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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I. DEFENDANTS' OPPOSITION TO CLASS CERTIFICATION RESTS UPON AN UNJUSTIFIALBLY MYOPIC VIEW OF PLAINTFFS' MOTION.

As a threshold matter, Defendants' Opposition to Plaintiffs' Motion for Class Certification ("Opp."), ECF 83, is remarkable more for what it neglects to say than for what it does. First, Defendants completely ignore all but one of the legal claims Plaintiffs have asserted in their Complaint, focusing solely on Plaintiffs' claims under the Religious Freedom Restoration Act ("RFRA"). Yet, Plaintiffs' Complaint asserts constitutional claims under the First Amendment's Establishment, Free Exercise, and Free Speech Clauses, as well unconstitutional Retaliation; the Fifth Amendment Due Process Clause; Article VI's No Religious Test Clause; Section 533 of the 2013 National Defense Authorization Act ("NDAA") as amended by the 2014 NDAA (hereinafter "§533"); and the Administrative Procedure Act ("APA") and Major Policy Doctrine. Plaintiffs' have requested that the Court certify each of these claims, in addition to their RFRA claims. *See* ECF 72, PL Class Cert. Mot., at 15-16 (identify "Common Questions of Law" for these claims); *id.* at 3-6 ("Military Chaplains Raise Unique Claims"). Defendants' oversight of these claims is surely intentional because a careful analysis of *all* the issues and claims asserted by Plaintiffs shows they raise legal and factual that are present in each and every absent Class Member's claim. The Court is undoubtedly warranted in certifying Plaintiffs' Rule 23(b)(2) injunctive relief classes.

Second, Defendants ignore the ample evidence Plaintiffs have already provided the Court to support some of the most central factual allegations undergirding their legal claims. As shown herein, Plaintiffs have submitted evidence (gathered before the benefit of formal discovery), supporting their contention that Defendants are employing a sham process to routinely deny Plaintiffs' and Class Members' religious accommodation requests ("RARs") seeking an exemption from the Department of Defense's ("DoD") COVID-19 vaccine mandate (the "DoD Mandate").

Defendants also ignore evidence that they have been put on notice, through a June 2, 2022,

DoD Inspector General Memo to Secretary Austin ("DoD IG Report") that the Armed Services' RAR process was not in compliance with the law or DoD's own regulations. *See* ECF 72, PL Class Cert. Mot., at 7-8 (summarizing report's findings); ECF 74, PL Mot. to File, at 3-4 (same); ECF 74-1 (DoD IG Report). Defendants similarly elide the evidence Plaintiffs have put on record countering Defendants' narrative that the military's compelling interest in maintaining a medically fit and ready force necessitates the DoD Mandate and justifies the wholesale denial of RAR requests regarding the mandate (the "Categorical RAR Ban"). Instead, Defendants assume favorable answers to these merits issues when they oppose certification, arguing that individualized issues predominate and that the military's judgment regarding the DoD Mandate must necessarily trump their chaplains' religious rights and convictions.

The third and most glaring defect in Defendants' opposition is its failure to recognize the droves of factual and legal issues common to those of named Plaintiffs and absent Class Members. When the Court looks at Plaintiffs' true theory of the case (as opposed to Defendants' version), it should see that the overwhelming commonality between the Plaintiffs' claims and Class Members' claims supports class certification as requested.

II. PLAINTIFFS MEET THE COMMONALITY TEST OF RULE 23(a)(2) AS DEFINED IN *WAL-MART V. DUKES*.

A. The Proposed Class Should Be Certified Because All Plaintiffs' Claims Rest on a Single, Top-Level Policy Directive to Ban Religious Accommodations and to Deny the Individualized Assessment Required by Law.

The parties agree that *Wal-Mart v. Dukes*, 564 U.S. 338 (2011) ("*Wal-Mart*"), provides this Court with a roadmap for analyzing the present motion for class certification. As was true in *Wal-Mart*, Plaintiffs in this case complain about "the reason for a particular employment decision." *Wal-Mart*, 564 U.S. at 352. But unlike *Wal-Mart*, where the Court found there could be hundreds if not thousands of different reasons for any specific employment decision, here Plaintiffs allege

just one reason: the DoD has directed that RARs seeking an exemption from the DoD Mandate be denied. Evidence of that directive is seen in the fact no RAR's have been granted except for those already programmed to retire or otherwise leave the service, *e.g.*, end of enlistment or term of service. Three courts have granted class certifications and issued preliminary injunctions against the Navy, Air Force, and Marine Corps after finding the RAR process was a sham.[1]

But no matter the reasons behind the directive, Plaintiffs allege they have all suffered religious-based discrimination because of it. Thus, while the specific implementation of the directive may differ by Service, and while the specific impact the directive may have on a particular service member may take different forms, Plaintiffs allege that the impact of this singular directive is negative and harmful to all Class Members, equally illegal with respect to all of them, and can be remedied by a single injunction and declaratory judgment.

Defendants correctly recognize that the *Wal-Mart* case offers two circumstances under which a plaintiff can bridge the "conceptual gap" between an individual claim versus a class claim asserting adverse employment action based on discriminatory grounds. *Wal-Mart*, 564 U.S. at 353 (*citing General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982) ("*Falcon*")). One way for the plaintiff to bridge the gap is to show the employer "used a biased testing procedure" which necessarily would satisfy the commonality and typicality requirements of Rule 23(a). *Falcon*, 457

[1] *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 members who submitted an RAR) ("*Doster* TRO Order"); *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 class-wide certification and preliminary injunction for Marine Corps members).

U.S. at 159, n.15. The other method is for the plaintiff to present "[s]ignificant proof that an employer operated under a general policy of discrimination . . . [where] the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision-making processes." *Id.*

Plaintiffs allege both. First, Plaintiffs allege that the DoD mandated the use of a "biased testing procedure" for each Service when evaluating any RARs relating to the DoD Mandate. Specifically, Plaintiffs allege that Defendants' policy is to categorically deny any religious accommodations for the DoD Mandate, notwithstanding the First Amendment, Congress' specific directive in RFRA to the government generally to conduct "to the person" individualized assessments, and Congress' directive in § 533 to the DoD specifically to honor and protect military Chaplains' religious views and decisions based on conscience. In addition, Plaintiffs allege (and have already presented significant proof) that all Services operated under a general policy to categorically deny RARs relating to the DoD Mandate.

Plaintiffs have presented direct evidence of specific directives by a Service Secretary or other senior leaders to their chain of command to deny all RARs, as well as specific procedures and software tools used to ensure the pre-determined outcome of denying all RARs. Army and Air Force leadership issued specific directives to deny all RARs. *See* Compl., ¶¶ 97-101. Plaintiffs have also provided testimony from a Navy whistleblower describing the Navy's 50-step process to generate automated denial letters, ECF 60-9 (whistleblower testimony), the principal evidence relied on by the District Court in granting the initial injunction against the Navy. *See Navy SEALs 1-26 v. Austin*, 2022 WL 34443, at *6 (N.D. Tex. Jan. 3, 2022) (describing Navy process). In this Reply, Plaintiffs also present whistleblower evidence demonstrating that the U.S. Coast Guard ("USCG"), now under the Department of the Navy, has established a set of "digital tools" similar

to the Navy's pre-determined process that permits of only one outcome: an automatically generated denial letter. *See* Ex. 1, Oct. 18, 2022 House Committee Letter to USCG Commandant Fagan ("Congressional Letter").[2] The Congressional Letter and whistleblower documents demonstrate the USCG denied all, or nearly all, RARs and dismissed appeals "*en masse* with the help of computer-assisted technology, indicating that no case-by-case determinations were taking place." Ex. 1, Congressional Letter, at 2. Plaintiffs have thus provided direct evidence that four of the five Armed Services issued top-down directives and procedures requiring the denial of all, or nearly all, RARs. The Armed Services report directly to the Secretary of Defense, so either there is a widespread and open military bureaucratic insurgency (which Defendants have not claimed), or the Services are following Secretary Austin's DOD-wide policy.

Plaintiffs have also provided the Court with a copy of the June 2, 2022 DoD IG Report to Secretary Austin. *See* ECF 74-1. The DoD IG Report refutes Defendants' strawman argument that "Plaintiffs' claim hinges on the notion that hundreds, or perhaps thousands, of officials throughout all branches of the military have conspired with each other and with Secretary Austin to perpetuate a sham religious accommodation request process to issue indiscriminate denials of each service member's request without basis." Opp. at 12. Plaintiffs do not—and need not—allege any conspiracy. Instead, they allege and provide significant proof that Secretary Austin issued the DoD Mandate that all service members would be vaccinated, without any religious

[2] The letter explains that a Coast Guard whistleblower provided copies of screenshots of the Coast Guard's "Religious Accommodations Appeal Generator" ("RAAG"). Upon information and belief, Exhibit 2 is one of a series of screenshots of the auto-generated responses from the RAAG, using drop down menus with rebuttals to the Top 25 claims made by service members' in their religious accommodation requests. Upon information and belief, Exhibit 3 is a Word document of canned denial paragraphs by Sector, Ship, or Station, that was designed – and used by members of the Coast Guard – to deny legitimate and sincere RARs from Coast Guardsmen by adding those paragraphs alongside the dropdown rebuttals.

accommodations granted. This directive has been flawlessly transmitted and executed by the entire military chain of command: from Secretary Austin to the Service Secretaries who report directly to him; from the Service Secretary to Flag Officers, including the RAR review and appeal authorities, the Surgeons General, the Judge Advocate Generals, and the Chaplain Corps; and from these officers to each level below them in the chain of command. What Plaintiffs described is the intended and actual functioning of the military chain of command. Thus, viewed correctly and consistently with the actual argument Plaintiffs make, the DoD IG Memo shows that "hundreds or perhaps thousands, of officials throughout all branches of the military" are following a singular directive that originated with Secretary Austin and DoD, contrary to the Opp.'s false claim at 12 .

Given that the nature of this allegation, *i.e.,* that there is a policy issued from the very top of the chain of command to categorically deny all RARs, the Courts' ultimate view of this evidence will necessarily apply to all putative Class Members' claims. Contrary to the Defendants' opposition to class certification, it is not the case that each named Plaintiff is challenging the RAR process because of some administrative failure unique to him or her. Rather, the named Plaintiffs all allege that, without regard to their specific Service Branch, and despite the variations in any particular implementation of the RAR process, their RARs were, or will be denied, because of a singular DOD mandate emanating from the very top.[3] Should the Court accept this as proven by any particular named Plaintiff, that question will have been proven for each absent Class Member.

In all events, Defendants' opposition to class certification is predicated upon their view that they have already prevailed on this key merits question (*i.e.* that the outcome of the RAR

[3] *See, e.g.,* ECF 60-7, 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."); ECF 1-3, Young Decl., ¶ 18.v (informed that his RAR "would certainly result in failure, *i.e.*, expulsion from the military," and that the RAR process was "intended to achieve 100% compliance," *i.e.*, no religious exemptions).

process is not preordained, but highly individualized). *See* Opp. at 9-13. While the Court may take a "peek at the merits" when conducting its "rigorous analysis," it certainly should not deny class certification based upon a *sub silencio* ruling on perhaps the most hotly contested factual question presented by the case. In *Doster*, the Sixth Circuit rejected the same argument, explaining that "for purpose of certification is not whether the [Defendants] in fact had a general policy of discrimination …, but instead whether the plaintiffs have 'significant proof' that [Defendants] had such a policy." *Doster*, 2022 WL 4115768, at *4 (*quoting Wal-Mart*, 564 U.S. at 353). Plaintiffs have presented the same statistical evidence that Defendants denied all, or nearly all, RARs, while granting thousands of secular exemptions, *see, e.g.,* ECF 60, PL PI Br., at 29-30 & Table. The *Doster* court found this to constitute "significant proof of discrimination," *Doster*, 2022 WL 4115768, at *4.[4] Plaintiffs also provide direct evidence of top-down directives and procedures to deny all RARs summarized in this section. Thus, it is readily apparent that the resolution of this central merits question applies to the Plaintiffs' claims and to all absent Class Members' claims alike such that resolving the question one way or the other "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350.

B. There Are Numerous Common Issues Supporting Class Certification.

Plaintiffs' provide a detailed listing of numerous common legal and factual issues between Plaintiffs' and Class Members' claims. *See* ECF 72, PL Class Cert. Mot., at 15-18. Defendants' opposition to class certification illustrates, however, that those, and many additional issues beyond

[4] Defendants argue that no such policy exists because a small number of RARs have been granted. *See* Opp. at 10. However, other courts, including the Sixth Circuit in *Doster*, have found that the number of genuine RARs granted is likely zero because Defendants have admitted that RARs have only been granted for service members at the end of their term of service who qualified for administrative exemptions. *See Doster,* 2022 WL 4115768, at *4; *CFMO*, 2022 WL 364351216, at *1 (same); ECF 67, PL Reply Br., at 17 & n.22 (summarizing other cases where Defendants Air Force, Marine Corps and Navy made same admission).

those already identified, must be resolved in the named Plaintiffs' case which by necessity, serve to establish (or disprove) Defendants' liability to all absent Class Members.

For example, one of these common issues includes the threshold question of the Courts' subject matter jurisdiction under the "Major Policy Decisions," a legal issue more thoroughly briefed in Plaintiffs' Memorandum in Support of their Motion for a Preliminary Injunction. *See* ECF 60, PL PI Br., at 14-18. In determining whether the Court has the power to review any of the named Plaintiffs' claims, the Court necessarily will have to evaluate whether it has subject matter jurisdiction over such claims asserted by any putative class member.

In the same vein, there are common issues surrounding whether Plaintiffs' exhaustion is required at all under RFRA or the First Amendment claims and whether they are exempted from exhaustion due to Defendants' Categorical RAR Ban. *See generally* ECF 60, PL PI Br. at 19-20 & ECF 67, PL Reply Br., at 9-13. Defendants assert that there are many potential class members whose RARs are still pending either at the initial level or on an administrative appeal, and thus those Chaplains cannot be a part of any putative class. *See* Opp. at 16, 20. This argument misses the critical point that Plaintiffs allege and provide significant proof that—due to Defendants' Categorical RAR Ban and manifest hostility to religion—Plaintiffs' and other Class Members' RARs *ultimately will be* denied and that there will be adverse ramifications to them unless they then capitulate, betray their religious beliefs, and take the vaccine. Indeed, Plaintiffs argue the failure to grant RARs and other actions by the Defendants sends an unmistakable message of religious hostility to Plaintiffs and preference to those who embrace and support abortion in violation of the Establishment Clause.[5] *Chaplaincy of Full Gospel Churches v. England,* 454 F.3d

[5] Perhaps to underscore Defendants' unequivocal message of hostility to service members who oppose abortion and the DoD Mandate because their faith commands them to uphold the sanctity of life—and to confirm their full moral and financial support for abortion—on October 20, 2022,

290, 302 (D.C. Cir. 2006) ("*CFGC*"). Under Plaintiffs' view, the Court can enjoin Defendants from continuing to violate the Establishment Clause and direct them to act within their constitutional boundaries. Thus, Plaintiffs maintain, consistent with abundant Fourth Circuit precedent, that administrative exhaustion or finality is not required when "First Amendment Values are being violated or threatened. *Id.* (*citing Elrod v. Burns*, 427 U.S. 347 (1976)). *See also* ECF 67, PL Reply Br., at 9-13 (discussing Fourth Circuit precedent on relaxing or excusing exhaustion and finality for First Amendment claims). In the end, however, the Court either agrees that a chaplain has standing even if the RAR process is still ongoing (as Plaintiffs maintain) or that they do not (as argued by Defendants), but the Courts' conclusion either way will effectively decide the issue for Plaintiffs and absent Class Members alike.

Moreover, Plaintiffs allege that this singular directive has been issued based upon flawed science, false equivalencies, and untrue facts. Secretary Austin's Memo to the Undersecretary of Personnel and Reserve Affairs and subordinate secretaries passing on the DoD IG Report asserts that "Mandatory Vaccination against coronavirus 2019 (COVID-19) is necessary to protect the Force and ensure its readiness to defend the American people." ECF 74– 1, DoD IG Report, at 4. This is, in effect, a command as evidenced by the fact that no subordinate has found that the

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Secretary Austin issued a Memorandum entitled "Ensuring Access to Reproductive Health Care," *see* Ex. 4 ("October 20, 2022 Austin Memo"). Secretary Austin's memo, issued in response to the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022), *see id.* at 1, commits the DoD to providing service members seeking abortion with leave, travel and transportation allowances, and other benefits, and also to provide funding for military health care providers to obtain training and certifications necessary to conduct their "official duties" in connection with Secretary Austin's memo. *See id.* at 1-3. Plaintiffs intend to seek leave of the Court to file this document to supplement the record in support of Plaintiffs' preliminary injunction motion, along with a short brief explaining why the October 20, 2022 Austin Memo demonstrates that Defendants are willing to support abortion to the point of violating express federal statutes prohibiting DoD funding or facilities to be used for abortions, *see* 10 U.S.C. § 893(a)-(b), while at the same time violating equally clear statutory and constitutional prohibitions on discrimination against those with religious beliefs that compel them to oppose abortion.

treatment protocol provided to the fully vaccinated and boosted but COVID infected Secretary, Commander in Chief, and other key Military leaders to be the least restrictive means of achieving the readiness mission, *i.e.*, several days of isolation combined with treatment and return to work. The DoD, the Biden Administration, the CDC, and Pfizer[6] have all admitted the so-called COVID-19 vaccines do not immunize recipients or prevent transmission and therefore **cannot** prevent the spread of COVID-19 or "protect the Force." *See* ECF 60, PL PI Br., ¶¶ 2-4. These admissions demonstrate that there is not, and never has been, a scientific or policy basis for the DoD Mandate, a question of fact and law common to all named Plaintiffs and Class Members.

Assuming the Court determines it has subject matter jurisdiction over the named Plaintiffs' claims and turns to the merits, it will be confronted with the central question, as already discussed above, of whether there is truly a DOD-wide policy in place directing that all RARs relating to the Vaccine Mandate be denied. The named Plaintiffs' Complaint alleges this to be true and is supported by significant proof Plaintiffs have already submitted. Plaintiffs intend to develop during discovery additional evidence support these allegations. For purposes of this motion, however, the point is that this evidence will be the same for Plaintiffs' and Class Members' claims.

The Court's evaluation of the specific causes of action asserted by the named Plaintiffs also presents the same commonalities. Plaintiffs allege that as Chaplains, they are entitled to § 533(b)'s special religious protections, which Congress enacted to protect the religious freedom of all Chaplains serving in the Military. In evaluating whether § 533(b) provides the named Plaintiffs

[6] On October 10, 2022, Janine Small, President of International Developed Markets at Pfizer, in sworn testimony before the European Union Parliament Covid Hearing on October 10, 2022, admitted "that the Pfizer mRNA vaccine was *never tested* or shown *before its release*, to impact the transmission of the SARS-NCOV2 virus." Robert Turner, *Pfizer Confirms mRNA Vaccine Never Tested for Preventing COVID Transmission*, Medika Life (Oct. 12, 2022) (emphasis added), available at: https://medika.life/pfizer-confirms-mrna-vaccine-never-tested-forpreventing-covid-transmission/ (last visited Oct. 31, 2022).

protection, the Court will be deciding that question for all Chaplains. When analyzing whether there have been violations of the Free Exercise Clause and Establishment Clause of the First Amendment, the Court will necessarily be deciding that issue for all Class Members.

Similarly, Defendants argue that "the fact that most RARs have been denied is entirely consistent with the military's compelling interest in maintaining a medically fit and ready force." Opp. at 11. This again is a central question underlying all of Plaintiffs' and Class Members' claims. Plaintiffs allege that the vaccine at issue is not a true "vaccine" as that term traditionally has been defined, at least prior to the Covid pandemic and in DoD Instruction 6205.02, "DoD Immunization Program." ("DODI 6205.02"). ECF 60-6. *See generally* ECF 60, PL PI Br., ¶ 3 & ECF 67, PL PI Reply Br., at 5 n.5. Plaintiffs dispute that requiring them to take the vaccine is consistent with a compelling interest when the science indicates a prior COVID-19 infection confers similar if not greater protective effects than the vaccine mandated by Defendants. Contrary to Defendants' false assertion, Plaintiffs do not "disagree that the military has a compelling interest in the health and readiness of its force," Opp. at 11, but they do argue that mandating vaccines which do not immunize, prevent transmission and/or protect recipients from COVID are not the least restrictive means of furthering that interest. In any event, the resolution of the factual issues regarding whether the DoD Mandate furthers the military's compelling interests for the named Plaintiffs will effectively resolve those same issues for absent Class Members.

C. Plaintiffs' and Class Members' Subjective Religious Beliefs Do Not Preclude Class Certification.

Defendants contend that Plaintiffs cannot satisfy either commonality or typicality, which "tend to merge" in Rule 23(b)(2) class actions based on an alleged general policy of discrimination, Opp. at 13-14 (*quoting Wal-Mart*, 564 U.S. at 349 n.5), because Plaintiffs' class "includes service members with a broad variety of religious beliefs and, consequently, different reasons for objecting

to the COVID-19 vaccine." Opp. at 15.[7]

Courts have consistently and repeatedly rejected this argument for similar RFRA claims because Defendants' argument "misconceives the nature of the RFRA claim" for which Plaintiffs seek certification. *Doster*, 2022 WL 4115768, at *4. Claims "based on a 'class-wide clear policy of discrimination against [RARs]'" do "not turn on an analysis of the class members' individualized circumstances and likely can be adjudicated class-wide." *Id.* (*quoting Doster* TRO Order, 2022 WL 2760455, at *8). The *Doster* court further concluded that this argument "confuses the certification stage with the merits stage" for the reasons set forth above in Section II.A.

The Court in *DeOtte v. Azar*, 332 F.R.D. 188 (N.D. Tex. 2019), rejected the same argument made by Defendant Department of Health and Human Services because there, as here, "the *beliefs*—and the *actions* that inevitably follow from those beliefs—are clearly set forth in the class definitions." *DeOtte*, 332 F.R.D. at 197 (citation and quotations marks omitted). The court "need not—indeed *may not*—delve into each [class member's] state of mind," and it is instead sufficient to contend that compliance with the "mandate is forbidden by [the class member's] sincerely held religious beliefs, [and] the Court must accept those contentions." *Id.* (citations omitted).

III. THE PROPOSED CLASS AND SUB-CLASSES ARE APPROPRIATE AND SUB-CLASS MEMBERS ARE READILY IDENTIFIABLE.

Defendants complain that sub-class members are unidentifiable, but do not argue the same point with respect to members of the over-arching Military Chaplain Class. Given that all potential sub-class members, by definition, fall within the overarching class proposed by Plaintiffs, they too

[7] Defendants have cited no precedent from the Fourth Circuit, or any other, in support of their unqualified position that RFRA claims categorically cannot be certified based on the subjective nature of Plaintiffs' religious beliefs. Instead, the only precedent cited by Defendants is an opinion denying certification of a consumer fraud class action based on objective differences in the type of car, repairs required, and contractual terms. *See* Opp. at 17 (*citing Stout v. J.D. Byrider*, 228 F.3d 709 (6th Cir. 2000)).

are in fact readily identifiable through Defendants' personnel system and records.

For example, with respect to the "Constructively Discharged Sub-Class," Defendants quarrel that to determine membership in the sub-class the Court would have to resolve "subjective" complaints such as whether a chaplain did not "wish to retire" or was "faced with a draconian threat." Opp. at 4. Yet, Defendants do not dispute that any Chaplain falling within this sub-class would be, by definition, a member of the Military Chaplain Class who is subject to the DoD Mandate and who submitted an RAR seeking an exemption from such a mandate. Furthermore, Defendants do not dispute that their own personnel system will reflect whether any such class member has "sufficient time in service to retire." ECF 72, PL Class Cert. Mot., at 1. Thus, there is no speculation necessary to identify Chaplains who fall within the Military Chaplain Class (*i.e.* submitted an RAR that was or will be denied) and who have "sufficient time in service to retire," thus placing them in the proposed sub-class. The same argument applies with equal force to the "Sanctuary Subclass." Again, Defendants' personnel system and records will easily and readily identify any main class members who have "reached or almost reached 18 years of service." *Id.*

Finally, with respect to the "Natural Immunity Subclass," this includes those with a documented prior case of COVID-19. Defendants' assert that as they have "previously shown, no scientifically reliable method exists to determine the existence, extent, or duration of protection for COVID from a prior infection." Opp. at 5. Yet, this assertion assumes the Defendants have prevailed on the merits of this contention. Plaintiffs allege that a prior COVID-19 infection of any kind is sufficient to confer protection from a subsequent infection at least as great as that provided by the vaccine, a position consistent with DoD's official policy "presumption" as expressed in AR 40-562, "Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases." *See* Compl., ¶ 25. Defendants have not shown AR 40-562 has been repealed. In fact, Plaintiffs argue

the current science shows those with natural immunity have a greater protection from subsequent COVID infections and that being immunized after having COVID-19 increases the risk and injury of subsequent COVID-19 infections. Thus, if Plaintiffs prevail on the merits of their claim, a sub-class member would need only have documentation in their military medical records of a prior COVID-19 infection to fall within this sub-class. In any event, with respect to the named Plaintiffs themselves, the Court already has before it ample evidence from each to permit the Court to determine their respective membership in the proposed sub-classes.

IV. THE NAMED PLAINTIFFS ARE ADEQUATE REPRESENTATIVES UNDER RULE 23(A)(4) AND THEIR CLAIMS ARE TYPICAL OF THE CLASS

A. The Presence of Other Class Actions Does Not Preclude Class Certification Because Chaplains Are a Unique Class and Assert Unique Claims.

As alleged in the Complaint, *see* Compl., ¶¶ 11-12, Chaplains are "unique" military officers "involving simultaneous service as clergy or a 'professional representative[]' of a particular religious denomination and as a commissioned … officer." *In re England*, 375 F.3d. 1169, 1171 (D.C. Cir. 2004), *cert denied,* 543 U.S. 1152 (2005). This is necessary because the Constitution requires military religious leaders to meet the military's Free Exercise needs. Plaintiff Military Chaplains as a class thus may raise unique statutory and constitutional religious liberty claims, in addition to the claims for systematic violations of service members' RFRA and First Amendment rights that several courts have recently found Military Defendants likely committed. *See* Compl., ¶ 4; ECF 60, PL PI Br., at 3-4

Defendants erroneously argue that Court should not certify any of the proposed classes because other courts have already certified classes of Service members in a number of cases pending around the county. Opp. at 2, 18-19. Indeed, Plaintiffs' class certification motion alerted the Court to the presence and status of these other class actions. *See* ECF 72, PL Class Cert. Mot., at 4-5 & n.3. However, none of these other class action cases seek the vindicate the specific rights

of Military Chaplains, and none assert the specific claims present this case, particularly the claims predicated on § 533, passed by Congress specifically to protect military chaplains. *See id.* at 3-6. The unique role of Military Chaplains and the unique claims asserted by them in this case means there are no conflicts between the present action and any of the other actions presently pending.

Military chaplains' unique claims deserve careful consideration by the Court for a variety of reasons. First, the religious nature of their claims and the importance of their role as religious leaders—which *Katcoff v. Marsh*, 755 F.2d 223 (2nd Cir. 1985) held is both protected and compelled by the Establishment and Free Exercise Clauses working in tandem—requires careful examination of their allegations. *See, e.g., Comm. for Pub. Educ. v. Nyquist,* 413 U.S. 756, 794 (1973) ("Our cases require [] careful examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause protects").

Second, chaplains provide a unique, important function within the military in line with their constitutional role as religious leaders that no other aspect of the government can satisfy.

> I look upon the spiritual life of the soldier as even more important than his physical equipment...the soldier's heart, the soldier's spirit, the soldier's soul are everything. Unless the soldier's soul sustains him, he cannot be relied upon and will fail himself and his commander and his country in the end. It's morale, and I mean morale, which wins the victory in the ultimate, and that type of morale can only come out of the religious fervor in his soul.

Gen. George C. Marshall, quoted in JCS Joint Pub 1-05, *Religious Ministry Support for Joint Operations*, 1996. Chaplains feed the souls of soldiers, sailors, airmen, Marines and "Coasties."

Third, in feeding souls, chaplains also provide valuable services to the military, especially in times of combat that other lay leaders or military personnel cannot provide. The Navy as the *In re: Navy Chaplaincy* defendant, submitted a declaration by then Marine Corps Brigadier General Dunford (later Commandant), former assistant Division Commander of the First Marine Division, on the importance of chaplains using examples from his experience in Operation Iraqi Freedom:

> Competent, caring, and courageous chaplains serve in a vital role in maintaining the spiritual well being [sic] of Marines and Sailors. Their contribution directly influences the will of the individual Marine to fight and the combat effectiveness of our units. …
>
> During combat operations, chaplains provide worship services, counseling, and a significant leadership presence. They also assist units in dealing with casualties to include leading memorial services that are critical to the grieving process. **All of these duties have a direct and critical role in maintaining the will and spirit of our Marine and Sailors; these intangibles are the most important factors in the combat readiness of our units.** *** In addition to their upfront leadership in combat, chaplains serve as a connecting file between the command and families back home.

Ex. 5, B.G. Dunford Decl., ¶¶ 2-3 (emphasis added).

Plaintiffs and the putative class are religious leaders, and as such, the Defendants' policies at issue are particularly pernicious. Stifling Chaplains' religious freedoms chills everyone's religious freedoms to an even greater degree than just targeting lay service members. As such, the Court is warranted in certifying the proposed classes in this case even though some class members may also be members of other class action cases.

B. Defendants' Hypothetical Unique Defenses Are a Red Herring and the Named Plaintiffs' Claims Are Typical of Class Members Claims.

Defendants also assert they have hypothetical "unique" defenses against the named Plaintiffs which render their claims atypical of Class Members' claims. Opp. at 19. But these defenses are not unique and, as discussed throughout this brief, are actually common to all named Plaintiffs' and Class Members' claims. For example, Defendants argue that some of the named Plaintiffs' claims are not yet ripe and not exhausted. Yet, these ripeness and exhaustion remedies are common issues, and the Defendants cannot create imaginary conflicts by simply asserting that they have already prevailed on the merits of these so-called unique defenses. But even if Defendants are right that some of the named Plaintiffs have not yet been harmed by the corrupt RAR process, *Wal-Mart* recognizes that a Rule 23(b)(2) class can be certified even if some named

plaintiffs may not have been "*in fact* injured by the common policy." *In re Nexium Antitrust Litig.*, 777 F.3d 9, 23 (1st Cir. 2015) ("*Nexium*"). *See also Krakauer v. Dish Network L.L.C.*, 925 F.3d 643, 657-58 (4th Cir. 2019) (affirming class certification where class did not include "a large number of uninjured persons"). In other words, Rule 23(b)(2) does not require "a specific policy uniformly affecting—and injuring—each [plaintiff] ... so long as declaratory or injunctive relief 'settling the legality of the [defendant's] behavior with respect to the class as a whole is appropriate.'" *Prantil v. Arkema Inc.*, 986 F.3d 570, 581–82 (5th Cir. 2021) (*quoting M.D. ex. rel. Stukenberg v. Perry*, 675 F.3d 832, 847-48 (5th Cir. 2012) (alterations in original)). Thus, there are no unique issues or defenses that undermine commonality or typicality of the Plaintiffs.

V. NUMEROSITY IS ESTABLISHED

Turning logic and common sense on their head, Defendants argue that the fact there are over 40 named plaintiffs (with several others waiting in the wings) somehow undermines the Court finding numerosity. Opp. at 5-6. In reality, the number of identified Plaintiffs proves the point that individualized trials are unworkable, and more importantly, unnecessary.

If anything, the inclusion of a large number of named plaintiffs illustrates the pervasiveness of the challenged policies. The fact that over 40 military chaplains, across all Branches, of differing rank, and varied geographic assignments, all could allege they were adversely impacted by the sham RAR process suggests there is a widespread and uniform policy of denial, regardless of individual characteristics, beliefs or circumstances. Further, Plaintiffs would have included more, but due to the extreme arbitrary, retaliatory and punitive measures taken against them—as part of the military's effort to purge and make examples of religious believers—other chaplains seeking religious accommodation have not been willing to step forward and identify themselves or even communicate with Plaintiffs to share their status. In the absence of these retaliatory actions

with the object and effect of chilling First Amendment protected communication and expression by chaplains, there almost certainly would have been a larger number of the more than 2,800 military chaplains joining this suit as named plaintiffs. Given the percentage of religious objections across the Armed Services—which is expected to lead to the expulsion of at least 75,000 from the U.S. Army alone (roughly 8%), *see* ECF 72-3, Sept. 15, 2022 Congressional Letter to Secretary Austin, at 1—it strains credulity that the percent of religious objectors among military chaplains is only 0.67% (42 out of 2,800). In any case, Defendants have the precise numbers, which they easily could have presented to demonstrate that there are no other class members, but chose not to, presumably because the numbers are surely much higher. Their failure to present such readily available information supporting their position permits this Court to draw the adverse inference that Defendants' records do not support their litigation position and that the number of putative class members easily meets the numerosity requirement.

The Complaint and the Motion for Joinder, ECF 57, included a large number of named Plaintiffs because the Government would stay adverse actions only for named plaintiffs. Thus, as individual chaplains sought counsel, it was imperative to add them as named plaintiffs in order to protect their rights. The inclusion of all such individuals has provided some momentary respite for some of the named plaintiffs. However, despite their initial commitment to "pause" such adverse actions, Defendants have resumed their efforts to discharge the named Plaintiffs in the Army, which has only just begun to deny RARs and RAR appeals, as they are not protected by the three class-wide injunctions in place for the Air Force, Marine Corps and Navy. Indeed, as discussed at the September 28, 2022 hearing, Plaintiff Army Chaplain (COL) Brad Lewis will be discharged in the next 90 days without an injunction. Since then, the Army has denied Plaintiff CH Hirko's appeal and has threatened him with disciplinary action followed by a discharge.

VI. PLAINTIFFS AND THE CLASS DO NOT SEEK INDIVIDUALIZED RELIEF.

The Court need not direct any specific individualized relief be granted to any particular Plaintiff or Class Member, as Defendants claim. *See, e.g.,* Opp. at 22-23. Instead, if the Court finds that Plaintiffs are correct in asserting that Defendants' have adopted a general policy of religious discrimination and that the RAR process is illegal and unconstitutional, then the Court need only order that the Defendants: (1) re-evaluate decisions already made (and undertake any future decision making) without using the unlawful criteria applied to date; (2) correct the records of the Plaintiffs and the Class Members by removing unfavorable reports resulting from their lawful refusal to take alleged experimental vaccines contrary to their conscience; and (3) be enjoined from further retaliation stemming from or related to Plaintiffs' COVID-19 vaccine refusal by having the Secretary instruct future promotion or other professional advancement selection boards or decision-makers, *e.g.* schools and assignments, that the fact Plaintiffs suffered professional injury due to their vaccine refusal is a sign of great personal integrity and professionalism which must be viewed and rewarded positively to preclude further retaliation or prejudice.

Plaintiffs' cite *Dilley v. Alexander*, 627 F.2d 409 (D.C. Cir. 1980) as "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." ECF 72, PL Class Cert. Mot., at 24-25, Defendants do not contradict Plaintiffs' assertions or take issue with *Dilley*, conceding the point.

VII. DEFENDANTS DO NOT CHALLENGE ADEQUACY OF CLASS COUNSEL OR THE PROPOSED CLASS REPRESENTATIVES.

Defendants do not challenge the adequacy of Plaintiffs' counsel as class counsel, nor do they challenge the adequacy of the proposed Class Representatives other than to say their claims

are atypical, a point that misses the mark for reasons discussed above. Accordingly, Defendants should be deemed to have conceded these points and the Court should appoint the proposed named Plaintiffs as Class Representatives and grant Plaintiffs' motion to appoint Plaintiffs' counsel as class counsel under Rule 23(g).

VIII. THE DOD MANDATE AND CATEGORICAL RAR BAN WERE ADOPTED AND IMPLEMENTED IN BAD FAITH, REQUIRING PROMPT JUDICIAL ACTION.

The DoD IG Report, along with the direct evidence provided by Plaintiffs of top-level directives to categorically deny all RARs, supports Plaintiffs' contention that Defendants have been operating in "bad faith" since they began implementing their corrupt RAR process contrary to Defendants' assertion otherwise. *See, e.g.,* Opp. at 11-12. Despite being on notice their RAR process was not in accordance with law, they are still continuing to follow what courts have described as a "sham." That is more evidence of bad faith. As the Court explained in *Anderson v. Laird*, where the military was mandating, rather than discriminating against, religious exercise:

> Individual freedom may not be sacrificed to military interests to the point that constitutional rights are abolished. The military regulations in this case [requiring chapel attendance] violate the core value of the Establishment Clause and completely abolish its protection. Therefore, judicial action is mandated now.

466 F.2d 283, 295 (D.C. Cir. 1972). Defendants' top-down policy to discriminate and purge religious service members can only be remedied by prompt judicial action, namely, by granting Plaintiffs' pending motions for preliminary injunction and class certification.

IX. CONCLUSION

This Court should certify the Military Chaplain Class and proposed sub-classes, and appoint Plaintiffs' counsel as class counsel, as requested in the Class Certification Motion.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 31st day of October, 2022, the foregoing Plaintiffs' Reply Brief was e-filed using the CM/ECF system.

Respectfully Submitted,

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