IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*, Plaintiffs, v. JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*, Defendants.	No. 5:21-cv-01136-F

DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

In December, this Court entered a comprehensive opinion explaining why Plaintiffs' challenges to Executive Order 14043 and the military vaccination requirement cannot succeed. *See* ECF No. 41 ("PI Order"). Developments have only confirmed that these claims fail as a matter of law, and the Court should grant the motion to dismiss. *See* ECF No. 52 ("Mot.").

ARGUMENT

I. The Court Lacks Jurisdiction.

A. The State Of Oklahoma Lacks Standing.

This Court has rejected all but one of Oklahoma's standing theories: the theory that the challenged requirements would deprive the state of law enforcement resources because Guard members will resign or retire. *See* PI Order at 8. The Court should revisit that holding because Oklahoma does not allege that more Guard members are resigning or retiring due to the vaccination requirement than normal. Regardless, Plaintiffs do not dispute that this theory would provide standing only as to the military policy, not EO 14043. *See* Mot. at 8. Oklahoma also asks the Court to revisit whether it has *parens patriae* standing, *see* ECF No. 56 ("Opp.") at 4-6, yet its principal authority holds that states may not invoke *parens patriae* to "sue purely on behalf of their own citizens' interests," *Kentucky v. Biden*, 23 F.4th 585, 596 (6th Cir. 2022). Oklahoma is barred from asserting its citizens' individual rights. *See also* Mot. at 9–10.

B. The Individual Plaintiffs Lack Standing To Challenge EO 14043.

Plaintiffs do not dispute that the Title 32 and dual-status Plaintiffs lack standing to challenge EO 14043. *See* Opp. at 6. As for the Title 5 civilians, Plaintiffs suggest that the CSRA does not apply because they sued prior to discipline. Plaintiffs offer only dissenting authority for that position, *see* Opp. at 8, which has recently been rejected by four different courts. *See*

Feds for Med. Freedom v. Biden, 30 F.4th 503, 509 (5th Cir. 2022), *pet. for rh'g en banc pending*; *Rydie v. Biden*, No. 21-2359, 2022 WL 1153249, at *6 (4th Cir. Apr. 19, 2022) (unpublished); *Payne v. Biden*, No. 21-3077, 2022 WL 1500563, at *8 (D.D.C. May 12, 2022); *AFGE Local 2018 v. Biden*, --- F. Supp. 3d ----, 2022 WL 1089190, at *5 (E.D. Pa. Apr. 12, 2022).

In any case, the Title 5 employees each have religious objections to vaccination. *See* 2d Am. Compl., ECF No. 49, ¶¶ 29, 33. Their claims are thus either moot, unripe, or self-inflicted, depending on the status of any exception request—information that Plaintiffs decline to provide. Plaintiffs contend that ripeness "would have no bearing on any counts other than the RFRA and Free Exercise Clause claims," Opp. at 6, but that is wrong. If the adjutant general grants religious exceptions to the Title 5 employees, then *none* of the alleged injuries—religious or otherwise—will occur. *See Brnovich v. Biden*, --- F. Supp. 3d ----, 2022 WL 252396, at *8 (D. Ariz. 2022); *Church v. Biden*, --- F. Supp. 3d ----, 2021 WL 5179215, at *9 (D.D.C. Nov. 8, 2021); *Donovan v. Vance*, --- F. Supp. 3d ----, 2021 WL 5979250, at *4-5 (E.D. Wa. Dec. 17, 2021); *McCray v. Biden*, --- F. Supp. 3d ----, 2021 WL 5823801, at *8-9 (D.D.C. Dec. 7, 2021).

Plaintiffs claim "the likelihood of any plaintiff's obtaining an exemption is effectively illusory." Opp. at 7. But some federal employees have received exceptions. *See, e.g.*, *Church v. Biden*, No. 21-2815, 2022 WL 1491100, at *5 (D.D.C. May 11, 2022); *AFGE Local 2018*, at *2. And the Oklahoma adjutant general—not the federal Defendants—has the authority to grant the Title 5 Plaintiffs exceptions. *See* Mot. at 12.

C. The Military Plaintiffs Have Not Exhausted Administrative Remedies.

Plaintiffs also do not dispute that they have failed to exhaust available administrative remedies related to the military vaccine requirement (including pursuing accommodations). *See*

Opp. at 9-10. Instead, they argue that requiring exhaustion would be futile. But merely raising the *possibility* that exhaustion would be futile is insufficient to survive a motion to dismiss. *See Aikens v. Ingram*, 652 F.3d 496, 501 (4th Cir. 2011); *Von Hoffburg v. Alexander*, 615 F.2d 633, 638 (5th Cir. 1980) (affirming dismissal despite Plaintiff's futility arguments); *Hodges v. Callaway*, 499 F.2d 417, 424 (5th Cir. 1974) (similar). And the process is not futile—the Air Force has granted 794 medical exemptions, 1,038 administrative exemptions, and 85 religious exemptions. DAF COVID-19 Statistics, May 24, 2022, https://perma.cc/W74N-ZELG; *compare U.S. Navy SEALs 1-26 v. Biden*, 27 F.4th 336, 347 (5th Cir. 2022) (per curiam) (finding futility when no religious accommodation request for "any vaccine in seven years").

Plaintiffs also argue that "agency expertise is not at play" for RFRA and constitutional claims. Opp. at 10. But military expertise is required to decide if there is a compelling interest and whether less restrictive means are available. *See Navy SEAL 1 v. Austin*, No. 22-0688, 2022 WL 1294486, at *6 (D.D.C. Apr. 29, 2022), *appeal filed*, No. 22-5114 (D.C. Cir. May 5, 2022); *Austin v. U.S. Navy SEALs 1-26*, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J., concurring).

Requiring exhaustion through final separation is important here because Congress vested the discretionary power in the military (not the judiciary) to discharge a member of the National Guard, 32 U.S.C. § 323. There is "no injustice in requiring [a member of the military] to submit to a system established by Congress and carefully designed to protect not only military interests but his legitimate interests as well." *Schlesinger v. Councilman*, 420 U.S. 738, 759–60 (1975). And the Board for Correction of Military Records ("BCMR") "provides another means with which an aggrieved member of the military may" pursue relief, including "retroactive back pay and retroactive promotion." *Chappell v. Wallace*, 462 U.S. 296, 303 (1983).

"Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious or not based on substantial evidence." *Id.* The courts have a role to play, but it is only *after* the military processes.[1]

II. Plaintiffs Fail To State A Claim On Which Relief May Be Granted.

A. The Military's Policies Are Valid (Count XII).

Nothing in the opposition supports the argument that the military's vaccination policy violates the Constitution or any statute. Plaintiffs cannot show that military vaccination requirements "lack [] historical precedent," Opp. at 17, when "military immunization mandates . . . date back as far as General George Washington," PI Order at 15. The claim that there "is no statute authorizing the President to issue a vaccine mandate," Opp. at 18, ignores the statutes cited in Defendants' motion and the Court's preliminary injunction order that provide that authority. No cited case supports Plaintiffs' argument that only Congress can set medical standards for the military, which the President and military leaders have set for generations. *See* Opp. at 18 (citing cases where Presidential actions conflicted with statutes or where Congress was silent). And Plaintiffs' "Take Care" theory is that the President is ignoring applicable statutes, *id.* at 18, but Plaintiffs' brief does not identify any conflicting statute.

B. EO 14043 Is A Valid Exercise Of Presidential Authority (Counts I, II, III).

Apparently conceding that the statutes invoked in Counts I, II, and III do not create an implied right of action, Plaintiffs now contend that they are actually not pleading statutory

[1]No Plaintiff alleges to have begun, much less completed, the process for withdrawal of federal recognition (*i.e.*, discharge). *See* AFI 36-3209 (outlining withdrawal of federal recognition process). And Plaintiffs did not respond to Defendants' explanation that those who have not had their federal recognition withdrawn do not have ripe claims. *See* Mot. at 13; *see also Smith v. Harvey*, 541 F. Supp. 2d 8, 13 (D.D.C. 2008).

claims, but three separate equitable claims to enjoin *ultra vires* conduct. Yet the second amended complaint nowhere actually pleads such an equitable *ultra vires* claim.

Even if Plaintiffs had pleaded an *ultra vires* claim, it would fail. Plaintiffs cannot use this "doctrine[] of last resort," *Terveer v. Billington*, 34 F. Supp. 3d 100, 123 (D.D.C. 2014), to circumvent applicable statutory review schemes like the CSRA and the Administrative Procedure Act ("APA"). *See, e.g.*, *El Paso Cnty. v. Trump*, 982 F.3d 332, 362 (5th Cir. 2020). Moreover, the "modern cases make clear" that an officer may be said to act *ultra vires* "only when he acts 'without any authority whatever,'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101–02 n.11 (1984) (citation omitted). This is a "very stringent standard," "essentially a Hail Mary pass" that "in court as in football, . . . rarely succeeds." *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009) (Kavanaugh, J.). It is not satisfied here.

EO 14043 is amply supported by the President's constitutional and statutory authority. *See* PI Order at 21. Employment in the United States is generally at will, so agencies may terminate employees at their discretion unless there is an affirmative statutory, constitutional, or other legal impediment to their doing so. For that reason, prior to the Civil War, "federal employees came and went, depending upon party service and changing administrations, rather than meritorious performance." *U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 557 (1973). Contrary to Plaintiffs' suggestion, *see* Opp. at 17, that plenary authority was not limited to officers of the United States, which is why Congress sometimes limits the Executive Branch's authority to terminate employees, as it has done in Title VII and the CSRA.

Absent congressional prohibition, the Executive Branch is thus free to impose vaccination requirements, just as numerous private sector employers have elected to do. But

even if additional authorization from Congress were necessary, it exists. *See* Mot. at 15–19. Most importantly, 5 U.S.C. § 7301 permits regulation of federal employees' conduct, and the statute is not limited to "workplace" conduct, *contra* Opp. at 15. Had Congress meant to limit this statute in that manner, "it knew how to say so." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 826 (2018). If Plaintiffs' theory were correct, EO 12564, which prohibits illegal drug use both in the workplace and elsewhere, would be unlawful. As for 5 U.S.C. § 3301, EO 14043 applies to new entrants to federal service, and Plaintiffs provide no basis for second-guessing the President's determination that requiring vaccination would improve the efficiency of the service. Finally, as for 5 U.S.C. § 3302, the second sentence's identification of specific matters the President "shall" address does not prohibit the President from addressing other matters pursuant to the first sentence's broad authority.

C. Plaintiffs' APA Claims Should Be Dismissed (Count IV).

The Court has properly held that Plaintiffs cannot pursue an APA claim against the President or the Safer Federal Workforce Task Force. *See* PI Order at 22–23. Plaintiffs ask the Court to reconsider those holdings, *see* Opp. at 15, but they provide no explanation why.

Plaintiffs further suggest that they may bring APA claims challenging "DoD's directives that make up the military mandate." Opp. at 15. Yet as Defendants have observed, their complaint does not seek review of any final agency action taken by the Secretary of Defense or any of the Service Secretaries. *See* Mot. at 19–20. But even if Plaintiffs could bring APA challenges, they would still fail as a matter of law. "Our Constitution principally entrusts the safety and the health of the people to the politically accountable officials" and when "those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude

must be especially broad." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring) (cleaned up). And the deference owed to military decisionmaking "is layered on top of the deference that courts must give to expert policymakers on matters involving complex medical or scientific uncertainties." *Short v. Berger*, No. 22-1151, 2022 WL 1051852, at *7 (C.D. Cal. Mar. 3, 2022), *appeal filed*, No. 22-55339 (9th Cir. Apr. 5, 2022).

Under these standards, Plaintiffs' arbitrary and capricious challenges fail because the military requirement and EO 14043 are rational. The CDC recommends all persons ages 5 and over receive the COVID-19 vaccine "regardless of a history of symptomatic or asymptomatic SARS-CoV-2 infection." CDC, Interim Clinical Considerations for Use of COVID-19 Vaccines (updated April 21, 2022), https://perma.cc/7V3Z-9UK5.[2] Nothing in Plaintiffs' complaint can overcome the high hurdle required to show that either vaccination requirement is arbitrary. *See Lloyd v. Sch. Bd. of Palm Beach Cnty.*, --- F. Supp. 3d ----, 2021 WL 5353879, at *13 (S.D. Fla. Oct. 29, 2021) (dismissing for failure to state a claim in part because "the Court cannot find that Defendants are irrational for following the recommendations of the CDC"); *Denis v. Ige*, 538 F. Supp. 3d 1063, 1078 (D. Haw. 2021) (similar).

D. Plaintiffs' Structural Constitutional Claims Fail (Counts V, VI, XI).

Plaintiffs' structural constitutional claims boil down to three contentions. First, they argue that the President lacked authority to impose EO 14043, *see* Opp. at 17–18—an argument addressed above. Second, Plaintiffs argue that if the President could impose a vaccine mandate, his power would be so limitless as to violate the nondelegation doctrine. *See*

[2] Publicly available guidance from the CDC is the type of information subject to judicial notice. *See Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007).

Opp. at 19. But this case challenges the government setting policy for its own employees—not an exercise of legislative power. *See, e.g.*, *NASA v. Nelson*, 562 U.S. 134, 148 (2011) ("Government has a much freer hand in dealing 'with citizen employees than it does when it brings its sovereign power to bear on citizens at large.'" (quoting *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008))). "[A] function of the President's role as head of the executive branch and his associated broad statutory authority to regulate executive branch employment policies" is "not an impermissible exercise of legislative power." *Serv. Emps. Int'l Union Local 200 United v. Trump*, 419 F. Supp. 3d 612, 620–21 (W.D.N.Y. 2019), *aff'd*, 975 F.3d 150 (2d Cir. 2020).

Finally, Plaintiffs make the extraordinary argument that under the Tenth Amendment, "[i]f there is any governmental power to mandate vaccinations at all, it belongs only to the States." Opp. at 20. If that were correct, the military would lack constitutional authority to require any soldier, sailor, or airman to be vaccinated against any disease, in contravention of 250 years of consistent practice. And the Supreme Court's decision in *Missouri v. Biden*, 142 S. Ct. 647 (2022)—which upheld a federal COVID-19 vaccination requirement for healthcare workers without a hint of Tenth Amendment hesitation—would be inexplicable.

E. The Challenged Vaccination Requirements Do Not Violate Due Process Or The Fourth Amendment (Counts VII-VIII).

Plaintiffs' due process and Fourth Amendment claims should be dismissed out of hand. As for due process, it has been settled for more than a century that there is no substantive due process right to refuse vaccination against a contagious, deadly disease. *See Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Plaintiffs evidently believe that other cases have undermined *Jacobson*, *see* Opp. at 21, but lower courts may not conclude that "more recent cases have, by implication, overruled an earlier precedent," *Agostini v. Felton*, 521 U.S. 203, 237 (1997). As

every court to consider the question has held, *Jacobson* controls and compels the conclusion that "there can't be a constitutional problem with vaccination against SARS-CoV-2." *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021); *see generally* Mot. at 21-23.

Plaintiffs' rational basis argument about requiring vaccines for individuals who were previously infected also fails as a matter of law since the CDC recommends all persons ages 5 and over receive the COVID-19 vaccine regardless of a history of SARS-CoV-2 infection. *See supra* II.C. And the argument that there cannot be a rational basis unless a vaccine is 100% effective is unsupported by over a century of precedents supporting vaccinations.

Nor does EO 14043 or the military vaccination requirement implicate the Fourth Amendment. Plaintiffs cite *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1207 (10th Cir. 2003), for the proposition that "breaches of bodily integrity for non-investigatory purposes may constitute forbidden searches," Opp. at 22, but that case simply rejected the contention that "the Fourth Amendment does not apply in the 'noncriminal' and 'noninvestigatory' context." *Dubbs*, 336 F.3d at 1205. More recently, the Supreme Court has made clear that an "invasion of privacy[] is not alone a search unless it is done *to obtain information*." *United States v. Jones*, 565 U.S. 400, 408 n.5 (2012) (emphasis added); *see also, e.g.*, *Gaytan v. New Mexico*, No. 19-778, 2021 WL 1634383, at *4 (D.N.M. Apr. 27, 2021); *United States v. Waligorski*, No. 21-602, 2022 WL 1102464, at *4 (D.N.M. Apr. 13, 2022). Nor has there been a seizure, for the reasons the Court has explained. *See* PI Order at 26. "[P]laintiffs do not cite a single Fourth Amendment case questioning, or even addressing, the power of the government as an employer (civilian or military), to require vaccinations." *Id.* at 25. This Court should not be the first.

F. Plaintiffs Fail To Plead A Free Exercise Or RFRA Claim (Counts IX–X).

The Court should dismiss the individual Plaintiffs' Free Exercise and RFRA claims. No facial challenge is available because both the military and civilian requirements contemplate religious exceptions in compliance with the law. *See Church*, 2021 WL 5179215, at *9; *see also Navy Seal 1 v. Biden*, --- F. Supp. 3d ----, 2021 WL 5448970, at *2 (M.D. Fla. Nov. 22, 2021) (EO 14043 "expressly require[s] religious exemption"); *Donovan*, 2021 WL 5979250, at *7 (rejecting facial Free Exercise challenge to EO 14043). To the extent that Plaintiffs are seriously contending that the challenged requirements are not neutral *because* they offer religious exceptions in compliance with the law, that argument refutes itself.

As for an as-applied challenge, no Plaintiff—civilian or military—alleges that he has been denied an exception. *See Robert v. Austin*, No. 21-2228, 2022 WL 103374, at *3 (D. Colo. Jan. 11, 2022) (dismissing case because plaintiff was not denied exemption), *appeal filed*, No. 22-1032 (10th Cir. Feb. 2, 2022). Plaintiffs who have not received a final decision on their religious accommodation request have no standing to bring a RFRA or First Amendment claim since they are currently exempt from the COVID-19 vaccination requirement. Plaintiffs wrongly claim otherwise by pointing to the Fifth Circuit's discussion of futility in the Navy. *See* Opp. at 24 (citing *Navy SEALs 1-26*, 27 F.4th at 347). But the Air Force's process is not futile. *Supra*, I.C. And the futility exception to the exhaustion doctrine cannot create Article III standing. Finally, if a Title 5 civilian did believe that he was wrongfully denied a religious exception, that injury would be caused by the adjutant general—not Defendants.

CONCLUSION

The Court should dismiss the complaint in its entirety.

Dated: May 26, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

On May 26, 2022, I electronically submitted this document to the clerk of court for the U.S. District Court for the Western District of Oklahoma using the electronic case filing system of the Court. I certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

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