

1
2
3 **United States of America**
4 **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**
5 **Los Angeles District Office**

6 Sarah Weimer, et. al.

7 Complainant,

8 v.

9 Frank Kendall III,

10 Secretary, Department of Air Force

11 Agency.

EEOC Appeal No. 2023000892

EEOC NO. 550-2021-00060X Agency Case

No. 5P1C2000493CH20

**COMPLAINANTS' OPPOSITION TO
AGENCY APPEAL OF CLASS
CERTIFICATION**

Date: February 28, 2023

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Alphabetical Index of all Evidence Offered in Support of Complainant’s Renewed Motion for Class Certification VI

I. Introduction..... 1

II. Law Relevant to Class Claims 5

III. Statement of Facts..... 9

A. Centralized Air Force policies and practices serve to discriminate against the Agency’s d/Deaf employees and applicants. 11

1. The Air Force routinely denies necessary accommodations for lack of funds even though ample resources are available to the Agency as a whole, and the Agency has repeatedly failed to adopt a centralized process for funding accommodations or otherwise fix this issue..... 11

2. The Air Force has failed to provide reliable access to American Sign Language interpreters and other necessary accommodations, and in many instances has provided no access at all: according to its own records, it has only provided ASL 152 times since 2018, despite having over 700 d/Deaf employees. 17

3. 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. 24

4. 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 27

5. 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..... 30

6. The Air Force routinely fails to ensure that trainings, presentations, and videos for civilian employees are properly captioned or otherwise accessible..... 33

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

7. The Air Force has failed to adequately staff its disability program, to the detriment of its d/Deaf employees, and everyone else who needs accommodations. 36

B. Complainants 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. 40

1. The Air Force has discriminated against class agent Sarah Weimer and repeatedly denied or delayed necessary accommodations, leading to her constructive termination..... 40

2. The Air Force has discriminated against class agent Hugo Perez, and repeatedly denied or delayed necessary accommodations. 45

3. The Air Force has discriminated against class agent Sheila Burg, and repeatedly denied or delayed necessary accommodations. 48

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. 49

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. 51

6. The Air Force has discriminated against class declarant Rachel McAnallen, and repeatedly denied or delayed necessary accommodations. 52

7. Claimants have satisfied all EEO procedural requirements..... 53

IV. Legal Standard Applicable to Class Certification..... 54

V. Legal Standard Applicable to Review of Class Certification Decision..... 55

VI. Argument 56

A. Administrative Judge Peterson’s decision on class certification should be affirmed..... 56

1. Judge Peterson correctly found that Complainants’ claims and those of the class depend on common questions that are capable of classwide resolution. 58

2. Judge Peterson correctly found that Complainant’s claims are typical of the class..... 65

3. Judge Peterson correctly found that the proposed class – which includes at least a thousand d/Deaf civilian employees throughout the Air Force – easily satisfies numerosity..... 68

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

4. Judge Peterson correctly found that Complainants and their counsel will fairly and adequately protect the interests of the class. 70

5. Certification of a class is appropriate, because a single injunction or declaratory judgment would provide relief to each member of the class. 72

6. The Commission routinely finds that claims under § 501 of the Rehabilitation Act are suitable for class treatment. 74

7. The Commission endorses the *Teamsters* method of proof for class claims under § 501 of the Rehabilitation Act 75

8. Damages for Complainant Weimer and the class can be determined at a later stage..... 79

B. The Agency repeatedly ignored Judge Peterson’s orders on pre-certification discovery and attempted to impede the development of an adequate record. 79

1. Complainants diligently sought pre-certification discovery. 79

2. The Agency violated or ignored every pre-certification discovery order in this case, including an order to show cause..... 80

C. Judge Peterson did not abuse his discretion in ordering production of a class list, but even if he had the error would be harmless, because he subsequently issued a protective order limiting its use, and the assertedly-confidential information from it formed no part of Complainants’ motion or the class certification decision. 85

D. Judge Peterson did not abuse his discretion in ordering the Agency to make its head Disability Program Manager available for deposition, and the Agency’s refusal to designate her as a “30(b)(6)” witness is irrelevant because the certification decision did not rely on any finding that her testimony “bound” the Agency..... 88

VII. Conclusion 92

1 **TABLE OF AUTHORITIES**

2 **Cases**

3 *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952 (9th Cir. 2013)..... 59, 60, 61, 62

4 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)..... 72

5 *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013)..... 55

6 *Aracely J., Complainant*, EEOC DOC 2019003498, 2020 WL 6134366 (Sept. 21, 2020)..... 63

7 *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001)..... 64

8 *Aurore C., et.al., Complainant*, EEOC DOC 0120150342, 2018 WL 2932869 (May 18,

9 2018)..... 55

10 *Bates v. United Parcel Service*, 204 F.R.D. 440 (N.D. Cal. 2001)..... passim

11 *Bedynek-Stumm v. Dep’t. of the Interior*, EEOC DOC 0520110587, 2011 WL 5894136

12 (Nov. 15, 2011)..... 89, 91

13 *Burke-Thompson v. Attorney General*, Appeal No. 05870473 (1988)..... 79

14 *Californians for Disability Rts., Inc. v. California Dep’t of Transp.*, 249 F.R.D. 334 (N.D.

15 Cal. 2008)..... 71

16 *Cf. Aracely J., Complainant*, EEOC DOC 2019003498, 2020 WL 6134366 (Sept. 21,

17 2020)..... 69

18 *Complainant v. Ashton B. Carter* (Dep’t of Def.), EEOC DOC 0120103592, 2015 WL

19 5530294, (Sept. 9, 2015)..... 63, 64

20 *Complainant v. Dept. of Def.*, EEOC DOC 0120103592, 2015 WL 5530294, at *7 (Sept.

21 9, 2015)..... 74

22 *Cyncar*, EEOC Appeal No. 0720030111 (February 1, 2007)..... 78, 79

23 *EEOC v. Bass Pro Outdoor World, LLC*, 826 F.3d 791, 797 (5th Cir. 2016)..... 75

24 *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011)..... 70

25 *Felix Z. et al., Complainant*, EEOC DOC 2020005328, 2021 WL 1928243 (Apr. 29,

26 2021)..... 64, 67

27 *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982)..... 67

28 *Glover v. United States Postal Serv.*, EEOC Appeal No. 01A04428 (April 23, 2001)..... 75

Hae T., Complainant, EEOC DOC 2019003385, 2020 WL 6134360 (Sept. 23, 2020)..... 6

Hanon v. Dataproducts Corp., 976 F.2d 497 (9th Cir. 1992)..... 66

1	<i>Harris v. Pan American World Airways</i> , 74 F.R.D. 25, 45 (N.D. Cal. 1977)	54
2	<i>Haywood C. v. U.S. Postal Service</i> . EEOC Appeal No. 0120132452 (Nov. 18, 2014)	78
3	<i>Hines v. Dep't of the Air Force</i> , EEOC Appeal No. 01931776 (July 7, 1994)	54
4	<i>Hohider v. United Parcel Serv., Inc.</i> , 574 F.3d 169 (3d Cir. 2009).....	77
5	<i>Holman v. Experian Info. Sols., Inc.</i> , No. C 11-0180 CW, 2012 WL 1496203 (N.D. Cal. Apr. 27, 2012).....	58
6	<i>Huddleson v. U.S. Postal Service</i> , EEOC Appeal No. 0720090005 n. 6 (Apr. 4, 2011).....	78
7	<i>Ignacio v. United States Postal Serv.</i> , EEOC Appeal No. 03840005 (September 4, 1984)	6
8	<i>In re Abbott Labs Norvir Anti-Trust Litig.</i> , 2007 WL 1689899 (N.D. Cal. Jun. 11, 2007).....	69
9	<i>In re online DVD-Rental Antitrust Litig.</i> , 779 F.3d 934 (9th Cir. 2015)	70
10	<i>International Bhd. Of Teamsters v. United States</i> , 431 U.S. 324 (1977).....	75
11	<i>Jantz, et al. v. Astrue</i> , EEOC Appeal No. 0720090019 (Aug. 25, 2010)	54
12	<i>Jay v. Internet Wagner</i> , 233 F.3d 1014 (7th Cir. 2000).....	8
13	<i>Jeffries v. Secretary of Treasury</i> , 01A02227 (2003).....	66, 69
14	<i>Jennings v. Rodriguez</i> , 138 S. Ct. 830 (2018)	73
15	<i>Johnson-Feldman v. Secretary of Veterans Affairs</i> , 01953168 (1997).....	68, 69
16	<i>Just Film, Inc. v. Buono</i> , 847 F.3d 1108 (9th Cir. 2017)	66
17	<i>Kwok v. USPS</i> , 01871083, 1721/E10 (1987)	54
18	<i>Lee v. Secretary of Army</i> , 01990384 (2000)	69
19	<i>Lozano v. AT & T Wireless Servs., Inc.</i> , 504 F.3d 718 (9th Cir. 2007)	66
20	<i>Mazza v. Am. Honda Motor Co.</i> , 666 F.3d 581 (9th Cir. 2012)	60
21	<i>McConnell, et. al. v. United States Postal Serv.</i> , EEOC Hearing No. 520-2008-00053X, (May 30, 2008)	74
22	<i>McCray v. Wilkie</i> , 966 F.3d 616 (7th Cir. 2020)	8
23	<i>McDonnell Douglas Corporation v. Green</i> , 411 U.S. 792 (1973)	75, 76
24	<i>Melodee M. et al., Complainant</i> , EEOC DOC 2020004194, 2020 WL 7243675 (Nov. 23, 2020).....	74
25	<i>Meyer v. Kerry (State)</i> , EEOC Appeal No. 0720110007 (2014).....	75
26		
27		
28		

1	<i>Meza v. Renaud</i> , 9 F.4th 930, 933 (D.C. Cir. 2021).....	56
2	<i>Miles v USPS</i> , EEOC DOC 05860013 (Oct. 20, 1986).....	5
3	<i>Mitchell v. Potter</i> (USPS), EEOC DOC 01A20442 (July 29, 2003).....	63
4	<i>Moghenhan v. Napolitano</i> , 613 F.3d 1162 (D.C. Cir. 2010).....	8
5	<i>Moten</i> , EEOC Request No. 05960233 (April 8, 1997).....	54
6	<i>Muller v. USDA</i> , EEOC DOC 0120065071, 2008 WL 2484320 (June 12, 2008).....	3, 56
7	<i>Nat'l Fed'n of the Blind v. Target Corp.</i> , 582 F. Supp. 2d 1185 (N.D. Cal. 2007).....	67, 68
8	<i>Parsons v. Ryan</i> , 754 F.3d 657 (9th Cir. 2014).....	passim
9	<i>Penk v. Oregon State Board of Higher Education</i> , 93 F.R.D. 45 (1981).....	54
10	<i>Prewitt v. United States Postal Serv.</i> , 662 F.2d 292 (5th Cir. 1981).....	6
11	<i>Rannis v. Recchia</i> , 380 Fed. Appx. 646 (9 th Cir. 2010).....	68, 69
12	<i>Robinson v. Department of Navy</i> , EEOC DOC 05810091, 1981 WL 382968 (1981).....	3, 88
13	<i>Rodriguez v. Hayes</i> , 591 F.3d 1105 (9th Cir. 2011).....	72
14	<i>Sali v. Corona Reg'l Med. Ctr.</i> , 909 F.3d 996 (9th Cir. 2018), <i>cert. dismissed</i> , 139 S. Ct. 1651 (2019).....	55, 70, 71, 72
15	<i>Scott v. Leavenworth Unified School District</i> , 190 F.R.D. 583 (D.Kan. 1999).....	87
16	<i>Sedillo v. USDA</i> , EEOC DOC 07A20071, 2002 WL 1841018 (Aug. 7, 2002).....	55
17	<i>Selenke v. Med. Imaging of Colo.</i> , 248 F.3d 1249 (10th Cir. 2001).....	8
18	<i>Semenko v. Wendy's Int'l, Inc.</i> , No. 2:12-CV-0836, 2013 WL 1568407 (W.D. Pa. Apr. 12, 2013).....	77, 78
19	<i>Shaw v. DOJ</i> , EEOC DOC 01A51519, 2006 WL 228804 (Jan. 20, 2006).....	91
20	<i>Shealey v. E.E.O.C.</i> , 111 LRP 30774 (April 18, 2011).....	8
21	<i>Shirley v. Devine</i> , 670 F.2d 1188 (D.C. Cir. 1982).....	6
22	<i>Siddiqi v. Regents of Univ. of California</i> , No. C 99-0790 SI, 2000 WL 33190435 (N.D. Cal. Sept. 6, 2000).....	65
23	<i>Smith v. Res-Care, Inc.</i> , No. CIV.A. 3:13-5211, 2015 WL 461529 (S.D.W. Va. Feb. 3, 2015).....	66
24	<i>Southeastern Community College v. Davis</i> , 442 U.S. 397 (1979).....	6
25	<i>Tessa L., Complainant</i> , EEOC DOC 0720170021, 2017 WL 5564438 (Nov. 9, 2017).....	passim
26		
27		
28		

1	<i>Thockmorton v. Secretary of Interior</i> , 01A03994 (2003).....	69
2	<i>Travis v. United States Postal Serv.</i> , EEOC Appeal 01992222 (October 10, 2002)	75
3	<i>Turner v. Dep’t of Justice (Fed. Bureau of Prisons)</i> , EEOC Appeal No. 0720060041	
4	(July 19, 2007)	68
5	<i>Turtle v. U.S. Postal Service</i> , EEOC Appeal No. 0720080025 n. 2 (Mar. 5, 2009).....	78
6	<i>U.S. E.E.O.C. v. UPS Supply Chain Sols.</i> , 620 F.3d 1103 (9th Cir. 2010).....	9
7	<i>Valle-Arce v. Puerto Rico Ports Auth.</i> , 651 F.3d 190 (1st Cir. 2011).....	8
8	<i>Velva B., Class Agent</i> , EEOC DOC 0720160006, 2017 WL 4466898 (Sept. 25, 2017).....	7, 75, 76, 78
9	<i>Walker v. United States Postal Serv.</i> , EEOC Appeal No. 0720060005 (March 18, 2008)	74
10	<i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. 338 (2011)	60
11	<i>Zivkovic v. S. Cal. Edison Co.</i> , 302 F.3d 1080 (9th Cir. 2002).....	7
12	Statutes	
13	29 U.S.C. § 791(f).....	6, 7, 71
14	29 U.S.C. § 794(b)	7
15	29 U.S.C. § 794d(a)(1)(A)	34
16	42 U.S.C. § 12101(b)(1)	78
17	42 U.S.C. § 12111(9)(B).....	8
18	42 U.S.C. § 12112(b)(5)(A).....	7
19	42 U.S.C. § 12112(b)(5)(B)	9
20	42 U.S.C. § 12112(b)(7)	9
21	42 U.S.C. § 12112(d)(3)(B)	86
22	Rules	
23	Fed. R. Civ. P. 23(b)(2).....	75
24	Treatises	
25	William B. Rubenstein, 1 Newberg on Class Actions § 3:12 (5 th ed. 2020)	68, 69, 70
26	William B. Rubenstein, 1 Newberg on Class Actions § 3:20 (5 th ed., 2020)	64
27	William B. Rubenstein, 1 Newberg on Class Actions § 3:72 (5 th ed. 2020)	71
28		

1	Regulations	
2	29 C.F.R. § 1614.109(f)(1)	88
3	29 C.F.R. § 1614.203(b)	6, 7, 71
4	29 C.F.R. § 1614.203(c).....	6
5	29 C.F.R. § 1614.203(d)	7
6	29 C.F.R. § 1614.203(d)(3)(ii).....	8, 11
7	29 C.F.R. § 1614.203(d)(3)(ii)(A)	8
8	29 C.F.R. § 1614.204	55
9	29 C.F.R. § 1614.204(a)(2).....	54, 56
10	29 C.F.R. § 1614.204(a)(2)(i)	70
11	29 C.F.R. § 1614.204(iv)	70
12	29 C.F.R. § 1630.1	7
13	29 C.F.R. § 1630.14(c).....	86
14	29 C.F.R. § 1630.14(c)(1).....	86
15	29 C.F.R. § 1630.2(g)(1).....	78, 79
16	29 C.F.R. § 1630.2(j)(ii)	79
17	29 C.F.R. § 1630.2(m)	79
18	36 C.F.R. Appendix D (Electronic and Information Technology Accessibility Standards)	
19	§§ D1194.24(c)(d)	34
20		
21		
22		
23		
24		
25		
26		
27		
28		

Alphabetical Index of all Evidence Offered in Support of Complainant’s Renewed Motion for Class Certification

Document	Original Location	Complainant’s Excerpt of Record (“ER”) Pages
2016 Diversity and Inclusion Initiatives Implementation Guidance	Exhibit 7 to Deposition of Kendra Shock, attached as Exhibit E to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.	ER 0452-477
AFI 36-2710 – Reasonable Accommodation Training	Exhibit 13 to Deposition of Kendra Shock, attached as Exhibit J to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.	ER 0654-686
Air Force Instruction 36-205; Affirmative Employment Program, Special Emphasis Programs, and Reasonable Accommodations Policy	Publicly available at https://www.af.mil/Portals/1/document/s/eo/AFI%2036-205%2015%20Dec%2016.pdf?ver=2017-09-15-170350-580 .	
Combined Record of Investigation (“ROI”)	Filed by Agency on November 13, 2020	ER 2578-4193
Correspondence Involving CART for Ms. Burg	Exhibit N to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.	ER 0839-853
DAF Deaf Accommodation (K. Shock) Excel Sheet	Exhibit 9 to Deposition of Kendra Shock, attached as Exhibit I to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.	ER 0644-653
Declaration of Hugo Perez in Support of Complainants’ Motion for Class Certification (“Perez Decl.”)	Filed February 11, 2021	ER 2280-2288
Declaration of Matthew Wambold in Support of Complainants’ Motion for Class Certification (“Wambold Decl.”)	Filed February 11, 2021	ER 2446-2448

1	Declaration of Mika Hongyu-Perez in Support of Complainants' Motion for Class Certification	Filed February 11, 2021	ER 2357-2366
2			
3	("Hongyu-Perez Decl.")		
4	Declaration of Rachel McAnallen in Support of Complainants' Motion for Class Certification	Filed February 11, 2021	ER 2449-2454
5			
6	("McAnallen Decl.")		
7	Declaration of Sarah Weimer in Support of Complainants' Motion for Class Certification	Filed February 11, 2021	ER 1917-1940
8			
9	("Weimer Decl.")		
10	Declaration of Sean Betouliere in Support of Complainants' Renewed Motion for Class Certification	Filed June 21, 2022. Includes Exhibits A through N in Support of Complainant's Renewed Motion for Class Certification.	ER 0308-1916
11			
12	("Betouliere Decl.")		
13	Declaration of Sheila Burg in Support of Complainants' Motion for Class Certification	Filed February 11, 2021	ER 2327-2340
14			
15	("Burg Decl.")		
16	Fiscal Year 2018 Affirmative Action Plan report	Exhibit 10 to Deposition of Kendra Shock, attached as Exhibit F to Declaration of Sean Betouliere in Support of Complainants' Renewed Motion for Class Certification.	ER 0478-500
17			
18	Fiscal Year 2020 Affirmative Action Plan report	Exhibit 11 to Deposition of Kendra Shock, attached as Exhibit G to Declaration of Sean Betouliere in Support of Complainants' Renewed Motion for Class Certification.	ER 0501-527
19			
20	Fiscal Year 2020 MD-715 Workforce Tables	Exhibit 12 to Deposition of Kendra Shock, attached as Exhibit H to Declaration of Sean Betouliere in Support of Complainants' Renewed Motion for Class Certification.	ER 0528-643
21			
22			
23			
24			
25			
26			
27			
28			

1	January 21, 2021 Report of Investigation After-Acquired Evidence Memorandums in the complaint of Sheila Burg, 9L4W2000671.	Exhibit C to Declaration of Sean Betouliere in Support of Complainants' Renewed Motion for Class Certification.	ER 0327-389
2			
3			
4	June 18, 2020 Air Force Instruction 36-2710 Policy Document	Exhibit K to Declaration of Sean Betouliere in Support of Complainants' Renewed Motion for Class Certification.	ER 0687-830
5			
6	Letter from Complainants' Counsel Identifying Mr. Wambold as a class member and seeking to amend his individual EEO Complaint	Exhibit A to Declaration of Sean Betouliere in Support of Complainants' Renewed Motion for Class Certification.	ER 0320-325
7			
8			
9			
10	Opt-Out Notice Proposed and Adopted in Nevarez.	Exhibit M to Declaration of Sean Betouliere in Support of Complainants' Renewed Motion for Class Certification.	ER 0835-838
11			
12	Proposed Contact Information Opt-Out Notice to Class Members.	Exhibit L to Declaration of Sean Betouliere in Support of Complainants' Renewed Motion for Class Certification.	ER 0831-834
13			
14	Second Supplemental Declaration of Hugo Perez in Support of Complainants' Motion for Class Certification		ER 2554-2559
15		Filed concurrently with the motion herein	
16	("Perez Second Supp. Decl.")		
17	Second Supplemental Declaration of Sarah Weimer in Support of Complainants' Motion for Class Certification		ER 2499-2506
18		Filed February 3, 2022	
19			
20	("Weimer Second Supp. Decl.")		
21	Supplemental Declaration of Hugo Perez in Support of Complainants' Motion for Class Certification		ER 2455-2459
22		Filed April 28, 2021	
23			
24			
25	Supplemental Declaration of Sarah Weimer in Support of Complainants' Motion for Class Certification		ER 2466-2480
26		Filed November 1, 2021	
27			
28	("Weimer Supp. Decl")		

<p>1 The January 11, 2021 Report of 2 Investigation in the complaint of 3 Sheila Burg, 9L4W2000671 4 (“Burg ROI”)</p>	<p>Exhibit B to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.</p>	<p>ER 0854-1916</p>
<p>5 6 Transcript excerpts from the 7 June 1, 2022 (Volume One) and 8 June 2, 2022 (Volume Two) 9 depositions of head Air Force 10 Disability 11 Program Manager Kendra 12 Shock 13 (“Shock Dep.”)</p>	<p>Exhibit D to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.</p>	<p>The full transcripts of the June 1, 2022 (Volume One) and June 2, 2022 (Volume Two) depositions of head Air Force Disability Program Manager Kendra Shock (collectively, “Shock Dep.”) were filed by the Agency in connection with its appeal on January 12, 2023. Citations to “Shock Dep.” in this brief are to those full transcripts, unless otherwise noted.</p>

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. Introduction

3 Complainant Weimer and other class agents¹—all of whom are d/Deaf employees, applicants, or
4 former employees² of the United States Air Force (“Air Force” or the “Agency”)—have brought this
5 case to challenge centralized Air Force policies, practices, and failures to act that result in widespread
6 discrimination, including denial of consistent or reliable access to American Sign Language³ (ASL)
7 interpreters, videophones,⁴ Communication Access Realtime Translation⁵ (CART) services, and other

8
9 ¹ Collectively, “Class Agents” or “Claimants.”

10 ² For the purposes of this case and brief, **the terms “d/Deaf” or “deaf” should be read as**
11 **synonymous with “deaf or serious difficulty hearing,”** the first category of disability listed in Part A
12 of question 5 of the Equal Employment Opportunity Commission's Demographic Information on
13 Applicants form, located at [https://www.eeoc.gov/sites/default/files/migrated_files/federal/2017-](https://www.eeoc.gov/sites/default/files/migrated_files/federal/2017-approved-Applicant-Form.pdf)
14 [approved-Applicant-Form.pdf](https://www.eeoc.gov/sites/default/files/migrated_files/federal/2017-approved-Applicant-Form.pdf).

15 Similarly, the word “employee” should be read to include all members of the certified class,
16 including current d/Deaf civilian employees, d/Deaf applicants, and former d/Deaf civilian employees.

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

26 ³ As the National Institute on Deafness and Other Communication Disorders (NIDCD) explains,
27 American Sign Language, “is a language completely separate and distinct from English.” It “is a
28 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-](https://www.nidcd.nih.gov/health/american-sign-language)
[sign-language](https://www.nidcd.nih.gov/health/american-sign-language).

⁴ 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.

⁵ 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

1 necessary accommodations.

2 Administrative Judge Peterson’s order certifying a class in this case was based on voluminous
3 evidence—drawn largely from the Agency’s own documents and the uncontroverted testimony of its
4 own head Disability Program Manager, Ms. Kendra Shock—establishing that the Air Force’s denials of
5 necessary accommodations and other discriminatory actions or inactions were not attributable to the
6 discretionary decisions of isolated departments or supervisors, but to failings in systems, processes, and
7 trainings that come from the top down, and that affect over 700 d/Deaf employees throughout the Air
8 Force, regardless of the base at which they are stationed or the position in which they work.

9 This included uncontroverted evidence 1) that necessary accommodations are routinely delayed
10 or denied for supposed lack of funds (despite ample resources available to the Agency as a whole) and
11 that this is a direct result of the Agency’s byzantine and broken process for funding accommodations; 2)
12 that necessary accommodations like ASL interpreters are rarely granted;⁶ 3) that the Agency has failed
13 to hire or contract for interpreters with high levels of security clearance; 4) that the Agency requires
14 “appropriate notice” each time an employee with a disability requires a “repeat” accommodation—such
15 as ASL interpretation—even when their need for that accommodation is known and has not changed; 5)
16 that there are ongoing delays of months or even years with getting videophones and captioned
17 telephones working on base networks; 6) that training videos and presentations are consistently not
18 captioned; and 7) that the Air Force has completely failed to adequately staff its disability program, to
19 the detriment of every employee (including every d/Deaf employee) who needs accommodations. *See*
20 *Order at 4-7 (ER 4-7);⁷ see also § III, below.*

21 _____
22 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.

23 ⁶ As discussed in §III(A)(2), below, while the Agency indisputably has over 700 deaf civilian
24 employees, its own tracking tools show that the accommodation of ASL interpretation has only been
25 approved 152 times since 2018. Even if this accommodation record is somewhat incomplete, it is also in
26 accord with Complainants’ own experiences, and the Agency’s repeated failures to provide them with
ASL interpretation or CART services. As Judge Peterson noted, the agency failed to “provide any
27 contrary evidence to demonstrate that such services were provided on more occasions.” *Order at 5 (ER*
28 *5).*

⁷ “ER” citations, here and throughout, are to page numbers in Complainants’ Excerpts of Record,
filed along with this opposition brief.

1 The Agency’s appeal largely ignores this evidence, and fails to grapple with Judge Peterson’s
2 well-reasoned finding that Complainant Weimer and other class agents have satisfied every element of
3 29 C.F.R. § 1614.204(a)(2). *See* Order at 9-13 (ER 9-13). Instead, it devotes the majority of its brief to a
4 profoundly inaccurate account of pre-certification discovery proceedings, and to two bizarre arguments
5 for overturning the class certification decision: first, that the Administrative Judge “erred” by ordering
6 the Agency to produce a class list,⁸ and second, that he similarly “erred” by ordering the Agency to
7 produce its head Disability Program Manager to testify on certain topics when it had not chosen to
8 designate her as a “person most knowledgeable.”

9 Both arguments are easily dispensed with. To begin, Administrative Judges have “broad
10 discretion” over discovery matters, and their decisions regarding discovery are subject to the stringent
11 “abuse of discretion” standard of review.⁹

12 Moreover, the supposed “errors” asserted by the Agency had no bearing on Judge Peterson’s
13 class certification decision. Complainants’ Renewed Motion for Class Certification did not rely on
14 supposedly-confidential information drawn from the class list in any way,¹⁰ and Judge Peterson’s

15
16 ⁸ The Agency suggests that the Administrative Judge ordered this disclosure without regard to
17 asserted privacy objections, but as Judge Peterson noted in his order, the Agency did not actually
18 articulate any specific privacy objections until well after the fact. *See* Order at 15 (ER 15) (“I reiterate
19 that the Agency made no effort to advise this tribunal of any legal objections it had until its May 19,
20 2022 filing. As explained in the Initial Processing Order, dated January 20, 2022, “[R]equests to me
shall be submitted as a motion.” The Agency did not file such a motion. It did not oppose the Class
Agent’s discovery motions. It did not respond to a show-cause order. Only after the Sanctions Notice did
the Agency seek to formally raise privacy concerns, which was followed by the complained-of order that
limited further production and implemented additional protections.”)

21 ⁹ *See Muller v. USDA*, EEOC DOC 0120065071, 2008 WL 2484320, at *5 (June 12, 2008)
(holding that “an AJ has broad discretion in the conduct of a hearing, including matters such as
discovery orders,” and finding no abuse of discretion regarding discovery orders).

22 Beyond having broad discretion regarding pre-certification discovery, EEOC Administrative
23 Judges are in fact “charged with the responsibility to assure full development of an adequate record.”
24 *Robinson v. Department of Navy*, EEOC DOC 05810091, 1981 WL 382968, at *3 (1981). As Judge
25 Peterson noted in his order “my expectation was that allowing further discovery would assist the parties in
developing evidence on whether the class should be certified. As has been demonstrated in this decision,
clearly, additional discovery (including discovery to which the Agency has not objected) has aided in
determining whether the class should be certified.” Order at 16 (ER 16).

26 ¹⁰ As Judge Peterson pointed out, “[t]he Agency argues that the Class Agent should not be allowed
27 to rely on information received as a result of obtaining the employee’s disability status. As addressed
above, the Class Agent ceased such efforts upon receipt of the order and further production was not

1 finding on numerosity was based entirely on other evidence. *See* Order at 11-12 (ER 11-12) (finding
2 numerosity on the basis of Ms. Shock’s testimony and the Agency’s 2020 “Total Workforce Distribution
3 by Disability Status Report,” which identified over 700 Agency employees as being deaf or having
4 serious difficulty hearing). In his order, Judge Peterson was also very clear that he did not consider Ms.
5 Shock to be someone who “‘binds’ the Agency with her testimony” (as would be the case for a “person
6 most knowledgeable” designee in federal court). Order at 4, fn. 3 (ER 4). At the same time, he noted that
7 “her role and experience as the central Disability Program Manager is illustrative,” and that her
8 testimony “has not been opposed by any witness the Agency has designated that would bind it. For
9 example, the individuals at the local installations did not provide affidavits or other evidence that would
10 contradict or contextualize Shock’s testimony.” *Id.* In other words, Judge Peterson gave Ms. Shock’s
11 un rebutted testimony only the weight that it was naturally due, given her eight years of experience as
12 head Disability Program Manager for the Air Force, and her first-hand knowledge of relevant policies
13 and practices.

14 The Agency also asserts that Judge Peterson “erred” by ordering discovery regarding the lack of
15 a “centralized funding structure to pay for reasonable accommodations,” arguing—without citation to
16 anything—that “the establishment of such a structure is not a remedy the AJ could order or enforce.”
17 Agency Appeal Brief at 24. This, of course, is wrong.

18 As Complainants noted in their Renewed Motion for Class Certification, the claim that the
19 Agency’s existing process for funding accommodations is fundamentally broken, and that that necessary
20 accommodations are routinely delayed or denied for supposed lack of funds—despite ample resources
21 available to the Agency as a whole—is very similar to the one asserted in *Tessa L., Complainant*, EEOC
22 DOC 0720170021, 2017 WL 5564438 (Nov. 9, 2017). There, complainants filed a class case alleging
23 that when “the [a]gency transitioned funding for sign language interpreting services from the

24 _____
25 required during the pre-certification discovery period. I note that the Agency does not now oppose the
26 numerical facts of over 2500 individuals self-identifying as deaf or hard of hearing, or the information in
27 its Total Workforce Distribution by Disability Status Report that identifies over 700 employees as deaf
28 or having serious difficulty hearing.” Order at 15 (ER 15); *see also* Renewed Motion for Class
Certification at 77-78 (ER 306-07) (noting compliance with Judge Peterson’s “Limited Stay and
Protective Order” regarding class list).

1 Department level to the sub-agency level without using the appropriate process and without providing
2 adequate time and training,” this “resulted in denial and delay of interpreting services and inhibited
3 Class Agent from performing her job duties.” *Tessa L. v Perdue* (USDA), 2017 WL 5564438, at *4-5.
4 Upon review, the Commission affirmed the AJ’s decision to certify the class, holding that “[t]he basic
5 premise underlying Class Agent’s claim and the class members’ claim is the same - the very same act of
6 dismantling the centralized fund caused everyone to suffer lack of reasonable accommodations in the
7 form of consistent, qualified interpreting services for essential functions of their respective employment
8 and Department-wide functions.”¹¹ *Id.* at *5. Where, as here, an agency’s process for funding
9 accommodations causes necessary accommodations to be discriminatorily delayed or denied, changes to
10 that funding process are absolutely something the EEOC can order. *See id.*¹²

11 Though the Agency may prefer to pretend otherwise, the extensive evidence offered in support
12 of Complainant’ Renewed Motion for Class Certification showed that d/Deaf employees throughout the
13 Air Force are subjected to the same broken systems, and consequently experience the same
14 discriminatory exclusion, the same denials of reasonable and necessary accommodations, and the same
15 inexcusable delays. On the basis of this evidence, Judge Peterson correctly found that Complainants had
16 satisfied every element of 29 C.F.R. § 1614.204(a)(2), and his order granting class certification in this
17 case should be affirmed.

18 **II. Law Relevant to Class Claims**

19 Under the Rehabilitation Act of 1973 (the “Act”) and its implementing regulations, Federal
20 agencies must “not discriminate on the basis of disability in regard to the hiring, advancement or
21

22 ¹¹ This case ultimately resolved through settlement, with the agency agreeing—among other
23 things—to “centralize the provision of sign language interpreter services in the National Capital Region”
24 and to fund interpreter services in the region through a “Shared Cost Program.” *See* USDA Notice of
Resolution of Class Action, at <https://www.nad.org/usda/>.

25 ¹² *See also* MD-110 at Chapter 8, Section X (noting that if there is a finding of discrimination in the
26 context of a class complaint, “the decision shall include systemic relief for the class”); *Miles v USPS*,
27 EEOC DOC 05860013 (Oct. 20, 1986) (describing Commission policy that in “issuing federal sector
28 Commission decisions or orders, obtaining full remedial, corrective and preventive relief is the standard
by which the agency is to be guided,” and that this relief “is to be tailored to cure or correct the
particular source of the identified discrimination and to minimize the chance of its recurrence.”)

1 discharge of employees, employee compensation, job training, or other terms, conditions, and privileges
2 of employment.” 29 C.F.R. § 1614.203(b); *see also* 29 U.S.C. § 791(f). In 1978, Congress amended the
3 Rehabilitation Act to explicitly provide a private right of action under § 501 that allows federal
4 employees to pursue claims of discrimination. *See Prewitt v. United States Postal Serv.*, 662 F.2d 292 at
5 302 (5th Cir. 1981); *Shirley v. Devine*, 670 F.2d 1188, 1194-96 (D.C. Cir. 1982).

6 Congress passed the Rehabilitation Act with the express purpose of “promot(ing) and
7 expand(ing) employment opportunities in the public and private sectors for handicapped individuals.”
8 *Prewitt*, 662 F.2d 292, 301 (quoting 29 U.S.C § 710(8)). In passing the Act, Congress specifically
9 intended that the Federal Government would be a “**model employer**” of people with disabilities; to this
10 end, the Act imposes considerable affirmative obligations on federal employers, beyond the mandate not
11 to discriminate against people with disabilities.^{13, 14} 29 C.F.R. § 1614.203(c) (emphasis added); *see also*
12 *Prewitt*, 662 F.2d at 301-306 and *Shirley*, 670 F.2d. at 1193-97 (discussing legislative history); *Ignacio*
13 *v. United States Postal Serv.*, EEOC Appeal No. 03840005 (September 4, 1984) (“Congress expected
14 and fully intended that the [f]ederal government was to be a model employer of the handicapped, taking
15 affirmative action to hire and promote the disabled”). To this end, the Act requires that federal agency
16

17 ¹³ With this affirmative obligation in mind, the Commission issued Management Directive 715
18 (MD-715) in October 2003, requiring federal agencies to submit for review their “affirmative action
19 programs under Section 501 of the Rehabilitation Act.” MD-715 required federal agencies to “maintain
20 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.”

21 ¹⁴ “Inherent in this duty is an obligation to break down artificial barriers which preclude individuals
22 with disabilities from participating on an equal footing in the work force.” *Hae T., Complainant*, EEOC
23 DOC 2019003385, 2020 WL 6134360, at *4 (Sept. 23, 2020). The mandate to be a model employer not
24 only requires nondiscrimination, but also imposes an affirmative legal duty to take special efforts to
25 recruit, hire, retain, and advance employees with disabilities.

26 In its first case addressing the Rehabilitation Act, the Supreme Court recognized that the
27 affirmative action obligation imposes additional duties beyond mere non-discrimination. *Southeastern*
28 *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.”).

1 employers develop an “affirmative action program plan for the hiring, placement and advancement of
2 handicapped individuals.” 29 U.S.C. § 794(b); *see also* 29 C.F.R. § 1614.203(d) (detailing various
3 requirements of “affirmative action plan” for the employment of people with disabilities).

4 The Rehabilitation Act makes clear that “[t]he standards used to determine whether Section 501
5 has been violated in a complaint alleging employment discrimination under this part shall be the
6 standards applied under the [Americans with Disabilities Act, also known as the] ADA.”¹⁵ 29 C.F.R. §
7 1614.203(b); 29 U.S.C. § 791(f); *see also Velva B., Class Agent*, EEOC DOC 0720160006, 2017 WL
8 4466898, at *11 (Sept. 25, 2017).

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

20 Further, the Commission has held that excessive delays in providing necessary reasonable
21 accommodation are just as discriminatory as denials. *See, e.g., Shealey v. E.E.O.C.*, 111 LRP 30774
22 (April 18, 2011) (delay of nine months to provide reasonable accommodations was an unnecessary delay
23 in violation of the Rehabilitation Act, where procedures required a request for reasonable
24

25 ¹⁵ Congress’s incorporation of ADA standards for the purposes of determining whether §501 has
26 been violated in a complaint alleging nonaffirmative action employment discrimination does not
27 diminish the agency’s affirmative obligations. 29 C.F.R. § 1630.1 (“Except as otherwise provided in
28 this part, this part does not apply a lesser standard than the standards applied under Title V of the
Rehabilitation Act of 1973.”).

1 accommodation decision within 20 business days). Federal courts are in accord and have consistently
2 held that “[a]n unreasonable delay in providing an accommodation for an employee’s known disability
3 can amount to a failure to accommodate his disability that violates the Rehabilitation Act.” *McCray v.*
4 *Wilkie*, 966 F.3d 616, 621 (7th Cir. 2020); *see also Jay v. Internet Wagner*, 233 F.3d 1014, 1017
5 (7th Cir. 2000) (“unreasonable delay in providing an accommodation can provide evidence of
6 discrimination”); *Valle-Arce v. Puerto Rico Ports Auth.*, 651 F.3d 190, 200-01 (1st Cir. 2011)
7 (same); *Mogenhan v. Napolitano*, 613 F.3d 1162, 1168 (D.C. Cir. 2010) (same); *Selenke v. Med.*
8 *Imaging of Colo.*, 248 F.3d 1249, 1262 (10th Cir. 2001) (same).

9 Under regulations implementing § 501 of the Act, federal agencies must also “take specific steps
10 to ensure that requests for reasonable accommodation are not denied for reasons of cost, and that
11 individuals with disabilities are not excluded from employment due to the anticipated cost of a
12 reasonable accommodation, if the resources available to the agency as a whole, excluding those
13 designated by statute for a specific purpose that does not include reasonable accommodation, would
14 enable it to provide an effective reasonable accommodation without undue hardship.” 29 C.F.R.
15 § 1614.203(d)(3)(ii) (emphasis added). In addition, federal agencies must “[e]nsure that anyone who is
16 authorized to grant or deny requests for reasonable accommodation or to make hiring decisions is aware
17 that [. . .] all resources available to the agency as a whole [. . .] are considered when determining
18 whether a denial of reasonable accommodation based on cost is lawful.” 29 C.F.R.
19 § 1614.203(d)(3)(ii)(A).

20 In defining “reasonable accommodation,” Congress expressly included “the provision of
21 qualified readers or interpreters” as an illustration of proper accommodations in a workplace setting. 42
22 U.S.C. § 12111(9)(B). Further, in considering the claims of a deaf employee whose employer denied
23 repeated accommodation requests for ASL interpreters during routine meetings, instead only providing a
24 coworker to take notes in written English, the Ninth Circuit found “a genuine issue of material fact
25 regarding whether these modifications, viewed as a whole, would allow a deaf employee, even one who
26 was fluent in written English, to enjoy the benefits and privileges of attending and participating in the
27
28

1 departmental meetings [especially where the employee only has] limited proficiency in written English.”
2 *U.S. E.E.O.C. v. UPS Supply Chain Sols.*, 620 F.3d 1103, 1112 (9th Cir. 2010) (noting that agendas,
3 contemporaneous notes, and written summaries alone did not necessarily enable d/Deaf employees to
4 enjoy the same benefits and privileges of meeting participation as their nondisabled peers).

5 In addition to requiring reasonable accommodations, § 501 of the Act and the ADA prohibit
6 federal employers from “denying employment opportunities to a job applicant or employee,” if such a
7 denial is based on their need for accommodation—as happens when qualified ASL interpreters or
8 similar necessary accommodations are not provided for applicant interviews, employee trainings, and
9 other work-related opportunities. *See* 42 U.S.C. § 12112(b)(5)(B). Similarly, under both § 501 and the
10 ADA, it is discriminatory to fail “to select and administer tests concerning employment in the most
11 effective manner to ensure that, when such test is administered to a job applicant or employee who has a
12 disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills,
13 aptitude, or whatever other factor of such applicant or employee that such test purports to measure,
14 rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant.”
15 *See* 42 U.S.C. § 12112(b)(7). When a federal entity fails to provide ASL interpreters and similar
16 accommodations to d/Deaf employees and applicants who need them, this is precisely the sort of
17 discrimination that occurs.

18 **III. Statement of Facts.**¹⁶

19 As the underlying record in this case plainly shows, the Agency attempted to frustrate the pre-
20 certification discovery process at every turn—repeatedly disregarding the Administrative Judge’s orders
21 to produce relevant designees, documents, and information, and offering discovery responses that were
22
23

24 ¹⁶ To aid the Commission in locating documents cited in this section and throughout this brief,
25 Complainants have included an “Alphabetical Index of all Evidence Offered in Support of
26 Complainant’s Renewed Motion for Class Certification,” which is located at page VI of this document
27 (immediately after the Table of Authorities).

28 Additionally, Complainants have included all filed documents cited herein in their “Excerpts of
Record” filed in connection with this motion, and have added citation to specific Excerpt of Record
 (“ER”) page numbers throughout.

1 plainly evasive and incomplete.¹⁷ Indeed, during the deposition of Air Force Disability Program
2 Manager Kendra Shock (“Shock Dep.”),¹⁸ Complainants learned that the Agency had indisputably
3 withheld large numbers of relevant and responsive documents, including its 2019 MD-715 Part J report
4 to the EEOC regarding barriers facing employees with disabilities; as well as multiple emails between
5 Ms. Shock and the undersecretary of the Air Force regarding reasonable accommodation requests being
6 unlawfully denied because of a lack of unit-level funding, and the need to establish a central Agency
7 accommodations fund to address this issue. Shock Dep. at 212:11-213:12 (ER 419-420) (2019 MD-715
8 report); *id.* at 174:23-179:10 (ER 406-411) (emails with Agency leadership regarding need for
9 centralized funding); *see also* Complainants Motion to Compel Responsive Documents (June 14, 2022)
10 (ER 8051-8077).

11 Despite the Agency’s efforts to avoid producing responsive documents—and to prevent its head
12 Disability Program Manager, Ms. Shock, from testifying at all—the pre-certification discovery process
13 established beyond doubt that centralized Air Force policies, practices, and procedures serve to
14 discriminate against its deaf employees, and that certification is appropriate in this case.

15 To aid the Commission in locating documents cited in this section and throughout this brief,
16 Complainants have included an “Alphabetical Index of all Evidence Offered in Support of
17 Complainant’s Renewed Motion for Class Certification,” which is located at page VI of this document
18 (immediately after the Table of Authorities). Additionally, Complainants have included all filed
19 documents cited herein in their “Excerpts of Record” filed in connection with this motion, and have
20

21 ¹⁷ *See, e.g.*, Complainants’ May 16, 2022 Response to Sanctions Notice (summarizing history of
22 noncompliance) (ER 7941 – 7959); *see also* February 25, 2022 Motion to Compel and related filings
23 (ER 4510 – 4539); March 07, 2022 Second Pre-Certification Discovery Order (ER 4550-4551); March
24 23, 2022 Motion to Compel and related filings (ER 4552 – 7886); April 12, 2022 Third Pre-Certification
Discovery Order (ER 8107 – 8108); April 20 2022 Motion to Compel and Related filings (ER 8109 –
8183); May 2, 2022 Order to Show Cause (ER 7895 – 7897). May 9, 2022 Motions to Compel
Compliance and related filings (ER 7898 – 7939).

25 ¹⁸ The full transcripts of the June 1, 2022 (Volume One) and June 2, 2022 (Volume Two)
26 depositions of head Air Force Disability Program Manager Kendra Shock (collectively, “Shock Dep.”)
27 were filed by the Agency in connection with its appeal on January 12, 2023. Citations to “Shock Dep.”
28 are to those full transcripts, unless otherwise noted.

1 added citation to specific Excerpt of Record (“ER”) page numbers throughout.

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

4 **1. The Air Force routinely denies necessary accommodations for lack of funds**
5 **even though ample resources are available to the Agency as a whole, and the Agency**
6 **has repeatedly failed to adopt a centralized process for funding accommodations or**
7 **otherwise fix this issue.**

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

10 *A. Yes.*

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

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

18 Agency documents and the testimony of head Disability Program Manager Ms. Shock confirm
19 the Air Force has failed to abide by this clear statutory requirement, that the byzantine process for
20 reimbursement of reasonable accommodations that the Air Force created in 2016 has been an
21 unmitigated failure, and that accommodations are still routinely denied for lack of unit-level funds.

22 According to Air Force documents and the testimony of Ms. Shock, the Air Force has
23 consistently spent something in the range of \$1 million per year to accommodate its employees with
24 disabilities—roughly **.000005%** of a budget that, in recent years, has exceeded \$190 billion. Shock Dep.
25 at 160:16-161:20; *see also* Betouliere Decl., Exhibit E (2016 Diversity and Inclusion Initiatives
26 Implementation Guidance) at 19 (ER 471) (noting projected FY 2017 cost of accommodations).

27 In a 2016 guidance document regarding the Air Force’s initiative to “Reduce Bureaucratic
28 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

1 disabilities,” but that “[o]ften [. . .] managers do not budget for reasonable accommodations and funding
2 this obligation becomes a unit-level challenge.” Betouliere Decl., Exhibit E (2016 Diversity and
3 Inclusion Initiatives Implementation Guidance) at 18 (ER 470).

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

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

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

19 In the Agency’s Fiscal Year 2018 “Affirmative Action Plan for the Recruitment, Hiring,
20 Advancement, and Retention of Persons with Disabilities” report—authored approximately three years
21 after the guidance document discussed above, and approved by the Agency’s Director of Equal
22 Employment Opportunity¹⁹—it notes that accommodations are still “**denied due to unit funding**,” and
23 cites “[l]ack of centralized funding for reasonable accommodations” as a barrier affecting all employees
24 with disabilities. Betouliere Decl., Exhibit F (Fiscal Year 2018 Affirmative Action Plan report) at 19
25 (ER 497) (emphasis added).

26 _____
27 ¹⁹ Shock Dep at 225:21-226:1 (ER 70-71) (all such reports reviewed and approved by agency EEO
28 director).

1 Similarly, the Fiscal Year 2020 version of the same document—authored roughly **five years**
2 after the agency rolled out its new funding codes—continued to cite “Lack of execution of centralized
3 funding for all RA’s,” **“Lack of understanding of the DAF process for funding RA,”** and
4 **“Accommodations denied due to unit funding,”** as major barriers affecting employees with
5 disabilities. Betouliere Decl., Exhibit G (Fiscal Year 2020 Affirmative Action Plan report) at 21 (ER
6 522) (emphasis added).

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

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

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

23 Ms. Shock then described her repeated efforts “explain that our current process does not, in my
24 opinion, reduce bureaucratic obstacles; that it actually increases the obstacles to funding reasonable
25 accommodations; that the financial management folks have not done a good job of explaining this
26 process to their financial management and resource advisors. So, the answer is still often ‘we don't have
27
28

1 the money for that.’ And I don't believe it's a practice that is currently effective.” Shock Dep. at 168:10-
2 19.

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

7 A. I wish I knew. You know, that -- that's the best-kept secret in the Air Force. Every time
8 I would ask for specific information on -- on how that process worked so that I could
9 provide that information to the disability program managers, I was told that our financial
10 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

11 Q. But weren't those same folks who were supposed to know asking you this question?

12 A. Yes.

13 Q. So it was clear that they didn't know, correct?

14 A. Yes, which is why I was asking for the information so I could provide it to them.

15 [...]

16 Q. Okay. And this was supposed to stop shortfalls at the unit level on being used as a basis
17 for denial of reasonable accommodation, right?

18 A. Right.

19 Q. But since the process to get unfunded requests did not occur or was a mystery, that still
20 occurred, right?

21 A. Yes.

22 Q. Meaning that reasonable accommodations were still being denied because of a
23 purported funding shortfall, and that included for employees who were deaf or hard of
24 hearing?

25 [...]

26 A: Yes, I believe that was still happening.

27 Q. Additionally for applicants who were deaf or hard of hearing, that was still occurring?

28 [...]

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 (ER 406 – 409); *see also id.* at 343:12 – 21 (ER 188).

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

1 times. Shock Dep. at 334:6 – 335:7 (ER 179 – 180) (supervisors, managers, and employees); *id.* at 340:8
2 – 341:21 (ER 446 – 447) (hears about this from disability program managers roughly once per month);
3 *see also id.* at 343:5 – 11 (ER 188) (hearing from different disability program managers each time). In
4 each instance when Ms. Shock has been told that an accommodation was denied on the basis of cost, she
5 found the report was true, and that the requested accommodation has indeed been denied on account of
6 cost – despite the Air Force having billions of dollars at its disposal. Shock Dep. at 336:7-23 (ER 181)

7 As Ms. Shock sensibly notes, the instances of improperly-denied accommodations that happen to
8 filter their way up to her are likely only the tip of the iceberg: “evidence of a larger problem” and of
9 “Air Force wide denials of reasonable accommodations based on costs.” Shock Dep. at 339:3-17 (ER
10 184).

11 Despite being told by their own Disability Program Manager that the Air Force’s current process
12 for funding accommodations was not working, the Agency’s response has repeatedly been that business-
13 as-usual is good enough.²⁰ Shock Dep. at 169:1-170:2. As she explained:

14 [A]nybody you can ask in Air Force will know that I am the No. 1 proponent for centralized
15 funding for reasonable accommodations. I believe it’s a best practice. I've tried to convince
16 leadership of this organization that it's a best practice, and I just have been unable to
17 convince them otherwise, even as late as last month. We're still having this conversation,
18 and they still believe this process is working.

17 Q. Even though you've informed them unequivocally it is not?

18 A. In my opinion, I believe it is not.

19 Q. And when you say them, who are you referring to?

20 A. This conversation has **gone all the way to the undersecretary of the Air Force.**

21 Shock Dep. at 177:14 – 178:5 (ER 409 – 410) (emphasis added).

22 ²⁰ Over the years, d/Deaf employees at the Air Force have also repeatedly raised the need to reform
23 the way accommodations are funded, so as to avoid the frequent delays and denials associated with the
24 current process. McAnallen Decl. ¶ 12 (ER 2451 – 2452). However, there has been no change in the
25 byzantine and inefficient way by which ASL interpreters, CART translators, and other necessary
26 accommodations are funded and procured. McAnallen Decl. ¶ 15 (ER 2452). As a result, necessary
27 accommodations are still routinely delayed or denied because of a lack of unit-level funding, or the
28 lengthy process required to get it.

26 Furthermore, when supervisors have attempted to use certain base- or unit- level funds to cover
27 the cost of accommodating their d/Deaf employees (because of the lack of a central source from which
28 funds could be drawn), they were actually *disciplined* for doing so. *See* McAnallen Decl. at ¶¶ 10, 13
(ER 2451 – 2452).

1 This information obtained during the pre-certification discovery process comports with
2 Claimants' own experiences. For example, when Class Agent Wambold (whose first language is ASL,
3 and who has significant difficulty communicating in written English) requested accommodations in the
4 Air Force EEO process, Mr. Randy White, Director of the Equal Opportunity Office at Offutt Air Force
5 Base, informed Mr. Wambold that "he needed to work with his organization to secure the services of [an
6 ASL interpreter] or bring his own **as the EO Office does not have that sort of funding nor the**
7 **responsibility.**" See 20.11.13 Complaint File ("Record of Investigation")²¹ at 41 (ER 2618) (emphasis
8 added). Indeed, rather than provide Mr. Wambold with this reasonable and necessary accommodation,
9 Mr. White admits that "**many times over the years**, he personally explained to Mr. WAMBOLD the
10 Intake and other documents could be taken home and completed," and that Mr. Wambold could "**have a**
11 **friend, family member or other individual to assist him** and return the signed and dated documents
12 for Pre-Complaint or Formal Complaint processing." Record of Investigation at 42 (ER 2619) (emphasis
13 added).

14 Class Agent Sheila Burg has similarly been denied necessary accommodations due to an alleged
15 lack of funding. For example, in late September of 2017 Ms. Burg requested CART services for an
16 upcoming Air Force workshop. After a lengthy email exchange which involved Kendra Duckworth
17 Shock, the Disability Program Manager for the central Air Force Equal Opportunity Office, she was told
18 that this accommodation would be denied because of a lack of unit level funds. See Declaration of Sean
19 Betouliere in Support of Complainants' Renewed Motion for Certification ("Betouliere Decl.") Ex. C
20 (Burg Record of Investigation at Addendum) at 48-58 (ER 375 – 384). Specifically, on October 16,
21 2017, Kim Vu wrote to Ms. Burg: "With much regret, I'm unable to obtain a CART interpreter due to
22 the restrictions on my Micro Purchase Supply GPC Card. I also want you to know I did all I could." *Id.*
23 at 49 (ER 376); see also Betouliere Decl. Ex. B at 299-375 (ER 1153 – 1229) (Air Force GPC Policy).
24 Ultimately, Ms. Burg was forced to rely on coworkers to help fill in the pieces of the training that she
25 could not understand, because this basic and necessary accommodation was not provided. See *id.*

26 _____
27 ²¹ Unless otherwise indicated, all subsequent cites to the Record of Investigation refer to the
28 20.11.13 Complaint File uploaded by the Air Force to the EEOC docket of this case.

1 Class Agent Hugo Perez has similarly repeatedly been told that there were “no funds available to
2 be allocated to the accommodations I requested”—without any indication that all resources available to
3 the Air Force as a whole were considered, as the law requires. *See* Declaration of Hugo Perez, filed
4 February 11, 2021 (“Perez Decl.”) at ¶ 16 (ER 2284).

5 **2. The Air Force has failed to provide reliable access to American Sign**
6 **Language interpreters and other necessary accommodations, and in many instances**
7 **has provided no access at all: according to its own records, it has only provided ASL**
8 **152 times since 2018, despite having over 700 d/Deaf employees.**

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

12 During her deposition, Ms. Shock estimated that as of 2022, the Air Force has “over a thousand
13 deaf employees” in its civilian workforce. Shock Dep. at 71:2-10. The Agency’s MD-715 “Workforce
14 Tables” for Fiscal Year 2020 bear out this estimate: as of that year, the Air Force had 773 civilian
15 employees who self-identified as “deaf or serious difficulty hearing,” and in the previous year, it had
16 591. Shock Dep. at 300:19-301:14 (ER 145); *see also* Betouliere Decl., Exhibit H (Fiscal Year 2020
17 MD-715 Workforce Tables) at 50 (ER 581).

18 Unfortunately, the Air Force’s own internal tracking documents suggest that these deaf civilian
19 employees are accommodated at an alarmingly low rate – which is in accordance with the experiences of
20 class agents and declarants. As discussed below, Agency records indicate that despite having over 700
21 employees who identify as being deaf or having serious difficulty hearing, the Air Force only approved
22 ASL interpretation 152 times between 2018 and mid-2022. *See* Shock Dep. at 198:3-12 (ER 412).

23 According to head Air Force Disability Program Manager Ms. Shock, base-level disability
24 program managers Disability Program Managers are “required to complete a spreadsheet for tracking
25 purposes that [. . .] captures all of the required information regarding reasonable accommodation.”
26 Shock Dep. at 120:20-25 (ER 8063). This spreadsheet is supposed to be provided to Ms. Shock on a
27 quarterly basis, and if one is not provided, she will follow up to ask about it; in each instance where no
28 spreadsheet has been provided, Ms. Shock testified that it was because disability program managers

1 stated “they didn’t provide any reasonable accommodations,” and thus “they didn’t have a spreadsheet
2 to submit.” Shock Dep. at 120:20-124:2 (ER 8063 – 8067).

3 In response to a request to “provide information on the number and types of accommodations
4 that we’ve provided for individuals that are deaf and hard of hearing,” Ms. Shock produced a
5 spreadsheet based on this quarterly data. Shock Dep. at 186:5-20; *see also* Betouliere Decl., Exhibit I
6 (ER 644 – 653) (“DAF Deaf Accommodation (K. Shock)” Excel Sheet). Though it was created several
7 months into 2022, this spreadsheet **does not indicate even a single approved request for interpreters,**
8 **Agency-wide for that year,** and shows only 3 such requests in 2021, 3 in 2020, and 4 in 2019.
9 Betouliere Decl., Exhibit I (ER 651 – 652). In fiscal year 2018 – the only year with more than a handful
10 of approved requests – there were 142. *Id.* Even this, however, suggests serious problems, because all
11 142 approved requests come from three bases: Sheppard, Tinker, and Wright Patterson. *Id.*

12 Aside from these 152 approved requests (nearly all of which came from only three Air Force
13 bases), there is no indication that the Air Force provided ASL interpretation or CART to any of its
14 hundreds of deaf civilian employees over the past five years—which, given the Agency’s repeated
15 refusal or inability to provide Class Agents and declarants with ASL interpretation or CART services for
16 meetings, trainings, interviews, and other work-related events, rings true.²² For an Agency with as many
17 deaf employees as the Air Force, this is a shockingly small number of requests to have approved over
18 the past five years—particularly because, as Ms. Shock acknowledged, ASL interpretation is among the
19 most commonly-needed accommodations for deaf employees. Shock Dep. at 62:25-63:9 (discussing
20 common accommodations).

21 The Agency’s apparently extremely low rate of approving ASL interpretation may have much to
22 do with the fact that only three Air Force bases – Tinker, Wright-Patterson, and Eielson – have standing
23
24
25

26 ²² During her deposition, Ms. Shock expressed her belief that the spreadsheet data she provided
27 regarding accommodations for deaf employees was incomplete and inaccurate – however, she also
28 acknowledged that she had no way of knowing what the true data was. Shock Dep. at 198:3-12 (ER
412).

1 contracts for the provision of interpreters.²³ Shock Dep. at 67:17-68:3 (ER 395 – 396); *see also id.* at
2 73:13-21 (explaining why standing contract would expedite the process of procuring interpreters); *id.* at
3 74:24-75:8 (agreeing that a standing contract would expedite the process of getting ASL or CART
4 interpretation for someone with a higher security clearance).

5 Notably, of the 152 interpreter requests that Agency records show having been approved since
6 2018, 130 (or over 85%) were at Tinker or Wright-Patterson – places where standing contracts exist, and
7 which also happen to be among the three bases that have full time disability program managers.
8 Betouliere Decl., Exhibit I (ER 644 – 653) (“DAF Deaf Accommodation (K. Shock)” Excel Sheet). As
9 Ms. Shock observed wryly during her deposition, “Yeah, kind of a coincidence, isn’t it?” Shock Dep. at
10 248:17-249:2 (ER 430 – 431) (“Funny how that works out. Yeah, when you have somebody who can
11 devote their time to addressing reasonable accommodation issues for that organization, yes, then you are
12 more likely to have the programs in place that you need to support those individuals.”).

13 This extremely low rate of approval is in accord with Complainants’ own experiences, and the
14 Agency’s repeated failures to provide them with ASL interpretation or CART services.

15 For example, the Air Force has repeatedly refused or failed to provide Complainant Weimer with
16 ASL interpreters, CART and similar accommodations. *See* February 11, 2021 Declaration of Sarah
17 Weimer in Support of Class Certification (“Weimer Decl.”) at ¶ 5 (ER 1919). She was repeatedly denied
18 accommodations for Judge Advocate symposiums, including for a February 2020 symposium at
19 which—ironically—she was slated make a presentation about the Agency’s Equal Opportunity
20 obligations. *Id.* at ¶¶ 13-14 (ER 1922-1924). As a consequence of the Air Force’s utter failure to
21 accommodate her, Ms. Weimer was effectively excluded from the symposium, and a co-worker gave
22 Ms. Weimer’s prepared presentation in her stead. *Id.* at ¶ 14 (ER 1923 – 1924). In October 2020, she

23
24 ²³ Apparently, in order to set up a contract, the Air Force requires quotes from “at least three
25 authorized businesses.” Betouliere Decl., Ex. N at 803 (ER 845) (September 27, 2017 email from Veda
26 Crawley, asking for a list of at least three “authorized businesses” that offer CART service, before she
27 could procure CART for Ms. Burg – an accommodation that was, in fact, never provided). Incredibly,
28 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 ¶ 17 (ER 2557-2558).

1 was once again not provided for accommodations for a Judge Advocate symposium, and thus was once
2 again excluded from this valuable opportunity for training and career development. *Id.* Shockingly, **by**
3 **the Air Force’s own admission, Ms. Weimer only received ASL interpreter services three times**
4 between the start of her employment in January 2018, and February of 2021. *See* Record of Investigation
5 at 284 (ER 2861) (“We have provided an interpreter on 3 occasions: an office off-site in May 19, DJAG
6 visit in Nov 19, and the off-site in Jan 20.”); Supplemental Declaration of Sarah Weimer, filed
7 November 1, 2021, (hereinafter “Weimer Supp. Decl.”) at ¶ 9 (ER 2467).

8 After returning to in-person meetings in July 2021, Ms. Weimer was effectively excluded from
9 these recurring team meetings because of the Agency’s failure to provide her ASL interpreters, despite
10 her repeated requests for this accommodation. *Id.* at ¶¶ 12-14 (ER 2470 – 2471) (noting that this
11 “demonstrates that the Air Force’s systemic failure to ensure that d/Deaf and hard of hearing employees
12 and applicants have consistent, reliable access to ASL interpreters.”).

13 Class agents and other class members have had similar issues getting consistent, reliable, or any
14 access to interpreters and other basic accommodations. For example, despite knowing that class agent
15 Hugo Perez was Deaf and needed an ASL interpreter for his new-employee orientation, and despite
16 having **months** to procure one, the Air Force only gave him an interpreter for half of his orientation,
17 meaning that he “had no accommodations for the rest of [his] orientation and was therefore, unable to
18 access most of the information provided.” Perez Decl. at ¶ 6 (ER 2281 – 2282). The Air Force also
19 repeatedly failed to provide him with requested interpreters for his first six months on the job—a crucial
20 adjustment period for any new employee—thus depriving him of the opportunity to communicate with
21 co-workers, learn, and progress. *Id.* at ¶ 7 (ER 2282). This pattern of denying Mr. Perez’s necessary
22 accommodations has continued throughout his employment, and through to the present. *Id.* at ¶¶ 10, 15,
23 16, 19 (ER 2282 – 2285). Indeed, Mr. Perez was informed in October 2020 that a contract to provide
24 interpreter services had expired, and that the Agency would not provide to him accommodations of an
25 interpreter until a later date when a new contract was secured. Perez Decl. at ¶¶ 21-23 (ER 2286). As of
26 this writing, such a contract has **still** not been established – and indeed, **Mr. Perez has been made to**
27
28

1 **search for and obtain quotes from possible ASL and Video Remote Interpreting providers himself,**
2 before anyone at the Agency will finalize a contract and provide him with the accommodations he
3 needs. *See* June 21, 2022 Second Supplemental Declaration of Hugo Perez (“Perez Second Supp.
4 Decl.”) at ¶ 17 (ER 2557 – 2558).

5 By the Air Force’s own admission, Mr. Perez has been denied “the same, equal access to
6 training, work or advancement opportunities since he was hearing impaired.” *See* Perez Decl., Ex. D
7 (ER 2311) (Kimberlei Calhoun Decl.). As another example, Mr. Perez was explicitly told via email that
8 the Air Force would not provide ASL interpreters for a March 31, 2021 mandatory “Extremism Stand
9 Down Training,” which was meant to include open dialogue and conversation with colleagues and base
10 leaders. *See* April 28, 2021 Supplemental Declaration of Hugo Perez (Perez Supp. Decl.) at ¶¶ 4-7 (ER
11 2456). Mr. Perez’s supervisor himself acknowledged that this was not ideal but “we are stuck having to
12 do it this way” because his base still had no active contract to bring in outside ASL interpreters, despite
13 his own supervisor advocating for this for many months. *Id.* at ¶¶ 7-8 (ER 2456). As a result of the
14 Agency’s inability to accommodate him effectively, Mr. Perez instead reviewed a 71-page booklet,
15 rather than effectively participate in an interactive program on a topic he was particularly interested in
16 communicating about. *Id.* at ¶¶ 11-12 (ER 2457 – 2458).

17 Class agent Sheila Burg is not fluent in ASL and thus requires CART services rather than ASL
18 interpretation, but again, the Air Force has failed to consistently provide her with CART and other
19 necessary accommodations. *See* February 11, 2021 Declaration of Sheila Burg (“Burg Decl.”) at ¶¶ 9,
20 10, 11 (ER 2329 – 2331). Indeed, **the Air Force even failed to accommodate Ms. Burg during the**
21 **EEO process that she initiated about the Agency’s persistent failure to accommodate her.**²⁴ Burg
22 Decl. ¶ 32 (ER 2338). *See also* Betouliere Decl. Exhibit B at 983-984 (ER 1839 - 1840) (email from
23 Diversity Management Operations Center Investigations and Resolutions Directorate Investigator Leslie
24 M. Walter to Ms. Burg indicating that her interview options were by telephone with Federal Relay, the
25

26 _____
27 ²⁴ This failure to accommodate d/Deaf employees during their EEO processes is a common and
28 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 41-42 (ER 2618-2619) (no interpreter for EEO process).

1 cost for which “would be absorbed by” the EEO office, or by written interrogatory, which “might be the
2 easiest way to go.”).

3 While Ms. Burg has received many promotions and accolades from the Air Force during her
4 three-decade career with the Agency, this consistent denial of necessary reasonable accommodations
5 over the past many years has negatively impacted her ability to do her job, caused her extreme stress,
6 and taken a severe toll on her mental health and general well-being. Burg Decl. at ¶¶ 6, 26, 38 (ER 2328,
7 2336-37, 2339-40); *see also* Betouliere Decl. Ex. B at 968-969 (ER 1824-1825) (declaration by Air
8 Force Personal Property Activity Headquarters Operations Chief Rodney Phillips that he “witnessed Ms.
9 Burg attempting to perform her duties without accommodations and afterwards expressing no support
10 offered by Agency to assist;” that Ms. Burg “**missed several projected, planned, and ad hoc meetings**
11 **due to her inability to participate due to lack of accommodations;”** and he “**felt Ms. Burg was**
12 **almost apologetic for not being able to participate at the level she could due to lack of medical**
13 **accommodations.”**).

14 In his 18 years as an Air Force employee, class agent Wambold’s needs for reasonable
15 accommodation were ignored again and again: he was **never** provided with a videophone, despite
16 requesting one in 2006, and his requests for ASL interpretation and other basic accommodations were
17 habitually refused, **including during the Air Force EEO process itself**. Wambold Decl. at ¶¶ 5-7, 10-
18 12, 13-14 (ER 2437 – 2441); *see also* Record of Investigation at 41-42 (ER 2617-2618) (no interpreter
19 for EEO process). Despite repeatedly requesting interpreters for trainings and other work-related events,
20 he was only provided with “an interpreter **twice** from 2014 to 2019.” *Id.* at ¶ 9 (ER 2439). Ultimately,
21 Mr. Wambold was constructively terminated from his position, as a result of the Air Force’s utter failure
22 to accommodate him. *Id.* at ¶ 16 (ER 2442).

23 The Air Force also repeatedly failed to accommodate class declarant Rachel McAnallen during
24 her five years at the Agency, and this discrimination occurred in a variety of positions, across a variety
25 of bases. *See* February 11, 2021 Declaration of Rachel McAnallen (“McAnallen Decl.”) at ¶¶ 4-9, 16-17
26 (ER 2450-2451, 2453). Ms. McAnallen too was ultimately constructively terminated as a result, and
27
28

1 made it a point to note in her exit paperwork that the Air Force’s failure to accommodate her was one of
2 the main reasons she was leaving the position. McAnallen Decl. at ¶ 18 (ER 2453).

3 The Air Force’s failure to accommodate people who are d/Deaf extends to the application
4 process as well: despite over a month of advance notice and the knowledge that class agent Mika
5 Hongyu-Perez was Deaf and needed an ASL interpreter for her job interview, the Air Force failed to
6 provide one. *See* February 11, 2021 Declaration of Mika Hongyu-Perez, (“Hongyu-Perez Decl.”) ¶¶ 9-
7 10 (ER 2359 – 2360). The Agency has also withdrawn an internship offer from Ms. Hongyu-Perez
8 rather than provide her with the accommodation of an interpreter, and has provided her with an
9 interpreter for only one-half day out of a three-day new employee orientation. *Id.* at ¶¶ 11-12, 13-15 (ER
10 2361 – 2364).

11 Nor was the Air Force’s failure to provide ASL Interpretation for applicant Ms. Hongyu-Perez
12 an isolated occurrence. During Ms. Shock’s deposition, she discussed yet another incident of the Air
13 Force denying or failing to provide ASL interpretation during the application process, despite being
14 well-aware of the applicants’ disability and disability-related need. Shock Dep. at 30:17-32:4 (discussing
15 case of Mr. Brown); *id.* at 38:20 – 40:6 (Agency aware of Mr. Brown’s needs but failed to locate an
16 interpreter); *id.* at 40:18 – 42:22 (discussing July 2019 EEOC finding of discriminatory failure to
17 provide reasonable accommodations and violation of the Rehabilitation Act as it pertained to Mr.
18 Brown; order that Agency be trained in providing reasonable accommodations); *id.* at 43:18-44:6
19 (Agency ordered to provide two full-time interpreters for Mr. Brown).

20 Finally, in its June 1, 2022 Limited Stay Order, the Administrative Judge took judicial notice of
21 what may be yet another example of the Air Force’s failure to accommodate deaf employees:²⁵ “I note
22 that the Commission recently issued a decision in *Alvaro P. v. Dep’t of the Air Force*, EEOC Appeal No.
23 2021004984 (Mar. 14, 2022), which was an appeal of the same case. I take administrative notice of the
24

25 ²⁵ In his order, the Administrative Judge suggested that this case involved Mr. Brown, the same
26 individual named in the “Notice of Intent to Issue a Decision” filed by the Agency on May 20, 2022.
27 Order at fn. 1 (ER 8049). However, because the individual identified in the caption for this case is not
28 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.

1 administrative judge’s further findings that the Agency failed to accommodate the complainant and
2 otherwise discriminated against the complainant based on his disability (deaf). Further, the
3 administrative judge found that the individual assigned to engage the complainant in the reasonable
4 accommodation process had no relevant experience or training. In reviewing the administrative judge’s
5 decision, which was fully implemented by the Agency, I recognize similarities between the allegations
6 raised by the Class Agent.” June 1, 2022 Limited Stay and Protective Order at 2, fn. 1 (ER 8049).

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

10 Moreover, even the limited workarounds that many deaf employees had relied on to make up for
11 the Air Force’s failures to accommodate are now no longer available. For years, Class Agent Weimer
12 was forced to rely on the Federal Relay Service to make up for the Agency’s lack of any central process,
13 fund, or contract for providing ASL interpreters or CART services. *See* February 3, 2022 Second
14 Supplemental Declaration of Sarah Weimer (“Weimer Second Supp. Decl.”) at ¶¶ 12-15 (ER 2503 –
15 2504). When Ms. Weimer learned that the Federal Government planned to terminate this service in
16 February 2022, she immediately contacted Ms. Shock because she was concerned that the Air Force
17 would not establish an appropriate replacement in time. *Id.* at ¶ 15 (ER 2504). Indeed, as class Agent
18 Hugo Perez confirms, the Air Force has failed to establish its own alternative to the Federal Relay
19 Service, despite him also making this request to multiple supervisors. *See* June 21, 2022 Second
20 Supplemental Declaration of Hugo Perez (“Perez Second Supp. Decl.”) at ¶ 15 (ER 2557). Because the
21 stopgap services provided by Federal Relay are now no longer available – and the Air Force has
22 consistently failed and refused to provide ASL, CART, or Video Remote Interpreting itself – Mr. Perez
23 now struggles even more to communicate at work, and to perform his job without these basic and
24 necessary reasonable accommodations. *Id.* at ¶¶ 15-18 (ER 2557 – 2558).

25 **3. The Air Force has a centralized discriminatory policy or practice that puts**
26 **the onus of requesting necessary accommodations on d/Deaf employees every time,**
27
28

1 **even when need for that accommodation is known to the Agency, and has not**
2 **changed.**

3 Agency training documents produced during pre-certification discovery process confirm that
4 while employees who need the same obvious accommodation again and again are not necessarily
5 required to submit a new written request, they are expected to provide supervisors with “appropriate
6 notice each time the accommodation is needed.” Betouliere Decl., Exhibit J (ER 669) (AFI 36-2710 –
7 Reasonable Accommodation Training). In other words, the onus of requesting necessary
8 accommodations is placed on employees with disabilities every time, even when need for that
9 accommodation is or should be known to the Agency, and has not changed—just as Complainants have
10 alleged.

11 This requirement has a particular discriminatory impact on the Agency’s deaf employees, as “the
12 [a]ssistance of sign language interpreters” is among the “most common example[s . . .] of a reasonable
13 accommodation that’s requested on a repeated basis.” Shock Dep. 303:5-11 (ER 148).

14 During her deposition, Ms. Shock clarified that managers were not in fact supposed to be making
15 employees request the same accommodations over and over again, where their accommodation needs
16 are known. Shock Dep. at 304:8-305:9 (ER 149 – 150). Unfortunately, Claimants’ experiences suggest
17 that managers have not gotten the message on this point – and understandably not, since the training
18 they are given expressly says otherwise, and instructs them to require “appropriate notice” from
19 employees with disabilities “each time the accommodation is needed.” Betouliere Decl., Exhibit J at 15
20 (ER 669).

21 For example, Ms. Weimer has been required to provide the same information regarding her
22 disability and need for reasonable accommodations over and over, despite the fact that her disability is
23 permanent and her need for accommodations does not change. Weimer Decl. ¶ 5 (ER 1919). She has had
24 to request the same reasonable accommodations for trainings and work meetings that are scheduled on
25 repeated basis. Weimer Decl. at ¶¶ 5, 8, 13-15, 16-17, 41-49 (ER 1919 – 1925, 1933 – 1937); *see also*
26 Record of Investigation at 128-29 (ER 2705 – 2706) (“I see an email where you say that [. . .] the
27 symposium is an example of something for which you would need an accommodation, but I do not see a
28

1 request for an accommodation - to whom was that request sent?" Ms. Weimer responded, "I did request
2 accommodations for future events such as that symposium in the email – i[t] wasn't rhetorical example -
3 and brought it up in our meeting." Record of Investigation at 129 (ER 2706).

4 The Agency has admitted in writing that Ms. Weimer is responsible for requesting CART
5 services for each staff meeting (that occurs weekly), and if she does not do so, no accommodations of
6 CART services will be provided. Record of Investigation at 111 (ER 2688) (email from Col. Debra
7 Luker acknowledging, at top of page, that Col. Luker needed to authorize a court reporter to caption a
8 meeting for Ms. Weimer during the one instance that Ms. Weimer forgot to request one—thus affirming
9 that Ms. Weimer is responsible for requesting her own CART services for **each** staff meeting, and that if
10 she forgets, there is no CART). As noted above, Ms. Weimer has almost never been provided ASL
11 interpreters despite her numerous requests, and when she requests an ASL interpreter she is routinely
12 still questioned as to why she needs this accommodation, despite the Air Force being on notice that she
13 is Deaf and communicates using ASL. Weimer Supp. Decl. at ¶ 6 (ER 2467 – 2468).

14 Similarly, accommodations for a DOD Security Certification exam were not offered until Mr.
15 Wambold's sixth attempt, despite the Agency knowing of his disability and need for accommodations—
16 a need that did not change. *See* Record of Investigation at 43, 999 (ER 2620, 3576); Wambold Decl. at
17 ¶¶ 9 (ER 2439) (not provided accommodations for Cybersecurity Liaison training), 11 (ER 2439 – 2440)
18 (no accommodations for Kiosk Training), 12 (ER 2440) (no accommodations for security plus certificate
19 training). Ms. Burg was likewise required to provide the same information regarding her disability and
20 need for accommodations over and over during the past 5 years, with little help or guidance from the
21 Agency. Burg Decl. at ¶¶ 10, 15, 29, 34 (ER 2330, 2332, 2337 – 2339). For example, when Ms. Burg
22 asked for assistance obtaining CART services for a 3-day teleconference in May 2020, after having
23 consistently sought CART services since 2015, the Air Force's central Disability Program Manager Ms.
24 Shock only responded with a list of local CART providers, and left the burden and responsibility of
25 obtaining the accommodation on Ms. Burg. Betouliere Decl., Exhibit B at 293-296 (ER 1147 – 1150).
26 Ms. Burg even tried to ask whose responsibility it was to assist her, but the only response she received
27
28

1 was that “No one person is responsible for implementing reasonable accommodations.” *Id.* at 293-4 (ER
2 1147 – 1148); Burg Decl. at ¶ 34 (ER 2338 – 2339).

3 Like Ms. Burg, Ms. Weimer, and Mr. Wambold, Hugo Perez has had to repeatedly request ASL
4 interpretation, even though his need for that accommodation was known, and had not changed. Perez
5 Decl. at ¶ 7 (ER 2282) (“For over six (6) months from the time I was hired, I was forced to chase people
6 to get an interpreter.”).

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

11 Because of the Air Force’s lack of standardized process, class members are forced to wait for
12 years to receive or be able to use assistive communications devices.

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

18 **Q.** Are you aware of consistent delays with ensuring that videophones and/or captioned
19 telephones work on base networks?

20 **A.** Yes.

21 [. . .]

22 **Q.** And what is your understanding of those consistent delays?

23 **A.** It's a complicated process due to Air Force security and firewalls.

24 **Q.** And has -- have those consistent delays been in place at least from 2018 to the present?

25 **A.** Yes.

26 [. . .]

27 **Q.** And do those consistent delays ensuring videophones and captioned telephones work
28 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 (ER 397 – 398).

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

1 (ER 399).

2 According to Ms. Shock, the Agency has not done anything to expedite the process of ensuring
3 that videophones or captioned telephones can actually be used by its deaf employees, such as training
4 “IT staff so that they understand the particular requirements of videophones or captioned telephones”
5 and how to get them working on each base network. Shock Dep. at 136:7-12 (ER 401). Instead, the
6 Agency has chosen to address these issues on a “case by case” basis – presumably in the same
7 unacceptably slow and incompetent way experienced by Complainants Weimer, Burg, and Perez, each
8 of whom had to wait months or years before they had a functioning videophone or captioned telephone.
9 See Shock Dep. at 135:7-136:12 (ER 400 – 401); *see also* § III(A)(5), above (describing excessive
10 delays in getting Complainants’ essential communication devices working on base networks).

11 In many cases, these delays are truly egregious. For example, Mr. Wambold requested a
12 videophone when he began employment at Offutt AFB in 2006, but had still not received one by the
13 time of his constructive discharge in 2020. His supervisor Heidi Snyder suggested getting an iPad for
14 him to use to communicate, but was unable to procure one because of unspecified “government
15 restrictions.” Record of Investigation at 1020 (ER 3597). Similarly, class members Mr. Arthur Garcia
16 and Mr. Rex Nelson worked as Wood Workers at the 99th Logistics Readiness Squadron at Nellis AFB
17 for **ten years** without receiving videophones, even though Mr. Garcia requested one when he first began
18 the job. Record of Investigation at 39 (ER 2616).

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

25 Class Agent Weimer brought her videophone with her from her job at the Army. Weimer Decl.
26 at ¶¶ 7-8 (ER 1920 – 1921). Although she had not experienced any difficulty or delay in getting the
27
28

1 phone connected to the network at Joint Base Elmendorf–Richardson when she worked for the U.S.
2 Army, her experience working for the Air Force was vastly different and worse-- it took 11 months for
3 her to connect the phone to the Nellis AFB network. *Id.* During that time, she was forced to take it upon
4 herself to find a fix, and contacted multiple people, units, and bases. *Id.* Eventually, a separate internet
5 line was installed in her office to connect to her video phone. *Id.*; *see also* Record of Investigation at 36
6 (ER 2613) (Kathy Wiltse stating that attempts made to install video phones for d/Deaf Nellis AFB
7 employees in warehouse took “**several years**” because of network and firewall issues; installation of
8 Class Agent Weimer’s videophone took **at least 8 months**); Record of Investigation at 37 (ER
9 2614)(Colonel Luker stating that “Firewalls often a problem for some of the software or devices.”);
10 Record of Investigation at 358-362 (ER 2935 – 2939) (correspondence regarding connecting Ms.
11 Weimer’s videophone).

12 Similarly, after Ms. Burg received the captioned telephone she requested at the Pentagon, it took
13 her over a year of attempting to coordinate between the Communications Squadron and IT to get the
14 phone working. Burg Decl. at ¶ 17 (ER 2333); *see also* Betouliere Decl. Ex. B at 464 (ER 1318) (Ms.
15 Mahoney stated in August 2019, “We have been working on the CAPTEL request...CAPTEC was very
16 supportive, however, we are still working the many challenges in getting the CAPTEL phone connected.
17 Five months in for reconsideration...Ms. Burg has been more than patient.”).

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

23 Mr. Perez, who received his videophone at Fort Sam Houston in May 2020 after requesting it
24 since November 2018, was *still* not able to use his phone consistently as of February 2021. Perez Decl.
25 at ¶ 12 (ER 2283 – 2284). Between May 2020 and at least February of 2021, his videophone only
26 worked for a day or two at a time. *Id.* Then it would display an error message like “waiting for server
27
28

1 issue.” *Id.* at Ex. A (ER 2289 – 2292). Mr. Perez and Mr. Morgan submitted numerous tickets to the
2 Network Enterprise Center (NetOps), but each ticket would be treated as a separate issue and closed out
3 when the phone worked temporarily. *Id.* For a time, Mr. Perez would daily restart the phone, restart the
4 networking setting, log in to the server with username and password, and wait for the connection. Even
5 when it seemed to connect, the screen was often black and Mr. Perez was unable to see the interpreters.
6 *Id.* Ms. Burg’s captioned telephone also stopped working at one point and there was no standardized
7 process she could use to ensure that it would be fixed within a reasonable time period. Burg Decl. at ¶ 17
8 (ER 2333).

9 **5. The Air Force has failed to “whitelist” appropriate assistive technology, and**
10 **failed to provide workable alternative accommodations (such as interpreters with**
11 **security clearance) for d/Deaf employees working in secure areas.**

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

15 Mr. Perez requested around January 2019 to be able to install video relay service software on his
16 government computer, including Convo Communications, Sorensen video relay service, and ZVRS. He
17 was never permitted to download the software. Perez Decl. at ¶ 14 (ER 2284); *see also* Record of
18 Investigation at 1320, 1469 (ER 3897, 4046) (discussing issue with software not being allowed on
19 network, failure to fix).

20 Even some software that is “whitelisted” is blocked. Video relay service software for the
21 government’s Federal Relay service remote interpreting, for example, is already whitelisted. The 99th
22 Communications Squadron installed it on Ms. Weimer’s government laptop at her request. However,
23 even once installed, the software was blocked, and she could not actually use it. She notified the
24 Communications Squadron about this problem repeatedly, but it was never fixed. Weimer Decl. at ¶ 8
25 (ER 1920 – 1921); *see also* Record of Investigation at 111 (ER 2688) (Colonel Luker acknowledging
26 that government On Demand Video Relay software on Ms. Weimer’s computer was still being worked
27 on in April 2020, from months prior). Ms. Weimer repeatedly asked to be permitted to use the
28

1 Automated Speech Recognition (ASR) feature in Microsoft Teams, the Agency had disabled this
2 feature, thereby making Teams inaccessible to her and other deaf employees. *See* Weimer Supp Decl. at
3 ¶ 15 (ER 2471 – 2472).²⁶

4 Similarly, a new policy was instituted in May 2018 that prohibited Ms. Burg from using her
5 Bluetooth hearing aids upon which she previous relied, which enable her to adequately hear a
6 conversation taking place around her. See Record of Investigation at 38 (ER 2615) (investigatory
7 summary stating that, according to Ms. Shock, Ms. Burg’s request for Bluetooth hearing aids was
8 denied, and CART services for meetings somehow “not possible”; only option was reassignment outside
9 of Sensitive Compartmentalize Information Facility (SCIF)). Ms. Burg’s supervisor, Personnel and
10 Training Division Chief of Budget Operations and Personnel Heidi Mahoney, wrote to Ms. Shock the
11 following about the change in policy:

12 Although I understand the “national security” policy **I do believe that further AF**
13 **guidance/policy is required to address those individuals that were hired into**
14 **positions/locations that can no longer provide specific accommodations based on these**
15 **security policy changes/updates.** To say that we are limited in choices to address Sheila’s
16 situation, such as providing accommodations at a certain level based on the security requirement
17 and not on the individual’s disability seems misplaced. **I would think there would be an Air**
18 **Force policy that outlines next steps such as an alternate work location or reassignment as**
19 **a priority action since the restriction of accommodations, as in Sheila’s case, were levied**
20 **after accepting her current position as Schedule A employee.**

21 Betouliere Decl. Ex. B at 463 (ER 1317) (emphasis added). Ms. Shock responded that “AF/A1Q is
22 currently updating AFI 36-205 which contains AF reasonable accommodation policy and procedures
23 and we are developing a handbook to accompany the instructions. We can certainly address this issue in
24 both of these documents.” *Id.* at 507 (ER 1361). To date, it does not appear that this has happened, and
25 there does not appear to be a version of AFI 36-205 more recent than 2016. *See*

26 <https://www.af.mil/Portals/1/documents/eeo/AFI%2036-205%2015%20Dec%2016.pdf?ver=2017-09->

27 ²⁶ While Teams’ Automated Speech Recognition feature was eventually enabled in mid-2021—
28 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. Weimer Supp. Decl. at ¶ 16
(ER 2472).

1 [15-170350-580](#).

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

9 The Air Force seems to have made little if any effort to do this – as Ms. Shock noted at her
10 deposition, the Air Force has largely failed to hire or contract for interpreters with high levels of security
11 clearance, severely impacting deaf employees who must work with secure information as part of their
12 jobs.

13 According to Ms. Shock, when other organizations have needed to obtain ASL or CART
14 interpreters with secret or top-secret security clearance to assist deaf employees who work with that
15 level of information, they have either established standing contracts for such interpreters, or hired them
16 as employees. Shock Dep. at 369:25 – 371:12 (ER 447 – 448). Based on her conversation with staff at
17 other agencies, “most often they [. . .] have both staff interpreters that are employees of the agency and
18 they supplement that with contract employees” *Id.* at 370:16-19 (ER 447). The Air Force, by contrast,
19 has largely failed to do either thing.

20 To the best of Ms. Shock’s knowledge, the Air Force has “one or two” staff interpreters (at
21 Wright-Patterson and Tinker, two of the same bases that have standing interpreter contracts and full-
22 time disability program managers) but it has largely failed to procure the services of interpreters with
23 high levels of security clearance—to the detriment of deaf employees like Ms. Burg, who must regularly
24 work with secure information. Shock Dep. at 370:20-371:12 (ER 447 – 448); *see also* Burg Decl. at ¶ 9
25 (ER 2329 – 2330) (“My understanding is that the Air Force has, or can get, CART translators with
26 appropriate security clearances to work in a Sensitive Compartmentalized Information Facility (SCIF),
27
28

1 but as far as I am aware there has been no effort to do this on my behalf, whether for meetings, trainings,
2 or any other occasion in which the reasonable accommodation of CART translation would help me
3 perform the essential functions of my job.”).

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

6 The Air Force routinely fails to provide captions and similar accommodations for necessary
7 trainings, presentations, and videos, thereby denying class members the accommodations they need to
8 benefit from this programming. During her deposition, Ms. Shock confirmed that she was well-aware of
9 this problem, that it was ongoing, that complaints about lack of captioning were well-founded, and that
10 Agency leadership had done essentially nothing to address the issue. Shock Dep. at 138:13-24 (ER
11 402)(aware of problem); Shock Dep. at 138:25-139:15 (ER 402 – 403) (complaints well-founded, deaf
12 employees denied equal access to training); Shock Dep. at 139:16-141:7 (ER 403 – 405) (systemic and
13 ongoing problem, no agency action).

14 When asked whether she was “aware of complaints by deaf and hard of hearing employees that
15 there’s a persistent problem that videos for training and other purposes are not captioned,” Ms. Shock
16 responded that she was, and stated “I’m aware that we’ve had multiple issues where [. . .] mandatory
17 training[has] been required, videotapes have been used, and they’ve not been captioned.” Shock Dep. at
18 138:13-24 (ER 402). Ms. Shock also confirmed that the complaints of these employees were well-
19 founded, that the mandatory training was in fact not captioned, and that this meant there was “no way
20 for the employee to have equal access to that training.” Shock Dep. at 138:25-139:15 (ER 402 – 403).

21 Despite affirming that this was a “systemic problem with the Air Force that persists to today,”
22 and that she had had multiple conversations about the need for captions with the people “responsible for
23 providing such training videos,” Ms. Shock stated that she was not aware of any Air Force policy
24 requiring that training videos be captioned. Shock Dep. at 139:16-141:7 (ER 403 – 405). This was
25 reaffirmed during Ms. Shock’s second day of deposition, during which the following exchange
26 occurred:

27 **Q.** [. . .] is there a plan that the Air Force has to ensure its videos are consistently captioned?
28 **A.** Not that I’m aware of.

1 Q. Given that it's a requirement of the law, do you think that would be a good idea for the
2 Air Force to do that?

3 [. . .A.]. I would recommend that for the updating policy that we're crafting, that [. . .] they
4 include a section on accessible media and what the requirements there would be.

5 Shock Dep. at 254:17-255:8 (ER 437 – 438).

6 The Air Force's consistent failure to caption its training videos may have something to do with
7 the fact that the Agency's sole employee responsible for ensuring compliance with Section 508 of the
8 Rehabilitation Act²⁷ – who, shockingly, performs this task as a “collateral duty,” meaning that it may
9 take up no more than 20% of her total work time²⁸—apparently does not believe that ensuring the
10 accessibility of electronic training materials is her responsibility, and that making such materials
11 accessible should be handled case-by-case, as an accommodation. Shock Dep. at 251:21-254:4 (ER 433
12 - 436) (noting that Agency's section 508 office views the accessibility of electronic content as
13 something that should be handled as an individual reasonable accommodation).

14 As Ms. Shock explained, in addition to being illegal, this individualized accommodation
15 approach is fraught with problems, because she is not involved in the creation of training videos and has
16 no way of knowing “whether a video exists and whether or not its captioned until someone informs me

17 _____
18 ²⁷ Section 508 requires federal departments and agencies “developing, procuring, maintaining, or
19 using electronic and information technology” to ensure that the electronic and information technology
20 allows “individuals with disabilities who are Federal employees to have access to and use of information
21 and data that is comparable to the access to and use of the information and data by Federal employees
22 who are not individuals with disabilities.” 29 U.S.C. § 794d(a)(1)(A).

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

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

28 (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).

²⁸ Shock Dep. at 293:15-22 (ER 439) (noting that Section 508 coordinator performs that job as a
“collateral” duty); *id.* at 241:13-242:8 (ER 425 - 426) (explaining that employees are “only allowed to
spend 20% of their time” on an assigned collateral duty).

1 that it's not" – that is, not until “after the fact when the individual has not been provided [. . .] access.”
2 Shock Dep. at 253:15-254:4 (ER 435 – 436).

3 The systemic lack of legally-required captioning for Air Force trainings and presentations is also
4 confirmed by Complainants and class declarant McAnallen.

5 For example, in order to maintain her Financial Management certificate, which was necessary for
6 her position, Ms. Burg was required to participate in periodic trainings. Burg Decl. at ¶ 20 (ER 2334).
7 These trainings often consisted of online seminars that were not reliably captioned. *Id.* Captioning of
8 these videos is particularly important for Ms. Burg, because Bluetooth streaming between the video and
9 her hearing aids is not allowed in the “open space vaults” where she works, which means that, without
10 captions, she has no way of accessing their content at all. *Id.*

11 Similarly, Ms. Weimer has consistently struggled to complete required video trainings because
12 she could not access them without captioning. As just one example, Ms. Weimer has requested that the
13 Mandatory Annual Legal Assistance Refresher Training be provided with captions since she began
14 working for the Air Force in 2018, but this has not happened. Weimer Decl. at ¶¶ 19-26 (ER 1926 –
15 1928). While Ms. Weimer was told that the Air Force was in the middle of an upgrade would enable
16 them to caption the Annual training as well as other webcasts and videos- to date captioning has still not
17 been provided. *Id.* Ms. Weimer has been denied access to multiple other mandatory trainings, as videos
18 are consistently provided without captions, despite repeated efforts on her part to advocate for herself
19 and other d/Deaf employees who require captioning. Weimer Decl. at ¶¶ 16-40 (ER 1924 – 1933)
20 (detailing failure to provide captions or other accommodations for a variety of required trainings). More
21 recently, upon returning to work after several months of leave under the Family and Medical Leave Act,
22 Ms. Weimer was informed that she needed to complete multiple video or audio trainings, all but one of
23 which lacked captions and thus were entirely inaccessible to her. Weimer Second Supp. Decl. at ¶¶ 4-8
24 (ER 2500 – 2502). While Ms. Weimer immediately requested captions so that she could access these
25 trainings, only one was subsequently captioned, meaning Ms. Weimer has been unable to complete the
26 vast majority of these trainings. *Id.* at ¶¶ 8-11 (ER 2501 – 2503).

1 Ms. McAnallen experienced the same harm when videos at mandatory Wing trainings were
2 consistently provided without captioning. McAnallen Decl. at ¶ 17 (ER 2453). By neglecting to ensure
3 that all trainings, videos, and presentations are provided with captioning, the Air Force discriminates
4 against d/Deaf employees who are denied the ability to benefit from this material in the same manner as
5 their coworkers without disabilities.

6 **7. The Air Force has failed to adequately staff its disability program, to the**
7 **detriment of its d/Deaf employees, and everyone else who needs accommodations.**

8 The Air Force has completely failed to adequately staff its disability program, to the detriment of
9 every employee who needs accommodations: despite an Air Force Instruction that “highly
10 recommend[s]” appointment of full-time Disability Program Managers, only 3 bases have full-time
11 people in this position, and roughly a quarter have no Disability Program Managers at all. The remainder
12 perform their disability-related work as a “collateral duty,” meaning that they must somehow
13 accomplish all of it – or not – in only 20% of their work time.

14 The Agency’s Fiscal Year 2018 “Affirmative Action Plan for the Recruitment, Hiring,
15 Advancement, and Retention of Persons with Disabilities” report asks the following question: “Has the
16 agency designated sufficient qualified personnel to implement its disability program during the reporting
17 period? Betouliere Decl., Exhibit F at 2 (ER 480).

18 The answer, unsurprisingly, is “No.” *Id.*

19 In elaboration, the report explains that “Air Force Instruction (AFI) 36-2710 encourages
20 installations to establish full-time DPMs [(Disability Program Managers)],²⁹ but still the majority of
21

22 ²⁹ AFI 36-2710 is the Agency’s Equal Opportunity Program Guidance. Section 11.4.6 of this
23 document states “It is **highly recommended** that installations designate a full-time Disability Program
24 Manager.” AFI 36-2710 at 101 (emphasis added). Betouliere Decl., Exhibit K (AFI 36-2710) at 101, §
25 11.4.6 (ER 791).

26 Similarly, section 3.5.3 of an earlier Air Force Instruction 36-205, titled “Affirmative
27 Employment Program (AEP), Special Emphasis Programs (SEPS) and Reasonable Accommodation
28 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/eo/AFI%2036-205%2015%20Dec%2016.pdf?ver=2017-09-15-170350-580>).

1 DPMs in FY20 were assigned as collateral duty.” *Id.* It then goes on to note that one of the “primary
2 challenges with collateral duty DPMS” is an “**inability to effectively execute DPM duties due to**
3 **performing full-time jobs.**” *Id.* (emphasis added).

4 A table immediately below this explanation shows that the Air Force has only 3 full time
5 employees responsible for “processing reasonable accommodation requests from applicants and
6 employees,” and 85 employees who perform this task as a “collateral duty” – meaning that they cannot
7 devote more than 20% of their time to it. *Id.* at 3; *see also* Shock Dep. at 241:13-242:8 (ER 425 – 426)
8 (explaining that employees are “only allowed to spend 20% of their time” on an assigned collateral
9 duty).

10 The Fiscal Year 2020 “Affirmative Action Plan” report comes to the same conclusion about
11 whether the Agency has “designated sufficient qualified personnel to implement its disability program
12 during the reporting period” – “No” – and shows that the number of full-time employees responsible for
13 processing reasonable accommodation requests remains unchanged. Betouliere Decl., Exhibit G at 2-3
14 (ER 503 – 504).

15 When Agency counsel asked Ms. Shock why she believed collateral duty Disability Program
16 Managers could not accomplish “the proper processing [. . .] of reasonable accommodation requests,”
17 she responded that in reports and during trainings, “usually the first question [her disability program
18 managers] ask is, [‘]how do I do all of this with only 20 percent of my time[?]” Shock Dep. at 328:10-
19 329:14 (ER 444 – 445) (stating that she is asked this approximately five or six times every year, and that
20 she also knows disability program managers cannot properly process accommodation requests because
21 the Agency is not meeting its policy of processing such requests within 30 days).

22 As Ms. Shock explained, “at most installations in this organization,” the Disability Program
23 Manager positions “should be full-time jobs. It’s full-time work.” Shock Dep. at 291:6-13 (ER 438). In
24 response to questioning from Agency counsel, she elaborated: the “role of the disability program
25 manager is vast. It’s not just related to ensuring the reasonable accommodation process. It also [. . .]
26 involves training managers and supervisors [and] addressing accessibility issues. Shock Dep. at 327:19-
27
28

1 23 (ER 443).

2 When asked “so how is it that a person is supposed to get a full-time job done in 20 percent of
3 their time,” she responded: “That’s a great question. I don’t have an answer for that.” Shock Dep. at
4 242:5-8 (ER 426).

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

9 A. Well, then I would have a point of contact at that organization when there was a
10 question about how do we install a video phone or is there a contract for interpreters or
11 where do I locate some piece of equipment. Without a point of contact at those locations,
12 then it's -- it's on -- falls to me to figure that out and, again, I'm one person and there are a
13 hundred bases across the world.

12 Q. And 174,000 employees?

13 A. Yes. In -- in 2018 we had about -- just a little over 19,000 individuals with disabilities.

13 Q. Who had identified?

14 A. Who identified as being individuals with disabilities, yes.

15 Shock Dep. at 249:15-250:5 (ER 431 – 432); *see also id.* at 236:15-237:7 (ER 421 – 422) (explaining
16 why full-time DPMs are encouraged by the Air Force’s own policy document); *id.* at 245:13-246:13 (ER
17 427 – 428) (further elaborating on need for full-time DPMs at “most installations” and support for this in
18 Air Force policy documents, but noting that her office does not have the authority to dictate staffing).

19 In addition to the fact that all but three of the Air Force’s Disability Program Managers perform
20 that role as a “collateral duty,” roughly 25% of the Agency’s bases do not have designated Disability
21 Program Managers at all. Shock Dep. at 237:8-22 (ER 422). As Ms. Shock confessed, it is “difficult to
22 have a disability program if you don’t have anyone managing the reasonable accommodation program
23 for that organization [. . . because] there wouldn’t be anyone identified [. . .] to facilitate that process for
24 providing reasonable accommodations.” Shock Dep. at 238:12-239:1 (ER 423 – 424).

25 In the absence of qualified full-time Disability Program Managers at most bases, it seems that
26 **the burden of researching, locating, and coordinating necessary accommodations like ASL and**
27 **Video Remote Interpreting—and doing the requisite work to set up contracts—has fallen on the**
28

1 **Agency’s deaf employees themselves.** *See* Second Supplemental Declaration of Hugo Perez (“Perez
2 Second Supp. Decl.”) ¶ 17 (ER 2557 – 2558) (describing being told that he would need to personally
3 provide his supervisor with quotes from various agencies providing ASL interpretation and video remote
4 interpreting services, before his supervisor could take any further steps to set up a contract or provide
5 him with those accommodations).

6 Not coincidentally, the bases with full-time Disability Program Managers are also the ones that
7 have standing contracts for ASL or CART interpretation, and that appear to have approved requests for
8 ASL Interpretation in the greatest numbers. Shock Dep. at 67:17-68 (ER 395 – 396) (bases with standing
9 contracts); *id.* at 248:17-249:2 (ER 430 – 431) (bases with full-time disability program managers);
10 Betouliere Decl., Exhibit I (ER 644 – 653) (“DAF Deaf Accommodation (K. Shock)” Excel Sheet)
11 (showing that, of the 152 interpreter requests that Agency records indicate have been approved since
12 2018, 130 (or over 85%) were at Tinker or Wright-Patterson – places where standing contracts exist, and
13 which also happen to be among the three bases that have full time disability program managers). There
14 is thus every indication that the Agency’s systemic failure to adequately staff its disability program
15 directly impacts Complainants and other deaf employees across the Air Force.

16 Despite this, Air Force leadership has done nothing to ensure that the Agency’s disability
17 program is adequately staffed, in accordance with its own guidance. As Ms. Shock explained, “on an
18 annual basis my office would meet with our leadership to brief this report and the results of this report,
19 and every year from the day I started in 2012 until last year, I have said that this is a recommendation
20 and that it's very difficult to have a competent disability program when you have people who are only
21 devoting 20 percent of their time to that work” – and yet, for whatever reason, she has been “unable to
22 convince leadership that [. . .] full-time DPMs are required at most bases.” Shock Dep. at 247:2-22 (ER
23 429).

24 In addition to inadequately staffing its Disability Program, the Air Force has failed to properly
25 train supervisors and others with the power to approve or deny accommodations,³⁰ and has appointed
26

27 ³⁰ For example, Mr. Perez’s supervisors have admitted that they have received little training and
28 guidance regarding providing reasonable accommodations. Perez Decl. ¶ 25 (ER 2286 - 2287).

1 base-level “Disability Program Managers” who are profoundly unqualified for the job—something its
2 own policy documents prohibit. Under the Air Force’s own written policies, Disability Program
3 Managers must:

- 4 “3.9.1. Be familiar with federal laws, regulations, and policies that protect individuals with
5 disabilities from discrimination in all employment practices and procedures.
6 3.9.2. Be familiar with special appointing authorities available to hire individuals with
7 disabilities (including Schedule A, 5 CFR 213.3102(u))
8 3.9.3. Be familiar with reasonable accommodation obligations and procedures.
9 3.9.4. Be able to, assist as necessary, candidates or employees, and advise managers
10 regarding reasonable accommodations.”

11 *See* AFI 36-205 at ¶ 3.9.³¹

12 As just one example of the Air Force’s failure to follow its own stated policies in this regard, the
13 Disability Program Manager at Nellis Air Force base was for some time apparently a GS-05 Dental
14 Assistant, who served as a Disability Program Manager as a “collateral duty”—a distressing indication
15 of the low priority the Agency has given to this essential role. There is no indication that this person had
16 any specialized training in or knowledge of disability laws, reasonable accommodation obligations, or
17 disability-related needs and how to meet them. Weimer Decl. at ¶¶ 50-53 (ER 1937 - 1938); *see also*
18 Record of Investigation at 38 (ER 2587) (acknowledging that Lydia Champion, GS-5 Dental
19 Assistant/Nellis AFB “Collateral Duty” Disability Program Manager was overseeing Ms. Weimer’s
20 requests for ASL interpreter services and videophone line).

21 **B. Complainants are civilian Air Force employees who are d/Deaf, and like every other**
22 **member of the proposed class, they have been subjected to discriminatory Air Force**
23 **policies and practices, and denied necessary accommodations.**

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

27 Ms. Weimer is a Class Agent and the named Complainant in this matter. Weimer Decl. at ¶ 1
28 (ER 1917). She is Deaf and uses bi-lateral cochlear implants. *Id.* at ¶ 4 (ER 1918). She was a civilian
attorney with the U.S. Air Force Warfare Center, Office of the Staff Judge Advocate where she advised

³¹ Available at <https://www.af.mil/Portals/1/documents/eo/AFI%2036-205%2015%20Dec%2016.pdf?ver=2017-09-15-170350-580>.

1 commanders, managers and supervisors, military organizations, human resources personnel, equal
2 opportunity personnel, investigators, and other personnel on administrative law, ethics, labor and
3 employment law, contract law, environmental law, military law, and other areas of law as needed. *Id.* at
4 ¶ 3 (ER 1917 – 1918). She was the primary ethics and labor and employment law attorney for Nellis
5 AFB and the Nevada Test and Training Range (NTTR). *Id.* Ms. Weimer has been awarded two Civilian
6 of the Quarter awards during her time with the Air Force, and she was nominated for a Civilian of the
7 Year award. *Id.* at ¶ 4 (ER 1918 - 1919).

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

13 Unfortunately, the Air Force has repeatedly failed to provide Ms. Weimer with reasonable
14 accommodations since she began working there in January 2018, including but not limited to
15 videophone/video relay services, ASL interpreters, CART services, and meeting/event/training
16 accommodations. *Id.* at ¶ 5 (ER 1919).

17 Ms. Weimer previously worked for the U.S. Army, where there was no difficulty or delay in
18 connecting her videophone that she required to perform her job duties. *Id.* at ¶¶ 6-7 (ER 1919 – 1920).
19 When she left her employment at the U.S. Army to work for the U.S. Air Force, she brought her Z70
20 videophone with her, so the Air Force needed only to connect the videophone to the network. *Id.* By
21 contrast to the immediate installation of the videophone by the Army, it took the Air Force over eleven
22 (11) months to get the videophone connected to the network. *Id.* This was the case even though there
23 had been approval to connect videophones to the Air Force network prior to her working at the Air
24 Force. *Id.* While she waited for her videophone to get connected to the network, Ms. Weimer requested
25 that a video relay service software be installed on her government laptop computer so that she could
26 have a way to make and receive phone calls and in order to access the federal government’s on-demand
27
28

1 video relay sign interpreter (VRI) service (www.federalrelay.us). *Id.* at ¶ 8 (ER 1920 – 1921). While this
2 software is approved for installation of government computers, three years later, Ms. Weimer has still
3 not been provided with this accommodation. *Id.*

4 The Air Force has failed to provide reasonable accommodations of captioning, transcripts and
5 live interpreter at trainings and other work-related events. In February 2020, Ms. Weimer was asked to
6 give a presentation at the Judge Advocate Symposium, which is an Agency-wide training for Staff Judge
7 Advocates and a prestigious honor to be selected to present. *Id.* at ¶ 13 (ER 1922 – 1923). Ms. Weimer
8 requested accommodations of a speakerphone and an ethernet connection so that she could access the
9 federal government’s relay conference captioning (RCC) service and have the captioner call into the
10 speakerphone so he or she could transcribe what was being said for her. *Id.* This request was denied, and
11 she was not provided reasonable accommodations. *Id.* As a result, she was excluded from giving the
12 presentation and a co-worker gave Ms. Weimer’s presentation instead. *Id.*

13 Similarly, for the same Judge Advocate Symposium that occurred in October 2020, she
14 requested accommodations in the form of CART services. This was denied and Ms. Weimer was not
15 able to attend the Symposium as a result. *Id.* at ¶ 14 (ER 1923 - 1924). Ms. Weimer is required to attend
16 a mandatory annual legal assistance refresher training. However, the training is not captioned so that
17 d/Deaf employees may have equal access to the training. Weimer Decl. at ¶¶ 19-26 (ER 1926-1928).
18 Ms. Weimer requested CART services so that she may access the content of the trainings but has not
19 received it. *Id.* at ¶ 19 (ER 1926). While the Air Force has promised since 2018 to “upgrade” the training
20 to provide for captioning, to date, this has not occurred. *Id.* at ¶¶ 19-26 (ER 1926-1928).

21 On June 16, 2020, Ms. Weimer received a directive informing her that she is required to attend a
22 monthly Bridge Chat training, a directive that she is informed came from General David Goldfein, Chief
23 of Staff of the Air Force and is a requirement for her office. Weimer Decl. at ¶¶ 27-29 (ER 1929 –
24 1930). There were instructions to view a video before the Bridge Chat. The video was not captioned. *Id.*
25 Ms. Weimer informed the Air Force that because the video did not have captions, she could not watch it,
26 even though the Air Force is required by Section 508 of the Rehabilitation Act of 1973 to make their
27
28

1 videos (among other mediums) accessible to people with disabilities, including d/Deaf individuals. *Id.*
2 In response, Ms. Weimer was informed that her team facilitator would try to reach out to whoever was
3 in charge of the Bridge Chat training to “see if we can get this rectified for future trainings.” *Id.* at ¶¶ 27-
4 28 (ER 1929 – 1930). It took more than six months and extensive advocacy on Ms. Weimer’s part for
5 the Bridge Chat videos to be captioned, and she was never offered any means of accessing the content
6 that she missed during that time. *Id.* at ¶ 29 (ER 1930).

7 On July 20, 2020, the Secretary of Defense Mark Esper, issued a memorandum requiring all U.S.
8 Department of Defense personnel, including military members, civilian employees, and on-site
9 contractors, to complete the following OPSEC trainings: (1) Center for the Development of Security
10 Excellence OPSEC Awareness; (2) Unauthorized Disclosure of Classified Information for DoD and
11 Industry; (3) Insider Threat Awareness; and (4) Introduction to Information Security. *Id.* at ¶¶ 30-31 (ER
12 1930). All four videos for this training were not captioned. *Id.* at ¶ 32 (ER 1930-1931). While Ms.
13 Weimer repeatedly requested accommodation that the videos be captioned, the Air Force failed to do so.
14 *Id.* at ¶¶ 33-40 (ER 1931-1933). Ms. Weimer was precluded from accessing the entirety of the
15 mandatory training and could only access portions of the training through reading slides and slide notes
16 and partial transcripts that were later made available to her. *Id.* She requested that all future Air Force
17 trainings and video fully accessible to d/Deaf Air Force personnel, to include captions. *Id.* at ¶ 40 (ER
18 1933). To date, the Air Force has not responded. *Id.*

19 Ms. Weimer was on leave under the Family and Medical Leave Act from September 2021 until
20 January 2022; during that time and upon her return she was informed she needed to complete several
21 trainings. *See* Second Supplemental Declaration of Sarah Weimer in Support of Claimants’ Motion for
22 Class Certification (hereinafter “Weimer Second Supp. Decl.”) at ¶¶ 4-6, 8 (ER 2500-2502). Ms.
23 Weimer attempted to complete the trainings but discovered that all but one³² of the trainings were
24 completely inaccessible to her as they lacked transcripts or captions. *Id.* at ¶¶ 6, 8 (ER 2500-2502). Ms.
25 Weimer sent multiple emails requesting accommodations so that she could access these training videos,
26

27 ³² The only accessible training was a DOD training which had captions available.
28

1 as of the date of her supplemental declaration only one of those trainings was captioned, such that Ms.
2 Weimer was unable to complete the rest. *Id.* at ¶¶ 9-11 (ER 2502-2503).

3 Even in the rare instances that Ms. Weimer’s necessary accommodations for trainings are
4 ultimately granted, such as for a 40-hour Federal Employment Labor Law training in October 2020, it is
5 only after a long and frustrating back and forth. Weimer Decl. at ¶ 17 (ER 1925).

6 Despite her need for disability-related accommodations being known and unchanging, Ms.
7 Weimer was required to repeatedly request accommodations for meetings that occurred on a set,
8 reoccurring basis, such as weekly staff meetings and a weekly Civil Law section meeting. *Id.* at ¶ 41
9 (ER 1933). Ms. Weimer was required to put in multiple requests a week in order to have
10 accommodations in order to participate in these reoccurring meetings, and the agency has generally
11 failed to provide her with consistent and reliable accommodations in connection with meetings, as the
12 law requires. *Id.* at ¶¶ 42-49 (ER 1934-1937). When Ms. Weimer’s recurring meetings became virtual
13 from March 2020 to June 2021, Ms. Weimer was able to rely on the Federal Relay Service, which
14 provided her some access to these meetings.³³ Weimer Supp. Decl. at ¶ 11 (ER 2470). When Ms.
15 Weimer was instructed that she was again expected to attend these meetings in-person starting in July
16 2021, she again requested ASL interpreters, but she received no response; she discovered at the meeting
17 that no interpreter had been arranged, meaning she was forced to return to her office to read the federal
18 relay service transcript while her coworkers remained in the conference room. *Id.* at ¶ 14 (ER 2471)
19 (noting also that she experienced nights of insomnia and anxiety due to her worries that the Agency
20 would not provide effective communication accommodations for this meeting).

21 As mentioned above, Ms. Weimer took a brief leave under the FMLA and when she returned,
22 encountered the same repeated, systemic barriers regarding the Air Force’s inability to accommodate her
23 in violation of Federal Law. Weimer Second Supp. Decl. at ¶ 18 (ER 2473).

24
25 ³³ As Ms. Weimer later noted in her second supplemental declaration, the Federal Relay Service
26 has subsequently been discontinued, leading Ms. Weimer to fear that “it will be impossible for myself,
27 as well as many other deaf and hard of hearing Air Force employees, to do our jobs.” Weimer Second
28 Supp. Decl. at ¶¶ 15-16 (ER 2504); *see also* § III(C)(2) (further details regarding discontinuation of
Federal Relay Service accommodations, lack of replacement).

1 As a result of more than four years of the Air Force’s failure to provide effective
2 accommodations, combined with frequent accessibility barriers such as the inaccessible mandatory
3 trainings, the upcoming termination of the RCC and VRI services she relied on, and the profound impact
4 of this constant discrimination (and the ensuing stress of attempting to work without accommodations)
5 on Ms. Weimer’s health, she felt that she had no choice but to resign from her job. *See* Weimer Second
6 Supp. Decl. at ¶ 19 (ER 2473-2474). Had Ms. Weimer been effectively accommodated, she would not
7 have been forced to resign. *Id.* Despite her resignation, Ms. Weimer is still committed to ending the Air
8 Force’s discrimination against deaf employees, and she “would be willing to return to work for the Air
9 Force [again] if there were adequate policies and procedures in place ensuring effective
10 accommodations for deaf and hard of hearing employees.” *Id.*

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

13 Mr. Perez is a Class Agent. He has been Deaf Since birth. *See* Perez Decl. at ¶ 3 (ER 2280). He
14 is employed as an Engineering Technician (Drafting) at 502nd Air Base Wing, 802nd Civil Engineering
15 Squadron at Fort Sam Houston, Texas since November 2018. *Id.* As soon as his employment started
16 with the Air Force, Mr. Perez encountered substantial barriers to equal opportunity in employment and a
17 failure to provide reasonable accommodations. For example, in November 2018, Mr. Perez requested an
18 ASL interpreter during his orientation. *Id.* at ¶ 6 (ER 2281-2282). Despite nearly a month of lead time,
19 the Air Force only provided Mr. Perez with an interpreter for half of the first day of his new hire
20 orientation, and therefore, he was unable to access much of the information provided. *Id.* at ¶ 8 (ER
21 2282). In October 2020, Mr. Perez was informed that the contract for ASL has expired, and therefore
22 interpreter accommodations would not be provided until it is renewed. *Id.* at ¶ 23 (ER 2286).

23 As of the filing of Complainants’ Renewed Motion for Class Certification in June 2022, **there**
24 **was still no active contract in place, for these crucial accommodations.** Incredibly, on May 23, 2022
25 – nearly two years later – Mr. Perez was informed that if he wanted ASL interpretation of Video Remote
26 Interpreting Services, **he would need to personally provide his supervisor with quotes from various**
27 **interpreting agencies**, before his supervisor could take any further steps to set up a contract or provide
28

1 him with those accommodations. Second Supplemental Declaration of Hugo Perez (“Perez Second
2 Supp. Decl.”) at ¶ 17 (ER 2557). In other words, **the Agency has placed the burden of researching,**
3 **locating, and coordinating Mr. Perez’s accommodations on him**, rather than assigning that work to a
4 competent Disability Program Manager or some similar official. *Id.*

5 For the first six months of his hiring, he requested an interpreter and was not provided interpreter
6 services. Perez Decl. at ¶ 7 (ER 2282). Mr. Perez did not receive reasonable accommodations and the
7 Air Force did not provide him work to perform because management did not know what to do. *Id.* at ¶¶
8 7, 24-25 (ER 2282, 2286-87). Mr. Perez has repeatedly requested a sign language interpreter and other
9 accommodations, but the Air Force has consistently failed to properly and fully provide reasonable and
10 timely accommodations on a consistent basis. *See id.* at ¶¶ 10-11, 15-16, 18-19, 21-23 (ER 2282 –
11 2286).

12 Mr. Perez was told at times there were no funds available to be allocated to the accommodations
13 he requested. *See* Perez Decl. at ¶ 16 (ER 2284). This is the case even though the Air Force budget at the
14 time was approximately \$165.6 billion dollars.³⁴ This has caused disruptions and barriers for Mr. Perez
15 to fully perform his job duties. Mr. Perez has also not been fully included in trainings, where no
16 interpreter or other effective accommodation was provided. *Id.* at ¶¶ 6, 16, 19 (ER 2281-2285).

17 Mr. Perez requested an audio video device for his desk for phone calls soon after he became
18 employed by the Air Force. Perez Decl. at ¶ 11 (ER 2283). As set forth in Mr. Perez and his supervisor
19 Mr. Morgan’s declarations, a video phone was not provided for over a year. *Id.* at ¶¶ 11-12 (ER 2283-
20 84); *id.* Ex. C (ER 2299 – 2306) (Morgan Decl.). Once the phone was provided, it was not installed
21 correctly, and was generally not operational. *Id.* Supervisor Morgan aptly described the Air Force’s
22 inexcusable failure to provide Mr. Perez with a working videophone in an email dated September 29,
23 2020, which states that Mr. Perez’s videophone:

24 is still not operational and has never worked more than a day or so since it's connection in
25 Jul/Aug.

26 ³⁴ 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
27 February 7, 2021).

1 As this phone is a Reasonable Accommodation Solution, I find it difficult to believe that
2 after almost TWO YEARS of this issue that a permanent solution has yet to be found.

3 I am requesting that your office take action to fix this issue – he has already submitted
4 several tickets and the original goes back to Jan 2019. At this point I see no reason for
5 this individual to have to submit any further requests, etc. Your organization needs to
6 step up to the plate and do what is necessary to get this equipment functioning properly –
7 if a ticket needs to go in, just find a closed one and re-open it – it should not have been
8 closed in the first place. Once it’s operational – and stays operational for 30 days I think
9 you could say at that point the issue has been solved. Until then – it’s just sweeping it
10 under the carpet.

11 I think we’ve been more than patient in this exercise and I request that action be taken to
12 get this problem solved. As this email is elevating to the highest possible levels, the only
13 way forward from here, if there is no action, is through the IG office. Not something I’d
14 want to do, or desire to do, but if that’s what it takes to get this issue addressed, I’m
15 without other recourse. Please – assign someone to this issue, get it fixed, and follow up
16 with it to make sure it stays fixed.

17 Perez Decl. at ¶ 12 (ER 2283-84), Exhibit A. To date, the video phone is still not consistently
18 operational more than two years after the initial request for accommodation was made. *Id.* at ¶¶ 12-13
19 (ER 2283-2284). Mr. Perez has also been denied assistive technology. Perez Decl. at ¶ 14 (ER 2284).

20 Mr. Perez’s supervisors have admitted that they have received little training and guidance
21 regarding providing reasonable accommodations. *Id.* at ¶¶ 25-26 (ER 2286-2287). Ms. Calhoun, Mr.
22 Perez’s prior supervisor, admitted in her declaration that Mr. Perez “could not have the same, equal
23 access to training, work or advancement opportunities since he was hearing impaired.” *See* Perez Decl.,
24 Ex. D (ER 2331) (Calhoun Decl.); Perez Decl. at ¶ 20 (ER 2286). Supervisor Morgan admitted the
25 “problem has been the lack of authority to get things done” in order to reasonably and timely
26 accommodate Mr. Perez. *See* Morgan Decl. Ex. C (ER 2304); Perez Decl. at ¶ 26 (ER 2287).

27 **Supervisor Morgan stated, “there should be standard accommodation vehicle in place for
28 employees who may need these types of services that should be able to be implemented quickly –
not after 2 years of red tape.”** *Id.* at ¶ 26 (ER 2287) (emphasis added); *id.* at Exhibit C (ER 2306).

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

1 government. *See* Perez Second Supp. Decl. at ¶ 4 (ER 2554-2555). FRS used Video Remote Interpreting
2 (“VRI”) to enable all Federal employees to communicate via videoconferencing by connecting federal
3 employees free of charge and on-demand to ASL interpreters and vice-versa. *Id.* While VRI is not an
4 appropriate substitute for ASL interpretation in many situations, particularly large group settings, for
5 Mr. Perez it was better than the minimal to no accommodations the Agency had provided him and kept
6 him from being completely excluded from communicating with his coworkers. *Id.* at ¶¶ 5-6 (ER 2555).

7 However, in late 2021 Mr. Perez received notice that the FRS would be decommissioned. In
8 November 2021, he notified his supervisors about the impending termination of FRS and the resulting
9 communication barriers that would ensue. *Id.* at ¶ 8 (ER 2555). On February 15, 2022, Mr. Perez again
10 contacted his supervisor, noting that FRS had officially been decommissioned. *Id.* at ¶ 11 (ER 2556).
11 Given the lack of FRS, Mr. Perez again requested ASL interpreters but was told by a Program Manager
12 that to her knowledge Joint Base Saint Andrews did not have a contract with an interpreting agency. *Id.*
13 at ¶ 14 (ER 2556-2557). Without FRS, Mr. Perez is even more isolated at work. *See id.* at ¶¶ 19-20 (ER
14 2558) (noting isolation, including incident where Mr. Perez was totally excluded from work-related
15 celebration of “staff resiliency” due to lack of interpreter).

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

18 Ms. Sheila Burg is a Class Agent. She has had a hearing disability since birth and diagnosed as
19 Deaf, with progressive (that is, worsening) hearing loss. Burg Decl. at ¶ 4 (ER 2328). She is an oral
20 communicator and uses Bluetooth hearing aids. *Id.* Ms. Burg also reads lips to assist with her
21 understanding of what is being stated. *Id.* Ms. Burg has been employed with the Air Force since 1986
22 and has received awards and promotions throughout her three-decade long career. *Id.* at ¶¶ 3, 6 (ER
23 2328). Since 2015, Ms. Burg has held a GS-13 position in SAF/FMBOP as an OCO Budget Analyst at
24 the Pentagon. *Id.* at ¶ 8 (ER 2329). She was hired under the Schedule A hiring program, which is
25 described by the Office of Personnel Management as a non-competitive hiring process to increase the
26
27
28

1 hiring and retention of employees with disabilities.³⁵ *Id.*

2 The Air Force continues to fail to provide the accommodations that Ms. Burg needs to perform
3 her job. This includes a working captioned telephone, CART services, notetaker services, and written
4 notes/instructions/information necessary for her job. The lack of timely, consistent reasonable
5 accommodations has lasted for over five (5) years. *Id.* at ¶¶ 9-15, 19-20 (ER 2329 – 2334). Despite the
6 fact that Ms. Burg’s disability is permanent and her need for accommodations is ongoing and
7 unchanging, she has been required to provide documentation and share information to justify the need
8 for accommodation, due to poorly trained staff and supervisors. Burg Decl. at ¶¶ 14-15 (ER 2332). Ms.
9 Burg has teleworked since September 2019 so that she could self-accommodate at her home. *Id.* at ¶¶
10 21-22 (ER 2334-2335). However, in January 2020 Ms. Burg was informed that she would be reassigned
11 to Andrews Air Force Base rather than the Pentagon, because “currently there are no restrictions on the
12 use of cell phones or other Bluetooth devices in the building.” *Id.* at ¶ 23 (ER 2335-2336). The
13 “Bluetooth devices” in question are Ms. Burg’s hearing aids. *See id.* Ms. Burg was informed the move
14 would be “an interim accommodation until [the Air Force] determined if there are other available
15 locations closer to the Pentagon” or if she will be “reassigned to another position” within the Air Force.
16 *Id.* For now, she continues to telework due to COVID, but she does not know when her permission to do
17 this will be revoked, or whether she will be able to return to her former workplace at the Pentagon. *Id.* at
18 ¶¶ 23, 27 (ER 2335-2337).

19 Ms. Burg has not been consistently provided accommodations for trainings and teleconferences.
20 Burg Decl. at ¶¶ 9, 19, 20 (ER 2329-2330, 2334). She also has not received reasonable accommodations
21 of CART services she requested in the EEO process. Burg Decl. at ¶ 32 (ER 2338).

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

25 Mr. Matthew Wambold is class agent and former employee of the Air Force. He is Deaf and has
26 been since birth, and like many d/Deaf people, English is not his first language, and he struggles to

27 ³⁵ See <https://www.opm.gov/policy-data-oversight/disability-employment/hiring/> (February 4,
28 2021).

1 understand or use written English. *See* February 11, 2021 Declaration of Matthew Wambold (“Wambold
2 Decl.”) at ¶ 3 (ER 2436-2437). Mr. Wambold communicates primarily through ASL. *Id.* As the National
3 Institute on Deafness has noted, “ASL is a language completely separate and distinct from English.” *Id.*

4 Mr. Wambold was hired in 2002 as a WG-05 Electronic Worker at the Offutt Air Force Base in
5 Nebraska. *Id.* at ¶ 4 (ER 2437). Mr. Wambold requested a video phone in approximately 2006 but his
6 request was denied, and he was never provided an accessible phone that would enable him to
7 communicate via ASL. *Id.* at ¶ 5 (ER 2437). Co-workers who were hired at approximately the same time
8 as Ms. Wambold at the WG-05 level like Mr. Wambold were promoted to a WG-10. *Id.* Mr. Wambold’s
9 supervisor responded that the reason Mr. Wambold was not similarly promoted was because he can’t use
10 the phone, despite the fact that the *reason* he could not use the phone was that the accessible one he
11 requested was never provided to him. *Id.*

12 Mr. Wambold has been denied ASL interpreter accommodation for trainings, as well as
13 opportunities for Temporary Duty Travel (offsite) training opportunities—even when he asked for such
14 accommodations weeks in advance. *Id.* at ¶¶ 6-7 (ER 2438). When trainings occurred, “[a]ll my co-
15 workers were provided the training but me. I sat in the office and did nothing.” *Id.* at ¶ 6 (ER 2438).
16 Furthermore, Mr. Wambold was not even informed of what happened at the trainings after the fact or
17 provided with training information, despite asking that he be allowed to “make up what [he] missed.” *Id.*
18 at ¶¶ 6-7 (ER 2438).

19 In 2011, Mr. Wambold requested a transfer to a GS-05 Computer Assistant position in order to
20 attempt to obtain reasonable accommodations and have equal opportunity to training and promotional
21 opportunities. *Id.* at ¶¶ 8-12 (ER 2438 – 2440). Nothing changed in the new position, Mr. Wambold
22 continued to not be provided accommodations for work related meetings and for trainings. *Id.* For
23 example, despite his need for accommodations being well known by the Agency, Mr. Wambold was not
24 offered accommodations for DOD Security certification examinations until his *sixth* attempt to take the
25 test. *Id.* at ¶ 10 (ER 2439). Despite many requests, Mr. Wambold only received an ASL interpreter on
26 two occasions between 2014 and 2019. *Id.* at ¶ 9 (ER 2439).

1 Mr. Wambold was not provided reasonable accommodations for the EEO process. He requested
2 an interpreter for communications and to ask questions related to the EEO process. *Id.* at ¶¶ 13-14 (ER
3 2440 – 2441); *see also* ROI at 41-42 (ER 2617-2618). When denying the requested accommodations,
4 Mr. Wambold was informed the “EO Office does not have that sort of funding nor the responsibility,”
5 and “the Intake and other documents could be taken home and completed, have a friend, family member
6 or other individual to assist him and return the signed and dated documents for PRE Complaint or
7 Formal Complaint processing.” *See* Report of Investigation p. 41-42 (ER 2617-2618); Wambold Decl. at
8 ¶¶ 13-14 (ER 2440-2441). Two weeks after Mr. Wambold filed an EEO complaint, he received a
9 memorandum of instruction stating that if he did not pass the Security Plus test by January 31, 2020, he
10 would be reassigned, have a reduction in grade or pay or removed from federal service. *Id.* at ¶ 15 (ER
11 2441-2442). He requested an interpreter for the test, but none was provided, resulting in Mr. Wambold
12 not passing the test. *Id.* at ¶ 15 (ER 2441 – 2442). Mr. Wambold was constructively discharged in
13 January 2020. *Id.* at ¶¶ 13-16 (ER 2440 – ER 2442). Mr. Wambold has applied for many positions with
14 the Air Force, without being hired, even for positions he was well qualified for. *Id.* at ¶ 17 (ER 2442).

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

18 Ms. Mika Hongyu-Perez is a Class Agent. She is Deaf. *See* Hongyu-Perez Decl. at ¶ 3 (ER
19 2358). She is both a former employee and an applicant, having applied for and not been selected for a
20 position on the basis of her disability within forty-five days of filing her declaration in support of
21 Complainants’ Motion for Class Certification. *Id.* at ¶¶ 1-7, 17-18 (ER 2357-2359, 2365). Ms. Hongyu-
22 Perez has applied for more than 150 positions in the Air Force at the Lackland Air Force Base, Texas,
23 including seven jobs in January and February of 2021. *Id.* at ¶¶ 6-7, 17-18 (ER 2358-2359, 2365-2366).

24 Though Ms. Hongyu-Perez consistently applied to civilian Air Force jobs through the Agency’s
25 Schedule A noncompetitive hiring process (for which her deafness makes her eligible), she has seldom
26 been selected for interviews, including for positions for which she was very well qualified. *Id.* at ¶¶ 6-7,
27 17-18 (ER 2358-2359, 2365-2366). In the few instances where she has gotten past the initial application
28

1 stage, she has not been properly accommodated throughout the application process, despite the Air
2 Force knowing that she is Deaf and needed such accommodations. *Id.* at ¶¶ 8-10 (ER 2359 – 2360).

3 In fact, in one instance the Air Force canceled a paid internship position that they had offered
4 her, rather than simply providing her with the reasonable accommodations she required to perform the
5 essential functions of the job. *Id.* at ¶¶ 11-12 (ER 2361-2362).

6 For one position that Ms. Hongyu-Perez was able to secure employment as a GS-1702-6, Step 1
7 in January 2020, no accommodations were provided to her. *Id.* at ¶¶ 13-16 (ER 2362-2364). Despite
8 making her need for an ASL interpreter known well in advance, she was only provided an interpreter for
9 part of the first day of her weeklong new-hire orientation. *Id.* at ¶ 15 (ER 2363-2364). Her supervisor
10 was not informed she is Deaf. Ms. Hongyu-Perez realized that the primary duty of the position was
11 Charge of Quarters, supervising a dormitory, and required extensive oral communication as well as
12 listening to announcements over an intercom. *Id.* at ¶¶ 15-16 (ER 2363-2364). Her supervisor said the
13 position was almost 100% focused on communication; in person and via phone and intercom. *Id.*
14 However, none of these forms of communication were accessible to her as a Deaf employee, and no
15 accommodations were provided to her, despite the Air Force knowing that she was Deaf and would need
16 such accommodations. *Id.* As a result of the Air Force’s failure to accommodate her and her inability to
17 perform the essential functions of the position without such accommodations, she resigned. *Id.*

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

20 Ms. McAnallen is a class declarant and former employee of the Air Force. Ms. McAnallen has
21 been Deaf since birth and communicates primarily through spoken language and cued speech, which is a
22 way for people who are d/Deaf to “see” spoken English (or any other language). McAnallen Decl. at ¶ 2
23 (ER 2449-2450). Ms. McAnallen worked for the Air Force for five years, initially as part of the Palace
24 Acquire Program, a two-year, full-time paid training program designed for both professional and
25 personal growth, and then as an Environmental Program Manager and Environmental Engineer. *Id.* at ¶
26 3 (ER 2450).

27 Throughout her five-year career at the Air Force, Ms. McAnallen was repeatedly denied a variety
28

1 of reasonable accommodations that were necessary for her to do her job and receive effective training.
2 *Id.* at ¶ 5 (ER 2450). The Air Force routinely denied Ms. McAnallen’s requests for interpreters or cued
3 language services at trainings, meetings, and other functions- making it very difficult for her to perform
4 essential job duties. *Id.* at ¶ 10 (ER 2451). Many of the difficulties Ms. McAnallen faced in receiving
5 necessary accommodations stemmed from the Air Force’s lack of centralized funding for interpreting,
6 captioning, and cued language transliteration services, meaning the financial burden of providing
7 accommodations was entirely on individual squadrons. *Id.* Ms. McAnallen continually advocated for the
8 Air Force to establish centralized accommodations funding and contracts for interpretation and other
9 services but faced numerous barriers while doing so. *Id.* at ¶¶ 11–12, 15 (ER 2451-2452). When Ms.
10 McAnallen left the Air Force in 2018 she cited its continual failure to effectively accommodate her as
11 one of the main reasons for leaving her post. *Id.* at ¶ 18 (ER 2453).

12 **7. Claimants have satisfied all EEO procedural requirements.**

13 Claimant Weimer and the other Class Agents have properly exhausted their administrative
14 remedies and identified the EEO complaints as class complaints. Ms. Weimer identified her complaint
15 as a class complaint in the EEO process and identified the scope of the class and the policies and
16 practices at issue. *See* Record of Investigation at 454-56 (ER 3031 – 3033) (January 24, 2020 Class
17 Complaint); *see also* Weimer Decl. ¶¶ 55-64 (ER 1938-1940); *see also* Weimer Decl., Ex. A-J (ER 1941
18 - 2279). Similarly, Mr. Perez, and Ms. Hongyu-Perez also identified that they were class agents and
19 members of the same class. Perez Decl. at ¶ 30 (ER 2287-2288); Hongyu-Decl. at ¶ 19 (ER 2366). Class
20 agent Ms. Burg was also identified as a class member; her materials were a part of the class complaint,
21 and her investigative report was included in the Report of Investigation provided by the Agency to the
22 Commission. *See* Burg Decl. at ¶¶ 28-38 (ER 2377 – 2340). As it relates to Mr. Wambold, he identified
23 himself as part of the class, and sought to amend his complaint to add a claim that he was not
24 accommodated in the EEO process. Wambold Decl. at ¶¶ 13-14, 18 (ER 2440-2441); Musell Decl. at ¶
25 36, Ex. A (ER 8196, 8196-8203); Betouliere Decl. Ex. A (ER 320-325). The Agency improperly
26 dismissed Mr. Wambold’s claims in part without referring them to the EEOC for assignment of an
27
28

1 administrative judge. Such a decision is not within the Agency’s jurisdiction. *Kwok v. USPS*, 01871083,
2 1721/E10 (1987); *see also Penk v. Oregon State Bd. of Higher Educ.*, 93 F.R.D. 45, 53 (D. Or. 1981)
3 (individuals who have not complied with administrative filing requirements can serve as class agents for
4 a subclass).

5 Complainant is not aware of any other complaints pending before the agency that assert the
6 claims pled on behalf of the class in this motion. Based on the history recited above, Complainant
7 Weimer and the other Class Agents have met all regulatory deadlines and fulfilled all administrative
8 requirements to permit this case to proceed as a class action.³⁶

9 **IV. Legal Standard Applicable to Class Certification**

10 Under EEOC regulations, a class complaint must allege that: (1) the class is so numerous that a
11 consolidated complaint concerning the individual claims of its members is impractical; (2) there are
12 questions of fact common to the class; (3) the class agent's claims are typical of the claims of the class;
13 and (4) the agent of the class, or, if represented, the representative, will fairly and adequately protect the
14 interests of the class.³⁷ 29 C.F.R. § 1614.204(a)(2). These requirements are an adaptation of Rule 23(a)
15 of the Federal Rules of Civil Procedure. *See Hines v. Dep’t of the Air Force*, EEOC Appeal No.
16 01931776 (July 7, 1994). Decisions interpreting Rule 23 are thus relevant, and routinely considered in
17 EEOC decisions on class certification. *See, e.g., Jantz, et al. v. Astrue*, EEOC Appeal No. 0720090019
18 (Aug. 25, 2010) at *5 (looking to federal court decisions on numerosity under Rule 23).

19 At the same time, complainants engaged in the EEOC administrative process are not held to the
20

21 ³⁶ As noted by Mr. Perez and Ms. Burg, the ROI submitted by the Agency to the EEOC improperly
22 omitted evidence obtained in the formal complaint stage, including affidavits of supervisors and rebuttal
23 evidence, and the Agency has refused to cure or explain this deficient and cherry-picked record. *See*
24 *Perez* ¶ 30 (ER 2287); *Burg Decl.* ¶ 37 (ER 2339).

23 A copy of Ms. Burg’s more complete ROI (inexplicably not submitted by the Agency to the
24 EEOC) was included as Exhibit B to the Declaration of Sean Betouliere in Support of Complainants’
25 Renewed Motion Class Certification (“Burg ROI”), and is located at ER 854-1916. (Because of file size
26 limitations, this Exhibit in split into four parts, and appears across multiple ER volumes).

27 ³⁷ The EEOC has explained that when addressing a class complaint, it is important to resolve the
28 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).

1 same standard of proof as a Rule 23 plaintiff due to the limited availability of discovery prior to
2 certification of the complaint as a class complaint. *See Aurore C., et.al., Complainant*, EEOC DOC
3 0120150342, 2018 WL 2932869, at *5 (May 18, 2018) (“We note that, although the Commission’s
4 requirements for an administrative class complaint are patterned on the Rule 23 requirements,
5 Commission decisions in administrative class certification cases should be guided by the fact that an
6 administrative complainant has not had access to pre-certification discovery in the same manner and to
7 the same extent as a Rule 23 plaintiff.”). EEOC regulations provide for development of the evidence by
8 the parties once a class complaint has been accepted. As a case progresses, the Administrative Judge
9 may take appropriate action if the evidence reveals that the class should be redefined, subdivided, or
10 otherwise changed. *See* 29 C.F.R. § 1614.204.

11 Under both EEOC regulations and Rule 23, courts have “no license to engage in free-ranging
12 merits inquiries at the certification stage,” and merits questions can only be considered to the extent
13 “that they are relevant to determining whether the Rule 23 prerequisites . . . are satisfied.” *Amgen Inc. v.*
14 *Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013). In other words, “[n]either the possibility that
15 a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit
16 might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to
17 certify a class which apparently satisfies’ Rule 23.” *Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1004–
18 05 (9th Cir. 2018), *cert. dismissed*, 139 S. Ct. 1651 (2019) (citation omitted). Similarly, evidence offered
19 in support of class certification does not need to be admissible at trial, and rejection of such evidence on
20 the basis admissibility is an abuse of discretion. *See id.* at 1004-06.

21 **V. Legal Standard Applicable to Review of Class Certification Decision**

22 Where, as here, an Administrative Judge has entered a certification decision without a hearing,
23 the Commission applies a *de novo* standard of review, and bases its decision on a preponderance of the
24 evidence. *Sedillo v. USDA*, EEOC DOC 07A20071, 2002 WL 1841018, at *3 (Aug. 7, 2002). In so
25 doing, the Commission may affirm the decision to grant class certification on any grounds supported the
26 record, including on the basis of evidence that was not specifically cited in the challenged order. *See*
27
28

1 *Meza v. Renaud*, 9 F.4th 930, 933 (D.C. Cir. 2021) (“On *de novo* review, we generally may affirm on
2 any ground supported by the record.”).

3 To the extent the Agency is attempting to challenge the Administrative Judge’s underlying
4 decisions regarding pre-certification discovery, it must establish an abuse of discretion. *See Muller v.*
5 *USDA*, EEOC DOC 0120065071, 2008 WL 2484320, at *5 (June 12, 2008) (holding that “an AJ has
6 broad discretion in the conduct of a hearing, including matters such as discovery orders,” and finding no
7 abuse of discretion).

8 **VI. Argument**

9 **A. Administrative Judge Peterson’s decision on class certification should be affirmed.**

10 Complainants’ June 21, 2022 Renewed Motion for Class Certification asked Judge Peterson to
11 certify a class of “all d/Deaf³⁸ civilians who are currently employed by the United States Air Force, as
12 well as all d/Deaf civilians who either applied for civilian employment with the Air Force or were so
13 employed at any time between January 1, 2018 and the present.” *See* Renewed Motion for Class
14 Certification at 54 (ER 283).

15 29 C.F.R. § 1614.204(a)(2) sets forth four prerequisites to maintaining a class action: (1) the
16 class is so numerous that a consolidated complaint of the members of the class is impractical
17 (numerosity); (2) there are questions of fact common to the class (commonality) (3) the claims of the
18 agent of the class are typical of the claims of the class (typicality); and (4) the agent of the class or, if
19 represented, the representative will fairly and adequately protect the interests of the class (adequacy of
20 representation. 29 C.F.R. § 1614.204(a)(2).

21 In his decision granting class certification, Judge Peterson properly found that each of these
22 elements had been satisfied; that there was significant evidence of systemic Agency discrimination

23 _____
24 ³⁸ For the purposes of this proposed class definition, the terms “d/Deaf” or “deaf” were to be read
25 as synonymous with “deaf or serious difficulty hearing,” the first category of disability listed in Part A
26 of question 5 of the Equal Employment Opportunity Commission's Demographic Information on
27 Applicants form, located at [https://www.eeoc.gov/sites/default/files/migrated_files/federal/2017-
28 approved-Applicant-Form.pdf](https://www.eeoc.gov/sites/default/files/migrated_files/federal/2017-approved-Applicant-Form.pdf). Similarly, the word “employee” was to 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.

1 against d/Deaf employees; and that certification of a class was appropriate in this case. *See* Order at 4-7
2 (ER 4-7) (discussing evidence of systemic Agency discrimination against d/Deaf employees); *see also*
3 *id.* at 9-13 (ER 9-13) (analyzing class certification factors). The Administrative Judge thus certified the
4 following class:

5 “All deaf civilians who are currently employed by the Agency, as well as all deaf civilians who
6 either applied for civilian employment with the Agency or were so employed at any time between
7 January 1, 2018 and the present who were discriminated against or denied reasonable accommodations
8 because the Agency has:

- 9 a. Failed to ensure that anyone who is authorized to grant or deny requests for reasonable
10 accommodation or to make hiring decisions is aware that all resources available to the Agency as
11 a whole must be considered when determining whether a denial of reasonable accommodation
12 based on cost;
- 13 b. Failed to provide a common fund for accommodations, such that accommodations for deaf
14 employees are denied because of cost;
- 15 c. Failed to ensure that deaf employees have access to American Sign Language services;
- 16 d. A centralized discriminatory policy or practice that puts the onus of requesting accommodations
17 on deaf employees every time, even when the need for the accommodation is known to the
18 Agency, and has not changed;
- 19 e. Failed to implement a streamlined and standardized process for connecting videophones and
20 other assistive devices for deaf employees to base networks and ensuring that they function;
- 21 f. Failed to whitelist assistive technology for deaf employees working in secure areas;
- 22 g. Failed to ensure that trainings, presentations, and videos are accessible for deaf employees; and
- 23 h. Failed to adequately staff its disability program, appoint qualified disability program managers,
24 and/or ensure proper training of individuals with the power to approve and deny
25 accommodations for deaf employees.”
26
27
28

1 Order at 7-8 (ER 7-8) (articulating class definition); *see also id.* at 9-13 (ER 9-13) (analyzing class
2 certification factors).

3 As explained in further detail below, Judge Peterson’s decision to certify a class in this case was
4 well-supported by the evidence and in accordance with all applicable law. That decision should be
5 affirmed.³⁹

6 **1. Judge Peterson correctly found that Complainants’ claims and those of the**
7 **class depend on common questions that are capable of classwide resolution.**

8 In ordering granting class certification, Judge Peterson highlighted numerous centralized Agency
9 policies, practices, and systemic failures to act that are alleged to discriminate against Complainants and
10 other d/Deaf civilian employees, along with significant evidence—drawn from the Agency’s own
11 documents, the uncontroverted testimony of its head Disability Program Manager Kendra Shock, and
12 the declarations of Class Agents—affirming the existence of these Agency-wide issues, as well as their
13 alleged discriminatory effect. This included uncontroverted evidence that 1) necessary accommodations
14 are routinely delayed or denied for supposed lack of funds (despite ample resources available to the
15 Agency as a whole) and that this is a direct result of the Agency’s byzantine and broken process for
16 funding accommodations; 2) that necessary accommodations like ASL interpreters are rarely granted; 3)
17 that the Agency has failed to hire or contract for interpreters with high levels of security clearance; 4)
18 that the Agency places the onus on its deaf employees to request “repeat” accommodations—such as
19 ASL interpretation—every time they are needed, even when their need for that accommodation is
20 known and has not changed; 5) that there are ongoing delays of months or even years with getting
21 videophones and captioned telephones working on base networks, 6) that training videos and
22 presentations are consistently not captioned; and 7) that the Air Force has completely failed to
23 adequately staff its disability program, to the detriment of every employee (including every d/Deaf

24 ³⁹ If the Commission has any concerns regarding the definition of the class certified by Judge
25 Peterson, it may modify that definition in whatever ways it believes are necessary. *See Holman v.*
26 *Experian Info. Sols., Inc.*, No. C 11-0180 CW, 2012 WL 1496203, at *8 (N.D. Cal. Apr. 27, 2012)
27 (discussing authority and modifying proposed definition). Similarly, if the Commission believes that
28 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 employee) who needs accommodations. *See* Order at 4-7 (ER 4-7). On the basis of such systemic issues
2 Judge Peterson properly found that “commonality” requirement of 29 C.F.R. § 1614.204(a)(ii) was
3 satisfied, and this decision should be affirmed.

4 As Judge Peterson noted, the Agency’s brief in opposition to class certification did not “grapple
5 with the[se] policies and practices,” did not “produce any evidence demonstrating that the allegations
6 are one-off instances at dispersed installations,” and did not address or rebut the testimony of its own
7 head Disability Program Manager Ms. Kendra Shock “that there are persistent issues across virtually all
8 installations.” Order at 10 (ER 10). The same is true of its appeal brief here, which ignores or attempts to
9 wish-away this extensive evidence, rather than to address any of it.⁴⁰

10 As discussed in more detail below, any one of the allegedly-discriminatory Agency policies,
11 practices, or failures to act discussed in Judge Peterson’s order would be enough to establish the
12 “commonality” requirement of 29 C.F.R. § 1614.204(a)(ii), because whether or not they are
13 discriminatory is a common question whose answer is “apt to drive the resolution of the litigation.”
14 *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (emphasis in original, citations
15 omitted).

16 29 C.F.R. § 1614.204(a)(ii)’s “commonality” requirement, like that of Rule 23(a)(2), is satisfied
17 if the claims of plaintiffs and the proposed class “depend upon a common contention . . . capable of class
18 wide resolution” —meaning that a “determination of its truth or falsity will resolve an issue that is
19

20 ⁴⁰ Many of the Agency’s arguments along these lines are simply counter-factual. For example, the
21 Agency asserts that “Complainant has produced no evidence of the ‘denials of necessary
22 accommodations associated with the lack of [a centralized] fund.” Agency Appeal Brief at 25. Of
23 course, Complainants offered pages of such evidence, including the Agency’s own Fiscal Year 2018
24 “Affirmative Action Plan for the Recruitment, Hiring, Advancement, and Retention of Persons with
25 Disabilities” report, which notes that accommodations are still “**denied due to unit funding**,” and cites
26 “[I]ack of centralized funding for reasonable accommodations” as a barrier affecting all employees with
27 disabilities. *Betouliere Decl.*, Exhibit F (Fiscal Year 2018 Affirmative Action Plan report) at 19 (ER
28 497) (emphasis added); *see also* § III(A)(1), above.

25 Similarly, the Agency says that Ms. Duckworth “stated unequivocally” that she “does not hold
26 [the] view” that what the Agency euphemistically terms “bureaucratic challenges” constitute evidence of
27 discrimination against deaf employees. Agency Appeal Brief at 23-24. The cited section of Ms. Shock’s
28 deposition says no such thing—and nor does any other. Rather, Ms. Shock testified extensively
regarding the ways in which the Agency’s current policies and practices serve to discriminate against
deaf employees. *See* § III, above.

1 central to the validity of each one of the [class members'] claims in one stroke.”⁴¹ *Wal-Mart Stores,*
2 *Inc. v. Dukes*, 564 U.S. 338 at 350 (2011). This does not “mean that *every* question of law or fact must
3 be common to the class” *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013)
4 (emphasis in original, citations omitted). Rather, “[F]or purposes of Rule 23(a)(2), **even a single**
5 **common question**” can establish commonality. *Wal-Mart Stores*, 564 U.S. at 359 (internal quotations
6 and citation omitted, emphasis added); *see also Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th
7 Cir. 2012).

8 Here, Complainant Weimer and other class agents have alleged that centralized Air Force
9 policies, practices, and failures to act have resulted in discriminatory denial of “consistent, reliable, or
10 any sign language interpreter services at all,” as well as in the discriminatory denial of “consistent,
11 reliable, or any” access to videophones, CART services, and other necessary accommodations; these are
12 precisely the sort of claims that the Commission has previously found to satisfy commonality, and be
13 suitable for class treatment. *See Tessa L. v. Purdue (USDA)*, EEOC DOC 0720170021, 2017 WL
14 5564438, at *4-5 (Nov. 9, 2017) (certifying class of deaf employees challenging policy); *see also Bates*
15 *v. United Parcel Service*, 204 F.R.D. 440, 445 (N.D. Cal. 2001) (“Plaintiffs in this case do not challenge
16 the accommodations provided to particular individuals [r]ather, ‘at issue is the *process* that UPS
17 follows in addressing (and failing to address) communication barriers and determining what jobs deaf
18 workers can hold, not the specific outcomes that a valid process would produce for individual class
19 members.” (emphasis in original)).

20 Further, the declarations of class agents, the deposition testimony of head Disability Program
21 Manager Ms. Shock, and other evidence already in the record establishes that these discriminatory
22

23 ⁴¹ The Agency argues that *Wal-Mart* requires a showing that all class members have suffered the
24 “same injury,” but it misstates what this requirement means. Agency Appeal Brief at 30. As *Wal-Mart*
25 itself made clear, this does not require a showing of identical harms, but merely “a common contention .
26 . . . that is capable of classwide resolution” (such as, here, the contention that d/Deaf employees are
27 subjected to discrimination as a result of specific centralized policies, practices, and failures to act). *See*
28 *Wal-Mart Stores*, 564 U.S. at 350. As multiple courts have explained, following *Wal-Mart*, “[w]here the
circumstances of each particular class member vary but [they] retain a common core of factual or legal
issues with the rest of the class, commonality exists. *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014)
(citation omitted).

1 denials of necessary accommodations are not attributable to the discretionary decisions of isolated
2 departments or supervisors, but to failings in systems, processes, and trainings that come from the top
3 down, and that affect d/Deaf employees throughout the Air Force, regardless of the base at which they
4 are stationed or the position in which they work. *See id.*; *see also* § III, above (detailing factual support
5 for claims of systemic and centralized discrimination).

6 Here, Complainants have identified numerous common questions whose answers are “apt to
7 drive the resolution of the litigation”—far more than the commonality element requires. *See Abdullah*,
8 731 F.3d at 957 (citation and quotation omitted). While “[a] single common question will suffice for
9 commonality,” Complainants have more than a single common question which will inevitably generate
10 common – rather than individualized answers. These include (but are not limited to) the following:

- 11 1. Whether the Air Force has failed to ensure that “anyone who is authorized to grant or
12 deny requests for reasonable accommodation or to make hiring decisions is aware that [. . .
13 . . .] “all resources available to the agency as a whole” . . . must be “considered when
14 determining whether a denial of reasonable accommodation based on cost is lawful,” as
15 required by 29 C.F.R. § 1614.203(d)(3)(ii);
- 16 2. Whether the Air Force has failed and refused to provide a common fund for
17 accommodations, such that accommodations are frequently delayed or denied because of
18 cost, and a d/Deaf employee’s ability to get an interpreter or other necessary
19 accommodation rises or falls on the finances of their particular unit;
- 20 3. Whether the Air Force has failed to ensure that d/Deaf employees and applicants have
21 consistent, reliable access to American Sign Language interpreter services and other
22 necessary accommodations, and in many instances has provided no access at all;
- 23 4. Whether Air Force has a centralized discriminatory policy or practice that puts the onus
24 of requesting necessary accommodations on d/Deaf employees every time (for example,
25 for every meeting or training), even when the need for that accommodation is known to
26 the Agency, and has not changed;

- 1 5. Whether the Air Force has failed to implement a streamlined and standardized process for
2 connecting videophones and other necessary devices to base networks and ensuring that
3 they function, such that they languish unconnected or unusable for months or years even
4 after they have been acquired;
- 5 6. Whether the Air Force has failed to whitelist appropriate assistive technology or to find
6 workable alternative accommodations such as ASL interpretation or CART services for
7 d/Deaf employees working in secure areas;
- 8 7. Whether the Air Force routinely fails to ensure that trainings, presentations, and videos
9 for civilian employees are properly captioned or otherwise accessible; and
- 10 8. Whether the Air Force has failed to adequately staff its disability program, appoint
11 qualified disability program managers, and/or ensure proper training of individuals with
12 the power to approve and deny accommodations.

13 As discussed in Section III above, Air Force documents, the declaration testimony of Ms. Shock,
14 and the experiences of Complainants Hugo Perez, Sheila Burg, Matthew Wambold, Mika Hongyu-Perez
15 and declarant Rachel McAnallen all suggest that **the answer to all of the above questions is yes.** *See*
16 § III, above. However, the answer to even one would be sufficient to satisfy the commonality
17 requirement of 29 C.F.R. § 1614.204(a) (ii). *See Abdullah*, 731 F.3d at 957.

18 Indeed, the declaration testimony of Complainants and Ms. McAnallen alone was **already** more
19 than enough to satisfy this element: the fact that these d/Deaf employees or former employees have had
20 markedly similar experiences of discrimination at a variety of different Air Force bases itself shows that
21 these are not isolated incidents of discriminatory conduct, but rather, ones that are reflective of
22 centralized discriminatory policies, practices, and failures across the Air Force as a whole.⁴² *Mitchell v.*
23

24 ⁴² Even the Agency admits that reliance on declarations, deposition testimony and other evidence to
25 establish commonality is proper. *See Appeal* at 29-30 (“Complainant must establish some evidentiary
26 basis from which one could reasonably infer the operation of an overriding policy or practice of
27 discrimination...This showing can be made, for example, **by supporting affidavits from putative class**
28 **members containing anecdotal testimony that the identified agency practice or policy affected**
them in the same manner as it affected the class agent, with evidence of the specific adverse
actions.”) (emphasis added).

1 *Potter* (USPS), EEOC DOC 01A20442, at *3 (July 29, 2003) (“allegations of specific incidents of
2 discrimination” coupled with “supporting affidavits containing anecdotal testimony” sufficient to
3 establish an overriding Agency policy or practice of discrimination, for purposes of commonality
4 analysis). The copious evidence of centralized discriminatory policies and practices revealed during the
5 pre-certification discovery process—as detailed in § III, above—removes any doubt at all regarding the
6 existence of common questions, or the appropriateness of certification in this case.⁴³

7 In many ways, the class claims in this case are analogous to those asserted in *Tessa L.*,
8 *Complainant*, EEOC DOC 0720170021, 2017 WL 5564438 (Nov. 9, 2017). There, complainants filed a
9 class case alleging disability discrimination under the Rehabilitation Act, based on their hearing
10 disabilities, alleging that when “the [a]gency transitioned funding for sign language interpreting services
11 from the Department level to the sub-agency level without using the appropriate process and without
12 providing adequate time and training ... resulted in denial and delay of interpreting services and
13 inhibited Class Agent from performing her job duties.” *Tessa L. v Perdue* (USDA), 2017 WL 5564438,
14 at *4-5. Upon review, the Commission found the AJ’s decision to certify the class well-founded, noting
15 the agency's decision to decentralize the system for approving and funding requests for qualified sign
16 language interpreter services was the “‘glue’ that holds the reasons for the alleged discrimination
17 experienced by each class member together.” *Id.* Further, the Commission found that the specific
18 accommodations that were being denied (the lack of consistent, reliable, or any sign language interpreter
19 services at all) were typical of class agent's claims as well as those of the putative class members.⁴⁴

21 ⁴³ The amount and scope of the commonality evidence submitted by class agents here stands in
22 sharp contrast to cases like *Aracely J.*, where the Commission found that commonality and other key
23 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.”).

24 ⁴⁴ The Commission’s decision in *Complainant v. Ashton B. Carter* (Dep’t of Def.), EEOC DOC
25 0120103592, 2015 WL 5530294 (Sept. 9, 2015), is similarly in accord and provides further support for a
26 finding of commonality. There, the Commission reversed the AJ’s determination that commonality was
27 not established, instead finding that the class agent had “identified a policy or practice of the Agency
28 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

1 *Tessa L. v Perdue* (USDA), 2017 WL 5564438, at *5.

2 While it is true that the Air Force’s discriminatory actions and failures to act might *affect*
3 Claimants and class members in different ways, such different effects do not defeat commonality and
4 certainly does not mean that class members must suffer the “same harm,” as the Agency wants the
5 commonality standard to be. Agency Appeal Brief at 30. Where a civil rights class action lawsuit
6 challenges “systemic policies and practices” that harm all putative class members—as this case does—
7 Rule 23(a)’s commonality requirement is met even if variations in individual circumstances may result
8 in slightly divergent harms. *See Parsons v. Ryan*, 754 F.3d 657, 681–83 (9th Cir. 2014) (discussing
9 cases); *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (“[Defendant] argues that a wide variation
10 in . . . class members’ disabilities precludes a finding of commonality . . . [w]e reject this approach to
11 class-action litigation.”); William B. Rubenstein, 1 *Newberg on Class Actions* § 3:20 (5th ed., 2020)
12 (“varying degrees of injury[] will not bar a finding of commonality”); *Felix Z. et al., Complainant*,
13 EEOC DOC 2020005328, 2021 WL 1928243, at *5 (Apr. 29, 2021) (“[t]he fact that some individuals
14 chose to complete the reasonable accommodation form and provide the information while others did not,
15 and/or the fact that some individuals were accommodated and others were not, did not destroy
16 commonality or typicality because there was a common policy or practice at issue.”) (discussing
17 *Complainant v. Ashton B. Carter*, 2015 WL 5530294, at *5 (Sept. 9, 2015)).

18 Moreover, the Commission should reject—as Judge Peterson did—any Agency argument that
19 commonality cannot be established because no “Agency-wide” or “centralized” policy exists for
20 handling reasonable accommodation requests (for example, because the Air Force has no policy
21 regarding captioning of training videos or connecting videophones to base networks at all). In *Bates*, the
22 court expressly rejected such a narrow approach to identification of a “policy”, explaining that
23 “[a]dopting UPS’s position would lead to the unacceptable conclusion that an employer could protect
24 itself from any class action suit simply by failing to adopt specific policies” and that this “result seems
25 particularly egregious in cases like this one, where plaintiffs’ claims that an employer’s failure to adopt

26 _____
27 the Agency’s use of this process was sufficient to establish an “Agency Policy that violated the
28 Rehabilitation Act which harmed the class as a whole.” *Id.*

1 specific policies is the very reason that the employer is in violation of anti-discrimination laws.” *Bates*,
2 204 F.R.D at 448; *see Siddiqi v. Regents of Univ. of California*, No. C 99-0790 SI, 2000 WL 33190435
3 at, *3 and *9 (N.D. Cal. Sept. 6, 2000) (certifying class where defendant “failed to adopt” various
4 policies necessary to prevent discrimination, including a policy “requiring the use of closed captioning
5 for video presentations during classes and other campus settings.”).

6 Because the claims of Claimants and the proposed class depend on common contentions that are
7 “capable of classwide resolution,” the Commission should affirm Judge Peterson’s finding that the
8 “commonality” requirement of 29 CFR § 1614.204(a)(ii) is met.

9 **2. Judge Peterson correctly found that Complainant’s claims are typical of the**
10 **class.**

11 Judge Peterson correctly held that 29 CFR § 1614.204(a)(iii)’s typicality requirement was
12 satisfied, noting that Complainant “Weimer was a deaf civilian employee for the relevant period, as
13 were other Class Agents,” and that “each of the Class Agents has reported instances where they were
14 discriminated against . . . or denied reasonable accommodations. . . . under one or all of the alleged
15 policies or practices identified in the sub-issues (a)-(h)” of the certified class definition. Order at 10 (ER
16 10).

17 While Judge Peterson acknowledged “that there is factual variation as to how the policies and
18 practices affected each individual,” he correctly held that “the interests of the class members will be
19 appropriately encompassed within the sub-issues, and that “to the extent relief is ultimately granted to
20 the class, the type of equitable or injunctive relief addressed to each sub-issue would have the same
21 result for each class member, even if their particular alleged harms are different.” Order at 10 (ER 10).
22 In other words, because Class Agents had identified, experienced, and sought to challenge “centralized
23 policies and practices that affect all other putative class members,” typicality was established, and
24 certification was appropriate. *Id.* As explained in more detail below, this holding is wholly in accordance
25 with applicable law, and should be affirmed.⁴⁵

26 _____
27 ⁴⁵ The Agency argues—without any citation to law or fact—that Complainant “has failed to present
28 any evidence that her interests are aligned with the putative class members,” is “attempting to serve as

1 The Commission has held that “typicality is met when there is some nexus between the class
2 agent’s claims and the class members’ claims,” and cautioned that “this prerequisite does not mandate
3 that the class agent’s circumstances be identical to those of the class members’.” *Tessa L. v. Purdue*
4 (*USDA*), 2017 WL 5564438, at *5. Likewise, “[u]nder [Rule 23(a)(3)’s] permissive standards,
5 representative claims are ‘typical’ if they are reasonably coextensive with those of absent class
6 members; they need not be substantially identical.” *Parsons*, 754 F.3d at 685 (quoting *Hanlon*, 150 F.3d
7 at 1020). “The requirement of typicality is not primarily concerned with whether each person in a
8 proposed class suffers the same type of damages; rather, it is sufficient for typicality if the plaintiff
9 endured a course of conduct directed against the class.” *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1118
10 (9th Cir. 2017); *see also Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (“Typicality
11 refers to the nature of the claim or defense of the class representative, and not to the specific facts from
12 which it arose or the relief sought”); *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 734 (9th Cir.
13 2007) (citing *Simpson v. Fireman’s Fund Ins. Co.*, 231 F.R.D. 391, 396 (N.D. Cal. 2005) for the
14 proposition that “[i]n determining whether typicality is met, the focus should be ‘on the defendants’
15 conduct and plaintiff’s legal theory,’ not the injury caused”). Because typicality overlaps with
16 commonality, a finding of commonality usually supports a finding of typicality. *See Gen. Tel. Co. of the*

17
18
19 the class representative by asserting claims that may not be shared by any other class members.” Agency
20 Appeal Brief at 31. This, of course, ignores the substantial evidence of both systemic discrimination and
aligned interests that Complainants actually presented in their Renewed Motion for Class Certification,
and that Judge Peterson discussed in his order, all of which is set forth again in § III, above.

21 The Agency also relies on an unreported case from the Southern District of West Virginia --
22 *Smith v. Res-Care, Inc.* – for the proposition that typicality requires a showing that all class members’
23 claims “arise from the same events.” *Smith v. Res-Care, Inc.*, No. CIV.A. 3:13-5211, 2015 WL 461529,
24 at *5 (S.D.W. Va. Feb. 3, 2015). However, that portion of *Smith* relies, in turn, on *Jeffreys v. Commc'ns*
Workers of Am., AFL-CIO, which clarifies that “factual variances” do not “prohibit a finding of
typicality as long as the claims are based on the same legal or remedial theory.” *Jeffreys v. Commc'ns*
Workers of Am., AFL-CIO, 212 F.R.D. 320, 322 (E.D. Va. 2003).

25 In any event, the cited language from *Smith* is not an accurate statement of the typicality standard
26 under either 29 CFR § 1614.204(a)(iii) or Rule 23(a)(3). *See Tessa L. v. Purdue (USDA)*, 2017 WL
27 5564438, at *5 (“identical circumstances” not required); *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1118
28 (9th Cir. 2017) (typicality met so long as class agents and other class members challenge the same
“course of conduct,” regardless of whether they suffered the same damages).

1 *Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (noting that commonality and typicality requirements
2 frequently “merge”).

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

9 As other courts have observed, in most cases alleging discrimination on the basis of disability,
10 “there will be individual variations among class members in terms of the nature of their disability, the
11 types of aides used, and the individual nature of each class member’s . . . access to services and
12 facilities” – however, such differences do not defeat typicality. *Nat’l Fed’n of the Blind v. Target Corp.*,
13 582 F. Supp. 2d 1185, 1201 (N.D. Cal. 2007) (internal citations omitted). Again, the declarations of
14 class agents and other evidence already in the record establishes that the lack of consistent and reliable
15 accommodations for the Agency’s d/Deaf employees is not attributable to the discretionary decisions of
16 isolated departments or supervisors, but to failings in systems, processes, and trainings that come from
17 the top down, and that affect d/Deaf employees throughout the Air Force, regardless of the base at which
18 they are stationed or the position in which they work. *See* § III, above.

19 Where—as here—all class members have been harmed by centralized discriminatory policies,
20 practices, and failures to act, neither the fact that class members may need somewhat different
21 accommodations, nor the fact that they may work at different locations or have different positions and
22 supervisors is sufficient to defeat typicality. *See Felix Z.*, 2021 WL 1928243, at *5 (whether some
23 individuals chose to complete the reasonable accommodation form and provide the information while
24 others did not, and/or the fact that some individuals were accommodated and others were not, did not
25 destroy commonality or typicality); *Tessa L.*, EEOC DOC 0720170021, at *6 (Nov. 9, 2017) (typicality
26 found where “dismantling the centralized fund caused everyone to suffer lack of reasonable
27
28

1 accommodation in the form of consistent, qualified interpreting services for essential functions of their
2 respective employment and Department-wide functions.”); *Bates v. United Parcel Service*, 204 F.R.D.
3 440, 446-47 (N.D. Cal. 2001) (individualized nature of ADA determinations does not defeat typicality);
4 *Nat’l Fed’n of the Blind*, 582 F. Supp. 2d at 1201 (internal citations omitted); *see also Turner v. Dep’t of*
5 *Justice (Fed. Bureau of Prisons)*, EEOC Appeal No. 0720060041 (July 19, 2007) (“To the extent that
6 the agency argues that the mere fact that individuals work in different positions in different locations
7 automatically defeats a claim for class certification, we disagree. If there is sufficient evidence of a
8 common policy or practice, the commonality test can be met, even if the employees hold different
9 positions and work in different facilities.”).

10 Because Complainant, other class agents, and all members of the proposed class have been
11 harmed by the same discriminatory course of conduct, and would benefit from the same declaratory and
12 injunctive relief, Judge Peterson correctly found that the proposed class satisfies 29 CFR §
13 1614.204(a)(iii)’s typicality requirement. This finding should be affirmed.

14 **3. Judge Peterson correctly found that the proposed class – which includes at**
15 **least a thousand d/Deaf civilian employees throughout the Air Force – easily satisfies**
16 **numerosity.**

17 In finding that 29 C.F.R. §1614.204(a)(2)(i)’s “numerosity” requirement was satisfied, Judge
18 Peterson noted that the Agency’s “2020 Total Workforce Distribution by Disability Status Report”
19 identified “more than 700 Agency employees identified as being deaf or having serious difficulty
20 hearing,” and that Disability Program Manager Ms. Shock “believed there were more than a thousand
21 such individuals” across the Agency. As Judge Peterson reasonably concluded, this was far above the
22 standard threshold (40 or more) for finding “numerosity.” Order at 11-12 (ER 11-12).

23 In doing so, Judge Peterson accepted the general principle—also accepted by the Agency—that
24 classes with 40 or more members usually satisfy the numerosity requirement. *See* William B.
25 Rubenstein, 1 Newberg on Class Actions § 3:12 (5th ed. 2020) (“A class of 40 or more members raises a
26 presumption of impracticability of joinder based on numbers alone.”). *See also Johnson-Feldman v.*
27 *Secretary of Veterans Affairs*, 01953168 (1997); *see also Jeffries v. Secretary of Treasury*, 01A02227
28

1 (2003) (77 past and present employee sufficient for class certification); *Thockmorton v. Secretary of*
2 *Interior*, 01A03994 (2003) (class of 74 meets numerosity requirement); *Lee v. Secretary of Army*,
3 01990384 (2000) (60 employees are sufficient for class certification). Where “the exact size of the class
4 is unknown but general knowledge and common sense indicate that it is large, the numerosity
5 requirement is satisfied.” *In re Abbott Labs Norvir Anti-Trust Litig.*, 2007 WL 1689899, at *6 (N.D. Cal.
6 Jun. 11, 2007) (citing Cone, Newberg, *Newberg on Class Actions* § 3.3 (4th ed. 2002); *Rannis v.*
7 *Recchia*, 380 Fed. App’x. 646, 651 (9th Cir. 2010) (discussing standard, and affirming certification of
8 20-member class). *Cf. Aracely J., Complainant*, EEOC DOC 2019003498, 2020 WL 6134366, at *6
9 (Sept. 21, 2020) (26 putative class members who currently or previously worked at agency’s Regional
10 Office was not so large or geographically dispersed that consolidated or separate complaints would be
11 impractical).

12 The Agency critiques Judge Peterson’s conclusion that numerosity was satisfied as “shoddy and
13 faulty reasoning,” but it offers no contrary evidence regarding the size of the class. Instead, it suggests—
14 disingenuously—that a class cannot be certified on the basis of the six specific individuals named in Ms.
15 Weimer’s original complaint. Agency Appeal Brief at 27-28. This, of course, is a straw man.
16 Complainant’s motion for class certification is not based on these six individuals, but on centralized
17 Agency policies, practices, and failures to act that serve to discriminate against d/Deaf employees across
18 the Air Force—a class that, by the Agency’s own admission, is well in excess of 700 individuals.

19 The Agency’s 2020 Total Workforce distribution by Disability Status Report, which covered the
20 period from October 1, 2019 to September 30, 2020 indicated that **773 employees identified as being**
21 **deaf or having serious difficulty hearing**. Betouliere Decl., Exhibit H (FY 2020 Workforce Tables) at
22 50 (ER 578).⁴⁶ During her deposition, Ms. Shock testified that “as far as deaf employees, yes, I’d say
23 there’s **over a thousand**.” Shock Dep. at 71:9-10 (emphasis added).

24 A class which according to the Agency’s own documents and testimony consists of anywhere
25

26 ⁴⁶ That same report also identified 120 “qualified external applicants” who self-identified as deaf or
27 having serious difficulty hearing during that same time period and were hired in that year alone –
28 indicating that the “applicant” portion of the class also independently satisfies the “numerosity”
threshold. *Id* at 78.

1 between 773 and over a thousand members readily clears the threshold to satisfy numerosity. *See*
2 William B. Rubenstein, 1 Newberg on Class Actions § 3:12 (5th ed. 2020). In finding that the
3 numerosity requirement has been satisfied, Judge Peterson confirmed that Complainants established that
4 “the class is so numerous that a consolidated complaint of the members of the class is impractical.” *See*
5 29 C.F.R. § 1614.204(a)(2)(i). Judge Peterson’s decision is amply supported by the facts and law and
6 should be affirmed.

7 **4. Judge Peterson correctly found that Complainants and their counsel will**
8 **fairly and adequately protect the interests of the class.**

9 Judge Peterson properly found that Class Agents met the adequacy requirement. Order at 12 (ER
10 12) (“I find that adequacy of representation has been satisfied”). By not addressing this issue on appeal,
11 the Agency concedes that Class Agents and their counsel meet the adequacy requirement.

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

24 Complainant Weimer and other class agents are adequate class representatives because they are
25 directly affected by the discriminatory Air Force policies, practices, and failures to act at the heart of this
26 case, which serve to deprive them of consistent and reliable access (or any access at all) to
27 accommodations that they need to do their jobs, advance their careers, apply for positions at the Air
28

1 Force, or participate in the Agency’s EEO processes. *See* § III, above.

2 Complainants’ interests are not antagonistic to, nor in conflict with, the interests of the class as a
3 whole. Rather, the relief they seek would benefit themselves and every member of the proposed class,
4 by ensuring that class agents and other class members have equal and nondiscriminatory access to the
5 same opportunities for “hiring, advancement [. . .], employee compensation, job training, or other terms,
6 conditions, and privileges of employment” that are available to their nondisabled peers. 29 C.F.R. §
7 1614.203(b); *see also* 29 U.S.C. § 791(f). Complainant and other class agents are incentivized to
8 vigorously pursue this requested relief on behalf of the class. Weimer Decl. ¶¶ 1-2 (ER 1917); Perez
9 Decl. ¶¶ 1-2 (ER 2280); Hongyu-Perez Decl. ¶¶ 1-2 (ER 2357); Burg Decl. ¶¶ 1-2 (ER 2327); Wambold
10 Decl. ¶¶ 1-2 (ER 2436); *see also Ellis*, 657 F.3d at 985 (affirming adequacy, where nothing in record
11 suggested that representative would not “vigorously pursue injunctive relief on behalf of the entire
12 class”).

13 Complainants’ attorneys also satisfy the adequacy requirement. Adequate representation of
14 counsel is “usually presumed in the absence of contrary evidence,” *Californians for Disability Rts., Inc.*
15 *v. California Dep’t of Transp.*, 249 F.R.D. 334, 349 (N.D. Cal. 2008) and there is nothing to rebut that
16 presumption in this case. *See* Musell Decl. ¶¶ 1-36, 38 (ER 8184-8197); Betouliere Decl. ¶¶ 3-16 (ER
17 310-314); *see also* William B. Rubenstein, 1 Newberg on Class Actions § 3:72 (5th ed. 2020). Where
18 there is no conflict, the only relevant questions are whether “proposed class counsel [is] qualified and
19 would prosecute the action vigorously.” *Sali*, 909 F.3d at 1007. Here, the answer to both questions is
20 yes.

21 Complainants’ attorneys have already devoted a significant amount of time and effort to
22 investigating and prosecuting this action on behalf of Complainant, class agents, and the class (as
23 revealed by the record so far) and they have more than enough resources to continue vigorously
24 prosecuting this case. *See* Musell Decl. ¶ 38 (ER 8196 – 8197). Complainants’ counsel also has
25 substantial experience litigating complex and novel class action cases such as this one. Disability Rights
26 Advocates (“DRA”) has specialized in disability law and class action institutional reform litigation for
27
28

1 nearly three decades, and has served as class counsel in dozens of disability rights class actions.
2 Betouliere Decl. ¶¶ 3-14 (ER 310 – 316). Law Offices of Wendy Musell has extensive decades-long
3 experience representing public employees and federal workers, including in class action cases. Musell
4 Decl. ¶¶ 4-34 (ER 8184 – 8196). Both firms are thus well-qualified to litigate claims on behalf of the
5 class, and ably meet standards for appointment as class counsel. *See Sali*, 909 F.3d at 1007–08.

6 In its February 8, 2022 opposition to complainant’s request for an extension to file this motion
7 and to take discovery related to class certification, the Air Force “concedes that the information
8 contained [in] Complainant’s Response and its attachments likely satisfy the adequacy requirement” of
9 29 C.F.R. § 1614.204(iv). *See Agency Opp’n* at 3. Judge Peterson subsequently found that class agents
10 and their counsel meet the adequacy requirement. The Agency fails to challenge this issue in its appeal.
11 Therefore, the Commission should find that the adequacy requirement of 29 C.F.R. § 1614.204(iv) is
12 satisfied as to both Complainants and their counsel and should affirm Judge Peterson’s decision.

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

15 While Rule 23(b)(2) does not apply in this administrative context, class-wide injunctive relief is
16 still appropriate, because the Air Force has “acted or refused to act on grounds that apply generally to
17 the class” Fed. R. Civ. P. 23(b)(2). Indeed, the claims raised by Complainant Weimer and other
18 class agents are of precisely the sort that Rule 23(b)(2) was designed to facilitate: the “primary role of
19 [the rule] has always been the certification of civil rights class actions” *Parsons*, 754 F.3d at 686;
20 *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (noting that “[c]ivil rights cases
21 against parties charged with unlawful, class-based discrimination are prime examples” of proper (b)(2)
22 actions). When conducting a Rule 23(b)(2) inquiry, courts do not “examine the viability or bases of class
23 members’ claims for declaratory and injunctive relief, but only to look at whether class members seek
24 uniform relief from a practice applicable to all of them.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th
25 Cir. 2011); *Parsons*, 754 F.3d at 689 n.35 (holding, in the context of Rule 23(b)(2) inquiry, that “the
26 class certification hearing is not a dress rehearsal of the trial on the merits (let alone a dress rehearsal of
27 the remedy proceedings).”)
28

1 Certification is also appropriate because “final injunctive relief or corresponding declaratory
2 relief is appropriate respecting the class as a whole”—meaning that “a single injunction or declaratory
3 judgment would provide relief to each member of the class.” *See Jennings v. Rodriguez*, 138 S. Ct. 830,
4 851–52 (2018). The Ninth Circuit has held that this requirement “ordinarily will be satisfied when
5 plaintiffs have described the general contours of an injunction that would provide relief to the whole
6 class, that is more specific than a bare injunction to follow the law, and that can be given greater
7 substance and specificity at an appropriate stage in the litigation through fact-finding, negotiations, and
8 expert testimony.” *Parsons*, 754 F.3d at 689 n.35.

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

- 13 1. The creation of captioned and signed videos explaining the Air Force EEO process and
14 associated rights, along with the provision of ASL interpreters [or other necessary
15 accommodations] for d/Deaf employees who need them in order to participate fully in the
16 EEO process.
- 17 2. The establishment of a centralized Air Force fund to pay for ASL interpreters and other
18 necessary reasonable accommodations.
- 19 3. The establishment of long-term Air Force-wide contracts for ASL interpreters, CART,
20 and similar services, to address current contract-related delays in finding appropriate
21 providers.
- 22 4. The establishment of procedures to ensure that all work events (including webcasts,
23 trainings, and the like) are accessible to d/Deaf civilian employees.

1 5. The establishment of procedures for all NAFs, MAJCOMs, and bases to promptly and
2 timely connect videophones and captioned telephones to base networks upon receipt of
3 the videophone or captioned telephone.⁴⁷

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

5 **6. The Commission routinely finds that claims under § 501 of the Rehabilitation**
6 **Act are suitable for class treatment.**

7 29 C.F.R. §1614.204 (a)(1) states that “a class is a group of employees, former employees or
8 applicants for employment who, it is alleged, have been or are being adversely affected by an agency
9 personnel management policy or practice that discriminates against the group on the basis of [. . .]
10 handicap.” “The purpose of class action complaints is to economically address claims common to a class
11 as a whole . . . turning on questions of law applicable in the same manner to each member of the class.”
12 *Melodee M. et al., Complainant*, EEOC DOC 2020004194, 2020 WL 7243675, at *2 (Nov. 23, 2020)
13 (internal citations omitted).

14 The Commission has certified numerous cases on behalf of federal agency employees with
15 disabilities who allege their rights have been violated under § 501 of the Rehabilitation Act. *See*
16 *McConnell, et. al. v. United States Postal Serv.*, EEOC Hearing No. 520-2008-00053X (May 30, 2008)
17 (noting that the EEOC “has found in certain cases, a large number of disabled persons can be an
18 appropriate group for class certification” and certifying class of “[a]ll permanent rehabilitation
19 employees and limited duty employees who have been subjected to NRP [national reassessment
20 process]”); *Walker v. United States Postal Serv.*, EEOC Appeal No. 0720060005 (March 18, 2008)
21 (certifying class comprised of individuals with disabilities in permanent rehabilitation positions who had
22 their duty hours restricted); *Complainant v. Dep’t. of Def.*, EEOC DOC 0120103592, 2015 WL
23 5530294, at *7 (Sept. 9, 2015) (preliminarily certifying class of all employees, current and former, who
24 requested reasonable accommodation and were required to complete and sign the Agency's Reasonable
25 Request Form beginning in 2002 until such time as the use of the contested form was discontinued);
26 *Glover v. United States Postal Serv.*, EEOC Appeal No. 01A04428 (April 23, 2001) (certifying class

27 ⁴⁷ This is only a partial list of what Ms. Weimer requested.

1 where Complainant alleged that the agency maintained a nationwide policy of denying promotional
2 opportunities to individuals with disabilities in permanent rehabilitation duty positions); *Meyer v. Kerry*
3 (State), EEOC Appeal No. 0720110007 (2014), at *10 (certifying class challenging policy denying the
4 benefits of employment within the Foreign Service to those with disabilities, without regard to
5 accommodation, and without any individualized assessment into the individual’s specific condition.”);
6 *see also Travis v. United States Postal Serv.*, EEOC Appeal 01992222 (October 10, 2002) (rejecting
7 argument that actions brought under the Rehabilitation Act are “ill-suited” for class treatment).

8 **7. The Commission endorses the *Teamsters* method of proof for class claims**
9 **under § 501 of the Rehabilitation Act**

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

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

20 When a class alleges a broad-based policy of employment discrimination such as this, it may
21 pursue its pattern or practice claims in a bifurcated proceeding. *Velva B.*, 2017 WL 4466898, at *11. In
22 the first stage, the Class Agent must establish that unlawful discrimination has been a regular procedure
23 followed by an employer. *EEOC v. Bass Pro Outdoor World, LLC*, 826 F.3d 791, 797 (5th Cir. 2016),
24 *citing Teamsters, supra*, at 336 n.16. The Class Agent may establish that class-wide and systemic
25 discrimination occurred at the Agency at this merits stage by submitting evidence utilizing the burden
26 shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). If the Class
27 Agent meets her burden to establish class-wide discrimination using this framework, a subsequent
28

1 remedial phase determines the scope of individual relief. *Id.*

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

7 Expecting every potential class member to undertake the individualized
8 inquiry that the Rehabilitation Act requires during the liability phase of the
9 *Teamsters* process is inherently impractical, unworkable in practice, and
10 would effectively bar the use of class complaints as a means of challenging
11 workplace policies that discriminate against individuals with disabilities.
12 Such a result would clearly be contrary to Congress's intent in enacting the
13 Rehabilitation Act and the ADA.⁶

14 A far more efficient and effective way to resolve the individualized-inquiry
15 dilemma is to require prospective class members to prove that they are
16 qualified individuals with disabilities during the remedies phase of the
17 *Teamsters* proceeding, as opposed to the liability phase. The remedies stage
18 is where proof of one’s status as a qualified individual with a disability
19 under the Rehabilitation Act naturally aligns with proof of one’s
20 membership in a class under *Teamsters*.

21 *Id.* The Commission’s use of the *Teamsters* method of proof for class-wide disability discrimination
22 claims is consistent with the approach employed by the federal court in *Bates v. United Parcel Service*,
23 204 F.R.D. 440 (N.D. Cal. 2001). In *Bates*, plaintiffs pursued a class action similar to the case at bar,
24 seeking to address extensive communication access barriers in the workplace. Plaintiff alleged the
25 company frequently ignored requests for interpreters, and often failed to provide video captioning,
26 access to teletype telephones, and reliable emergency alert systems. *Bates*, 204 F.R.D at 442. The Court
27 granted class certification together with plaintiffs’ motion for bifurcation of the class action trial. *Id.*
28 449-50.

29 Just as the Commission did in *Velva B.*, the court in *Bates* rejected the defendant’s argument that
30 a *Teamsters-type* bifurcated proceeding was not viable for ADA claims. In dismissing the argument, the
31 court explained how the bifurcated proceeding would work in practice. For the first phase, “liability, as
32 well as what equitable relief would be appropriate should liability be found, depends on questions of law
33
34

1 and fact common to the class and subclass; these questions relate to the policies and practices UPS has
2 employed during the period in question and whether those policies comply with the ADA and California
3 laws.” *Bates*, 204 F.R.D at 449. By contrast, the second phase, regarding “the appropriate level of
4 damages ... depends on individualized questions, such as each class member’s employment history, the
5 particular communication barriers faced by each class member, and the accommodations UPS has
6 provided to each class member.” *Id.* The court emphasized that “[e]ach phase would therefore require
7 the parties to present different types of evidence” and that “UPS is simply mistaken when it argues that
8 the evidence in the liability phase ‘must include’ evidence of ‘each individual’s need for
9 accommodation, considering his or her particular limitations and essential job functions, what
10 accommodations he or she was offered and how they were inadequate, if at all, what other reasonable
11 accommodations was available ...” *Id.*⁴⁸

12 In sum, well-established Commission and federal court precedent authorizes the use of a
13 *Teamsters-type* bifurcated proceeding for the Rehabilitation Act claims in this case. Even those courts
14 that take a more restrictive approach to class certification endorse the *Teamsters* method of proof for
15

16 ⁴⁸ A minority of federal courts have taken a different approach, finding that the *Teamsters* method
17 of proof cannot be used under the ADA. *See Semenکو v. Wendy’s Int’l, Inc.*, No. 2:12-CV-0836, 2013
18 WL 1568407, at *1 (W.D. Pa. Apr. 12, 2013). Those courts have found that “there is an important
19 distinction between Title VII and ADA claims for class action purposes and courts presiding over ADA
20 cases must determine not just whether the employer acted improperly, but also ‘whether class members
21 are ‘qualified’-which includes whether they can or need to be reasonably accommodated-before a
22 classwide determination of unlawful discrimination ... can be reached.” *Hohider v. United Parcel
23 Serv., Inc.*, 574 F.3d 169, 191 (3d Cir. 2009). (“[i]t is the ADA ... and not the *Teamsters* evidentiary
24 framework, that controls the substantive assessment of what elements must be determined to prove a
25 pattern or practice of unlawful discrimination ...”). This approach finds it necessary to resolve
26 individualized questions under the ADA at the liability stage of any *Teamsters* proceeding, and as a
27 result, these courts believe that individualized inquiries will often overwhelm the common issues at the
28 liability stage. *Hohider*, 574 F.3d at 191.

23 However, even this most restrictive approach does not find all disability-related employment
24 class actions ill-suited for class treatment. In fact, the district court in *Semenکو* acknowledged “that there
25 are situations when ADA class actions are certified” and approvingly cited the class certification
26 decisions in *Bates v. UPS* and *Wilson v. Pa. State Police Dep’t*, 1995 WL 422750 (E.D. Pa. July 17,
27 1995) – both cases that are analogous to this one. *Semenکو*, 2013 WL 1568407, at *8 (discussing cases)
28 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.

1 cases where there is “unifying criteria” such as “common conditions suffered” or “accommodations
2 sought” – all of which exist here. *See Semenکو*, 2013 WL 1568407, at *8. In other words, even under the
3 more restrictive approach to class certification adopted in *Semenکو*, certification would still be
4 appropriate in this case, because all proposed class members share a common disability (deafness or
5 serious difficulty hearing), require the same or similar accommodations, and have been subjected to
6 common Air Force policies and practices that discriminate against all of them in essentially the same
7 way – as detailed above. *See* § III above; §§ VI(A)(1-3), above.

8 Moreover, to the extent any federal case conflicts with Commission precedent such as that
9 established in *Velva B*, Commission precedent controls. *Velva B.*, 2017 WL 4466898, at *49, n. 6 (“A
10 primary purpose of the ADA, and by extension the Rehabilitation Act, is to eliminate discrimination
11 against individuals with disabilities.”) 42 U.S.C. § 12101(b)(1). In enforcing these statutes, the
12 Commission's responsibility is to eliminate employment policies and practices that purposefully or
13 effectively discriminate against qualified individuals with disabilities because of their disabilities.
14 Consequently, the Commission is not compelled to interpret the Rehabilitation Act or the ADA in a
15 manner that conflicts with its mandate.”) *See Haywood C. v. U.S. Postal Service*. EEOC Appeal No.
16 0120132452 (Nov. 18, 2014) (referring to the fact that the Commission is not bound by federal circuit
17 court precedent for purposes of adjudicating federal sector complaints); *see also, e.g., Huddleson v. U.S.*
18 *Postal Service*, EEOC Appeal No. 0720090005 n. 6 (Apr. 4, 2011); *Turtle v. U.S. Postal Service*, EEOC
19 Appeal No. 0720080025 n. 2 (Mar. 5, 2009) (rejecting lower court case law inconsistent with
20 Commission precedent). Class Agents are civilian Air Force employees with a disability, thus satisfying
21 the threshold requirement for bringing this class case.

22 The Commission has explained that “[i]n order to bring a class complaint of disability
23 discrimination, Complainant must demonstrate at a minimum, that [they have. . .] a disability within the
24 meaning of the Rehabilitation Act.” *Cyncar*, EEOC Appeal No. 0720030111 (February 1, 2007).
25 Disability means a physical or mental impairment that substantially limits one or more major life
26 activity. 29 C.F.R. § 1630.2(g)(1). A person is substantially limited in a major life activity if they are
27
28

1 “significantly restricted as to the condition, manner or duration under which [he] can perform a
2 particular major life activity as compared...to the average person in the general population.” 29 C.F.R. §
3 1630.2(j)(ii). A complainant must also show that they are a “qualified individual with a disability” under
4 29 C.F.R. § 1630.2(m).

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

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

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

15 **B. The Agency repeatedly ignored Judge Peterson’s orders on pre-certification**
discovery and attempted to impede the development of an adequate record.

16 The Agency spills much ink regarding the underlying pre-certification discovery proceedings
17 before the EEOC, preferring to focus on ad hominin attacks against the Administrative Judge rather than
18 the substance of the matter supposedly at issue: whether class certification was properly granted.
19 However, even a cursory review of the factual record demonstrates that the Agency is misrepresenting
20 the record below and failing to accurately set forth its own dilatory and sanctionable discovery conduct.

21 **1. Complainants diligently sought pre-certification discovery.**

22 The Agency’s brief opens with the absurd suggestion that Class Agent Weimer failed to “take
23 advantage of the two year time lapse between the filing of this complaint and the provision of renewed
24 certification pleadings, to locate and develop evidence to support her efforts to gain certification.” This,
25 however, profoundly misrepresents the record, and ignores the fact that the Agency acted to oppose and
26 delay pre-certification discovery at every turn.

1 Ms. Weimer initiated this action in 2020, and the matter was originally venued in the San
2 Francisco District Office. The San Francisco office’s initial and amended Acknowledgement Orders did
3 not allow class agents to commence discovery until permitted by the Administrative Judge following an
4 Initial Conference. *See* Acknowledgement Order (ER 4199 – 4200); Amended Acknowledgement Order
5 (ER 4213 – 4214). Complainants repeatedly requested to commence discovery related to class
6 certification, and requested a case management conference in order for the EEOC to set forth the
7 reasonable parameters of pre-certification discovery. *See, e.g.*, Complainants Request for Extension to
8 File Class Certification Motion, Request for Discovery and Request for Case Management Conference,
9 dated January 29, 2021 (ER 4425-4437); Complaints Renewed Request for Extension to File Class
10 Certification Motion, Request for Discovery and Request for Case Management Conference and
11 Declaration in Support of Wendy Musell, dated February 6, 2021, and related filings (ER 4438-4458).
12 As the record shows, the Air Force opposed these requests. Agency February 8, 2021 Opposition to
13 Request for Extension and Discovery (ER 4459-66).

14 The San Francisco District Office Administrative Judge originally overseeing this action did not
15 rule on Complainant’s request for pre-certification discovery or convene an informal conference while
16 the case was pending in the San Francisco District Office, and Complainants were thus precluded from
17 conducting any discovery during this period. The Agency’s argument that Complainants failed to seek
18 discovery while the case was pending in the EEOC San Francisco District Office is baseless.

19 **2. The Agency violated or ignored every pre-certification discovery order in**
20 **this case, including an order to show cause.**

21 On January 12, 2022, this case was transferred to the Los Angeles District Office, and
22 subsequently assigned to Judge Peterson. As discussed below, the failure of the Agency to comply with
23 discovery orders began from the Administrative Judge’s first discovery order. On January 20, 2022
24 Judge Peterson issued an “Initial Processing Order,” which gave the Parties until February 2, 2022 to file
25 statements regarding “whether the party requests pre-certification discovery,” along with “the specific,
26 written interrogatories, requests, and testimony that it would seek if [he] allowed pre-certification
27 discovery” (and, if not obvious, an explanation of their relevance). Initial Processing Order at 1 (ER
28

1 4467). Complainants filed their statement regarding pre-certification discovery and proposed requests on
2 February 2, 2022, as ordered, which included eleven proposed interrogatories, 10 proposed categories of
3 document production, and four categories of desired deposition testimony – all tailored to produce
4 information relevant to the question of whether a class should be certified in this case. Complainant’s
5 Statement Regarding Pre-Certification Discovery (ER 4473-4482). The Agency chose not to file a
6 statement regarding pre-certification discovery, and not to seek any. *See* Exhibit A to May 24, 2022
7 Supplemental Declaration of Sean Betouliere in Response to Sanctions Notice (CART Transcript of
8 February 4, 2022 Hearing) at ER 8043-8044 (Counsel for Agency stating, “And as you know, the
9 agency because it did not believe that pre-certification discovery was necessary or appropriate here, we
10 did not file a discovery request, but I know that your order says that if we do not file one, it may be
11 deemed -- may be deemed a waiver of the right to request pre-certification discovery.”)

12 Following a February 4, 2022 hearing, Judge Peterson largely granted Complainant’s proposed
13 pre-certification discovery. February 4, 2022 Discovery Order (ER 4501 – 4503). In its appeal brief, the
14 Agency faults the order granting this discovery for supposedly “depriving it of its right to make
15 arguments regarding burden,” but this argument misrepresents the Administrative Judge’s reasons for
16 not allowing further objections of burden or relevance, which is that he had already reviewed
17 Complainants’ / Class Agents requests and found them to be both relevant and not overly burdensome.
18 As stated at the February 4, 2022 hearing:

19 I will be granting pre-certification discovery. I want to share some of those parameters
20 with you in advance of reading the order, just so that you'll know what to expect. It's not
21 maybe typical and, you know, with class cases, they get run a little bit differently and they
22 are run differently by different administrative judges. And by different tribunals. So I want
23 to just give you some advanced notice here. I will be ordering the agency to produce to the
24 class agents certain information by a certain date, without objections based on relevance or
25 burden. However, the agency will be able to identify privilege objections if there are any
26 which would then, of course, necessitate production of a privilege log. So, in other words,
27 this is more like an order to produce information than it is granting the parties leave to
28 engage in written discovery. So, essentially, what's going to happen is the agency will be
producing information to the class agent on the date that's set, and **I find that this method
is a little bit more streamlined and more appropriate for -- in a case like this, where
I've reviewed the record, I've reviewed the requests. I'm not as concerned about
objection -- objectionable requests.**

1 May 24, 2022 Supplemental Declaration of Sean Betouliere in Response to Sanctions Notice at ¶ 9 (ER
2 8024); *see also id.* at Exhibit A (CART Transcript of February 4, 2022 Hearing) (ER 8027 – 8044).⁴⁹

3 To the extent the Agency wished to bring any issues about burden to Judge Peterson’s attention
4 that may not have been apparent upon his initial review of the requests,⁵⁰ it could easily have done so in
5 opposition to one of the many motions to compel that Complainant’s were forced to file. Instead, it
6 chose to simply disobey Judge Peterson’s order on pre-certification discovery (repeatedly) and to make
7 no effort to explain or justify its actions (such as by opposing a motion to compel or responding to Judge
8 Petersons’ eventual order to show cause).⁵¹

9 The Agency’s failure to comply with Judge Peterson’s orders on pre-certification discovery
10 began with its very first response, which was supposed to be the identification of employees who could
11 testify to Complainant’s four narrowly-tailored deposition topics. *See* Complainants’ February 25, 2022
12 Motion to Compel and related filings (ER 4510 – 4539).

13 The Agency’s refusal to identify potential deponents who could even potentially have the
14 requisite knowledge resulted in a Second Precertification Discovery Order, dated March 7, 2022. *See*
15 March 07, 2022 Second Pre-Certification Discovery Order (ER 4550-4551). As Judge Peterson noted in
16 that order, his original order required production of a deponent or deponents who could testify regarding
17 Complainants’ four narrowly-tailored pre-certification deposition topics, each of which contemplated
18 production of someone with “Agency-wide knowledge as appropriate, especially where the putative
19
20
21

22 ⁴⁹ Judge Peterson discussed this CART hearing transcript of the February 4, 2022 conference –
noting its history and authenticity – on Page 14 of his Order, in fn. 5. *See* Order at 14, fn. 5 (ER 14).

23 ⁵⁰ Such as the vague possible arguments regarding “timeframes, ability to obtain information,
access to the information, protected information, etc.” it suggests in its appeal brief.

24 ⁵¹ *See, e.g.,* Complainants’ May 16, 2022 Response to Sanctions Notice (summarizing history of
25 noncompliance) (ER 7941 – 7959); *see also* February 25, 2022 Motion to Compel and related filings
26 (ER 4510 – 4539); March 07, 2022 Second Pre-Certification Discovery Order (ER 4550-4551); March
27 23, 2022 Motion to Compel and related filings (ER 4552 – 7886); April 12, 2022 Third Pre-Certification
Discovery Order (ER 8107 – 8108); April 20 2022 Motion to Compel and Related filings (ER 8109 –
8183); May 2, 2022 Order to Show Cause (ER 7895 – 7897). May 9, 2022 Motions to Compel
28 Compliance and related filings (ER 7898 – 7939).

1 matter for certification is addressed to the entire Agency.”⁵² Second Pre-Certification Discovery Order
2 at 1 (ER 4550).

3 Next, the Agency failed to respond to interrogatory requests or produce even a single document
4 by the deadline imposed in Judge Peterson’s first pre-certification discovery order, necessitating yet
5 another motion to compel. *See* Complainants’ March 23, 2022 Second Motion to Compel and related
6 filings (ER 4552 – 7886). Judge Peterson then issued a Third Pre-certification Discovery Order, dated
7 April 12, 2022, which required the Agency on before April 19, 2022 to respond to certain interrogatory
8 requests and requests for production of documents. April 12, 2022 Third Pre-Certification Discovery
9 Order (ER 8107 – 8108).

10 When the extended discovery due date from Judge Peterson’s third pre-certification discovery
11 order also came and went with no compliance on behalf of the Agency, Complainants filed another
12 motion to compel compliance, and requested an order to show cause. *See* April 20 2022 Motion to
13 Compel and Related filings (ER 8109 – 8183).

14 On May 2, 2022, the Administrative Judge’s Order to Show Cause required the Agency to take
15 two actions. First, the Order to Show Cause ruled:

16 As of the date of this order, the Agency has failed to comply with the Pre-Certification
17 Discovery Order and the Third Pre-Certification Discovery Order. Therefore, **before May**
18 **92022 at noon (PDT)**, I order the Agency to file, a submission, together with a supportive
19 declaration (*see* 28 U.S.C. § 1746 regarding language for declarations), showing good cause
20 why, as appropriate, the Agency failed to comply with item nos. 1-7 in the Third Pre-
21 Certification Discovery Order. Failure to provide such a showing of good cause, supported
22 by a declaration, may result in sanctions allowed under the authority of 29 C.F.R. §
23 1614.109(f)(3), up to and including a decision in the other party's favor. *Dionne W. v. Dep’t*
24 *of the Air Force*, EEOC Appeal No. 0720150040 (Mar. 27, 2018) (noting that before
25 imposing a sanction the administrative judge is required to issue an order to show cause to
26 the offending party).

27 May 2, 2022 Order to Show Cause (ER 7895 – 7897) at ER 7896 (emphasis in original).

28 The second action required by the Order to Show Cause was as follows:

⁵² In this order, Judge Peterson properly found that head Disability Program Manager Kendra Shock had the requisite knowledge, and that the Agency should make her available for deposition. As he observed, the Agency’s own documents stated that Ms. Shock was responsible for “strategic-level planning, policy development and oversight of ... the Air Force reasonable accommodation policy and Disability Program.” Second Pre-Certification Discovery Order at 2 (ER 4551).

1 Further, **before May 9, 2022 at noon (PDT)**, I order the Agency to comply with the Third
2 Pre Certification Discovery Order by serving the discovery materials to the Class Agent.
3 Failure to comply may result in sanctions up to and including a decision in the other party's
4 favor, in accordance with EEOC Regulations and Commission case law. *See* 29 C.F.R. §
5 1614.109(f)(3); EEO MD-110, Ch. 7 § III.D.10.

6 *Id.* (emphasis in original).

7 The Agency did not comply with either requirement of the Order to Show Cause and did not file
8 a motion or other request demonstrating good cause for its failure to comply with the Order to Show
9 Cause by the date specified. Indeed, the Agency **did not respond to the Order to Show Cause at all**.
10 As a result, Judge Peterson issued a Sanctions Notice, dated May 11, 2022, giving notice to the parties
11 that the Administrative Judge intended to issue sanctions. *See* Sanctions Notice (ER 7940).

12 As discussed below, it was not until the Agency's May 19, 2022 response to this sanctions notice
13 that the Agency made any attempt to justify its repeated and flagrant disregard for the Administrative
14 Judge's pre-certification discovery orders. *See* Complainants' May 16, 2022 Response to Sanctions
15 Notice (summarizing history of noncompliance) (ER 7941 – 7959); Agency May 19, 2022 Response to
16 Sanctions Notice (ER 7988 -8001). However, just as with the Agency's current appeal brief, this belated
17 attempt at justification contained demonstrable untruths and misrepresentations of the factual record. *See*
18 May 24, 2022 Supplemental Declaration of Sean Betouliere in Support of Complainants' Response to
19 Sanctions Notice at ¶¶ 2 – 11 (ER 8022 – 8025); *id.* at Exhibit A.

20 The Administrative Judge then issued its Order Granting Class Certification on October 13,
21 2022. Order (ER 1- 17). The Order Granting Certification ruled regarding sanctions as follows, “As I
22 have granted certification to the putative class based on the existing evidence in the record, the
23 contemplated sanctions of adverse inferences and considering matters established are mooted, and I
24 decline to impose sanctions at this time. Nevertheless, I remind the Agency that past noncompliance
25 may be considered where there are new instances of noncompliance.” Order at 13 (ER 13).

26 The Order Granting Class Certification also ordered the Agency to produce documents identified
27 during the deposition of Ms. Kendra Shock that had indisputably been withheld. *Id.* at 16 (ER 16). Just
28 as it had done with every prior discovery order in this matter, the Agency did not comply with this

1 portion of Judge Peterson’s order, necessitating yet another motion to compel and for sanctions that is
2 currently pending (which, once again, the Agency did not even bother to oppose). *See* Class Agents’
3 Motion to Compel Compliance with this Court’s October 13, 2022 Granting Class Agents’ June 14,
4 2022 Motion to Compel, and related documents (ER 8095-8106).

5 With each pre-certification discovery order, the Administrative Judge warned the Agency
6 regarding the consequences of non-compliance with its orders. The Agency’s failure to comply with
7 orders regarding pre-certification discovery interfered with the timely development of an adequate
8 record. The record demonstrates that the Agency simply at times refused to respond altogether, missed
9 ordered deadlines, and failed to even file oppositions to motions to compel, effectuating waiver.⁵³ The
10 Administrative Judge twice extended the pre-certification discovery deadline and the amended
11 certification submission deadline due to the Agency’s failure and refusal to comply with pre-
12 certification orders in this case. *See* April 12, 2022 Third Pre-Certification Discovery Order (ER 8107 –
13 8108) (first extension); May 2, 2022 Order to Show Cause (ER 7895 – 7897) (second extension).

14 The Agency attempts to miscast the facts and redirect the proper focus of this appeal, bemoaning
15 that it was subjected to some sort of unfair application of rules and orders. The factual record instead
16 demonstrates that the Agency was given every opportunity to respond to and comply with discovery
17 orders but refused to do so over and over again. Far from being treated unfairly by the Administrative
18 Judge, the Agency ultimately was not even sanctioned, despite its flagrant disregard for the Judge’s
19 discovery orders and its dilatory and abusive discovery tactics, which were plainly designed to frustrate
20 the development of a full record in an (unsuccessful) attempt to avoid class certification in this case.

21 **C. Judge Peterson did not abuse his discretion in ordering production of a class list,**
22 **but even if he had the error would be harmless, because he subsequently issued a protective**
23 **order limiting its use, and the assertedly-confidential information from it formed no part of**
24 **Complainants’ motion or the class certification decision.**

25 The Agency argues that Judge Peterson erred in ordering it to produce a list of civilian
26 employees who identify as deaf or have serious difficulty hearing (the “class list”), without regard to its
27 concerns that doing so would violate provisions of the Americans with Disabilities Act and/or the

28 ⁵³ *See* fn. 17 and 51, above (compiling motions and orders regarding history of noncompliance)

1 Rehabilitation Act concerning the confidentiality of information obtained during medical
2 examinations.⁵⁴ This argument fails for two distinct reasons, and it has no bearing on Judge Peterson’s
3 class certification ruling in any event, because information from the class list was not relied on in any
4 portion of Complainant’s motion or the ultimate decision.

5 First, as the record in this case establishes, and as Judge Peterson pointed out in his certification
6 order, the Agency **did not actually bring any specific privacy concerns to his attention** until long
7 after he ordered production of this information, despite having had multiple opportunities to do so. *See*
8 Order at 15 (“I reiterate that the Agency made no effort to advise this tribunal of any legal objections it
9 had until its May 19, 2022 filing. As explained in the Initial Processing Order, dated January 20, 2022,
10 “[R]equests to me shall be submitted as a motion.” The Agency did not file such a motion. It did not
11 oppose the Class Agent’s discovery motions. It did not respond to a show-cause order. Only after the
12 Sanctions Notice did the Agency seek to formally raise privacy concerns, which was followed by the
13 complained-of order that limited further production and implemented additional protections.”).

14 The Agency has repeatedly misrepresented the record on this point, including in sworn
15 declarations, and it continues to do so the same in its appeal brief. However, its false statements about
16 what was communicated to Judge Peterson and when are plainly refuted by the actual record. *See* May
17 24, 2022 Supplemental Declaration of Sean Betouliere in Support of Complainants Response to
18 Sanctions Notice at ¶¶ 2-9 (ER 8022 – 8024); *see also id.* at Exhibit A (CART Transcript of February 4,
19 2022 Hearing) (ER 8027 – 8044).

20 Second, if the Agency had actually bothered to articulate its asserted privacy concerns to Judge
21

22 ⁵⁴ The ADA and its regulations prohibit the disclosure of information about the medical condition
23 or history of an employee when that information is obtained through any medical examination or in
24 response to a medical inquiry allowed under the ADA. 42 U.S.C. § 12112(d)(3)(B); 29 C.F.R. §
25 1630.14(c). Both the statute and the regulations provide that such medical information must be collected
26 and maintained on separate forms and kept in separate medical files and “treated as a confidential
27 medical record.” 42 U.S.C. § 12112(d)(3)(B); 29 C.F.R. § 1630.14(c)(1). The statute and regulations set
28 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.*

1 Peterson, he would have been free to disregard them, because it is well-established that “the ADA's
2 prohibitions against disclosure of medical information do not amount to a ‘privilege’ that protects the
3 requested documents from disclosure.” *Scott v. Leavenworth Unified School District*, 190 F.R.D. 583
4 (D.Kan. 1999); *see also* Order at 13-14 (ER 13 – 14). As the court held in that case—which also
5 concerned a request for the information of similarly-situated disabled employees—“**Congress never**
6 **intended for a defendant charged with violating the ADA to use the ADA's confidentiality**
7 **provisions to impede a plaintiff's ability to discover facts that might help the employee establish**
8 **his/her claims.**” *Scott*, 190 F.R.D. at 587 (emphasis added); *see also* Complainants’ Renewed Motion
9 for Class Certification at § V(B)(1) (ER 302 – 305) (discussing additional cases); Order at 13 – 14 (ER
10 13 – 14) (same)

11 Moreover, even if Judge Peterson **had** somehow “erred” in ordering production of a class list,
12 this error would be harmless from a class certification perspective, because as soon as the Agency
13 (belatedly) brought its specific concerns to Judge Peterson’s attention, he issued a Limited Stay and
14 Protective Order prohibiting Complainant’s from contacting Air Force employees identified in the class
15 list, and requiring all information about them to be kept confidential. *See* June 1, 2022 Limited Stay and
16 Protective Order at 1-2 (ER 8048-8049) (“I issue a limited protective order that the Class Agent not
17 contact individuals whose names and contact information have been provided in response to the
18 discovery orders in this complaint. Additionally, the Class Agent must keep confidential the information
19 produced pursuant to the discovery orders in this complaint.”)

20 As Complainants explained in § V(B)(4) of their Renewed Motion for Class Certification (ER
21 306-307), immediately after receiving this June 1, 2022 “Limited Stay and Protective Order” and its
22 instruction not to contact individuals whose names and contact information had been provided in
23 response to discovery orders, counsel for Complainants suspended all contact with putative class
24 members, and cancelled scheduled phone calls. Complainants’ Renewed Motion for Class Certification
25 at 77-78 (ER 306-307); Betouliere Decl. ¶¶ 17-18 (ER 317). For this reason, counsel could not complete
26 two additional class member declarations they had already begun drafting, and could not continue
27
28

1 interviewing putative class members in an effort to obtain more. Betouliere Decl. ¶ 19 (ER 317).

2 In other words, Complainant’s Renewed Motion for Class Certification **did not rely** on any
3 assertedly confidential information contained in or derived from the class list. Nor did such information
4 form the basis for any portion of Judge Peterson’s order. *See* Order at 11-12 (ER 11-12) (finding
5 numerosity on the basis of Ms. Shock’s testimony and the Agency’s 2020 “Total Workforce Distribution
6 by Disability Status Report,” which identified over 700 Agency employees as being deaf or having
7 serious difficulty hearing); *id.* at 15 (ER 15) (noting that Class Agents ceased all efforts to rely on
8 information received from the class list upon receipt of the Limited Stay and Protective Order, and that
9 “that the Agency does not now oppose the numerical facts of over 2500 individuals self-identifying as
10 deaf or hard of hearing, or the information in its Total Workforce Distribution by Disability Status
11 Report that identifies over 700 employees as deaf or having serious difficulty hearing.”).

12 There is no reason to overturn Judge Peterson’s class certification decision based on his ordered
13 disclosure of information that 1) was not made in error, 2) was not relied on in any way, in the class
14 certification context, and 3) concerning which the Agency repeatedly failed to object. The Agency’s
15 arguments to the contrary should be rejected.

16 **D. Judge Peterson did not abuse his discretion in ordering the Agency to make its head**
17 **Disability Program Manager available for deposition, and the Agency’s refusal to designate**
18 **her as a “30(b)(6)” witness is irrelevant because the certification decision did not rely on**
any finding that her testimony “bound” the Agency.

19 EEOC Administrative Judges are “charged with the responsibility to assure full development of
20 an adequate record.”⁵⁵ To this end, 29 C.F.R. § 1614.109(f)(1) requires production of “such
21 documentary and testimonial evidence as the administrative judge deems necessary.” 29 C.F.R. §
22 1614.109(f)(1). Judge Peterson’s order that the Agency produce head Disability Program Manager
23 Kendra Shock for deposition—in a case credibly alleging centralized discrimination against the
24 Agency’s d/Deaf employees—was properly made pursuant to this authority.

25 As Complainants discuss in more detail below, that the Agency had not “designated” Ms. Shock
26 as a witness pursuant to Federal Rule of Civil Procedure 30(b)(6) is irrelevant, because “the federal

27 ⁵⁵ *Robinson v. Department of Navy*, EEOC DOC 05810091, 1981 WL 382968, at *3 (1981).
28

1 sector EEO administrative process is not bound by the Federal Rules of Civil Procedure.”⁵⁶ Moreover,
2 whether or not Ms. Shock was the Agency’s “designated” 30(b)(6) witness had no bearing on Judge
3 Peterson’s class certification decision, because he expressly **did not consider** her to be someone whose
4 testimony “binds” the Agency—as would have been the case for a 30(b)(6) designee in federal court.
5 Order at 4, n. 3 (ER 4).

6 On February 4, 2022, Judge Peterson issued a Pre-Certification Discovery Order “to ensure an
7 appropriate record upon which to determine whether the Class Agent can satisfy the prerequisites for
8 class certification.” Pre-Certification Discovery Order at 1 (ER 4501). This order authorize[d] the Class
9 agent to depose the Most Knowledgeable Designee(s) as to Topic Nos. 1-4 (limiting topic 4 to obstacles
10 identified regarding DEAF OR HARD OF HEARING accommodations and actions related thereto.)
11 Specifically, Judge Peterson ordered the Agency to identify its “most knowledgeable” designees to
12 testify regarding:

- 13 1. “YOUR⁵⁷ policies, practices, and/or procedures RELATING TO reasonable accommodation
14 for DEAF OR HARD OF HEARING civilian employees and applicants from January 1,
15 2018 to the present, including all related training, and any policies, practices, and/or
16 procedures RELATING TO provision [of] specific accommodations for DEAF OR HARD
17 OF HEARING civilians such as ASL Interpretation, CART, or videophones, and all records
18 or other DOCUMENTS RELATING TO the same.
- 19 2. The number of YOUR civilian employees or applicants for employment since January 1,
20 2018 who are DEAF OR HARD OF HEARING, and all related records.
- 21 3. YOUR processes, practices, or procedures for ensuring that required trainings, presentations,
22 videos, webcasts and the like are accessible to DEAF OR HARD OF HEARING civilian
23 employees.
- 24 4. YOUR initiative to “Reduce Bureaucratic Obstacles to Providing Reasonable
25

26 ⁵⁶ *Allen Bedynek-Stumm, Complainant*, EEOC DOC 0520110587, 2011 WL 5894136, at *3 (Nov.
15, 2011).

27 ⁵⁷ “YOUR” was defined as the “AGENCY” for purposes of these requests. *See* Claimaints’
28 February 2, 2022 Statement Regarding Pre-Certification Discovery at 3-4 (ER 4776-4777).

1 Accommodations for Individuals with Disabilities,” as noted in YOUR 2016 “Memorandum
2 for All Commanders” titled 2016 Diversity & Inclusion (D&I) Initiatives,” including all
3 “bureaucratic obstacles” identified regarding DEAF OR HARD OF HEARING
4 accommodations and actions related thereto, and any related records.”⁵⁸

5 In response, on February 18, 2022, the Agency designated five (5) officials at the bases at which
6 some Complainants experienced discrimination (Nellis Air Force Base, Joint Base San Antonio
7 Lackland and Randolph, and Offutt Air Force Base), along with a lower-level Agency “HR Specialist”
8 at the Pentagon – individuals who were put forth as having knowledge regarding each Class Agent’s
9 requests for reasonable accommodation at their respective bases at the “installation level,” but who
10 could reasonably be expected to have little knowledge regarding Agency-wide policies, procedures, and
11 practices.⁵⁹ See February 18, 2022 Agency Identification of ‘Most Knowledgeable’ Designees (ER 4504
12 – 4509).

13 As Judge Peterson noted in his March 7, 2022 “Second Pre-Certification Discovery Order,” his
14 original order requiring production of a deponent who could testify regarding Complainants’ four
15 narrowly-tailored pre-certification deposition topics, each of which contemplated production of someone
16 with “Agency-wide knowledge as appropriate, especially where the putative matter for certification is
17 addressed to the entire Agency.” Second Pre-Certification Discovery Order at 1 (ER 4550).

18 Judge Peterson properly found that head Disability Program Manager Kendra Shock had the
19 requisite knowledge, and that the Agency should make her available for deposition. As he observed, the
20 Agency’s own documents stated that Ms. Shock was responsible for “strategic-level planning, policy
21 development and oversight of ... the Air Force reasonable accommodation policy and Disability
22

23 ⁵⁸ See Claimants’ February 2, 2022 Statement Regarding Pre-Certification Discovery at § II(C) (ER
24 4481); February 4, 2022 Pre-Certification Discovery Order at § 2 (ER 4501-4502).

25 ⁵⁹ Specifically, the Agency designated the following five individuals: 1) Kathy Wiltse, Chief of
26 Civilian Personnel Flight at Nellis Air Force Base; 2) Irene Treviño, Chief of the Affirmative
27 Employment Section (Staffing) at Joint Base San Antonio Lackland; 3) Patty Rivera, Chief of the
28 Affirmative Employment Section at Joint Base San Antonio Randolph; 4) Shaylea Caris, Chief of
Employee and Management Relations at Offutt Air Force Base; and 5) Leslie O. Brown, an HR
Specialist (Employee Relations) with the Office of the Secretary of the Air Force at the Pentagon. See
Agency February 18, 2022 Response to Pre-Certification Discovery Order at 2-3 (ER 4505 – 4506).

1 Program.” Second Pre-Certification Discovery Order at 2 (ER 4551).

2 The Agency argues that Judge Peterson’s order requiring it to produce Ms. Shock for deposition
3 was issued in error, because it had not designated her as a “most knowledgeable” witness pursuant to
4 Federal Rule of Civil Procedure 30(b)(6). As the Air Force puts it, “the AJ and the Complainant
5 conveniently chose not to acknowledge the applicability of Federal Rule of Civil Procedure 30(b)(6)” to
6 the underlying EEOC proceeding. *See* Agency Appeal Brief at 15. This, however, is only proper,
7 because the Federal Rules of Civil Procedure **do not have any applicability** in this context: as the
8 Commission has repeatedly held, the “federal sector EEO administrative process is not bound by the
9 Federal Rules of Civil Procedure.” *Bedynek-Stumm v. Dep’t. of the Interior*, EEOC DOC 0520110587,
10 2011 WL 5894136, at *3 (Nov. 15, 2011); *see also, e.g., Shaw v. DOJ*, EEOC DOC 01A51519, 2006
11 WL 228804, at *3 (Jan. 20, 2006) (holding that the “EEOC AJ is not bound by the Federal Rules of
12 Civil Procedure or Evidence. The AJ is bound only to the EEOC Regulations”).

13 Notably, the Agency does not contest that Ms. Shock—who served as the head Disability
14 Program Manager of the Air Force for eight years—has first-hand knowledge relevant to this case. *See*
15 Shock Dep. at 7:13-15 (Agency Council’s statement at deposition that Ms. Shock “is a witness, of
16 course, who's been designated and who's been determined to be relevant to this proceeding, and
17 obviously, we have no objection to that”).

18 As discussed above, Judge Peterson was very clear that he did not consider Ms. Shock to be
19 someone who “‘binds’ the Agency with her testimony” (as would be the case for a “person most
20 knowledgeable” designee in federal court). Order at 4, fn. 3 (ER 4). Rather, he noted that “her role and
21 experience as the central Disability Program Manager is illustrative,” and that her testimony “has not
22 been opposed by any witness the Agency has designated that would bind it. For example, the individuals
23 at the local installations did not provide affidavits or other evidence that would contradict or
24 contextualize Shock’s testimony.” *Id.* In other words, Judge Peterson gave Ms. Shock’s un rebutted
25 testimony only the weight that it was naturally due, given her eight years of experience as head
26 Disability Program Manager for the Air Force, and her first-hand knowledge of relevant policies and
27
28

1 practices. *See id.*

2 For the above reasons, the Agency’s argument that it did not “designate” Ms. Shock as a 30(b)(6)
3 witness cannot serve as a basis for overturning Judge Peterson’s class certification decision. This
4 argument should be rejected.

5 **VII. Conclusion**

6 For the reasons stated above, Judge Peterson’s order granting class certification in this case
7 should be affirmed.

8
9 DATED: February 28, 2023

10
11 Respectfully submitted,

12
13 DISABILITY RIGHTS ADVOCATES

14 

15 _____
16 Sean Betouliere
17 Jinny Kim

18 LAW OFFICES OF WENDY MUSELL

19 /s/ Wendy Musell
20 Wendy Musell
21 Brittany Wightman Shamma

22 Attorneys for Complainants
23
24
25
26
27
28