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	:	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' REQUEST TO DISMISS FOR MOOTNESS WITH DECLARATIONS IN SUPPORT

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Plaintiffs, through Counsel, provide this Opposition to Defendants' Request to Dismiss this case on grounds of mootness. Even if this Court grants Defendants' motion, the facts and circumstances surrounding the entry of the preliminary injunctive relief in this case entitle Plaintiffs to their reasonable attorney fees and costs, which Plaintiffs would move for pursuant to L.R. 54.1 and 54.2; *see, also*, 42 U.S.C. § 1988(b); *Roberts v. Neace*, 65 F.4th 280 (6th Cir. 2023). We incorporate salient facts below.

I. FACTS

This case involves claims under the Religious Freedom Restoration Act (42 U.S.C. 2000bb-1) arising out of the unconstitutional implementation of the Department of the Air Force's ("**Defendants**") Vaccine Mandate. [Complaint, DE#1, PageID#1-22]. And, the Sixth Circuit Court of Appeals has held that final relief in this case involves "root and branch" relief. *Doster v. Kendall*, 54 F.4th 398, 439 (6th Cir. 2022). That relief includes enjoining any further adverse action against class members and the correction of "***any adverse action***[1] against the class members on the basis of denials of religious exemptions." *Doster v. Kendall*, 48 F.4th 608, 615 (6th Cir. 2022) (emphasis added). The Sixth Circuit's language is no accident—it comes from a long line of discrimination cases that ended both illegal discriminatory policies and also all remaining vestiges of that illegal discrimination. *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991); *Green v. County Sch. Bd. Of New Kent County, Va.*, 391 U.S. 430, 437 (1968).

Declarations attached hereto demonstrate that "root and branch" relief has not yet been afforded to all class members and, in many cases, is not even contemplated by Defendants without a court order. First, the reservists: two named Plaintiffs, and hundreds of class members, were

[1] Defendants' definition of what constitutes an "adverse action," on the one hand, and Plaintiffs' and the Sixth Circuit's definition of what constitutes an adverse action, on the other hand, are not aligned, likely because Defendants are the ones who've taken the adverse actions and Plaintiffs are the ones who've borne the brunt of those actions.

suspended from reserve duty for their refusal to violate their sincerely held religious beliefs. (Dec. Dills, Dec. Schuldes, Dec. Jones). Their suspensions caused them to not accrue retirement points and/or "good years" towards a military retirement. *Id.* Their suspensions also caused loss of pay. *Id.* Defendants will not remedy this adverse action without a court ordering them to do so.

Next, hundreds of airmen in the class were selected for promotion but then had promotion propriety actions instituted against them because of their refusal to violate their sincerely held religious beliefs. (Dec. Sigala). That is, their promotions have been held. *Id.* Likewise, these adverse actions have not been halted nor adjudicated (we assume this is a wait-and-see approach by Defendants to see what this Court does). *Id.* In fact, these promotion propriety actions solely at the discretion of the Secretary of the Air Force to grant or deny, and no current policy or change to policy addresses them. *Id.*

And while it is true the Defendants have removed unfavorable performance reports for class members, Defendants have replaced them with what is essentially a blank report, which will cause future and ongoing adverse actions. (Dec. Haberle).

Defendants also continue to maintain Automated Military Justice Analysis & Management System ("**AMJAMS**") records for most of the class (everyone who completed the sham accommodation process and was given an order to vaccinate), and Defendants plainly intend to continue to retain these records for the foreseeable future. (Dec. Martinez-Sanchez; Dec. Hartsell, DE #111-5). Class members continue to be tracked and reported to Air Force Headquarters. (Dec. Martinez-Sanchez at ¶4). Without a court order, these case files will remain in the system indefinitely. (*Id.* at ¶5, Dec. Oberg at ¶2). Inquiries are made to this system by promotion boards, by those making assignment decisions, and for investigatory purposes. (*Id.* at ¶6). And the continuation of these entries will forever "affect an airmen's ability to promote, as well as their

ability to be selected for special assignments and other career enhancing assignments." (*Id.*). Master Sergeant Sanchez-Martinez's declaration provides further evidence that Defendants still continue to use the AMJAMS record system to screen airman for special duty assignments. Just recently, at least one named Plaintiff had an AMJAMS record used against her when she attempted to obtain a career-enhancing assignment. (Dec. Colontanio). Moreover, retention of this database facilitates a return to the rescinded practice or policy and would facilitate the future punishment or future ability to court-martial these airmen. (*Id.* at ¶7).

Orders to vaccinate were given to class members by commanders. (Dec. Reineke; Appendix, DE#11-5, PageID#385-387 [Dills]; DE#11-19, PageID#551-552 [Schuldes]; DE#11-21, PageID#569-573 [Theriault]; DE#38-2, PageID#2632-2634 [Mosher]; DE#107-1, PageID#5359-5360 [Reineke]). Refusals to follow those orders can still be charged under the Uniform Code of Military Justice. 10 U.S.C. § 890; 10 U.S.C. § 892. A five-year statute of limitations applies for most military offenses, including failures to follow orders, and that period has not passed. 10 U.S. Code § 843. Potential penalties involve years in a military prison.[2] Defendants provided testimony confirming such punishments and potential court-martial prosecutions. (Declaration Hernandez at ¶¶ 5, 8, 12-14, DE#25-14, PageID#1413-1419).

On February 28, 2023, top Pentagon officials testified to Congress "that the Defense Department is still reviewing for potential 'disciplinary procedures' numerous cases of active-duty troops who refused the shot while the mandate was in force."[3] The Undersecretary of Defense for Personnel and Readiness, Gilbert Cisneros, admitted: "They're reviewing the cases because …

[2] Manual for Court Martial (2019 Edition), *available at* https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610. (last accessed 3/1/2023).

[3] https://www.washingtontimes.com/news/2023/feb/28/pentagon-has-its-own-long-covid-problem-over-dropp/ (last accessed 3/1/2023).

they [disobeyed] a lawful order." *Id.* Simply put, there is nothing standing in the way of future prosecutions other than the current preliminary injunction. And this is no idle concern.

Defendants remain unrepentant. Their own submissions reveal their continued boast that everything they did was a "valid lawful policy." (Policy, DE#111-3, at second paragraph). The Air Force's own submission before Congress in February continued to assert that their actions were "lawful." (Statement, DE#111-6, PageID#5817). Defendants continue to maintain the proven fiction that all religious accommodation requests were considered "seriously and thoroughly." (*Id.* at PageID#5818). And their same submission ominously warned that "**there may be situations in the future when vaccination status will be a consideration**." (*Id.* at 5819(emphasis added).

No less than the Undersecretary of Defense falsely asserted that "[e]ach request was considered individually and adjudicated [lawfully]." (Statement, DE#111-2, PageID#5426). And he also continued the fiction that service members who did not receive an exemption, even those in this class, "receiv[ed] a lawful order to [vaccinate]…" And he admitted that "8,422 were subsequently separated" as a consequence. (*Id.* at PageID#5427).[4] Driving home the point that nothing has changed, he also boasted/threatened that "[c]ompliance with lawful orders is not optional in the military, and leaders … took appropriate disciplinary action." *Id.* In fact, he confirmed that there are no plans to restore reservists their pay or their retirement points or good years. (*Id.* at PageID#5429). And equally relevant to the mootness inquiry, the Executive Branch

[4] Those include class members who were punitively discharged. We disagree with Defendants that the class definition, at DE#86, does not include members who met the criteria as of July 27, 2022, as having submitted a religious accommodation request, had their beliefs confirmed as sincere, and had their accommodation request denied. Obviously, there are discharged airmen who were punitively discharged and need relief.

publicly bemoaned that Congress' direction to rescind the mandate was a "mistake,"[5] while nothing in the NDAA prevents the Government from instituting a new mandate.[6]

Ultimately, even putting these admissions aside, to the extent the Court is not inclined to deny the Government's motion based on the current record, we request a lifting of the Court's stay to pursue limited discovery on these discrete mootness issues.[7]

II. LAW AND ARGUMENT

Defendants bear the burden of demonstrating that mootness applies. *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022) ("the Government, not petitioners, bears the burden to establish that a once-live case has become moot."). A case "becomes moot only when it is **impossible** for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U. S. 165, 172 (2013) (emphasis added). "As long as the parties have a concrete interest, **however small**, in the outcome of the litigation, the case is not moot." *Id.* (emphasis added).

Generally, Defendants raise apples-to-oranges comparisons in their papers by citing other recent court decisions finding mootness where each case they cite was either the appeal of the denial of a preliminary injunction, or inapposite cases that deal with constitutional challenges to a statute, where the statute is repealed mid-stream and there are no adverse effects that remain to be corrected. Further, a preliminary injunction appeal is a substantially different matter than the merits of a case truly being moot. *See Ramsek v. Beshear*, 989 F. 3d 494, 500 (6th Cir. 2021). None of Defendants' cited examples are analogous to *this* case.

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[5] https://www.cnn.com/2022/12/07/politics/biden-military-covid-mandate-ndaa/index.html (last accessed 5/4/2023).

[6] https://docs.house.gov/billsthisweek/20221205/BILLS-117hres_-SUS.pdf (last accessed 5/4/2023), relevant language at page 408-409.

[7] A FRCP 56(d) declaration of Mr. Wiest is attached seeking discrete discovery on the mootness issue. Defendants' motion is predicated upon mootness and is a Rule 12 motion. Rule 12(d) provides that if "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d).

A. Unredressed Harm, Within the Scope of the Final Relief Envisioned by the Sixth Circuit, Continues, so the Case is Not Moot

Under the collateral consequences exception to mootness, when the plaintiff's primary injury (here, the discriminatory exemption process) has ceased, the case is not moot if the challenged conduct continues to cause other harm (*i.e.*, "collateral consequences") that the court is capable of remedying. *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 227 (5th Cir. 1998) (citing *Sibron v. New York*, 392 U.S. 40, 53–59 (1968)). A continuing collateral consequence is one that provides the plaintiff with a "concrete interest" in the case and for which "effective relief" is available. *Id.* (*citing Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 571 (1984)).

It is well-settled that new legislation does not *ipso facto* eliminate the discriminatory intent behind older legislation, nor does it moot a dispute regarding the violation of law. *Hunter v. Underwood*, 471 U.S. 222, 232-33 (1985) (events over 80 years to change the terms of the law do not eliminate its original discriminatory intent); *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 408-09 (5th Cir. 1991); *N. C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 240 (4th Cir. 2016).

In *Akers v. McGinnis*, 352 F.3d 1030 (6th Cir. 2003), the Michigan Department of Corrections ("MDOC**"**) repealed a series of contested work regulations while the case was still pending. Nevertheless, and for two distinct reasons, the Sixth Circuit held that the repeal did not moot the case. First, "there was no guarantee that MDOC [would] not change back to its older, stricter [r]ule as soon as [the] action [was] terminate[d]." *Id.* at 1035. More importantly, however, because additional corrective relief could be awarded, and the amendment/rescission did not completely eradicate the harm associated with the contested policies, the case was not moot. And the Supreme Court has been clear that if there is any additional relief that can be awarded, however

small, a case is not moot. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307-308 (2012); *Chafin*, 568 U. S. 165, 172.

Only the act of fully remedying all ongoing harm can moot a case, and that is not the present situation. *Wooten v. Housing Authority of Dallas*, 723 F.2d 390, 392 (5th Cir. 1983) (explaining that only receipt of "all of the relief sought" will moot the case); *see also Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1138 (9th Cir. 2016) (noting that a claim becomes moot when a plaintiff actually receives complete relief). Plainly, then, this case is not moot, as Defendants have not yet afforded Plaintiffs full corrective relief and, in many cases, have no intention to *ever* do so.[8] That full corrective relief includes, as the attached declarations establish, at least: (i) restoration of lost points and good "retirement" years for reservists; (ii) removing AMJAMS entries; (iii) corrective action and the restoration of promotions related to ongoing promotion proprietary actions; (iv) appropriate corrective action for promotion reports versus leaving holes in personnel service records that will result in adverse actions; and (v) the correction of adverse discharges.

Defendants (citing mostly outdated case law) argue that pay and points relief for reservists is barred by immunity. In contrast, the Supreme Court adopted an expansive view of the available remedial relief in construing RFRA's "appropriate relief" provision. *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020). *Tanzin* forecloses Defendants' argument and, as with Title VII claims, given the "appropriate relief" mandate in RFRA, and the characterization of backpay as equitable, rather than legal relief, this Court can order such relief. *Kolstad v. ADA*, 527 U.S. 526 (1999); *West v. Gibson*, 527 U.S. 212, 119 S. Ct. 1906 (1999). In any event, even *if* backpay cannot be awarded

[8] Defendants suggest that the corrective action here is "inevitable," where they indicate that they have not yet implemented removal of other adverse actions for the class, and they cite *Hill v. Snyder*, 878 F.3d 193, 204 (6th Cir. 2017). But *Hill* involved a statutory change that required not only discontinuation of the offending policy, but also required retroactive relief. The NDAA here requires no such retroactive relief. Instead, that relief is left to Defendant's discretion. And, as we have demonstrated, Defendants do not ever intend to correct the harms identified herein.

(which Plaintiffs do not concede), retirement credit, points, and other similar equitable relief plainly can be. Defendants' citation to *Palmer v. United States*, 168 F.3d 1310 (Fed. Cir. 1999), which relied upon separate statutes not at issue here fails to change the analysis because, again, RFRA affords "appropriate relief." 42 U.S.C. § 2000bb-1(c). Retirement credit has long been determined to be equitable relief by courts. *Downie v. Independent Drivers Ass'n Pension Plan*, 934 F.2d 1168 (10th Cir. 1991); *Oppenheim v. Campbell*, 571 F.2d 660, 661-663 (D.C. Cir. 1978) (retirement credit is equitable relief);[9] *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011) (explaining wide-ranging equitable relief available for similar "appropriate" remedy statute). Regardless, Defendants' concession that some additional relief might occur in the future merely confirms that the case is not moot today. Indeed, "the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

B. Plaintiffs Received Orders to Vaccinate, Did Not Comply with Those Orders, and are Still Exposed to Punitive Actions as a Result

In late 2021 and early 2022, numerous named Plaintiffs and class members received direct orders to vaccinate, with attendant threats of criminal penalties and court-martial. Add to that the fact that Defendants continue to track these individuals, confirming the ability (and perhaps the intent) to implement adverse actions in the future. (Dec. Martinez-Sanchez). Rather than provide an enforceable commitment to foreswear any prosecutions (which Defendants repeatedly have refused to do), Defendants instead merely reference current policy memoranda that do not take these options forever "off the table." And, two other pieces of evidence leave this sword clearly dangling over Plaintiffs' heads. First, on February 28, 2023, top Pentagon officials acknowledged

[9] The Complaint asked the Court to direct exemptions be granted to Plaintiffs and the class. That did not occur and instead harm accrued. Consequently, "root and branch" relief is now required – the removal not only of the offending policy (which has occurred), but the remaining vestiges of that harm as well (which has not yet happened and, in many cases, will not). *Doster*, 54 F.4th 398, 439. This Court can award appropriate relief.

in testimony before Congress "that the Defense Department is still reviewing for potential 'disciplinary procedures' numerous cases of active-duty troops who refused the shot while the mandate was in force."[10] The Undersecretary of Defense admitted "[t]hey're reviewing the cases because . . . they [disobeyed] a lawful order." *Id.* Literally, the only thing that continues to protect Plaintiffs from prosecution is the present preliminary injunction. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764 (9th Cir. 2006) (recognizing that violation of repealed statute does not foreclose relief if the statute was violated); *Bennie v. Munn*, 822 F.3d 392 (8th Cir. 2016) (same).

In *Ramsek v. Beshear*, 989 F. 3d 494, 500 (6th Cir. 2021), the Court found that a claim was not moot where the **mere possibility** of prosecution continued. Defendants attempt to distinguish *Ramsek* by noting that the case was dismissed on remand. But Defendants deliberately omit that *Ramsek* was dismissed because the statute of limitations for criminal prosecutions had lapsed in the meantime. Likewise, here, when the five-year statute of limitations lapses, then there will be no further risk of prosecution. Defendants claim Plaintiffs' legitimate fear of future prosecutions is "speculative." Of course, their unfounded claim ignores Defendants' past prosecutions, their refusal to foreswear future prosecutions and the fact Defendants continue to track these same refusers through AMJAMS, demonstrating Defendants' ability return to their unconstitutional ways. (Dec. Martinez-Sanchez). In the same vein, the general savings clause makes clear that the NDAA did not extinguish the criminal liability because it did not express an intention to do so. 1 U.S.C. § 109. And even the disavowal of an intention to prosecute by Defendants as a prosecuting authority is not sufficient to moot a case where, as here, explicit directives to vaccinate were given to Plaintiffs, they were within the scope of persons subjected to the liability, and they plainly face

[10] https://www.washingtontimes.com/news/2023/feb/28/pentagon-has-its-own-long-covid-problem-over-dropp/?utm_campaign=shareaholic&utm_medium=email_this&utm_source=email (last accessed 5/1/2023).

liability therefrom. *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390 (6th Cir. 1987).

It bears repeating: Defendants refuse to make any official statements that members of the class will never face prosecution. What Defendants do make are plenty of statements, including under oath to Congress, that punishment remains on the table for those who did not follow vaccination orders. They attempt to limit the scope of the threat by claiming that those who are not involved in pending lawsuits (those who did not seek exemptions) are the ones who face punishment, but that for now, at least with litigation pending, those who are involved in pending litigation will not. The litigation posturing is obvious. In any event, the ongoing specter of prosecution remains.

C. This is a Textbook Case for Application of the Voluntary Cessation Doctrine

The already heavy burden of establishing mootness is made even heavier when it comes to voluntary cessation. "A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 at 189. "If it did, the courts would be compelled to leave 'the defendant . . . free to return to his old ways.'" *Id.* (*citing City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). That is why a Defendant "bears the **formidable burden** of showing that it is **absolutely clear** the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (emphasis added). In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017), the Supreme Court held that a government actor's change in policy does not moot a case. Rather, the court held that the defendant must prove that it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. 167 at 190. "This standard is strict because courts are naturally suspicious—or at least they should be—of officials who try to avoid judicial review by voluntarily mooting a

case." *Tucker v. Gaddis*, 40 F.4th 289, 295 (5th Cir. 2022) (Ho, J. concurring). "The skepticism is warranted because the opportunities and incentives for government defendants are obvious: Any 'defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends.'" *Id.* (*citing Already*, 568 U.S. at 91).

"If a government not only ceases the challenged behavior, but also assures the plaintiffs and the courts that it will never return to its previous course of conduct, a court might reasonably decide to credit that promise, and hold the case moot, so long as it finds no reason to doubt the government's credibility on this score." *Id.* By contrast, Defendants here not only refuse to make such a promise, but given the language in the Secretary's initial Memorandum, this Court has plenty of reason to doubt the Defendants' "credibility on this score."

Not only did the plain text of the NDAA not require the Secretary's voluntary actions, but on February 28, 2023, top Pentagon officials acknowledged in testimony before Congress that "[t]he services are going through a process to review those cases [where individuals disobeyed a lawful order' to get a COVID-19 vaccine] to make a determination what needs to be done."[11]

In fact, Defendants have *never* "asserted nor demonstrated that [they] will never resume the complained of conduct" and Plaintiffs do not and cannot expect that they assert as much. *Norman-Bloodsaw v. Lawrence Berkely Lab.*, 135 F.3d 1260, 1274 (9th Cir 1998); *Cf. United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018) (holding "the rescission of the policy does not render this case moot").

[11] Leo Shane III, *Troops who refused COVID vaccines still could face punishment*, Military Times (Feb. 28, 2023), https://www.militarytimes.com/news/coronavirus/2023/02/28/troops-who-refused-covid-vaccines-still-could-face-punishment/?utm_source=sailthru&utm_medium=email&utm_campaign=mil-ebb&STOverlay=de88742f-46f7-4f2c-819d-3b36a47d6a7e.

Defendants falsely argue (when they could remove all doubt with an enforceable agreement) that there is no evidence that a return to the old policy can or might occur. As noted, their own evidence refutes their argument. Defendants' own submissions reveal their determination that everything they did was a "valid lawful policy." (Policy, DE#111-3, at second paragraph). The Air Force's own submission before Congress in February continued to assert that their order was "lawful." (Statement, DE#111-6, PageID#5817). Defendants continue the absurd contention that all religious accommodation requests were considered "seriously and thoroughly." (*Id.* at PageID#5818). And that same submission ominously warned "**there may be situations in the future when vaccination status will be a consideration**." (*Id.* at 5819) (emphasis added). The Undersecretary of Defense likewise falsely asserted that "[e]ach request was considered individually and adjudicated [lawfully]." (Statement, DE#111-2, PageID#5426). And he asserted that service members who did not receive an exemption, even those in this class, "receiv[ed] a lawful order to do so, and 8,422 were subsequently separated." (*Id.* at PageID#5427).[12] Finally, the statement was made that "[c]ompliance with lawful orders is not optional in the military, and leaders … took appropriate disciplinary action." *Id.* Equally relevant to the mootness inquiry, the Executive Branch believes that Congress's direction to rescind the mandate was a "mistake,"[13] while nothing in the NDAA prevents the Government from instituting a new mandate.[14] The NDAA at (§ 525, pages 177-178) only required rescission or discontinuation of the prior policy.[15]

[12] Those include class members who were punitively discharged. We disagree with Defendants that the class definition, at DE#86, does not include members who met the criteria as of July 27, 2022, as having submitted a religious accommodation request, had their beliefs confirmed as sincere, and had their request denied. Obviously, there are discharged members who met the class requirements who were punitively discharged and need relief.

[13] https://www.cnn.com/2022/12/07/politics/biden-military-covid-mandate-ndaa/index.html (last accessed 5/4/2023)

[14] https://docs.house.gov/billsthisweek/20221205/BILLS-117hres_-SUS.pdf (last accessed 5/4/2023), relevant language at page 408-409.

[15] Available at: https://www.congress.gov/117/bills/hr7776/BILLS-117hr7776enr.pdf (last accessed 2/10/2023).

It did not require any additional measures or prohibit a future vaccine mandate, demonstrating anything beyond the initial rescission was purely voluntary.

Given Defendants' admissions, it is not "**absolutely clear** the allegedly wrongful behavior could not reasonably be expected to recur." *Already*, 568 U.S. at 91. In fact, Defendants' statements about "changing public health conditions, relevant data, and geographic risks" place this case squarely within the import of *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 68–69 (2020). The Court observed there that if restrictions are dependent upon public health conditions, which are subject to change, the case is plainly not moot. The reservation here to reimpose vaccination requirements based on "changing public health conditions" is on all fours with *Cuomo*.

Determining whether the ceased action "could not reasonably be expected to recur," *Laidlaw*, 528 U.S. at 189, takes into account the totality of the circumstances surrounding the voluntary cessation, including the manner in which the cessation was executed. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019). Where, as here, "a change is merely regulatory [or by executive action], the degree of solicitude the voluntary cessation enjoys is based on whether the regulatory processes leading to the change involved legislative-like procedures or were ad hoc, discretionary, and easily reversible actions." *Id.* Thus, where, as here, "[i]f the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change, significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim." *Id.* Steps taken in the midst of litigation to remove and/or temporarily discontinue certain, but not all, adverse actions are entitled to no weight whatsoever. *See A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 713 (6th Cir. 2016), rev'd on other grounds, 138 S. Ct. 1833 (2018); *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 342-43 (6th Cir. 2007).

And, most important to the mootness inquiry is the fact that the Government "vigorously defends the constitutionality of its … program." *Schlissel*, 939 F.3d 756 at 770, *citing Parents Involved in Cmty. Sch.*, 551 U.S. 701, 719.

This "authority to reinstate [the challenged policies] at any time" from officials "with a track record of 'moving the goalposts'" subjects Plaintiffs to a credible threat of widespread enforcement of Defendants' discriminatory vaccination requirements in the future. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). Tellingly, Defendants even continue to defend the merits of the unconstitutional manner in which their mandate was carried out. Given that Defendants *still* "vigorously defend" the legality of their prior mandate, including as to all those who sought and were denied religious accommodations, mootness is not met. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U. S. 701, 719 (2007). Courts do not dismiss a case as moot in such circumstances. *See City of Mesquite*, 455 U.S. 283, 288–89.

Problematically, and foreshadowing a return to past practice, the Air Force has retained its published Instruction that enabled the widespread disregard of the Constitution in the first place. Specifically, the Air Force continues to permit local decision-makers to make medical exemption decisions on vaccination exemptions, while channeling all religious exemption requests to vaccination requirements to the highest of decision-makers.[16]

Moreover, given the waiting game being played here, Plaintiffs submit that the temporary recission or expiration or termination of the vaccine mandate order—in the midst of litigation—is entitled to no weight whatsoever. *See A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 713 (6th Cir. 2016), *rev'd on other grounds*, 138 S. Ct. 1833 (2018).

[16] https://static.e-publishing.af.mil/production/1/af_sg/publication/afi48-110/afi48-110.pdf (last accessed 5/11/2023).

Finally, while Defendants seek to hide behind the alternative rule for government actors, even under that test voluntary cessation is met. The three factors when applying this alternative rule are: "(1) the absence of a controlling statement of future intention [not to repeat the challenged policy]; (2) the suspicious timing of the change; and (3) the [governmental entity's] continued defense of the challenged polic[y]" after the supposedly mooting event. *Speech First,* 979 F.3d at 328.

Here, of course, there is no controlling statement regarding future intention not to repeat the policy. To the contrary, Defendants plainly reserve the right to do so (and say as much in their policy memos). (Statement, DE#111-6, PageID#5818). The Government has "neither asserted nor demonstrated that [they] will never resume the complained of conduct" despite numerous opportunities to do so. *Norman-Bloodsaw v. Lawrence Berkely Lab*., 135 F.3d 1260, 1274 (9th Cir 1998); *Cf. United States v. Sanchez-Gomez,* 138 S. Ct. 1532, 1537 n.* (2018) (holding "the rescission of the policy does not render this case moot"). The Government suggests, in support, that it has reserved authority at high levels to implement vaccine mandates in the future, as if this is some sort of reassuring fact, when these very decision-makers implemented the unconstitutional process that this litigation challenges. Thus, the first factor is plainly met.

For the second factor, there is clearly suspicious timing. Defendants' stepwise efforts are nothing more than their attempt to moot ongoing litigation, particularly in cases where they continue to disagree, publicly, with adverse decisions. Recall that only recently Defendants took the extraordinary step to attempt to vacate the published *Doster* decision, so that they would not be bound by it in the future. Warning bells should be ringing about the timing here.

Moreover, Defendants continue to vigorously defend their unconstitutional policy in the January and February 2023 Memoranda. (Statement, DE#111-6, PageID#5817, Statement,

DE#111-2, PageID#5426-7). Defendants thus fail on all three factors and cannot meet their "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already*, 568 U.S. at 91.

D. The Capable of Repetition Yet Evading Review Exception to Mootness Also Applies

This case also falls under the capable of repetition yet evading review exception to mootness. That exception "applies where: '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 462 (2007). Defendants claim that the capable of repetition exception does not apply because the initial mandate imposed in August of 2021 had no expiration date. But this case is not about a vaccine mandate in and of itself. Rather, it is about Defendants' wholesale refusal to grant valid religious accommodations to their mandate via a rigged regulatory process that is still in force—where that rigged process was based on a double standard involving local decision makers for secular exceptions, but high-level decision makers for religious exceptions that override the local decision makers.[17]

Given the rapidly changing COVID-19 landscape and the changes in policy throughout the DoD, the duration of the Vaccine Mandate was likely going to be "too short to be fully litigated prior to cessation or expiration." *See Kingdomware Tech., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (two years is too short); *Turner v. Rogers*, 564 U.S. 431, 440 (2011) (12 months is too short); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) (18 months is too short); *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) (two years is too short); *Roe v.*

[17] https://static.e-publishing.af.mil/production/1/af_sg/publication/afi48-110/afi48-110.pdf (last accessed 5/11/2023).

Wade, 93 S. Ct. 705 (1973) (266 days is too short). Under the first element, a case evades review if its duration is too short to receive "complete judicial review," including review by the Supreme Court. *First Nat'l Bank of Bos.*, 435 U.S. 765, 774.

When analyzing the second element, courts are concerned with whether the conduct was "capable of repetition and not … whether the claimant had demonstrated that a reoccurrence of the dispute was more probable than not." *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988). In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court held that a church's First Amendment challenge to New York's COVID-19 lockdown orders was not moot because the lockdown orders were capable of repetition, yet evading review. The church "remain[ed] under a constant threat" the government would reinstitute a lockdown in its area. *Id.* at 68. Because the challenged action was too short in duration to be fully litigated prior to cessation, and there was a reasonable expectation the church would be subject to the same action in the future, the case was not moot. *Id.*

Here, Plaintiffs have a reasonable expectation the challenged action will recur. The NDAA only forced Defendants to rescind the existing Vaccine Mandate, it did not eliminate their ability to impose a new one. Consequently, Defendants continue to claim the power to make decisions about unvaccinated airmen that will unlawfully harm their careers, while providing no assurances that they will not continue to violate RFRA. Defendants also claim the power to institute an identical and more widespread vaccine mandate at any time and continue to assert a compelling interest in doing so. Defendants also claim the power to punish past objectors because the order to vaccinate, allegedly, was "lawful." Likewise, Defendants continue to falsely claim that everything they did in processing exemption requests was constitutionally appropriate.

Given the clear record evidence, there is nothing speculative here about future harm.

E. The Class/Pickoff Exception Applies (and Defendants' Arguments About Dissolving the Injunction and Decertifying the Class are Wrong)

As a certified class action, the picking off exception would apply here. *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980) (picking off exception); *Blankenship v. Secretary of HEW*, 587 F.2d 329, 331-33 (6th Cir. 1978). That is, if any member of the class continues to suffer harm or could do so (and we have demonstrated they do), the case is not moot.

Perhaps anticipating this argument (and the fact that Defendants have not afforded the class full relief), Defendants brazenly argue that the class should be decertified and the injunction dissolved. Defendants have filed no motion to do so, and had they done so, it would violate the Court's current stay order. In any event, Defendants' contentions about the common questions no longer being applicable are simply wrong. Defendants relied upon "'broadly formulated' reasons for the vaccine mandate to deny specific exemptions to the Plaintiffs [and the class]." *Doster*, 54 F.4th 398, 405-406. And the common questions remain, namely whether the Defendants had "a uniform policy of relying on its generalized interests in the vaccine mandate to deny religious exemptions regardless of a service member's individual circumstances?" *Id.* And whether it had "a discriminatory policy of broadly denying religious exemptions but broadly granting secular ones?" *Id.* Since the answers to both remain yes, relief can then be afforded to the class. And the fact that Defendants discontinued their mandate does not change the fact that they have not yet afforded the appropriate and full "root and branch" relief to the class. *Id.* at 439.

With respect to the District Court in Florida, the relief envisioned by the Sixth Circuit here, which is law of *this case*, is different than merely discontinuing the vaccine mandate, and on that basis alone, we submit that the lead of the Sixth Circuit should be followed.

Defendants claim that the class, as-certified, might no longer be appropriate, and that the existing class definition should be narrowed (and on that score, we agree, it should be narrowed to

those who: (i) received an order to vaccinate and thus face the continued prospect of prosecution; (ii) received adverse action, which has not been remedied, to include (a) those who have records of past adverse action in AMJAMS; (b) reservists or guard members who lost retirement points or good years, which have not been remedied; (c) those who are the subject of promotion proprietary actions that have not been remedied; (d) those who were discharged with discharges that were not characterized as honorable); and (e) those with other unremedied harms. A single injunction can rectify these harms. We are prepared to submit a motion to modify the class, with appropriate supporting documents and the identity of class representatives, but, in light of the Court's stay order, have not done so.

Defendants argue that coercion no longer applies because the mandate was rescinded (but, again, as we have demonstrated, harm remains). But plainly, coercion is not the only basis for injunctive relief. "The power to modify or dissolve injunctions springs from the court's authority 'to relieve inequities that arise after the original order.;" *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 414 (6th Cir. 2012) (*quoting Credit Suisse First Bos. Corp. v. Grunwald*, 400 F.3d 1119, 1124 (9th Cir. 2005)). However, such judicial intervention should be "guarded carefully." *Id.* Accordingly, "[t]o obtain modification or dissolution of an injunction, a movant must demonstrate significant 'changes in fact, law, or circumstance since the previous ruling.'" *Id.* (*quoting Gill v. Monroe Cty. Dep't of Soc. Servs.*, 873 F.2d 647, 648-49 (2d Cir. 1989)).

Indeed, the Sixth Circuit has been clear that only when a previously issued injunction becomes "an 'instrument of wrong,'" should it be dissolved. *Gooch v,* 672 F.3d 402, 414. Courts in this Circuit do not find such circumstances because an offending policy or practice has been discontinued. *KCI USA, Inc. v. Healthcare Essentials, Inc.*, 2017 U.S. Dist. LEXIS 225456 (S.D. Ohio 2017). A modification may be appropriate "when the original purposes of the injunction are

not being fulfilled in ***any*** material respect." *LFP IP, LLC v. Hustler Cincinnati, Inc.*, 810 F.3d 424, 426 (6th Cir. 2016) (emphasis added). But that is not this case.

It is curious, to say the least, that Defendants on the one hand claim the case is moot, effectively arguing that the injunction is not in practicality enjoining Defendants from doing anything (because they do not intend to do anything that the injunction prohibits), while on the other hand arguing that continuing the injunction in force is somehow inequitable. One might, appropriately in such circumstances, question the sincerity of all their mootness arguments.

III. CONCLUSION

This case is not moot. Perhaps a settlement with Defendants could be reached to resolve the remaining issues in this matter, but Defendants have indicated that they do not intend to engage in those discussions until after disposition of this motion.

Respectfully submitted,

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing by electronic mail this 16th day of May, 2023.

/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 JOE DILLS

Pursuant to 28 U.S.C. §1746, the undersigned, Joe Dills, 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 Joe Dills and I am a class representative in the above captioned matter. I am a Senior Airman in the Air Force and currently serve as an active reservist.
2. After I exhausted all appeals for my religious accommodation request for the COVID-19 vaccination requirement and received my final denial, I was involuntarily placed into the inactive ready reserve (IRR) in January, 2022. I remained in the IRR until I was allowed to return to active reservist status in September 2022. However, I was not allowed to make up the missed drill weekends and I lost all retirement points and back pay for those dates. As a result, I lost $7, 140 of pay, and 12 reserve points for the drill weekends I was not able to attend, as well as the inability to count fiscal year 2022 towards my reserve retirement. Without my pay and points being restored, I will now have to serve another full year to make-up for the year I lost.
3. 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 4 May 2023

Joe Dills

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 5/4/2023.

Christopher Schuldes

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 TRAVIS B. JONES

Pursuant to 28 U.S.C. §1746, the undersigned, Travis B. Jones, 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 Travis B. Jones and I am a class member in the above captioned matter. I am a Staff Sergeant in the Air Force and currently serve as an active reservist.
2. After I exhausted all appeals for my religious accommodation request for the COVID-19 vaccination requirement and received my final denial, I was involuntarily placed into the inactive ready reserve (IRR) in January, 2022. I remained in the IRR until I was allowed to return to active reservist status in July 2022. However, I was not allowed to make up the missed drill weekends and I lost all retirement points and back pay for those dates. As a result, I lost $2,324 of pay, and 24 reserve points for the drill weekends I was not able to attend, as well as the inability to count fiscal year 2022 towards my reserve retirement. Without my pay and points being restored, I will now have to serve another full year to make-up for the year I lost.
3. 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 05/04/2023. Travis Jones

Travis Jones

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 ALBERTO SIGALA

Pursuant to 28 U.S.C. §1746, the undersigned, Alberto Sigala, 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 Alberto Sigala, and I am a class member in the above captioned matter. I am Captain in the Air Force and currently serve as a systems engineer at Wright Patterson Air Force Base.
2. I was selected for promotion to Major, on or about May 3, 2022.
3. Because I was unable to receive any of the currently available COVID-19 vaccines due to my religious beliefs, I was subjected to a promotion proprietary action (PPA) (even though I submitted an exception request). A promotion propriety action is an administrative action that effectively re-reviews the promotion, and whether it should be awarded. It effectively stops and freezes the promotion, with the threat of withdrawing it.
4. After the COVID-19 vaccine mandate for the armed services was rescinded, I was notified by my commander that my promotion proprietary action (PPA) was going to be withdrawn/removed and they congratulated me on my finally being promoted to Major. I

started wearing my new rank on January 2, 2023, and was also told that my promotion date would be back dated to my original promotion date on or about 1 August 2022.

5. However, on February 7, 2023, I was instructed to continue to wear the rank of Captain (i.e. I am not promoted), and that ultimately the Secretary of the Air Force has the final decision on whether my PPA would be reversed. I am told that this action is discretionary and is not automatic.
6. On March 13, 2023, my declaration explaining all of the continuing harm that I was facing because of my religious beliefs was submitted to this Court. I understand that the declaration was struck by the Court after filing.
7. The very next day, March 14, 2023, I received a text from my commander while I was on leave. My commander requested a meeting with me so that we could "move some promotion paperwork forward." AF Form 4364 – Record of Promotion Delay Resolution with my signature and my Wing Commander's signature was sent to Air Staff on March 17, 2023.
8. On March 17, 2023, I was emailed a memorandum to sign withdrawing my administrative discharge action. I did so.
9. As of today, I await the final decision on my PPA. My PPA has been sitting at Air Staff since March 21, 2023, awaiting review and routing to the Secretary of the Air Force for final decision. I do not know when, if ever, action will be taken on it, and, again, I have been instructed that this PPA is discretionary with the Secretary of the Air Force, even under the current circumstances.
10. I am aware of hundreds of other airmen who are in a similar position and have PPAs awaiting decisions.

11. Throughout the entire religious accommodation process and now this process, I have maintained my integrity and followed all orders and directions (with the exception of the order to vaccinate, which violates my sincerely held religious belief).
12. Nothing Defendants have done, to date, has or will correct these actions. It is unclear if my promotion will be reinstated or if I will lose my promotion to Major altogether. However, I am certain that without judicial accountability, no action will be taken on my PPA.

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 05/04/2023.

Alberto Sigala

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 MARK HABERLE

Pursuant to 28 U.S.C. §1746, the undersigned, Mark Haberle, 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 Mark Haberle, and I am a class member in the above captioned matter. I am Captain in the Air Force and currently stationed at Naval Air Station Pensacola, Florida. I have served for 8 years in the Air Force as a Combat Systems Officer (CSO). I have deployed to Afghanistan, and I am currently an instructor CSO at NAS Pensacola.
2. Prior to becoming a class member, I was an intervening plaintiff in *Corvi v. Kendall*.
3. On September 28, 2021, I submitted my request for religious accommodation, which was ultimately denied on appeal on March 3, 2022.
4. On March 24, 2022, I received a Letter of Reprimand (LOR) stating that I failed to obey a lawful order to get a COVID-19 vaccination. After submitting rebuttal matters, the LOR was filed in my Unfavorable Information File.

5. On April 11, 2022, I was notified that Lieutenant General Marshall B. Webb, was initiating a separation board (show cause for retention on active duty) for disobeying two separate lawful orders to get the COVID-19 vaccination. My Commander recommended that I receive a GENERAL DISCHARGE.
6. My separation board started on July 13, 2022, at Joint Base San Antonio, Texas. On July 14, the second day of my separation board, I received a phone call from Ms. Wendy Cox, co-counsel in this case, who informed me that Judge McFarland had certified the class and ordered a temporary restraining order (TRO) for all class members. I immediately informed my counsel who presented this information to the board. Because of the TRO, the board was stayed and slated to reconvene in two-weeks when the TRO was projected to end. Thankfully, a class injunction was granted before the two weeks ended and my separation board was stopped.
7. With the lifting of the Covid-19 vaccine mandate, I received notification that my administrative discharge board was cancelled.
8. I have also been able to return to flying and completed my requalification. However, I missed out on 12 flying gate months for my career, which now puts me behind my peers for assignment considerations. A flying gate month is basically time spent in a flying assignment, that accrues benefits for assignments.
9. Specifically, I have been informed that I will be moving back to the operations squadron in June, but if I had those 12 gate months on my record during the time I was not allowed to fly, my career path and next PCS assignment would have allowed me more career enhancing and advancement opportunities. These opportunities build upon themselves over time, and it appears that, without corrective action (which the

Air Force has not offered at present) I will remain in a second-class status, and ultimately that status will result in my separation from the Air Force.

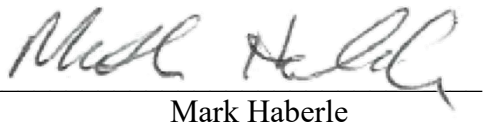
10. Instead of doing my job in the Air Force for the past 12 months, I was being punished for my sincerely held religious beliefs.
11. The Secretary of Defense released a memo stating that referred Officer Performance Reports (OPR) would be removed from service members records. My Referred OPR was removed from my performance record. However, it is now replaced with a mostly blank OPR with the following comment, "Not rated for the above time period. Evaluation removed by order of SECAF". There will have long-ranging implications for my future as the void in the record will be seen as a permanent scar because of this language. Anyone reviewing my record for future assignments and promotions will always ask the question, “Why was the evaluation removed?” “Why does this officer have over a year of unrated time for 12 months?” Those questions will have negative career effects, and will ultimately result in my separation from the Air Force.
12. In the past 17 months, I have gone from having a stellar career with high performance ratings to a sub-standard career that it appears unlikely I will recover from. Unless the Air Force is forced to revise their religious accommodation process, there is no doubt in my mind that this harm will be repeated in the future. The Air Force has destroyed thousands of service members’ careers and placed unnecessary stress on mine and other Air Force families because we were unable to take the currently available COVID-19 vaccines due to our religious beliefs. This harm no

doubt will continue for years to come and is likely to be repeated if this case is dismissed.

13. Nothing Defendants have proposed to do, to date, has or will correct these actions.

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 May 4, 2023.



Mark Haberle

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 was 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 used 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, to include class members, were put into AMJAMS for the purpose of tracking the Airman's individual administrative and punitive actions for 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 to this day.

5. This information will remain in the AMJAMS system until a proactive step is taken to permanently delete an airman's record. Just closing an administrative action in AMJAMS does not get rid of the record, and the Air Force has no intention of permanently deleting these records and has stated as such to this Court and in my presence. Without an order to completely remove an airman's file from AMJAMS, a

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

class member's closed case file will remain in the system indefinitely and will be a permanent mark on their military record every time information is requested from AMJAMS through the SJA office.

6. Our office and local SJA offices routinely get requests from commanders, promotion boards, special duty assignment inquiries, and other investigative bodies asking whether a named Airman has a case file in AMJAMS, and if so, what was the reason for the entry. If the COVID-19 vaccine refusers record/file remains 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, 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. I am aware that the Air Force has argued contrary to the above statements, but that is inaccurate. For example, in order for an Air Force enlisted member to be nominated for a Developmental Special Duty (DSD) assignment, one of the screening requirements is that the AMJAMS be reviewed to see if there is any "negative information in their records." (See Exhibit 1). If there is any negative information in an Airman's AMJAMS, then "additional in depth legal review" is required to determine if they are eligible for DSD. *Id*. The record of the derogatory information whether closed or open, becomes a discriminatory mark on an airman's

record. As shown above, it will be used to discriminate against those who are requesting special assignments, or specialized training. The bottom line is that there will always be a record that a class member was alleged to have violated Article 90 or 92 of the UCMJ, without the record's permanent deletion from AMJAMS.

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). In fact, leadership in my office does not believe that the Air Force needs to remove the AMJAM records at all.

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 May 5, 2023

Lucila Sanchez Martinez

EXHIBIT 1

Developmental Special Duty (DSD) Nomination Instructions

Spring 2023 Cycle

*****Do not make any changes to the format on the Nomination Roster *****

- **Career Field Manager Releases:**
  - CFM releases are subject to change without notice.

- **Nomination Roster:**
  Utilize the PSDG and SPECAT for proper nomination criteria
  - This roster is a tool to assist your command with nominations, it is not mandatory to nominate all members listed. Members on the roster meet basic DSD eligibility and are not required to be nominated if they are not the right fit for a DSD SDI. Please do not delete or change the roster.

  - Pregnancy and SRB waivers **MUST** be turned in the same time you send your nomination roster to us.

- **Nomination Roster continued:**
  - Utilize drop down menus to select a primary vector and if warranted an optional secondary vector.
  - AMJAMS (Legal Review) has been checked, if a member is highlighted they have some sort of derogatory information. Please ensure a full AMJAMs review is conducted by your Legal Team to ensure member meets DSD eligibility for the considered vector.
  - PT has **NOT** been reviewed. Please ensure all members that have had a PT failure in the last 12 months be removed from the roster. Also, Please review your members for exemptions before vectoring for a DSD AFSC that they will not qualify for.
  - Education has **NOT** been identified for any member. Please ensure your bases complete the required pre eligibility check for any member nominated for SDI's that require CCAF/PME credits.
  - Ensure communication with the hiring/host MAJCOM of the DSD position for members in DETs/GSUs/on that base.

Nomination Reminders:

- **Time On Station Requirements:**
  - **CONUS (36 Months):** Airmen must meet TOS requirements in DAFI 36-2110, Chapter 6, paragraph 6.5 andtable 6.1 to be eligible
  - OS: Airmen who are nominated must have a DEROS that coincides with the applicable DSD assignment cycle; however DEROS extensions and curtailments may be considered.

- **Deployed Airmen**
  - Airmen who are deployed must have a return from deployment date with a minimum of 90 days prior to the end of the DSD cycle.

    ****These members will not reflect in this current roster, however may be manually added****

- **Automated Military Justice Analysis Management System**
  - Airmen highlighted have some sort of negative information in their records and require additional in depth legal review to determine if eligible for DSD.
  - Any deeper review of a member's legal record must be coordinated with the Base Legal Team, they can assist in getting the additional information. Case type and AMJAMS ID has been provided for your Legal Teams review.
  - If there is information found in members records and may require additional review, please provide supporting justification with your nomination roster to the DSD office.
- **Air Force Fitness Management System**
  - **MAJCOMS** are required to verify that Airmen have a 75 or above on last fitness tests with no PT failures within parameters set by Air Force guidance.
  - Airmen with PT exemptions are included in this roster; please verify vector eligibility before nominating members. In order to be nominated for the following AFSCs, Airmen may not have a current PT exemption; MTI, MTL, AMT, AF HG and PME.

- **Selective Retention Bonus**
  - Airmen receiving an SRB must have completed 50% of their current enlistment and sign the SRB memorandum ***(Attachment 2)*** upon nomination agreeing to waive the remaining payment portion of the SRB.
  - All signed SRB attachments **must** be submitted to AFPC/DPMOSS by suspense of nominations.
  - Airmen will not be considered if Attachment 2 is not received by MAJCOM nomination suspense.

- **Pregnancy**
  - Airmen with Pregnancy deferment **must** submit ***Attachment 1, Post-Delivery Deferment Memorandum*** in order to be considered. These memos will also be due by suspense.
  - Airmen will not be considered if Attachment 1 is not received by MAJCOM nomination suspense.

- **Primary AFSC**
  - Airmen will not be selected for two consecutive DSD/SDI tours. All airmen must return to theirPAFSC for a minimum of 3 years.

- **Voluntary Assignments/Special Programs**
    - Although members are not precluded from applying for any other assignment/volunteer program, if vectored for DSD, please ensure each nominee does not plan to retrain or apply for special programs (i.e. OTS, RPA, NCORP etc.) during the DSD cycle. Our goal is to eliminate any assignment/selection conflicts/delays that will detract from members' career path and further delay filling DSD requirements. **NOTE: If member is selected for another volunteer program and is nominated and selected for DSD prior to selection, DSD will take priority.**

****Commanders have the authority to remove members from the NCORP. Please contact HQ AFPC Reenlistments for further guidance****

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 JONATHAN OBERG

Pursuant to 28 U.S.C. §1746, the undersigned, Jonathan Oberg, 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 Jonathan Oberg, and I am an active-duty Major who is currently serving at Tinker Air Force Base, Oklahoma. I am a class member in this case.
2. I have confirmed that Defendants have closed my Article 15 record in the Automated Military Justice Analysis and Management System (AMJAMS). However, I was notified that the Air Force will maintain a record of that Article 15 in AMJAMS indefinitely.
3. Having this record in the system could have significant affects on my promotion potential, special duty assignment options, as well as inquiries from other investigative bodies, such as when I have to update my security clearance.
4. If my file remains in AMJAMS, and for that matter, other tracking systems throughout the Air Force, I will be marked by the Air Force as someone who received an Article 15 for allegedly disobeying a lawful order, which is not true.

5. I believe this harm to be unjust because the only reason that my name was placed into AMJAMS in the first place was because of the Air Force's religious discrimination against me. Now they get to continue that discrimination by keeping my case file in AMJAMS.

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 May 4, 2023

Jonathan Oberg

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 as a Readiness Volunteer Staff Member at the Military & Family Readiness Center at Hurlburt Field, Florida.
2. On April 26, 2023, I discussed my request to "Palace Chase" with the legal branch on Hurlburt Field. Palace Chase provides active-duty service members the opportunity to convert the remaining portion of their active service commitment to a Reserve or Air Guard commitment.
3. During my interview with the Hurlburt Field legal office, I was informed that prior to my interview they conducted an AMJAMS review. In that AMJAMS review they had found a record under my name with a closed letter of reprimand. Although the record was closed, they could still see that I had had a letter of reprimand and that I

had failed to allegedly follow a lawful order to get the COVID-19 vaccination. I was told that this should not affect my application, but the interviewer could not guarantee that.

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 15 May 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 4 May 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 WIEST PURSUANT TO FRCP 56(d)

Pursuant to 28 U.S.C. §1746, the undersigned, Christopher Wiest, 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 Wiest, and I am one of the counsel for the Plaintiffs, and make this declaration pursuant to FRCP 56(d).
2. We require, but have not had the opportunity, to take certain discrete discovery on the issues of mootness, as explained herein.
3. We have been unable to take discovery because this matter, apart from briefing mootness, has been generally stayed since March 3, 2023. In the same manner, the circumstances and facts that the Government relies upon to argue mootness have all arisen in December, 2022 through the passage of the NDAA, and then more significantly, in January and February, 2023 as Defendants have attempted certain corrective action to address some but not many of the harms caused to service members by its prior mandate.

4. Despite the need for some limited discovery to properly oppose Defendant's motion claiming mootness, Plaintiffs have thus not been afforded the opportunity to take discovery on the facts and circumstances that the Government relies upon to claim mootness.
5. We have attached, hereto, proposed narrow written discovery directed to the issue of mootness, at **Exhibit A**.
6. We also seek the Court's permission to take a limited, narrow FRCP 30(b)(6) deposition of the United States and Secretary of the Air Force, limited solely to the issue of mootness, and more narrowly to the following discrete subtopics: (i) the number and characterization of adverse discharges issued to person(s) who submitted a religious accommodation request to the COVID-19 vaccine mandate; (ii) the Government's definition of "adverse action" in terms of remedial action and what that includes and what that does not include; (iii) retention in AMJAMS of entries related to discipline imposed upon person(s) who submitted a religious accommodation request to the COVID-19 vaccine mandate, the reason(s) therefore, and under what circumstances, who has the ability to access same, and the number of such reports; (iv) the effects of a "blank" or sanitized performance reports (either officer or enlisted) on future promotion or assignment prospects, in terms of the current corrective action for person(s) who submitted a religious accommodation request to the COVID-19 vaccine mandate and the number of person(s) effected; (v) the loss of retirement points and "good years" on reservists and guard members for person(s) who submitted a religious accommodation request to the COVID-19 vaccine mandate, the lack of any intention to rectify same, and the number of person(s)

effected; (vi) any current COVID-19 vaccine requirements that are in place, to whom they apply, and under what circumstances; (vii) any planned future COVID-19 vaccine requirements and under what circumstances; (viii) the number, circumstances, and status of promotion proprietary actions (as well as an explanation of same) for person(s) who submitted a religious accommodation request to the COVID-19 vaccine mandate; and (ix) other remaining consequences and effects related to person(s) who submitted a religious accommodation request to the COVID-19 vaccine mandate.

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 5/16/2023.

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	:	

EXHIBIT A – PROPOSED WRITTEN DISCOVERY TO THE UNITED STATES

All Definitions and Instructions from Plaintiffs' First Set of Discovery are hereby reincorporated.

Interrogatories:

1. Identify the number and characterization of adverse discharges issued to person(s) who submitted a religious accommodation request to the COVID-19 vaccine mandate.

RESPONSE:

2. Identify the Government's definition of "adverse action" in terms of remedial action and what that includes and what that does not include.

RESPONSE:

3. Identify each remaining AMJAMS entry related to discipline imposed upon person(s) who submitted a religious accommodation request to the COVID-19 vaccine mandate, the reason(s) therefore, and under what circumstances, who has the ability to access same, and the number of such reports.

RESPONSE:

4. Identify the effects of a "blank" or sanitized performance reports (either officer or enlisted) on future promotion or assignment prospects, in terms of the current corrective action for person(s) who submitted a religious accommodation request to the COVID-19 vaccine mandate and the number of person(s) effected.

   RESPONSE:

5. Identify the number of reserve or national guard airmen or guardians who were not permitted to accrue retirement points and "good years" towards retirement (including those transferred to the Individual Ready Reserve), due to their unvaccinated status, who submitted a religious accommodation request to the COVID-19 vaccine mandate, the number of retirement point(s) lost.

   RESPONSE:

6. Identify the circumstances, and status of promotion proprietary actions (as well as an explanation of same) for person(s) who submitted a religious accommodation request to the COVID-19 vaccine mandate.

   RESPONSE:

7. Identify any other remaining consequences and effects related to person(s) who submitted a religious accommodation request to the COVID-19 vaccine mandate.

   RESPONSE:

Request for Production:

1. Produce documents that reflect the number and characterization of adverse discharges issued to person(s) who submitted a religious accommodation request to the COVID-19 vaccine mandate.

RESPONSE:

2. Produce documents that reflect the Government's definition of "adverse action" in terms of remedial action and what that includes and what that does not include.

RESPONSE:

3. Produce documents that reflect each remaining AMJAMS entry related to discipline imposed upon person(s) who submitted a religious accommodation request to the COVID-19 vaccine mandate, the reason(s) therefore, and under what circumstances, who has the ability to access same, and the number of such reports.

RESPONSE:

4. Produce documents that reflect the effects of a "blank" or sanitized performance reports (either officer or enlisted) on future promotion or assignment prospects, in terms of the current corrective action for person(s) who submitted a religious accommodation request to the COVID-19 vaccine mandate and the number of person(s) effected.

RESPONSE:

5. Produce documents that reflect the number of reserve or national guard airmen or guardians who were not permitted to accrue retirement points and "good years" towards retirement (including those transferred to the Individual Ready Reserve), due to their

unvaccinated status, who submitted a religious accommodation request to the COVID-19 vaccine mandate, the number of retirement point(s) lost.

RESPONSE:

6. Produce documents that reflect the circumstances, and status of promotion proprietary actions (as well as an explanation of same) for person(s) who submitted a religious accommodation request to the COVID-19 vaccine mandate.

RESPONSE:

7. Produce documents that reflect any other remaining consequences and effects related to person(s) who submitted a religious accommodation request to the COVID-19 vaccine mandate.

RESPONSE:

8. Produce documents that reflect any current plans or policies, including in draft or other form, that relate to any planned punishment of any member who declined a COVID-19 vaccine, including any order to vaccinate.

RESPONSE:

9. Produce documents that reflect any current plans or policies, including in draft or other form, that relate to any intention to implement or reimplement a COVID-19 vaccine.

RESPONSE: