captain in the 173rd Air Refueling Squadron of the Nebraska Air National Guard. He is an Instructor Pilot in the KC-135R, stationed at Offutt Air Force Base in Nebraska. Plaintiff Karpisek filed an RAR on October 27, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. More than four months later, he still has not yet received a response to his request. Due to his pending RAR, he was restricted from January and February 2022 Unit Training Assemblies. In addition, he is not permitted to attend any professional military educational courses, he is restricted from travelling, and he is unable to complete his required annual OCONUS oceanic training. He is also unable to attend any simulator training that is required every semester. Most recently, he was informed that he was removed from his 2022 deployment.

50. Plaintiff Ian C. McGee is an active duty Air Force Captain in the 45th Reconnaissance Squadron and is deployed in 379th Expeditionary Operations Support Squadron. He is an Instructor Pilot on the RC-135V/W/U/S/T. He regularly deploys on the RC-135 Cobra Ball. He also trains and instructs pilots in his squadron. He is permanently stationed at Offutt Air Force Base in Nebraska. He has been deployed three times since March 2020. He recently deployed as an unvaccinated pilot from June 12, 2021, to August 18, 2021.

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. The inexperienced pilots ultimately asked for the experienced, unvaccinated pilots to be on board with them out of concern for safety. 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. Plaintiff McGee filed an RAR on September 21, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. Five and a half months later, he still has received no answer to his request. Because of his RAR, Plaintiff McGee has been denied the opportunity to attend training that would advance his flying, instructing, and evaluating skills as a pilot. After filing his RAR, he was informed by his squadron commander that regardless of MAJCOM's decision on his RAR, the Air Force would likely force him to leave by discharge. Plaintiff McGee has been taking weekly COVID-19 tests. He has also been required to wear a mask while indoors.

51. Plaintiff Evan McMillan is an active duty Air Force Major in the 22nd Air Refueling Wing and is an Aircraft Commander in the KC-46A aircraft. Additionally, Plaintiff McMillan is the Wing's Chief of Flight Safety, who oversees aviation safety policy, mishap prevention programs for all aviation assets, and various other safety programs. He is also an Aircraft Commander on the C-146 aircraft and an Instructor Pilot on the T-6 aircraft. He is currently deployed from McConnell Air Force Base in Wichita, Kansas. He submitted an RAR on October 8, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. Plaintiff McMillan has yet to receive a response. Plaintiff McMillan is

currently deployed overseas. Because he is not fully vaccinated while deployed, he is required to wear a mask. He is also restricted to his base and is not allowed any off-base travel.

52. Plaintiff Zachary Morley is an active duty Air Force Captain in the 755th Operations Support Squadron and is a pilot and Aircraft Commander on the EC-130H aircraft. He operates as the Pilot in Command for the Electronic Combat Group, tasked with being combat mission ready to employ electronic attacks anywhere on the globe. He is stationed at Davis-Monthan Air Force Base in Arizona. He filed an RAR for the COVID-19 vaccine on September 20, 2021, and for the flu vaccine on December 14, 2021, because receiving the vaccines conflicts with his sincerely held religious beliefs. Nearly six months after filing his COVID-19 vaccine RAR, he has not received any response. As a result of his filing an RAR, he has been denied travel privileges.

53. Plaintiff Matthew L. Nelson is an active duty Air Force Captain in the 343rd Reconnaissance Squadron and is a Co-Pilot on the RC-135 V/W Rivet Joint aircraft. He is the Squadron's Safety Office Flight Commander and is stationed at the Offutt Air Force Base in Nebraska. Plaintiff Nelson filed an RAR on September 27, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. Five and a half months later, he has not received any response. Because of his RAR, he has been prohibited from attending the Pilot Upgrade Program and is being denied the ability to receive training for updated aircraft. He was also removed from his Fleet Command Center position and denied access to numerous relays, exercises, and travel duty assignments.

54. Plaintiff Bryan Stigall is an active duty Air Force Major in the 338th Combat Training Squadron who is an Evaluator Pilot on the RC-135S/U/V/W aircraft and Chief of Standardization and Evaluations at the Offutt Air Force Base in Nebraska. Plaintiff Stigall filed

an RAR on September 28, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. Five months later, he still has not received a response. Prior to his RAR, he was selected for leadership opportunities, including an Assistant Director of Operations position, but he has been denied those opportunities following the submission of his request. Plaintiff Stigall has also been denied travel duty opportunities.

55. Plaintiff Kynan Valencia is an active duty Air Force Captain in the 350 Aerial Refueling Squadron and is a Co-Pilot on the KC-135R/T aircraft. He is stationed at McConnell Air Force Base in Wichita, Kansas. Plaintiff Valencia filed an RAR on October 13, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. Nearly five months later, he has not received any response to his RAR. Because he filed an RAR, he was informed that he may not attend any formal training programs, nor may he file for a permanent change of station. He was also prohibited both from attending Aircraft Commander upgrade training and from switching aircraft. Plaintiff Valencia has been taking weekly COVID-19 tests.

56. Plaintiff Morgan T. Viar is an active duty Air Force Captain and an RC-135 Co-Pilot and Flight Commander with the 4th Reconnaissance Squadron at Offutt Air Force Base in Nebraska. He is also a pilot and commander of the MQ-1 and MQ-9 unmanned aircraft and has more than 1,000 hours of combat flights with the MQ-9. Plaintiff Viar filed an RAR on October 6, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. Five months later, he has not received any response. After he submitted his RAR, he was prevented from undertaking his previously scheduled December 2021 deployment. He has also been denied the opportunity to participate in his squadron's Pilot Upgrade Program, which is necessary for him to become an Aircraft Commander on the RC-

135. He has also been denied multiple travel opportunities since filing his RAR and has only been permitted to fly in local training and simulator sorties, which has severely hampered his flight and career progression.

57. Plaintiff Daniel Vera Ponce is a First Lieutenant in the Air Force who is a student Navigator on the RC-135 and a member of the 338th Combat Training Squadron at Offutt Air Force Base in Nebraska. He is also proficient in Russian. On November 1, 2021, he submitted his (amended) RAR because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. Four months later, he has not received a response to his request.

58. Plaintiff Adam R. Cassidy is a Major and the Commander of the 155th Aircraft Maintenance Squadron in the Nebraska Air National Guard, stationed at the Lincoln Air National Guard Base in Lincoln, Nebraska. On October 25, 2021, he filed an RAR because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. Four and a half months later, he has not received a response. Because of his RAR and his remaining unvaccinated, in January of 2022, he was told he could not attend a regularly scheduled drill. At approximately the same time, he was ordered by the Nebraska Adjutant General to participate as a board member on a discharge board. He asked for clarifying guidance on which order took precedence and was informed that he must participate in the board in person at Joint Force Head Quarters (in close confines within a small conference room), but he was denied the opportunity to participate in any drill function unless he did so through telecommute. He was and remains able to telecommute for most drill functions. In February 2022, after the number of Omicron cases started to fall, leadership decided to allow certain unvaccinated individuals to drill, but not all of them. Due to the nature of Plaintiff Cassidy's position, he was allowed to

participate, but was required to mask and social distance. Other lower level, unvaccinated individuals, however, were not allowed to participate.

59. Plaintiff Tristan M. Fries is a Lieutenant Colonel in the Kansas Air National Guard's 177th Information Aggressor Squadron stationed at McConnell Air Force base in Wichita, Kansas. He is a Cyber Operations Officer currently overseeing outreach and exercises. Plaintiff Fries filed an RAR on September 9, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. Since December 2021, because he filed an RAR, he has been prevented from traveling for mission purposes, which has significantly hindered his career in the Kansas Air National Guard. Since February 5, 2022, he has taken weekly COVID-19 tests.

60. Plaintiff Airman #10 is a Captain and Intelligence Officer in the Air Force Reserve who serves as the Imagery Branch Chief for the Current Intelligence Division as a member of the United States Strategic Command Joint Reserve Intelligence Element. He oversees a team of seven junior officers and enlisted personnel at Offutt Air Force Base in Nebraska. His branch produces and disseminates intelligence reports throughout the Intelligence Community. On September 24, 2021, he submitted his RAR because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. Five and a half months later, he has yet to receive a response. Because he filed an RAR, he must have a negative COVID-19 test within the past 48 hours in order to enter the United States Strategic Command and Control facility where he works.

61. Plaintiff Airman #11 is a Chief Master Sergeant in the Active Guard Reserve with the 184th Wing of the Kansas Air National Guard at McConnell Air Force Base in Wichita, Kansas. He is a Cyberwarfare Operator serving both the Cyberspace Operations Team Chief

and the Senior Enlisted Leader of the 177th Information Aggressor Squadron. He filed an RAR on October 17, 2021, because taking the COVID-19 vaccine conflicts with his sincerely held religious beliefs. Nearly five months later, he has not received any response. Because he filed for a religious accommodation, he has been removed from the mandatory Chiefs' course, and has been prohibited from conducting official travel.

## **DEFENDANTS**

62. Defendant Lloyd J. Austin, III, is the United States Secretary of Defense. Secretary Austin issued a memorandum on August 24, 2021, which requires the United States Armed Forces to vaccinate all service members, including Plaintiffs. Secretary Austin is being sued in his official capacity.

63. Defendant United States Department of Defense ("DoD") is the executive branch department that coordinates and supervises all agencies and functions of the government related to the United States Armed Forces, including the vaccination policies at issue herein.

64. Defendant Frank Kendall, III, is the United States Secretary of the Air Force. Secretary Kendall is being sued in his individual and official capacities.

65. Defendant Robert I. Miller is the Surgeon General of the United States Air Force. He is the Air Force official who is ultimately responsible for determining the outcome of religious accommodation appeals with respect to COVID-19 vaccinations.

66. Defendant Michael A. Loh is the Director of the Air National Guard. He is the senior officer responsible for formulating and developing the policies of the Air National Guard, including those governing RARs.

67. Defendant David A. Weishaar is the Adjutant General of the Kansas National Guard. He is the senior officer responsible for implementing policies governing the Kansas Air National Guard.

68. Defendant Daryl L. Bohac is the Adjutant General of the Nebraska National Guard. He is the senior officer responsible for implementing policies governing the Nebraska Air National Guard.

## **FACTUAL BACKGROUND**

### **Defendants' Vaccine Mandate**

69. On or about July 29, 2021, President Joseph Biden directed the Department of Defense (“DoD”) to add the COVID-19 vaccine to its list of required immunizations for all service members. *See* 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), <http://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/> (“Today, the President will announce that he is directing the Department of Defense to look into how and when they will add COVID-19 vaccination to the list of required vaccinations for members of the military.”); Meghann Meyers and Howard Altman, *Military Times*, Oct. 21, 2021, <http://www.militarytimes.com/news/your-military/2021/07/29/biden-orders-pentagon-to-consider-mandatory-covid-19-vaccination/>.

70. On August 24, 2021, Defendant Austin issued a memorandum entitled “Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members” (“the DoD Vaccine Mandate”). A true and correct copy of the DoD Vaccine Mandate is attached as Exhibit A to this Complaint.

71. The DoD Vaccine Mandate directs DoD to vaccinate all active duty and reserve service members against COVID-19.

72. The DoD Vaccine Mandate states that all service members who previously contracted COVID-19 and now have active antibodies against the virus are not considered fully vaccinated and are still required to receive a vaccination against COVID-19.

73. The DoD Vaccine Mandate provides that DoD will only use or administer COVID-19 vaccines that are fully licensed by the United States Food and Drug Administration (“FDA”), in accordance with FDA-approved labeling and guidance.

74. The DoD Vaccine Mandate provides that service members who previously received a vaccination against COVID-19 under FDA Emergency Use Authorization or World Health Organization Emergency Use Listing are considered fully vaccinated.

75. The DoD Vaccine Mandate provides that service members actively participating in COVID-19 clinical trials are exempted from the DoD Vaccine Mandate until the trial is complete.

76. The DoD Vaccine Mandate states that the Department of Defense will implement the DoD Vaccine Mandate consistent with DoD Instruction 205.02, “DoD Immunization Program,” dated July 23, 2019.

77. The DoD Vaccine Mandate further states, “Those with previous COVID-19 infections are not considered fully vaccinated.”

78. The DoD Vaccine Mandate states that the Military Departments, including the Air Force, Air Force Reserve, and Air National Guard, should use existing policies and procedures to manage mandatory vaccination of service members to the extent practicable.

79. The DoD Vaccine Mandate states that vaccination of service members will be subject to any identified contraindications and any administrative or other exemptions established in Military Department policy.

80. Defendants issued subsequent guidance stating that service members who are not fully vaccinated by established deadlines will immediately suffer adverse consequences as directed by their service components. The adverse consequences may include: court-martial (criminal) prosecution, involuntary separation, relief for cause from leadership position, removal from promotion lists, inability to attend certain military training and education schools, loss of special pay, placement in a non-deployable status, recoupment of money spent training the service member, and loss of leave and travel privileges for both official and unofficial purposes.

81. On September 3, 2021, Secretary Kendall issued a memorandum entitled “Mandatory Coronavirus Disease 2019 Vaccination of Department of the Air Force Military Members” (the “Air Force Vaccine Mandate”) (collectively, the DoD Vaccine Mandate and the Air Force Vaccine Mandate are the “Vaccine Mandates”). A true and correct copy of the Air Force Vaccine Mandate is attached as Exhibit B to this Complaint.

82. The Air Force Vaccine Mandate directs all Air Force active duty personnel to become fully vaccinated by November 2, 2021, and all United States Air Force Reserve personnel and Air National Guard personnel to become fully vaccinated by December 2, 2021, unless exempted.

83. The Air Force Vaccine Mandate states that “[o]nly 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 that has

obtained U.S. Food and Drug Administration Emergency Use Authorization or is included in the World Health Organization's Emergency Use Listing.”

84. Although vaccines that received FDA emergency use authorization were widely available by November 2, 2021, no vaccine that had received full licensure from the FDA was widely available by November 2, 2021.

85. The Air Force Vaccine Mandate states: “Individuals with previous COVID-19 infections or positive serology are not considered fully vaccinated and are not exempt.”

86. On December 7, 2021, Secretary Kendall issued a memorandum entitled “Supplemental Coronavirus Disease 2019 Vaccination Policy” (“Air Force Supplemental Policy”). A copy of the memorandum is attached as Exhibit C to this Complaint.

87. The Air Force Supplemental Policy states that failure to comply with the DoD Vaccine Mandate will result in immediate adverse consequences for regular members of the Air Force, to wit, “Refusal to comply with the vaccine mandate without an exemption will result in the member being subject to initiation of administrative discharge proceedings.”

88. The Air Force Supplemental Policy states: “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.”

89. The Air Force Supplemental Policy (in Attachment 1 of the Policy) states that Traditional Reserve members who fail to comply with the Vaccine Mandate and have not submitted an accommodation request “will be placed in a no pay/no points status and involuntarily reassigned to the Individual Ready Reserve (IRR). Active Guard and Reserve (AGR) members who fail to comply and have not submitted an accommodation request “will

have their AGR tour curtailed and [sic] involuntarily reassigned to the IRR.” They will be subject to “recoupment for any unearned special, incentive pays or certain training.”

90. Other consequences for failure to comply with the Vaccine Mandate, which have been threatened or already imposed upon one or more Plaintiffs, include: involuntary separation, relief for cause from leadership position, removal from promotion lists, inability to attend certain military training and education schools, loss of leadership positions, loss of special pay, placement in a non-deployable status, recoupment of money spent training the service members, and loss of leave and travel privileges for both official and unofficial purposes.

91. Defendants have discretion in granting religious accommodations. *See, e.g.*, Department of Defense Instruction (DODI) 1300.17, Religious Liberty in the Military Services, dated September 1, 2020.

92. Defendants have discretion in granting medical and administrative accommodations.

93. On November 30, 2021, Defendant Austin issued a memorandum entitled “Coronavirus Disease 2019 Vaccination for Members of the National Guard and Ready Reserve” (“National Guard and Reserve Mandate”). A true and correct copy of the National Guard and Reserve Mandate is attached as Exhibit D to this Complaint.

94. The National Guard and Reserve Mandate states that unless exempted, members of the National Guard must be vaccinated “to participate in drills, training and other duty.”

95. The National Guard and Reserve Mandate states: “No Department of Defense funding may be allocated for payment of duties performed under title 32 for members of the

National Guard who do not comply with Department of Defense COVID-19 vaccination requirements.”

96. The National Guard and Reserve Mandate states: “No credit or excused absence shall be afforded to members who do not participate in drills, training, or other duty due to failure to be fully vaccinated against COVID-19.”

97. As reported by the Air Force on March 1, 2022, the Air Force had granted 1,294 medical exemptions and 1,686 administrative exemptions from the DoD Vaccine Mandate. *See* DAF COVID-19 Statistics – Mar. 1, 2022, Secretary of the Air Force Public Affairs, *available at* <https://www.af.mil/News/Article-Display/Article/2950923/daf-covid-19-statistics-mar-1-2022/>.

98. As reported by the Air Force on March 1, 2022, the Air Force had denied 4,637 religious accommodation requests regarding the DoD Vaccine Mandate (3,110 initial requests denied and 1,051 appeals denied). The Air Force had granted only 17 religious accommodation requests. *See id.*

99. Defendants have denied 99.6% of religious accommodation requests. *See id.*

100. Plaintiffs have been informed that those 17 cases in which requests were granted were ones in which the service member was already imminently approaching retirement or other voluntary separation from the service.

101. Therefore, those grants of accommodation were of little significance and were likely done to create the illusion of a process that is not virtually certain to result in denial.

102. As reported by the Air Force on March 1, 2022, 96.2 % of all Air Force personnel (including active duty, reserves, and national guard) have been fully vaccinated against COVID-19. *Id.*

103. Plaintiffs have spent years in training, at tremendous personal cost and sacrifice, to attain the status they have achieved and to serve their country.

104. The United States Air Force has spent an extraordinary amount of money to provide highly specialized training to Plaintiffs. This is particularly true with respect to the pilot Plaintiffs. According to a Rand study commissioned by the United States Air Force, the cost of training an Air Force pilot of an RC-135 (the principal aircraft at Offutt Air Force Base, which has the same platform as a KC-135, the principal aircraft at McConnell Air Force Base) 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](https://www.rand.org/pubs/research_reports/RR2415.html).

105. Seventeen of the Plaintiffs are pilots. 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.

106. Plaintiffs are all in excellent physical condition. They are statistically unlikely to suffer significant consequences or hospitalization from contracting COVID-19.

107. Twenty-nine of the 36 Plaintiffs have already had, and recovered from, COVID-19. None were hospitalized. Those Plaintiffs possess natural immunity as a result, as described more fully below.

108. Since early 2020, all Plaintiffs have practiced social distancing, frequent handwashing, masking, regular COVID-19 testing, or working remotely as directed by their commanding officers.

109. All Plaintiffs can continue to perform their work at the highest level while practicing a combination of social distancing, frequent handwashing, masking, regular COVID-19 testing, or working remotely, depending on the duties of the Plaintiff.

110. Thousands of Air Force service members with approved medical or administrative accommodations are being permitted to work in person and perform their duties without facing adverse employment consequences, involuntary separation from the Air Force, or early retirement.

### **Plaintiffs' Sincerely Held Religious Objections to COVID-19 Vaccinations**

111. Plaintiffs each object to receiving a COVID-19 vaccination based on his or her sincerely held religious beliefs.

112. Plaintiffs are members of various denominations within the Christian faith.

113. Plaintiffs' sincerely held religious beliefs forbid each of them from receiving the COVID-19 vaccine for a variety of reasons based upon their Christian faith as revealed through the Holy Bible and prayerful discernment.

114. Multiple Plaintiffs hold 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.

115. As a result of their sincerely held religious beliefs regarding life and abortion, multiple Plaintiffs are unable to receive any of the COVID-19 vaccines due to what they believe and understand is a connection between these vaccines and their testing, development, or production using aborted fetal cell lines.

116. Plaintiffs believe that receiving a COVID-19 vaccine that was tested, developed, or produced using aborted fetal cell lines would force them to violate their sincerely held

religious beliefs by causing them to participate in the abortion enterprise, which they believe to be immoral and highly offensive to God. *See, e.g.*, Annette B. Vogel, et al., “BNT162b vaccines protect rhesus macaques from SARS-Cov-2,” *Nature* (Feb. 1, 2021), <https://www.nature.com/articles/s41586021-03275-y> (explaining that the BNT162b vaccines (the Pfizer/BioNTech vaccine now known as Comirnaty) were tested using HEK293T aborted fetal cells); Meeting of the Vaccines and Related Biological Products Advisory Committee, U.S. Food and Drug Administration (May 2016, 2001) (Statement of Dr. Alex van der Eb, emeritus professor at the University of Leiden) (“The fetus [from whom the HEK 293 cell lines were acquired], as far as I can remember was completely normal. Nothing was wrong. The reasons for the abortion were unknown to me. I probably knew it at the time, but it got lost, all this information.”).

117. Multiple Plaintiffs, prior to learning about the production or testing of the COVID-19 vaccines using aborted fetal cell lines, were unaware that such cell lines were used in the production or testing of any medications or vaccines.

118. Multiple Plaintiffs, having learned that other medications may be tested or produced using aborted fetal cell lines, have since committed to refusing to take any medication that is thus developed or tested.

119. Multiple Plaintiffs hold to the sincere religious belief that the human body is God’s temple, which is fearfully and wonderfully made by God, and that they must not put anything into their bodies that God has forbidden or that would alter the functions of their body such as by inducing the production of a spike protein in a manner not designed by God.

120. In accordance with their sincerely held religious belief, multiple Plaintiffs carefully monitor what they put into their bodies, and they are compelled to avoid anything that

adversely alters or may modify their bodies' natural functions in a manner not designed by God.

121. The COVID-19 vaccines use mRNA technology, which causes human cells to produce a spike protein they would not normally produce. *See* Center for Disease Control, "Understanding mRNA COVID-19 Vaccines," <http://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/mrna.html> (Mar. 4, 2021).

122. 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. *See* 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-cases-linked-covid-19-vaccines.html>.

123. U.S. Army Lieutenant Colonel (LTC) Theresa Long, M.D., M.P.H., F.S., submitted a sworn affidavit, under penalty of perjury, as a whistleblower under the Military Whistleblower Protection Act, 10 U.S.C. §1034, in support of a Motion for Preliminary Injunction in *Robert, et al. v. Austin, et al.*, 1:21-cv-02228-RM-STV (D. Colo., filed Aug. 17, 2021).

124. In her affidavit, LTC Long expressed her expert opinion that:

"None of the ordered Emergency Use COVID-19 vaccines can or will provide better immunity than an infection-recovered person."

"All three of the [Emergency Use Authorization] EUA COVID-19 vaccines (Comirnaty is not available)...are more risky, harmful, and dangerous than having no vaccine at all, whether a person is COVID-recovered or facing a COVID infection."

“Direct evidence exists and suggests that all persons who have received a COVID-19 vaccine are damaged in their cardiovascular system in an irreparable and irrevocable manner.”

125. LTC Long does not hold an outlier opinion. For example, in a sworn declaration, Dr. Jayanta Bhattacharya and Dr. Martin Kulldoff—professors of medicine at Stanford University and Harvard Medical School, respectively—expressed similar conclusions. *Zywicki v. Washington*, 1:21-cv-00894-AJT-MSN (E.D. Va., filed Aug. 3, 2021). Dr. Hooman Noorchashm, M.D., Ph.D.—who is well-published in the medical field and has held multiple prestigious faculty appointments—reached a similar conclusion in his own sworn declaration. He concluded that “[a] series of epidemiological studies have demonstrated to a reasonable degree of medical certainty that natural immunity following infection and recovery from the SARS-CoV-2 virus provides robust and durable protection against reinfection, at levels equal to or better than the *most effective* vaccines currently available.” *Zywicki v. Washington*, 1:21-cv-00894-AJT-MSN (E.D. Va., filed Aug. 3, 2021).

126. Many of the Plaintiffs have contracted and recovered from COVID-19, and many have antibodies tests showing that they have acquired natural immunity.

127. At least one Plaintiff experienced negative side effects from a previous vaccination, came to regret the vaccination, and came to see it as a defilement of his body. Through prayer and reflection, this Plaintiff has determined that receiving a COVID-19 vaccine similarly would defile his body.

128. Multiple Plaintiffs hold the sincere religious belief that, upon seeking guidance from God through prayer as to whether to receive a COVID-10 vaccine, God directed them not to do so.

129. Fidelity to their religious beliefs is more important to Plaintiffs than their military careers, but the Constitution of the United States prohibits Defendants from forcing them to choose between their beliefs and their military service to our country.

130. The DoD Vaccine Mandate has lowered Plaintiffs' morale as service members because they have been forced to choose between their sincerely held religious beliefs and their military careers. The DoD Vaccine Mandate has lowered the morale of other service members for the same reasons.

**DoD and Air Force Regulations Recognize Religious and Medical Accommodations for Immunizations under RFRA and the Free Exercise Clause Generally**

131. Department of Defense Instructions (DODI) 1300.7, Religious Liberty in the Military Services, dated September 1, 2020, establishes DoD policy in furtherance of RFRA and the Free Exercise Clause of the First Amendment to the Constitution of the United States, recognizing that service members have the right to observe the tenets of their religion, or to observe no religion at all.

132. DODI 1300.17 provides that it is DoD policy that "Service members have the right to observe the tenets of their religion or to observe no religion at all, as provided in this issuance."

133. DODI 1300.17 provides that "[i]n accordance with Section 533(a)(1) of Public Law 112-239, as amended, the DoD Components will accommodate individual expressions of sincerely held beliefs (conscience, moral principles, or religious beliefs) which do not have an adverse impact on military readiness, unit cohesion, good order and discipline, or health and safety. A Service member's expression of such beliefs may not, in so far as practicable, be used as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, and assignment."

134. DODI 1300.17 provides that “[a]ccommodation includes excusing a Service member from an otherwise applicable military policy, practice, or duty. In accordance with RFRA, if such a military policy, practice, or duty substantially burdens a Service member’s exercise of religion, accommodation can only be denied if:

- (1) The military policy, practice, or duty is in furtherance of a compelling governmental interest; and
- (2) It is the least restrictive means of furthering that compelling governmental interest.”

135. Department of Air Force Instruction (DAFI) 52-201, ¶ 1.3, states: “A member’s expression of sincerely held beliefs may not be used as the basis for any adverse personnel action, discrimination, or denial of promotion; and may not be used as a basis for making schooling, training, or assignment decisions.”

### **Defendants’ Refusal to Grant Religious Exemptions**

136. Plaintiffs are requesting religious accommodations or exemptions from Defendants’ Vaccine Mandates that set forth Plaintiffs’ sincerely held religious beliefs regarding the COVID-19 vaccines.

137. Defendants have implemented a system of processing religious accommodation requests whereby all, or virtually all, such requests are denied without being considered individually.

138. Defendants’ communications with Plaintiffs rejecting their religious accommodation requests have used identical, pre-written, “boilerplate” language to deny their requests.

139. Air Force Reserve Plaintiffs have 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.

140. 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.” (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 religious accommodation request did not in fact “consider the specific facts and circumstances” of the request.

141. 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.”

142. None of the Air Force Reserve Plaintiffs have received an *individualized* explanation of why their initial religious accommodation requests were *specifically* rejected.

143. Active duty Air Force Plaintiffs have received similar 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.”

144. 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.”

145. Plaintiff Roth’s appeal has already been denied, and his squadron commander has already initiated the involuntary-separation process. As a result, his involuntary separation from the Air Force Reserve is imminent, absent rapid injunctive relief from this Court. As a result, his involuntary separation from the Air Force Reserve is imminent, absent rapid injunctive relief from this Court.

146. Plaintiff Smithley’s appeal has already been denied, and he received an official letter of reprimand on March 1, 2022. As a result, his involuntary separation from the Air Force Reserve is imminent, absent rapid injunctive relief from this Court.

147. Plaintiff Roberts’s appeal has already been denied, and she received an official letter of reprimand on March 1, 2022. As a result, her involuntary separation from the Air Force Reserve is imminent, absent rapid injunctive relief from this Court.

148. Plaintiff Priebe’s appeal has already been denied, and she received an official letter of reprimand on March 6, 2022. As a result, her involuntary separation from the Air Force Reserve is imminent, absent rapid injunctive relief from this Court.

149. Plaintiff Airman #1's appeal has already been denied, and his squadron commander has already initiated the involuntary-separation process. As a result, his involuntary separation from the Air Force Reserve is imminent, absent rapid injunctive relief from this Court.

150. Numerous other Plaintiffs expect their appeals to be denied within days or weeks of this filing. Their involuntary separation from the Air Force will follow quickly thereafter, absent injunctive relief from this Court.

151. Plaintiffs believe that their requests have been rejected without any consideration of the specific information included in their religious accommodation requests.

152. All of the rejection letters received by Plaintiffs rely on the assumption that receiving a vaccination prevents a person from acquiring or spreading COVID-19.

153. The assumption that receiving a vaccination prevents a person from acquiring or spreading COVID-19 has been proven false. This was publicly acknowledged by the Director of the Centers for Disease Control and Prevention ("CDC") in January 2022. *See* Eric Sykes, "CDC Director: COVID Vaccines Can't Prevent Transmission Anymore," *MSN* (Jan. 10, 2022), available at <https://www.msn.com/en-us/health/medical/cdc-director-covid-vaccines-cant-prevent-transmission-anymore/ar-AASDndg>.

154. The Air National Guard, aware that its blanket denials would likely violate RFRA and the First Amendment, has pursued a strategy of preparing for litigation. Air National Guard leadership apparently determined that boilerplate-style recommendations of denial of Air National Guard Plaintiffs' RARs would be legally indefensible.

155. 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.”

**Defendants’ Punishment of Plaintiffs for Merely Filing Religious Accommodation Requests**

156. According to the accommodation request form created by Defendants, merely making a request for a religious accommodation “may have an adverse impact on [the requesting service member’s] deployability, assignment, and/or international travel.”

157. The vast majority of Plaintiffs have already been punished through the denial of training, travel, leadership, and deployment opportunities, merely because they have filed a religious accommodation request.

158. The denials of training, travel, leadership, and deployment opportunities have been detrimental to Plaintiffs’ careers and have also financially disadvantaged Plaintiffs.

159. Plaintiffs believe that the overly broad denials of training, travel, leadership, and deployment opportunities by Defendants are intended to discourage service members from exercising their religious beliefs or filing religious accommodation requests.

160. This adverse workplace treatment for merely requesting a religious exemption amounts to punishment for asserting one’s religious beliefs. Like the termination that all Plaintiffs face, it is also a punishment that violates both RFRA and the Free Exercise Clause of the First Amendment.

**FIRST CAUSE OF ACTION**

**Violation of Plaintiffs’ Rights under the Religious Freedom Restoration Act**  
**(42 U.S.C. § 2000bb *et seq.*)**

161. Plaintiffs repeat and re-allege each of the allegations contained in the foregoing paragraphs of this Complaint.

162. The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000b *et seq.* (“RFRA”), states that the “[g]overnment 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.

163. RFRA broadly defines the “exercise of religion” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000bb-2(4) (citing 42 U.S.C. § 2000cc-5(7)(A)).

164. In *Burwell v. Hobby Lobby Stores*, the Supreme Court stated that the exercise of religion involves “not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014) (citing *Smith*, 494 U.S. at 877).

165. The Supreme Court has articulated repeatedly that courts may not question whether sincerely-held religious beliefs are reasonable. *Hobby Lobby*, 573 U.S. at 724.

166. The Supreme Court of the United States has held that no state official may second-guess whether a person’s sincerely held religious beliefs are correct, reasonable, or sufficiently based in relevant scripture. Doing so impermissibly entangles the state official with religion, in violation of the Establishment Clause of the First Amendment of the Constitution of the United States. *See Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 396, (1990).

167. RFRA imposes strict scrutiny on all actions of the federal government that “substantially burden a person’s exercise of religion.” 42 U.S.C. § 2000bb-1(b).

#### **Application of Strict Scrutiny**

168. Defendants' Vaccine Mandate fails strict scrutiny.

169. Unless the government satisfies the compelling interest test by “demonstrat[ing] that [the] 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), the governmental act violates RFRA.

170. Plaintiffs have sincerely held religious beliefs that they cannot receive the mandated COVID-19 vaccine.

171. Defendants' Vaccine Mandates substantially burden Plaintiffs' sincerely held religious beliefs by requiring them to take an action—receiving a COVID-19 vaccine—that would violate those religious beliefs or to suffer adverse employment action, financial harm, and potential physical harm.

172. A person's exercise of religion is substantially burdened whenever a measure imposes substantial pressure on the person to modify his or her behavior and to violate his or her beliefs.

173. The DoD Vaccine Mandate imposes on Plaintiffs and all service members whose religious beliefs prevent them from receiving COVID-19 vaccination the choice between violating their religious beliefs and ending their military careers and livelihood.

174. The adverse actions to which plaintiffs are subject may include: involuntary discharge, court-martial (criminal) prosecution, involuntary separation, relief for cause from leadership position, removal from promotion lists, inability to attend certain military training and education schools, loss of special pay, placement in a non-deployable status, recoupment of money spent training the service member, and loss of leave and travel privileges for both official and unofficial purposes.

175. Plaintiffs have already suffered and continue to suffer adverse employment actions merely for requesting relief that is protected by RFRA. The adverse employment actions that have already been taken against Plaintiffs include: denial of opportunities to attend military training schools, loss of leadership positions, placement in non-deployable status, and loss of leave and travel privileges for both official and unofficial purposes.

176. Defendants do not have a compelling government interest in refusing to grant religious exemptions and requiring Plaintiffs to violate their sincerely held religious beliefs by taking a COVID-19 vaccine.

177. Defendants do not have a compelling government interest in refusing to grant religious exceptions to the DoD Vaccine Mandate when they have granted thousands of medical and administrative exemptions to the DoD Vaccine Mandate.

178. Allowance of thousands of accommodations for reasons other than religious ones demonstrates that Defendants can tolerate the risk posed by some service members remaining unvaccinated—and that Defendants are treating religious members of the military differently, inconsistent with RFRA and the First Amendment.

179. The fact that Plaintiff McGee has been deployed three times since March 2020 while being unvaccinated and that Plaintiff McMillan is currently deployed while being unvaccinated demonstrates clearly that Defendants can accommodate Plaintiffs' religious beliefs without sacrificing military readiness. Both Plaintiffs are pilots; and both have completed their missions on deployment successfully. *See* ¶¶ 50-51, *supra*.

180. Defendants' delay in imposing the DoD Vaccine Mandate for more than nine months after vaccines were widely available also belies any claim that their interest in enforcing the Mandate is compelling.

181. Defendants do not have a compelling government interest in refusing to make a religious exception to the COVID-19 vaccine mandate when refusing to do so results in the discharge of a pilot who the United States Air Force has spent \$5.5 million to train.

182. Defendants may not rely on generalized or broadly formulated interests to satisfy the compelling interest test.

183. Defendants must establish that they have a compelling interest in denying each Plaintiff an accommodation. Asserting a compelling interest in maximizing the vaccination of Air Force personnel does not satisfy the compelling interest test.

184. The letters denying Reserve Plaintiffs their religious accommodation requests are conclusory and cite only generalized interests in maximizing the vaccination of Air Force personnel, stating, “the Department of Defense and the Department of the Air Force have a compelling government interest in maintaining a healthy and ready military force through vaccination.” The equivalent letters to other Plaintiffs similarly cite only generalized interests.

185. Defendants’ Vaccine Mandates are also not the least restrictive means of accomplishing the government’s purported interest because the DoD has operated for approximately two years during the COVID-19 pandemic with a ready and healthy force that had not been fully vaccinated.

186. Defendants possess multiple less restrictive methods of mitigating the spread of COVID-19, including masking, remote teleworking, physical distancing, and regular COVID-19 testing. These methods are already being used to facilitate Plaintiffs’ performance of their duties now. Defendants could also accept positive tests for COVID-19 antibodies (indicating the presence of natural immunity) as a substitute for a COVID-19 vaccination. All of these approaches constitute less restrictive means.

187. Indeed, if Defendants are concerned about COVID-19 affecting their personnel, it would need to implement these other mitigation protocols even if service members receive the vaccine because vaccinated personnel can also carry, transmit, and become sick with COVID-19. Centers for Disease Control and Prevention, “Science Brief: COVID-19 Vaccines and Vaccination” (last updated September 15, 2021), <http://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html>.

188. Defendants’ denials of Plaintiffs’ religious accommodation requests fail to provide any explanation of why they cannot continue to fulfill their duties in the manner they have done since the COVID-19 pandemic began through masking, remote teleworking, physical distancing, and regular testing.

189. Requiring the vaccination of a service member who possesses natural immunity, as the overwhelming majority of Plaintiffs do, does nothing to reduce the risk of COVID-19 infection to other service members.

190. The case of Plaintiff Airman #6 illustrates how Defendants’ denial of religious accommodations fails to serve any purpose. He performs the exact same duties in his job as an employee of the Air Force’s civilian contractor Leidos as he does in his job in the Air Force Reserve. He is an Airborne Cryptologic Language Analyst Instructor operating on the same aircraft that he operates on in the Air Force Reserve as an Airborne Cryptologic Language Analyst. However, his civilian employer has granted him a religious exemption to its vaccine requirement. Doing so has not impaired the performance of his duties in any way.

191. Defendants’ punishment of Plaintiffs for even seeking a religious accommodation also fails strict scrutiny under RFRA. Plaintiffs are being denied travel privileges, while nearly all of the 3,000 unvaccinated recipients of medical and administrative exemptions are

permitted to enjoy full travel privileges in the Air Force. This also represents a non-neutral treatment of those whose objection to the vaccine is based on religious faith.

192. And there can be no compelling interest in denying Plaintiffs their travel privileges when thousands of unvaccinated medical and administrative exemption recipients are permitted to travel.

193. RFRA requires that Defendants grant an accommodation in every case where denying one does not pass strict scrutiny.

194. Accordingly, Defendants' Vaccine Mandates violate Plaintiffs' rights under RFRA.

195. Because of Defendants' policy and actions, Plaintiffs have suffered, and continue to suffer, irreparable harm. They are entitled to equitable relief.

196. Plaintiffs are entitled to a declaration that Defendants violated their rights under RFRA to freely exercise their religion and an injunction against Defendants' policy and actions. Plaintiffs are also entitled to the reasonable costs of this lawsuit, including reasonable attorneys' fees.

## **SECOND CAUSE OF ACTION**

### **Violation of Plaintiffs' First Amendment Right to the Free Exercise of Religion**

197. Plaintiffs repeat and re-allege each of the allegations contained in the foregoing paragraphs of this Complaint.

198. The First Amendment's Free Exercise Clause prohibits the government from enacting non-neutral and non-generally applicable laws or policies unless they are narrowly tailored to achieve a compelling government interest.

199. The original meaning of the Free Exercise Clause is that the government may not burden a sincerely held religious belief unless the government can demonstrate a compelling

interest that the law or policy burdening religious exercise is the least restrictive means to achieve that compelling interest.

200. The Supreme Court of the United States has articulated repeatedly that courts may not question whether sincerely held religious beliefs are reasonable. *Hobby Lobby*, 573 U.S. at 724.

201. The Supreme Court has held that no state official may second-guess whether a person's sincerely held religious beliefs are correct, reasonable, or sufficiently based in relevant scripture. Doing so impermissibly entangles the state official with religion, in violation of the Establishment Clause of the First Amendment of the United States Constitution. *See Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 396, (1990).

202. Plaintiffs have sincerely held religious beliefs that prohibit their receipt of presently available COVID-19 vaccines.

203. Defendants' Vaccine Mandate substantially burdens Plaintiffs' sincerely held religious beliefs by requiring them to take an action—receiving a COVID-19 vaccine—that would violate those religious beliefs or to suffer adverse employment action and financial harm.

204. Many Plaintiffs have already suffered and continue to suffer adverse employment actions merely for requesting relief that is protected by RFRA. The adverse employment actions that have already been taken against Plaintiffs include: denial of opportunities to attend military training schools, loss of leadership positions, placement in non-deployable status, and loss of leave and travel privileges for both official and unofficial purposes.

205. Defendants' Vaccine Mandate, as implemented by Defendants, is plainly not neutral and not generally applicable.

206. A law or policy is not generally applicable if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.

207. Defendants' Vaccine Mandate allows service members to remain unvaccinated if they participate in a clinical trial.

208. More significantly, Defendants' Vaccine Mandate has allowed thousands of service members to remain unvaccinated for medical and administrative reasons through the granting of large numbers of medical and administrative exemption requests.

209. At the time of this filing, Defendants have granted at least 1,294 medical exemptions and 1,686 administrative exemptions to the DoD Vaccine Mandate. *See* DAF COVID-19 Statistics - Mar. 1, 2022, Secretary of the Air Force Public Affairs, *available at* <https://www.af.mil/News/Article-Display/Article/2950923/daf-covid-19-statistics-mar-1-2022/>.

210. Defendants have granted only 17 religious accommodation requests. As explained above, these few instances are of illusory significance because it is believed that they were granted in cases where separation of the service member was imminent for other reasons.

211. Assuming Plaintiffs posed any risk to Defendants' asserted interests by remaining unvaccinated (which they do not), the risk they pose would be no greater than the risk posed by the nearly 3,000 service members with medical or administrative exemptions.

212. Defendants' punishment of Plaintiffs for even seeking a religious accommodation also fails strict scrutiny. Plaintiffs are being denied travel privileges, while the nearly 3,000 unvaccinated recipients of medical and administrative exemptions are permitted to enjoy full

travel privileges in the Air Force. This also represents a non-neutral treatment of those whose objection to the vaccine is based on religious faith. And there can be no compelling interest in denying Plaintiffs their travel privileges when thousands of unvaccinated medical and administrative exemption recipients are permitted to travel.

213. Because Defendants accept a purported risk from people who are unvaccinated for secular reasons but not from people with religious reasons, the DoD Vaccine Mandate is not neutral and not generally applicable.

214. A law or policy that is not neutral and not generally applicable and that burdens religious exercise must satisfy strict scrutiny.

#### **Application of Strict Scrutiny**

215. Defendants' Vaccine Mandate fails strict scrutiny.

216. To survive strict scrutiny, the question is not whether Defendants have a compelling interest in vaccinating Air Force personnel in general; rather, the question is whether Defendants have a compelling interest in not granting religious accommodation requests to Plaintiffs.

217. Defendants do not have a compelling government interest in requiring Plaintiffs to violate their sincerely held religious beliefs by receiving a COVID-19 vaccination.

218. Defendants' asserted interests in "military readiness, unit cohesion, good order, and discipline," although important, do not rise to the level of compelling interests.

219. Even if the asserted interests did rise to the level of compelling interests, Defendants cannot have a compelling government interest in refusing to make religious exemptions to the DoD Vaccine Mandate when they have already granted thousands of medical and administrative exemptions to the DoD Vaccine Mandate.

220. Defendants' allowance of accommodations for secular reasons demonstrates that Defendants can tolerate the risk posed by some service members remaining unvaccinated.

221. Defendants' nine-month delay in imposing the Vaccine Mandate after COVID-19 vaccines became widely available also belies their claim that their interest in enforcing universal vaccination is compelling.

222. Defendants do not have a compelling government interest in refusing to make a religious exception to the COVID-19 vaccine mandate when refusing to do so will result in the discharge of highly skilled pilots who the United States Air Force has spent \$5.5 million each to train.

223. To survive strict scrutiny, Defendants must demonstrate that there is not a less restrictive means of accomplishing their purported interest than in refusing to grant virtually all religious accommodation requests.

224. Plaintiffs have worked successfully in their respective Air Force positions, fulfilling their responsibilities completely during the two years of the COVID-19 pandemic without taking the COVID-19 vaccination.

225. Defendants' Vaccine Mandate is not the least restrictive means of accomplishing the government's purported interest because the DoD used multiple means to operate for approximately two years during the COVID-19 pandemic with a ready force that had not been fully vaccinated.

226. As has been demonstrated in the case of each Plaintiff, Defendants possess multiple less restrictive methods of mitigating the spread of COVID-19, including masking, remote teleworking, physical distancing, and regular testing.

227. Indeed, Defendants will need to implement these other mitigation protocols even if service members receive the vaccine because vaccinated personnel can also carry, transmit, and become sick with COVID-19. Centers for Disease Control and Prevention, “Science Brief: COVID-19 Vaccines and Vaccination” (last updated September 15, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html>.

228. In the many letters rejecting Plaintiffs’ religious accommodation requests, Defendants have failed to explain with any specificity why the less restrictive means of restricting the spread of COVID-19 that have been used for the past two years are no longer sufficient.

229. In the many letters rejecting Plaintiffs’ religious accommodation requests, Defendants have failed to explain how vaccines that have been proven *not* to reduce the spread of COVID-19 serve Defendants’ purported interests at all.

230. Forcing Plaintiffs who have natural immunity from prior COVID-19 infections does not serve Defendants’ purported interests.

231. At the time the DoD Vaccine Mandate was first launched, Defendants may have believed that vaccination would reduce the spread of COVID-19. But Defendants have refused to acknowledge the fact that the vaccines have since been proven not to reduce the spread of COVID-19. *See* Eric Sykes, “CDC Director: COVID Vaccines Can’t Prevent Transmission Anymore,” *MSN* (Jan. 10, 2022), available at <https://www.msn.com/en-us/health/medical/cdc-director-covid-vaccines-cant-prevent-transmission-anymore/ar-AASDndg>.

232. Defendants have also failed to demonstrate that the less restrictive means of reducing the spread of COVID-19, including masking, remote teleworking, physical

distancing, and regular testing, are more costly than universal enforcement of the DoD Vaccine Mandate.

233. Universal, or near-universal, denial of religious accommodation requests will result in Defendants losing more than 4,600 service members from the Air Force alone.

234. This loss of skilled, experienced personnel, along with the administrative burden that follows, *impedes* the Air Force's ultimate interest in mission readiness, rather than promoting it.

235. The separation of more than 4,600 service members from the Air Force because those service members chose to remain faithful to their religious beliefs severely undermines morale and harms Defendants' purported interest in unit cohesion, good order, and discipline.

236. Defendants' policy of denying all, or virtually all, religious accommodation requests no matter the circumstances is vastly out of step with policies in the rest of the country, including in countless workplaces across the country that provide religious accommodation to vaccination requirements.

237. Because Defendants' refusal to grant religious exemptions to the DoD Vaccine Mandate is not supported by a compelling interest, and is not the least restrictive means available, Defendants' implementation of the DoD Vaccine Mandate violates Plaintiffs' right to the free exercise of religion under the First Amendment.

238. Because of the Defendants' policy and actions, Plaintiffs have suffered and continue to suffer irreparable harm. They are entitled to injunctive relief.

239. Plaintiffs are entitled to a declaration that Defendants violated their First Amendment rights to free exercise of religion and an injunction against Defendants' policy and

actions. Additionally, Plaintiffs are entitled to the reasonable costs of this lawsuit, including their reasonable attorneys' fees.

### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs respectfully request a bench trial in Omaha and request that the Court enter judgment against Defendants and provide Plaintiffs with the following relief:

(A) A declaratory judgment that Defendants' vaccination policies challenged in this Complaint violate Plaintiffs' rights under the First Amendment to the Constitution of the United States;

(B) A declaratory judgment that Defendants' vaccination policies challenged in this Complaint violate Plaintiffs' rights under the Religious Freedom Restoration Act;

(C) A preliminary and permanent injunction prohibiting Defendants, their agents, officials, servants, employees, and any other persons acting on their behalf from enforcing the vaccination policies challenged in this Complaint against any member the Air Force, Air Force Reserve, or Air National Guard who has filed a religious accommodation request;

(D) An order declaring unlawful and setting aside Defendants' Vaccine Mandate;

(E) A preliminary and permanent 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 religious accommodation requests.

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

(G) Plaintiffs' reasonable attorneys' fees, costs, and other disbursements in this action, pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 2412; and

(H) All other and further relief to which Plaintiffs are entitled.

Respectfully submitted,

Dated: March 8, 2021

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