United States of America
EQUAL EMPLOYMENT OPPORTUNITY COMISSION
Los Angeles District Office

Sarah Weimer,

Complainant,

v.

Frank Kendall,

Secretary, Department of Air Force

Agency.

EEOC NO. 550-2021-00060X
Agency Case No. 5P1C2000493CH20

COMPLAINANT'S RENEWED MOTION FOR CLASS CERTIFICATION

Date: June 21, 2022

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Complainant Weimer and other class agents—all of whom are d/Deaf[1] employees, applicants, or former employees of the United States Air Force ("Air Force" or the "Agency")—have brought this case to challenge centralized Air Force policies, practices, and failures to act that result in widespread discrimination, including denial of consistent or reliable access to American Sign Language[2] (ASL) interpreters, videophones,[3] Communication Access Realtime Translation[4] (CART) services, and other necessary accommodations.

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[1] For the purposes of this case and motion, **the terms "d/Deaf" or "deaf" should be read as synonymous with "deaf or serious difficulty hearing,"** the first category of disability listed in Part A of question 5 of the Equal Employment Opportunity Commission's Demographic Information on Applicants form, located at https://www.eeoc.gov/sites/default/files/migrated_files/federal/2017-approved-Applicant-Form.pdf.

The term d/Deaf is used in the d/Deaf community to encompass people who identify with Deaf culture and consider sign language to be their first and primary language (Deaf)—often, but not always, people who have been Deaf for their entire lives—as well as those who meet medical definitions of deafness but may not strongly identify with Deaf culture or communicate using sign language (deaf). As one source puts it: "We use the lowercase deaf when referring to the audiological condition of not hearing, and the uppercase Deaf when referring to a particular group of deaf people who share a language – American Sign Language (ASL) – and a culture." *See* https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions/.

[2] As the National Institute on Deafness and Other Communication Disorders (NIDCD) explains, American Sign Language, "is a language completely separate and distinct from English." It "is a complete, natural language that has the same linguistic properties as spoken languages, with grammar that differs from English. ASL is expressed by movements of the hands and face. It is the primary language of many North Americans who are deaf." *See* https://www.nidcd.nih.gov/health/american-sign-language.

[3] Videophones allow people who are d/Deaf to place telephone calls with the assistance of an ASL interpreter. Through a high-speed internet connection, d/Deaf individuals using a videophone, place calls to (or receive calls from) hearing people, who can use their standard phone. Calls are routed through an interpreting center, where an interpreter, fluent in ASL and spoken English (or other languages) appears on the device. The d/Deaf caller signs the message to the interpreter, and the interpreter relays the conversation between the two parties. As callers use their native language, communication is smooth and seamless. This same process can be completed using computers or mobile devices that are equipped with cameras, so long as proper software is installed and appropriate network access is provided.

[4] CART is "the instant translation of the spoken word into English text using a stenotype machine, notebook computer and realtime software." The text produced by the CART service can be displayed on a computer monitor, projected onto a screen, combined with a video presentation to appear as captions, or otherwise made available using other transmission and display systems. CART is widely used by d/Deaf people who are not fluent in American Sign Language.

In their time with the Air Force, Complainant Weimer and other class members have been forced to wait months or years for basic accommodations like videophones. Some, in fact, have never gotten videophones at all, meaning that unlike their nondisabled peers, they have no ability to make or receive a simple call, and are thus completely barred from engaging in this basic form of communication with their coworkers or anyone outside the agency. Complainants, class agents, and other d/Deaf Air Force employees have also been repeatedly denied ASL interpreters, CART services, and other necessary accommodations, or had the provision of those accommodations so delayed that they have been denied an equal opportunity to participate in new-employee orientations, trainings, presentations, interviews, and other opportunities for career development and advancement. Similarly, Complainant Weimer and other class members have routinely been asked to complete mandatory Air Force trainings, participate in webcasts, or watch videos that are not captioned, interpreted, or otherwise made accessible to them. Indeed, even the Air Force Equal Employment Opportunity (EEO) process itself—by which d/Deaf employees are supposed to seek redress from such discrimination—is inaccessible, and when class members have asked for ASL interpretation or other accommodations in the course of making their EEO claims, they have been refused.[5]

As the declarations of class agents establish, and as Agency documents and deposition testimony obtained during the pre-certification discovery process have now affirmed, the Air Force's denials of necessary accommodations and other discriminatory actions or inactions are not attributable to the discretionary decisions of isolated departments or supervisors, but to failings in systems, processes, and trainings that come **from the top down**, and that affect d/Deaf employees throughout the Air Force, regardless of the base at which they are stationed or the position in which they work. The record shows that employee after employee, at base after base, is subjected to the same broken systems, and consequently experiences the same discriminatory exclusion, the same denials of reasonable and necessary accommodations, and the same inexcusable delays.

[5] This is only a partial account of the discrimination that Complainants, class agents, and other d/Deaf Air Force employees have faced; further discriminatory Air Force policies and practices are described in detail below. *See* § III, below.

As this Court is well-aware, the Agency has attempted to frustrate the pre-certification discovery process at every turn: repeatedly disregarding court orders to produce relevant designees, documents, and information, and offering discovery responses that are plainly evasive and incomplete. However, despite the Agency's efforts to avoid producing responsive documents – and to prevent its head Disability Program Manager, Ms. Shock, from testifying – the pre-certification discovery process has shown beyond doubt that centralized Air Force policies, practices, and procedures serve to discriminate against its deaf employees, and that certification is appropriate in this case.

As detailed in §III(B), below, Agency documents and the testimony of Ms. Shock—procured as part of the pre-certification discovery process—show that 1) necessary accommodations are routinely delayed or denied for lack of funds, despite ample resources available to the Agency as a whole; 2) that necessary accommodations like ASL interpreters are rarely granted;[6] 3) that Agency training documents demand "appropriate notice" each time an employee with a disability requires a "repeat" accommodation—such as ASL interpretation—even when their need for that accommodation is known and has not changed; 4) that the Agency has failed to hire or contract for interpreters with high levels of security clearance; 5) that there are ongoing delays with getting videophones and captioned telephones working on base networks, 6) that training videos are consistently not captioned; and 7) that the Air Force has completely failed to adequately staff its disability program, to the detriment of every employee (including every d/Deaf employee) who needs accommodations. *See* § III(B), below.

Under Section 501 of the Rehabilitation Act, the Air Force must ensure that its d/Deaf employees and applicants have equal and nondiscriminatory access to the same opportunities for "hiring, advancement [. . .], employee compensation, job training, or other terms, conditions, and privileges of employment" that are available to their nondisabled peers. 29 C.F.R. § 1614.203(b) *see also* 29 U.S.C. § 791(f) In addition to this basic mandate of nondiscrimination, Congress has directed the federal

[6] As discussed in §III(B)(2), below, while the Agency indisputably has over 700 deaf civilian employees, its own tracking tools show that the accommodation of ASL interpretation has only been approved 152 times since 2018. Even if this accommodation record is somewhat incomplete, it is also in accord with Complainants' own experiences, and the Agency's repeated failures to provide them with ASL interpretation or CART services.

government to be a "model employer" of people with disabilities.[7] 29 C.F.R. § 1614.203(c) "Inherent in this duty is an obligation to break down artificial barriers which preclude individuals with disabilities from participating on an equal footing in the work force." *Hae T., Complainant*, EEOC DOC 2019003385, 2020 WL 6134360, at *4 (Sept. 23, 2020). The mandate to be a model employer not only requires nondiscrimination, but also imposes an affirmative legal duty to take special efforts to recruit, hire, retain, and advance employees with disabilities. The Air Force has violated this law both by failing to take adequate affirmative efforts to ensure equal opportunity, and by systematically discriminating against its d/Deaf employees.

As discussed in more detail below, Complainant Weimer and other class agents have satisfied every element of 29 C.F.R. § 1614.204(a)(2). They thus respectfully request that this matter be allowed to proceed on a class basis, and that they be permitted to act on behalf of a class of "**all d/Deaf[8] civilians who are currently employed by the United States Air Force, as well as all d/Deaf civilians who either applied for civilian employment with the Air Force or were so employed at any time between January 1, 2018 and the present**."

II. Law Relevant to Class Claims

Under the Rehabilitation Act of 1973 (the "Act") and its implementing regulations, Federal agencies must "not discriminate on the basis of disability in regard to the hiring, advancement or discharge of employees, employee compensation, job training, or other terms, conditions, and privileges

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[7] With this affirmative obligation in mind, the Commission issued Management Directive 715 (MD-715) in October 2003, requiring federal agencies to submit for review their "affirmative action programs under Section 501 of the Rehabilitation Act." MD-715 required federal agencies to "maintain a system that tracks applicant flow data, which identifies applicants by…disability status and the disposition of all applications," and "[e]stablish procedures to prevent all forms of discrimination, including…failure to provide reasonable accommodation to qualified individuals with disabilities."

[8] Again, for the purposes of this case and class definition, the **terms "d/Deaf" or "deaf" should be read as synonymous with "deaf or serious difficulty hearing,"** the first category of disability listed in Part A of question 5 of the Equal Employment Opportunity Commission's Demographic Information on Applicants form, located at https://www.eeoc.gov/sites/default/files/migrated_files/federal/2017-approved-Applicant-Form.pdf.

Similarly, for the purposes of this motion and class definition, the word "employee" should be read to include all members of the proposed class, including current d/Deaf civilian employees, d/Deaf applicants who have not been properly accommodated, and former d/Deaf civilian employees who were constructively terminated because of a lack of reasonable and necessary accommodations.

of employment." 29 C.F.R. § 1614.203(b); *see also* 29 U.S.C. § 791(f). In 1978, Congress amended the Rehabilitation Act to explicitly provide a private right of action under § 501 that allows federal employees to pursue claims of discrimination. *See Prewitt v. United States Postal Serv*., 662 F.2d 292 at 302; *Shirley v. Devine*, 670 F.2d 1188, 1194-96 (D.C. Cir. 1982)

Congress passed the Rehabilitation Act with the express purpose of "promot(ing) and expand(ing) employment opportunities in the public and private sectors for handicapped individuals." *Prewitt*, 662 F.2d 292, 301 (quoting 29 U.S.C § 710(8)). In passing the Act, Congress specifically intended that the Federal Government would be a "**model employer**" of people with disabilities; to this end, the Act imposes considerable affirmative obligations on federal employers, beyond the mandate not to discriminate against people with disabilities.[9] 29 C.F.R. § 1614.203(c) (emphasis added); *see also Prewitt,* 662 F.2d at 301-306 and *Shirley,* 670 F.2d. at 1193-97 (discussing legislative history); *Ignacio v. United States Postal Serv.*, EEOC Appeal No. 03840005 (September 4, 1984) ("Congress expected and fully intended that the [f]ederal government was to be a model employer of the handicapped, taking affirmative action to hire and promote the disabled"). To this end, the Act requires that federal agency employers develop an "affirmative action program plan for the hiring, placement and advancement of handicapped individuals." 29 U.S.C. 794(b); *see also* 29 C.F.R. § 1614.203(d) (detailing various requirements of "affirmative action plan" for the employment of people with disabilities).

The Rehabilitation Act makes clear that "[t]he standards used to determine whether Section 501 has been violated in a complaint alleging employment discrimination under this part shall be the standards applied under the [Americans with Disabilities Act, also known as the] ADA." [10] 29 C.F.R. §

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[9] In its first case addressing the Rehabilitation Act, the Supreme Court recognized that the affirmative action obligation imposes additional duties beyond mere non-discrimination. *Southeastern Community College v. Davis,* 442 U.S. 397, 410 (1979) ("The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome disabilities caused by handicaps."). That obligation to make affirmative efforts extends to all aspects of employment, including hiring, training, and promotion. *See Prewitt*, 662 F.2d at 306 (§501 "impose(s) a duty upon federal agencies to structure their procedures and programs so as to ensure that handicapped individuals are afforded equal opportunity in both job assignment and promotion.")

[10] Congress's incorporation of ADA standards for the purposes of determining whether §501 has been violated in a complaint alleging nonaffirmative action employment discrimination does not

1614.203(b); 29 U.S.C. § 791(f); see also *Velva B., Class Agent,* EEOC DOC 0720160006, 2017 WL 4466898, at *11 (Sept. 25, 2017).

Chief among the mandates of both the Americans with Disabilities Act (ADA) and the Rehabilitation Act is the requirement to make "reasonable accommodations to the known physical or mental limitations" of applicants and employees, so that they have the same access to hiring, advancement, compensation, job training, and other terms, conditions, and privileges of employment as their nondisabled peers. *See* 42 U.S.C. § 12112(b)(5)(A); *see also* 29 C.F.R. § 1614.203(b). "[O]nce an employee requests an accommodation ..., the employer must engage in an interactive process with the employee to determine the appropriate reasonable accommodation." *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002). Complying with this interactive process "requires: (1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee's request; and (3) offering an accommodation that is reasonable and effective." *Id*.

Further, the Commission has held that excessive delays in providing necessary reasonable accommodation are just as discriminatory as denials. *See, e.g., Shealey v. E.E.O.C*, 111 LRP 30774 (April 18, 2011) (delay of nine months to provide reasonable accommodations was an unnecessary delay in violation of the Rehabilitation Act, where procedures required a request for reasonable accommodation decision within 20 business days). Federal courts are in accord, and have consistently held that "[a]n unreasonable delay in providing an accommodation for an employee's known disability can amount to a failure to accommodate his disability that violates the Rehabilitation Act." *McCray v. Wilkie*, 966 F.3d 616, 621 (7th Cir. 2020); *see also Jay v. Internet Wagner*, 233 F.3d 1014, 1017 (7th Cir. 2000) ("unreasonable delay in providing an accommodation can provide evidence of discrimination"); *Valle-Arce v. Puerto Rico Ports Auth*., 651 F.3d 190, 200-01 (1st Cir. 2011) (same); *Mogenhan v. Napolitano*, 613 F.3d 1162, 1168 (D.C. Cir. 2010) (same); *Selenke v. Med.*

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diminish the agency's affirmative obligations. 29 C.F.R. 1630.1 ("Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973.").

Imaging of Colo., 248 F.3d 1249, 1262 (10th Cir. 2001) (same).

Under regulations implementing § 501 of the Act, federal agencies must also "take specific steps to ensure that requests for reasonable accommodation are not denied for reasons of cost, and that individuals with disabilities are not excluded from employment due to the anticipated cost of a reasonable accommodation, if the resources available to the agency as a whole, excluding those designated by statute for a specific purpose that does not include reasonable accommodation, would enable it to provide an effective reasonable accommodation without undue hardship." 29 C.F.R. § 1614.203(d)(3)(ii) (emphasis added). In addition, federal agencies must "[e]nsure that anyone who is authorized to grant or deny requests for reasonable accommodation or to make hiring decisions is aware that [. . .] all resources available to the agency as a whole [. . .] are considered when determining whether a denial of reasonable accommodation based on cost is lawful." 29 C.F.R. § 1614.203(d)(3)(ii)(A).

In defining "reasonable accommodation," Congress expressly included "the provision of qualified readers or interpreters" as an illustration of proper accommodations in a workplace setting. 42 U.S.C. § 12111(9)(B). Further, in considering the claims of a deaf employee whose employer denied repeated accommodation requests for ASL interpreters during routine meetings, instead only providing a coworker to take notes in written English, the Ninth Circuit found "a genuine issue of material fact regarding whether these modifications, viewed as a whole, would allow a deaf employee, even one who was fluent in written English, to enjoy the benefits and privileges of attending and participating in the departmental meetings [especially where the employee only has] limited proficiency in written English." *U.S. E.E.O.C. v. UPS Supply Chain Sols*., 620 F.3d 1103, 1112 (9th Cir. 2010) (noting that agendas, contemporaneous notes, and written summaries alone did not necessarily enable d/Deaf employees to enjoy the same benefits and privileges of meeting participation as their nondisabled peers).

In addition to requiring reasonable accommodations, § 501 of the Act and the ADA prohibit federal employers from "denying employment opportunities to a job applicant or employee," if such a denial is based on their need for accommodation—as happens when qualified ASL interpreters or

similar necessary accommodations are not provided for applicant interviews, employee trainings, and other work-related opportunities. *See* 42 U.S.C. § 12112(b)(5)(B). Similarly, under both § 501 and the ADA, it is discriminatory to fail "to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant." *See* 42 U.S.C. § 12112(b)(7). When a federal entity fails to provide ASL interpreters and similar accommodations to d/Deaf employees and applicants who need them, this is precisely the sort of discrimination that occurs.

III. Statement of Facts.[11]

A. Centralized Air Force policies and practices serve to discriminate against the Agency's d/Deaf employees and applicants.

1. The Air Force has consistently failed to ensure that the resources of the Agency as a whole are considered, before necessary accommodations are denied or delayed on account of cost.

Under 29 C.F.R. § 1614.203(d)(3)(ii), the Air Force must ensure that "anyone who is authorized to grant or deny requests for reasonable accommodation or to make hiring decisions is aware that [. . . .] "all resources available to the agency as a whole" . . . must be "considered when determining whether a denial of reasonable accommodation based on cost is lawful." 29 C.F.R. § 1614.203(d)(3)(ii). The record in this case makes clear that the Air Force has failed to abide by this basic obligation.

As discussed in §III(B)(1), below, Agency documents and the testimony of head Disability

[11] **Please note** that citations to the declarations of Wendy Musell, Sarah Weimer, Hugo Perez, Sheila Burg, Mika Hongyu-Perez, Matthew Wambold, and Rachel McAnallen throughout this motion refer to the versions of those documents filed in support of Complainants' original class certification motion, on February 11, 2021. Similarly, references to the Supplemental Declarations of Mr. Perez and Ms. Weimer are indicated by the dates they were filed.

These previously-filed declarations and their exhibits are incorporated herein by reference. **Complainants have not re-filed these documents or the exhibits thereto, but can do so if the Court prefers.** Where citation is made to a declaration or exhibit thereto that was not filed previously, it is included with this renewed motion.

Program Manager Ms. Shock confirm the Air Force has failed to abide by this clear, statutory requirement, that the byzantine process for reimbursement of reasonable accommodations that the Air Force created in 2016 has been an unmitigated failure, and that accommodations are still routinely denied for lack of unit-level funds. *See* § III(B)(1), below.

This information obtained during the pre-certification discovery process comports with Claimants' own experiences. For example, when Class Agent Wambold (whose first language is ASL, and who has significant difficulty communicating in written English) requested accommodations in the Air Force EEO process, Mr. Randy White, Director of the Equal Opportunity Office at Offutt Air Force Base, informed Mr. Wambold that "he needed to work with his organization to secure the services of [an ASL interpreter] or bring his own **as the EO Office does not have that sort of funding nor the responsibility**." *See* 20.11.13 Complaint File ("Record of Investigation")[12] at 41 (emphasis added). Indeed, rather than provide Mr. Wambold with this reasonable and necessary accommodation, Mr. White admits that "**many times over the years**, he personally explained to Mr. WAMBOLD the Intake and other documents could be taken home and completed," and that Mr. Wambold could "**have a friend, family member or other individual to assist him** and return the signed and dated documents for Pre-Complaint or Formal Complaint processing." Record of Investigation at 42 (emphasis added)

Class Agent Sheila Burg has similarly been denied necessary accommodations due to an alleged lack of funding. For example, in late September of 2017 Ms. Burg requested CART services for an upcoming Air Force workshop. After a lengthy email exchange which involved Kendra Duckworth Shock, the Disability Program Manager for the central Air Force Equal Opportunity Office, she was told that this accommodation would be denied because of a lack of unit level funds. *See* Declaration of Sean Betouliere in Support of Complainants' Renewed Motion for Certification ("Betouliere Decl.") Ex. C (Burg Record of Investigation at Addendum) at 48-58. Specifically, on October 16, 2017, Kim Vu wrote to Ms. Burg: "With much regret, I'm unable to obtain a CART interpreter due to the restrictions on my Micro Purchase Supply GPC Card. I also want you to know I did all I could." *Id*. at 49; *see also*

[12] Unless otherwise indicated, **all subsequent cites to the Record of Investigation refer to the 20.11.13 Complaint File uploaded by the Air Force to the EEOC docket of this case**.

Betouliere Decl. Ex. B at 299-375 (Air Force GPC Policy). Ultimately, Ms. Burg was forced to rely on coworkers to help fill in the pieces of the training that she could not understand, because this basic and necessary accommodation was not provided. *See id*.

Class Agent Hugo Perez has similarly repeatedly been told that there were "no funds available to be allocated to the accommodations I requested"—without any indication that all resources available to the Air Force as a whole were considered, as the law requires.[13] *See D*eclaration of Hugo Perez, filed February 11, 2021 ("Perez Decl.") at ¶ 16.

2. The Air Force has failed and refused to provide a common fund for accommodations, such that accommodations are frequently delayed or denied, and a d/Deaf employee's ability to get an interpreter or other necessary accommodation rises or falls on the finances of their particular unit.

In addition to failing to ensure that anyone who is authorized to grant or deny requests for reasonable accommodation or to make hiring decisions is aware that "all resources available to the agency as a whole" must be considered, the Air Force has failed and refused to provide a common fund for accommodations, such that a d/Deaf employee's ability to get an interpreter or other necessary accommodation rises or falls on the finances of their particular unit or base. *See* III(A)(1), above and III(B)(1) below.

During her deposition, Ms. Shock spoke at length about her efforts to inform Agency leadership that its process for funding reasonable accommodations was broken beyond repair, and to advocate for a central fund that would prevent accommodations from being delayed or denied for reasons of cost—an absurd outcome, for an Agency that routinely spends only around $1 million a year (or roughly .000005% of its over $190 billion budget) on accommodations. *See* § III(B)(1), below.

Over the years, d/Deaf employees at the Air Force have also repeatedly raised the need to reform the way accommodations are funded, so as to avoid the frequent delays and denials associated with the

[13] Even when accommodations are ultimately granted, the cost of necessary accommodations is routinely taken out of unit- or base-level funds. *See* ROI at 40 (noting base-level costs to install and maintain network connection for videophones used by Ms. Weimer and other d/Deaf employees at Nellis Air Force base). As Ms. Weimer's supervisor Col. Luker has noted, the process of using such funds for accommodations can result in "delays due to lack of funding." *See* ROI at 296; *see also* § III(B)(1), below (detailing systemic delays and denials, due to issues with Agency process for funding accommodations).

current process. McAnallen Decl. ¶ 12. However, despite advocating directly with Kendra Duckworth Shock at the Air Force's central Equal Opportunity office, there has been no change in the byzantine and inefficient way by which ASL interpreters, CART translators, and other necessary accommodations are funded and procured. McAnallen Decl. ¶ 15. As a result, necessary accommodations are still routinely delayed or denied because of a lack of unit-level funding, or the lengthy process required to get it. *See* § III(A)(1), above; § III(B)(1), below.

Indeed, despite an apparent 2016 "initiative" to "Reduce Bureaucratic Obstacles to Providing Reasonable Accommodation for Individuals with Disabilities" that was intended to "streamline funding for disability accommodations to reduce" what the Air Force itself described as "consistent bureaucratic delays" (Betouliere Decl. Ex. B at 158) complainants, class agents, and other d/Deaf employees continue to have their accommodations denied or delayed because of the lack of a sufficient, streamlined source and process for funding them. *See* III(A)(1), above and III(B)(1), below.

Furthermore, when supervisors have attempted to use certain base- or unit- level funds to cover the cost of accommodating their d/Deaf employees (because of the lack of a central source from which funds could be drawn), they were actually *disciplined* for doing so. *See* McAnallen Decl. at ¶¶ 10, 13.

3. The Air Force has failed to ensure that d/Deaf employees and applicants have consistent, reliable access to American Sign Language interpreter services and other necessary accommodations, and in many instances has provided no access at all.

The Air Force has failed to ensure that d/Deaf employees and applicants have consistent, reliable access to ASL interpreter services and other necessary accommodations, and in many instances has provided no access at all.

As discussed in § III(B)(2), below, Agency records indicate that the Air Force has only approved ASL interpretation 152 times since 2018, despite having over 700 employees who identify as being deaf or having serious difficulty hearing as of 2020. *See* § III(B)(2), below. While these records of accommodation may be somewhat incomplete, Ms. Shock confirmed she did not have other data regarding approved accommodations for deaf employees. *See id*; *see also* Betouliere Decl., Exhibit D. at 198:3-12. Moreover, such an extremely low rate of approval is in accord with Complainants' own

experiences, and the Agency's repeated failures to provide them with ASL interpretation or CART services.

For example, the Air Force has repeatedly refused or failed to provide Complainant Weimer with ASL interpreters, CART and similar accommodations. *See* February 11, 2021 Declaration of Sarah Weimer in Support of Class Certification ("Weimer Decl.") at ¶ 5. She was repeatedly denied accommodations for Judge Advocate symposiums, including for a February 2020 symposium at which—ironically—she was slated make a presentation about the Agency's Equal Opportunity obligations. *Id.* at ¶¶ 13-14. As a consequence of the Air Force's utter failure to accommodate her, Ms. Weimer was effectively excluded from the symposium, and a co-worker gave Ms. Weimer's prepared presentation in her stead. *Id.* at ¶ 14. In October 2020, she was once again not provided for accommodations for a Judge Advocate symposium, and thus was once again excluded from this valuable opportunity for training and career development. *Id*. at ¶ 14. Shockingly, **by the Air Force's own admission, Ms. Weimer only received ASL interpreter services three times** between the start of her employment in January 2018, and February of 2021. *See* Record of Investigation at 284 ("We have provided an interpreter on 3 occasions: an office off-site in May 19, DJAG visit in Nov 19, and the off-site in Jan 20."); Supplemental Declaration of Sarah Weimer, filed November 1, 2021, (hereinafter "Weimer Supp. Decl.") at ¶ 9

After returning to in-person meetings in July 2021 Ms. Weimer was effectively excluded from these recurring team meetings because of the Agency's failure to provide her ASL interpreters, despite her repeated requests for this accommodation. *Id*. ¶¶ 12-14 (noting that this "demonstrates that the Air Force's systemic failure to ensure that d/Deaf and hard of hearing employees and applicants have consistent, reliable access to ASL interpreters.").

Class agents and other class members have had similar issues getting consistent, reliable, or any access to interpreters and other basic accommodations. For example, despite knowing that class agent Hugo Perez was Deaf and needed an ASL interpreter for his new-employee orientation, and despite having **months** to procure one, the Air Force only gave him an interpreter for half of his orientation,

meaning that he "had no accommodations for the rest of [his] orientation and was therefore, unable to access most of the information provided." Perez Decl. ¶ 6. The Air Force also repeatedly failed to provide him with requested interpreters for his first six months on the job—a crucial adjustment period for any new employee—thus depriving him of the opportunity to communicate with co-workers, learn, and progress. *Id.* at ¶ 7. This pattern of denying Mr. Perez's necessary accommodations has continued throughout his employment, and through to the present. *Id.* at ¶¶ 10, 15, 16, 19. Indeed, Mr. Perez was informed in October 2020 that a contract to provide interpreter services had expired, and that the Agency would not provide to him accommodations of an interpreter until a later date when a new contract was secured. Perez Decl. ¶¶ 21-23. As of this writing, such a contract has **still** not been established – and indeed, **Mr. Perez has been made to search for and obtain quotes from possible ASL and Video Remote Interpreting providers himself**, before anyone at the Agency will finalize a contract and provide him with the accommodations he needs. June 21, 2022 Second Supplemental Declaration of Hugo Perez ("Perez Second Supp. Decl.") at ¶ 17.

By the Air Force's own admission, Mr. Perez has been denied "the same, equal access to training, work or advancement opportunities since he was hearing impaired." *See* Perez Decl., Ex. D (Kimberlei Calhoun Decl.). As another example, Mr. Perez was explicitly told via email that the Air Force would not provide ASL interpreters for a March 31, 2021 mandatory "Extremism Stand Down Training," which was meant to include open dialogue and conversation with colleagues and base leaders. *See* April 28, 2021 Supplemental Declaration of Hugo Perez (Perez Supp. Decl.) at ¶¶ 4-7. Mr. Perez's supervisor himself acknowledged that this was not ideal but "we are stuck having to do it this way" because his base still had no active contract to bring in outside ASL interpreters, despite his own supervisor advocating for this for many months. *Id*. ¶¶ 7-8. As a result of the Agency's inability to accommodate him effectively, Mr. Perez instead revifcewed a 71-page booklet, rather than effectively participate in an interactive program on a topic he was particularly interested in communicating about. *Id*. ¶ 11-12.

Class agent Sheila Burg is not fluent in ASL and thus requires CART services rather than ASL

interpretation, but again, the Air Force has failed to consistently provide her with CART and other necessary accommodations. February 11, 2021 Declaration of Sheila Burg ("Burg Decl.") ¶¶ 9, 10, 11. Indeed, **the Air Force even failed to accommodate Ms. Burg during the EEO process that she initiated about the Agency's persistent failure to accommodate her**.[14] Burg Decl. ¶ 38. *See also* Betouliere Decl. Ex. B at 983-84 (email from Diversity Management Operations Center Investigations and Resolutions Directorate Investigator Leslie M. Walter to Ms. Burg indicating that her interview options were by telephone with Federal Relay, the cost for which "would be absorbed by" the EEO office, or by written interrogatory, which "might be the easiest way to go.").

While Ms. Burg has received many promotions and accolades from the Air Force during her three-decade career with the Agency, this consistent denial of necessary reasonable accommodations over the past many years has negatively impacted her ability to do her job, caused her extreme stress, and taken a severe toll on her mental health and general well-being. *Id.* at ¶¶ 6, 26, 38; *see also* Betouliere Decl. Ex. B at 968-969 (declaration by Air Force Personal Property Activity Headquarters Operations Chief Rodney Phillips that he "witnessed Ms. Burg attempting to perform her duties without accommodations and afterwards expressing no support offered by Agency to assist;" that Ms. Burg "missed several projected, planned, and ad hoc meetings due to her inability to participate due to lack of accommodations;" and he "felt Ms. Burg was almost apologetic for not being able to participate at the level she could due to lack of medical accommodations.")

In his 18 years as an Air Force employee, class agent Wambold's needs for reasonable accommodation were ignored again and again: he was **never** provided with a videophone, despite requesting one in 2006, and his requests for ASL interpretation and other basic accommodations were habitually refused, **including during the Air Force EEO process itself**. Wambold Decl. at ¶ 5-7, 10-12, 13-14; *see also* Record of Investigation at 41 (no interpreter for EEO process). Despite repeatedly requesting interpreters for trainings and other work-related events, he was only provided with "an

[14] This failure to accommodate d/Deaf employees during their EEO processes is a common and pervasive problem at the Air Force, as Mr. Wambold had the same experience with a different EEO counselor at a different base. *See* ROI at 41 (no interpreter for EEO process).

interpreter **twice** from 2014 to 2019." *Id.* at ¶ 9. Ultimately, Mr. Wambold was constructively terminated from his position, as a result of the Air Force's utter failure to accommodate him. *Id*. at 16.

The Air Force also repeatedly failed to accommodate class declarant Rachel McAnallen during her five years at the Agency, and this discrimination occurred in a variety of positions, across a variety of bases. *See* February 11, 2021 Declaration of Rachel McAnallen ("McAnallen Decl.") at ¶¶ 4-9, 16-17. Ms. McAnallen too was ultimately constructively terminated as a result, and made it a point to note in her exit paperwork that the Air Force's failure to accommodate her was one of the main reasons she was leaving the position. McAnallen Decl. at ¶¶ 18

The Air Force's failure to accommodate people who are d/Deaf extends to the application process as well: despite over a month of advance notice and the knowledge that class agent Mika Hongyu-Perez was Deaf and needed an ASL interpreter for her job interview, the Air Force failed to provide one. *See* February 11, 2021 Declaration of Mika Hongyu-Perez, ("Hongyu-Perez Decl.") ¶¶ 9-10. The Agency has also withdrawn an internship offer from Ms. Hongyu-Perez rather than provide her with the accommodation of an interpreter, and has provided her with an interpreter for only one half day out of a three-day new employee orientation. *Id.* at ¶¶ 11-12, 13-15.

Nor was the Air Force's failure to provide ASL Interpretation for applicant Ms. Hongyu-Perez an isolated occurrence. During Ms. Shock's deposition, she discussed yet another incident of the Air Force denying or failing to provide ASL interpretation during the application process, despite being well-aware of the applicants' disability and disability-related need. Betouliere Decl., Exhibit D, Transcript excerpts from the June 1, 2022 and June 2, 2022 depositions of head Air Force Disability Program Manager Kendra Shock ("Shock Dep.") at 30:17-32:4 (discussing case of Mr. Brown); *id*. at 38:20 – 40:6 (Agency aware of Mr. Brown's needs, but failed to locate an interpreter); *id.* at 40:18 – 42:22 (discussing July 2019 EEOC finding of discriminatory failure to provide reasonable accommodations and violation of the Rehabilitation Act as it pertained to Mr. Brown; order that Agency be trained in providing reasonable accommodations); *id*. at 43:18-44:6 (Agency ordered to provide two full-time interpreters for Mr. Brown).

Finally, in its June 1, 2022 Limited Stay Order, the Court took judicial notice of what may be yet another example of the Air Force's failure to accommodate deaf employees:[15] "I note that the Commission recently issued a decision in *Alvaro P. v. Dep't of the Air Force,* EEOC Appeal No. 2021004984 (Mar. 14, 2022), which was an appeal of the same case. I take administrative notice of the administrative judge's further findings that the Agency failed to accommodate the complainant and otherwise discriminated against the complainant based on his disability (deaf). Further, the administrative judge found that the individual assigned to engage the complainant in the reasonable accommodation process had no relevant experience or training. In reviewing the administrative judge's decision, which was fully implemented by the Agency, I recognize similarities between the allegations raised by the Class Agent." June 1, 2022 Order at fn. 1.

This, of course, is only a partial account of the myriad ways in which the Air Force fails to provide its d/Deaf employees and applicants with consistent and reliable access to the accommodations they need.

Moreover, even the limited workarounds that many deaf employees had relied on to make up for the Air Force's failures to accommodate are now no longer available. For years, Class Agent Weimer was forced to rely on the Federal Relay Service to make up for the Agency's lack of any central process, fund, or contract for providing ASL interpreters or CART services. February 3, 2022 Second Supplemental Declaration of Sarah Weimer ("Weimer Second Supp. Decl.") at ¶¶ 12-15. When Ms. Weimer learned that the Federal Government planned to terminate this service in February 2022, she immediately contacted Ms. Shock because she was concerned that the Air Force would not establish an appropriate replacement in time. *Id*.¶ 15. Indeed, as class Agent Hugo Perez confirms, the Air Force has failed to establish its own alternative to the Federal Relay Service, despite him also making this request to multiple supervisors. *See* June 21, 2022 Second Supplemental Declaration of Hugo Perez ("Perez

[15] In its order, the Court suggested that this case involved Mr. Brown, the same individual named in the "Notice of Intent to Issue a Decision" filed by the Agency on May 20, 2022. Order at fn. 1. However, because the individual identified in the caption for this case is not Mr. Brown and Complainants do not have access to the filings, they are unsure of whether it in fact concerns the same employee referenced above, or yet another employee that the Air Force failed to accommodate.

Second Supp. Decl.") ¶ 15. Because the stopgap services provided by Federal Relay are now no longer available – and the Air Force has consistently failed and refused to provide ASL, CART, or Video Remote Interpreting itself – Mr. Perez now struggles even more to communicate at work, and to perform his job without these basic and necessary reasonable accommodations. *Id*. ¶¶ 15-18.

4. The Air Force has a centralized discriminatory policy or practice that puts the onus of requesting necessary accommodations on d/Deaf employees every time, even when need for that accommodation is known to the Agency, and has not changed.

As discussed in § III(B)(3), below, Agency training documents produced during pre-certification discovery plainly state that employees must provide supervisors with "appropriate notice" each and every time they need repeat accommodations such as sign language interpretation, even where their need for that accommodation is or should be known, and has not changed. *See* § III(B)(3).

This comports with Complainants' experiences. For example, Ms. Weimer has been required to provide the same information regarding her disability and need for reasonable accommodations over and over, despite the fact that her disability is permanent and her need for accommodations does not change. Weimer Decl. ¶ 5. She has had to request the same reasonable accommodations for trainings and work meetings that are scheduled on repeated basis. Weimer Decl. ¶ ¶ 5, 8, 13-15, 16-17, 41-49; *see also* Record of Investigation at 128-29 ("I see an email where you say that [. . .] the symposium is an example of something for which you would need an accommodation, but I do not see a request for an accommodation - to whom was that request sent?" Ms. Weimer responded, "I did request accommodations for future events such as that symposium in the email – i[t] wasn't rhetorical example - and brought it up in our meeting."); Record of Investigation at 131, 278.

The Agency has admitted in writing that Ms. Weimer is responsible for requesting CART services for each staff meeting (that occurs weekly), and if she does not do so, no accommodations of CART services will be provided. Record of Investigation at 43, 111 (email from Col. Debra Luker acknowledging, at top of page, that Col. Luker needed to authorize a court reporter to caption a meeting for Ms. Weimer during the one instance that Ms. Weimer forgot to request one—thus affirming that Ms. Weimer is responsible for requesting her own CART services for **each** staff meeting, and that if she

forgets, there is no CART). As noted above, Ms. Weimer has almost never been provided ASL interpreters despite her numerous requests, and when she requests an ASL interpreter she is routinely still questioned as to why she needs this accommodation, despite the Air Force being on notice that she is Deaf and communicates using ASL. Weimer Supp. Decl. ¶ 6.

Similarly, accommodations for a DOD Security Certification exam were not offered until Mr. Wambold's sixth attempt, despite the Agency knowing of his disability and need for accommodations—a need that did not change. *See* Record of Investigation at 43, 999; Wambold Decl. at ¶¶ 9 (not provided accommodations for Cybersecurity Liaison training), 11 (no accommodations for Kiosk Training), 12 (no accommodations for security plus certificate training). Ms. Burg was likewise required to provide the same information regarding her disability and need for accommodations over and over during the past 5 years, with little help or guidance from the Agency. Burg Decl. at ¶¶ 10, 15, 29, 34. For example, when Ms. Burg asked for assistance obtaining CART services for a 3-day teleconference in May 2020, after having consistently sought CART services since 2015, the Air Force's central Disability Program Manager Ms. Shock only responded with a list of local CART providers, and left the burden and responsibility of obtaining the accommodation on Ms. Burg. Betouliere Decl., Exhibit B at 293-296. Ms. Burg even tried to ask whose responsibility it was to assist her, but the only response she received was that "No one person is responsible for implementing reasonable accommodations." *Id*. at 293-4; Burg Decl. at ¶ 34. *See also* Perez Decl. ¶ 7 ("For over six (6) months from the time I was hired, I was forced to chase people to get an interpreter.").

5. The Air Force has failed to implement a streamlined and standardized process for providing videophones and other necessary devices, connecting them to base networks, and ensuring their actual functioning, such that class members wait for years to have and be able to use these accommodations

Because of the Air Force's lack of standardized process, class members are forced to wait for years to receive or be able to use assistive communications devices. Indeed, during her deposition, Ms. Shock confirmed that there are consistent delays with getting videophones and captioned telephones working on base networks, and that these delays continue into the present. *See* § III(B)(4), below.

Complainants have experienced exactly such delays, which in many cases are truly egregious.

For example, Mr. Wambold requested a videophone when he began employment at Offutt AFB in 2006, but had still not received one by the time of his constructive discharge in 2020. His supervisor Heidi Snyder suggested getting an iPad for him to use to communicate, but was unable to procure one because of "government restrictions." Record of Investigation at 1020. Similarly, class members Mr. Arthur Garcia and Mr. Rex Nelson worked as Wood Workers at the 99th Logistics Readiness Squadron at Nellis AFB for **ten years** without receiving videophones, even though Mr. Garcia requested one when he first began the job. Record of Investigation at 39.

In addition, after waiting long periods of time to obtain hardware or equipment that they needed as a reasonable accommodation, many of the complainants have had to wait for many additional months (or longer) for their equipment to be installed and connected as needed in order to function. The Air Force's failure to implement a standardized process to connect these essential devices, along with its failure to have any trained or designated staff to coordinate such processes, has created a classwide barrier for d/Deaf employees to receiving the accommodations they need. *See* § III(B)(4), below.

Class Agent Weimer brought her videophone with her from her job at the Army. Weimer Decl. at ¶¶ 7-8. Although she had not experienced any difficulty or delay in getting the phone connected to the network at Joint Base Elmendorf–Richardson, it took 11 months for her to connect the phone to the Nellis AFB network. *Id*. During that time, she was forced to take it upon herself to find a fix, and contacted multiple people, units, and bases. *Id*. Eventually, a separate internet line was installed in her office to connect to her video phone. *Id.*; s*ee also* Record of Investigation at 36 (Kathy Wiltse stating that attempts made to install video phones for d/Deaf Nellis AFB employees in warehouse took **"several years"** because of network and firewall issues; installation of Class Agent Weimer's videophone took **at least 8 months**); Record of Investigation at 37 (Colonel Luker stating that "Firewalls often a problem for some of the software or devices."); Record of Investigation at 358-62 (correspondence regarding connecting Ms. Weimer's videophone).

Similarly, after Ms. Burg received the captioned telephone she requested at the Pentagon, it took her over a year of attempting to coordinate between the Communications Squadron and IT to get the

phone working. Burg Decl. ¶ 17; *see also* Betouliere decl. Ex. B at 464 (Ms. Mahoney stated in August 2019, "We have been working on the CAPTEL request…CAPTEC was very supportive, however, we are still working the many challenges in getting the CAPTEL phone connected. Five months in for reconsideration…Ms. Burg has been more than patient.").

The same failure of process for installation and original connection of assistive equipment extends to its continued maintenance and troubleshooting. Again, there is no centralized and streamlined process or designated staff to assist class members in resolving technical problems with their equipment. This results in class members effectively and functionally having no accommodations for long stretches of time, even if they ultimately receive the necessary equipment after a long delay.

Mr. Perez, who received his videophone at Fort Sam Houston in May 2020 after requesting it since November 2018, was *still* not able to use his phone consistently as of February 2021. Perez Decl. ¶ 12. Between May 2020 and at least February of 2021, his videophone only worked for a day or two at a time. *Id.* Then it would display an error message like "waiting for server issue." *Id.* Ex. A. Mr. Perez and Mr. Morgan submitted numerous tickets to the Network Enterprise Center (NetOps), but each ticket would be treated as a separate issue and closed out when the phone worked temporarily. *Id.* For a time, Mr. Perez would daily restart the phone, restart the networking setting, log in to the server with username and password, and wait for the connection. Even when it seemed to connect, the screen was often black and Mr. Perez was unable to see the interpreters. *Id.* Ms. Burg's captioned telephone also stopped working at one point and there was no standardized process she could use to ensure that it would be fixed within a reasonable time period. Burg Decl. ¶ 17.

6. The Air Force has failed to "whitelist" appropriate assistive technology, and failed to provide workable alternative accommodations (such as interpreters with security clearance) for d/Deaf employees working in secure areas.

The Air Force's Network Enterprise Center is responsible for providing approval for software, including assistive technology applications, but lacks policies to ensure that software that class members require as reasonable accommodations is approved.

Mr. Perez requested around January 2019 to be able to install video relay service software on his

government computer, including Convo Communications, Sorensen video relay service, and ZVRS. He was never permitted to download the software. Perez Decl. ¶ 14; *see also* Record of Investigation at 1320, 1470 (discussing issue with software not being allowed on network, failure to fix).

Even some software that is "whitelisted" is blocked. Video relay service software for the government's Federal Relay service remote interpreting, for example, is already whitelisted. The 99th Communications Squadron installed it on Ms. Weimer's government laptop at her request. However, even once installed, the software was blocked, and she could not actually use it. She notified the Communications Squadron about this problem repeatedly, but it was never fixed. Weimer Decl. at ¶ 8; *see also* Record of Investigation at 111 (Colonel Luker acknowledging that government On Demand Video Relay software on Ms. Weimer's computer was still being worked on in April 2020, from months prior). Ms. Weimer repeatedly asked to be permitted to use the Automated Speech Recognition (ASR) feature in Microsoft Teams, the Agency had disabled this feature, thereby making Teams inaccessible to her and other deaf employees. See Weimer Supp Decl. ¶ 15.[16]

Similarly, a new policy was instituted in May 2018 that prohibited Ms. Burg from using her Bluetooth hearing aids upon which she previous relied, which enable her to adequately hear a conversation taking place around her. See Record of Investigation at 38 (investigatory summary stating that, according to Ms. Shock, Ms. Burg's request for Bluetooth hearing aids was denied, and CART services for meetings somehow "not possible"; only option was reassignment outside of Sensitive Compartmentalize Information Facility (SCIF)). Ms. Burg's supervisor, Personnel and Training Division Chief of Budget Operations and Personnel Heidi Mahoney, wrote to Ms. Shock the following about the change in policy:

> Although I understand the "national security" policy **I do believe that further AF guidance/policy is required to address those individuals that were hired into positions/locations that can no longer provide specific accommodations based on these security policy changes/updates**. To say that we are limited in choices to address Sheila's situation, such as providing accommodations at a certain level based on the security requirement

[16] While Teams' Automated Speech Recognition feature was eventually enabled in mid-2021—after Ms. Weimer and other deaf employees had been made to do without this essential feature for over half a year—Ms. Weimer's understanding is that this resulted from a general, Air Force wide software update and not in response to her November 2020 accommodations request. *Id*. ¶ 16.

> and not on the individual's disability seems misplaced. **I would think there would be an Air Force policy that outlines next steps such as an alternate work location or reassignment as a priority action since the restriction of accommodations, as in Sheila's case, were levied after accepting her current position as Schedule A employee**.

Betouliere Decl. Ex. B at 463. (emphasis added). Ms. Shock responded that "AF/A1Q is currently updating AFI 36-205 which contains AF reasonable accommodation policy and procedures and we are developing a handbook to accompany the instructions. We can certainly address this issue in both of these documents." *Id*. at 507. To date, it does not appear that this has happened, and there does not appear to be a version of AFI 36-205 more recent than 2016. *See* https://www.af.mil/Portals/1/documents/eeo/AFI%2036-205%2015%20Dec%2016.pdf?ver=2017-09-15-170350-580.

Even if security concerns genuinely prevent the use of some Bluetooth-enabled assistive devices or other accommodations, and exceptions to this policy cannot be made (which Complainant and class agents do not concede), the Air Force has an obligation to conscientiously explore other possible devices and accommodations that would enable d/Deaf employees to work in secure environments. For example, the Air Force could make recordings using a non-Bluetooth device that were later transcribed, or provide d/Deaf employees in secure areas with regular access to a qualified CART provider or ASL interpreter with appropriate clearances.

The Air Force seems to have made little if any effort to do this – as Ms. Shock noted at her deposition, unlike other organizations, the Air Force has largely failed to hire or contract for interpreters with high levels of security clearance, to the detriment of its deaf employees. *See* § III(B)(5); *see also* Burg Decl. at ¶ 9 ("My understanding is that the Air Force has, or can get, CART translators with appropriate security clearances to work in a Sensitive Compartmentalized Information Facility (SCIF), but as far as I am aware there has been no effort to do this on my behalf, whether for meetings, trainings, or any other occasion in which the reasonable accommodation of CART translation would help me perform the essential functions of my job.").

7. The Air Force routinely fails to ensure that trainings, presentations, and videos for civilian employees are properly captioned or otherwise accessible.

The Air Force routinely fails to provide captions and similar accommodations for necessary trainings, presentations, and videos, thereby denying class members the accommodations they need to benefit from this programming. During her recent deposition, Ms. Shock confirmed that she was well-aware of this problem, that it was ongoing, that complaints about lack of captioning were well-founded, and that Agency leadership had done essentially nothing to address the issue. Shock Dep. at 138:13-24 (aware of problem); Shock Dep. at 138:25-139:15 (complaints well-founded, deaf employees denied equal access to training); Shock Dep. at 139:16-141:7 (systemic and ongoing problem, no agency action); *see also* §III(B)(6), below.

This systemic lack of legally-required captioning is also confirmed by Complainants and class declarant McAnallen. For example, in order to maintain her Financial Management certificate, which was necessary for her position, Ms. Burg was required to participate in periodic trainings. Burg Decl. ¶ 20. These trainings often consisted of online seminars that were not reliably captioned. *Id*. Captioning of these videos is particularly important for Ms. Burg, because Bluetooth streaming between the video and her hearing aids is not allowed in the "open space vaults" where she works, which means that, without captions, she has no way of accessing their content at all. *Id*.

Similarly, Ms. Weimer has consistently struggled to complete required video trainings because she could not access them without captioning. As just one example, Ms. Weimer has requested that the Mandatory Annual Legal Assistance Refresher Training be provided with captions since she began working for the Air Force in 2018, but this has not happened. Weimer Decl. ¶ 19-26. While Ms. Weimer was told that the Air Force was in the middle of an upgrade would enable them to caption the Annual training as well as other webcasts and videos- to date captioning has still not been provided. *Id*. at ¶¶ 19-26. Ms. Weimer has been denied access to multiple other mandatory trainings, as videos are consistently provided without captions, despite repeated efforts on her part to advocate for herself and other d/Deaf employees who require captioning. Weimer Decl. ¶ 16-40 (detailing failure to provide captions or other accommodations for a variety of required trainings). More recently, upon returning to work after several

months of leave under the Family and Medical Leave Act, Ms. Weimer was informed that she needed to complete multiple video or audio trainings, all but one of which lacked captions and thus were entirely inaccessible to her. Weimer Second Supp. Decl. ¶¶ 4-8. While Ms. Weimer immediately requested captions so that she could access these trainings, only one was subsequently captioned, meaning Ms. Weimer has been unable to complete the vast majority of these trainings. *Id*. ¶¶8-11.

This systemic lack of legally-required captioning is also confirmed by Complainants and class declarant McAnallen. Ms. McAnallen experienced the same harm when videos at mandatory Wing trainings were consistently provided without captioning. McAnallen Decl. ¶ 17. By neglecting to ensure that all trainings, videos, and presentations are provided with captioning, the Air Force discriminates against d/Deaf employees who are denied the ability to benefit from this material in the same manner as their coworkers without disabilities.

8. The Air Force has failed to adequately staff its disability program, appoint qualified disability program managers, or ensure proper training of individuals with the power to approve and deny accommodations.

As discussed in §III(B)(7), below, the Air Force has Agency has completely failed to adequately staff its disability program, to the detriment of every employee who needs accommodations: despite an Air Force Instruction that "highly recommend[s]" appointment of full-time Disability Program Managers, only 3 bases have full-time people in this position, and roughly a quarter have no Disability Program Managers at all. *See* § III(B)(7). The remainder perform their disability-related work as a "collateral duty," meaning that they must somehow accomplish all of it – or not – in only 20% of their work time. *See id*.

In addition, the Air Force has failed to properly train supervisors and others with the power to approve or deny accommodations, and has appointed base-level "Disability Program Managers" who are profoundly unqualified for the job—something its own policy documents prohibit. Under the Air Force's own written policies, Disability Program Managers must:

> "3.9.1. Be familiar with federal laws, regulations, and policies that protect individuals with disabilities from discrimination in all employment practices and procedures.
> 3.9.2. Be familiar with special appointing authorities available to hire individuals with disabilities (including Schedule A, 5 CFR 213.3102(u))
> 3.9.3. Be familiar with reasonable accommodation obligations and procedures.

3.9.4. Be able to, assist as necessary, candidates or employees, and advise managers regarding reasonable accommodations."

See AFI 36-205 at ¶ 3.9.[17]

As just one example of the Air Force's failure to follow its own stated policies in this regard, the Disability Program Manager at Nellis Air Force base is apparently a GS-05 Dental Assistant, who serves as a Disability Program Manager as a "collateral duty"—a distressing indication of the low priority the Agency has given to this essential role. There is no indication that this person has any specialized training in or knowledge of disability laws, reasonable accommodation obligations, or disability-related needs and how to meet them. Weimer Decl. ¶¶ 50-53; *see also* Record of Investigation at 38 (acknowledging that Lydia Champion, GS-5 Dental Assistant/Nellis AFB "Collateral Duty" Disability Program Manager was overseeing Ms. Weimer's requests for ASL interpreter services and videophone line).

The Agency has similarly failed to provide proper training to supervisors and others with the authority and obligation to consider and approve necessary accommodations—for instance, Mr. Perez's supervisors have admitted that they have received little training and guidance regarding providing reasonable accommodations. Perez Decl. ¶ 25.

B. Pre-certification discovery has confirmed Complainants' claims of systemic discrimination, and shown beyond doubt that class certification is appropriate in this case.

As this Court is well aware, the Agency has attempted to frustrate the pre-certification discovery process at every turn—repeatedly disregarding court orders to produce relevant designees, documents, and information, and offering discovery responses that are plainly evasive and incomplete.[18] Indeed, during the deposition of Air Force Disability Program Manager Kendra Shock, Complainants learned that the Agency has indisputably withheld large numbers of relevant documents, including its 2019 MD-

[17] Available at https://www.af.mil/Portals/1/documents/eeo/AFI%2036-205%2015%20Dec%2016.pdf?ver=2017-09-15-170350-580.

[18] *See, e.g.,* Complainants' May 16, 2022 Response to Sanctions Notice (summarizing history of noncompliance); *see also* March 7, 2022; March 28, 2022; April 21 2022; and May 10, 2022 Motions to Compel; Court's March 07, 2022 Second Pre-Certification Discovery Order; Court's April 12, 2022 Third Pre-Certification Discovery Order; Court's May 2, 2022 Order to Show Cause.

715 Part J report to the EEOC regarding barriers facing employees with disabilities; and multiple emails between Ms. Shock and the undersecretary of the Air Force regarding reasonable accommodation requests being unlawfully denied because of a lack of unit-level funding, and the need to establish a central Agency accommodations fund to address this issue. Shock Dep. at 212:11-213:12 (2019 MD-715 report); *id.* at 174:23-179:10 (emails with Agency leadership regarding need for centralized funding); *see also* Complainants Motion to Compel Responsive Documents (June 14, 2022).

Despite the Agency's efforts to avoid producing responsive documents – and to prevent its Disability Program Manager, Ms. Shock, from testifying – the pre-certification discovery process has shown beyond doubt that centralized Air Force policies, practices, and procedures serve to discriminate against its deaf employees, and that certification is appropriate in this case.

1. Agency documents and deposition testimony show that necessary accommodations are routinely delayed or denied for lack of funds, even though ample resources are available to the Agency as a whole.

Q. Do you believe there is a straight line to be drawn between lack of centralized funding and denial of reasonable accommodations to employees that are deaf or hard of hearing based on lack of funding?

A. Yes.

—Exchange Between Air Force Disability Program Manager Ms. Shock and Agency Counsel Mr. Wells (Shock Dep. at 340:8-13).

According to Air Force documents and the testimony of Disability Program Manager Ms. Shock, the Air Force has consistently spent something in the range of $1 million per year to accommodate its employees with disabilities – out of a total budget that, in recent years, has exceeded $190 billion. *See* Shock Dep. at 160:16-161:20; *see also* Betouliere Decl., Exhibit E (2016 Diversity and Inclusion Initiatives Implementation Guidance) at 19 (noting projected FY 2017 cost of accommodations).

In a 2016 guidance document regarding the Air Force's initiative to "Reduce Bureaucratic Obstacles to Providing Reasonable Accommodations for Individuals with Disabilities," the Agency noted that it "has a legal obligation to provide reasonable accommodations to employees with disabilities," but that "[o]ften [. . .] managers do not budget for reasonable accommodations and funding

this obligation becomes a unit-level challenge." Betouliere Decl., Exhibit E (2016 Diversity and Inclusion Initiatives Implementation Guidance) at 18.

This guidance document went on to say "Currently, there is no formal process through which reasonable accommodation funding requests are made. It is the responsibility of the individual to request special accommodations from his or her manager, who can then seek to pay for the accommodation out of unit funds. Often, however, these accommodations are not budgeted by the unit and the request must be elevated to the Major Command or higher headquarters, creating delays in providing the necessary accommodations." *Id.*

In an effort to address this issue, the Air Force created two special funding codes, which would supposedly allow "units to request reimbursement of expenses associated with providing reasonable accommodations, so that funding shortfalls at the unit-level no longer prevent [employees] from receiving the accommodations they need." *Id.*; *see also* Shock Dep. at 159:18-160:15 (no other changes made to funding process to address accommodation delays and denials for lack of funds).

Unfortunately – as subsequent documents and the testimony of Disability Program Manager Ms. Shock make clear – the byzantine process for reimbursement that the Air Force created in 2016 has been an unmitigated failure, and accommodations are still routinely denied for lack of unit-level funds, despite the billions of dollars available to the Agency as a whole.

In the Agency's Fiscal Year 2018 "Affirmative Action Plan for the Recruitment, Hiring, Advancement, and Retention of Persons with Disabilities" report—authored approximately three years after the guidance document discussed above, and approved by the Agency's Director of Equal Employment Opportunity[19]—it notes that accommodations are still "**denied due to unit funding**," and cites "[l]ack of centralized funding for reasonable accommodations" as a barrier affecting all employees with disabilities. Betouliere Decl., Exhibit F (Fiscal Year 2018 Affirmative Action Plan report) at 19 (emphasis added).

Similarly, the Fiscal Year 2020 version of the same document—authored roughly **five years**

[19] Shock Dep at 225:21-226:1 (all such reports reviewed and approved by agency EEO director).

after the agency rolled out its new funding codes—continued to cite **"**Lack of execution of centralized funding for all RA's," "**Lack of understanding of the DAF process for funding RA**," and "**Accommodations denied due to unit funding**," as major barriers affecting employees with disabilities. Betouliere Decl., Exhibit G (Fiscal Year 2020 Affirmative Action Plan report) at 21 (emphasis added).

During her deposition testimony, Ms. Shock spoke at length about the delay and confusion caused by the Agency's current process for funding accommodations—and the Agency's persistent unwillingness to implement a streamlined and centralized funding process, to prevent accommodations from being delayed or denied due to a lack of unit-level funds. As she put it at one point: "I can't tell you how many times I have beat my head against this rock in the last eight years." Shock Dep. at 168.

As Ms. Shock explained during her deposition, the Agency's current system for funding and reimbursing reasonable accommodations is essentially as follows: "the unit would make a request [for funding] through their financial manager. If the financial manager doesn't have the funding, they would make a request to the installation. The installation would make the request to the match com, and the match com would make the request to headquarters until someone was able to fund the reasonable accommodation request." Shock Dep. at 163:24-164:8.

Each step in this process is, of course, one more opportunity for unnecessary delay. *See* Shock Dep. at 167:9-20. When asked if anything had been done to ensure that accommodations are funded through some other source, to "stop these delays" and this "step by step by step" process, Ms. Shock responded: "Yes [. . .] I have this conversation with leadership frequently, multiple times, every year." Shock Dep. at 167:21 – 168:6.

Ms. Shock then described her repeated efforts "explain that our current process does not, in my opinion, reduce bureaucratic obstacles; that it actually increases the obstacles to funding reasonable accommodations; that the financial management folks have not done a good job of explaining this process to their financial management and resource advisors. So, the answer is still often 'we don't have the money for that.' And I don't believe it's a practice that is currently effective." Shock Dep. at 168:10-

19.

As Ms. Shock explained, **even the people responsible for implementing the Air Force's current process for funding accommodations do not know how it works**. When asked how an "unfunded request" was supposed to be "submitted through the organization's established corporate process," as Agency documents describe, Ms. Shock responded as follows:

> **A.** I wish I knew. You know, that -- that's the best-kept secret in the Air Force. Every time I would ask for specific information on -- on how that process worked so that I could provide that information to the disability program managers, I was told that our financial resource managers know what it is and that's all -- that's all I need to know. So there are a lot of things I don't know about how it works in the Air Force, but that's -- that's definitely one of them.
> **Q.** But weren't those same folks who were supposed to know asking you this question?
> **A.** Yes.
> **Q.** So it was clear that they didn't know, correct?
> **A.** Yes, which is why I was asking for the information so I could provide it to them.
> […]
> **Q.** Okay. And this was supposed to stop shortfalls at the unit level on being used as a basis for denial of reasonable accommodation, right?
> **A.** Right.
> **Q.** But since the process to get unfunded requests did not occur or was a mystery, that still occurred, right?
> **A.** Yes.
> **Q.** Meaning that reasonable accommodations were still being denied because of a purported funding shortfall, and that included for employees who were deaf or hard of hearing?
> […]
> **A:** Yes, I believe that was still happening.
> **Q**. Additionally for applicants who were deaf or hard of hearing, that was still occurring?
> [. . .]
> **A**. I assume it was, yeah.
> **Q**. And that continues up until today, as you've testified to, correct?
> **A.** Same process.

Shock Dep at 174:23-177:3; *see also id.* at 343:12-21.

When questioned further on this subject by the Agency's own counsel, Ms. Shock noted that she has had conversations about accommodations being denied due to lack of funding with employees, managers, and supervisors at least 2 or 3 times a year, and that base-level disability program managers have brought this issue to her attention "**at least once a month**" since 2018 – in other words, roughly 60

times. Shock Dep. at 334:6 – 335:7 (supervisors, managers, and employees); *id.* at 340:8 – 341:21 (hears about this from disability program managers roughly once per month); *see also id.* at 343:5-11 (hearing from different disability program managers each time). In each instance when Ms. Shock has been told that an accommodation was denied on the basis of cost, she found the report was true, and that the requested accommodation has indeed been denied on account of cost – despite the Air Force having billions of dollars at its disposal. Shock Dep. at 336:7-23.

As Ms. Shock sensibly notes, the instances of improperly-denied accommodations that happen to filter their way up to her are likely only the tip of the iceberg: "evidence of a larger problem" and of "Air Force wide denials of reasonable accommodations based on costs." Shock Dep. at 339:3-17.

Despite being told by their own Disability Program Manager that the Air Force's current process for funding accommodations was not working, the Agency's response has repeatedly been that business-as-usual is good enough. Shock Dep. at 169:1-170:2. As she explained:

> [A]nybody you can ask in Air Force will know that I am the No. 1 proponent for centralized funding for reasonable accommodations. I believe it's a best practice. I've tried to convince leadership of this organization that it's a best practice, and I just have been unable to convince them otherwise, even as late as last month. We're still having this conversation, and they still believe this process is working.
> **Q**. Even though you've informed them unequivocally it is not?
> **A.** In my opinion, I believe it is not.
> **Q.** And when you say them, who are you referring to?
> **A.** This conversation has **gone all the way to the undersecretary of the Air Force**.

Shock Dep. at 177:4 – 178:5 (emphasis added).

2. Discovery has shown that the Air Force has at least 700 d/Deaf employees, but according to its own tracking tool, it has only provided them with sign language interpretation 152 times since 2018.

During her deposition, Ms. Shock estimated that as of 2022, the Air Force has "over a thousand deaf employees" in its civilian workforce. Shock Dep. at 71:2-10. The Agency's MD-715 "Workforce Tables" for Fiscal Year 2020 bear out this estimate: as of that year, the Air Force had 773 civilian employees who self-identified as "deaf or serious difficulty hearing," and in the previous year, it had 591. Shock Dep. at 300:19-301:14; *see also* Betouliere Decl., Exhibit H (Fiscal Year 2020 MD-715 Workforce Tables) at 50.

Unfortunately, the Air Force's own internal tracking documents suggest that these deaf civilian employees are accommodated at an alarmingly low rate – which is in accordance with the experiences of class agents and declarants, discussed elsewhere in this motion. *See*, *e.g.* § III(A)(3), above.

According to head Air Force Disability Program Manager Ms. Shock, base-level disability program managers Disability Program Managers are "required to complete a spreadsheet for tracking purposes that [. . .] captures all of the required information regarding reasonable accommodation." Shock Dep. at 120:20-25. This spreadsheet is supposed to be provided to Ms. Shock on a quarterly basis, and if one is not provided, she will follow up to ask about it; in each instance where no spreadsheet has been provided, Ms. Shock testified that it was because disability program managers stated "they didn't provide any reasonable accommodations," and thus "they didn't have a spreadsheet to submit." Shock Dep. at 120:20-124:2.

In response to a request to "provide information on the number and types of accommodations that we've provided for individuals that are deaf and hard of hearing," Ms. Shock produced a spreadsheet based on this quarterly data. Shock Dep. at 186:5-20; *see also* Betouliere Decl., Exhibit I ("DAF Deaf Accommodation (K. Shock)" Excel Sheet). Though it was created several months into this year, this spreadsheet **does not indicate even a single approved request for interpreters, Agency-wide, in 2022**, and shows only 3 such requests in 2021, 3 in 2020, and 4 in 2019. Betouliere Decl., Exhibit I. In fiscal year 2018 – the only year with more than a handful of approved requests – there were 142. *Id.* Even this, however, suggests serious problems, because all 142 approved requests come from three bases: Sheppard, Tinker, and Wright Patterson. *Id.*

Aside from these 152 approved requests (nearly all of which came from only three Air Force bases), there is no indication that the Air Force provided ASL interpretation or CART to any of its hundreds of deaf civilian employees over the past five years—which, given the Agency's repeated refusal or inability to provide Class Agents and declarants with ASL interpretation or CART services for

meetings, trainings, interviews, and other work related events, rings true.[20] For an Agency with as many deaf employees as the Air Force, this is a shockingly small number of requests to have approved over the past five years—particularly because, as Ms. Shock acknowledged, ASL interpretation is among the most commonly-needed accommodations for deaf employees. Shock Dep. at 62:25-63:9 (discussing common accommodations).

The Agency's apparently extremely low rate of approving ASL interpretation may have much to do with the fact that only three Air Force bases – Tinker, Wright-Patterson, and Eielson – have standing contracts for the provision of interpreters.[21] Shock Dep. at 67:17-68:3; *see also id.* at 73:13-21 (explaining why standing contract would expedite the process of procuring interpreters); *id.* at 74:24-75:8 (agreeing that a standing contract would expedite the process of getting ASL or CART interpretation for someone with a higher security clearance).

Notably, of the 152 interpreter requests that Agency records show having been approved since 2018, 130 (or over 85%) were at Tinker or Wright-Patterson – places where standing contracts exist, and which also happen to be among the three bases that have full time disability program managers. Betouliere Decl., Exhibit I ("DAF Deaf Accommodation (K. Shock)" Excel Sheet). As Ms. Shock observed wryly during her deposition, "Yeah, kind of a coincidence, isn't it?" Shock Dep. at 248:17-249:2 ("Funny how that works out. Yeah, when you have somebody who can devote their time to addressing reasonable accommodation issues for that organization, yes, then you are more likely to have the programs in place that you need to support those individuals.").

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[20] During her deposition, Ms. Shock expressed her belief that the spreadsheet data she provided regarding accommodations for deaf employees was incomplete and inaccurate – however, she also acknowledged that she had no way of knowing what the true data was. Shock Dep. at 198:3-12.

[21] Apparently, in order to set up a contract, the Air Force requires quotes from "at least three authorized businesses." Betouliere Decl., Ex. N at 803 (September 27, 2017 email from Veda Crawley, asking for a list of at least three "authorized businesses" that offer CART service, before she could procure CART for Ms. Burg – an accommodation that was, in fact, never provided). Incredibly, complainant Mr. Perez has been **asked to obtain three such quotes himself, before a contract can be set up to provide him with ASL, Video Remote Interpreting, or other necessary accommodations**. In the meantime, he has been forced to do without. Second Supplemental Declaration of Hugo Perez ("Perez Second Supp. Decl.") at ¶ 16.

3. Agency training documents plainly state that employees must provide supervisors with "appropriate notice" each and every time they need repeat accommodations such as sign language interpretation -- even when need for that accommodation is known to the Agency, and has not changed.

Training documents produced during pre-certification discovery process confirm that while employees who need the same obvious accommodation again and again are not necessarily required to submit a new written request, they are expected to provide supervisors with "appropriate notice each time the accommodation is needed." Betouliere Decl., Exhibit J (AFI 36-2710 – Reasonable Accommodation Training). In other words, the onus of requesting necessary accommodations is placed on employees with disabilities every time, even when need for that accommodation is or should be known to the Agency, and has not changed—just as Complainants have alleged. *See id.*; *see also* § III(A)(4), above (detailing Complainants' experiences).

This requirement has a particular discriminatory impact on the Agency's deaf employees, as "the [a]ssistance of sign language interpreters" is among the "most common example[s . . .] of a reasonable accommodation that's requested on a repeated basis." Shock Dep. 303:5-11.

During her deposition, Ms. Shock clarified that managers were not in fact supposed to be making employees request the same accommodations over and over again, where their accommodation needs are known. Shock Dep. at 304:8-305:9. Unfortunately, Claimants' experiences suggest that managers have not gotten the message on this point – and understandably not, since the training they are given expressly says otherwise, and instructs them to require "appropriate notice" from employees with disabilities "each time the accommodation is needed." Betouliere Decl., Exhibit J at 15.

4. Ms. Shock confirmed that there are consistent delays with getting videophones and captioned telephones working on base networks, and that these delays continue into the present.

During her deposition, Ms. Shock confirmed Complainants' allegation that the Air Force has failed to implement a streamlined and standardized process for connecting videophones and captioned telephones to base networks and ensuring that they actually work, such that class members must wait for months or years before being able to do something as basic as making a phone call. Ms. Shock's testimony on this point is as follows:

> **Q.** Are you aware of consistent delays with ensuring that videophones and/or captioned telephones work on base networks?
> **A.** Yes.
> [. . .]
> **Q**. And what is your understanding of those consistent delays?
> **A.** It's a complicated process due to Air Force security and firewalls.
> **Q.** And has -- have those consistent delays been in place at least from 2018 to the present?
> **A.** Yes.
> [. . .]
> **Q**. And do those consistent delays ensuring videophones and captioned telephones work on base networks continue into the future, as far as you're aware?
> [. . . **A**.]: They continue at present, is all I can predict.

Shock Dep. at 130:20 – 131:14.

Ms. Shock also confirmed that, unlike Complainants and other members of the proposed class, hearing employees receive working phones their first day on the job. Shock Dep at 134:4-6.

According to Ms. Shock, the Agency has not done anything to expedite the process of ensuring that videophones or captioned telephones can actually be used by its deaf employees, such as training "IT staff so that they understand the particular requirements of videophones or captioned telephones" and how to get them working on each base network. Shock Dep. at 136:7-12. Instead, the Agency has chosen to address these issues on a "case by case" basis – presumably in the same unacceptably slow and incompetent way experienced by Complainants Weimer, Burg, and Perez, each of whom had to wait months or years before they had a functioning videophone or captioned telephone. *See* Shock Dep. at 135:7-136:12; *see also* § III(A)(5), above (describing excessive delays in getting Complainants' essential communication devices working on base networks).

5. Ms. Shock testified that unlike other organizations, the Air Force has largely failed to hire or contract for interpreters with high levels of security clearance – to the detriment of its d/Deaf employees.

According to Ms. Shock, when other organizations have needed to obtain ASL or CART interpreters with secret or top-secret security clearance to assist deaf employees who work with that

level of information, they have either established standing contracts for such interpreters, or hired them as employees. Shock Dep. at 369:25 – 371:12. Based on her conversation with staff at other agencies, "most often they [. . .] have both staff interpreters that are employees of the agency and they supplement that with contract employees" *Id.* at 370:16-19. The Air Force, by contrast, has largely failed to do either thing.

To the best of Ms. Shock's knowledge, the Air Force has "one or two" staff interpreters (at Wright-Patterson and Tinker, two of the same bases that have standing interpreter contracts and full-time disability program managers) but it has largely failed to procure the services of interpreters with high levels of security clearance—to the detriment of deaf employees like Ms. Burg, who must regularly work with secure information. Shock Dep. at 370:20-371:12; *see also* Burg Decl. at ¶ 9 ("My understanding is that the Air Force has, or can get, CART translators with appropriate security clearances to work in a Sensitive Compartmentalized Information Facility (SCIF), but as far as I am aware there has been no effort to do this on my behalf, whether for meetings, trainings, or any other occasion in which the reasonable accommodation of CART translation would help me perform the essential functions of my job.").

6. Ms. Shock confirmed that Air Force training videos are consistently not captioned, that the problem persists to this day, and that the Agency has done nothing to address it.

When asked whether she was "aware of complaints by deaf and hard of hearing employees that there's a persistent problem that videos for training and other purposes are not captioned," Ms. Shock responded that she was, and stated "I'm aware that we've had multiple issues where [. . .] mandatory training[has] been required, videotapes have been used, and they've not been captioned." Shock Dep. at 138:13-24. Ms. Shock also confirmed that the complaints of these employees were well-founded, that the mandatory training was in fact not captioned, and that this meant there was "no way for the employee to have equal access to that training." Shock Dep. at 138:25-139:15.

Despite affirming that this was a "systemic problem with the Air Force that persists to today," and that she had had multiple conversations about the need for captions with the people "responsible for

providing such training videos," Ms. Shock stated that she was not aware of any Air Force policy requiring that training videos be captioned. Shock Dep. at 139:16-141:7. This was reaffirmed during Ms. Shock's second day of deposition, during which the following exchange occurred:

> **Q**. [. . .] is there a plan that the Air Force has to ensure its videos are consistently captioned?
> **A**. Not that I'm aware of.
> **Q**. Given that it's a requirement of the law, do you think that would be a good idea for the Air Force to do that?
> [. . .**A.**]. I would recommend that for the updating policy that we're crafting, that [. . .] they include a section on accessible media and what the requirements there would be.

Shock Dep. at 254:17-255:8.

The Air Force's consistent failure to caption it's training videos may have something to do with the fact that the Agency's sole employee responsible for ensuring compliance with Section 508 of the Rehabilitation Act[22] – who, shockingly, performs this task as a "collateral duty," meaning that it may take up no more than 20% of her total work time[23]—apparently does not believe that ensuring the accessibility of electronic training materials is her responsibility, and that making such materials accessible should be handled case-by-case, as an accommodation. Shock Dep. at 251:21 – 254:4 (noting that Agency's section 508 office views the accessibility of electronic content as something that should be handled as an individual reasonable accommodation).

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[22] Section 508 requires federal departments and agencies "developing, procuring, maintaining, or using electronic and information technology" to ensure that the electronic and information technology allows "individuals with disabilities who are Federal employees to have access to and use of information and data that is comparable to the access to and use of the information and data by Federal employees who are not individuals with disabilities." 29 U.S.C. § 794d(a)(1)(A).

The United States Access Board has explained that this requirement applies to agency training as follows:

> (c) All training and informational video and multimedia productions which support the agency's mission, regardless of format, that contain speech or other audio information necessary for the comprehension of the content, shall be open or closed captioned, [and]
>
> (d) All training and informational video and multimedia productions that support the agency's mission, regardless of format, that contain visual information necessary for the comprehension of the content, shall be audio described

36 C.F.R. Appendix D (Electronic and Information Technology Accessibility Standards) at §§ D1194.24(c)(d).

[23] Shock Dep. at 293:15-22 (noting that Section 508 coordinator performs that job as a "collateral" duty); *id.* at 241:13-242:8 (explaining that employees are "only allowed to spend 20% of their time" on an assigned collateral duty).

As Ms. Shock explained, in addition to being illegal, this individualized accommodation approach is fraught with problems, because she is not involved in the creation of training videos and has no way of knowing "whether a video exists and whether or not its captioned until someone informs me that it's not" – that is, not until "after the fact when the individual has not been provided [. . .] access." Shock Dep. at 253:15-254:4.

7. Agency documents and deposition testimony confirm that the Agency has failed to adequately staff its disability program, to the detriment of its d/Deaf employees, and everyone else who needs accommodations.

The Agency's Fiscal Year 2018 "Affirmative Action Plan for the Recruitment, Hiring, Advancement, and Retention of Persons with Disabilities" report asks the following question: "Has the agency designated sufficient qualified personnel to implement its disability program during the reporting period? Betouliere Decl., Exhibit F at 2.

The answer, unsurprisingly, is "No." *Id.*

In elaboration, the report explains that "Air Force Instruction (AFI) 36-2710 encourages installations to establish full-time DPMs [(Disability Program Managers)],[24] but still the majority of DPMs in FY20 were assigned as collateral duty." *Id.* It then goes on to note that one of the "primary challenges with collateral duty DPMS" is an "**inability to effectively execute DPM duties due to performing full-time jobs**." *Id.* (emphasis added).

A table immediately below this explanation shows that the Air Force has only 3 full time employees responsible for "processing reasonable accommodation requests from applicants and employees," and 85 employees who perform this task as a "collateral duty" – meaning that they cannot

[24] AFI 36-2710 is the Agency's Equal Opportunity Program Guidance. Section 11.4.6 of this document states "It is **highly recommended** that installations designate a full-time Disability Program Manager." AFI 36-2710 at 101 (emphasis added). Betouliere Decl., Exhibit K (AFI 36-2710) at 101, § 11.4.6.

Similarly, section 3.5.3 of an earlier Air Force Instruction 36-205, titled "Affirmative Employment Program (AEP), Special Emphasis Programs (SEPS) and Reasonable Accommodation Policy" states: "Installations are encouraged to establish a full-time Disability Program Manager (DPM) position due to the lack of representation of individuals with disabilities, in particular, individuals with targeted disabilities, in the federal workforce." AFI 36-205 at 19 (available at https://www.af.mil/Portals/1/documents/eeo/AFI%2036-205%2015%20Dec%2016.pdf?ver=2017-09-15-170350-580).

devote more than 20% of their time to it. *Id*. at 3; *see also* Shock Dep. at 241:13-242:8 (explaining that employees are "only allowed to spend 20% of their time" on an assigned collateral duty).

The Fiscal Year 2020 "Affirmative Action Plan" report comes to the same conclusion about whether the agency has "designated sufficient qualified personnel to implement its disability program during the reporting period" – "No" – and shows that the number of full-time employees responsible for processing reasonable accommodation requests remains unchanged. Betouliere Decl., Exhibit G at 2-3.

When Agency counsel asked Ms. Shock why she believed collateral duty Disability Program Managers could not accomplish "the proper processing [. . .] of reasonable accommodation requests," she responded that in reports and during trainings, "usually the first question [her disability program managers] ask is, [']how do I do all of this with only 20 percent of my time[?']" Shock Dep. at 328:10-329:14 (stating that she is asked this approximately five or six times every year, and that she also knows disability program managers cannot properly process accommodation requests because the Agency is not meeting its policy of processing such requests within 30 days).

As Ms. Shock explained, "at most installations in this organization," the Disability Program Manager positions "should be full-time jobs. It's full-time work." Shock Dep. at 291:6-13. In response to questioning from Agency counsel, she elaborated: the "role of the disability program manager is vast. It's not just related to ensuring the reasonable accommodation process. It also [. . .] involves training managers and supervisors[, and] addressing accessibility issues. Shock Dep. at 327:19-23.

When asked "so how is it that a person is supposed to get a full-time job done in 20 percent of their time," she responded: "That's a great question. I don't have an answer for that." Shock Dep. at 242:5-8.

At multiple points during her deposition, Ms. Shock eloquently explained why having so few full-time Disability Program Managers—as the Agency's own Air Force Instruction (AFI) 36-2710 document encourages – is a problem. For example, when asked how more full-time DPMs would make her own job easier, she replied:

> **A.** Well, then I would have a point of contact at that organization when there was a question about how do we install a video phone or is there a contract for interpreters or where do I locate some piece of equipment. Without a point of contact at those locations,

then it's -- it's on -- falls to me to figure that out and, again, I'm one person and there are a hundred bases across the world.
Q. And 174,000 employees?
A. Yes. In -- in 2018 we had about -- just a little over 19,000 individuals with disabilities.
Q. Who had identified?
A. Who identified as being individuals with disabilities, yes.

Shock Dep. at 249:15-250:5; *see also id*. at 236:15-237:7 (explaining why full-time DPMs are encouraged by the Air Force's own policy document); *id.* at 245:13-246:13 (further elaborating on need for full-time DPMs at "most installations" and support for this in Air Force policy documents, but noting that her office does not have the authority to dictate staffing).

In addition to the fact that all but three of the Air Force's Disability Program Managers perform that role as a "collateral duty," roughly 25% of the Agency's bases do not have designated Disability Program Managers at all. Shock Dep. at 237:8-22. As Ms. Shock confessed, it is "difficult to have a disability program if you don't have anyone managing the reasonable accommodation program for that organization [. . . because] there wouldn't be anyone identified [. . .] to facilitate that process for providing reasonable accommodations." Shock Dep. at 238:12-239:1.

In the absence of qualified full-time Disability Program Managers at most bases, it seems **that the burden of researching, locating, and coordinating necessary accommodations like ASL and Video Remote Interpreting—and doing the requisite work to set up contracts—has fallen on the Agency's deaf employees themselves**. Second Supplemental Declaration of Hugo Perez ("Second Supp. Perez Decl") ¶ 17, (describing being told that he would need to personally provide his supervisor with quotes from various agencies providing ASL interpretation and video remote interpreting services, before his supervisor could take any further steps to set up a contract or provide him with those accommodations).

Not coincidentally, the bases with full-time Disability Program Managers are also the ones that have standing contracts for ASL or CART interpretation, and that appear to have approved requests for ASL Interpretation in the greatest numbers. Shock Dep. at 67:17-68:3 (bases with standing contracts); *id.* at 248:17-249:2 (bases with full-time disability program managers); Betouliere Decl., Exhibit I

("DAF Deaf Accommodation (K. Shock)" Excel Sheet) (showing that, of the 152 interpreter requests that Agency records indicate have been approved since 2018, 130 (or over 85%) were at Tinker or Wright-Patterson – places where standing contracts exist, and which also happen to be among the three bases that have full time disability program managers). There is thus every indication that the Agency's systemic failure to adequately staff its disability program directly impacts Complainants and other deaf employees across the Air Force.

Despite this, Air Force leadership has done nothing to ensure that the Agency's disability program is adequately staffed, in accordance with its own guidance. As Ms. Shock explained, "on an annual basis my office would meet with our leadership to brief this report and the results of this report, and every year from the day I started in 2012 until last year, I have said that this is a recommendation and that it's very difficult to have a competent disability program when you have people who are only devoting 20 percent of their time to that work" – and yet, for whatever reason, she has been "unable to convince leadership that [. . .] full-time DPMs are required at most bases." Shock Dep. at 247:2-22.

C. Claimants are civilian Air Force employees who are d/Deaf, and like every other member of the proposed class, they have been subjected to discriminatory Air Force policies and practices, and denied necessary accommodations.

1. The Air Force has discriminated against class agent Sarah Weimer and repeatedly denied or delayed necessary accommodations, leading to her constructive termination.

Ms. Weimer is a Class Agent and the named Complainant in this matter. Weimer Decl. ¶ 1. She is Deaf and uses bi-lateral cochlear implants. *Id.* at ¶ 4. She was a civilian attorney with the U.S. Air Force Warfare Center, Office of the Staff Judge Advocate where she advised commanders, managers and supervisors, military organizations, human resources personnel, equal opportunity personnel, investigators, and other personnel on administrative law, ethics, labor and employment law, contract law, environmental law, military law, and other areas of law as needed. *Id.* at ¶ 3. She was the primary ethics and labor and employment law attorney for Nellis AFB and the Nevada Test and Training Range (NTTR). *Id*. Ms. Weimer has been awarded two Civilian of the Quarter awards during her time with the Air Force, and she was nominated for a Civilian of the Year award. *Id.* at ¶ 4.

Ms. Weimer's work at the Air Force is incredibly important to her. As Ms. Weimer states in her declaration, "the U.S. Air Force has been part of my life since birth. I am the daughter of a U.S. Air Force Academy graduate and retired Air Force pilot, and I grew up on Air Force bases around the United States and in the Philippines. As a child, I wanted to become an Air Force pilot like my father but my deafness medically disqualified me from joining the Air Force as a military member." *Id*.

Unfortunately, the Air Force has repeatedly failed to provide Ms. Weimer with reasonable accommodations since she began working there in January 2018, including but not limited to videophone/video relay services, ASL interpreters, CART services, and meeting/event/training accommodations. *Id*. ¶ 5.

Ms. Weimer previously worked for the U.S. Army, where there was no difficulty or delay in connecting her videophone that she required to perform her job duties. *Id.* ¶¶ 6-7. When she left her employment at the U.S. Army to work for the U.S. Air Force, she brought her Z70 videophone with her, so the Air Force needed only to connect the videophone to the network. *Id.* By contrast to the immediate installation of the videophone by the Army, it took the Air Force over eleven (11) months to get the videophone connected to the network. *Id.* This was the case even though there had been approval to connect videophones to the Air Force network prior to her working at the Air Force. *Id.* While she waited for her videophone to get connected to the network, Ms. Weimer requested that a video relay service software be installed on her government laptop computer so that she could have a way to make and receive phone calls and in order to access the federal government's on-demand video relay sign interpreter (VRI) service (www.federalrelay.us). *Id.* ¶ 8. While this software is approved for installation of government computers, three years later, Ms. Weimer has still not been provided with this accommodation. *Id*. ¶ 8.

The Air Force has failed to provide reasonable accommodations of captioning, transcripts and live interpreter at trainings and other work-related events. In February 2020, Ms. Weimer was asked to give a presentation at the Judge Advocate Symposium, which is an Agency-wide training for Staff Judge Advocates and a prestigious honor to be selected to present. *Id.* ¶ 13 Ms. Weimer requested

accommodations of a speakerphone and an ethernet connection so that she could access the federal government's relay conference captioning (RCC) service and have the captioner call into the speakerphone so he or she could transcribe what was being said for her. *Id.* This request was denied, and she was not provided reasonable accommodations. *Id.* As a result, she was excluded from giving the presentation and a co-worker gave Ms. Weimer's presentation instead. *Id.*

Similarly, for the same Judge Advocate Symposium that occurred in October 2020, she requested accommodations in the form of CART services. This was denied and Ms. Weimer was not able to attend the Symposium as a result. at ¶ 14. Ms. Weimer is required to attend a mandatory annual legal assistance refresher training. However, the training is not captioned so that d/Deaf employees may have equal access to the training. Weimer Decl. ¶¶ 19-26. Ms. Weimer requested CART services so that she may access the content of the trainings but has not received it. *Id.* at ¶ 19. While the Air Force has promised since 2018 to "upgrade" the training to provide for captioning, to date, this has not occurred. *Id.* ¶¶ 19-26.

On June 16, 2020, Ms. Weimer received a directive informing her that she is required to attend a monthly Bridge Chat training, a directive that she is informed came from General David Goldfein, Chief of Staff of the Air Force and is a requirement for her office. Weimer Decl. at ¶¶ 27-29. There were instructions to view a video before the Bridge Chat. The video was not captioned. *Id*. Ms. Weimer informed the Air Force that because the video did not have captions, she could not watch it, even though the Air Force is required by Section 508 of the Rehabilitation Act of 1973 to make their videos (among other mediums) accessible to people with disabilities, including d/Deaf individuals. *Id*. In response, Ms. Weimer was informed that her team facilitator would try to reach out to whoever was in charge of the Bridge Chat training to "see if we can get this rectified for future trainings." *Id.* at ¶ 27-28. It took more than six months and extensive advocacy on Ms. Weimer's part for the Bridge Chat videos to be captioned, and she was never offered any means of accessing the content that she missed during that time. *Id.* at ¶ 29.

On July 20, 2020, the Secretary of Defense Mark Esper, issued a memorandum requiring all U.S.

Department of Defense personnel, including military members, civilian employees, and on-site contractors, to complete the following OPSEC trainings: (1) Center for the Development of Security Excellence OPSEC Awareness; (2) Unauthorized Disclosure of Classified Information for DoD and Industry; (3) Insider Threat Awareness; and (4) Introduction to Information Security. *Id*. at ¶¶ 30-31. All four videos for this training were not captioned. *Id*. at ¶ 32. While Ms. Weimer repeatedly requested accommodation that the videos be captioned, the Air Force failed to do so. *Id.* at ¶¶ 33-40. Ms. Weimer was precluded from accessing the entirety of the mandatory training and could only access portions of the training through reading slides and slide notes and partial transcripts that were later made available to her. *Id*. She requested that all future Air Force trainings and video fully accessible to d/Deaf Air Force personnel, to include captions. *Id.* at ¶ 40. To date, the Air Force has not responded. *Id.*

Ms. Weimer was on leave under the Family and Medical Leave Act from September 2021 until January 2022; during that time and upon her return she was informed she needed to complete several trainings. *See* Second Supplemental Declaration of Sarah Weimer in Support of Claimants' Motion for Class Certification (hereinafter "Weimer Second Supp. Decl.") at ¶¶ 4-6, 8. Ms. Weimer attempted to complete the trainings but discovered that all but one[25] of the trainings were completely inaccessible to her as they lacked transcripts or captions. *Id*. ¶¶ 6, 8. Ms. Weimer sent multiple emails requesting accommodations so that she could access these training videos, as of the date of her supplemental declaration only one of those trainings was captioned, such that Ms. Weimer was unable to complete the rest. *Id*. at ¶¶ 9-11.

Even in the rare instances that Ms. Weimer's necessary accommodations for trainings are ultimately granted, such as for a 40-hour Federal Employment Labor Law training in October 2020, it is only after a long and frustrating back and forth. Weimer Decl. ¶ 17.

Despite her need for disability-related accommodations being known and unchanging, Ms. Weimer was required to repeatedly request accommodations for meetings that occurred on a set, reoccurring basis, such as weekly staff meetings and a weekly Civil Law section meeting. Id. at ¶ 41.

[25] The only accessible training was a DOD training which had captions available.

Ms. Weimer was required to put in multiple requests a week in order to have accommodations in order to participate in these reoccurring meetings, and the agency has generally failed to provide her with consistent and reliable accommodations in connection with meetings, as the law requires. *Id.* at ¶¶ 42-49. When Ms. Weimer's recurring meetings became virtual from March 2020 to June 2021, Ms. Weimer was able to rely on the Federal Relay Service, which provided her some access to these meetings[26]. Weimer Supp. Decl. at ¶ 11. When Ms. Weimer was instructed that she was again expected to attend these meetings in-person starting in July 2021, she again requested ASL interpreters, but she received no response; she discovered at the meeting that no interpreter had been arranged, meaning she was forced to return to her office to read the federal relay service transcript while her coworkers remained in the conference room. *Id*. ¶ 14 (noting also that she experienced nights of insomnia and anxiety due to her worries that the Agency would not provide effective communication accommodations for this meeting).

As mentioned above, Ms. Weimer took a brief leave under the FMLA and when she returned, encountered the same repeated, systemic barriers regarding the Air Force's inability to accommodate her in violation of Federal Law. Weimer Second Supp. Decl. ¶ 18.

As a result of more than four years of the Air Force's failure to provide effective accommodations, combined with frequent accessibility barriers such as the inaccessible mandatory trainings, the upcoming termination of the RCC and VRI services she relied on, and the profound impact of this constant discrimination (and the ensuing stress of attempting to work without accommodations) on Ms. Weimer's health, she felt that she had no choice but to resign from her job. Weimer Second Supp. Decl. ¶ 19. Had Ms. Weimer been effectively accommodated, she would not have been forced to resign. *Id.* Despite her resignation, Ms. Weimer is still committed to ending the Air Force's discrimination against deaf employees, and she "would be willing to return to work for the Air Force [again] if there were adequate policies and procedures in place ensuring effective accommodations for

[26] As Ms. Weimer later noted in her second supplemental declaration, the Federal Relay Service has subsequently been discontinued, leading Ms. Weimer to fear that "it will be impossible for myself, as well as many other deaf and hard of hearing Air Force employees, to do our jobs." Weimer Second Supp. Decl. at ¶¶ 15-16; *see also* § III(C)(2) (further details regarding discontinuation of Federal Relay Service accommodations, lack of replacement).

deaf and hard of hearing employees." *Id*.

2. The Air Force has discriminated against class agent Hugo Perez, and repeatedly denied or delayed necessary accommodations.

Mr. Perez is a Class Agent. He has been Deaf Since birth. *See* Perez Decl. at ¶ 3. He is employed as an Engineering Technician (Drafting) at 502nd Air Base Wing, 802nd Civil Engineering Squadron at Fort Sam Houston, Texas since November 2018. *Id.* As soon as his employment started with the Air Force, Mr. Perez encountered substantial barriers to equal opportunity in employment and a failure to provide reasonable accommodations. For example, in November 2018, Mr. Perez requested an ASL interpreter during his orientation. *Id.* ¶ 6. Despite nearly a month of lead time, the Air Force only provided Mr. Perez with an interpreter for half of the first day of his new hire orientation, and therefore, he was unable to access much of the information provided. *Id.* at ¶ 8. In October 2020, Mr. Perez was informed that the contract for ASL has expired, and therefore interpreter accommodations would not be provided until it is renewed. *Id*. at ¶ 23.

Apparently, **there is still no active contract in place, for these crucial accommodations**. Incredibly, on May 23, 2022 – nearly two years later – Mr. Perez was informed that if he wanted ASL interpretation of Video Remote Interpreting Services, **he would need to personally provide his supervisor with quotes from various interpreting agencies**, before his supervisor could take any further steps to set up a contract or provide him with those accommodations. Second Supplemental Declaration of Hugo Perez ("Perez Second Supp. Decl.") at ¶ 17. In other words, **the Agency has placed the burden of researching, locating, and coordinating Mr. Perez's accommodations on him**, rather than assigning that work to a competent Disability Program Manager or some similar official. *Id.*

For the first six months of his hiring, he requested an interpreter and was not provided interpreter services. Perez Decl. at ¶ 7. Mr. Perez did not receive reasonable accommodations and the Air Force did not provide him work to perform because management did not know what to do. *Id*. at ¶ 7, 24-25. Mr. Perez has repeatedly requested a sign language interpreter and other accommodations, but the Air Force has consistently failed to properly and fully provide reasonable and timely accommodations on a consistent basis. *See id.* ¶¶ 10, 11, 15, 16, 18, 19, 21-23. In fact, Mr. Perez has never been provided an

ASL interpreter for a work function, despite requesting this accommodation multiple times. *See* Perez Supp. Decl. at ¶ 16.

Mr. Perez was told at times there were no funds available to be allocated to the accommodations he requested. *See* Perez Decl. ¶ 16. This is the case even though the Air Force 2020 budget request is approximately $165.6 billion dollars, a 6% increase from the FY 2019 request.[27] This has caused disruptions and barriers for Mr. Perez to fully perform his job duties. Mr. Perez has also not been fully included in trainings, where no interpreter or other effective accommodation was provided. *Id.* at ¶¶ 6, 16, 19.

Mr. Perez requested an audio video device for his desk for phone calls soon after he became employed by the Air Force. Perez Decl. ¶ 11. As set forth in Mr. Perez and his supervisor Mr. Morgan's declarations, a video phone was not provided for over a year. *Id.* ¶ 12; *id.* Ex. C (Morgan Decl.). Once the phone was provided, it was not installed correctly or in a timely manner. *Id.* Supervisor Morgan aptly described the Air Force's inexcusable failure to provide Mr. Perez with a working videophone in an email dated September 29, 2020, which states that Mr. Perez's videophone:

> is still not operational and has never worked more than a day or so since it's connection in Jul/Aug.
>
> As this phone is a Reasonable Accommodation Solution, I find it difficult to believe that after almost TWO YEARS of this issue that a permanent solution has yet to be found.
>
> I am requesting that your office take action to fix this issue - he has already submitted several tickets and the original goes back to Jan 2019. At this point I see no reason for this individual to have to submit any further requests, etc. Your organization needs to step up to the plate and do what is necessary to get this equipment functioning properly - if a ticket needs to go in, just find a closed one and re-open it - it should not have been closed in the first place. Once it's operational - and stays operational for 30 days I think you could say at that point the issue has been solved. Until then - it's just sweeping it under the carpet.
>
> I think we've been more than patient in this exercise and I request that action be taken to get this problem solved. As this email is elevating to the highest possible levels, the only

[27] *See* https://www.saffm.hq.af.mil/FM-Resources/Budget/Air-Force-Presidents-Budget-FY20/#:~:text=President's%20Budget%20FY20-,Air%20Force%20President's%20Budget%20FY20,from%20the%20FY%202019%20request (dated February 7, 2021).

> way forward from here, if there is no action, is through the IG office. Not something I'd want to do, or desire to do, but if that's what it takes to get this issue addressed, I'm without other recourse. Please - assign someone to this issue, get it fixed, and follow up with it to make sure it stays fixed.

Perez Decl. at ¶12, Exhibit C. To date, the video phone is still not consistently operational more than two years after the initial request for accommodation was made. *Id.* at ¶¶ 12-13. Mr. Perez has also been denied assistive technology. Perez Decl. at ¶ 14.

Mr. Perez's supervisors have admitted that they have received little training and guidance regarding providing reasonable accommodations. *Id*. at ¶¶ 25-26. Ms. Calhoun, Mr. Perez's prior supervisor, admitted in her declaration that Mr. Perez "could not have the same, equal access to training, work or advancement opportunities since he was hearing impaired." *See* Perez Decl., Ex. C (Calhoun Decl.); *id*. ¶ 20. Supervisor Morgan admitted the "problem has been the lack of authority to get things done" in order to reasonably and timely accommodate Mr. Perez. *See* Morgan Decl.; Perez Decl. ¶ 24. Supervisor Morgan stated, "there should be standard accommodation vehicle in place for employees who may need these types of services that should be able to be implemented quickly – not after 2 years of red tape." *Id.* ¶ 26.

The one tool that had been available to Mr. Perez to facilitate effective communication was the Federal Relay Service ("FRS"), which was provided not by the Air Force, but by the federal government. Perez Second Supp. Decl. ¶ 4. FRS used Video Remote Interpreting ("VRI") to enable all Federal employees to communicate via videoconferencing by connecting federal employees free of charge and on-demand to ASL interpreters and vice-versa. *Id*. While VRI is not an appropriate substitute for ASL interpretation in many situations, particularly large group settings, for Mr. Perez it was better than the minimal to no accommodations the Agency had provided him and kept him from being completely excluded from communicating with his coworkers. *Id.* ¶¶ 5-6.

However, in late 2021 Mr. Perez received notice that the FRS would been decommissioned. In November, 2021 he notified his supervisors about the impending termination of FRS and the resulting communication barriers that would ensue. *Id*. ¶ 8. On February 15, 2022 Mr. Perez again contacted his

supervisor, noting that FRS had officially been decommissioned. *Id*. ¶ 11. Given the lack of FRS, Mr. Perez again requested ASL interpreters but was told by a Program Manager that to her knowledge Joint Base Saint Andrews did not have a contract with an interpreting agency. *Id*. ¶ 14. Without FRS, Mr. Perez is even more isolated at work. Prior to a recent work party, he requested an ASL interpreter but when he arrived, no interpreter was provided; unable to communicate he left the party early. *Id*. ¶ 20.

3. The Air Force has discriminated against class agent Sheila Burg, and repeatedly denied or delayed necessary accommodations.

Ms. Sheila Burg is a Class Agent. She has had a hearing disability since birth and diagnosed as Deaf, with progressive (that is, worsening) hearing loss. Burg Decl.") at ¶ 4. She is an oral communicator and uses Bluetooth hearing aids. *Id.* Ms. Burg also reads lips to assist with her understanding of what is being stated. *Id*. Ms. Burg has been employed with the Air Force since 1986 and has received awards and promotions throughout her three-decade long career. *Id.* at ¶¶ 3, 6. Since 2015, Ms. Burg has held a GS-13 position in SAF/FMBOP as an OCO Budget Analyst at the Pentagon. *Id*. at ¶ 8. She was hired under the Schedule A hiring program, which is described by the Office of Personnel Management as a non-competitive hiring process to increase the hiring and retention of employees with disabilities.[28] *Id.*

The Air Force continues to fail to provide the accommodations that Ms. Burg needs to perform her job. This includes a working captioned telephone, CART services, notetaker services, and written notes/instructions/information necessary for her job. The lack of timely, consistent reasonable accommodations has lasted for over five (5) years. *Id.* at ¶¶ 9-15, 19-20. Despite the fact that Ms. Burg's disability is permanent and her need for accommodations is ongoing and unchanging, she has been required to provide documentation and share information to justify the need for accommodation, due to poorly trained staff and supervisors. Burg Decl. at ¶¶ 14-15. Ms. Burg has teleworked since September 2019 so that she could self-accommodate at her home. *Id.* at ¶¶ 21-22. However, in January 2020 Ms. Burg was informed that she would be reassigned to Andrews Air Force Base rather than the Pentagon,

[28] *See* https://www.opm.gov/policy-data-oversight/disability-employment/hiring/ (February 4, 2021).

because "currently there are no restrictions on the use of cell phones or other Bluetooth devices in the building." *Id.* at ¶ 23. The "Bluetooth devices" in question are Ms. Burg's hearing aids. *See id*. Ms. Burg was informed the move would be "an interim accommodation until [the Air Force] determined if there are other available locations closer to the Pentagon" or if she will be "reassigned to another position" within the Air Force. *Id*. For now, she continues to telework due to COVID, but she does not know when her permission to do this will be revoked, or whether she will be able to return to her former workplace at the Pentagon. *Id.* at ¶¶ 23, 27.

Ms. Burg has not been consistently provided accommodations for trainings and teleconferences. Burg Decl. at ¶¶ 9, 19, 20. She also has not received reasonable accommodations of CART services she requested in the EEO process. Burg Decl. at ¶ 32.

4. The Air Force has discriminated against class agent Matthew Wambold and repeatedly denied or delayed necessary accommodations—including during the Agency's EEO process itself—leading to his constructive termination.

Mr. Matthew Wambold is class agent and former employee of the Air Force. He is Deaf and have been since birth, and like many d/Deaf people, English is not his first language, and he struggles to understand or use written English. *See* February 11, 2021 Declaration of Matthew Wambold ("Wambold Decl.") at ¶ 3. Mr. Wambold communicates primarily through ASL. *Id.* As the National Institute on Deafness has noted, "ASL is a language completely separate and distinct from English." *Id*.

Mr. Wambold was hired in 2002 as a WG-05 Electronic Worker at the Offutt Air Force Base in Nebraska. *Id*. at ¶ 4. Mr. Wambold requested a video phone in approximately 2006 but his request was denied, and he was never provided an accessible phone that would enable him to communicate via ASL. *Id.* at ¶ 5. Co-workers who were hired at approximately the same time as Ms. Wambold at the WG-05 level like Mr. Wambold were promoted to a WG-10. *Id.* Mr. Wambold's supervisor responded that the reason Mr. Wambold was not similarly promoted was because he can't use the phone, despite the fact that the *reason* he could not use the phone was that the accessible one he requested was never provided to him. *Id.*

Mr. Wambold has been denied ASL interpreter accommodation for trainings, as well as

opportunities for Temporary Duty Travel (offsite) training opportunities—even when he asked for such accommodations weeks in advance. *Id.* at ¶¶ 6-7. When trainings occurred, "[a]ll my co-workers were provided the training but me. I sat in the office and did nothing." *Id.* at ¶ 6. Furthermore, Mr. Wambold was not even informed of what happened at the trainings after the fact or provided with training information, despite asking that he be allowed to "make up what [he] missed." *Id.* at ¶¶ 6-7.

In 2011, Mr. Wambold requested a transfer to a GS-05 Computer Assistant position in order to attempt to obtain reasonable accommodations and have equal opportunity to training and promotional opportunities. *Id.* at ¶¶ 8-12. Nothing changed in the new position, Mr. Wambold continued to not be provided accommodations for work related meetings and for trainings. *Id.* For example, despite his need for accommodations being well known by the Agency, Mr. Wambold was not offered accommodations for DOD Security certification examinations until his *sixth* attempt to take the test. *Id*. at ¶ 10., Despite many requests, Mr. Wambold only received an ASL interpreter on two occasions between 2014 and 2019. *Id*. at ¶ 9.

Mr. Wambold was not provided reasonable accommodations for the EEO process. He requested an interpreter for communications and to ask questions related to the EEO process. *Id.* at ¶¶ 13-14. When denying the requested accommodations, Mr. Wambold was informed the "EO Office does not have that sort of funding nor the responsibility," and "the Intake and other documents could be taken home and completed, have a friend, family member or other individual to assist him and return the signed and dated documents for PRE Complaint or Formal Complaint processing." *See* Report of Investigation p. 41-42; Wambold Decl. at ¶¶ 13-14. Two weeks after Mr. Wambold filed an EEO complaint, he received a memorandum of instruction stating that if he did not pass the Security Plus test by January 31, 2020, he would be reassigned, have a reduction in grade or pay or removed from federal service. *Id.* at ¶ 15. He requested an interpreter for the test, but none was provided, resulting in Mr. Wambold not passing the test. *Id.* at ¶ 15. Mr. Wambold was constructively discharged in January 2020. *Id.* at ¶¶ 13-16. Mr. Wambold has applied for many positions with the Air Force, without being hired, even for positions he was well qualified for. *Id.* at ¶ 17.

5. The Air Force has discriminated against class agent Mika Hongyu-Perez, and failed to provide her with necessary accommodations during the application process, as well as during employment.

Ms. Mika Hongyu-Perez is a Class Agent. She is Deaf. *See* Hongyu-Perez Decl. at ¶ 3. She is both a former employee and an applicant, having applied for and not been selected for a position on the basis of her disability within the last forty-five days. *Id.* at ¶¶ 1-7, 17-18. Ms. Hongyu-Perez has applied for more than 150 positions in the Air Force at the Lackland Air Force Base, Texas, including seven jobs in January and February of 2021. *Id*. at ¶¶ 6-7, 17-18.

Though Ms. Hongyu-Perez consistently applied to civilian Air Force jobs through the Agency's Schedule A noncompetitive hiring process (for which her deafness makes her eligible), she has seldom been selected for interviews, including for positions for which she was very well qualified. *Id*. at ¶¶ 6-7, 17-18. In the few instances where she has gotten past the initial application stage, she has not been properly accommodated throughout the application process, despite the Air Force knowing that she is Deaf and needed such accommodations. *Id.* at ¶¶ 8-10.

In fact, in one instance the Air Force canceled a paid internship position that they had offered her, rather than simply providing her with the reasonable accommodations she required to perform the essential functions of the job. *Id.* at ¶¶ 11-12.

For one position that Ms. Hongyu-Perez was able to secure employment as a GS-1702-6, Step 1 in January 2020, no accommodations were provided to her. *Id*. at ¶¶ 13-16. Despite making her need for an ASL interpreter known well in advance, she was only provided an interpreter for part of the first day of her weeklong new-hire orientation. *Id.* at ¶ 15. Her supervisor was not informed she is Deaf. Ms. Hongyu-Perez realized that the primary duty of the position was Charge of Quarters, supervising a dormitory, and required extensive oral communication as well as listening to announcements over an intercom. *Id.* at ¶¶ 15-16. Her supervisor said the position was almost 100% focused on communication; in person and via phone and intercom. *Id.* However, none of these forms of communication were accessible to her as a Deaf employee, and no accommodations were provided to her, despite the Air Force knowing that she was Deaf and would need such accommodations. *Id.* As a result of the Air

Force's failure to accommodate her and her inability to perform the essential functions of the position without such accommodations, she resigned. *Id*.

6. The Air Force has discriminated against class declarant Rachel McAnallen, and repeatedly denied or delayed necessary accommodations

Ms. McAnallen is a class declarant and former employee of the Air Force. Ms. McAnallen has been Deaf since birth and communicates primarily through spoken language and cued speech, which is a way for people who are d/Deaf to "see" spoken English (or any other language). McAnallen Decl. at ¶ 2. Ms. McAnallen worked for the Air Force for five years, initially as part of the Palace Acquire Program, a two-year, full-time paid training program designed for both professional and personal growth, and then as an Environmental Program Manager and Environmental Engineer. *Id*.at ¶ 3.

Throughout her five-year career at the Air Force, Ms. McAnallen was repeatedly denied a variety of reasonable accommodations that were necessary for her to do her job and receive effective training. *Id*. at¶ 5. The Air Force routinely denied Ms. McAnallen's requests for interpreters or cued language services at trainings, meetings, and other functions- making it very difficult for her to perform essential job duties. *Id*. at¶ 10. Many of the difficulties Ms. McAnallen faced in receiving necessary accommodations stemmed from the Air Force's lack of centralized funding for interpreting, captioning, and cued language transliteration services, meaning the financial burden of providing accommodations was entirely on individual squadrons. *Id*. at ¶ 10. Ms. McAnallen continually advocated for the Air Force to establish centralized accommodations funding and contracts for interpretation and other services but faced numerous barriers while doing so. *Id*. at ¶¶ 11–12; 15. When Ms. McAnallen left the Air Force in 2018 she cited its continual failure to effectively accommodate her as one of the main reasons for leaving her post. *Id*. at¶ 18.

IV. Legal Standard Applicable To Certification

Under EEOC regulations, a class complaint must allege that: (1) the class is so numerous that a consolidated complaint concerning the individual claims of its members is impractical; (2) there are questions of fact common to the class; (3) the class agent's claims are typical of the claims of the class; and (4) the agent of the class, or, if represented, the representative, will fairly and adequately protect the

interests of the class.[29] 29 C.F.R. § 1614.204(a)(2). These requirements are an adaptation of Rule 23(a) of the Federal Rules of Civil Procedure. *See Hines v. Dep't of the Air Force,* EEOC Appeal No. 01931776 (July 7, 1994). Decisions interpreting Rule 23 are thus relevant, and routinely considered in EEOC decisions on class certification. *See, e.g.*, *Jantz, et al. v. Astrue*, EEOC Appeal No. 0720090019 (Aug. 25, 2010) at *5 (looking to federal court decisions on numerosity under Rule 23).

At the same time, complainants engaged in the EEOC administrative process are not held to the same standard of proof as a Rule 23 plaintiff due to the limited availability of discovery prior to certification of the complaint as a class complaint. *See Aurore C., et.al., Complainant,* EEOC DOC 0120150342, 2018 WL 2932869, at *5 (May 18, 2018*)* ("We note that, although the Commission's requirements for an administrative class complaint are patterned on the Rule 23 requirements, Commission decisions in administrative class certification cases should be guided by the fact that an administrative complainant has not had access to pre-certification discovery in the same manner and to the same extent as a Rule 23 plaintiff."). EEOC regulations provide for development of the evidence by the parties once a class complaint has been accepted. As a case progresses, the Administrative Judge may take appropriate action if the evidence reveals that the class should be redefined, subdivided, or otherwise changed. *See* 29 C.F.R. § 1614.204.

Under both EEOC regulations and Rule 23, courts have "no license to engage in free-ranging merits inquiries at the certification stage," and merits questions can only be considered to the extent "that they are relevant to determining whether the Rule 23 prerequisites . . . are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) In other words, "'[n]either the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies' Rule 23." *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1004–05 (9th

[29] The EEOC has explained that when addressing a class complaint, it is important to resolve the requirements of commonality and typicality prior to addressing numerosity in order to "determine the appropriate parameters and the size of the membership of the resulting class." *Moten,* EEOC Request No. 05960233 (April 8, 1997) (citing *Harris v. Pan American World Airways,* 74 F.R.D. 25, 45 (N.D. Cal. 1977)

Cir. 2018), *cert. dismissed,* 139 S. Ct. 1651 (2019) (citation omitted). Similarly, evidence offered in support of class certification does not need to be admissible at trial, and rejection of such evidence on the basis admissibility is an abuse of discretion. *See id.* at 1004-06.

V. Argument

A. The Court should certify Complainants' proposed class.

Here, Complainants seek to certify a proposed class of class of "**all d/Deaf civilians who are currently employed by the United States Air Force, as well as all d/Deaf civilians who either applied for civilian employment with the Air Force or were so employed at any time between January 1, 2018 and the present**."

As discussed in more detail below, the four requirements of 29 C.F.R. § 1614.204(a)(2) are met. Moreover, if the Court has any concerns regarding Complainants proposed class definition, it may modify that definition in whatever ways it believes are necessary. *See Holman v. Experian Info. Sols., Inc*., No. C 11-0180 CW, 2012 WL 1496203, at *8 (N.D. Cal. Apr. 27, 2012) (discussing authority and modifying proposed definition). Similarly, if the Court believes that different categories of Air Force employees or applicants are harmed to different degrees or in different ways by the Agency's discriminatory conduct it could choose to certify multiple subclasses of affected individuals (for example, a subclass of current employees and a subclass of applicants). *See id*

1. The EEOC routinely finds that claims under § 501 of the Rehabilitation Act are suitable for class treatment.

29 C.F.R. §1614.204 (a)(1) states that "a class is a group of employees, former employees or applicants for employment who, it is alleged, have been or are being adversely affected by an agency personnel management policy or practice that discriminates against the group on the basis of [. . .] handicap." "The purpose of class action complaints is to economically address claims common to a class as a whole . . . turning on questions of law applicable in the same manner to each member of the class." *Melodee M. et al., Complainant*, EEOC DOC 2020004194, 2020 WL 7243675, at *2 (Nov. 23, 2020) (internal citations omitted).

The Commission has certified numerous cases on behalf of federal agency employees with

disabilities who allege their rights have been violated under § 501 of the Rehabilitation Act. *See McConnell, et. al. v. United States Postal Serv.,* EEOC Hearing No. 520-2008-00053X, (May 30, 2008) (noting that the EEOC "has found in certain cases, a large number of disabled persons can be an appropriate group for class certification" and certifying class of "[a]ll permanent rehabilitation employees and limited duty employees who have been subjected to NRP [national reassessment process]"); *Walker v. United States Postal Serv.,* EEOC Appeal No. 0720060005 (March 18, 2008) (certifying class comprised of individuals with disabilities in permanent rehabilitation positions who had their duty hours restricted); *Complainant v. Dept. of Def.*, EEOC DOC 0120103592, 2015 WL 5530294, at *7 (Sept. 9, 2015) (preliminarily certifying class of all employees, current and former, who requested reasonable accommodation and were required to complete and sign the Agency's Reasonable Request Form beginning in 2002 until such time as the use of the contested form was discontinued); *Glover v. United States Postal Serv.,* EEOC Appeal No. 01A04428 (April 23, 2001) (certifying class where Complainant alleged that the agency maintained a nationwide policy of denying promotional opportunities to individuals with disabilities in permanent rehabilitation duty positions); *Meyer v. Kerry* (State), EEOC Appeal No. 0720110007 (2014), *10 (certifying class challenging policy denying the benefits of employment within the Foreign Service to those with disabilities, without regard to accommodation, and without any individualized assessment into the individual's specific condition."); *see also Travis v. United States Postal Serv.,* EEOC Appeal 01992222 (October 10, 2002) (rejecting argument that actions brought under the Rehabilitation Act are "ill-suited" for class treatment).

2. The EEOC endorses the *Teamsters* method of proof for class claims under § 501 of the Rehabilitation Act

Class Agents in this pattern and practice case assert that the Agency has discriminated against members of the class as "the standard operating procedure – the regular rather than the unusual practice." *See International Bhd. Of Teamsters v. United States*, 431 U.S. 324, 335 (1977). To prove such a case, complainants must ultimately "prove more that the more than the mere occurrence of isolated or 'accidental' or discriminatory acts." *Id.* Instead, the Class Agents must show that the denial of rights was repeated, routine, or of a generalized nature. *Id*.

Class Agents have in large part already met this ultimate burden, and have **far** more evidence of centralized discriminatory policies, procedures, and practices than is required at this initial certification stage, as Agency documents and deposition testimony obtained during the pre-certification discovery process affirm. *See* § III, above.

When a class alleges a broad-based policy of employment discrimination such as this, it may pursue its pattern or practice claims in a bifurcated proceeding. *Velva B.,* 2017 WL 4466898, at *11. In the first stage, the Class Agent must establish that unlawful discrimination has been a regular procedure followed by an employer. *EEOC v. Bass Pro Outdoor World, LLC*, 826 F.3d 791, 797 (5th Cir. 2016), *citing Teamsters, supra*, at 336 N.16. The Class Agent may establish that class-wide and systemic discrimination occurred at the Agency at this merits stage by submitting evidence utilizing the burden shifting framework established in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). If the Class Agent meets her burden to establish class-wide discrimination using this framework, a subsequent remedial phase determines the scope of individual relief. *Id.*

In *Velva B.* the agency defendant argued to the Commission that a bifurcated *Teamsters* proceeding could not be used for claims under the Rehabilitation Act. *Velva B.*, 2017 WL 4466898, at *14. The Commission rejected this argument and explained that the agency's suggested approach was inconsistent with Congressional intent and the Commission's obligation to address class-wide discrimination based on disability:

> Expecting every potential class member to undertake the individualized inquiry that the Rehabilitation Act requires during the liability phase of the Teamsters process is inherently impractical, unworkable in practice, and would effectively bar the use of class complaints as a means of challenging workplace policies that discriminate against individuals with disabilities. Such a result would clearly be contrary to Congress's intent in enacting the Rehabilitation Act and the ADA.[6]
>
> A far more efficient and effective way to resolve the individualized-inquiry dilemma is to require prospective class members to prove that they are qualified individuals with disabilities during the remedies phase of the *Teamsters* proceeding, as opposed to the liability phase. The remedies stage is where proof of one's status as a qualified individual with a disability under the Rehabilitation Act naturally aligns with proof of one's membership in a class under *Teamsters*.

Id. The Commission's use of the *Teamsters* method of proof for class-wide disability discrimination claims is consistent with the approach employed by the federal court in *Bates v. United Parcel Service*, 204 F.R.D. 440 (N.D. Cal. 2001). In *Bates*, plaintiffs pursued a class action similar to the case at bar, seeking to address extensive communication access barriers in the workplace. Plaintiff alleged the company frequently ignored requests for interpreters, and often failed to provide video captioning, access to teletype telephones, and reliable emergency alert systems. *Bates,* 204 F.R.D at 442. The Court granted class certification together with plaintiffs' motion for bifurcation of the class action trial. *Id.* 449-50.

Just as the Commission did in *Velva B.*, the court in *Bates* rejected the defendant's argument that a *Teamsters-type* bifurcated proceeding was not viable for ADA claims. In dismissing the argument, the court explained how the bifurcated proceeding would work in practice. For the first phase, "liability, as well as what equitable relief would be appropriate should liability be found, depends on questions of law and fact common to the class and subclass; these questions relate to the policies and practices UPS has employed during the period in question and whether those policies comply with the ADA and California laws." *Bates,* 204 F.R.D at 449. By contrast, the second phase, regarding "the appropriate level of damages … depends on individualized questions, such as each class member's employment history, the particular communication barriers faced by each class member, and the accommodations UPS has provided to each class member." *Id.* The Court emphasized that "[e]ach phase would therefore require the parties to present different types of evidence" and that "UPS is simply mistaken when it argues that the evidence in the liability phase 'must include' evidence of 'each individual's need for accommodation, considering his or her particular limitations and essential job functions, what accommodations he or she was offered and how they were inadequate, if at all, what other reasonable accommodations was available …" *Id.*[30]

[30] A minority of federal courts have taken a different approach, finding that the *Teamsters* method of proof cannot be used under the ADA. *See Semenko v. Wendy's Int'l, Inc.*, No. 2:12-CV-0836, 2013 WL 1568407, at *1 (W.D. Pa. Apr. 12, 2013). Those courts have found that "there is an important distinction between Title VII and ADA claims for class action purposes and courts presiding over ADA cases must determine not just whether the employer acted improperly, but also 'whether class members

In sum, well established Commission and federal court precedent authorizes the use of a *Teamsters-type* bifurcated proceeding for the Rehabilitation Act claims in this case. Even those courts that take a more restrictive approach to class certification endorse the *Teamsters* method of proof for cases where there is "unifying criteria" such as "common conditions suffered" or "accommodations sought" – all of which exist here. *See Semenko,* 2013 WL 1568407, at *8. In other words, even under the more restrictive approach to class certification adopted in *Semenko*, certification would still be appropriate in this case, because all proposed class members share a common disability (deafness or serious difficulty hearing), require the same or similar accommodations, and have been subjected to common Air Force policies and practices that discriminate against all of them in essentially the same way – as detailed both above and below. *See* § III above; §§ V(A)(4) and (5), below.

Moreover, to the extent any federal case conflicts with Commission precedent such as that established in *Velva B*, Commission precedent controls. *Velva B.,* 2017 WL 4466898, at *49, n. 6 ("A primary purpose of the ADA, and by extension the Rehabilitation Act, is to eliminate discrimination against individuals with disabilities.") 42 U.S.C. § 12101(b)(1). In enforcing these statutes, the Commission's responsibility is to eliminate employment policies and practices that purposefully or effectively discriminate against qualified individuals with disabilities because of their disabilities.

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are 'qualified'-which includes whether they can or need to be reasonably accommodated-before a classwide determination of unlawful discrimination … can be reached.'" *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169 at 191 (3d Cir. 2009). ("[i]t is the ADA … and not the *Teamsters* evidentiary framework, that controls the substantive assessment of what elements must be determined to prove a pattern or practice of unlawful discrimination …"). This approach finds it necessary to resolve individualized questions under the ADA at the liability stage of any *Teamsters* proceeding, and as a result, these courts believe that individualized inquiries will often overwhelm the common issues at the liability stage. *Hohider*, 574 F.3d at 191.

However, even this most restrictive approach does not find all disability-related employment class actions ill-suited for class treatment. In fact, the district court in *Semenko* acknowledged "that there are situations when ADA class actions are certified" and approvingly cited the class certification decisions in *Bates v. UPS* and *Wilson v. Pa. State Police Dep't*, 1995 WL 422750 (E.D. Pa. July 17, 1995) – both cases that are analogous to this one. *Semenko*, 2013 WL 1568407, at *8 (discussing cases) As that court explained, certification is unquestionably appropriate in cases where "there appear to be some unifying criteria, such as common disability or requested accommodation, for example, so that classwide evaluation of 'qualification' may be conducted without requiring a prohibitive number of individualized mini-trials." *Id.* (citations and internal quotation marks omitted) (discussing cases). Exactly such unifying criteria are present here.

Consequently, the Commission is not compelled to interpret the Rehabilitation Act or the ADA in a manner that conflicts with its mandate.") *See Haywood C. v. U.S. Postal Service*. EEOC Appeal No. 0120132452 (Nov. 18, 2014) (referring to the fact that the Commission is not bound by federal circuit court precedent for purposes of adjudicating federal sector complaints); *See also*, *e.g*. *Huddleson v. U.S. Postal Service*, EEOC Appeal No. 0720090005 n. 6 (Apr. 4, 2011); *Turtle v. U.S. Postal Service*, EEOC Appeal No. 0720080025 n. 2 (Mar. 5, 2009) (rejecting lower court case law inconsistent with Commission precedent). Class Agents are civilian Air Force employees with a disability, thus satisfying the threshold requirement for bringing this class case.

The Commission has explained that "[i]n order to bring a class complaint of disability discrimination, Complainant must demonstrate at a minimum, that [they have. . .] a disability within the meaning of the Rehabilitation Act." *Cyncar*, EEOC Appeal No. 0720030111 (February 1, 2007). Disability means a physical or mental impairment that substantially limits one or more major life activity. 29 C.F.R. § 1630.2(g)(1). A person is substantially limited in a major life activity if they are "significantly restricted as to the condition, manner or duration under which [he] can perform a particular major life activity as compared…to the average person in the general population." 29 C.F.R. § 1630.2(j)(ii). A complainant must also show that they are a "qualified individual with a disability" under 29 C.F.R. 1630.2(m).

As a civilian Air Force employee who is Deaf (as well as a very experienced and highly-qualified Air Force attorney), Ms. Weimer easily satisfies these threshold requirements**.** *See* § III(C)(1), above. The same is true for every other Class Agent, as set forth above. *See* §§ III(C)(2)–(5), above.

3. Class Agents have satisfied all EEO procedural requirements.

The Class Agents have properly exhausted their administrative remedies and identified the EEO complaints as class complaints. Ms. Weimer identified her complaint as a class complaint in the EEO process, and identified the scope of the class and the policies and practices at issue. *See* Record of Investigation at 455-56 (January 24, 2020 Class Complaint); *see also* Weimer Decl. ¶¶ 55-64, Ex. A-J. Similarly, Mr. Perez, and Ms. Hongyu-Perez also identified that they were class agents and members of

the same class. Perez Decl. ¶ 30; Hongyu-Decl. ¶ 19. Class agent Ms. Burg was also identified as a class member; her materials were a part of the class complaint, and her investigative report was included in the Report of Investigation provided by the Agency to the Commission. *See* Burg Decl. ¶¶ 28-38. As it relates to Mr. Wambold, he identified himself as part of the class, and sought to amend his complaint to add a claim that he was not accommodated in the EEO process. Wambold Decl. at ¶¶ 13-14, 18; Musell Decl. ¶ 36, Ex. A; Betouliere decl. Ex. A. The Agency improperly dismissed Mr. Wambold's claims in part without referring them to the EEOC for assignment of an administrative judge. Such a decision is not within the Agency's jurisdiction. *Kwok v. USPS*, 01871083, 1721/E10 (1987); *see also Penk v. Oregon State Board of Higher Education,* 93 F.R.D. 45, 53 (1981) (individuals who have not complied with administrative filing requirements can serve as class agents for a subclass).

Complainant is not aware of any other complaints pending before the agency that assert the claims pled on behalf of the class in this motion. Based on the history recited above, Complainant Weimer and the other Class Agents have met all regulatory deadlines and fulfilled all administrative requirements to permit this case to proceed as a class action.[31]

4. Complainants' claims and those of the class depend on common questions that are capable of classwide resolution.

To demonstrate commonality, Complainant must demonstrate that there is a question of fact common to the class. 29 C.F.R. § 1614.204(a)(ii). Similarly, the "commonality" requirement of Rule 23(a)(2) is satisfied if the claims of plaintiffs and the proposed class "depend upon a common contention . . . capable of class wide resolution" —meaning that a "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the [class members'] claims in one stroke.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 at 350 (2011). This does not "mean that *every* question of law or fact must be common to the class . . . ." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (emphasis in original, citations omitted). "[F]or purposes of Rule 23(a)(2), **even a single common question**" can establish commonality. *Wal-Mart Stores*, 564 U.S. at 359 (internal quotations

[31] As noted by Mr. Perez and Ms. Burg, the ROI submitted by the Agency to the EEOC omitted evidence obtained in the formal complaint stage, including affidavits of supervisors and rebuttal evidence. *See* Perez ¶ 7; Burg Decl. ¶ 32.

and citation omitted, emphasis added); *see also Mazza v. Am. Honda Motor Co*., 666 F.3d 581, 589 (9th Cir. 2012).

Complainant Weimer and other class agents have alleged that centralized Air Force policies, practices, and failures to act have resulted in discriminatory denial of "consistent, reliable, or any sign language interpreter services at all," as well as in the discriminatory denial of "consistent, reliable, or any" access to videophones, CART services, and other necessary accommodations; these are precisely the sort of claims that the Commission has previously found to satisfy commonality, and be suitable for class treatment. *See Tessa L. v. Purdue (USDA)*, EEOC DOC 0720170021, 2017 WL 5564438 at *4-5 (Nov. 9, 2017) (certifying class of deaf employees challenging policy); *see also Bates* at 445 ("Plaintiffs in this case do not challenge the accommodations provided to particular individuals …. [r]ather, 'at issue is the *process* that UPS follows in addressing (and failing to address) communication barriers and determining what jobs deaf workers can hold, not the specific outcomes that a valid process would produce for individual class members." (emphasis in original)).

Further, the declarations of class agents, the deposition testimony of head Disability Program Manager Ms. Shock, and other evidence already in the record establishes that these discriminatory denials of necessary accommodations are not attributable to the discretionary decisions of isolated departments or supervisors, but to failings in systems, processes, and trainings that come from the top down, and that affect d/Deaf employees throughout the Air Force, regardless of the base at which they are stationed or the position in which they work. *See id.*; *see also* §§ III(A) and III(B), above (detailing factual support for claims of systemic and centralized discrimination)

Here, complainants have identified numerous common questions whose answers are "apt to drive the resolution of the litigation"—far more than the commonality element requires. *See Abdullah*, 731 F.3d at 957 (citation and quotation omitted). These include (but are not limited to) the following:

1. Whether the Air Force has failed to ensure that "anyone who is authorized to grant or deny requests for reasonable accommodation or to make hiring decisions is aware that [. . . .] "all resources available to the agency as a whole" . . . must be "considered when

determining whether a denial of reasonable accommodation based on cost is lawful," as required by 29 C.F.R. § 1614.203(d)(3)(ii);

2. Whether the Air Force has failed and refused to provide a common fund for accommodations, such that accommodations are frequently delayed or denied because of cost, and a d/Deaf employee's ability to get an interpreter or other necessary accommodation rises or falls on the finances of their particular unit;
3. Whether the Air Force has failed to ensure that d/Deaf employees and applicants have consistent, reliable access to American Sign Language interpreter services and other necessary accommodations, and in many instances has provided no access at all;
4. Whether Air Force has a centralized discriminatory policy or practice that puts the onus of requesting necessary accommodations on d/Deaf employees every time (for example, for every meeting or training), even when the need for that accommodation is known to the Agency, and has not changed;
5. Whether the Air Force has failed to implement a streamlined and standardized process for connecting videophones and other necessary devices to base networks and ensuring that they function, such that they languish unconnected or unusable for months or years even after they have been acquired;
6. Whether the Air Force has failed to whitelist appropriate assistive technology or to find workable alternative accommodations such as ASL interpretation or CART services for d/Deaf employees working in secure areas;
7. Whether the Air Force routinely fails to ensure that trainings, presentations, and videos for civilian employees are properly captioned or otherwise accessible; and
8. Whether the Air Force has failed to adequately staff its disability program, appoint qualified disability program managers, and/or ensure proper training of individuals with the power to approve and deny accommodations.

As discussed in Section III above, Air Force documents, the declaration testimony of Ms. Shock,

and the experiences of Complainants Hugo Perez, Sheila Burg, Matthew Wambold, Mika Hongyu-Perez and declarant Rachel McAnallen all suggest that **the answer to all of the above questions will be yes**. *See* § III, above. However, the answer to even one would be sufficient to satisfy the commonality requirement of 29 CFR § 1614.204(a) (ii). *See Abdullah*, 731 F.3d at 957.

Indeed, the declaration testimony of Complainants and Ms. McAnallen alone was **already** more than enough to satisfy this element: the fact that these d/Deaf employees or former employees have had markedly similar experiences of discrimination at a variety of different Air Force bases itself shows that these are not isolated incidents of discriminatory conduct, but rather, ones that are reflective of centralized discriminatory policies, practices, and failures across the Air Force as a whole. *Mitchell v. Potter* (USPS), EEOC DOC 01A20442 (July 29, 2003) at *3 ("allegations of specific incidents of discrimination" coupled with "supporting affidavits containing anecdotal testimony" sufficient to establish an overriding Agency policy or practice of discrimination, for purposes of commonality analysis). The copious evidence of centralized discriminatory policies and practices revealed during the pre-certification discovery process—as detailed in § III(B), above—removes any doubt at all that that regarding the existence of common questions, or the appropriateness of certification in this case.[32]

In many ways, the class claims in case are analogous to those asserted in *Tessa L., Complainant*, EEOC DOC 0720170021, 2017 WL 5564438 (Nov. 9, 2017). There, complainants filed a class case alleging disability discrimination under the Rehabilitation Act, based on their hearing disabilities, alleging that when "the [a]gency transitioned funding for sign language interpreting services from the Department level to the sub-agency level without using the appropriate process and without providing adequate time and training … resulted in denial and delay of interpreting services and inhibited Class Agent from performing her job duties." *Tessa L. v Perdue* (USDA), 2017 WL 5564438 at *4-5. Upon review, the Commission found the AJ's decision to certify the class well-founded, noting the agency's

[32] The amount and scope of the commonality evidence submitted by class agents here stands in sharp contrast to cases like *Arecely J*., where the Commission found that commonality and other key certification requirements were not satisfied. *See Aracely J., Complainant*, EEOC DOC 2019003498, 2020 WL 6134366 at *6 (Sept. 21, 2020) ("despite raising 14 alleged discriminatory practices, Complainant had not pointed to any specific incident that adversely affected the class members.").

decision to decentralize the system for approving and funding requests for qualified sign language interpreter services was the "'glue' that holds the reasons for the alleged discrimination experienced by each class member together." *Id*. Further, the Commission found that the specific accommodations that were being denied (the lack of consistent, reliable, or any sign language interpreter services at all) were typical of class agent's claims as well as those of the putative class members.[33] *Tessa L. v Perdue* (USDA), 2017 WL 5564438 at *5.

While it is true that the Air Force's discriminatory actions and failures to act might *affect* Claimants and class members in different ways, such different effects do not defeat commonality. Where a civil rights class action lawsuit challenges "systemic policies and practices" that harm all putative class members—as this case does—Rule 23(a)'s commonality requirement is met even if variations in individual circumstances may result in slightly divergent harms. *See Parsons v. Ryan*, 754 F.3d 657, 681–83 (9th Cir. 2014) (discussing cases); *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) ("[Defendant] argues that a wide variation in . . . class members' disabilities precludes a finding of commonality . . . [w]e reject this approach to class-action litigation."); William B. Rubenstein, 1 Newberg on Class Actions § 3:20 (5th ed., 2020) ("varying degrees of injury[] will not bar a finding of commonality"); *Felix Z. et al., Complainant*, EEOC DOC 2020005328, 2021 WL 1928243, at *5 (Apr. 29, 2021) ("[t]he fact that some individuals chose to complete the reasonable accommodation form and provide the information while others did not, and/or the fact that some individuals were accommodated and others were not, did not destroy commonality or typicality because there was a common policy or practice at issue.") (discussing *Complainant v. Ashton B. Carter*, 2015 WL 5530294 at *5 (Sept. 9, 2015).

[33] The Commission's decision in *Complainant v. Ashton B. Carter* (Dep't of Def.), EEOC DOC 0120103592, 2015 WL 5530294, (Sept. 9, 2015), is similarly in accord and provides further support for a finding of commonality. There, the Commission reversed the AJ's determination that commonality was not established, instead finding that the class agent had "identified a policy or practice of the Agency which affects all employees seeking a reasonable accommodation" - the policy being that all employees seeking a reasonable accommodation were required to use a form and provide extensive medical information in support of any reasonable accommodation request. *Id.* at 5. The Commission found that the Agency's use of this process was sufficient to establish an "Agency Policy that violated the Rehabilitation Act which harmed the class as a whole." *Id.*

Finally, the Court should reject any Agency argument commonality cannot be established because no "specific policy" exists (for example, because the Air Force has no policy regarding captioning of training videos or connecting videophones to base networks at all). In *Bates,* the court expressly rejected such a narrow approach to identification of a "policy", explaining that "[a]dopting UPS's position would lead to the unacceptable conclusion that an employer could protect itself from any class action suit simply by failing to adopt specific policies" and that this "result seems particularly egregious in cases like this one, where plaintiffs' claims that an employer's failure to adopt specific policies is the very reason that the employer is in violation of anti-discrimination laws." *Bates,* 204 F.R.D at 448; *see Siddiqi v. Regents of Univ. of California*, No. C 99-0790 SI, 2000 WL 33190435 at *3 and *9 (N.D. Cal. Sept. 6, 2000) (certifying class where defendant "failed to adopt" various policies necessary to prevent discrimination, including a policy "requiring the use of closed captioning for video presentations during classes and other campus settings.").

Because the claims of Claimants and the proposed class depend on common contentions that are "capable of classwide resolution," this Court should find that the "commonality" requirement of 29 CFR § 1614.204(a)(ii) is met.

5. Complainant's claims are typical of the class.

Under 29 CFR § 1614.204(a)(iii), a complainant must demonstrate that their claims are typical of the claims of the class. Similarly, under Rule 23, class certification is proper where "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3).

The Commission has held that "typicality is met when there is some nexus between the class agent's claims and the class members' claims," and cautioned that "this prerequisite does not mandate that the class agent's circumstances be identical to those of the class members'." *Tessa L. v. Purdue (USDA)*, 2017 WL 5564438 at *5. Likewise, "[u]nder [Rule 23(a)(3)'s] permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Parsons*, 754 F.3d at 685 (quoting *Hanlon*, 150 F.3d

at 1020). "The requirement of typicality is not primarily concerned with whether each person in a proposed class suffers the same type of damages; rather, it is sufficient for typicality if the plaintiff endured a course of conduct directed against the class." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1118 (9th Cir. 2017); *see also Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) ("Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought"); *Lozano v. AT & T Wireless Servs., Inc*., 504 F.3d 718, 734 (9th Cir. 2007) (citing *Simpson v. Fireman's Fund Ins. Co.*, 231 F.R.D. 391, 396 (N.D.Cal.2005) for the proposition that "[i]n determining whether typicality is met, the focus should be 'on the defendants' conduct and plaintiff's legal theory,' not the injury caused"). Because typicality overlaps with commonality, a finding of commonality usually supports a finding of typicality. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (noting that commonality and typicality requirements frequently "merge").

Here, Complainant Weimer, other class agents, and the proposed class members' claims all center upon the same discriminatory course of conduct: centralized Air Force policies, practices, and failures to act that serve to deny them of "consistent, reliable, or any" access to ASL interpreters and other necessary accommodations. *See Tessa L. v. Purdue (USDA)*, 2017 WL 5564438 *4-5 (certifying class of deaf employees raising claims of lack of ASL interpreters); *see also* § III, above (detailing Class Agents' experiences, and systemic discriminatory policies and practices).

As other courts have observed, in most cases alleging discrimination on the basis of disability, "there will be individual variations among class members in terms of the nature of their disability, the types of aides used, and the individual nature of each class member's . . . access to services and facilities" – however, such differences do not defeat typicality. *Nat'l Fed'n of the Blind v. Target Corp.,* 582 F. Supp. 2d 1185, 1201 (internal citations omitted). Again, the declarations of class agents and other evidence already in the record establishes that the lack of consistent and reliable accommodations for the Agency's d/Deaf employees is not attributable to the discretionary decisions of isolated departments or supervisors, but to failings in systems, processes, and trainings that come from the top down, and that

affect d/Deaf employees throughout the Air Force, regardless of the base at which they are stationed or the position in which they work. *See* § III, above.

Where—as here—all class members have been harmed by centralized discriminatory policies, practices, and failures to act, neither the fact that class members may need somewhat different accommodations, nor the fact that they may work at different locations or have different positions and supervisors is sufficient to defeat typicality. *See Felix Z.*, 2021 WL 1928243 at *5 (whether some individuals chose to complete the reasonable accommodation form and provide the information while others did not, and/or the fact that some individuals were accommodated and others were not, did not destroy commonality or typicality); *Tessa L.*, EEOC DOC 0720170021, at *6 (Nov. 9, 2017) (typicality found where "dismantling the centralized fund caused everyone to suffer lack of reasonable accommodation in the form of consistent, qualified interpreting services for essential functions of their respective employment and Department-wide functions."); *Bates v. United Parcel Service*, 204 F.R.D. 440, 446-47 (individualized nature of ADA determinations does not defeat typicality); *Nat'l Fed'n of the Blind,* 582 F. Supp. 2d at 1201 (internal citations omitted); *see also Turner v. Dep't of Justice (Fed. Bureau of Prisons*), EEOC Appeal No. 0720060041 (July 19, 2007) ("To the extent that the agency argues that the mere fact that individuals work in different positions in different locations automatically defeats a claim for class certification, we disagree. If there is sufficient evidence of a common policy or practice, the commonality test can be met, even if the employees hold different positions and work in different facilities.").

Because Complainant, other class agents, and all members of the proposed class have been harmed by the same discriminatory course of conduct, and would benefit from the same declaratory and injunctive relief, this Court should find that the proposed class satisfies 29 CFR § 1614.204(a)(iii)'s typicality requirement.

6. The proposed class – which includes at least a thousand d/Deaf civilian employees throughout the Air Force – easily satisfies numerosity.

29 CFR § 1614.204(a)(2)(i) requires that a complainant establish that "the class is so numerous that a consolidated complaint of the members of the class is impractical." A proposed class under Rule

23 is similarly sufficiently numerous if joining its members as individual plaintiffs would be "impracticable." See Fed. R. Civ. P. 23(a)(1) The numerosity requirement is "not tied to any fixed numerical threshold"—courts generally find that classes with 40 or more members satisfy it, but even much smaller classes can suffice. *See Rannis v. Recchia*, 380 Fed. Appx. 646, 651 (9th Cir. 2010) (discussing standard, and affirming certification of 20-member class); *see also* William B. Rubenstein, 1 Newberg on Class Actions § 3:12 (5th ed. 2020) ("A class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone."). *See also Johnson-Feldman v. Secretary of Veterans Affairs*, 01953168 (1997); *see also Jeffries v. Secretary of Treasury*, 01A02227 (2003) (77 past and present employee sufficient for class certification); *Thockmorton v. Secretary of Interior*, 01A03994 (2003) (class of 74 meets numerosity requirement); *Lee v. Secretary of Army*, 01990384 (2000) (60 employees are sufficient for class certification). Where "the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied." *In re Abbott Labs Norvir Anti-Trust Litig.*, 2007 WL 1689899, at *6 (N.D. Cal. Jun. 11, 2007) (citing Cone, Newberg, *Newberg on Class Actions* § 3.3 (4th ed.2002). *Cf. Aracely J., Complainant*, EEOC DOC 2019003498, 2020 WL 6134366, at *6 (Sept. 21, 2020) (26 putative class members who currently or previously worked at agency's Regional Office was not so large or geographically dispersed that consolidated or separate complaints would be impractical).

Here, evidence produced by the Agency during discovery easily demonstrates that the proposed class here satisfies the numerosity requirement. The Agency's 2020 Total Workforce distribution by Disability Status Report, which covered the period from October 1, 2019 to September 30, 2020 indicated that **773 employees identified as being deaf or having serious difficulty hearing**. Betouliere Decl., Exhibit H (FY 2020 Workforce Tables) at 50.[34] During her deposition, Ms. Shock testified that "as far as deaf employees, yes, I'd say there's **over a thousand**." Shock Tr. 71:9-10 (emphasis added).

Moreover, based on a class list that the Agency belated provided in response to Complainants'

[34] That same report also identified 120 "qualified external applicants" who self-identified as deaf or having serious difficulty hearing during that same time period and were hired in that year alone – indicating that the "applicant" portion of the class also independently satisfies the "numerosity" threshold. *Id* at 78.

Interrogatory No. 1, the class is geographically dispersed, making separate complaints extremely impracticable. Class members can be found at Air Force locations all across the County – according to this list, more than 80 bases have deaf employees, and the vast majority have five or more (sometimes many more). Betouliere Decl. at ¶ 15.

A class which according to the Agency's own documents and testimony consists of anywhere between 773 and over a thousand members readily clears the threshold to satisfy numerosity. *See* William B. Rubenstein, 1 Newberg on Class Actions § 3:12 (5th ed. 2020). The Court should thus find that Plaintiffs' proposed class satisfies the requirements of 29 CFR § 1614.204(a)(2)(i).

7. Complainant and their counsel will fairly and adequately protect the interests of the class.

In its February 8, 2022 opposition to complainant's request for an extension to file this motion and to take discovery related to class certification**, the Air Force "concedes that the information contained [in] Complainant's Response and its attachments likely satisfy the adequacy requirement" of 29 C.F.R. § 1614.204(iv)**. *See* Agency Opp'n at 3 (emphasis added).

Adequacy requires that the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class. 29 C.F.R. § 1614.204(iv). To determine if plaintiffs "will fairly and adequately protect the interests of the class" under Fed. R. Civ. P Rule 23(a)(4), courts ask whether 1) "named plaintiffs and their counsel have any conflicts of interest with other class members" and 2) whether "the named plaintiffs and their counsel [will] prosecute the action vigorously on behalf of the class." *Sali*, 909 F.3d at 1007, *cert. dismissed,* 139 S. Ct. 1651 (2019);. To answer these questions, courts look at a range of factors, including "an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011). "Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement. A conflict is fundamental when it goes to the specific issues in controversy." *In re online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th Cir. 2015) (internal citations omitted).

Complainant Weimer and other class agents are adequate class representatives because they are

directly affected by the discriminatory Air Force policies, practices, and failures to act at the heart of this case, which serve to deprive them of consistent and reliable access (or any access at all) to accommodations that they need to do their jobs, advance their careers, apply for positions at the Air Force, or participate in the Agency's EEO processes. *See* § III, above.

Complainants' interests are not antagonistic to, nor in conflict with, the interests of the class as a whole. Rather, the relief they seek would benefit themselves and every member of the proposed class, by ensuring that class agents and other class members have equal and nondiscriminatory access to the same opportunities for "hiring, advancement [. . .], employee compensation, job training, or other terms, conditions, and privileges of employment" that are available to their nondisabled peers. 29 C.F.R. § 1614.203(b); *see also* 29 U.S.C. § 791(f). Complainant and other class agents are incentivized to vigorously pursue this requested relief on behalf of the class. Weimer Decl. ¶¶ 1-2; Perez Decl. ¶¶ 1-2; Hongyu-Perez Decl. ¶¶ 1-2; Burg Decl. ¶¶ 1-2; Wambold Decl. ¶¶ 1-2; s*ee also Ellis*, 657 F.3d at 985 (affirming adequacy, where nothing in record suggested that representative would not "vigorously pursue injunctive relief on behalf of the entire class").

Complainant's attorneys also satisfy the adequacy requirement. Adequate representation of counsel is "usually presumed in the absence of contrary evidence," *Californians for Disability Rts., Inc. v. California Dep't of Transp.*, 249 F.R.D. 334, 349 (N.D. Cal. 2008) and there is nothing to rebut that presumption in this case. *See* Musell Decl. ¶¶ 1-36, 38; Betouliere decl. ¶¶ 3-26; *see also* William B. Rubenstein, 1 Newberg on Class Actions § 3:72 (5th ed. 2020). Where there is no conflict, the only relevant questions are whether "proposed class counsel [is] qualified and would prosecute the action vigorously." *Sali*, 909 F.3d at 1007. Here, the answer to both questions is yes.

Complainants' attorneys have already devoted a significant amount of time and effort to investigating and prosecuting this action on behalf of Complainant, class agents, and the class, and they have more than enough resources to continue vigorously prosecuting this case. Musell Decl. ¶ 38; Betouliere Decl. ¶¶ 25-26. Complainants' counsel also has substantial experience litigating complex and novel class action cases such as this one. Disability Rights Advocates ("DRA") has specialized in

disability law and class action institutional reform litigation for nearly three decades, and has served as class counsel in dozens of disability rights class actions. Betouliere Decl. ¶¶ 3-14. Law Offices of Wendy Musell has extensive decades-long experience representing public employees and federal workers, including in class action cases. Musell Decl. ¶¶ 4-34. Both firms are thus well-qualified to litigate claims on behalf of the class, and ably meet standards for appointment as class counsel. *See Sali*, 909 F.3d at 1007–08.

In sum, this Court should find that the adequacy requirement of 29 C.F.R. § 1614.204(iv) is satisfied as to both Complainants and their counsel, and should appoint Complainants as Class Agents, and their attorneys as Class Counsel.

8. Certification of a class is appropriate, because a single injunction or declaratory judgment would provide relief to each member of the class.

While Rule 23(b)(2) does not apply in this administrative context, class-wide injunctive relief is still appropriate, because the Air Force has "acted or refused to act on grounds that apply generally to the class . . . ." Fed. R. Civ. P. 23(b)(2). Indeed, the claims raised by Complainant Weimer and other class agents are of precisely the sort that Rule 23(b)(2) was designed to facilitate: the "primary role of [the rule] has always been the certification of civil rights class actions . . . ." *Parsons*, 754 F.3d at 686; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (noting that "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of proper (b)(2) actions). When conducting a Rule 23(b)(2) inquiry, courts do not "examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2011); *Parsons*, 754 F.3d at 689 n.35 (holding, in the context of Rule 23(b)(2) inquiry, that "the class certification hearing is not a dress rehearsal of the trial on the merits (let alone a dress rehearsal of the remedy proceedings).")

This Court should also certify a class because "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"—meaning that "a single injunction or declaratory judgment would provide relief to each member of the class." *See Jennings v. Rodriguez*, 138

S. Ct. 830, 851–52 (2018). The Ninth Circuit has held that this requirement "ordinarily will be satisfied when plaintiffs have described the general contours of an injunction that would provide relief to the whole class, that is more specific than a bare injunction to follow the law, and that can be given greater substance and specificity at an appropriate stage in the litigation through fact-finding, negotiations, and expert testimony." *Parsons*, 754 F.3d at 689 n.35.

Here, Complainants and class agents have asked for a variety of revisions to the Air Force's discriminatory policies and practices regarding accommodation of d/Deaf employees—the benefit of which would redound to the class as a whole. For example, in her original January 24, 2020 Complaint, Complainant Weimer requested relief including (but not limited to) the following:

1. The creation of captioned and signed videos explaining the Air Force EEO process and associated rights, along with the provision of ASL interpreters [or other necessary accommodations] for d/Deaf employees who need them in order to participate fully in the EEO process.
2. The establishment of a centralized Air Force fund to pay for ASL interpreters and other necessary reasonable accommodations.
3. The establishment of long-term Air Force-wide contracts for ASL interpreters, CART, and similar services, to address current contract-related delays in finding appropriate providers.
4. The establishment of procedures to ensure that all work events (including webcasts, trainings, and the like) are accessible to d/Deaf civilian employees
5. The establishment of procedures for all NAFs, MAJCOMs, and bases to promptly and timely connect videophones and captioned telephones to base networks upon receipt of the videophone or captioned telephone.[35]

See Weimer January 24, 2020 Complaint (Record of Investigation at 455-456).

[35] This is only a partial list of what Ms. Weimer requested.

9. Damages for Complainant Weimer and the class can be determined at a later stage.

Class members' entitlement to individual damages can be determined in a second phase of this action, after the Air Force's liability and the scope of appropriate injunctive relief are determined. This procedure is routinely employed in cases before the Commission. *See, e.g.*, *Burke-Thompson v. Attorney General*, Appeal No. 05870473 (1988) at *5-7 (explaining bifurcated liability and damages phases articulated in *Teamsters v. United States*, 431 U.S. 324, and applying same).

B. <u>Complainants are entitled to a class list, and removal of the limited stay.</u>

In its June 1, 2022 "Limited Stay and Protective Order," the Court informed the Parties that it was "considering the following options" regarding the release of putative class members' names and contact information: "(a) providing an opt-in or opt-out authorization to putative class members; (b) reconsidering the order to produce the subject information; (c) entry of a protective order and removing the limited stay." Order at 2. The Court then granted both Parties leave to "address these options in their amended certification filings (or sooner)." *Id.* Pursuant to this Order, Complainants' respond as follows.

1. Courts have repeatedly held that the confidentiality provisions of the Americans with Disabilities Act do not prevent disclosure in discovery.

The Agency asserts that provisions of the Americans with Disabilities Act concerning the confidentiality of information obtained during medical examinations[36] prevent it from disclosing a class list in this case – however, every court to consider this issue has held otherwise.

Scott v. Leavenworth Unified School District, 190 F.R.D. 583 (D.Kan.1999)—which held that "the ADA's prohibitions against disclosure of medical information do not amount to a 'privilege' that

[36] The ADA and its regulations prohibit the disclosure of information about the medical condition or history of an employee when that information is obtained through any medical examination or in response to a medical inquiry allowed under the ADA. 42 U.S.C. § 12112(d)(3)(B); 29 C.F.R. § 1630.14(c). Both the statute and the regulations provide that such medical information must be collected and maintained on separate forms and kept in separate medical files and "treated as a confidential medical record." 42 U.S.C. § 12112(d)(3)(B); 29 C.F.R. § 1630.14(c)(1). The statute and regulations set forth three express exceptions to these confidentiality rules: "(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and (iii) [that] government officials investigating compliance with [the ADA] shall be provided relevant information on request." *Id.*

protects the requested documents from disclosure"—is instructive. 190 F.R.D. 583, 586. There, the plaintiff filed a claim for discrimination and retaliation under the ADA, and sought to discover information regarding similarly-situated disabled employees. The defendant argued that disclosure of such information would violate § 12112(d)(3). In rejecting this argument, the court noted that "the ADA was enacted 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,' 42 U.S.C. § 12101(b)(1)," and that the law's confidentiality provisions were intended to "further the purpose behind the ADA's goal of ensuring equal employment opportunities for the disabled." *Scott*, 190 F.R.D. at 586–87. The court found that the plaintiff's requested disclosures would advance this purpose, and that "**Congress never intended for a defendant charged with violating the ADA to use the ADA's confidentiality provisions to impede a plaintiff's ability to discover facts that might help the employee establish his/her claims**." *Id.* at 587 (emphasis added). That, however, is precisely what the Agency is attempting to do here.

Every other case Complainants have found that analyzes whether the ADA's confidentiality provisions can be used to prevent discovery has also held – in accordance with *Scott*—that they cannot. *See*, *e.g.*, *McDonald v. Holder*, No. 09-CV-0573-CVE-TLW, 2010 WL 4362821, at *5 (N.D. Okla. Oct. 26, 2010) (allowing discovery notwithstanding § 12112(d)(3), and noting that "defendant cites no cases adopting his argument that this statute creates a privilege preventing discovery of employee medical examinations in civil ligation. The Court has independently researched this issue and has found no cases supporting defendant's argument that this statute creates a discovery privilege."); *In re Nat'l Hockey League Players' Concussion Inj. Litig.*, 120 F. Supp. 3d 942, 949–52 (D. Minn. 2015) (allowing production of de-identified information regarding hockey players' head trauma and brain disease, and holding that "the ADA does not create a privilege that wholesale bars the discovery of the requested information."); *Tjernagel v. Gates Corp.*, No. 4-06-CV-362-TJS, 2007 WL 9761305, at 2-*5 (S.D. Iowa May 24, 2007) (discussing cases, and ordering discovery regarding the identities and contact

information of other employees with disabilities, subject to protective restrictions).[37]

Moreover, unlike many of the cases discussed above, this action has been pled as a class case. If Complainants' proposed class is certified, Class Agents and their Counsel will unquestionably have a duty to advance the interests of every one of the individuals identified in response to Interrogatories No. 1 and 3. *See* Fed. R. Civ. P. 23(a)(4) (duty of class representatives to "fairly and adequately protect the interests of the class"); Fed. R. Civ. P. 23(g)(4) (duty of class counsel to "fairly and adequately represent the interests of the class.") Indeed, class counsel's fiduciary duty toward class members attaches even before a class is certified: "The general rule is that the named plaintiff and counsel bringing the action stand as fiduciaries for the entire class, **commencing with the filing of a class complaint**." *Schick v. Berg*, No. 03 CIV. 5513(LBS), 2004 WL 856298, at *5 (S.D.N.Y. Apr. 20, 2004), *aff'd,* 430 F.3d 112 (2d Cir. 2005) (quoting Newberg & Conte, *Newberg on Class Actions*, § 11.65, at 11-183 (4th ed.2003)) (emphasis added).

It would be perverse in the extreme to allow the Agency to rely on the limited confidentiality provisions of § 12112(d)(3)—part of a law expressly intended to **prevent discrimination** against people with disabilities—to avoid producing information regarding the identities and contact information of putative class members in discovery, in an action alleging the Agency's widespread failure to comply

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[37] In addition to these cases, numerous cases have held that the ADA's confidentiality provisions only apply in the context of medical examinations and inquiries, and not in the context of voluntary disclosures of disabilities. *See, e.g., Cash v. Smith*, 231 F.3d 1301, 1307–08 (11th Cir. 2000) (holding that 42 U.S.C. § 12112(d) and related regulations "do not govern voluntary disclosures initiated by the employee," and that no confidentiality requirements attach to such disclosures); *E.E.O.C. v. Thrivent Fin. for Lutherans*, 700 F.3d 1044, 1048–49 (7th Cir. 2012) (same); *Wiggins v. DaVita Tidewater, LLC*, 451 F. Supp. 2d 789, 802 (E.D. Va. 2006) (no violation of § 121112(d)(3), because information disclosed "was not obtained pursuant to § 12112(d)"); *U.S. Equal Emp. Opportunity Comm'n v. Seven-Eleven of Hawaii, Inc.*, No. CV 07-00478 SPK-BMK, 2008 WL 11348363, at *2 (D. Haw. June 9, 2008) (discussing cases, and holding that if "the 'medical information' is not the result of a 'medical examination' or 'medical inquiry,' then the confidentiality requirement is not triggered. That is, if an employee—whether or not that employee is actually a covered 'person with a disability' under the ADA—gives information voluntarily, then there is no confidentiality requirement.").

As the Agency has acknowledged, the information contained in its response to Interrogatories No. 1 and 3 was based on employees' "voluntary provision of their disability status." May 5, 2022 Declaration of Kerri Bonner at fn. 3. This provides an independent reason for the court to find that § 12112(d)(3) and related regulations do not prevent disclosure of putative class member information in this case.

with applicable disability laws. *See Scott*, 190 F.R.D. at 587. ("Congress never intended for a defendant charged with violating the ADA to use the ADA's confidentiality provisions to impede a plaintiff's ability to discover facts that might help the employee establish his/her claims.").

If the Agency's argument were followed to its logical conclusion, class representatives would not be able to obtain the names or identities of fellow class members in **any** class action alleging employment discrimination on the basis of disability. This Court should not sanction such an absurd result.

2. Complainants have never opposed entry of a protective order, which would ensure that information about class members' disability status is not disclosed.

Complainants have consistently expressed their willingness to enter into a protective order in this case, including at the February 4, 2022 hearing,[38] and in their March 30, 2022 correspondence with Agency counsel, in which they wrote the following:

> If the Agency believed a stipulated protective order was necessary before it could comply with the EEOC's order on pre-certification discovery, it could have raised the issue and circulated a proposed order at any point after February 4th. Instead, the Agency has chosen to raise the issue for the first time twelve days after discovery was due, without even providing the protective order language it proposes – thus causing further needless delay.
>
> As putative class counsel, our ethical duty to the class prevents us from disclosing or otherwise misusing class member information, even in the absence of a protective order. That said, we would be happy to enter into a stipulated protective order along the lines of the Northern District of California's model stipulated protective order (available here), or similar, which we think would be more than sufficient to protect against the possibility of any improper disclosure. If the Agency wishes to make any changes to that model order or any similar one, we would want to see those in track-changes before agreeing to them. If the Agency has proposed redline changes to that model order or a similar one used by other courts, please send them to us today.

See Declaration of Wendy Musell in Support of March 31, 2022 Reply in Support of Second Motion to Compel, Exhibit A (March 30, 2022 correspondence between Agency and Complainants' Counsel).

The Agency never responded to this invitation, and never proposed protective order language of its own. *See* March 31, 2022 Musell Declaration at ¶ 5. However, Complainants remain fully amenable

[38] *See* May 4, 2022 Declaration of Sean Betouliere, Exhibit A (CART Transcript of February 4, 2022 hearing).

to a standard protective order in this case, and believe such an order would be more than enough to protect class members' disability status from disclosure.

3. Complainants support allowing class members a reasonable period to opt out of disclosure, if the Court believes such a period is necessary.

If, despite the above, the Court believes class members must have an opportunity to "opt out" of having their names and other information disclosed as Interrogatories 1 and 3 contemplate, Complainants would support such a procedure, provided that the opt-out period is reasonable. Complainants suggest that 30 days would be a reasonable length of time, and that the "opt out" notice be substantially in the form used in the *Nevarez* case cited in this Court's Limited Stay order. *See Nevarez v. Forty Niners Football Co., LLC*, No. 16CV07013LHKSVK, 2018 WL 306681, at *3 (N.D. Cal. Jan. 5, 2018) (finding that "putative class members' privacy interests [. . .] will be adequately protected by and through" a protective order and the opportunity to opt-out of disclosure).

Complainants' proposed notice to class members – including instructions to "opt-out" of having their names and contact information included on a class list—is included as **Exhibit L** to the Declaration of Sean Betouliere in support of this motion. Betouliere Decl., Exhibit L. This proposed notice is modeled directly off of the one proposed and approved in the *Nevarez* action. *Compare* Betouliere Decl., Exhibit L *with* Exhibit M (*Nevarez* notice).

Should the Court decide that some "opt out" opportunity is necessary, Claimants respectfully request that the Court order the Agency to disseminate this notice to all class members, and – upon expiration of the opt-out period – to produce the names and information of all members who have chosen not to exercise that right, as originally contemplated by Interrogatory No. 1.

4. Because Complainants have not been able to communicate with class members, their inability to submit additional declarations should not weigh against class certification.

Immediately after receiving this Court's June 1, 2022 "Limited Stay and Protective Order" and its instruction not to contact individuals whose names and contact information had been provided in response to discovery orders, counsel for Complainants suspended all contact with putative class members, and cancelled scheduled phone calls. Betouliere Decl. ¶¶ 17-18. For this reason, counsel could

not complete two additional class member declarations they had already begun drafting, and could not continue interviewing putative class members in an effort to obtain more. Betouliere Decl. ¶ 19.

Because Complainants were precluded from communicating with putative class members as they otherwise would have, they respectfully request that the absence of additional declaration not weigh against class certification in this case. In truth, the presence or absence of such declarations should make little difference, because – as explained in detail above – the Agency's own documents and sworn deposition testimony make the appropriateness of class certification in this case abundantly clear.

VI. Conclusion

For the reasons discussed above, Complainant respectfully requests that this matter be certified for class treatment, and that Complainant Weimer and other class agents be appointed to represent a class of "**all d/Deaf[39] civilians who are currently employed by the United States Air Force, as well as all d/Deaf civilians who either applied for civilian employment with the Air Force or were so employed at any time between January 1, 2018 and the present**."

DATED: June 21, 2022

Respectfully submitted,

DISABILITY RIGHTS ADVOCATES

Sean Betouliere
Kevin Knestrick
Emily Seelenfreund

LAW OFFICES OF WENDY MUSELL

/s/ Wendy Musell
Wendy Musell

Attorneys for Complainants

[39] Again, for the purposes of this case and class definition, the **terms "d/Deaf" or "deaf" should be read as synonymous with "deaf or serious difficulty hearing,"** the first category of disability listed in Part A of question 5 of the Equal Employment Opportunity Commission's Demographic Information on Applicants form, located at https://www.eeoc.gov/sites/default/files/migrated_files/federal/2017-approved-Applicant-Form.pdf.