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' MEMORANDUM IN SUPPORT OF CLASS CERTIFICATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & RULES

OTHER AUTHORITIES

INTRODUCTION

Class actions involving military personnel based on constitutional issues are not strangers to the judiciary, *see, e.g., Anderson v. Laird*, 466 F.2d 283, 292-293 (D.C. Cir. 1972) (mandatory church attendance for cadets unconstitutional), nor are chaplains when religious liberties are involved. *See, e.g., Adair v. England*, 209 F.R.D. 5 (D.D.C. 2002) (certifying class action by Navy Non-liturgical chaplains challenging the Navy's religious favoritism for Liturgical chaplains and hostility to non-liturgical chaplains in various programs).

These forty-two military chaplain Plaintiffs, on behalf of themselves and similarly situated class members, move the Court to enter an order certifying the following class and subclasses under Rule 23(b)(2) of the Federal Rules of Civil Procedure:

a) the class of all military chaplains who are subject to the Department of Defense's ("DOD") COVID-19 vaccine mandate ("DOD Mandate") and who have submitted a Religious Accommodation Request ("RAR") ("Military Chaplain Class");

b) a subclass of the Military Chaplain Class who have sufficient time in service to retire and who do not wish to retire, but are faced with the draconian threat either to retire or face disciplinary actions and forfeit everything they have worked for their entire careers ("Constructively Discharged Subclass");

c) a subclass of the Military Chaplain Class who have reached or almost reached 18 years of service, entitling them to "sanctuary" status until they reach 20 years of service and are eligible for retirement ("Sanctuary Subclass"); and

d) a subclass of the Military Chaplain Class who have natural immunity from a previous documented COVID-19 infection and should be eligible either for religious accommodation or a medical exemption ("Natural Immunity Subclass").

Plaintiffs further request that the Court enter an order appointing certain of the named Plaintiffs as Class Representatives for the class and sub-classes and appointing Plaintiffs' counsel as class counsel under Rule 23(g) of the Federal Rules of Civil Procedure.

LEGAL STANDARDS GOVERNING CLASS CERTIFICATION

"[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that

the prerequisites of Rule 23(a) have been satisfied." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (citation and quotation marks omitted). In addition to meeting the four criteria in Rule 23(a), a plaintiff must demonstrate that the putative class complies with at least one of the requirements of Rule 23(b). *Id.* Here, Plaintiffs seek certification of the class pursuant to Rule 23(b)(2). In this case, Plaintiffs affirmatively demonstrate herein that the prerequisites of Rule 23 are *in fact* satisfied and are supported by the extensive factual record submitted in support of certification. *See Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350-351 (2011) ("*Wal-Mart*").

In addition to meeting the express requirements set forth in Rule 23(a), the Court must determine that at least one named class representative has Article III standing. *See Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 343 (4th Cir. 2017); *Beck v. McDonald*, 848 F.3d 262, 269–70 (4th Cir. 2017). To establish such standing, a named plaintiff must meet the "irreducible constitutional minimum of standing" which consists of three elements: (1) the plaintiff must have suffered an injury-in-fact, which (2) must be causally connected to the conduct complained of, and that (3) will likely be redressed if the plaintiff prevails. *Baehr v. Creig Northrop Team, P.C.*, 953 F.3d 244, 252 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 373 (2020) (*citing Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

In addition, "Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable." *EQT Production Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) ("*EQT*") (citation and quotation marks omitted). This "ascertainability" requirement means that Plaintiffs must demonstrate that: (i) members of the proposed class "can be ascertained by reference to objective criteria," and (ii) analysis of that objective criteria is "administratively feasible," such that "identifying class members [would be] a manageable process that does not require much, if any, individual inquiry." *Peters v. Aetna Inc.*, 2 F.4th 199, 242 (4th Cir. 2021)

("*Peters*"). This requirement does not however, require plaintiffs "to identify every class member at the time of certification." *EQT*, 764 F.3d at 358. As discussed in the sections that follow, Plaintiffs and the proposed Class satisfy each of these class certification requirements.

ARGUMENT

I. MILITARY CHAPLAINS RAISE UNIQUE CLAIMS.

Military chaplains have a unique constitutional status and role in the military and therefore may raise constitutional and statutory claims distinct from those of other service members. *See* Compl., ¶¶ 4-7 & 72-76. Military chaplains are needed to accommodate the Establishment and Free Exercise Clauses' distinct constitutional commands because, absent a chaplaincy, the military "would deprive the soldier of his right under the Establishment Clause not to have his religion inhibited and of his right under the Free Exercise Clause to practice his freely chosen religion." *Katcoff v. Marsh*, 755 F.2d 223, 234 (2d Cir. 1985). Military chaplains are needed to ensure the governmental neutrality the Establishment Clause mandates and to implement the religious accommodation process the Free Exercise Clause and RFRA require.

In recognition of military chaplains' unique constitutional role—and the danger to servicemembers' religious liberties from the Services' mandating that chaplains participate in rites, rituals or ceremonies that run counter to their foundational religious beliefs—Congress and the President enacted Section 533 of the 2013 National Defense Authorization Act ("Section 533").[1]

[1] In 2012, Congress addressed numerous concerns arising out of Congress' or judicial changes to long-established social policies that impacted some denominations and chaplains' religious beliefs, *e.g.*, the repeal of the military ban on homosexual behavior and challenges to the Defense of Marriage Act. A FY 2013 NDAA Amendment specifically made changes to Title 10 clarifying the rights of all military personnel and chaplains to follow their conscience and protecting chaplains from being forced to participate in practices, rites, and activities contrary to their conscience and faith. *See* Complaint ("Compl.") **Error! Main Document Only.**¶¶82, 83 and Exhibits 5 and 6; Arthur Schulcz, Sr. Declaration re: Section 533's origins, Exhibit 1.

Section 533(b) expressly prohibits DOD from discriminating or retaliating against military chaplains for refusing to take certain actions contrary to a chaplain's "conscience, moral principles, or religious beliefs." Because the Services failed to implement these protections as required by Section 533(c), Congress amplified the importance for military chaplains in the 2016 NDAA Report. *See* ECF 1-5, 2016 NDAA Report. Congress did so again in the 2018 NDAA Report, which "recognize[d] the importance of protecting the rights of conscience of members of the Armed Forces" and provided specific directions to DOD to emphasize the importance of religious liberty training DOD wide.[2] DOD has continued to ignore Section 533(b)'s protections for military chaplains, as shown by the fact that no Plaintiff had ever heard of § 533 prior to joining the class and this litigation. *See* ECF 67, PL Reply Br. & 67-6, Plaintiffs' Supp. Decl.

Plaintiffs note that at present there are three other cases pending in different federal courts granting class certification to certain service members challenging the DOD Mandate. None of those cases, however, deal with the issues specific to Military Chaplains raised by the present case, and each of the classes certified to date have been on a Service-wide basis.[3] The Plaintiffs in those

[2] ECF 1-6, 2018 NDAA Report, at 149-150 ("Complying with this law requires an intentional strategy for developing and implementing a comprehensive training program on religious liberty issues for military leadership and commanders. The committee urges the Department, in consultation with commanders, chaplains, and judge advocates, to ensure that appropriate training on religious liberty is conducted at all levels of command on the requirements of the law, and to that end the committee directs the Secretary, in consultation with the Chief of Chaplains for the Army, Navy, and Air Force, to develop curriculum and implement training concerning religious liberty in accordance with the law. Recipients of this training should include commanders, chaplains, and judge advocates.").

[3] *See Navy SEALs 1-26 v. Austin*, 2022 WL 1025144 (N.D. Tex. Mar. 28, 2022) ("*Navy SEALs 1-26*") (granting class certification and preliminary injunction for Navy members who had submitted RARs); *Doster v. Kendall*, 2022 WL 2760455 (S.D. Ohio July 14, 2022) (granting class certification and class-wide temporary restraining order ("TRO") for Air Force member who submitted an RAR); *Doster v. Kendall*, 2022 WL 2974733 (S.D. Ohio July 27, 2022) (expanding Air Force class-wide TRO to class-wide preliminary injunction), *stay denied pending appeal*, 2022 WL 4115768 (6th Cir. Sept. 9, 2022) ("*Doster*"); *Colonel Fin. Mgmt. Officer v. Austin*, No. 8:22-CV-1275-SDM-TGW, 2022 WL 364351216 (M.D. Fla. Aug. 18, 2022) ("*CFMO*") (granting

three cases were all from a single Service, sought certification on a Service-wide basis, and presented evidence of RFRA violations specific to a single Service. The issue of DOD-wide violations presented by this class action was not before those Courts. Those Courts did not make any finding—nor were they asked to make any finding—that the violations in question were limited to one specific Service or that Service-specific violations originated somewhere else besides with Secretary Austin.[4]

While Plaintiffs' RFRA and Free Exercise claims regarding denials of their own RARs overlap with those in the certified class actions, Plaintiffs make additional claims regarding:

- Violations of § 533 due to the adverse personnel actions taken against military chaplains in retaliation for submitting an RAR and their refusal to participate in a rite, ritual or ceremony against their conscience;
- RFRA and Free Exercise Clause violations based on Military Defendants' intimidation, coercion and retaliation against military chaplains to deprive service members of their rights and to force military chaplains to become complicit in Military Defendants' violations and to corrupt the RAR process;
- Establishment Clause violations based on Military Defendants' non-neutrality and hostility toward religion and service members with sincerely held religious objections to the DOD Mandate;
- Establishment, Free Exercise and Free Speech violations due to Military Defendants' coercion and compulsion of government-endorsed speech;
- Establishment Clause and No Religious Test Clause violations by establishing a prohibited religious test or religious classification;
- Military Defendants' violations of the Free Exercise and Free Speech clauses by censoring military chaplains with religious objections and/or causing them to self-censor their

class-wide certification and preliminary injunction for Marine Corps members).

[4] Plaintiffs note that in at least one case, a U.S. district court denied a class certification motion on behalf of members of all services. *See Navy SEAL 1 v. Austin*, MDFL No. 8:21-cv 2429, ECF No. 194 (June 2, 2022), That court denied the motion based on the certification granted in *Navy SEALs 1-26*, pending motions for Air Force class certifications, and the paucity of plaintiffs who resided in the Middle District, *Navy SEAL 1* at 2, and determined that these facts "counsel[] against the pursuit of a military wide class in this action" and "in favor of severance by branch." *Id*. at 5.

religious speech due to actual or threatened retaliation;

- Defendants violations of the Administrative Procedure Act ("APA") and usurping major policy decisions, or violating major questions doctrine, to impose categorical ban on accession and retention of those with sincerely held religious objections; and

- Defendants' violations of the APA and the Fifth Amendment by arbitrarily re-defining "vaccine" and "vaccination", or ignoring their own regulations defining these terms, for the purpose of adopting the DOD Mandate and punishing those with religious objections.

Military chaplains' roles, rights and claims do not vary by Service; nor do Defendants' systematic violations of religious liberties and institutionalized hostility to religion. All of the policies and practices challenged by Plaintiffs originated at the top of the military hierarchy: Secretary Austin and/or the Commander-in-Chief, President Biden.[5] Accordingly Plaintiffs' injuries originate with Secretary Austin who ordered the Mandate and only an order from this Court against Secretary Austin can provide Plaintiffs the full relief they seek. Indeed, unlike the other certified class actions, Plaintiffs and class members in the present action come from each of the Services demonstrating the pervasive and uniform effect the DOD Mandate has had throughout the Military on chaplains.

Plaintiffs' Complaint includes as Exhibit 5, ECF No. 1-7, "The Associated Gospel Churches' ["AGC"] Perspective on Religious Liberty, Including Military Prayer and Religious Speech Problems," which provides an example why Secretary Austin is an appropriate and necessary object for injunctive and remedial relief as the senior defendant in this case. It illustrates the problems that arise under the "Joint Base" structure where major units of different Services fall under a different Service's authority and chaplains of different Services operate under different

[5] The Service branches are merely executing a common directive and have no discretion, as demonstrated by the uniformly negative results of the RAR process; to argue otherwise would require one to believe that the Services are, whether independently or in collusion with each other, not only violating the Constitution and federal law, but the military chain of command itself. Defendants have never made this claim, nor is there evidence of such a conspiracy.

statutes, regulations and customs. The Air Force command chaplain at Joint Base Richardson ("JBR") in Alaska censored the sermon of an Army AGC chaplain, also stationed at JBR who had been asked to speak at an Air Force chapel. The command chaplain did not like the sermon's content. The 2018 NDAA Report's "directive language" required the Secretary to implement a "comprehensive training program on religious liberty issues" that could have precluded such a conflict under § 533. In the joint base environment, DOD religious liberty "rules" are necessary to provide uniform protection for all chaplains regardless of Service, location, or command.

The June 2, 2022, DOD Inspector General ("IG") report to Secretary Austin,[6] *see* Exhibit 2 ("DOD IG Report"), provides further evidence that the religious liberty violations are DOD-wide and require a DOD-wide remedy, rather than a piecemeal Service-by-Service approach. The DOD IG Report to Secretary Austin concluded the DOD was in "noncompliance" with RFRA, where they "found a trend of generalized assessments rather than the individualized assessment that is required by Federal law and DoD and Military Service policies." Ex. 2, DOD IG Report, at 2. The DOD IG Report concluded that individualized assessments could not have been made based on the rate of denials by the Services' review and appeal authorities:

> Additionally, the volume and rate at which decisions were made to deny requests is concerning. The appeal authorities of the Services we reviewed indicated than an average of 50 denials per day were processed over a 90-day period. Assuming a 10-hour workday with no breaks or attention to other matters, the average review period was about 12 minutes for each package. Such a review period seems insufficient to process each request in an individualized manner and still perform the duties required of their position.

[6] *See* Meghann Myers, *Services May Be Improperly Denying Vaccine Religious Waivers*, MILITARY TIMES (Sept. 21, 2022), available at: https://www.militarytimes.com/news/your-military/2022/09/21/services-may-be-improperly-denying-vaccine-religious-waivers-ig-says/ (last visited Sept. 30, 2022). The IG Report was filed September 14, 2022 in *Doster v. Austin*, 22-cv-084-MWM (S.D. Ohio), ECF 91-1, along with an affidavit from Plaintiffs' counsel attesting to the authenticity of the document.

Id. at 3. Secretary Austin received this report on June 2, 2022, took no action on these findings substantiating the findings of RFRA violations by several courts for three months, until it was referred to the Service Secretaries on September 2, 2022. *Id.* at 1.

Congress has also taken notice of the disastrous effects that the DOD Mandate is having on military readiness and recruiting across the DOD, as set forth in the attached September 15, 2022 letter to Secretary Austin from nearly 50 members of Congress. *See* Ex. 3, Sept. 15, 2022 Letter to Secretary Austin. These Members of Congress express "grave concern of the effect of the" DOD Mandate because, "[a]s a major land war rages in Europe our own military faces a self-imposed readiness crisis." *Id.* at 1. In their view, the DOD "has abused the trust and good faith or loyal servicemembers by handling exemptions in a sluggish and disingenuous manner," making many wait "for nearly a year to learn if they will be forcibly discharged for their sincerely held religious beliefs or medical concerns." *Id.* at 2. They identify the DOD Mandate as the "primary cause of the [DOD]'s recruiting difficulties," which will result in the loss of at least 75,000 from the Army alone, *id.* at 2, and effectively "disqualifies more than forty percent of the Army's target demographic from service nationwide, and over half of the individuals in the most fertile recruiting grounds." *Id.* at 2. The letter also cites the growing body of evidence that "covid vaccinations have negligible or even negative efficacy against the Omicron strains," and that "natural immunity provides better protection against infection and death than existing Covid vaccines." *Id.* at 2-3.

II. CLASS MEMBERS HAVE STANDING AND ARE ASCERTAINABLE.

A. The Chaplain Plaintiffs

Plaintiffs include 42 current military chaplains[7] from all services including 11 chaplains who recently joined the suit. *See* ECF No. 56 (Motion to Join) and 57 (Memo). All Plaintiffs have

[7] This includes one Chaplain candidate who shares the same protections as chaplains.

submitted RARs; at least 21 of the original 31 Plaintiffs have had their initial RARs denied and 11 of those had their RAR appeals denied. Each of the named Plaintiffs could serve as a class representative. However, given the relatively large number of Plaintiffs and Prospective Plaintiffs, which by themselves satisfy the Rule 23(a)(1) numerosity requirement, *see infra* Section III.A, Plaintiffs propose to designate 12 of the 42 as Class Representatives. Plaintiffs propose 12 class representatives not because that number is necessary under Rule 23 but instead because the subset of individuals proposed as class representatives serve, as the name implies, as excellent "representatives" of how the DOD's unlawful actions have infringed upon and harmed service members across all Services as shown by their declarations in the Complaint Exhibit 1, ECF Nos. 1-1 and 1-2, and their subsequent declaration supplements supporting their Preliminary Injunction Motion. The proposed Class Representatives from the pool of Plaintiffs are:

- Arizona Army National Guard Captain Jeremy Botello
- U.S. Navy Lieutenant Justin Brown (Assigned to U.S. Coast Guard)
- U.S. Navy Reserves Commander Mark Cox
- U.S. Navy Commander John Eastman
- U.S. Navy Lieutenant Nathanael Gentilhomme
- U.S. Army Captain Doyle Harris
- U.S. Army Colonel Brad Lewis
- U.S Air Force Captain Robert Nelson
- U.S. Army Captain Parker Schnetz
- U.S. Air Force Major Lance Schrader
- U.S. Navy Lieutenant Jonathan Shour (Assigned to U.S. Marine Corps)
- U.S. Army Major Jerry Young

B. The Class Representatives And All Plaintiffs Have Standing.

Plaintiffs have submitted sworn declarations and supporting documentation describing the specific injuries in fact that they have suffered as a result of Defendants' unconstitutional and illegal policies. *See generally* Compl, ¶¶ 28-58 and ECF No. 57 (Joinder Memo) at 3-9, ¶¶ II.A-K (Description of plaintiffs and injuries) and ECF Nos. 57-1 to 11 (Declarations) and 57-12 (Matrix of plaintiffs and irreparable injuries). All Plaintiffs have suffered injury-in-fact due to adverse personnel actions, specific violations of § 533, and specific violations of their First Amendment rights and other irreparable harms.[8] Moreover, each Plaintiff has exhausted military remedies.[9]

Indeed, three district courts in three other circuits have found that RAR-related violations similar to those alleged here to be sufficient for standing, to support class certification and to justify a class-wide injunction. *See supra* note 3 & cases cited therein. In this case, Plaintiffs have suffered several additional categories of injuries-in-fact beyond those due to the unlawful and unconstitutional denial of their RARs. *See supra* Section I. Plaintiffs' PI Memo, ECF No. 60, and Reply Brief, ECF No. 67, discuss at length why each Plaintiff satisfies both the requirements for Constitutional and statutory standing for each of their claims, and why their claims are justiciable and ripe as well.[10] Thus, each of the proposed Class Representatives has Article III standing.

---

[8] *See generally* ECF 60, PI Br., ¶¶ 13-16 (summarizing Plaintiff injuries); ECF 60-10 (table summarizing negative personnel actions and Section 533 violations for all plaintiffs); ECF 60-11 table summarizing First Amendment violations and irreparable harms suffered by all Plaintiffs and Prospective Plaintiffs).

[9] Each Plaintiff has submitted an RAR. Most of the Plaintiffs (27 of 42) have had their RARs denied, while 14 Plaintiffs have had their RAR appeals denied as well. *See* Ex. 3 (Table Summarizing Initial RAR Denials and RAR Appeal Denials and other injuries).

[10] *See* ECF 60, PI Motion, at 14-24 (justiciability), 24-26 (standing) & 26-28 (ripeness); ECF 67, PI Reply Brief, at 5-11 (justiciability) & 11-14 (ripeness).

C. The Proposed Class and Sub-Classes Are Adequately Defined and Ascertainable.

Plaintiffs move for this Court to certify the Military Chaplains Class, where the members are: (a) a military chaplain, *i.e.*, commissioned as a faith group representative and appointed as a chaplain or chaplain candidate; (b) subject to the DOD Mandate; and (c) who has submitted a RAR in opposition to taking the vaccine.

Defendants maintain personnel systems which accurately identify each Plaintiff's status as a chaplain who has filed an RAR. Further, the Defendants have not disputed these facts and their submissions to the record of this proceeding further confirm their status as military chaplains who have submitted an RAR. Defendants' Opposition to Plaintiffs' PI Motion ("Opp.") provided a then current summary of all Plaintiffs' RARs and the adverse personnel actions taken against them, *see generally* ECF 65, DF Opp., at 6-8, supported by a sworn declaration from that Plaintiff's chain of command, as well as what Defendants characterized as the administrative record or working file for Plaintiffs whose RAR appeal had been denied. *See* ECF 65-25 to 60-47.

The same applies for each sub-class. First, a member of the Constructively Discharged Subclass is: (1) a member of the Military Chaplain Subclass; (2) eligible for retirement as determined by the number of years in service; (3) who does not wish to retire; and (4) but who may be compelled to do so due to their unvaccinated status. Second, a member of the Sanctuary Subclass is: (1) a member of the Military Chaplain Subclass (2) who has between 18 and 20 years of service and not yet eligible for retirement. Third, a member of the Natural Immunity Subclass is; is: (1) a member of the Military Chaplain Subclass (2) who has a previous documented infection based on Defendants' own records or positive test results from a private or military healthcare provider.

Therefore, each member of the Military Chaplain Class, or the three sub-classes, "can be

ascertained by reference to objective material," that are "administratively feasible," such that "identifying class members [would be] a manageable process that does not require much, if any, individual inquiry." *Peters*, 2 F.4th at 242. In any case,

III. THE PROPOSED CLASS SATISFIES RULE 23(a).

A. Rule 23(a)(1) – Numerosity

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." The touchstone for determining impracticability of joinder is numerosity of the class. "As a general guideline, ... a class that encompasses fewer than 20 members will likely not be certified ... while a class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone."[11] A class size between 20 and 40 occupies a "grey area" requiring the Court to examine all the circumstances of the case, including questions of judicial economy. *In re Zetia*, 7 F.4th at 234. Here, there are more than 40 Plaintiffs and Prospective Plaintiffs, not counting other class members. While Plaintiffs do not know the precise number of putative class members, there are over 2,800 chaplains across the U.S. military,[12] and Plaintiffs understand that hundreds of military chaplains have submitted RARs.

Each of the other factors typically considered—"judicial economy, … the financial resources of class members, [and] the geographic dispersion of class members," *In re Zetia*, 7 F.4th at 234—weigh in favor of finding numerosity. First, judicial economy is served not only by the

---

[11] *In re Zetia (Ezetimibe) Antitrust Litig.,* 7 F.4th 227, 234 (4th Cir. 2021) (*quoting* 1 *Newberg on Class Actions* § 3:12 (5th ed. 2021)). *See also Milbourne v. JRK Residential America*, LLC, 2014 WL 5529731, *5 (E.D. Va. 2014), *order amended,* 2016 WL 1071571 (E.D. Va. 2016) ("[T]he size of the proposed class, numbering 43, also weighs in favor of finding numerosity.").

[12] *See* C. Todd Lopez, *Recruiting Challenges for Chaplains Mirror Other Military Jobs*, DOD News (Jan. 16, 2020), available at: https://www.defense.gov/News/Feature-Stories/story/Article/2059467/recruiting-challenges-for-chaplains-mirror-other-military-jobs/#:~:text=With%20more%20than%202%2C800%20chaplains,adequate%20manning%20is%20a%20challenge (last visited Sept. 14, 2022).

number of Plaintiffs and putative class members, but also because Plaintiffs and class members satisfy the commonality and typicality requirements. *See infra* Sections III.B and III.C.

Second, plaintiff military chaplains are not only facing discharge and the likelihood that they will not be able to pursue their vocation due to their discharge characterization (general discharge with misconduct characterization), *see* ECF 60, PI Br., at 43-44 (discussing irreparable harm), but some have already failed selection, been denied necessary schooling, not been allowed to move destroying their careers, lost pay and are facing placement into the IRR and/or cannot drill or be paid. *See* Ex. 4 (table summarizing Plaintiff status and harms). Thus, they will be financially unable to pursue litigation on their own and certainly not against the combined forces of the Department of Justice and DOD.

Third, Plaintiffs and other class members are widely dispersed geographically. The named Plaintiffs are currently stationed in Okinawa, Hawaii, Italy, and various scattered locations around the United States. It would be very difficult, if not impossible, to litigate just the named plaintiffs' cases in various courts around the country. Putative class members are spread as widely as the U.S military across all 50 States and dozens of countries. Accordingly, based upon the number of individuals involved, judicial economy, Plaintiffs' limited financial resources, and their geographic dispersion, the class satisfies Rule 23(a)(1)'s numerosity requirement.

B. Rule 23(a)(2) – Commonality

The commonality requirement of Rule 23(a)(2) requires there be "questions of law or fact common to the class." To satisfy this requirement, a class-wide proceeding must have the capacity "to generate common answers apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350. Commonality requires that Plaintiffs' "claims depend upon a common contention" that is of "such a nature that it is capable of classwide resolution—which means that determination of tis truth or falsity will resolve an issue that is central to the validity of each of the claims in one

stroke." *Id.* at 2552.

But "for purposes of Rule 23(a)(2) [e]ven a single [common] question will do." *Id.* at 2556 (citation and quotation marks omitted). *See also Thomas v. Louisiana-Pacific Corp.,* 246 F.R.D. 505, 513–14 (D.S.C. 2007) ("The commonality test is qualitative, not quantitative. There need be only a single question of law or fact common to all members of the class.")(citation omitted). Thus, so long as there is at least one issue central to the validity of the claims that is capable of class-wide resolution—that is, one issue can be answered for all class members in a single stroke—the commonality requirement is deemed satisfied. *See Wal-Mart*, 564 U.S. at 350.

This prerequisite is readily met in this case. Plaintiffs' and Class Member's claims originate from the same conduct, practice and procedure on the part of Secretary Austin and the other Defendants. Numerous courts have already found the commonality requirement to be satisfied by largely identical RFRA and Free Exercise claims stemming from the sham RAR process and the unlawful denial of RARs. *See supra* note 3 & cases cited therein. This alone is sufficient to meet the commonality requirements.

Commonality "may also be demonstrated by showing that the defendants "operated under a general policy of discrimination."[13] That is exactly what is alleged here. Common questions that apply to all class members involve whether the Military Defendants were hostile to and inappropriately discriminated against religious belief in compelling vaccination despite those beliefs, refusing to accommodate those beliefs, and granting exemptions for secular but not religious reasons. If Defendants have engaged in unlawful discrimination, as Plaintiffs allege, such

[13] *Wal-Mart*, 564 U.S. at 353 (*quoting Gen. Tele. Co. of Sw. v. Falcon*, 347 U.S. 147, 159 n.15 (1982) ("*Falcon*")). "In cases involving claims of class-wide discrimination," the requirements of commonality and typicality "'tend to merge.'" *Doster*, 2022 WL 4115768, at *3 (*quoting Falcon*, 457 U.S. at 157 n.13). Accordingly, the Court should consider the Plaintiffs' arguments regarding commonality as largely applicable to the typicality requirement.

discrimination creates "the same injury" for purposes of commonality. Plaintiffs' claims of multiple statutory and constitutional violations are all issues that can be answered for all class members in "one stroke", satisfying the commonality requirement. *Wal-Mart*, 564 U.S. at 350. *Accord Navy SEALs 1-26*, 2022 WL 1025144, at * 5; *Doster*, 2022 WL 4115768, at *3; *CFMO*, 2022 WL 364351216, at *12.

Plaintiff chaplains challenge not only the discriminatory RAR process and its results as applied to them individually, but they also raise broader challenges to the DOD's institutionalized hostility to religion—and to those who oppose abortion or complicity in the evil of abortion on religious grounds—stemming from the policy set by Secretary Austin, either on his own, or at the directive of the Commander-in-Chief. Military Chaplains' claims—and the common issues of fact and law necessary to resolve them on a class-wide basis—are summarized below.

1. Common Questions of Fact for the Class and Sub-Classes

The questions of fact that are common to the Class and proposed Sub-classes include:

1. Whether the DOD Mandate is uniformly applicable to all Military Chaplains, and all service members, across all service branches, and including active duty and reservists alike;

2. Whether the Military Defendants, at the direction of DOD and in furtherance of Secretary Austin's Mandate, have a policy or practice of denying all, or refusing to grant any, RARs for the DOD Mandate;

3. Whether the Military Defendants at the direction of and/or in furtherance of instructions from the DOD in pursuit of the Secretary's Mandate, have a policy or practice of not conducting an individualized assessment of RARs for the DOD Mandate;

4. Whether the Military Defendants, at the direction of and in furtherance of the Secretary's Mandate, have a policy or practice of taking adverse action against servicemembers and chaplains in retaliation for following their conscience and submitting RARs for the DOD Mandate in violation of §533, RFRA, the Establishment, Free Exercise, Due Process and no religious test Clauses;

5. Whether the Military Defendants' RAR and Mandate policies are not neutral towards religion and/or express hostility to those with sincerely-held religious objections to the DOD Mandate;

6. Whether the Military Defendants have a policy or practice of using retaliation, intimidation, coercion, and other adverse actions against military chaplains to coerce military chaplains not to submit RARs and/or to dissuade servicemembers from submitting RARs in an effort to implement the DOD Mandate;

7. Whether the Military Defendants have a policy or practice to sideline, reassign, remove from the RAR process, retaliate against, or take other adverse actions against military chaplains who submitted RARs, expressed their own religious objections to the DOD Mandate, and/or provided assistance to service members with religious objections to the DOD Mandate;

8. Whether the Military Defendants have a policy or practice to take adverse personnel actions against military chaplains, including denial of promotion, schooling, training, or assignment, based on their submission of an RAR or the expression religious objections to what they deem to be a rite, ritual or ceremony related to the DOD Mandate or the RAR process;

9. Whether the Military Defendants have a policy or practice to compel, coerce, or direct military chaplains to engage in government-endorsed speech regarding vaccination or religious objections, contrary to military chaplains' conscience and/or denominations' beliefs;

10. Whether in adopting or implementing the DOD Mandate, all Defendants have changed the pre-Mandate definitions of "vaccine" and "vaccination", or ignored their own regulations defining those terms, to treat the mRNA treatments as "vaccines"; and

11. Whether the Defendants actually consider the DOD Mandate to be necessary, or to constitute the least restrictive means, now that President Biden has declared that "[t]he pandemic is over,"[14] and Defendant Air Force Secretary Kendall declared victory over the COVID almost two months ago in an Air Force-wide memo stating that "You've met and defeated a pandemic." *See* Ex. 4 at 2.

2. Common Questions of Law for the Class and Sub-Classes

The questions of fact that are common to the Class and proposed Sub-classes include:

1. Whether the Military Defendants' policy or practice of denying all, or refusing to grant any, RARs for the DOD Mandate deprives class members of their rights under RFRA, § 533, and/or the Free Exercise, Establishment, Due Process and no religious test Clauses;

2. Whether the Military Defendants' policy or practice of failing to provide an individualized assessment of RARs for the DOD Mandate deprives class members of their rights under

[14] *See* David Cohen & Adam Cancryn, *Biden on '60 Minutes': 'The Pandemic is Over*, Politico (Sept. 18, 2022), available at: https://www.politico.com/news/2022/09/18/joe-biden-pandemic-60-minutes-00057423 (last visited Sept. 19, 2022).

§ 533 RFRA and the above constitutional guarantees and protections;

3. Whether the Military Defendants' policy or practice of taking adverse personnel actions against military chaplains, including denial of promotion, schooling, training, or assignment, based on their submission of an RAR or the expression religious objections to what they deem to be a rite, ritual or ceremony related to the DOD Mandate or the RAR process is a violation of § 533(b);

4. Whether Military Defendants have failed to implement § 533(b);

5. Whether the foregoing policies or practices of Military Defendants, whether alone or collectively, are not neutral toward religion and/or send a message of overt hostility to religion or religious service members in violation of the Establishment Clause;

6. Whether the Military Defendants' policy or practice to compel, coerce, or direct military chaplains to engage in government-endorsed speech regarding vaccination or religious objections, contrary to military chaplains' conscience and/or denominations' beliefs, violates the First Amendment's Free Exercise Free Speech, and/or Establishment Clauses;

7. Whether the Military Defendants' policy or practice to censor military chaplains who submit RARs or express religious objections to the DOD Mandate or to cause such military chaplains to self-censor expression of their religious beliefs or their religious speech to other service members violates the First Amendments Free Exercise Clause or Free Speech Clause or RFRA;

8. Whether Military Defendants' policies or practices to make military chaplains complicit in actions contrary to their sincerely-held beliefs, either directly or through advising other service members in a manner contrary to their conscience or denomination's beliefs violates the First Amendment's Religion Clauses, § 533 or RFRA;

9. Whether the foregoing policies or practices of Military Defendants, whether in isolation or collectively, establish a religious test or religious classification in violation of the No Religious Test Clause; and

10. Whether the actions of Defendants in changing or ignoring the pre-Mandate definitions of "vaccine" and "vaccination" to impose the DOD Mandate and punish service members for failure to comply with the DOD Mandate, violates the APA, the Fifth Amendment Due Process Clause and the Separation of Powers.

3. Military Chaplain Sub-Classes: Common Questions

In addition to the common questions of law and fact detailed above, the three sub-classes have the same common questions as those for the Military Chaplain Class with the following additional common questions:

(a) For the **Constructively Discharged Subclass**, whether the subclass members: (i)

are eligible for retirement, (ii) but do not wish to retire, (ii) the Military Defendants seek to discharge them (or would in the absence of the current class-wide injunctions); and (iii) whether they will be deprived of retirement and other benefits as a result of their refusal to take vaccines to which they have religious objections.

(b) For the **Sanctuary Subclass**, whether the subclass members: (i) are eligible for "sanctuary" because they have 18 to 20 years of service; (ii) the Military Defendants seek to discharge them (or would in the absence of the current class-wide injunctions); and (iii) whether they will be deprived of retirement and other benefits as a result of their refusal to take vaccines to which they have religious objections.

(c) For the **Natural Immunity Subclass**, whether the subclass members have a documented previous infection, as demonstrated by Military Defendants' own records or a documented positive test from a private healthcare provider.

C. Rule 23(a)(3) – Typicality

Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). As noted above, "[i]n cases involving claims of class-wide discrimination," the requirements of commonality and typicality "'tend to merge.'" *Doster*, 2022 WL 4115768, at *3 (*quoting Falcon*, 457 U.S. at 157 n.13). Accordingly, the arguments in the foregoing section on commonality should largely apply for typicality.

To satisfy this requirement, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members" and "the named plaintiff's claim and the class claims [must be] so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Deiter v. Microsoft Corp.,* 436 F.3d 461, 466 (4th Cir. 2006) (*quoting Falcon*, 457 U.S. at 156-57). Thus, "the appropriate analysis of typicality must involve a comparison of the plaintiffs' claims or defenses with those of the absent class members," and a comparison between "the facts on which the plaintiff[s] would necessarily rely to prove" their claims and "the extent to which those facts would prove the claims of the absent class members." *Id.* "While the representatives claims must be typical of, they need not be identical to, the claims of the other class members." *Troche v. Bimbo Foods Bakeries Distribution, Inc.*, 2015

WL 5098380, at *5 (W.D.N.C. 2015).

Here, Plaintiff and all other Class Members have been subjected to the violations of their rights under § 533, RFRA and the Constitution by Defendants' same illegal, hostile, and coercive actions. The interests of the Plaintiffs' putative class representatives are the same as every member of the class; the representatives' claims have the same essential characteristics as the claims of the class at large.

D. Rule 23(a)(4) - Adequacy

Rule 23(a)(4) requires a showing that the plaintiff will fairly and adequately protect the interests of the class. "Two basic guidelines frame the Court's review of this requirement: (1) the absence of conflict between the representative and class members; and (2) the assurance that the representative will vigorously prosecute the matter on behalf of the class." *Nelson v. Warner*, 336 F.R.D. 118, 123–24 (S.D.W. Va. 2020). Plaintiffs and their counsel satisfy these requirements.

1. There Is No Conflict Between Representatives and Class Members.

A conflict "must be more than merely speculative or hypothetical" to defeat the adequacy requirement. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir. 2003) (citation omitted). "Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement." 1 *Newberg on Class Actions* § 3:58 (5th ed.). A conflict is not fundamental where, as here, all class members "share common objectives and the same factual and legal positions and have the same interest in establishing the liability of defendants." *Ward v. Dixie Nat. Life Ins. Co.,* 595 F.3d 164, 180 (4th Cir. 2010) (internal alterations omitted) (quoting *Gunnells v. Healthplan Servs., Inc.,* 348 F.3d 417, 431 (4th Cir.2003).

Here, there are no conflicts of interest between the class and the Plaintiffs who are the class's representatives. This is not a case where plaintiffs are seeking differing monetary awards;

they seek injunctive and declaratory relief against Defendants' illegal and unconstitutional actions and they seek to compel the Defendants to take appropriate action to fix Plaintiffs' careers and remove the current restrictions on their schooling, promotions, and assignments, all in violation of the Constitution, RFRA and § 533, and appropriate relief related thereto.

The Plaintiffs' prosecution of this lawsuit as a class action to vindicate the constitutional and civil rights that they are oath-bound to protect should give the Court no pause. The named Plaintiffs have demonstrated willingness to sacrifice their careers and livelihood to stay true to their sincerely held religious beliefs and oath of office. They have been willing to pursue these claims in the face of threats of court martial, dishonorable discharge, separation, and other severe sanctions. The Plaintiffs are undoubtedly suitable representatives of the Class and Subclasses.

There is also no conflict merely because each class representative Plaintiff does not have a claim against each Military Defendant because each class representative has a claim against Secretary Austin, DOD and the Service of which they are member. Such a conflicts exists only where Defendants do not share a "juridical link." 2 *Newberg on Class Actions* § 5:17 (5th ed.). The "paradigmatic application of the juridical link doctrine is to certify a defendant class of government officials acting in accordance with an allegedly unconstitutional law." *Id.* Here, the juridical link between each Military Defendant is provided by Secretary Austin's DOD Mandate and the Categorical RAR Ban, evidenced by the June 2, 2022 DoD IG Report to the Secretary highlighting the DoD's failure to follow requirements of the Religious Freedom Restoration Act, and DoD and the Services' instructions, Exhibit 2. The DoD IG Report applies DOD-wide and to all Services and service members. Plaintiffs allege that the unconstitutional policies were instituted at the directive of Secretary Austin and carried out by each of the Service Secretaries who are bound by law to follow his orders.

2. Class Representatives Will Vigorously Prosecute on Behalf of Class.

The second prong "considers the ability of both the class representative[s] and [their] attorneys." *Id.* As explained below, Plaintiffs' counsel have substantial experience in class actions, representation of military chaplains or other service members and/or the specific subject matter and claims raised by Plaintiffs. "In the absence of proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to prosecute vigorously the action on behalf of the class." *Hewlett v. Premier Salons Int'l, Inc.*, 185 F.R.D. 211, 218 (D. Md. 1997).

Plaintiffs request that the Court appoint Arthur A. Schulcz, Sr. as Lead Class Counsel and J. Andrew Meyer and Brandon Johnson as Class Counsel. Messrs. Schulcz and Meyer are experienced class action attorneys that have been committed to representing large numbers of individuals and parties in class or complex cases throughout the Country. Mr. Schulcz has previously been involved in multiple environmental cleanup cases under the Comprehensive Environmental Response, Compensation and Liability Act (aka "Superfund') in Indiana, Illinois, Wisconsin, Oklahoma, Michigan, Pennsylvania, California, New Jersey, and New York. Beginning in 2000, he became lead counsel for multiple class actions or putative class actions by Navy chaplains. *See* Declaration of Arthur A. Schulcz, Sr., Exhibit 5.

J. Andrew Meyer has had extensive experience in class actions. Since 2005, he has focused his practice on class actions on behalf of individual plaintiffs. He has litigated complex class action cases in state and federal courts throughout the country, with those cases ranging from class actions involving consumer products and consumer protection statutes, to civil rights class actions and insurance and banking class actions brought on behalf of consumers, as well as class actions brought under the TCPA and FDCPA. Mr. Meyer has previously served or been court appointed as class counsel in cases involving civil rights or constitutional law violations. For example, he was appointed class counsel in the matter *In re Black Farmers Discrimination Litigation*, Case.

No. 08-ML-0511-PLF (District Court for the District of Columbia), a case resulting in a $1.2 billion settlement for farmers subjected to the USDA's discrimination. He has been involved in a number of class action matters consolidated by the Judicial Panel on Multidistrict Litigation, *See* Mr. Myer's declaration providing his class action experience, Exhibit 6.

Brandon Johnson has over 20 years of experience in complex litigation and investigations involving federal administrative agencies before administrative bodies, trial courts and appellate courts, and is lead counsel or co-counsel in several related proceedings raising similar challenges to the DOD Mandate. *See* Mr. Johnson's declaration, Exhibit 7.

The named Plaintiffs designated as Class Representatives, *see supra* Section II.B, represent all services, all ranks, and operational as well as unit and post chapels. They also represent those waiting for their RARs and RAR appeals to be denied, as well as those in each of three sub-classes identified in Section III above.

IV. THE PROPOSED CLASS SATISFIES RULE 23(b)(2).

The Court may certify a (b)(2) class when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The Supreme Court has held that this requirement is satisfied "when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart*, 564 U.S. at 360; *see also id.* at 361-62 ("[T]he relief sought must perforce affect the entire class at once."). "Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples of what (b)(2) is meant to capture." *Wal-mart*, 564 U.S. at 361 (cleaned up); *see also Thorn v. Jefferson–Pilot Life Ins. Co.,* 445 F.3d 311, 330 n.24 (4th Cir.2006) ("Rule 23(b)(2) was created to facilitate civil rights class actions") (citations omitted).

As alleged in the Complaint, Defendants have engaged in a pattern of activity and conduct

towards the class that is adverse to the class as a whole. The DOD Mandate is applicable to all military service members, including all members of the Military Chaplain Class and subclasses. As the Fourth Circuit has recognized, Rule 23(b)(2) certification is primarily intended for civil rights litigation. *See Thorn*, 445 F.3d at 330 n.24. *Accord Doster*, 2022 WL 4115768, at *5. The class claims are prototypical civil rights claims under the First and Fifth Amendments, No Religious Test Clause, RFRA and Section 533. Further, the nature of the relief sought is primarily injunctive and declaratory relief—which seeks to preclude Defendants from enforcing the unconstitutional and unlawful DOD Mandate and retaliating against the class—would fairly adjudicate the pattern of activity adverse to the class.

Plaintiffs challenge the blatant violation of their rights to have their careers, integrity, reputation, and family supported, not attacked, threatened, and bullied to do that which not only their conscience tells them to oppose but emerging medical reports of widespread injury and harm mandate caution. As the DoD IG Report shows, the Military Defendants have expressed overt hostility to religion and even hatred of people who express a faith strong enough to resist the threat of separation with a discharge characterization that is unjust and vindictive that punishes them not only for their refusal to disobey the God they serve but destroys their careers and follows them until they die or successfully challenge their service characterization. Plaintiffs cannot change Defendants' attitude, but through injunctions they can change the effects of Defendants' prejudicial actions.

Plaintiffs' careers have been savaged. Although they have not yet been discharged, in effect, they have been sidelined as if they were discharged, denied promotions and important jobs necessary for career progression, essentially creating "dead space" with degraded performance reports because they followed their conscience as § 533 and the Religion Clauses allows, while

their contemporaries continue to accumulate fitness reports unencumbered by illegal and negative comments meant to destroy Plaintiffs' promotability. Because Defendants have "acted ... on grounds that apply generally to the class," Fed. R. Civ. P. 23(b)(2), "potential class members may receive relief from a single injunction, the claim is appropriate for class-wide resolution under Rule 23(b)(2)." *Navy SEALs 1-26*, at *9.

Dilley v. Alexander, 627 F.2d 409 (D.C. Cir. 1980) is a paradigm case showing the judiciary's role in correcting military wrongs. It provides a useful benchmark and model for military injunctive and declarative relief to remedy military wrongdoing. During the 1975-76 "drawdown" after the Vietnam War, Army Reserve officers on active duty who twice failed of selection after consideration by promotion boards without Reserve officer board members contrary to 10 U.S.C. § 226 were separated. The separated Reservists sued. *Dilley* found the Army's failure to include Reserve officer board members rendered the boards' composition illegal and their decisions "void ab initio." *Dilley v. Alexander*, 603 F.2d 914, 925 (1979) held "appellants are entitled to be reinstated to active duty and to be considered again" by two legal boards."

On remand, the Army refused to return the separated officers to active duty before holding new boards. The Plaintiffs asked the D.C. Circuit to clarify its mandate on their entitlement to be returned to active duty. *Dilley,* 627 F.2d at 410-411, explained why clarification of the Court's mandate was appropriate and required by justice to make the plaintiffs whole. *Id.* at 413 ("Courts attempt to return successful plaintiffs to the position that they would have occupied 'but for' their illegal release from duty"). Its analysis applies to this case where Defendants actions in not allowing Plaintiffs to move or attend schools and training have destroyed careers in the Services' competitive promotion environment.

Dilley explained judicial relief provided to wrongfully discharged military servicemen has

been premised upon one central principle: making the injured person "whole." *Id*. at 423. ("Courts attempt to return successful plaintiffs to the position that they would have occupied 'but for; their illegal release from duty'"). That should apply here, Defendants, in effect, released Plaintiffs from normal military duties and assignments, locking them down.

> But since the litigation that was thus forced on the Reserve officers by the Army's wrongful conduct has itself exacerbated the wrongs inflicted upon these deserving appellants, the relief applied must remedy not only the original, but also the additional and continuing wrongs.
>
> ***
>
> We must remember that appellants are career officers; deprivation of their livelihood was not a momentary insult that ended the instant they were thrown out on the streets. Rather, appellants faced the loss of their careers, and with it the loss of attendant benefits they would have earned and received during this period following the termination of their service as officers.

Id. at 411. *Dilley* further instructed:

> [T]he Secretary should ensure that records contain Officer Efficiency Reports for the period of illegal discharge that will not prejudice appellants' chances for promotion. *See Sanders v. United States*, 594 F.2d 804, 818-20 (Ct.Cl.1979). Finally, we instruct the Army to attempt to obviate any further adverse effects to appellants' careers in its correction of appellants' military records.

Id. at 413, n.12.Under these facts, certification under Rule 23(b)(2) is appropriate and warranted. Indeed, the nature of such an equitable remedy, applicable class-wide, distinguishes this case from the concerns the Supreme Court articulated in *Wal-Mart* regarding a plaintiff's efforts to shoehorn monetary relief into a (b)(2) injunctive relief class. *Wal-Mart*, 564 U.S. at 365-366.

V. PLAINTIFFS' COUNSEL SHOULD BE APPOINTED CLASS COUNSEL UNDER RULE 23(g).

An order that certifies a class action must appoint class counsel under Rule 23(g). *See* Fed. R. Civ. P. 23(c)(1)(B). Rule 23(g) mandates that class counsel "fairly and adequately represent the interest of the class." Fed. R. Civ. P. 23(g)(4). In making this determination, courts should consider four factors: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types

of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A).

In this case, as explained above in Section III.D, Plaintiffs' counsel are qualified to represent the interests of the class and subclasses fairly and adequately. Plaintiffs' counsel identified and thoroughly investigated all claims in this action and have committed sufficient resources to thoroughly and expeditiously bring this action. In addition, Plaintiffs' counsel has extensive experience in litigating class actions and other complex litigation, including class actions on behalf of military chaplains. They have extensive experience in litigation involving the First Amendment, APA and other administrative litigation against federal agencies. Plaintiffs' counsel therefore satisfy the standard under Rule 23(g) for appointment of class counsel.

VI. CONCLUSION

Based on the above, Plaintiffs have established all of the prerequisites for class certification under Rule 23(a), that this class can be certified under Rule 23(b)(2), and that Plaintiffs' counsel should be appointed as class counsel under Rule 23(g). Accordingly, Plaintiffs request that the Court enter an order granting their Motion for Class Certification, certifying the proposed Class, appointing the Plaintiffs identified here as Class Representatives, appointing the undersigned as Class Counsel, and granting Plaintiff any other and further relief which it may show itself justly entitled to in this matter.

Dated: September 30, 2022

Respectfully Submitted,

/s/ Arthur A. Schulcz, Sr.
Arthur A. Schulcz, Sr.
DC Bar No. 453402
Chaplains Counsel, PLLC
21043 Honeycreeper Place
Leesburg, VA 20175
Tel. (703) 645-4010
Email: art@chaplainscounsel.com

/s/ Brandon Johnson
Brandon Johnson
DC Bar No. 491370
Defending the Republic
2911 Turtle Creek Blvd., Suite 300
Tel. (214) 707-1775
Email: bcj@defendingtherepublic.org

/s/ J. Andrew Meyer
J. Andrew Meyer, Esq.
Fla Bar No. 0056766
FINN LAW GROUP, P.A.
8380 Bay Pines Blvd
St. Petersburg, Florida 33709
Tel.: 727-709-7668
Email: ameyer@finnlawgroup.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that on this 30th day of September, 2022, the foregoing Plaintiffs' Motion for Class Certification and Brief was e-filed using the CM/ECF system.

Respectfully Submitted,

/s/ Arthur A. Schulcz
Arthur A. Schulcz

CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with Defendants' counsel by email on September 22, September 26 and September 30, 2022, and Defendants' oppose this motion.

Respectfully Submitted,

/s/ Arthur A. Schulcz
Arthur A. Schulcz

EXHIBIT LIST

Exhibit No.	Name, Title or Topic of Exhibit
1.	Updated Status of Plaintiffs concerning Covid claims, injuries, vaccination status and various violations of their constitutional and statutory rights
2	June 2, 2022, DOD Inspector General ("IG") report to Secretary Austin, https://www.militarytimes.com/news/your-military/2022/09/21/services-may-be-improperly-denying-vaccine-religious-waivers-IG-says/?utm_source=sailthru&utm_medium=email&utm_campaign=mil-ebb.
3	September 15, 2022, letter to Secretary Austin from nearly 50 members of Congress.
4	Table Summarizing Initial RAR denials and RAR Appeal Denials and Other Injuries
5	Declaration of Arthur A. Schulcz, Sr.
6.	Declaration of Mr. J. Andrew Myer providing his class action experience
7.	Declaration of Mr. Brandon Johnson