IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ISRAEL ALVARADO, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	**Case No.: 1:22-cv-00876-AJT-JFA**
	:	
LLOYD AUSTIN, III, *et al.*,	:	
	:	
Defendants.	:	

PLAINTIFFS' REPLY BRIEF

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INTRODUCTION

Defendants' Opposition ("Opp"), ECF 65, to Plaintiffs' Brief Supporting the Motion for Preliminary Injunction ("PI Br."), ECF 60, can best be described as a smokescreen designed to obscure the real legal issues and misdirect or mislead the Court. Defendants fail altogether to: provide relevant evidence supporting their policies; respond to Plaintiffs' demonstration that what they have mandated is not a "vaccine" as traditionally understood by courts or as defined in their own regulations; address the merits of Plaintiffs' religious liberty claims; or justify their overt hostility to religion and religious discrimination.

I. DEFENDANTS' EVIDENCE DOES NOT SUPPORT THEIR POLICY

A. Defendants Have Not Provided Relevant Evidence.

Plaintiffs do not ask this Court to act as an epidemiologist or immunologist. Nor do Plaintiffs ask this Court to referee a battle of the experts because Defendants have not provided any expert witness testimony. Plaintiffs simply ask that this Court do what Courts do every day: decide whether Defendants' declarants have provided relevant evidence, and if so, whether that evidence supports their policies.[1]

Defendants have not provided any evidence at all that bears on the questions before this Court, in particular, whether Defendants' policies satisfy strict scrutiny under the First Amendment and the Religious Freedom Restoration Act ("RFRA"), or the Administrative Procedure Act's ("APA") standard of review. Under either standard, Defendants must show that they have evaluated marginal risks and benefits—for the service member and the military in terms of

[1] Plaintiffs hereinafter refer to the Department of Defense ("DOD") and the Armed Services collectively as the Military Defendants, and the Defendant public health agencies—the Centers for Disease Control and Prevention ("CDC"), the Food and Drug Administration ("FDA"), or the Department of Health and Human Services ("HHS")—as the Public Health Defendants.

readiness and other asserted compelling interests—of mandating the two-dose regimen of currently licensed treatments for healthy service members under current circumstances (namely, now in mid-2022 with respect to the currently prevalent Omicron sub-variants when 98% of other service members are fully vaccinated). The risks and benefits of the two-dose regimen should also be compared with the protection provided by: (a) previous documented infections (*i.e.*, natural immunity); (b) alternative mitigation measures (*e.g.*, screening, masking, etc.); and (c) post-infection treatments such as Paxlovid, monoclonal antibodies, or others employed successfully.

This information is readily available to Defendants. The Military and Public Health Defendants are the agencies "textually committed to resolving … scientific debates" by bringing to bear the U.S. governments' unmatched "scientific, economic, and technological resources" in military and medical matters. *Navy SEAL 1 v. Austin*, 2022 WL 1294486, at * 6 (D.D.C. Apr. 29, 2022) ("*Navy SEAL 1*"). Yet despite having the full resources of the United States government and ready access to comprehensive health data for service members, Defendants have chosen not to provide any relevant evidence, while the Public Health Defendants have not provided any evidence at all. Their choice not to do so reinforces Plaintiffs' claims that they have acted in bad faith.

The table in Exhibit 1 demonstrates that the studies referenced or cited by Defendants suffers from one or more—and usually all—of the following defects:

1. "[H]istorical data from the 2020 and 2021 pre-Omicron, pre-vaccine phase" and does not "address the present state of 'the force";[2]

2. Analysis of general population, rather than for service-members;

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[2] *Colonel Fin. Mgmt. Officer v. Austin*, No. 8:22-CV-1275-SDM-TGW, 2022 WL 3643512, at *16 (M.D. Fla. Aug. 18, 2022) ("*CFMO*"). Defendants state that 96 service members have died from COVID but only two were "fully vaccinated." Opp. at 3. But they do not identify when these deaths occurred. Defendants do not tell us how many of these deaths were in 2020 before any vaccines were available, or how many were in 2021 before Mandate was adopted or implemented.

3. Does not disaggregate by age, weight, BMI, health or medical conditions;
4. No citations to study and cannot be verified or included in record;
5. Includes or compares "boosters" to unvaccinated; and/or
6. No comparison for natural immunity or non-"vaccine" treatments.

Defendants do not attempt to quantify the relative benefits of vaccination for their asserted compelling interest (*i.e.*, lives saved, readiness, unit cohesion, reductions in days lost from sickness, quarantine or hospitalization) compared to non-vaccination, providing only conclusory, qualitative statements. Nor do they even acknowledge the other side of the ledger: the immense costs and risks to national security from losing highly trained and experienced service members.

There is no question that Defendants have the data and expertise needed to analyze and provide relevant data supporting their policies, whether under strict scrutiny or APA standards. This Court cannot, however, defer to Defendants' expertise or judgment where they have altogether refused to exercise it, or if they have, refused to provide any relevant data demonstrating that they have applied their vast expertise and resources to the problem. While Defendants' "major policy decisions" are not due any deference. *See* PI Br. at 14-18. But even if they were, "deference does not mean abdication," *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981), of the Court's role to consider the evidence before it.

Plaintiffs respectfully submit that the relevant, undisputed evidence that this Court should consider are the following. First, no active-duty service member, whether vaccinated or not, has died since November 2021 when the Omicron variant became prevalent. *See* ECF 39-3, Rans Decl., at 12-13 & Table. Second, the Defendants' own data shows that the treatment for the virus has killed more service members (119), *see* ECF 60, ¶ 4, than the virus itself (96). Opp. at 3. Third, the CDC has determined that the mandated two-dose regimen provides "minimal protection against infection and transmission," Ex. 2, CDC Guidance, at 1, and recommends "no longer

differentiat[ing] based on vaccination status." *Id.* at 3. Fourth, the FDA authorized new "bivalent vaccines" because the licensed vaccines are neither available nor adequate for treating Omicron, and the U.S. government appears set to abandon the licensed versions for all purposes except to punish service members like Plaintiffs who refuse to take them on religious grounds.[3]

B. The Mandated Product Is Not A "Vaccine."

Defendants have failed altogether to respond to Plaintiffs' claims regarding the HHS/CDC Vaccine Re-Definition and the DOD's violation of its own regulations, *see* Compl., ¶¶ 130-140, PI Br., ¶ 3 & 60-6, DODI 6502.02, which preclude the mRNA treatments from being treated as vaccines. By failing to respond they should be found to have conceded this point.

This is an easy case if the Court does not accept the Defendants' post-Mandate deceptive redefinition of the term "vaccine." The CDC had long defined "vaccine" and "vaccination" as a preparation and process, respectively, which gave the recipient "immunity."[4] On September 1, 2021, the week after the DOD Mandate, the CDC redefined "vaccine" as "[a] preparation that is

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[3] On August 31, 2022, the FDA granted an Emergency Use Authorization ("EUA") to new "bivalent" mRNA treatments from Pfizer/BioNTech and Moderna. *See* Ex. 3, Aug. 31, 2022 Pfizer Bivalent EUA Letter; Ex. 4, Aug. 31, 2022 Moderna Bivalent EUA Letter. To grant an EUA, the FDA must find, among other things that there is no adequate, available, approved alternative for treating or preventing the disease. *See* 21 U.S.C. § 360bbb-3(c)(3). In granting these EUAs for the Bivalent mRNA Treatments the FDA acknowledged that the current vaccines are not adequate for treating Omicron, and that the "bivalent" vaccines are the only treatments for the Omicron variant. *See* Ex. 3 at 14 n.30; Ex. 4 at 13 n.21. On August 16, 2022, prior to the EUA grants, the CDC stated that the U.S. Government would purchase 175 million doses of the "bivalent" vaccines for both "primary" series and "booster" doses. *See* Ex. 5, Aug. 16, 2022 CDC Fall Program Guidance, at 1. Thus, the U.S. government (including Military Defendants) will purchase and likely use the "bivalent" vaccines, rather than currently licensed and mandated vaccines going forward.

[4] The CDC defines "Immunity" as "Protection from an infectious disease. If you are immune to a disease, you can be exposed to it without becoming infected." It defines "Immunization" as "A process by which a person becomes protected against a disease through vaccination." CDC, "Immunization, the Basics," available at: https://www.cdc.gov/vaccines/vac-gen/imz-basics.htm (last visited Sept. 5, 2022).

used to stimulate the body's immune response against diseases," and "Vaccination" to mean "[t]he act of introducing a vaccine into the body to produce protection from a specific disease." *Id.*

The CDC's new definition and the DOD Mandate itself are both inconsistent with the definitions of "vaccine" and "vaccination" in the DOD's currently effective immunization regulation, *see* ECF 60-6, DODI 6205.02, which tracks CDC's pre-Mandate definitions.[5] Defendants cite the military's long history of requiring vaccines and "immunizations" for service members, Opp. at 1, 3, 27, 36, 41, *i.e.*, to prevent infection and transmission. This makes Defendants' argument that the COVID-19 vaccination requirement … protects its members and readiness to the greatest extent possible", Opp. at 35, a falsity. Those "long-standing" vaccination requirements immunized recipients and protected the force; the mRNA shots do not.

II. THIS COURT HAS SUBJECT MATTER JURISDICTION.

A. Plaintiffs' Claims and Relief Sought Are Justiciable.

Defendants' leading argument is that violations of First Amendment and statutory protections are not justiciable. *See, e.g.,* Opp. at 12-13 (assignment and operational decisions) & 34 (First Amendment). The rejection of this argument is well-established.

> It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. *** 'The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.'

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[5] DoDI 6205.02 defines "vaccination" as "[t]he administration of a vaccine to an individual for inducing immunity," and "vaccine" as a preparation that (1) "contains one or more components of a biological agent or toxin," and (2) "induces a protective immune response against that agent when administered to an individual." *Id.* The first and second clause establish an identity relationship between the "biological agent" administered (*i.e.*, mRNA) and "that agent" against which the vaccine "induces a protective immune response." The mRNA shots do not "contain" a single molecule of the COVID-19 virus; they are not the same as COVID-19 and therefore cannot be vaccines under the DoD's own regulations.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165 (1963) (*quoting Ex parte Milligan*, 4 Wall. 2 [71 U.S. 2], 120-121 (1866)). Military personnel policies are not exempt from the Constitution and are subject to judicial review.[6] Defendants cannot make religious classifications based on Plaintiffs' views on abortion and their belief they must abide by their conscience as formed by faith, the fundamental issue before the Court. *Saud v. Days*, 36 F.4th 949, 953 (4th Cir. 2022) (religion is a suspect class).

Congress has "plenary authority" … 'To make Rules for the Government and Regulation of the land and naval Forces.'" *Chappell v. Wallace*, 462 U.S. 296, 301, 103 S.Ct. 2362 (1982) (*quoting* U.S. Const. Art. I, § 8, cl. 14). In enacting the Religious Freedom Restoration Act ("RFRA"), "Congress exercised this plenary authority to guarantee the 'broad protection for religious liberty.'" *CFMO*, 2022 WL 3643512, at *7 (*quoting Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014)). "To ensure comprehensive protection of Free Exercise," *id.*, at *6, RFRA expressly grants a claim in district court to any "person whose religious exercise has been burdened" to "obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c).

RFRA was enacted with "singularly bi-partisan support" at a time when one party controlled the Presidency and both Houses of Congress, *CFMO* at *6, for the express purpose of "restor[ing] … the protection for Free Exercise suddenly eroded by the Supreme Court in

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[6] *See also Emory v. Sec'y of Navy*, 819 F.2d 291, 294 (D.C. Cir.1987) ("The military has not been exempted from constitutional provisions that protect the rights of individuals. It is precisely the role of the courts to determine whether those rights have been violated.")(citation omitted); *Matlovich v. Sec'y of the Air Force*, 591 F.2d 852, 859 (D.C. Cir. 1978) ("It is established, of course, that the federal courts have the power and the duty to inquire whether a military discharge was properly issued under the Constitution."); *Roe v. Shanahan*, 359 F. Supp. 3d 382, 404 (E.D. Va. 2019) (*citing Emory*); *Heap v. Carter*, 112 F. Supp. 3d 402, 413 (E.D. Va. 2015) (Court has "jurisdiction to decide constitutional questions that arise out of military decisions about establishing the armed forces").

Employment Division v. Smith, 494 U.S. 872 (1990)." *CFMO*, at *6. As such, "RFRA warrants heightened and focused attention and diligent compliance by the government, including the military, and discerning enforcement by the courts." *Id.* RFRA thus applies to any substantial burden on Free Exercise by the federal government including "everyone from the President to a park ranger, … from the Chairman of the Joint Chiefs of Staff to a military recruiter." *Id.*, at *6.

The same applies to Section 533, which expands RFRA and the First Amendment's protections specifically for service members. There, Congress and the President enacted into law specific protections for service members generally in Section 533(a), with specific protections for military chaplains in Section 533(b). Section 533(b)(2) prohibits religious discrimination and retaliation with respect to "promotion, schooling, training or assignment." Defendants' argument thus goes far beyond justiciability and attacks Congress' "plenary authority" under Article I to establish regulations for the military. Section 533 is duly enacted legislation by Congress and the President, and there is no indication in the statute that Congress or the President intended to deprive federal courts of jurisdiction to enforce congressional commands.[7]

Fourth Circuit cases have routinely found that categorical bans like the ones challenged here are justiciable and reviewable—and unconstitutional and illegal—even when they involve military policies on retention and deployment status.[8] In addressing a categorical ban, the Fourth

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[7] Defendants contend that Section 533 claims are not justiciable because Plaintiffs lack standing to enforce Section 533 and because it does not grant a private right of action. *See* Opp. at 20-22. Plaintiffs have already addressed these arguments. *See* PI Br. at 25-26 (§ 533 standing); 60-10 (§ 533 injuries); ECF 41 at 5-6 (standing and private right of action). Plaintiffs have standing to enforce § 533 under the First Amendment, and given Defendants' failure to implement § 533(b), the sham RAR process is the only available military remedy, which Plaintiffs have exhausted. If the Court disagrees and finds there is no right of action, then Plaintiffs have no other adequate remedy at law and may enforce their substantive rights under § 533 through the APA. *See* 5 U.S.C. §§ 702, 704, 706(2)(B)-(C) (violations of statutory and constitutional rights).

[8] *Roe v. Shanahan*, 359 F.Supp.3d 382, 421 (E.D. Va. 2019) ("*Roe I*"), *aff'd sub nom.*, *Roe v. Dept.*

Circuit in *Roe II* expressly acknowledged that it involved the "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force," *Roe II*, 947 F.3d at 219 (citations omitted), but nevertheless found the ban to be justiciable and reviewable, because "'military interests do not always trump other considerations.'" *Id*. (*quoting Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 26 (2008) ("*Winter*")).

Plaintiffs' complaint and requested relief also are not barred by the Supreme Court's decision in *Navy SEALs 1-26 v. Austin*, 142 S.Ct. 1301 (2022). The majority's decision left intact the district court's and the Fifth Circuit's determinations that RFRA claims largely identical to Plaintiffs were justiciable, ripe, and met all requirements for granting a preliminary injunction.[9] Instead, the majority limited the scope of relief for plaintiff Navy SEALs and Naval Special Warfare operators who are the sharpest tip of the spear (or trident), the "elite of the elite of this country's special operations forces."[10] The uniquely demanding requirements for Navy SEALs do not apply to other military specialties, in particular "chaplains" that the *Navy SEAL 1* court (cited

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of Defense, 947 F.3d 207 (4th Cir. 2020) ("*Roe II*") (categorical ban for HIV-positive service members justiciable and reviewable); *Deese v. Esper*, 483 F.Supp.3d 290, 306 (D. Md. 2020) (same); *Harrison v. Austin*, 2022 WL 1183767, at*11 (E.D. Va. Apr. 6, 2022) (same); *Stone v. Trump*, 280 F.Supp.3d 747 (D. Md. 2017) ("*Stone I*"), *stay denied pending appeal* 2017 WL 9732004 (4th Cir. Dec. 21, 2017) (same categorical ban on transgender service members).

[9] This "non-binding, shadow docket decision," *Navy SEAL 1*, at * 4, did not purport to go beyond the facts of, or specific parties to, the case. Nor did it adopt a broader "military non justiciability" doctrine articulated by Justice Kavanaugh, as Defendants' claim. *See* Opp. at 12-14. Justice Kavanaugh was only speaking for himself, as no other Justice joined his opinion. His solo opinion appears to be a dissent because it was contrary to the majority's decision in concluding that "RFRA does not justify judicial intrusion into military affairs in this case." *Austin*, 142 S.Ct. at 1302 (Kavanaugh, J., Concurring), and it would have required dissolution of the injunction.

[10] *Navy SEAL 1*, 2022 WL 1294486, at * 2; s*ee also id.*, at *6 (concluding that Navy SEAL's claim was not justiciable because it would "require the Court to review … the tactical particulars of [past] missions, and whether those tactical particulars are reflective of future special-operations missions," and that these questions are "perhaps the epitome of "complex, subtle, and professional decisions" otherwise left to the Commander-in-Chief and their subordinates.").

by Defendants 20 times) expressly excluded from its findings on justiciability. *Id.*, at *10.

B. Plaintiffs' Claims Satisfy *Mindes v. Seaman* Test For Justiciability.

1. Plaintiffs' Have Exhausted Remedies & Are Exempt from Exhaustion.

Plaintiffs have exhausted military remedies. Each Plaintiff has submitted an RAR. Ten Plaintiffs (Alvarado, Barfield, Brobst, Brown, Fussell, Gentilhomme, Henderson, Jackson, Layfield, and most recently Nelson on September 1, 2022), *see* Ex. 2, Nelson Supp. Decl., ¶ 5, and at least 17 have had their initial RARs denied. *See* PI Br., ¶ 12.

In any case, RFRA does not impose an exhaustion requirement. *See, e.g., Stuart Circle Parish v. Bd. of Zoning Appeals of City of Richmond, Va.,* 946 F.Supp.3d 1225, 1234 (E.D. Va. 1996); *Navy SEALs 1-26*, 27 F.4th 336, 346 (5th Cir. 2022); *CFMO*, at *7. Nor is exhaustion or administrative "finality" required for Plaintiffs' facial First Amendment challenges to Defendants' Categorial RAR Ban.[11] Plaintiffs' as-applied First Amendment challenges also do not require exhaustion or the initiation of enforcement proceedings. It is sufficient that the government have "manifested its views" that the conduct violates the policy and instruct them to comply or else "face penalties." *Cooksey v. Futrell*, 721 F.23d 226, 240-41 (4th Cir. 2013) ("*Cooksey*"). Exhaustion is also excused where, as here, the government has actually initiated enforcement proceedings and has engaged in retaliatory conduct to suppress and silence Plaintiffs' religious speech.[12] Further, Plaintiffs' RFRA and First Amendment claims qualify for the futility,

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[11] *See, e.g., Redemption Community Church v. City of Laurel, Md.*, 333 F.Supp.3d 521, 530 (D. Md. 2018); *Cities4Life, Inc. v. City of Charlotte*, 341 F.Supp.3d 621, 628 (W.D.N.C. 2018) ("*Cities4Life*"). *See also S. Carolinians for Responsible Gov't v. Krawcheck*, 2009 WL 10713347, at *7 (D.S.C. Mar. 25, 2009) (*citing Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183, 190-91 (4th Cir. 1991)) (collecting cases finding exhaustion not required for First Amendment claims).

[12] *See, e.g., Cities4Life*, 341 F.Supp.3d at 629 (finding exhaustion was not required and that missionaries' as-applied claims were ripe where missionaries alleged that, as a result of initiation of enforcement proceedings, their "speech and message are effectively suppressed and silenced").

inadequacy, and irreparable harm exemptions from exhaustion.[13]

In any case, the concerns underlying this judicially-created exhaustion doctrine "are diminished to a vanishing point in this case," *Roe I*, 359 F.Supp.3d at 402, because Plaintiffs' RARs were addressed through a "complex, tiered administrative review process," "culminating in an extensive administrative record and final written decisions" reviewed and approved by senior leadership acting as "the final appeal authority," *id.*, either a three-star or four-star flag officer and/or Assistant Secretary who report directly to the Service Secretary in question. *See* PI Br., ¶11 & n.15 (final review and appeal authority for each Service) & Opp. at 4 (describing RAR process).

2. *Mindes* Factors

Plaintiffs' have already discussed at length the reasons why their claims satisfy the *Mindes* factors. *See* PI Br. at 22-24. Here, Plaintiffs wish to focus on the last factor: military expertise and discretion. By adopting categorical bans and "declin[ing] to make individualized determinations regarding servicemembers' fitness for service," Defendants "failed to apply their expertise to the evidence before it." *Roe II*, 947 F.3d at 218. Further, Defendants have deliberately chosen not to submit to this Court any relevant evidence or studies in their possession, *see supra* Section I & Ex. 1 (describing defects in every study mentioned or cited by Defendants), and instead submitted irrelevant "historical data from the 2020 and 2021 pre-Omicron, pre-vaccine phase of the pandemic" that fails "to address the present state of 'the force.'" *CFMO*, at *16. This data not only

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See also Peachlum v. City of York, Pa., 333 F.3d 429, 436 (3d Cir. 2003) ("We recognize that free speech may be suppressed and a concrete injury may occur merely as a result of the initiation of enforcement proceedings. We do not now hold that administrative finality applies in such cases.").

[13] *See* PI Br. at 20-21; *CFMO,* at *9. *See also* Ex. 7, Botello Supp. Decl., ¶¶ 7-18 (describing loss of employment, wages and medical care/coverage due to unvaccinated status); Brown Supp. Decl., ¶ 7 (discussing September 20, 2021 email informing service members that "even if a religious accommodation or medical exemption were approved the member was likely to still be administratively separated.").

fails to support any individualized assessment, it fails even to provide a basis for a more generalized assessment on the basis of "assignment, duty, working circumstances, and performance." *Id.* Nor have they provided any such evidence or applied their expertise in the administrative record. Each RAR denial consists of a form letter with "identical language" reaching a prescribed conclusion using magic words from the statute. The use of these form letter further demonstrates the failure to provide "individualized determination" required by RFRA and Defendants' own regulations. *Roe II*, 947 F.3d at 223. *See also infra* Section I.B.1.

C. Plaintiffs' Claims Are Ripe.

"[R]ipeness requirements are ... relaxed in First Amendment cases."[14] Plaintiffs raise both facial and as-applied challenges to Defendants' actions. "A facial challenge to a regulation that 'has the force of law,'" like the DOD Mandate and the Categorical RAR Ban, "is generally a 'purely legal' question that does not require further factual development."[15] As-applied First Amendment claims may be brought before Plaintiffs are "subjected to any actual enforcement or punishment," and are ripe without any requirement to exhaust administrative remedies. *See supra* Section I.B.1 & notes 11-12. The initiation of enforcement or retaliatory actions, as has occurred for most Plaintiffs, is also sufficient for ripeness because the Defendants' conduct has "effectively suppressed and silenced" Plaintiffs' free exercise and speech. *Cities4Life*, 341 F.Supp.3d at 629.

With respect to religious liberty claims, Defendant agencies' actions were "final" no later

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[14] *Cooksey v. Futrell,* 721 F.3d 226, 240 (4th Cir. 2013). *See also AFGE v. Off. of Special Counsel*, 476 F. Supp. 3d 116, 121 (D. Md. 2020) ("When reviewing First Amendment claims for ripeness, courts 'relax' this inquiry so as 'to protect against any inhibiting chill' of free speech.").

[15] *Cities4Life*, 341 F.Supp.3d at 629 (*quoting Va. Soc. For Human Life, Inc. v. FEC*, 263 F.3d 379, 390 (4th Cir. 2001), *The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012)). *See also Peachlum*, 333 F.3d at 436 ("[A] *facial* First Amendment challenge is not normally subject to administrative finality analysis under any circumstances.").

than the date of the denial of the RAR appeal. Each service's RAR appeal authority determinations are described as "final." *CFMO*, at *8-9; *see also* PI Br., ¶ 11 & n.15 (final decision and appeal authorities for each Service). They should, however, be considered "final" for ripeness purposes as of the date of submission because "the Plaintiffs' requests are denied the moment they begin." *Navy SEALs 1-26 v. Biden*, 2022 WL 34443, at *5 (N.D. Tex. Jan. 3, 2022) ("*Navy SEALs 1-26*").

Defendants incorrectly describe Plaintiffs' injuries as being limited to involuntary discharge and adverse personnel actions, rather than the deprivation of constitutionally protected religious liberties and due process.[16] Plaintiffs have submitted sworn declaration describing a wide range of illegal practices that deprive them of their religious liberties or even treat the (non-verbal) expression or existence of their religious beliefs as offensive or an expression of hostility.[17]

The deprivation of Plaintiff chaplains' First Amendment rights is not limited to the denial of their own RARs—at least 17 initial denials and 10 RAR appeal denials—although that is certainly an indisputable part of that harm. Plaintiffs are also injured by: Defendants' consistent message of hostility to religion and people of faith; their campaign of intimidation, coercion, and retaliation; corruption of the RAR process by excluding chaplains with religious objections; direct

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[16] *See, e.g.,* Opp. at 15. Defendants erroneously equate "irreparable harm" with the showing of harm from delay under the hardship prong. *See id.* ("Plaintiffs will suffer no irreparable harm between now and any final determination in those agency decisionmaking processes."). While Plaintiffs have suffered irreparable harm, *see infra* Section IV, this is not the standard of harm for ripeness.

[17] *See* PI Br., ¶¶ 13-16, 60-10 (§ 533 violations) & 60-11 (First Amendment violations and irreparable harm). *See also* Ex. 7, Brown Supp. Decl., ¶ 5 (describing Chaplain Corps use of questions in RAR interviews to "dissuade service members from seeking" RARs and "to compel chaplains to adhere to a [military] approved religious belief on Covid vaccination"); Gentilhomme Supp. Decl., ¶ 8 (describing how non-verbal expressions of "sadness and grief" when learning of a service member's abortion was inaccurately interpreted as "disgust" for which he was supposed to apologize and his refusal to do so led to being targeted by his command for his "intractable position."); Young Supp. Decl., ¶ 3.f (informed by senior rater that his "pending RAR" was "creating a hostile work environment for" his rater.).

censorship of chaplains and using intimidation to chill their speech through self-censorship; and coercion of chaplains to advise service members contrary to the demands of their conscience or their denomination's doctrine. *See* PI Br., ¶¶ 14-15.

For purposes of ripeness, these harms occurred when the government adopted policies like the Categorical RAR Ban and no later than when they took the foregoing actions against Plaintiffs. "[T]he Establishment Clause is implicated as soon as the government engages in impermissible action." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006) ("*CFGC*"). Here, Defendants have "sen[t] a message" to religious believers "that they are outsiders, not full members of the … community." *Id.* This message was final for ripeness purposes as soon as it was sent; such a message cannot be retracted. Of course, Military Defendants go well beyond sending a message that may cause "feelings of marginalization and exclusion," *Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183 (4th Cir. 2018) (*citing Moss v. Spartanburg Cnty.. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012) ("*Moss*")), which alone are sufficient for ripeness and standing. Military Defendants have backed their message of marginalization and exclusion with the full force of the military command, justice and personnel policies to sideline, exclude and ostracize anyone who dissents. *See* PI Br., ¶ 14 & ECF 65-11 (Plaintiffs' subject to ostracization, stigmatization and exclusion).

As far as the hardship prong, Plaintiffs have described the hardship they have faced and will face if review is denied. They have all suffered significant deprivations of their First Amendment rights, and will face not only ongoing violations of those rights, but also result in: (1) reassignment or removal from positions; (2) discriminatory, irrational, and punitive restrictions on travel, training, deployability, new assignments and permanent change of station ("PCS"), which

are in turn used to coerce vaccination and justify discipline;[18] and (3) face the threat of discharge or transfer to the IRR with significant loss of benefits including loss of medical care for their families.[19]

III. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS

A. Establishment Clause and Section 533 Claims

Defendants demand that Plaintiff's recant their beliefs—beliefs formed by their faith and guided by their conscience—as the price for continuing to be chaplains. Plaintiff Chaplains are in a similar position to that of Martin Luther when he appeared before the Diet of Worms, April 18, 1521, where he was asked to recant his beliefs and he responded:

> My conscience is captive to the Word of God. It is unsafe and dangerous to do anything against conscience. Here I stand! I cannot do otherwise. So help me God. Amen.

Ex. 7, Gentilhomme Decl., ¶ 8; *see also* Elizbeth Knowles, *Oxford Book of Quotations* at 505, Martin Luther 4 (7th ed. 2009).

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[18] *See, e.g.,* Brown Supp. Decl., ¶ 14 (describing "contradictory" personal vs. professional travel restrictions that are ignored at the convenience of the service); Gentilhomme Supp. Decl., ¶¶ 7-8 (describing how restrictions on movement or access to facilities limit his ability to perform his duties, resulting in negative or lower performance ratings); Harris Supp. Decl., ¶ 6 (same); Henderson Supp. Decl., ¶ 3 ("official travel restriction policy" "intended to discipline unvaccinated members and provide coercive pressure to force vaccine compliance.") & ¶ 4 (prohibited from attending mandatory endorser training, unless he did so on vacation time at his own expense); Jackson Supp. Decl. ¶ 5 (describing contradictory travel policies); Young Supp. Decl., ¶ 3.b (contradictory policies on travel and PCS mean that even though PCS is "mission critical," he is not permitted to PCS because "Chief of Chaplains policy is that no orders will be cut for chaplains with pending RARs.").

[19] *See* PI Br., ¶¶ 16 (restrictions & adverse personnel actions). *See also* Ex. 7, Brown Supp. Decl., ¶ 8 (explaining that the negative counseling statements many Plaintiffs and other service members with denied RAR appeals is "used as a justification for their separation from service."); Nelson Supp. Decl., ¶¶ 3-4 (cancellation of new assignment means he will be separated in 2023); Young Supp. Decl., ¶ 3 (inability to PCS will likely end his career).

1. Defendants' Policies Are Driven By Hostility to Religion.

Defendants' actions are not neutral, demonstrate hostility to religion, and establish a prohibited religious test. *See* PI Br. at 33-37 & *infra* Section III.C.

> "[O]ne of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion that they are outsiders, not full members of the political community."

Moss 683 F.3d 599 at 607 (*quoting McCreary Cnty. v. ACLU,* 545 U.S. 844, 860 (2005)); *accord CFGC*, 454 F.3d at 302. *See also* Ex. 7, Young Supp. Decl., ¶ 3.c (informed by his supervisor "Yo do not belong here."). Yet that is exactly what they have done. Nearly all Plaintiffs have described the pervasive hostile environment to isolate, ostracize, stigmatize, and humiliate Plaintiffs and other service members with religious objections. *See* PI Br., ¶ 14 (summarizing Plaintiff declarations). Defendants' deep and pervasive hostility to religion is further proven by their decision to continue their discriminatory, arbitrary and punitive treatment of those seeking religious accommodation,[20] despite the CDC guidance to end such discrimination. Ex. 2 at 3.[21]

Defendants have not challenged Plaintiffs assertion that *Katkoff v. Marsh*, 755 F.2d 223, 232-234 (2d Cir. 1985), held that hostility to religion in violation of the Free Exercise Clause

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[20] Secretary Austin has ignored the fact there are well-established treatments which he himself has utilized when he was infected more than once despite being vaccinated and boosted, enabling a rapid recovery, while performing his duties in isolation. As in the HIV cases, those treatments could be shipped with unvaccinated personnel, and they can also be used as prophylactics if necessary to prevent infection, as civilian experts recommend. The Military Defendants' policy of continuing to mandate obsolete vaccines—and punishing Plaintiffs for not taking them—also flies in the face of and ignores the FDA and CDC decisions recognizing that the licensed vaccines are ineffective and to replace those with new bivalent vaccines. *See supra* note 3.

[21] Plaintiffs have also testified how these harsh travel restrictions were applied to personal leave, but are ignored when it was convenient for the service, showing that the restrictions were put in place to punish the unvaccinated, rather than promote health and readiness. *See, e.g.,* Ex. 7, Brown Supp. Decl., ¶ 14 ("the contradictory nature of the travel restrictions … belies any notion the restrictions pertain to health and mission readiness and are instead … coercive methods used … to compel members to violate their God given convictions.").

would offend the Establishment Clause's neutrality mandate or that *McDaniel v. Paty*, 435 U.S. 618 (1978) demonstrated the Establishment and Free Exercise Clauses are two sides of the same "religious liberty" coin. *See* PI Br. at 3. Nowhere do defendants address religious neutrality as measured by the impact of its mandate. "The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here." *McDaniel*, 435 U.S. at 642 (Brennan, J., concurring). Defendants' actions show its real purpose is to purge the military of persons who care enough about their faith to follow its commands.

2. Defendants Have Established a "Religious Gerrymander."

Defendants' claim the mandate is neutral, Opp at 35, but facial neutrality is not determinative and cannot shield religious discrimination. The Establishment Clause extends "beyond facial discrimination," to "forbid[] subtle departures from neutrality," and "covert suppression of particular religious beliefs." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("*Lukumi*") (citations and quotation marks omitted). "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) ("*Walz*") (Harlan, J., concurring). Here, its objective is very clear that chaplains who have strong objections to abortion and believe they are obligated by the God they serve to follow their conscience as formed by their faith are singled out for discriminatory and punitive treatment. Defendants' actions clearly show a forbidden disapproval of this particular aspect of Plaintiffs individual expressions of faith. *Lukumi*, 508 U.S. at 532.

Defendants' policy—in its actual effect—is to create a "religious gerrymander." There is near 1:1 correlation between those filing RARs and those who will be discharged based on vaccination status (or would be discharged in the absence of three class-wide injunctions). In fact, the RAR process is the means of implementing the "religious gerrymander," because it forces

those with religious objections to step forward and express their beliefs, thereby saving the military the trouble of employing more intrusive means in identifying the service members needing to be purged. The "pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander." *Lukumi*, 508 U.S. at 537. "[T]he burden of the [policy]"—persecution and adverse actions— "in practical terms, falls on" those with religious beliefs against abortion "but almost no others." *Id*.

B. RFRA and Free Exercise Claims

1. Defendants Have Systematically Denied Religious Accommodations.

Defendants have systematically discriminated against free exercise, granting less than one percent (1%) of RARs. *See* PI Br. at 30 & Table (0.7% approval rate).[22] Sub-1% approval rates are more than sufficient to demonstrate "systemic" RFRA violations and to grant Service-wide injunctions like that sought by Plaintiffs here. "[I]t is hard to imagine a more consistent display of discrimination."[23] Moreover, Defendants have done so using the same form letters that change only the name and the description of the service members' role, *see* Compl., ¶¶ 120-121, that courts have found to be definitive proof that the Service failed to provide the individualized determination required by RFRA, DODI 1300.17, and the applicable service regulations.[24]

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[22] Plaintiffs maintain that the real number of RARs remains zero. Several other courts reviewing other Services' RFRA policies have found that the RARs granted by other services are in fact administrative exemptions for those in the final months of service. *See, e.g., CFMO*, at *1 (RARs granted only to those "who are due for retirement and prompt separation"); *Navy SEAL 1 v. Austin*, 2022 WL 534459, at *19 (M.D. Fla. Feb. 18, 2022) ("MDFL *Navy SEAL 1*") (same); *Poffenbarger v. Kendall*, 2022 WL 594810, at *13 n.6 (S.D. Oh. Feb. 28, 2022) ("*Poffenbarger*") (same for Air Force). Defendants have not attempted to dispute this claim. The unrebutted evidence before this Court is that the Defendants have granted zero RARs.

[23] *Navy SEALs 1-26 v. Austin*, 2022 WL 1025144, at *5 (N.D. Tex. Mar. 28, 2022) (granting class-wide PI for Navy); *Doster v. Kendall*, 2022 WL 2760455, at *4 (S.D. Ohio July 14, 2022) (same for Air Force for <1% approval rate); *CFMO*, 2022 WL 3643512, at *3 (same for Marine Corps).

[24] *See, e.g., CFMO*, at *3-4 (describing and quoting Marine Corps form letter for class

2. Defendants' Policies Are Neither Neutral nor Generally Applicable and Discriminates Against Religious Exercise.

a) The Policy Is Neither Generally Applicable Nor Neutral.

Because the RAR policy "requires an evaluation of the particular justification for" the exemption request, "it represents a system of 'individualized governmental assessment of the reasons for the relevant conduct.'" *Lukumi*, 508 U.S. at 537 (*quoting Smith*, 494 U.S. at 884). This evaluation includes not just the religious nature of the request, but more importantly requires applicants to state in detail the specific religious beliefs that form the basis of their objections.

The purported facial neutrality of a policy does not end the inquiry, and a court must also consider how it has been applied in practice. *Id.* at 534. Military Defendants' uniform denial of religious accommodation shows that the policy is not neutral and is in fact highly discriminatory. The 0.0% to 0.7% approval rates demonstrates that the process "devalues religious reasons" for exemption "as of lesser importance than nonreligious reasons," and as a result, "religious practice is being singled out for discriminatory treatment." *Id.* at 537-38. The actual effect of the policy is that those seeking RARs (and who are denied) and processed for separation (or would be absent the class-wide injunctions), while those who are unvaccinated due to medical reasons are not.[25]

Moreover, for analysis under the Establishment Clause and Free Exercise Clause, "[n]eutrality in its application requires an equal protection mode of analysis," *id.* at 540 (*quoting*

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certification); *Doster*, 2022 WL 2760455, at *6 (same for Air Force); *Navy SEALs 1-26*, at *7 (same for Navy). *Cf.* Ex. 8 (Plaintiff RAR denial and RAR appeal denial letters).

[25] This operates like the categorical ban in *Deese* where the Court found that HIV was an easily treatable condition that did not prevent service members from being fit for service. *Deese*, 483 F.Supp3d at 309. Except here the situation is the reverse: healthy, fit service members are deemed unfit for service if unvaccinated for religious reasons, while those who are unvaccinated for medical reasons are not. It is also irrational—and would not survive rational basis review—to treat them as unfit when the DOD has provided no evidence of the effectiveness of post-infection treatments or the relative difference in recovery time.

Walz, 397 U.S. at 696), that may include statements and other evidence of motive by key decisionmakers. Plaintiffs have provided abundant evidence in the Complaint and their declarations of the discriminatory intent of key decisionmakers and the institutional pressure to deny RARs and corrupt the RAR process.[26]

b) Medical Exemptions Are Comparable to RARs.

Defendants' assertion that religious accommodations are somehow qualitatively different from, and therefore not comparable to, secular medical and administrative exemptions are without merit. *See* Opp. at 29-30. Both secular exemptions and religious accommodations are temporary and time-limited; religious accommodations may, at any time, be revoked, reevaluated, revised, rescinded, and/or withdrawn.[27] Further, both medical exemptions and religious accommodations are vaccine-specific.[28] Some Plaintiffs have stated that they would be willing to take FDA-

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[26] *See, e.g.,* Compl., ¶¶ 97-98 (Army Chief of Chaplains informing chaplains if they did not agree with the mandate they should get out of the service); ¶¶ 99-101 (Air Force Secretary Kendall purportedly directing denial of all RARs); PI Br., ¶ 10 & 60-9, *Navy SEALs 1-26* Whistleblower Declaration (Navy process for ensuring denial of RARs); PI Br., ¶¶ 14-15 (summarizing Plaintiff declarations regarding improper command influence and corruption of RAR process, removal from RAR process, futility of RAR process, and other attempts to coerce and coopt Plaintiff chaplains to be complicit in constitutional violations); Ex. 7, Brown Supp. Decl., ¶ 5 (describing how the Office of the Chaplain of the Coast Guard sent scripted RAR interview questions that sought "to dissuade members from seeking" RARs and "to establish a state/Coast Guard approved religious belief" regarding vaccination.).

[27] *See, e.g.,* ECF 1-4, DOD Instruction 1300.17, *Religious Liberty in the Military Services*, ¶ 3.2.g.1(Sept. 1, 2020) ("an approved accommodation may be subject to review and recission, in whole or in part, at any time" based on change in circumstances). *Accord* Ex. 9, Dept. of the Air Force Instruction, 52-501, *Religious Freedom in the Department of the Air Force*, ¶¶ 5.7.2 & 5.7.4 (June 23, 2021); Ex. 10, Dept. of the Navy, MILPERSMAN 1730-020, ¶ 7 (Aug. 15, 2020); Ex. 11, Dept. of the Navy, BUPERSINST 1730.111A, ¶ 5.g (Mar. 11, 2022); Ex. 12, COMDTINST 1000.15, ¶ 11.c.8.a.

[28] A medical exemption from the currently FDA-approved vaccines does not exempt a service member from other vaccination requirements. Medical exemptions are available, among other things, to service members who have medical conditions (or contraindications) or severe allergic reactions that are contraindicated for the current vaccines. *See* Opp. at 29-30.

approved vaccines to which they do not have religious objections. *See* Compl., ¶ 127. Finally, Defendants assert that the same restrictions apply to the unvaccinated whether for secular or religious reasons. *See* Opp. at 30. But Defendants fail to acknowledge that only those seeking religious accommodation are being systematically discharged, while those with medical exemptions are not.

3. Strict Scrutiny Applies for Free Exercise Claims.

Having met their burden of showing that Defendants have substantially burdened Plaintiffs' free exercise—and that the system of individualized exemptions is neither neutral nor generally applicable—the burden shifts to Defendants to demonstrate that their policies satisfy strict scrutiny. *See O Centro Espirita Beneficiente Uniao do Vegetal,* 546 U.S. 418, 429 (2006).

Defendants erroneously assert that strict scrutiny does not apply to Free Exercise claims against the military. Opp. at 34.[29] The Supreme Court expressly rejected applying different levels of deference to the military in constitutional matters in *Rostker v. Goldberg*, 453 U.S. 57 (1981), where it rejected a similar lower court analysis purporting to apply different levels of scrutiny to constitutional claims against the military, namely, the "rational" basis review as opposed to the "heightened scrutiny" normally applied to gender-based claims.[30]

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[29] In doing so, they cite to a misreading of *Goldman v. Weinberger*, 475 U.S. 503 (1986). *See* Opp. at 34 (for service member First Amendment challenges "courts should normally apply a level of scrutiny below that of strict scrutiny and evidently comparable to rational basis review'")(*quoting Navy SEAL 1*, 2022 WL 1294486, at *13). The *Goldman* majority opinion on which the *Navy SEAL 1* purports to rely merely stated that the lower court had applied a standard of review somewhere between strict scrutiny and rational basis review, *Goldman*, 475 at 506, but it did not endorse or adopt this approach or purport to apply a lower level of scrutiny.

[30] *Rostker*, 453 U.S. at 69. *See also id.* at 70 ("We do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further 'refinement' in the applicable tests as suggested by the Government," and emphasizing that "deference does not mean abdication."). And even under deferential review, Courts review of military policy considers "whether the policy was motivated by animus, … what military purposes are furthered by the

4. Defendants' Policy Fails to Further a Compelling Interest.

a) The Court Need Not Defer to Defendants' Asserted Purpose.

Defendants' Categorical RAR Ban cannot stand, even if the asserted purpose is taken at face value. As explained in the PI Motion, the military stands to lose tens and perhaps hundreds of thousands, *see* PI Br., ¶ 8, and the Coast Guard over 1,300, *see* ECF 22-5, Ex. A (1,343 RAR submitted with 12 supposedly granted), by mandating a vaccine (1) that cannot further its stated purpose (2) to protect against a disease that has not killed a single active-duty service member (whether vaccinated or not) since November 2021. *See* ECF 39-3, Rans Decl., at 12-13.

Defendants have also justified their policy based on the asserted need for chaplains to be deployable. Opp. at 30. Courts have rejected such circular reasoning to justify religious or other discrimination where deployability concerns are used to shield an improper purpose.[31]

Defendants have long imposed arbitrary and punitive restrictions on those seeking religious accommodations. *See* PI Br., ¶ 16 (cataloguing travel, training, deployment, assignment and other restrictions). Such discrimination is contrary to CDC guidance to no longer discriminate based on vaccination status, *see* Ex. 2 at 3, and based on obsolete science. Instead, it is reasonable for the

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policy, whether those purposes are legitimate, and whether … the Executive used considered professional judgment and accommodated the servicemembers' rights in a reasonable and evenhanded manner." *Doe 2 v. Shanahan*, 917 F.3d 694, 704 (D.C. Cir. 2019) ("*Doe 2*") (Wilkins, J. concurring). Military policy would fail even this more deferential review.

[31] *See, e.g., CFMO*, at *17 (Defendants "cannot evade RFRA by defining the conditions of service to exclude the possibility of an accommodation. This definitional sleight of hand evades the inquiry that RFRA demands: whether the Marine Corps's generalized interest in worldwide deployability is materially impaired by tolerating a few religious objectors and accommodating their continued service to the Marine Corps despite the generalized policy of worldwide deployability."); *Harrison,* 2022 WL 1183767, at *19 ("*Harrison*") (rejecting same circular reasoning for HIV positive service members, noting that the service considered their non-deployability in their discharge decision, "the only bar to their deployment was [the military's] own regulations, which restrict deployability based on HIV alone.").

Court to infer that where, as here, a policy visits "gratuitous restrictions on religious conduct … seeks not to effectuate the stated government interests, but to suppress the conduct because of its religious motivation." *Lukumi Babalu*, 508 U.S. at 538 (citation and quotation marks omitted).

b) The Court Must Consider the Compelling Interest in Retaining Service Members Who Wish to Serve.

The Court can and must consider more than one "compelling purpose" in evaluating the military's justification, especially when there is strong evidence that the asserted justification is not the actual one motivating the policy. The United States and its citizens have invested trillions of dollars in our service members to provide for our national defense. The military has a compelling purpose in retaining trained, experienced, patriotic service members, and to weigh their loss in its strict scrutiny analysis. The military routinely asserts its interest in retaining trained and experienced service members to justify its policies.[32]

> [T]he government undoubtedly has some considerable interest in maintaining the services of skilled, experienced, highly trained, patriotic, courageous, and esteemed … service members … in whom the public has an immense financial investment and who are not typically readily replaceable. The [military] has focused exclusively on one factor and dismissed the other without comment.

CFMO, at *17. Even if Defendants give this interest no weight, this Court should, particularly those like Plaintiffs who wish to continue to serve.

5. Defendants' Policy Is Not The Least Restrictive Means and Is Based on Obsolete Scientific Understanding.

As explained in Section I above, Plaintiffs' claims do not require the Court to act as an

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[32] *See, e.g., Harrison,* at *17 (describing DOD interest in retention as follows: "once a member has been fully trained and has experience in performing the duties of his or her position, whether as an enlisted member or officer, the needs of the [military] incline decidedly toward allow the member to continue to perform those duties and return the investment the [military] has made in the member.").

immunologist or epidemiologist. Instead, Plaintiffs simply request that the Court review the evidence submitted by Defendant, determine that it is not relevant to current circumstances facing the military and service members, and thus cannot support their policies.

Courts cannot defer to military expertise when there is no evidence that they have applied it. The data provided in Defendants' response is not relevant for the reasons set forth above in Section I and exhaustively catalogued in Exhibit 1. Defendants have deliberately chosen not to provide relevant evidence or any meaningful analysis. This fact, combined with abundant evidence of systemic violations and improper purpose and failure to provide the individualized determinations required by law, should preclude any deference from this Court.

Military Defendants have not only chosen not to provide relevant evidence, but their policies are directly contrary to those of the Public Health Defendants on whose recommendations Military Defendants purport to rely. The CDC in particular recommends that COVID prevention strategies should not "differentiate based on vaccination status," Ex. 2, CDC Guidance, at 3, but the Military Defendants continue to rely on obsolete scientific understandings to impose discriminatory, arbitrary and punitive treatment and categorically ban religious accommodation.[33]

C. No Religious Test Clause Claim

Defendants never address Plaintiffs claim that the DOD Mandate and Categorical RAR Ban establish a prohibited religious classification for those involved "in protected religious activity" which "imposes a unique disability upon those who exhibit a defined level of intensity of

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[33] *See, e.g., Roe II,* 947 F.3d at 228 ("Such obsolete understandings cannot justify a ban, even under a deferential standard of review.") The HIV and Transgender cases found similar categorical bans unlawful under the highly deferential standards of review for APA and Equal Protection claims. *See infra* Section III.E. Plaintiffs' RFRA and Free Exercise claims are subject to strict scrutiny. Accordingly, the Government faces a much higher hurdle in meeting its burden that it does under rational basis review or arbitrary and capricious review.

involvement in protected religious activity." *McDaniel,* 435 U.S. at 632 (Brennan, J., concurring).

Instead, Defendants respond only that the No Religious Test Clause is limited to religious "oaths". *See* Opp. at 37. A "test" need not be an oath and could equally be a categorical exclusion from office on the basis of religion or religious denominations, "which disqualifies Catholics, or Jews, or Protestants." *McDaniel*, 435 U.S. at 631 (Brennan, J., concurring). The No Religious Test Clause was intended to address, among other things, the fact that several States did have religious tests and exclusions and that these tests operated through such religious classification and categorical bans based on denomination or clerical status.[34] A person did not need to refuse to take an oath to be excluded from office. In any case, the Framers used the term "Test", rather than "Oath", which appears elsewhere throughout the Constitution for different purposes, demonstrating that the two are not coextensive.[35]

D. Section 533 Claims

Defendants' contention that § 533 has not been violated is without merit because their defense is based on the contention that the government, rather than a church or chaplain, can interpret "rite, ritual, and ceremony" in secular terms. *See* Opp. at 22. This argument ignores that these are religious terms, and it is up to chaplains to determine those terms in the meaning of their

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[34] The *McDaniel* majority explained that the "disqualification of ministers from legislative office was a practice carried from England by seven of the original States" and adopted by several new states as well. *McDaniel*, 435 U.S. at 622 (citations omitted). This religions test was not an oath, but a categorical exclusion based on status.

[35] Had the Framers intended to bar only religious oaths they easily could have used the term Oath as they did in other Constitutional provisions. *See, e.g.,* Art. I, § 3, cl. 5, Art. II, § 1, Art. VI, § 3, cl. 3 ("No Religious Test Clause"). Further, the term "Oath" appears in the exact same constitutional provision as the No Religious Test Clause. There are two additional important differences: (1) the first clause applies to all Officers of the United States and Legislators or officers of the States while (2) the second clause prohibiting a "religious Test" applies to an "Officer or public Trust under the United States," but not to States, which had religious Tests.

conscience and faith.

Defendants have no answer to Chaplain Brown's declaration explaining why such terms have no meaning in a pluralistic military. *See generally* ECF 60-12, Brown Decl. CAPT (Ret) Craig Muehler, the Lutheran Church-Missouri Synod endorser and Chaplain Alliance for Religious Liberty president echoes Chaplain Brown's testimony that religious terms such as sacraments, ordinances, rites, have different meaning depending on faith perspective and tradition. *See* Ex. 13, Muehler, ¶¶ 6-14, 14-16 (comparing Mandate to Luther's appearance before Emperor Charles V at the Diet of Worms quoted above). The government cannot determine what "rite, ritual and ceremony" mean to endorsers or chaplains, just as it can determine who is a minister or a belief or other religious issues.

Defendants also claim they complied with § 533(c)'s requirement to issue regulations implementing Section 533 in 2014 and implemented required training programs. *See* Opp. at 24-25. A cursory review of how their "implementation" demonstrates that they have failed to do so.[36] The military is not "at liberty to ignore" its governing statutes, and this Court has the authority to declare "agency action in contravention of applicable statutes and regulations is unlawful. *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir 1979) (citations omitted).

E. APA Claims

1. Defendants Fail to Address Vaccine Re-Definition Claims.

Defendants' opposition is silent with respect to Plaintiffs' HHS/CDC Vaccine Re-Definition Claims, including the claim that Military Defendants violated DODI 6205.02 because

[36] A review of the implementing regulations for Section 533(b) in DOD Instruction 1304.28 ("DODI 1304.28) demonstrates that the DOD did little more than cite its enactment without implementing Section 533(b) substantive protections for chaplains. *See* Ex. 14 (redline of 2014 revisions to DODI 1304.28).

the mRNA treatments cannot qualify as vaccines. *See* Compl., ¶¶ 254-255 & 261-262. Accordingly, they should be deemed to have waived any objections. *See supra* Section I.B.

2. APA Prohibits Categorical Bans Where Individualized Determination Required by Law or Regulation.

An agency violates the APA where it adopts a categorical ban, like the Categorical RA Ban and ME Bans, when the statute in question or "regulations require individualized determinations based on objective evidence to determine a servicemembers fitness for duty or separation." *Roe II*, 947 F.3d at 222. The regulations at issue here—DoDI 1300.17, the Service-specific regulations, *see supra* note 27 & Exs. 9-12, and AR 40-562—each specifically require such individualized determinations. The record, which consists of a one- or two-page form denial letters for most Plaintiffs, *see* Ex. 8, "is entirely lacking in an explanation reflecting an individualized determination for each servicemember." *Id.* at 224. These form letter denials are nearly identical to those issued in the categorical bans in *Roe I* and *Roe II* where the service "purported to engage in an individualized determination as to [service members'] fitness for duty, in fact its decisions were completely depending on the across-the-board" denial policy. *Roe I*, 359 F.Supp.3d at 418. For purposes of APA review, it is equally unlawful if the categorical denials are based on religious discrimination or a "deployability policy" that is a cover for such an improper purpose. *See supra* Section III.B.5

3. Military Defendants' Rely on Obsolete Science, Failed to Apply Expertise to Evidence and/or Have Withheld Relevant Evidence.

In Section I and Exhibit 1, Plaintiffs have detailed the numerous defects in each of the studies referenced by Defendants that render these studies irrelevant to the matters before the Court. The military cannot demand deference to its expertise when it has manifestly "failed to apply its expertise to the evidence before it." *Roe II*, 947 F.3d at 218. Instead of applying its unique expertise—and the data and studies of service members and DOD personnel to which they have

unique access—the DOD has instead relied "obsolete" scientific studies from 2020 and 2021 that address the pre-Omicron and/or pre-vaccine phase of the pandemic and that is not relevant to the scientific questions at hand because they address the general population and/or fail to disaggregated by relevant factors such as age, weight, BMI, or medical conditions or co-morbidities. Defendants have not only "declin[ed] to make the individualized determinations regarding servicemembers' fitness for service" required by law, *Roe II*, 947 F.3d at 218, they also have failed to account for relevant demographic or medical conditions.

By failing to consider relevant evidence and available treatments (or at least withholding such evidence from the Court), Military Defendants have "failed to consider an important aspect of the problem." *Roe II*, 947 F.3d at 226 (*quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, (1983) ("*State Farm*")). By citing its reliance on the CDC and CDC studies—but refusing to follow CDC current guidance not to discriminate against unvaccinated, the inefficacy of two-dose monovalent vaccines and past guidance on booster—its explanation "runs counter to the evidence before" it. *Id.* (*quoting State Farm*, 463 U.S. at 43).[37]

IV. IRREPARABLE HARM

Plaintiffs have shown in the preceding section that Defendants' violations of First Amendment rights, as enforced through RFRA and Section 533, are systemic and that they face imminent harm from these violations. *See supra* Sections III.A-III.C. "The loss of First

[37] And even under deferential review, Courts inquire review of military policy considers "whether the policy was motivated by animus, … what military purposes are furthered by the policy, whether those purposes are legitimate, and whether … the Executive used considered professional judgment and accommodated the servicemembers' rights in a reasonable and evenhanded manner." *Doe 2*, 917 F.3d at 704 (Wilkins, J. concurring). The foregoing discussion of religious discrimination and hostility makes it abundantly clear that these policies lack any legitimate purpose, while the choice not to submit any relevant evidence demonstrates that the military did not exercise professional judgment or accommodate service members' rights.

Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67, 208 L.Ed.2d 206 (2020); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012) ("This principle applies with equal force to the violation of RLUIPA rights because RLUIPA enforces First Amendment freedoms[.]"); *Holt v. Hobbs*, 574 U.S. 352, 357–58 (2015) (extending this principle to RFRA).[38] A religious objector suffers a loss of religious exercise when government "puts [the objector] to this choice": violate a sincerely held religious belief or "face serious disciplinary action." *Holt*, 574 U.S. at 361.

For the Establishment Clause violations, the harm "occurs merely by virtue of the governments purported unconstitutional policy or practice," "governmental endorsement," or hostility, and it "occurs the moment the government action takes place." *CFGC*, 454 F.3d at 302. Here, the government has "sen[t] a message" to religious believers "that they are outsiders, not full members of the … community," *id.*, which causes irreparable harm through "marginalization and exclusion." *Deal*, 911 F.3d at 188 (citation omitted). The same analysis applies for Military Defendants' establishment of a religious classification prohibited by the No Religious Test Clause.

In the Motion, Plaintiffs explained why a general discharge can constitute irreparable injury under *Sampson v. Murray*, 415 U.S. 61 (1974), *see* PI Br. at 43-44, where they are "discharge[d] without an individualized assessment of their fitness for continued service and for reasons unrelated to their ability to service," coupled with a discharge with a misconduct characterization

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[38] *See also Stuart Circle Parish*, 946 F.Supp. at 1235 ("In enacting RFRA, Congress accorded special status to free exercise claims. First, it found that the framers of the Constitution recognized the free exercise of religion as an inalienable right. Moreover, Congress found that the free exercise of religion should be substantially burdened only if the state has a compelling interest. Thus, [through RFRA] Congress has provided free exercise claims with the same level of protection as is available for the infringement of fundamental rights.").

that they will have to disclose along with their unvaccinated status, injuries that cannot be "address[ed] … through post-discharge intra-service procedures." *Roe II*, 947 F.3d at 218. Others even prior to discharge are facing what amounts to discharge by being prohibited from drilling or training, placement into the IRR, and loss of medical benefits for themselves and their families, and at least one Plaintiff has already lost coverage. *See* Ex. 7, Botello Supp. Decl., ¶¶ 7-13 (loss of employment and wages) & 14-18 (loss of medical care/coverage). Even if the general discharge and other punitive actions were not sufficient, "because these injuries are inextricably intertwined with Plaintiffs' loss of constitutional rights, this Court must conclude that Plaintiffs have suffered irreparable harm." *Navy SEALs 1-26*, 2022 WL 34443, at *13.

V. BALANCE OF EQUITIES AND PUBLIC INTEREST

Plaintiffs simply ask that this Court perform its assigned role, and duty, to interpret and enforce constitutional rights and "to determine whether those rights have been violated." *Emory*, 819 F.2d at 294. Here, there is no conflict between the public's "exceptionally strong interest in national defense," Opp. at 44, and Plaintiffs' constitutional rights. The public interest includes "the public benefits from the security provided by military departments populated with individuals dedicated to the notion of service," and "it is in the public interest to prevent [Plaintiffs'] discharge for apparently arbitrary and indefensible reasons, at least until the Court can definitively decide the merits of plaintiffs' claims." *Roe I*, 359 F.Supp.3d at 421. The most effective way to promote the public interest generally and the specific interest in strong national security is to enforce Plaintiffs Constitutionally protected liberties. Defendants' systematic violations of constitutional rights that threaten national security. Defendants' imposition and enforcement of an unlawful vaccine mandate threatens to purge hundreds of thousands of service members, is destroying recruitment, and even threatens the viability of the All Volunteer Force. *See* PI Br., ¶ 6.

VI. CONCLUSION

This Court should grant the relief requested in the Complaint and issue the Proposed Order.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 6th day of September, 2022, the foregoing Plaintiffs' Reply Brief was e-filed using the CM/ECF system.

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