UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT AARON WEILBACHER, Petitioner, v. JOHN M. McHUGH Secretary of the Army, Respondent.	No. 15-cv-651 (ABJ)

PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

Respondent's Motion to Dismiss should be denied in its entirety. This court has jurisdiction to consider the Petition, and each of Petitioner's claims is properly before this Court and adequately states a claim upon which relief can be granted.

Statement of the Case and Summary of the Facts

Overview. Petitioner Robert A. Weilbacher is currently serving as a medic in the United States Army. He is a conscientious objector, and is entitled at this time to an honorable discharge. He filed this Petition for a Writ of Habeas Corpus and Other Relief, because, after the Department of the Army's Conscientious Objector Review Board (DACORB) made a final decision determining that he was a conscientious objector in accordance with all applicable regulations, the Army failed to discharge him.

Pursuant to the published Army Regulation, AR 600-40, upon which Petitioner and all others relied, that DACORB decision was the Army's final decision, and at that point Petitioner had a legal right to an honorable discharge. But instead, the DACORB's final decision was countermanded by a Deputy Assistant Secretary of the Army, acting under purported authority

pursuant to two unpublished memoranda disclosed for the first time in Respondent's motion. (Respondent Exhs. 3 and 4).

Although there is good authority for the proposition that unpublished documents of this sort cannot supersede the military's own published regulations, *see Nolan v. United States*, 44 Fed. Cl. 49 (1999) (so holding in a very similar case), that issue is not before the Court on this motion.[1] However, as set forth in the Petition, the DACORB's decision was carefully reasoned, and was grounded on substantial and clearly convincing evidence of the depth and sincerity of Petitioner's conscientious objector beliefs. By contrast, and in direct violation of applicable law and regulation, the Deputy Assistant Secretary stated no reasons whatsoever for her decision.[2]

We respectfully refer the court to the Petition for a detailed presentation of the facts.

Facts Related to Jurisdiction. When the Petition was filed, on April 29, 2015, Petitioner was on leave, in transit on permanent change of station orders. His "losing command" was his duty station in Korea; he had not yet signed into his "gaining command," at Fort Campbell, Kentucky, nor was he yet due to sign in. *See* Motion to Dismiss at 12 (conceding that Petitioner reported for duty at Fort Campbell on May 6, 2015). For the period that Petitioner was on leave, he was considered a "Transient" pursuant to AR 600-8-6¶3-1*b*(2), "not available for duty while

[1] The Court's Minute Order of July 7, 2015, noted that the Court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." However, the Respondent has also moved to dismiss under Fed. R. Civ. P. 12(b)(6), *see* Respondent's Motion to Dismiss at 1 (ECF No. 9), and the question raised by the 12(b)(6) portion of the motion—whether the documents provided by the Respondent, which contradict the allegations of the Verified Complaint, should be credited instead of the allegations of the complaint—go not to the jurisdiction of the Court but to the merits of the case. It would not be proper for the Court to consider the evidentiary materials submitted by the Respondent on the 12(b)(6) portion of Respondent's motion to dismiss. *See* Fed. R. Civ. P. 12(d).

[2] The delegation memorandum explicitly instructs the Deputy Assistant Secretary as follows: "Should you disapprove an applicant's request, you shall ensure that the reasons for disapproval are made part of the record and provided to the applicant through command channels." For Petitioner, no such reasons were provided. *See* Exhibit C to Verified Petition (ECF No. 4-3).

en route to a new permanent duty station." Clearly, Petitioner was not at his new duty station while he was "transient." Until Petitioner arrived at his new duty station, Fort Campbell, he was either still under the command of his duty station in Korea, or under the general command of Army Headquarters in Washington, D.C.

Proceedings to Date. Petitioner filed his Petition on April 29, 2015. The Court issued an Order to Show Cause on May 8, and Respondent filed his Motion to Dismiss on June 16. On June 26, Petitioner moved to have Respondent file the Administrative Record. By Minute Order dated July 7, the Court denied Petitioner's motion, without prejudice.

ARGUMENT

I. This Court Has Subject-Matter Jurisdiction Over This Case

A. The Applicable Legal Standard

The Respondent challenges this Court's subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). "On a motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has subject-matter jurisdiction." *Runkle v. Gonzales*, 391 F. Supp. 2d 210, 220 (D.D.C. 2005). A court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction," *Jerome Stevens Pharmaceuticals, Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005), but other than as challenged by such evidence, a court "must accept as true the allegations in the complaint and consider the factual allegations of the complaint in the light most favorable to the non-moving party." *Erby v. United States*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006).

B. Respondent's Motion Does Not Address Subject-Matter Jurisdiction

The 12(b)(1) portion of Respondent's Motion to Dismiss (pages 11-15) argues only that Petitioner named the wrong respondent (pages 11-13 and 15), and that he filed in the wrong

district (pages 13-14). Even if those arguments were correct, neither of them addresses the subject-matter jurisdiction of this Court.

As the Supreme Court has made clear in a line of recent decisions, "the term 'jurisdictional' properly applies only to 'prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)' implicating that authority." *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). *See also, e.g., Arbaugh v. Y & H Corp*., 546 U.S. 500, 503 (2006) (explaining the distinction between "federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief."); *Brown v. Whole Foods Market Group, Inc*., ___ F.3d ___, 2015 WL 3634672 at *6 (D.C. Cir. No. 13-7156, June 12, 2015).

The Respondent explicitly concedes, in his motion, that federal courts have subject-matter jurisdiction over military servicemembers' claims that they are being unlawfully retained in the service. He specifically acknowledges that "[t]he writ [of habeas corpus] extends to 'members of the armed services who have been unlawfully detained, restrained or confined.'" Motion at 11 (quoting *Schlanger v. Seamans*, 401 U.S. 487, 489 (1971)). He could hardly do otherwise. *See Parisi v. Davidson*, 405 U.S. 34, 39 (1972) ("[T]he writ of habeas corpus has long been recognized as the appropriate remedy for servicemen who claim to be unlawfully retained in the armed forces."); *Aguayo v. Harvey*, 476 F.3d 971, 975 (D.C. Cir. 2007) ("For purposes of the federal habeas corpus statutes, members of the Armed Forces are in the custody of the United States government."). *See also Rumsfeld v. Padilla*, 542 U.S. 426, 434 n.7 (2004) (noting that the reference to "the district courts . . . within their respective jurisdictions" in 28 U.S.C. § 2241(a) is used "not in the sense of subject-matter jurisdiction of the District Court."). Because it ignores the controlling Supreme Court discussion of the point, the Respondent's entire

argument that this action should be dismissed for lack of subject-matter jurisdiction misses the mark.

Forty-six years ago, the Second Circuit carefully explained, in a conscientious objector habeas corpus case, that all federal district courts have subject-matter jurisdiction over such cases ("Undoubtedly subject matter jurisdiction exists"), and that the question of "which [particular district] court, or courts, of those which possess adequate personal and subject matter jurisdiction, may hear the specific matter in question" does not go to subject-matter jurisdiction. *United States ex rel. Rudick v. Laird*, 412 F.2d 16, 20 (2d Cir. 1969). That analysis remains correct.

No more need be said to defeat Respondent's misguided motion to dismiss for lack of subject-matter jurisdiction. Respondent's arguments go only to whether Petitioner has filed his Petition in the proper district and whether he has named the proper respondent. Those arguments will be discussed below.[3]

II. The Petition Was Properly Filed in this Court Against the Secretary of the Army

Respondent argues that the Petition should have been filed in Kentucky because Petitioner "is currently assigned to Fort Campbell" and his "immediate custodian" is his commander there. Motion at 12. Those facts do not support that conclusion, because at the time the Petition was filed Petitioner was not under the command or custody of anyone at Fort

[3] Respondent's argument that the filing of Petitioner's exhibits on May 29, 2015, somehow divests this Court of jurisdiction (Motion at 14), cites no authority, and makes no sense. Contrary to Respondent's unsupported assertion, the filing of the exhibits did not "perfect" the Petition. The exhibits were not essential but were filed simply as a convenience to the Court. The Court issued an Order to Show Cause, and the Petition was served on the Respondent, before the exhibits were filed. Respondent's argument that these exhibits were essential is particularly curious given Respondent's position that it is not necessary to file the administrative record. *See* ECF No. 10, ¶ 6.

Campbell, and his subsequent arrival there does not divest this Court of the jurisdiction that had already properly attached.

A. The Petition Was Properly Filed in this Court

In *Padilla*, the Court clarified that when a habeas corpus petitioner challenges his physical detention, the only correct respondent is the warden or immediate commander of the detention facility. 542 U.S. at 434-42; *accord Montagne v. Ericksen*, 2012 WL 868947 (D.D.C. March 14, 2012) (A.B. Jackson, J.) (applying that rule); *Gon v. D.C. Office of Att'y General*, 825 F. Supp. 2d 271, 275-77 (D.D.C. 2011) (A.B. Jackson, J.) (same). But that rule is inapplicable here for two independent reasons, both confirmed by the Supreme Court in *Padilla*.

First, Petitioner was in the legal custody of the Army overseas, in transit to his next duty station, when his Petition was filed. Verified Petition at ¶ 6. In such cases, the immediate custodian rule does not apply. *See Rumsfeld v. Padilla*, 542 U.S. 426, 435 n.9 ("We have long implicitly recognized an exception to the immediate custodian rule in the military context where an American citizen is detained outside the territorial jurisdiction of any district court."). Rather, the District of Columbia is the proper venue. *Id*.

Second, the immediate custodian rule also does not apply to a military petitioner who is not seeking release from physical confinement but rather release from his military obligation. *Padilla*, 542 U.S. at 438-39 (citing *Strait v. Laird*, 406 U.S. 341 (1972) (approving habeas jurisdiction in California, where conscientious objector's application for discharge and hearings thereon were held, even though his commanding officer was in Indiana; "the immediate custodian rule had no application because petitioner was not challenging any present physical confinement.")).

Respondent claims that because Petitioner was on leave when the Petition was filed, he was no longer attached to his command in Korea but was somehow in the custody of the commander at Fort Campbell. This argument is contrary both to fact and to applicable military regulations. When he filed his Petition on April 29, 2015, Petitioner had no connection to Fort Campbell. Army regulations make this clear. For the period that Petitioner was on leave, he was considered a "Transient" under AR 600-8-6¶3-1*b*(2), "not available for duty while en route to a new permanent duty station." Clearly, Petitioner was not at his new duty station while he was "Transient."

Respondent describes Petitioner's relationship to Korea as "tenuous," Motion at 14, but adjectives do not supersede Army regulations. A soldier is counted as part of the gaining command *as of the actual report date*, and not before. *See, e.g.*, AR 600-8-6 ¶3-3*a:* "Soldiers arriving at a permanent . . . gaining unit of assignment on or before the reporting date reflected in orders will be gained (assigned or attached as appropriate), and reported effective *on the actual date of arrival*." (emphasis supplied). Thus, Petitioner remained part of his losing command until his "actual date of arrival" at Fort Campbell. However "tenuous" his connection with Korea may have been, it was greater than his connection with Fort Campbell, as a matter of both fact and law, before he arrived there.

Consistent with these regulations, case law even before *Padilla* confirms, and the Army has previously agreed, that when a conscientious objector is on leave and is under orders to report to a new duty station, it is the old duty station that remains his "custodian" and has jurisdiction of his habeas petition. In *United States ex rel. Rudick v. Laird*, 412 F.2d 16 (2d Cir. 1969), Ruddick was drafted into the Army and thereafter claimed that he was a conscientious objector. His CO application was denied. He had had been stationed at Fort Ord, California, but

had departed Fort Ord on leave, with orders to report to the Army Overseas Replacement Center in Oakland, California, for assignment to Vietnam. Rudick went to New York and filed a habeas petition in federal court there seeking discharge as a conscientious objector. Contrary to its argument here, the Army argued that Rudick "while on leave, remained under the control of his commanding officer at Fort Ord, California." *Id*. at 21. As the Army argued in *Rudick*, Petitioner's physical location while on leave was not controlling. Until he was "gained" by Fort Campbell he was not in "custody" there. It is therefore clear that on April 29, 2015, he could not properly have filed his Petition in Kentucky.[4]

Where a petitioner is overseas, or in transit, when a petition is filed, venue in such cases is properly in the District of Columbia. *See, e.g., United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (court martial habeas petitioner detained in Korea properly filed in District of Columbia); *Eisel v. Secretary of Army*, 477 F.2d 1251, 1261 (D.C. Cir. 1973) ("[S]ervicemen stationed abroad have been freely granted the right to bring habeas actions in the District of Columbia even though their 'immediate custodians' were not in any sense located here."); *Smith v. Campbell*, 450 F.2d 829, 834 (9th Cir. 1971) (Navy argues that because petitioner is in Australia "he may properly file a new petition in the District Court for the District of Columbia"); *Gruca v. Secretary of Army*, 436 F.2d 239, 241 (D.C. Cir. 1970) ("Because [soldier seeking CO discharge] was under the interim jurisdiction of Army Headquarters in Washington, D.C.," suit was properly filed here); *Gherebi v. Bush*, 338 F. Supp. 2d 91, 93-94 (D.D.C. 2004) (habeas jurisdiction in District of Columbia appropriate for petition brought by parties confined overseas). When Petitioner filed his Petition, he remained either under the command of the

[4] Respondent relies on *Bishop v. Wynne*, 478 F. Supp. 2d 1 (D.D.C. 2006), but in *Wynne,* as in *Rudick*, both the petitioner's leaving command and his gaining command were in the continental United States and in the same state. *See Wynne*, 478 F. Supp. 2d at 1-2. It was therefore easy for the court to conclude that a habeas petition should be filed in that state.

Second Infantry Division in Camp Hovey, Korea, or—giving the benefit of the doubt to the Army, as in *Gruca*—"under the interim jurisdiction of Army Headquarters in Washington, D.C." *See* Verified Petition at ¶ 6. Either way, he followed the law and applicable precedent by filing in the District of Columbia.

As a fallback, Respondent suggests that the proper venue for a suit against Pentagon officials is in Virginia. Motion at 14. But this Court has consistently held that the military services can be sued here. *See, e.g.*, *Cohen v. U.S. Dept. of the Air Force*, 707 F. Supp. 12, 13 (D.D.C. 1989) ("The government argues that venue is improper because Cohen is suing the Air Force, which is located at the Pentagon, technically in Arlington, Virginia. However, the Court notes that the District of Columbia is a proper venue for suits against military defendants based in the Pentagon."); *accord Smith v. Dalton*, 927 F. Supp. 1, 5-6 (D.D.C. 1996); *Mundy v. Weinberger*, 554 F. Supp. 811 (D.D.C. 1982). Literally hundreds of cases have been filed and litigated against the Secretary of Defense and the Service Secretaries in this district. In the past calendar year alone, eight reported decisions of this Court involved Army Secretary McHugh as the defendant.[5]

B. This Court Does Not Lose Jurisdiction Because Petitioner Is Now at Fort Campbell

Respondent does not argue to the contrary, but to be clear: once jurisdiction properly attached in this Court, Petitioner's arrival at Fort Campbell and his acquisition of a new "custodian" does not divest this Court of jurisdiction. "[F]ederal courts have consistently held

[5] *Singh v. McHugh*, __ F. Supp. 3d __, 2015 WL 3648682 (D.D.C. Jun. 12, 2015); *Vargus v. McHugh*, __ F. Supp. 3d __, 2015 WL 1632623 (D.D.C. Apr. 9, 2015); *Saint-Fleur v. McHugh*, __ F. Supp. 3d __, 2015 WL 1209908 (D.D.C. Mar. 17, 2015); *Coburn v. McHugh*, __ F. Supp. 3d __, 2014 WL 7411859 (D.D.C. Dec. 30, 2014); *Barrett v. McHugh*, __ F. Supp. 3d __, 2014 WL 5499579 (D.D.C. Oct. 31, 2014); *Fulbright v. McHugh*, 67 F. Supp. 3d 81 (D.D.C. Sept. 9, 2014); *Spelman v. McHugh*, 65 F. Supp. 3d 40 (D.D.C. Aug. 22, 2014); *Ferguson v. McHugh*, 64 F. Supp. 3d 33 (D.D.C. Aug. 14, 2014).

that the court's jurisdiction does not cease to exist simply because the soldier may be involuntarily moved after the filing of the petition." *Jashinski v. Holcomb*, 482 F. Supp. 2d 785, 790 (W.D. Tex. 2006). *See also Miller v. Laird*, 474 F.2d 999, 1000 (5th Cir. 1973) (district court in Texas retained habeas jurisdiction after petitioner was transferred elsewhere); *Smith v. Campbell*, 450 F.2d 829, 834 (9th Cir. 1971) (reversing dismissal of habeas petition when "petitioner was involuntarily removed from the district after the filing of the petition").

C. The Petition Was Properly Filed Against the Secretary of the Army

Petitioner correctly named the Secretary of the Army as the Respondent. *See Rumsfeld v. Padilla*, 542 U.S. 426, 535 n.9 (2004). As already explained, Petitioner was not in the "custody" of any domestic commander when he filed his Petition, and in such cases the Secretary is the proper respondent. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (petitioner in Korea properly named Secretary of Air Force as respondent); *Burns v. Wilson*, 346 U.S. 137 (1953) (petitioner in Guam properly named Secretary of Defense as respondent).

Respondent relies on *Rooney v. Secretary of the Army*, 405 F.3d 1029 (D.C. Cir. 2005), for the proposition that the only proper respondent is a petitioner's "immediate custodian." Motion at 12. That, indeed, is the usual rule, and it was properly applied in *Rooney*, where Major Rooney was "an active duty officer, physically located at Fort Hood, Texas." 405 F.3d at 1032. But at the time the Petition in this case was filed, Petitioner Weilbacher had no "immediate custodian" *anywhere* in the United States—certainly not at Fort Campbell, where he had never set foot—and the exception to the usual rule for servicemembers who have no domestic custodian has been well established since at least 1955, *see United States ex rel. Toth v. Quarles, supra.*

Finally, Respondent curiously suggests that "[t]he Deputy Assistant Secretary of the Army (Review Boards)" might be the proper respondent, Motion at 15. But the Deputy Assistant Secretary (Review Boards) is a civilian lawyer; she is not the commander (or habeas "custodian") of any soldier. *See* http://www.asamra.army.mil/org_arba_bio.cfm. In any event, a suit against her in her official capacity would be a suit against the Army, *see, e.g., Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity"), and therefore could properly be filed in this Court.

III. All of Petitioner's Claims Are Properly Before this Court

Respondent also seeks dismissal of Petitioner's claim for relief in the nature of mandamus and his claims under the Administrative Procedure Act, the Religious Freedom Restoration Act, and the Fifth Amendment. Respondent argues generally that habeas corpus is the only relief available to Petitioner, and also argues that each of these claims fails to state a claim under which relief can be granted. Those arguments, which are advanced under Fed. R . Civ. P. 12(b)(6), are without merit.

A. Petitioner Is Not Seeking to Evade his Habeas Remedy

Most of the cases Respondent cites involve prisoners seeking post-conviction relief in criminal cases and are of dubious relevance, as Congress has regulated prisoners' access to the courts with great precision and disfavor. The military habeas cases cited by Respondent stand for the proposition that a servicemember cannot seek to evade the use of habeas corpus by filing other claims *instead*; they do not stand for the proposition that a servicemember cannot assert other legal rights while he pursues a petition for a writ of habeas corpus. *See, e.g., Rooney v. Secretary of the Army*, 405 F.3d 1029, 1031 (D.C. Cir. 2005) ("a party who can petition for a writ of habeas corpus may not *instead* seek a declaratory judgment.") (emphasis added). The

Petitioner here is not seeking to evade the use of habeas corpus or its particular limitations. He has filed the instant Petition seeking the Great Writ. He has not filed other claims *instead*.

To be sure, a party may not "avoid the requirement that he proceed by habeas corpus by adding a request for relief that may not be made in a petition for habeas corpus." *Id*. (quoting *Monk v. Secretary of the Navy*, 793 F.2d 364, 366 (D.C. Cir. 1986)). But, as in *Rooney* and *Monk*, that limitation assures that a servicemember cannot evade the personal jurisdiction and venue requirements, or the obligation to exhaust remedies, applicable to habeas petitions. The Petitioner here is not seeking to evade any of those requirements.

This Court can properly consider Petitioner's other claims within this habeas corpus proceeding, as other courts have done. *See, e.g., Dhiab v. Obama*, __ F. Supp. 3d ___, 2014 WL 4954458 (D.D.C. Oct. 3, 2014) (considering First Amendment motion for release of videotapes within habeas proceeding), *appeal dismissed*, 787 F.3d 563 (D.C. Cir. 2015). Properly, the relief sought under each of Petitioner's other claims is an order directing the Respondent to discharge the Petitioner from the Army—*i.e.,* a writ of habeas corpus.

B. Petitioner's Mandamus Claim Should Not Be Dismissed

The facts here present a classic case for mandamus relief: the applicable Army regulation provides that the DACORB makes the final decision on in-service applications for conscientious objector discharge; the DACORB decided that Petitioner is entitled to a conscientious objector discharge; the Army has refused to carry out its ministerial, non-discretionary duty to discharge him. QED.

On those facts, there is no reason why the Court cannot grant relief in the nature of a writ of mandamus within the parameters of this Petition for habeas corpus. *See United States ex rel. Schonbrun v. Commanding Officer, Armed Forces,* 403 F.2d 371, 374 (2d Cir. 1968) ("Whether

or not habeas corpus is available, the district court was free to treat the petition as one for mandamus") (Friendly, J.); *Al Odah v. United States*, 62 F. Supp. 3d 101, 110-11 (D.D.C. 2014) (assuming that court could grant mandamus relief in the context of a proper habeas petition); *cf. Zabala v. Hagee*, 2007 WL 963234 at *1, 2007 U.S. Dist. LEXIS 27423 at *1 (N.D. Cal. Mar. 29, 2007) (granting conscientious objector's petition for habeas corpus and denying petition for writ of mandamus as premature).

Respondent cites *Baptist Memorial Hospital v. Sebelius*, 603 F.3d 57 (D.C. Cir. 2010), where the court noted that mandamus relief is available where "there is no other adequate remedy available to plaintiff." *Id*. at 62. If habeas relief is adequate here, then mandamus will be unnecessary, as in *Zabala.* But that is not a reason to dismiss the mandamus claim at this early stage.

C. Petitioner's APA Claim Should Not be Dismissed

Petitioner's Administrative Procedure Act claim asserts that "[i]n countermanding DACORB's determination approving Petitioner's CO application, the Respondent's action was "unlawful, arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." Verified Petition at ¶ 104. At the time he filed, Petitioner did not know of the unpublished memoranda on which the Respondent now (improperly—*see* n.1, *supra*) relies.[6] Now that Petitioner knows about those memoranda, his APA claim continues, all the more so, to state a claim upon which relief may be granted. *See, e.g., Nolan v. United States*, 44 Fed. Cl. 49 (1999) (holding that an unpublished memorandum of the Secretary of Transportation purporting to

[6] Indeed, none of the decisionmakers and others involved in Petitioner's CO application process made any reference to the unpublished memoranda. For example, the DACORB Record of Proceedings makes no reference to them, and describes the DACORB as issuing a "decision memorandum" granting Petitioner conscientious objector status. (*See* Exhibit B to Verified Petition (ECF No. 4-2)).

delegate dismissal authority to the Commandant of the Coast Guard, contrary to a published non-delegation regulation, was invalid). Respondent moves to dismiss Petitioner's APA claim only on the ground that it is unnecessary, because "Petitioner has a cause of action under a petition for a *writ of habeas corpus*." Motion at 9 (italics in original). We certainly agree that the Petitioner has a cause of action for habeas corpus. But there is no rule that a party may assert only one claim, and the possibility that a claim may turn out to be unnecessary is not a reason to dismiss it under Rule 12(b)(6). This Court can consider Petitioner's APA argument within this habeas corpus proceeding.

D. Petitioner's RFRA Claim Should Not Be Dismissed

Petitioner's claim under the Religious Freedom Restoration Act (RFRA) is that "[t]he facts stated above [in the Petition] demonstrate that the that the Respondent has substantially burdened Petitioner's exercise of his religion in a manner that is not the least restrictive means of furthering a compelling governmental interest." Verified Petition at 23. The facts alleged in the Verified Petition include that "[i]f Petitioner is required to continue to serve in the United States Army [as he now has been for more than seven months after the DACORB's final decision], he will have to choose between participating in the military and following the deeply-held beliefs that guide his life, and he is likely to be subjected to trial by court-martial and to punishment for adhering to his sincere and legally-protected scruples," and that "Petitioner is suffering ongoing irreparable emotional harm … from his continuing military service." Verified Petition at ¶¶ 90-91.

Respondent moves to dismiss the RFRA claim on two grounds. First, that "RFRA does not substitute for a *habeas* petition." Motion at 10 (citing *Alamo v. Clay*, 137 F.3d 1366 (D.C. Cir. 1998)). As described by Respondent, *Alamo* was a case in which "a church attempted to use

RFRA to challenge the length of its pastor's criminal sentence." Motion at 10. It was thus a classic case of a party seeking to assert other claims *instead* of filing a habeas petition—and in a court that was not a proper habeas venue—and therefore was properly dismissed (indeed, it was also a case of a third party seeking to assert claims on behalf of a prisoner, and was dismissed for lack of standing). *See* 137 F.3d at 1367. But as already explained, the Petitioner here does not seek to bring a RFRA claim *instead* of filing a habeas petition. He has filed a habeas petition in a proper habeas venue. He seeks to raise his rights under RFRA as a legal basis for granting relief within that habeas action, and *Alamo v. Clay* casts no doubt on his ability to do so.

There is also no doubt that RFRA applies to the actions of the U.S. Army. This Court so held in *Singh v. McHugh*, 2015 WL 3648682 at *5 (D.D.C. Jun. 12, 2015) (A.B. Jackson, J.) (RFRA "specifies that 'the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States.'") (quoting 42 U.S.C. § 2000bb–2(1)). Petitioner is therefore entitled to assert a RFRA claim against the Army.

Respondent's second ground for moving to dismiss the RFRA claim is that Petitioner has "failed to plead sufficient facts." Motion at 10. But, as noted above, Petitioner has alleged that he is "suffering ongoing irreparable emotional harm . . . from his continuing military service" *because* the Army has refused to discharge him despite his showing of a sincere conscientious objection to all war, as confirmed by the Army's own final decision-making body. Petitioner's verified statement about his own emotional suffering is certainly a fact based on first-hand knowledge. And the DACORB, the Army's own final decision-making body, had no trouble concluding that Petitioner had demonstrated, by clear and convincing evidence, through the Army's own fact-finding and sincerity-determining mechanisms, that his scruples against all war

qualified as being based on "religious training and/or belief" within the meaning of the relevant statute and regulation. *See* Petition Exhibit B at 11-12 (ECF No. 4-2).

It requires only common sense to understand that forcing a conscientious objector to serve in the Army requires him "to engage in conduct that seriously violates [his] religious beliefs," which "easily satisfie[s]" the statutory requirement. *Holt v. Hobbs*, 574 U.S. ___, 135 S. Ct. 853, 862 (2015) (internal quotation marks omitted). In *Holt*, the Supreme Court observed that if Mr. Holt "contravenes [prison] policy and grows his beard, he will face serious disciplinary action. Because the grooming policy puts petitioner to this choice, it substantially burdens his religious exercise." *Id*. Likewise here, if Petitioner follows his conscience and leaves the Army, he will be subject to court martial as a deserter—certainly a more serious "disciplinary action" than that faced by Mr. Holt. It follows that the Army's retention of Petitioner substantially burdens his religious exercise.[7]

As the Supreme Court recently explained, RFRA's definition of the term "'exercise of religion' is not limited by the protection offered by the First Amendment," but is broad enough:

> to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc–5(7)(A). And Congress mandated that this concept "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." § 2000cc–3(g).

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___, 134 S. Ct. 2751, 2762 (2014). Petitioner has thus more-than-adequately alleged that the Army's refusal to discharge him is substantially burdening his exercise of his religion. At that point, the burden shifts to the government to "demonstrate[] that application of the burden to the person—(1) is in furtherance of a compelling

[7] *Holt* was decided under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq*. The religious exercise provision of RLUIPA "mirrors RFRA," and "allows prisoners 'to seek religious accommodations pursuant to the same standard as set forth in RFRA.'" *Holt*, 135 S. Ct. at 860.

governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Petitioner's RFRA claim cannot be dismissed under Rule 12(b)(6) where, as here, he has pleaded sufficient facts to shift the burden of proof to the Respondent.

E. Petitioner's Equal Protection Claim Should Not Be Dismissed

Petitioner's Equal Protection claim is that Respondent held Petitioner "to a different and more stringent legal standard than other CO applicants" by presuming his atheist pacifist beliefs to be "insincere, . . . as compared to COs with more traditional religious pacifist beliefs." Verified Petition at ¶ 107. It is black letter law that the Constitution "requires the state to be a neutral in its relations with groups of religious believers and non-believers." *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 18 (1947), and the Petition alleges that the Respondent violated this duty of neutrality.

The Petition contains ample detail to support this claim. For example, it shows that the Division Chaplain recommended disapproval of Petitioner's CO application on the ground that Petitioner, an atheist, was "angry at God." Even more telling, the Army's conscientious objector regulations on their face impose a heavier burden on non-religious applicants than on applicants with traditional pacifist religious beliefs. Pursuant to AR 600-40, a person whose conscientious objector beliefs are based on "ethical or moral convictions" must demonstrate the sincerity of his or her beliefs by showing that they were "gained through training, study, contemplation or other activity comparable in rigor and dedication to the processes by which traditional religious convictions are [presumed to be] formulated." ¶ 1-5*a*(5)*(b)*. By contrast, a person whose beliefs are religiously based does not have to meet this "rigor and dedication" test.

Accordingly, the Petition sets forth an ample factual and legal basis for Petitioner's Equal Protection claim. Respondent's dismissal argument is groundless.

CONCLUSION

Respondent's motion to dismiss the Petition under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) should be denied, and Respondent should be directed to file the Administrative Record forthwith.

A proposed order is filed herewith.

Respectfully submitted,

/s/ *Deborah H. Karpatkin*
Deborah H. Karpatkin
99 Park Avenue, Suite 2600
New York, New York 10016
(646) 865-9930
Fax (212) 277-5880
deborah.karpatkin@karpatkinlaw.com

/s/ *Arthur B.Spitzer*
Arthur B. Spitzer (D.C. Bar No. 235960)
American Civil Liberties Union
of the Nation's Capital
4301 Connecticut Avenue, N.W., Suite 434
Washington, DC 20008
(202) 457-0800
Fax (202) 457-0805
artspitzer@aclu-nca.org

/s/*Peter Goldberger*
Peter Goldberger
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
peter.goldberger@verizon.net

Counsel for Petitioner

July 24, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT AARON WEILBACHER,

Petitioner,

v.

JOHN M. McHUGH
Secretary of the Army,

Respondent.

No. 15-cv-651 (ABJ)

[Proposed]
ORDER

Upon consideration of Respondent's motion to dismiss, Petitioner's opposition thereto, and any reply, it is hereby

ORDERED that the motion is denied. It is further

ORDERED that Respondent is directed to file the complete, certified administrative record within seven days of the date of this Order.

Dated: _____, 2015

_____
Amy Berman Jackson
United States District Judge