IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HUNTER DOSTER, et. al.	:	Case Nos. 22-3497; 22-3702
Plaintiffs/Appellees	:	
v.	:	
HON. FRANK KENDALL, et. al.	:	
Defendants/Appellants	:	

PLAINTIFFS/APPELLEES MOTION TO SUPPLEMENT THE RECORD

Plaintiffs/Appellees, through Counsel, move this Court for an order permitting them to supplement the record with certain attached declarations from witnesses directed to the mootness issue. They attempted to file these in the District Court, but that Court has struck them, because it has stayed that entire case pending the *en banc* determination. In any event, these declarations are directed to the mootness issue, and there appears to be no other way to put this evidence before the Court given the District Court's prohibition on additional filings.

Courts have long recognized that they have the authority to permit the appellate record to be supplemented when doing so would be in the interest of justice. *Gibson v. Blackburn*, 744 F.2d 403, 405 n.3 (5th Cir. 1984); *see also Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir. 1986) (recognizing the court's "inherent equitable authority to enlarge the record and consider material that has not been considered by the court below"); *Turk v. United States*, 429 F.2d 1327, 1329 (8th Cir. 1970) (authorizing enlargement of record on appeal with preliminary hearing

evidence not presented to trial court if it is "in the interest of justice" to do so); *Gatewood v. United States*, 209 F.2d 789, 792 n. 5 (D.C. Cir. 1953) (considering a transcript of preliminary proceedings which had not been before trial court because it was in interest of both parties and due administration of justice).

Courts address requests to supplement an appellate record on a case-by-case basis. *Ross*, 785 F.2d at 1474; *see also Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (stating the "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.").

Factors courts consider when examining a request for supplementation include whether the supplemental materials contain information that will illuminate an issue before the court and whether remanding the case to the district court for consideration of the additional material would be contrary to both the interests of justice and the efficient use of judicial resources. *See Vital Pharms., Inc. v. Alfieri*, 23 F.4th 1282, 1288 (11th Cir. 2022) (allowing supplementation because the supplemental material illuminated an important issue in the appeal); *Teamsters Loc. Union No. 117 v. Washington Dep't of Corr.*, 789 F.3d 979, 986 (9th Cir. 2015) (allowing supplementation for the limited purpose of confirming harms acknowledged by a party in general terms during discovery and because a remand would merely prolong the proceedings); *Ross*, 785 F.2d at 1475 (discussing the

factors); *see also Gibson*, 744 F.2d at 405 n.3 (permitting supplementation because remanding the case would unnecessarily prolong proceedings and because the evidence confirmed the proper resolution of the case).

Here, the interests of justice weigh in favor of allowing supplementation. The Government has suggested the case is moot because it has rescinded the vaccination mandate at the direction of Congress in the National Defense Authorization Act ("NDAA"). At the same time, executive branch officials voluntarily have withdrawn (or have indicated an intentional to withdraw) certain adverse actions. But at the same time, top level Government Department of Defense officials have made recent under oath statements to Congress that nothing in the NDAA prevents it from punishing those who did not comply with the mandate when it was in force and they are considering taking that action against at least some of the past vaccine objectors.

And as the attached declarations make clear, the Government is maintaining a database that enables it to easily identify and punish these past vaccine objectors, including members of the class, and the Government has never rescinded or removed the threat of punishment it has previously issued to these class members.

Given the heightened burden that the Government must meet to demonstrate mootness, Plaintiffs should be permitted to put evidence before this Court for its consideration that the Government has failed to meet that burden.

Respectfully submitted,

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Counsel for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

I have served the foregoing upon the Defendants/Appellees, by electronic mail to their counsel, and through service of this Response via CM/ECF, this 21 day of March, 2023.

*/s/Christopher Wiest*___________
Christopher Wiest (OH 77931)

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(g) and 6th Cir. R. 32(a), I certify that this Motion contains 664 words. This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Times New Roman font using Microsoft Word.

/s/ Christopher Wiest__________

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO – Western Division at Cincinnati

HUNTER DOSTER, et. al.	:	Case No. 1:22-CV-84
Plaintiffs	:	
v.	:	
FRANK KENDALL, et. al.	:	
Defendants	:	

DECLARATION OF LUCILA SANCHEZ MARTINEZ

Pursuant to 28 U.S.C. §1746, the undersigned, Lucila Sanchez Martinez, makes the following declaration, under penalty of perjury under the laws of the United States of America, that the facts contained herein are true and correct to the best of my knowledge and belief and that such facts are made based on my personal knowledge:

1. My name is Master Sergeant (MSgt) Lucila Sanchez Martinez, and I am a class member in the above captioned matter. I am an active-duty paralegal who is currently assigned to the Military Justice Law & Policy Division at Joint Base Andrews, Maryland. I've been part of this section for over three years now.
2. There are several personnel tracking systems in the United States Air Force. The one that I am most familiar with is the Automated Military Justice Analysis and Management System (AMJAMS). I have used and continue to use this system for my current military specialty occupation as a paralegal.
3. The purpose of this system is to "collect and maintain data pertaining to the investigation process that can lead to administrative actions, NJP (non-judicial punishment) imposed pursuant to Article 15, UCMJ, trials by court-martial, and

related military justice activity.” [1] AMJAMS “contains detailed information on offenses and processing timelines as well as demographic information on subjects and victims.”[2]

4. When the vaccine mandate was ordered in August of 2021, anyone refusing the COVID-19 vaccine after having been denied their request for religious accommodation was entered into AMJAMS as a “special interest report” (SIR). Once a member failed to follow a commander’s order to receive the COVID-19 vaccination, the airman was categorized as failing “to obey other lawful order” (spec code 092-B) and they were coded as an Anthrax or smallpox vaccine refuser which facilitated the tracking of these cases as there was no code created for a COVID-19 vaccine refuser. All of these Airmen were put into AMJAMS for the purpose of tracking the Airman’s individual administrative and punitive actions over the last year and a half. Not only were these Airmen tracked in AMJAMS, these individuals’ names and their case status was reported to Headquarters Department of the Air Force (DAF) on a routine basis and continues to be reported.

5. This information will remain in the AMJAMS system until a proactive step is taken to permanently delete an airman’s record. It is not common practice to delete the records of airmen whose investigation, administrative and punitive actions have been closed. Without an order to completely remove the Airman’s file from AMJAMS, their closed case file will remain in the system indefinitely.

6. Our office routinely gets requests from promotion boards, special duty assignment inquiries, and other investigative bodies asking whether a named Airman has a case

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[1] Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 31.1 (14 Apr. 2022).
[2] *Id* at para. 31.2.

file in AMJAMS and if so, what was the reason for the entry. If the COVID-19 vaccine refusers files remain in AMJAMS, and for that matter, other tracking systems throughout the Air Force, the Airman will be forever marked with this allegation and discriminatory actions may be considered against them. This will affect an airmen's ability to promote, as well as their ability to be selected for special assignments and other career enhancing assignments, such as a White House internship. Subsequently after a member has separated, retired or has been discharged, these records in AMJAMS will still affect their post-service career. It is common practice for outside agencies to contact our office for background checks on discharged Airmen and these records will come up every time.

7. In the same way, the retention of the AMJAMS records for COVID-19 vaccine refusers could facilitate future punitive actions, to include court-martials, against the vaccine refusers, since the system serves as a central repository of information on such refusers.
8. As of the date of this declaration, there have been no steps taken, planned, or contemplated with regard to the removal of the AMJAMS records for COVID-19 vaccine refusers (including those who sought religious exemptions).

Pursuant to 28 U.S.C. §1746, I declare under penalties of perjury under the laws of the United States of America that the foregoing Declaration is true and correct to the best of my knowledge and belief and that such facts are made based on my personal knowledge.

Executed on March 13, 2023

Lucila Sanchez Martinez

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO – Western Division at Cincinnati

HUNTER DOSTER, et. al.	:	Case No. 1:22-CV-84
Plaintiffs	:	
v.	:	
FRANK KENDALL, et. al.	:	
Defendants	:	

DECLARATION OF MCKENNA COLANTONIO

Pursuant to 28 U.S.C. §1746, the undersigned, McKenna Colantonio, makes the following declaration, under penalty of perjury under the laws of the United States of America, that the facts contained herein are true and correct to the best of my knowledge and belief and that such facts are made based on my personal knowledge:

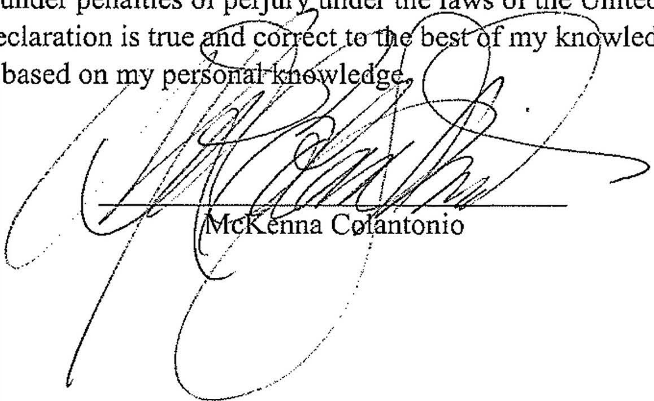
1. My name is McKenna Colantonio, and I am a class representative in the above captioned matter. I am an active-duty airmen who is currently serving at Hulbert Field, Florida.
2. After receiving final denial of my religious accommodation request to the COVID-19 vaccination requirement, I received an order to vaccinate on March 10, 2022.
3. Despite the rescission of the COVID-19 vaccine mandate in January 2023, my order to vaccinate still has not been rescinded as of today.
4. In any event, because the statute of limitations has not passed, I remain subject to prosecution under Article 90 and Article 92 of the Uniform Code of Military Justice (UCMJ), for willfully disobeying a superior commissioned officer and failing to obey a lawful order. Prosecution for this offense could result in a dishonorable discharge, forfeiture of all pay and allowances, and/or confinement for up to two years. I will

continue to be subject to trial by court-martial for this offense for up to five years from the date of the order unless it is rescinded. 10 U.S.C. § 843 (five-year statute of limitations); 10 U.S.C. § 890 (Article 90); 10 U.S.C. § 892 (Article 92).

5. Nothing Defendants have proposed to do, to date, has or will correct that action.

Pursuant to 28 U.S.C. §1746, I declare under penalties of perjury under the laws of the United States of America that the foregoing Declaration is true and correct to the best of my knowledge and belief and that such facts are made based on my personal knowledge.

Executed on March 13, 2023



McKenna Colantonio

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO – Western Division at Cincinnati

HUNTER DOSTER, et. al.	:	Case No. 1:22-CV-84
Plaintiffs	:	
v.	:	
FRANK KENDALL, et. al.	:	
Defendants	:	

DECLARATION OF DANIEL REINEKE

Pursuant to 28 U.S.C. §1746, the undersigned, Daniel Reineke, makes the following declaration, under penalty of perjury under the laws of the United States of America, that the facts contained herein are true and correct to the best of my knowledge and belief and that such facts are made based on my personal knowledge:

1. My name is Daniel Reineke, and I am a class representative in the above captioned matter. I am a Lt. Col. in the Air Force and currently serve on active duty.
2. After receiving final denial of my religious accommodation request to the COVID-19 vaccination requirement, I received an order to vaccinate on March 21, 2022.
3. Despite the rescission of the COVID-19 vaccine mandate in December 2022, my order to vaccinate still has not been rescinded as of today. As such, I remain subject to prosecution under Article 90 and Article 92 of the Uniform Code of Military Justice (UCMJ), for willfully disobeying a superior commissioned officer and failing to obey a lawful order. Prosecution for this offense could result in a dishonorable discharge, forfeiture of all pay and allowances, and/or confinement for up to two years. I will continue to be subject to trial by court-martial for this offense for up to

five years from the date of the order unless it is rescinded. 10 U.S.C. § 843 (five-year statute of limitations); 10 U.S.C. § 890 (Article 90); 10 U.S.C. § 892 (Article 92).

4. Nothing Defendants have proposed to do, to date, has or will correct that action.

Pursuant to 28 U.S.C. §1746, I declare under penalties of perjury under the laws of the United States of America that the foregoing Declaration is true and correct to the best of my knowledge and belief and that such facts are made based on my personal knowledge.

Executed on 13 March 2023.

Daniel Reineke

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO – Western Division at Cincinnati

HUNTER DOSTER, et. al.	:	Case No. 1:22-CV-84
Plaintiffs	:	
v.	:	
FRANK KENDALL, et. al.	:	
Defendants	:	

DECLARATION OF CHRISTOPHER SCHULDES

Pursuant to 28 U.S.C. §1746, the undersigned, Christopher Schuldes, makes the following declaration, under penalty of perjury under the laws of the United States of America, that the facts contained herein are true and correct to the best of my knowledge and belief and that such facts are made based on my personal knowledge:

1. My name is Christopher Schuldes, and I am a class representative in the above captioned matter. I am a Senior Master Sergeant in the Air Force and currently serve as an active reservist.
2. After receiving final denial of my religious accommodation request to the COVID-19 vaccination requirement, I received an order to vaccinate within 5 days on December 16, 2021.
3. Despite the rescission of the COVID-19 vaccine mandate in December 2022, my order to vaccinate still has not been rescinded as of today. As such, I remain subject to prosecution under Article 90 and Article 92 of the Uniform Code of Military Justice (UCMJ), for willfully disobeying a superior commissioned officer and failing to obey a lawful order. Prosecution for this offense could result in a dishonorable discharge, forfeiture of all pay and allowances, and/or confinement for up to two years. I will continue to be subject to trial by court-martial for this offense for up to

five years from the date of the order unless it is rescinded. 10 U.S.C. § 843 (five-year statute of limitations); 10 U.S.C. § 890 (Article 90); 10 U.S.C. § 892 (Article 92).

4. Furthermore, I was placed on no-points/no-pay status in January 2022, and notified that I was being involuntarily placed into the inactive ready reserve (IRR) in February 2022 after I had exhausted all appeals for my religious accommodation request for the COVID-19 vaccination requirement. I remained in that status until August 2022 when I was informed by the Director of Operations to return to drill in September 2022. My absences from the missed drills were excused from January 2022 - August 2022, along with my two weeks of annual tour. However, I was not allowed to make up the missed drill weekends or my annual tour, and I lost all retirement points and back pay for those dates. As a result, fiscal year 2022 will not be counted towards my retirement and I have now permanently lost pay for all of the drill weekends I was not allowed to attend. Without my pay and points being restored, I will now have to serve another full year to make-up for the year I lost.

5. Nothing Defendants have proposed to do, to date, has or will correct that action.

Pursuant to 28 U.S.C. §1746, I declare under penalties of perjury under the laws of the United States of America that the foregoing Declaration is true and correct to the best of my knowledge and belief and that such facts are made based on my personal knowledge.

Executed on 3/13/2023.

Christopher Schuldes