Receipt number AUSFCC-8499469

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JEREMIAH BOTELLO, BRENT CHISHOLM, KYLE DAVIS, BILLIE ENDRESS, ALLEN HALL, JAMES HOLDEN, BRANDI KING, BRITON LIMBURG, LAUREN WILLIAMS, individually and on behalf of all others similarly situated, ***Plaintiffs*,** **v.** **THE UNITED STATES OF AMERICA,** ***Defendant*.**	Case No. 23-174C

CLASS ACTION COMPLAINT

Plaintiffs Jeremiah Botello, *et al.*, on behalf of themselves and a class of similarly situated persons, bring this class action against Defendant United States of America (the "Government") and allege as follows upon personal knowledge as to themselves and their own acts and experiences, and, as to all other matters, upon reasonable information and belief, including investigation conducted by their attorneys.

NATURE OF THE CASE

1. This is a military class action for backpay, along with ancillary relief for compensation (points), reinstatement, and other relief owed to current and former *active status* members of the Air and Army National Guard ("National Guard" or "Guardsmen") and Reserve component members of the Armed Forces ("Reserves")[1] who were dropped

[1] Those generally referred to as "active duty" forces constitute the "Regular" part of the armed forces; all others are part of the "Reserve" of the armed forces of the United States. *See* 10 U.S.C. §101(b)(12), (b)(13), and (b)(16). The "Reserve" of the United States includes each service branch's "Reserve" *and* the National Guard. See 10 U.S.C. §101(c)-(d). "Active duty" is a duty status defined by 10 U.S.C. §101(d).

from active status and denied pay and benefits as a consequence of not being "fully vaccinated" pursuant to the Department of Defense's unlawful ("DoD") August 24, 2021 COVID-19 vaccine mandate ("DoD Mandate"), *see* Ex. 1, Aug. 24, 2021 SECDEF Mandate Memo, and the DoD's November 30, 2021 supplemental directive for National Guard and Reserve. Ex. 2, Nov. 30, 2021 Supplemental Directive.

2. On December 23, 2022, the DoD Mandate was "rescind[ed]" by act of Congress. Section 525 of the FY2023 National Defense Authorization Act (the "2023 NDAA") was enacted into law by veto-proof majorities in the House of Representatives (350-80) and the Senate (83-11). Congress expressly chose the term "rescind", rather than more customary language such as "repeal", "amend", or "clarify", to direct the DoD and the courts that the rescission should be applied retroactively to render the DoD Mandate null and void *ab initio*; to eliminate any legal basis or authority for adverse personnel actions or to deny pay and benefits National Guard and Reserve members; and to restore all adversely affected service members to the position they would have been in the absence of the unlawful mandate and resulting adverse actions and denial of pay and benefits.

3. The November 30, 2021 Supplemental Directive directed that unvaccinated National Guard and Reserve members would no longer be paid for, or permitted to participate in, drills, training, or other duties performed. Subsequent guidance from the individual Services required all unvaccinated Reserve and National Guard members to be placed in a "no pay/no points" status and/or involuntarily transferred to inactive status starting January 1, 2022. The Army adopted similar requirements effective July 1, 2022, when 60,000 Army National Guard and Reserves were removed from active status.

4. On January 10, 2023, Secretary of Defense Lloyd Austin, III issued a memorandum rescinding ("Rescission Memo") the August 24, 2021 DoD Mandate and

the November 30, 2021 Supplemental Directive. *See* Ex. 3. In the Rescission Memo, Secretary Austin acknowledged the Congressional directive to apply the Rescission retroactively by, among other things, committing to correct all of the paperwork and adverse personnel actions resulting from non-compliance with the now voided DoD Mandate and orders issued pursuant to it.

5. The Rescission in Section 525 of the 2023 NDAA, along with the FY2023 Omnibus Appropriations Bill funding the 2023 NDAA, makes the 2023 NDAA a "money mandating" statute within the meaning of the Tucker Act and provides Plaintiffs and Class members a substantive right to monetary compensation for backpay and other monetary damages.

6. Specifically, the Rescission in the FY2023 NDAA and 2023 Appropriations Act constitutes a "money-mandating" statute for Plaintiffs; the class consists of National Guard and Reserve members (the "Rescission Class") who were dropped from active status, had orders and/or training cancelled, and/or lost pay, benefits, points, training, promotion, or any other emoluments due to their unvaccinated status, while they were ready, willing and able to perform their duties (and not physically disabled from doing so), and who satisfy one or more of the following conditions:

(A) Were Guardsmen federalized to perform active duty, Active Duty Operational Support ("ADOS"), Active Guard Reserve ("AGR"), or full-time National Guard Duty ("FTNGD") pursuant to 37 U.S.C. § 204 and were dropped from such duty;

(B) Were Reserve members on active status with active duty, AGR or ADOS orders pursuant to 37 U.S.C. § 204 and were dropped from such orders, training, or duty;

(C) Were Guardsmen or Reserve members in active status drilling, participating in annual training, and any other required training, instruction or duties pursuant to 37 U.S.C. §206(a) for which they were not paid because of their vaccination status; and/or

(D) Were Guardsmen or Reserve members in active status denied "points" they would have earned from being on active status and/or for participating in drills, training, or other duties needed to complete a satisfactory ("SAT") year for retirement, promotion, and service obligation purposes.

7. Plaintiffs and members of the Rescission Class have an unconditional right to payment, irrespective of whether the DoD Mandate and Supplemental Directive are deemed to be unlawful, resulting in wrongful discharge, or merely a legal nullity; with Congress' rescission, National Guard and Reserve members are entitled to backpay regardless of the right or wrong of the mandate.

8. Additionally, their fellow Guardsmen in *active status* who were wrongfully dropped to inactive status and denied participation in activities under 37 U.S.C. §206, if not entitled to backpay, are *at least entitled* to compensation in the form of points and corrective actions that the Secretary of Defense's Rescission Memorandum already acknowledges for members of the Armed Forces. In short, Congress could not have created a two-tiered system of military members by virtue of its actions to *rescind* the Mandate.

9. In the alternative, all members of the Rescission Class have claims to backpay under 37 U.S.C. § 204 or 37 U.S.C. § 206 for wrongful discharge, denial of training, cancellation of orders, non-payment for drills, training, or duty actually performed, or for constructive service due to the DoD's unlawful actions, to include:

(a) mandating mRNA gene therapy products that are not a vaccine as defined by the DoD's own controlling regulation, *see* DoD Instruction 6205.02, *DoD Immunization Program*, App. G (July 23, 2019) ("DoDI 6205.02"); or (2) the mandate of Emergency Use Authorization ("EUA") only products in violation of Congress' explicit statutory prohibition in 10 U.S.C §1107a, because the DoD did not have any products licensed by the Food and Drug Administration ("FDA") (*i.e.*, COMIRNATY® and SPIKEVAX®) while the DoD Mandate was in effect.

10. This alternative class of wrongfully discharged National Guardsmen ("Wrongfully Discharged Class") is co-extensive with the Rescission Class because each member of the Rescission Class was unlawfully ordered to take a non-vaccine, unlicensed/EUA, and unavailable COVID-19 vaccine. Each member of the Rescission Class was wrongfully discharged or denied points or pay due to non-compliance with this unlawful order, compliance with which was in any case impossible due to the unavailability of FDA-licensed vaccines.

11. The Wrongfully Discharged Class also includes all National Guard or Reserve Members whose religious accommodation requests ("RARs") ("Religious Accommodation Sub-Class") for the DoD Mandate were unlawfully denied in violation of the Religious Freedom Restoration Act ("RFRA"), the First Amendment's Free Exercise Clause, DoD Instruction 1300.17, and the Army and Air Force implementing regulations. Several federal district courts have found that the Armed Services' RAR processes, which resulted in approval rates of 0.00% to at most 1%, were mere "theater," and four of the six Armed Services have been enjoined on a service-wide basis (Air Force/Space Force and Air National Guard, Navy, Marine Corps), while there are multiple pending class actions for the remaining two (Army/Army National Guard and Coast Guard). This includes

several Plaintiffs and approximately several thousand members of the Rescission Class and Wrongfully Discharged Class.

JURISDICTION AND VENUE

12. This Court has jurisdiction under the Tucker Act, 28 U.S.C. §1491(a). The Tucker Act provides, in relevant part, as follows:

> (1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or *any Act of Congress* or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
>
> (2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

13. Plaintiffs' and the Class members' claims against Defendant are founded upon either, or both, a money mandating Act of Congress and/or executive department regulations, including (a) the FY2023 NDAA, Sec. 525, (b) the Military Pay Act, 37 U.S.C. § 204 and § 206, (c) the military retirement pay statutes, 10 U.S.C. §1370 and §1370a, and their implementing regulations, including (d) DoD Financial Management Regulation ("FMR") 7000.14-R, Vol. 07a; and/or (e) various executive department regulations, including National Guard Bureau Pay Regulation NGR 37–104 (Sept. 25, 2015).

14. The aforementioned statutes and regulations constitute an express waiver of the sovereign immunity of the United States of America and can fairly be interpreted as mandating compensation by the Government for damages sustained and/or creating a

substantive cause of action and/or right to recover money damages against the Government.

15. Venue is proper in this Court pursuant to 28 U.S.C. §1491(a)(1).

PARTIES

16. Plaintiff Jeremiah Botello is a Captain in the Arizona Army National Guard with 15 years of service as a special forces soldier and now as a military chaplain. Since 2015, CPT Botello has been on ADOS for six to nine months per year. He was ordered to FTNGD and ADOS from May 1, 2021 through December 16, 2021. Due to his unvaccinated status and the November 30, 2021 Supplemental Directive, he was removed from active status duty on September 13, 2021; his pending full-time ADOS orders to Task-Force COVID on border missions were cancelled; he was placed on "no points/no pay status" on December 17, 2021; and he has been unemployed since December 2021. Plaintiff Jeremiah Botello seeks backpay and other financial compensation of at least $200,000, restoration of points, correction of records, and any other appropriate relief.

17. Plaintiff Brent William Chisholm is a Lieutenant Colonel ("LtCol") in the Air Force Reserves with over 17 years of service. who was on active status and was ordered into full-time federal service from October 31, 2021 through September 30, 2022. Due to his unvaccinated status and the November 30, 2021 Supplemental Directive, he was removed from active status duty on 16 June 2022; his pending federal orders through September 30, 2022 were cancelled; he was placed on "no points/no pay status" on June 17, 2022; and he was prohibited from participating in drills, training, and other duties except minimum Annual Tour and Individual Drill Times from June 17, 2022 to the present. He did not receive 106 points for that year. His initial RAR was denied on February 16, 2022, and his RAR appeal was denied on February 16, 2022. LtCol Chisholm

seeks backpay and other financial compensation in excess of $40,000, retirement benefits in excess of $500,000, restoration of points, correction of records, and any other appropriate relief.

18. Plaintiff Kyle A. Davis is Master Sergeant ("MSG") in the Army Reserves with over 30 years of service. Due to his unvaccinated status and the November 30, 2021 Supplemental Directive, MSG Davis was placed on "no points/no pay status" from August 01, 2022 through January 31, 2023; he was placed into "Pending Loss" category; he was prohibited from participating in drills, training, and other duties from August 01, 2022 to February 01, 2023; despite this prohibition, he actually performed drill periods for which he was not paid; and he lost 32 points for FY2022, as a result of which he was denied a SAT year. Plaintiff Kyle A. Davis seeks backpay and other financial compensation in excess of $5,000, restoration of points, correction of records, and other appropriate relief.

19. Plaintiff Billie Endress is a Staff Sergeant ("SSG") in the United States Army Reserve with 12 years of service. SSG Endress was on active status and ordered into federal ADOS service from June 27, 2019 to May 31, 2021, and then again from October 30, 2021 through October 29, 2022. Due to his unvaccinated status and the November 30, 2021 Supplemental Directive, he was removed from theater on March 5, 2022 and from active duty ("REFRAD") May 18, 2022, and as a result, he lost 239 retirement points. SSG Endress seeks backpay and other financial compensation in excess of $50,000, restoration of points, and any other appropriate relief.

20. Plaintiff Allen S. Hall is a Senior Master Sergeant ("SMSgt") in the Air Force Reserve with 21 years of service. SMSgt Hall was on active status in the Air Force AGR and was ordered into federal service from April 2, 2019, through January 31, 2023. Due to his unvaccinated status and the November 30, 2021 Supplemental Directive, he was removed

from active status duty on April 3, 2022; his pending federal orders to Robins Air Force Base, Georgia were cancelled; he was forced to retire on April 3, 2022; he was prohibited from participating in drills, training, and other duties from December 15, 2022 to April 3, 2022; and he lost 304 points. His initial RAR was denied on October 27, 2021, and his RAR appeal was denied in November 2021. As a result of losing his AGR position, Plaintiff also lost his Air Reserve Technician (ART) position. Plaintiff Allen S. Hall seeks backpay and other financial compensation in excess of $100,000, restoration of points, correction of records, and any other appropriate relief.

21. Plaintiff James R. Holden is a Lieutenant Colonel ("LTC") in the Indiana Army National Guard with a total of 18 years of service. LTC Holden is a traditional or M-Day drilling soldier not on active duty. On April 4, 2022, he received active duty orders to serve from August 15, 2022 through June 30, 2023, including a nine-month deployment to Kosovo. On May 25, 2022, his active duty orders were curtailed. As a result, Plaintiff Holden lost 9.5 months of active duty military pay, allowances, and benefits, including approximately 285 military retirement points. Plaintiff Holden seeks backpay and other financial compensation in excess of $100,000, restoration of points, correction of records, and any other appropriate relief.

22. Plaintiff Brandi B. King is a LtCol (Colonel Select) in the Air Force Reserve with 19.5 years of service. LtCol King was on active status and ordered into federal active-duty service from October 1, 2018 through September 30, 2021, with follow-on order projected through September 30, 2023. Due to her unvaccinated status and her submission of an RAR, her follow-on Title 10 orders were terminated on September 28, 2021; she was removed from active status duty on September 30, 2021; she was placed on "no points/no pay status" on January 5, 2022; she was placed into the IRR on March 23,

2022; she was prohibited from participating in drills, training, and other duties from October 4, 2021 to the present (with exception of two Annual Tour days for the purpose of being punished); and she lost 730 points, as a result of which she was denied a SAT year. Her initial RAR was denied on October 25, 2021, and her RAR appeal was denied December 2, 2021. Lt Col King seeks backpay and other financial compensation in excess of $1,000,000, restoration of points, correction of records, retirement benefits, and any other appropriate relief.

23. Plaintiff Briton Limburg is a SSG in the Army National Guard with 11 years of service. SSG Limburg was on active status and was ordered into ADOS federal service from July 15, 2018, through September 30, 2022, with a renewal expected for FY 2023 during which he was slotted for multiple schools, including Pre-Ranger/Ranger training. Due to his unvaccinated status and the November 30, 2021 Supplemental Directive, his orders were curtailed as of July 21, 2022; he was prohibited from participating in drills, training, and other duties from November 1, 2022 through January 22, 2023, as a result of which he lost his Airborne jump status; he was twice dis-enrolled from the Military Intelligence Senior Leader's Course because of his unvaccinated status, making him ineligible to be promoted. SSG Limburg seeks backpay and other financial compensation of approximately $100,000, restoration of points, correction of records, and any other appropriate relief.

24. Plaintiff Lauren Williams is a Captain in the Air National Guard with eight years of service. She was on active status and ordered into full-time federal service for Expeditionary Medical Support ("EMEDS") training from November 25, 2021, through December 2, 2021. Due to her unvaccinated status and the November 30, 2021 Supplemental Directive, her EMEDS orders were cancelled; she was placed on "no

points/no pay status" from January 1, 2022 through the present; and she was prohibited from participating in drills, training, and other duties, including her July 2022 annual training. She lost 82 retirement points as a result of these actions. She attempted to drill in April 2022, a 2.5 hour drive from her home, but was sent home because she was unvaccinated. Captain Williams seeks backpay and other financial compensation in excess of $15,000, restoration of points, correction of records, and any other appropriate relief.

25. Defendant is the United States of America (the "Government"), a sovereign entity and body politic. Defendant is responsible for the actions of its various agencies, including, for example, the DoD, the National Guard Bureau ("NGB"), the Department of the Air Force ("Air Force"), the Department of the Army ("Army"), and the Department of the Navy ("Navy") (collectively, "Defendant Agencies").

26. Jointly, the DoD and the NGB manage and administer the National Guard of the United States, the federal structure that underlies, and pays, almost all of the "militia," including the various State National Guards.

STATEMENT OF FACTS

I. DOD COVID-19 MANDATE AND RESCISSION

A. COVID-19 Emergency Declaration and National Guard Pandemic Emergency Response

27. On March 20, 2020, President Donald J. Trump issued a Presidential Proclamation declaring the COVID-19 outbreak a national emergency ("COVID-19 Emergency Declaration"). *See* Proc. 9994, 85 Fed. Reg. 15337. This emergency declaration has been extended several times, including by President Biden, and remains in effect through the present.

28. Pursuant to the COVID-19 Emergency Declaration and related actions, President Trump federalized certain National Guard to perform full-time national guard duty ("FTNGD") for operational support for the COVID-19 response and authorized 100% federal funding for all FTNGD personnel. *See* Ex. 4, Congressional Research Service, *The National Guard and the COVID-19 Pandemic Response*, at 1 (Mar. 12, 2021). National Guard units from at least 48 states and Washington, DC have been federalized and federally funded for the COVID-19 response, *see id.*, totaling between 15,000 to 20,000 on FTNGD in late 2021, see id. at 2 (18,000 in December 2021), and early 2022. See Ex.5, Congressional Research Service, Report No. IN11867, *Military Response to Omicron and COVID-19: Federal Armed Forces and National Guard*, at 3-5 and Table 1 (FTNGD activated from January-February 2022) (Mar. 28, 2022).

B. DoD COVID-19 Vaccine Mandate and Supplemental Directive

29. On August 24, 2021, Secretary of Defense Lloyd Austin III issued the DoD Mandate, directing the Secretaries of the Military Departments "to immediately begin full vaccination of all members of the Armed Forces … or in the Ready Reserve, including the National Guard, who are not fully vaccinated against COVID-19." Ex. 1, Aug. 24, 2021 SECDEF Mandate Memo, at 1. The SECDEF directed that mandatory vaccination "will only use COVID-19 vaccines that receive full licensure from the [FDA], in accordance with FDA labeling and guidance." *Id.*

30. On November 30, 2021, Secretary Austin issued supplemental directives for Members of National Guard and Ready Reserve, *see* Ex. 2, which directed that unvaccinated National Guard members: (1) cannot "participate in drills, training or other duty conducted under title 32" unless otherwise exempted; (2) "no funding may be allocated for payment of duties performed under title 32" for unvaccinated National

Guard members; and (3) "[n]o credit or excused absence shall be afforded to members who do not participate in drills, training, or other duty due to" being unvaccinated. *Id.*

C. Air Force Reserve and Air National Guard Implementation

31. On December 7, 2021, the Air Force issued supplemental guidance implementing the DoD Supplemental Directive, effective January 1, 2022. *See* Ex. 6, Sec. of the Air Force, Supplemental Coronavirus Disease 2019 Vaccination Policy (Dec. 7, 2021) ("Air Force Supplemental Policy"). For the Air Force Reserve, unvaccinated members without a pending exemption request were to be placed in "no pay/no points" status and being involuntarily transferred to inactive status in the IRR, while those with a pending exemption were subject to the same sanctions immediately after final denial. *Id.*, Attach. 1 (Air Force Reserve). For the Air National Guard, any unvaccinated members were prohibited from participating in drills, training or other duty, and they would be involuntarily placed into the IRR. *Id.*, Attach. 2.

32. On January 1, 2022, the Air Force Reserve and Air National Guard implemented these requirements, transferring 2,500 unvaccinated active status Air National Guard into the IRR with the expectation that up to 6,000 would follow in coming months. *See* Rachel S. Cohen, *Unvaccinated Airmen Lose Pay, Benefits as Air National Guard Yanks Orders*, AIR FORCE TIMES (Jan. 6, 2022), available at: https://www.airforcetimes.com/news/your-air-force/2022/01/06/unvaccinated-airmen-lose-pay-benefits-as-air-national-guard-yanks-orders/ (last visited January 25, 2023).

D. Army Reserve and Army National Guard Implementation

33. On September 14, 2021, the Army issued Fragmentary Order 5 ("FRAGO 5") implementing the DoD Directive for active duty and reserve components. Among other

things, FRAGO 5 set a target of 100% vaccination for National Guard and Reserve Components by June 30, 2022. *See* Ex. 7, FRAGO 5, ¶ 3.D.14.

34. Effective July 1, 2022, over 60,000 unvaccinated Army reserve and National Guard were barred from service on July 1, 2022, by being transferred into the IRR, denying them pay, benefits, and points; prohibiting them from participation in drills and training and from taking on new orders. *See* Allie Griffin, *Army Bars More Than 60K National Guards, Reservists from Service, Cutting Off Pay*, NY POST (July 8, 2022), available at: https://nypost.com/2022/07/08/army-cuts-pay-from-over-60k-unvaccinated-national-guard-reserves/ (last visited January 25, 2022).

E. Congressional Reaction and Rescission

35. Congress took notice of the disastrous effects that the DOD Mandate had on military readiness and recruiting across the DOD, which became a major campaign issue in the 2022 mid-term elections. For example, on September 15, 2022, over 50 Members of Congress wrote to Secretary Austin to express "grave concern of the effect of the" DOD Mandate because, "[a]s a major land war rages in Europe our own military faces a self-imposed readiness crisis." Ex. 8, Sept. 15, 2022 Congressional Letter to Secretary Austin, at 1. In their view, the DOD "has abused the trust and good faith or loyal servicemembers by handling exemptions in a sluggish and disingenuous manner," making many wait "for nearly a year to learn if they will be forcibly discharged for their sincerely held religious beliefs or medical concerns." *Id.* at 2. They identify the DOD Mandate as the "primary cause of the [DOD]'s recruiting difficulties," which will result in the loss of at least 75,000 from the Army alone, *id.* at 2, and effectively "disqualifies more than forty percent of the Army's target demographic from service nationwide, and over half of the individuals in the most fertile recruiting grounds." *Id.* at 2.

36. On December 23, 2022, President Biden signed into law the 2023 NDAA, which was enacted by a vote of 83-11 in the Senate and 350-80 in the House. Section 525 of the 2023 NDAA directed Secretary of Defense Lloyd Austin, III to "rescind" the August 24, 2021 DoD Mandate. H.R. 7776, Pub. L. No. 117-263, 136 Stat. 2395 (2022).

37. Congress intentionally used the term "rescind", rather than "repeal", to instruct Secretary Austin and the courts that Section 525 must be applied retroactively. "Rescind" is derived from the Latin "rescission", which means "an annulling; avoiding, or making void; abrogation; rescission". BLACK'S LAW DICTIONARY at 1306 (6th ed. 1990). It is normally used in the context of "rescission of contract", which means to "abrogate, annul, avoid or cancel a contract;" "void in its inception"; or "an undoing of it from the beginning." *Id.* "Rescind" thus necessarily has retroactive effect and renders the rescinded contract, policy or rule void *ab initio*. Section 525 thus reflects the determination by veto-proof majorities of Congress that Secretary Austin's Mandate was void *ab initio*. Consequently, all adverse personnel actions and denial of pay and benefits taken as a result of non-compliance with an order that is now a legal nullity must be undone from the beginning and corrected.

38. Section 525 and its retroactive effect further demonstrates Congress' intended that both 2023 NDAA and the 2022 NDAA are "money-mandating" statutes. Both the 2022 NDAA and 2023 NDAA included full funding for pay, training, benefits, points and other financial compensation for all members of the Rescission Class for all of FY2022 and FY2023. The Section 525 Rescission removed any legal basis for Secretary Austin or the Defendant Agencies (*i.e.*, DoD, NGB, Air Force, Army or Navy) to withhold any such funding or compensation for non-compliance with a directive that has been rescinded. Similarly, the 2023 NDAA does not include any funding offsets to reflect the

reduction in funding resulting from Secretary Austin's directive and subsequent discharges, placement into inactive status, resulting therefrom for the members of the Rescission Class.

F. Rescission Implementation by Defendant Agencies

39. On January 10, 2023, Secretary Austin rescinded the August 24, 2021 DoD Mandate and the November 30, 2021 Reserve/National Guard Directives. *See* Ex. 3, SECDEF Rescission Memo. In the Rescission Memo, Secretary Austin acknowledged that Section 525 applies retroactively by ordering that all separations and discharges resulting solely from non-compliance with the DoD Mandate should be halted and that all adverse personnel actions and paperwork should be corrected. *Id.* at 1. Secretary Austin further directed the Service Secretaries to cease adjudication of RARs and medical or administrative exemptions. *Id.*

40. On December 30, 2023, the Army issued FRAGO 35 partially implementing the Section 525 Rescission by directing commanders to "suspend processing and initiation involuntary enlisted separation and officer elimination actions", but to "continue to adhere to all other previous published" Army COVID-19 polices. *See* Ex. 9, FRAGO 35, ¶ 1.R. FRAGO 35 expressly kept in place the November 30, 2021 Supplemental Directive regarding Army Reserve and Army National Guard personnel. *Id.*, ¶ 3.D.29. On January 5, 2023, the Army issued FRAGO 36 that appears to have rescinded this paragraph retaining the November 30, 2021 Supplemental Directive. *See* Ex. 10, FRAGO 36, ¶ 3.D.29.

41. On January 23, 2023, the Secretary of the Air Force issued a memorandum rescinding the Air Force's mandate and the December 7, 2021 Air Force Supplemental Policy. *See* Ex. 11, Jan. 23, 2021 Air Force Rescission Memo, at 1. The Air Force Rescission

Memo directed commanders to no longer separate Air Force personnel "solely on the basis of their refusal to receive COVID-19 vaccination if they sought accommodation on religious, medical, or administrative grounds" (but not those who had not), and that Air Force would update the records of these individuals to remove any adverse actions "solely associated with denials of such [exemption] requests." *Id.*

42. Neither Secretary Austin or any of the Defendant Agencies have acknowledged that the Section 525 Rescission necessarily applies to financial compensation due to members of the Rescission Class.

G. Backpay and Other Compensation Required by Rescission

43. Plaintiffs seek backpay and other compensation pursuant to the 2023 NDAA Rescission for: (1) removal from FTNGD, active status, and/or full-time duty; (2) transfer to inactive status or the IRR; (3) placement into "no points/no pay" status or similar denials of pay, benefits, or points; (4) cancellation of federal orders, schools, training, and removal from promotion lists; and (5) ban on participation in drills, training, or other duties.

44. Secretary Austin's creation of a new requirement for service in the U.S. military (the Covid-19 mRNA gene therapy vaccines) resulted in record losses in retention, shortfalls in recruiting, as noted ¶ 35 *supra*, and also a financial windfall for DoD by keeping money that had previously been appropriated for Plaintiffs and Class Members in prior fiscal year defense authorizations and the 2023 NDAA.

45. Congress' rescission creates no new financial outlay, but rather restores the Total Force to troop levels for which Congress has already budgeted by its unequivocal removal of the barrier to - and payment for - service in the armed forces that Secretary Austin's actions created.

II. PREVIOUS MANDATES AND INFORMED CONSENT LAWS

A. This Is Not the First Vaccine Rodeo – For Guard or Congress.

46. The DoD and the other Armed Services have, for nearly a century, treated service members for medical experiments and experimental drugs. *See, e.g.*, Dale Saran, *United States v. Members of the Armed Forces*, at 9-29 (2d ed., 2021). In response to these abuses, Congress has repeatedly exercised its plenary authority under Article I, Section 8, clauses 12-14 of the U.S. Constitution, to regulate the Armed Services to protect service members from these experiments, to recognize their human rights to informed consent, and to prohibit the military from ordering or mandating them to participate in medical experiments or to take experimental treatments.

47. Prior to the first Gulf War, the DoD sought to pretreat service members with several unlicensed ("investigational") new drugs, including pyridostigmine bromine ("PD") and a botulinum toxoid ("BT") vaccine, which under U.S. law could not be administered to military members without informed consent. The DOD successfully petitioned the FDA to establish a new rule waiving U.S. servicemembers right to informed consent. In numerous hearings in the aftermath of the Gulf War, the administration of these experimental drugs has been correlated with "Gulf War Illness" or "Gulf War Syndrome," which "debilitated over 174,000 service members." *See generally* Efthimios Parasidis, *Justice and Beneficence in Military Medicine and Research*, 73 Ohio St. L.J. 723, 732-39 & 759-60 (2012).

48. After extensive hearings in Congress across multiple committees documenting systemic, repeated failures by the DOD involving the health of America's all-volunteer force, including the ill-fated and disastrous anthrax vaccine, the U.S. Congress passed Title 10 U.S.C. §1107 in 1997, requiring that in any instance in which the

DOD sought to use any unlicensed, *investigational* product on members of the Armed Forces, no one short of the Commander-in-Chief could waive a servicemember's right to informed consent.

49. In the following years, as the anthrax vaccine program remained mired in failed FDA inspections and controversy, Congress continued to hold hearings on the subject and strengthened 10 U.S.C. §1107's protections and requirements for both the Secretary of Defense and Commander-in-Chief. Compare 10 U.S.C. §1107 (1997) with 10 U.S.C. §1107 (2000). *See also* 144 Cong. Rec. H. 4616 (June 16, 1998).

50. In 2003, the district court for the District of D.C. issued a preliminary injunction against the DoD for their violations of that statute, and in 2004 that same court issued a permanent nation-wide injunction prohibiting the DoD's anthrax vaccine mandate. *See Doe v. Rumsfeld*, 297 F. Supp. 2d 119 (D.D.C. 2003)("*Rumsfeld I*"), *modified sub nom. John Doe No. 1 v Rumsfeld*, 341 F. Supp. 2d 1 (D.D.C. 2004) ("*Rumsfeld II*"), *modified sub nom. John Doe No. 1 v. Rumsfeld*, 2005 WL 774857 (D.D.C. Feb. 6, 2005) ("*Rumsfeld III*").

51. In the middle of that litigation in 2004, and in part as a result of the Anthrax Letter Attacks that occurred the week after 9/11, Congress passed the Project BioShield Act, the first version of the current EUA statute, 21 U.S.C. §360bbb-3. Shortly after, Congress also passed another mirror image statute for the protection for servicemembers' informed consent rights applicable to the EUA statute, 10 U.S.C. §1107a.

52. Much like its predecessor statute that was passed in 1997, 10 U.S.C. §1107a states in pertinent part:

> (a) Waiver by the President —
>
> (1) In the case of the administration of a product authorized for

> emergency use under section 564 of the Federal Food, Drug, and Cosmetic Act to members of the armed forces, the condition described in section 564(e)(1)(A)(ii)(III) of such Act and required under paragraph (1)(A) or (2)(A) of such section 564(e), designed to ensure that individuals are informed of an option to accept or refuse administration of a product, may be waived only by the President only if the President determines, in writing, that complying with such requirement is not in the interests of national security.

10 U.S.C. § 1107a.

53. After the EUA statute's passage, the FDA granted the first ever Emergency Use Authorization for the anthrax vaccine. Both the DOD and FDA then jointly filed an emergency petition in the D.C. District Court to modify the injunction already in place against the anthrax vaccine program in order to allow the vaccine to be administered to servicemembers under the EUA authorization, but *solely on a voluntary basis* – in *Rumsfeld III*. *See Rumsfeld III*, 2005 WL 774857, at *1 ("ORDERED that the Court's injunction of October 27, 2004, is modified by the addition of the following language: 'This injunction, however, shall not preclude defendants from administering AVA, on a *voluntary* basis, pursuant to the terms of a *lawful* emergency use authorization ("EUA")[.]'")(emphasis in original). *See also* "Authorization of Emergency Use of Anthrax Vaccine Adsorbed for Prevention of Inhalation Anthrax by Individuals at Heightened Risk of Exposure Due to Attack with Anthrax: Conditions of Authorization," 70 Fed. Reg. 5452-55, (Feb. 2, 2005).

54. In 2008, the DoD issued DoD Instruction 6200.02 ("DoDI 6200.02") the currently effective regulation governing the mandate of EUA products. Consistent with the EUA statute, 10 U.S.C. § 1107a, and the nation-wide consent decree in *Rumsfeld III*, the instruction requires that the DoD include an option to refuse an EUA product.

> E3.3 Implementation of EUA. DoD Components using medical products under an EUA shall comply with all requirements of section 564 of

> Reference (d), FDA requirements that are established as a condition of granting the EUA (except as provided in section E3.4 concerning a waiver of an option to refuse), guidance from the Secretary of the Army as Lead Component, and instructions from the ASD(HA).
>
> E3.4. Request to the President to Waive an Option to Refuse. In the event that an EUA granted by the Commissioner of Food and Drugs includes a condition that potential recipients are provided an option to refuse administration of the product, the President may, pursuant to section 1107a of Reference (e), waive the option to refuse for administration of the medical product to members of the armed forces. Such a waiver is allowed if the President determines, in writing, that providing to members of the armed forces an option to refuse is not in the interests of national security. Only the Secretary of Defense may ask the President to grant a waiver of an option to refuse.

DoDI 6200.02, *Application of Food and Drug Administration (FDA) Rules to Department of Defense Force Health Protection Programs*, ¶¶E3.3, 3.4 (Feb. 27, 2008).

55. DoDI 6205.02 is the extant governing regulation for routine military immunizations. This instruction defines a "vaccine" and "vaccination" as:

> **vaccination**. The administration of a vaccine to an individual for inducing *immunity*.
>
> **vaccine.** A preparation that [1] contains one or more components of a ***biological agent*** or toxin ***and*** [2] induces a protective immune response ***against that agent*** when administered to an individual.

DoDI 6205.02, ¶ G.2 ("Definitions") (emphasis added).

56. Army Regulation 40-562 "Immunization and Chemoprophylaxis for the Prevention of Infectious Diseases" (AR 40-562)[2] implements and complements DoDI 6205.02. The list of required vaccines for members of the military is found in App. D. AR 40-562 was signed on Oct. 7, 2013, went into effect on Nov. 7, 2013, and remains in effect

[2] This document is an all-service publication and has an equivalent name for each of the applicable services. We have chosen to use the Army designation throughout for ease, but these arguments apply equally under AFI 48-110, BUMEDINST 6230.15B, COMDETINST M6230.4G. *See*, AR 40-562, ¶2-6a.(1)(b).

today. It applies to all branches of the military. The Regulation also applies whether the proposed COVID-19 vaccines Defendant DoD seeks to administer to Plaintiffs and the class are "Investigational New Drugs" as defined in 21 CFR 56.104(c) ("IND"), an EUA issued under 21 USC § 360bbb-3, or a fully approved FDA vaccine for other illnesses such as chicken pox, measles, or mumps, for example.

B. Not Enough Guinea Pigs; From Volunteer to Volun-Told

57. In December 2020, after two months of clinical testing, the FDA granted the first EUAs for COVID-19 vaccines developed by Pfizer-BioNTech and Moderna.

58. In March 2021, March of 2021, members of Congress sent a memorandum to President Biden asking him to invoke 10 U.S.C. §1107a to "waive servicemembers right to informed consent" to refuse unlicensed, EUA vaccines because of low voluntary vaccine participation.

> Seven Democratic members of Congress signed the letter, including House Rules Committee Chairman Rep. James McGovern and House Armed Services Committee members Rep. Jimmy Panetta, Rep. Marilyn Strickland, Rep. Sara Jacobs and Rep. Marc Veasey…
>
> The Department of Defense has said publicly that the opt-out rate among service members eligible to be vaccinated is about 33%, but last week military officials and service members CNN spoke with from several bases and units across the country suggest the current rejection rate may be closer to 50%.

See Ellie Kaufman, *Lawmakers ask Biden to issue waiver to make Covid-19 vaccination mandatory for members of military*, CNN (Mar. 24, 2021), available at: https://www.cnn.com/2021/03/24/politics/congress-letter-military-vaccine/index.html (last accessed, Jan. 25, 2023).

59. In earlier reporting, State Guard Commanders openly admitted that the numbers were far worse for the National Guard than for the active duty force.

> The lower rate is more widespread than a single unit or region.
>
> The Adjutant General of the Nebraska National Guard said earlier this month the vaccine had "overall about a 30% take rate." The Washington National Guard had a marginally better 39% opt-in rate, according to the state's Adjutant General.
>
> There is also a stark difference between the enlisted and officer rate of accepting the vaccine, according to one source who spoke on condition of anonymity. While only 30% of officers opted out of the vaccine in the source's covered region, more than 55% of enlisted service members turned it down. Enlisted service members make up more than 80% of the military.

See Oren Liebermann and Ellie Kaufman, *US Military says a third of troops opt out of being vaccinated, but the numbers suggest it's more*, CNN (Mar. 19, 2021), *available at*: https://www.cnn.com/2021/03/19/politics/us-military-vaccinations/index.html (last accessed Jan. 25, 2023).

C. FDA Licensure and Interchangeability Determinations

60. On August 23, 2021, the FDA approved the Biologic License Application ("BLA") to Pfizer and BioNTech for the original "Purple Cap" formulation of COMIRNATY®. *See* FDA, Aug. 23, 2021 Purple Cap COMIRNATY® BLA Approval Letter at 1-2, available at: https://www.fda.gov/media/151710/download (last accessed Feb. 3, 2022).

61. Also on August 23, 2021, the FDA re-issued the EUA for the Pfizer COVID-19 vaccine. *See* Ex. 12, Aug. 23, 2021 Pfizer/BioNTech EUA Re-Issuance Letter. This letter stated that the EUA for a different, "legally distinct" mRNA injectable would remain in place because the licensed product COMIRNATY was "not available… in sufficient quantities" for the eligible population. *Id.* at 5 n.9.[3]

[3] In fact, it appears that the Purple Cap COMIRNATY® approved by the FDA was never manufactured or marketed in the United States. The FDA-approved product labeling for Purple Cap COMIRNATY® list its "Marketing Start Date" and "Marketing End Date"

62. The FDA's August 23, 2021 EUA Re-Issuance Letter also included a footnote claiming that:

> The licensed vaccine [COMIRNATY] has the same formulation as the EUA-authorized vaccine [BNT162b2] and the products can be used interchangeably to provide the vaccination series without presenting any safety or effectiveness concerns. The products are legally distinct with certain differences that do not impact safety or effectiveness.

Id. at 2 n.8. This footnote is significant because "interchangeability" is a statutorily defined term in the Public Health Safety Act ("PHSA"). The PHSA requires the manufacturer to separately apply for, and receive, FDA approval to treat a product as interchangeable with another licensed product.[4]

63. Neither the manufacturers (Pfizer and BioNTech) nor the FDA followed these statutorily mandated requirements to make an "interchangeability" finding or

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both as "23 Aug 2021." *See, e.g.*, Archived FDA Approved Labeling and Package Insert for COMIRNATY, available at: https://dailymed.nlm.nih.gov/dailymed/archives/fdaDrugInfo.cfm?archiveid=595377#section-13 (last visited January 25, 2023). On September 13, 2021, Pfizer subsequently confirmed that "it does not plan to produce any product with these new NDCs [*i.e.*, 0069-1000] and labels over the next few months." *See* Sept. 13, 2021 Pfizer Announcement, available at: https://dailymed.nlm.nih.gov/dailymed/dailymed-announcements-details.cfm?date=2021-09-13 (last accessed Feb. 6, 2023). A review of the NIH site confirms that there are no active National Drug Codes ("NDC") for the "Purple Cap" formulation. The referenced package insert was obtained from the NIH labeling archives; there are no currently effective package inserts for Purple Cap COMIRNATY®.

[4] A biologic product's *interchangeability* with another biologic product is governed by federal statute. 21 U.S.C. § 262(i)(3)("The term 'interchangeable' or 'interchangeability', in reference to a biological product that is shown to meet the standards described in subsection (k)(4), means that the biological product may be substituted for the reference product without the intervention of the health care provider who prescribed the reference product."). Subsection (k)(4) is just one among a long list of requirements under Section 262(k) that must be met before any "biologic product" can be deemed "bioequivalent" to, and thus "interchangeable with," an already licensed "reference product," including terms of years of exclusivity for the reference product itself. *See* 42 U.S.C. §§ 262(k)(6) and (k)(7).

determination. In related litigation the FDA has acknowledged that it has not made a "statutory" interchangeability determination.

64. On January 31, 2022, the FDA approved the BLA for Moderna's SPIKEVAX® COVID-19 vaccine. *See* FDA, Jan. 31, 2022 SPIKEVAX® BLA Approval Letter, available at: https://www.fda.gov/media/155815/download (last accessed Feb. 3, 2023).

65. Also on January 31, 2022, the FDA re-issued the EUA for Moderna's unlicensed COVID-19 vaccine because the FDA-licensed product not available in sufficient quantities. Ex. 13, Jan. 31, 2022 Moderna EUA Re-Issuance Letter. The Moderna EUA letter similarly acknowledged that the FDA-licensed SPIKEVAX® and EUA product were "legally distinct" and asserted that the unlicensed Moderna EUA COVID-19 vaccine "can be used interchangeably" with the FDA-licensed SPIKEVAX®. *See id*. at 3 n.

D. DoD Mandate of Unlicensed EUA Products

66. On August 24, 2021, Secretary Austin issued the DoD Mandate, *i.e.*, one day after FDA approval of Purple Cap COMIRNATY® and the re-issuance of the EUA for the unlicensed Pfizer/BioNTech COVID-19 vaccine due to the unavailability of the only FDA-licensed product, Purple Cap COMIRNATY®. As explained above, the DoD Mandate stated that mandatory vaccination "will only use COVID-19 vaccines that receive full licensure from the [FDA], in accordance with FDA labeling and guidance." Ex. 1, Aug. 24, 2021 SECDEF Mandate Memo, at 1.

67. The DoD has admitted in sworn testimony and official records filed in related litigation that the DoD did not have any FDA-licensed COVID-19 vaccines when the DoD Mandate or the November 30, 2021 Supplemental Directive was issued. The DoD

has consistently asserted that EUA vaccines may be mandated, and it has admitted it has mandated EUA-labeled vaccines. *See, e.g., Doe #1-#14 v. Austin,* 2021 WL 5816632, at *5 (N.D. Fla. Nov. 12, 2021) (defense counsel for Defendant Agencies admitting that they were "mandating vaccines from EUA-labeled vials").

68. Because there was no COMINARTY® available, all DoD units began using and mandating the unlicensed, EUA Pfizer/BioNTech COVID-19 vaccine based on the DoD's determination that the EUA vaccine and the licensed vaccine were "interchangeable" and could be mandated.

69. In a September 14, 2021 Memorandum, a DoD official relied on the FDA's footnote in directing all DoD components to treat the unlicensed, EUA version "as if" it were FDA-licensed and went well beyond the FDA's guidance in asserting that the licensed and unlicensed products are legally interchangeable for the purposes of the mandate.

> Per FDA guidance, these two vaccines are "interchangeable" and DoD health care providers should "use doses distributed under the EUA to administer the vaccination series as if the doses were the licensed vaccine.
>
> Consistent with FDA guidance, DoD health care providers will use both the Pfizer-BioNTech COVID-19 vaccine and the Comirnaty COVID-19 vaccine interchangeably for the purpose of vaccinating Service members in accordance with Secretary of Defense Memorandum.

Ex. 14, Asst. Secretary of Defense Memorandum "Mandatory Vaccination of Service Members Using the Pfizer-BioNTech COVID-19 and COMIRNATY COVID-19 Vaccines," (Sept. 14, 2021) ("Pfizer Interchangeability Directive").

70. On May 3, 2022, due to the unavailability of FDA-licensed SPIKEVAX®, the DOD issued the same directive that EUA Moderna COVID-19 vaccines were to be used interchangeably with, and "as if," they were the FDA-licensed and labeled Moderna

Spikevax vaccine. See Ex. 15, May 3, 2022 DOD Memo, at 1 ("Moderna Interchangeability Directive").

71. Only the FDA has the statutory authority to make a determination of legal interchangeability, which the FDA has expressly disclaimed having done. The Assistant Secretary of Defense for Health Affairs is an employee of the Department of Defense without any authority to declare an unlicensed, EUA biologic product *interchangeable* with an FDA-licensed one, and therefore to make such an EUA product mandatory for members of the military. Even the President cannot do so by three separate and unequivocal acts of Congress. *See* 10 U.S.C. §1107a, 42 U.S.C. §262, and 21 U.S.C. §360bbb-3.

E. Plaintiffs and Class Members Have Been Wrongfully Discharged Despite Unavailability of Any FDA-Licensed Vaccines.

72. DoD and the Armed Services have consistently misrepresented that they had FDA-licensed COVID-19 vaccines available to service members when they did not and that unlicensed EUA vaccines are legally interchangeable with FDA-licensed vaccines.

73. Defendants do not currently, and have never had any, FDA-licensed COMIRNATY® COVID-19 vaccines. To the extent that they ever did obtain COMIRNATY® COVID-19 vaccines, (1) the products were obtained insufficient quantities to fully vaccinate all putative class members and (2) these products are misbranded, expired, and/or adulterated and cannot be mandated.

74. To the extent that Defendants obtained any SPIKEVAX® COVID-19 vaccines, (1) the products were obtained insufficient quantities to fully vaccinate all

putative class members and (2) these products are misbranded, expired, and/or adulterated and cannot be mandated.

75. In related litigation, the DoD and Armed Services have admitted that they did not have any FDA-licensed vaccines—which they refer to as "Comirnaty-labeled" and "Spikevax-labeled" products—until at the earliest June 2022 for the "Comirnaty-labeled" products and September 2022 at the earliest for "Spikevax-labeled" products. It is therefore undisputed that there were no FDA-licensed vaccines available before those dates and that Defendants were mandating EUA vaccines, in violation of 10 U.S.C. § 1107a, at least through that date.

76. Investigations by military whistleblowers and filings in related proceedings demonstrate that the nearly 50,000 doses of "Comirnaty-labeled" vaccines were: (1) are in fact unlicensed EUA "monovalent" products misbranded as FDA-licensed because they were not manufactured at an FDA-licensed facility, as required by the PHSA and FDA regulations (the "FW Lots"); (2) are in fact unlicensed, EUA "bivalent" vaccines (the "G Lots"); and/or (3) are expired or adulterated products that may not be administered, much less mandated, to anyone.

77. The small number (approx. 770) of SPIKEVAX® doses obtained would have been sufficient to vaccinate less than 1% of class members. In any case, all SPIKEVAX® in DoD's possession as of January 23, 2023, has now expired and can no longer be ordered. *See* Ex. 16, Jan. 23, 2023 Defense Health Agency Guidance, at 1.

F. Backpay and Other Compensation Due to Wrongful Removal from Active Status or Full-Time Duty; Denial of Pay, Benefits,

Points, or Training; Transfer to IRR; and Ban on Participation in Drills, Training, or Other Duties.

78. Any Plaintiffs or Class Members who were removed from active status, discharged, transferred into the IRR, denied pay, points or benefits, or suffered any other adverse financial consequences necessarily have a claim for backpay under the applicable provisions of the Military Pay Statute, 37 U.S.C. § 204 or § 206, for the time of the adverse action through the date when the military first made an FDA-licensed product available to them.

79. Given the unavailability of any FDA-licensed vaccines for the entire period, they are owed backpay and other financial compensation from the date of wrongful discharge or denial pay, benefits, points, promotions, etc. through the present.

III. DEFENDANT AGENCIES' RELIGIOUS ACCOMMODATION PROCESS

A. The Religious Freedom Restoration Act

80. RFRA states that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). If the Government substantially burdens a person's exercise of religion, it can do so only if it "demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

81. The DoD has implemented RFRA through DoD Instruction 1300.17, *Religious Liberty in the Military Services* (Sept. 1, 2020). Each of the Services has implemented RFRA and DoD 1300.17's requirements in their own regulations. *See* Dept. of the Air Force Instruction, 52-501, *Religious Freedom in the Department of the Air*

Force (June 23, 2021); Dept. of the Navy, MILPERSMAN 1730-020 (Aug. 15, 2020); Dept. of the Navy, BUPERSINST 1730.111A (Navy and Marine Corps).

B. Defendant Agencies' Sham Religious Accommodation Process

82. The DoD and Armed Services have implemented a process for religious accommodations that courts have described as a "sham," *Navy SEAL 1 v. Biden,* No. 8:21-cv-2429, 2021 WL 5448970 (M.D. Fla. Nov. 22, 2021), and a "quixotic quest" that amounts to little more than "theater." *Air Force Officer v. Austin*, --- F.Supp.3d ---, 2022 WL 468799, at *1 (M.D. Ga. Feb. 15, 2022) (*quoting Navy SEALs 1-26 v. Austin,* 2022 WL 34443, at *1 (N.D. Tex. Jan. 3, 2022)).

83. Several district and appellate courts have issued nation-wide injunctions, against four of the six Armed Services (Air Force/Space Force including Air National Guard members, Navy, Marine Corps), finding a substantial likelihood of success on the merits for Plaintiff service members' RFRA claims.[5] There are several additional pending class actions against the remaining two services, the Army (including Army Reserves and National Guard members) and the Coast Guard.[6]

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[5] *See Navy SEALs 1-26 v. Austin*, 2022 WL 1025144 (N.D. Tex. Mar. 28, 2022) ("*Navy SEALs 1-26*") (granting class certification and preliminary injunction for Navy members who had submitted RARs); *Doster v. Kendall*, 2022 WL 2760455 (S.D. Ohio July 14, 2022) (granting class certification and class-wide temporary restraining order ("TRO") for Air Force member who submitted an RAR); *Doster v. Kendall*, 2022 WL 2974733 (S.D. Ohio July 27, 2022) (expanding Air Force class-wide TRO to class-wide preliminary injunction), *aff'd*, 2022 WL 17261374 (6th Cir. Nov. 29, 2022) ("*Doster*"); *Colonel Fin. Mgmt. Officer v. Austin*, No. 8:22-CV-1275-SDM-TGW, 2022 WL 364351216 (M.D. Fla. Aug. 18, 2022) ("*CFMO*") (granting class-wide certification and preliminary injunction for Marine Corps members).

[6] The proceedings in *CFMO, Doster,* and *Navy SEALs 1-26* are set for summary adjudication and trial in the next few months, and it is likely that there will be a decision on the merits for the Air National Guard and perhaps the Army National Guard and Reserves as well, before discovery concludes in this proceeding.

84. This is because the RAR process for all services and all statuses (active-duty, reserve or National Guard) has resulted in nearly uniform denials of service members requests for religious accommodations, using nearly identical form letters with only names, dates, and titles or duties changed. The Armed Services have denied at least 99% of RARs that have been adjudicated.

85. The true number likely approaches 100% given that the small number of RARs approved all appear to have been disguised administrative exemptions granted to service members on terminal leave in their final months of service.

86. All Plaintiffs who have submitted RARs have either had their requests denied, or are still pending and will not be adjudicated pursuant to Secretary Austin's January 10, 2023 Rescission Memorandum.

87. The DoD's categorical ban on religious accommodations clearly violates RFRA and the Free Exercise Clause, as several courts have found likely occurred, even with the government's opportunity to defend the policy under strict scrutiny.

88. Section 525 retroactive rescission of the DoD Mandate, however, has eliminated any possibility for the government to even raise a defense. The government no longer has any interest, compelling or otherwise, in systematically denying religious accommodation requests. Further the policy is no longer a permissible means at all for achieving any legitimate policy, much less the least restrictive means.

89. Accordingly, Plaintiffs need only show that the previous denials of religious liberties substantially burdened their free exercise of religion to shift the burden to the government to justify its policies. Rescission means that Congress has deprived the government of any ability to raise a defense or to justify the now-rescinded policy.

IV. CLASS ACTION ALLEGATIONS

A. Class Definitions

90. Plaintiffs bring this action pursuant to Rule 23 of the Rules of the United States Court of Federal Claims ("RCFC") on behalf of themselves and the following alternatively pleaded classes.

91. The "Rescission Class" consists of all current and former active status members of the National Guard who were dropped from active status and lost pay, points, training, promotion, or any other emoluments as a consequence of not being "fully vaccinated" as required by the DoD Mandate, and who were ready, willing and able to perform their duties (and not physically disabled from doing so), and who satisfy one or more of the following conditions:

(A) Were Guardsmen federalized to perform active duty, ADOS, AGR, or FTNGD pursuant to 37 U.S.C. § 204 and were dropped from such duty;

(B) Were Reserve members on active status with active duty orders pursuant to 37 U.S.C. § 204 and were dropped from such orders, training, or duty ;

(C) Were Guardsmen or Reserve members in active status drilling, participating in annual training, and any other required training, instruction or duties pursuant to 37 U.S.C. §206(a) for which they were not paid because of their vaccination status; and/or

(D) Were Guardsmen or Reserve members in active status denied "points" they would have earned from being on active status and/or for participating in drills, training, or other duties needed to complete a SAT year for retirement, promotion, and service obligation purposes; and,

(E) Choose to opt-in to the present action after notice as required by Rule 23

RCFC.

92. Should the Court not certify the Rescission Class as requested above, then in the alternative, Plaintiffs bring this action on behalf of a "Wrongfully Discharged Class" which is defined in the same manner as the Rescission Class alleged above, except the grounds for class members' claims in the Wrongfully Discharged Class are that (A) the DoD's Mandate was unlawful as it required class members to take an unlicensed, EUA vaccine, in violation of 10 U.S.C. § 1107a, (B) the DoD Mandate was predicated upon an unlawful order that has been rescinded by the 2023 NDAA, and thus cannot service as a legal basis for discharge or any other adverse actions against class members or (C) the DoD's categorical ban on religious accommodations to the DoD Mandate violates the RFRA and the Free Exercise Clause rendering Class Members' discharges unlawful.

B. The Proposed Classes and Sub-Class Satisfy RCFC 23

93. **Numerosity.** The Rescission Class and the Wrongfully Discharged Class each consist of at least 70,000 members of the Air Force and Army National Guard and Reserves.

94. The exact size of the Class and the identities of the individual members thereof are ascertainable through Defendant Agencies' records and centralized computer payroll and personnel systems.

95. The large class size and geographical dispersion makes joinder impractical, in satisfaction of RCFC 23(a)(1).

96. **Commonality.** The proposed Rescission Class and alternative Wrongfully Discharged Class each have a well-defined community of interest. The Defendant has acted and failed to act on grounds generally applicable to each Plaintiff and putative Class

member, *i.e.*, the , requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the Class.

97. There are many questions of law and fact common to the claims of Plaintiffs and the proposed Rescission Class and alternative Wrongfully Discharged Class, and those questions predominate over any questions that may affect individual Class members within the meaning of RCFC 23(a)(2) and 23(b)(2).

98. Common questions of law and fact affecting members of the proposed classes and sub-classes include, but are not limited to, the following:

a) **Rescission Class**

i) Whether the 2023 NDAA and Section 525 thereof is a "money mandating" statute and providing a substantive right to compensation for Plaintiffs and class members;

ii) Whether the rescission of the DoD Mandate should be applied retroactively such that the DoD Mandate is void *ab initio*; and,

iii) Whether Section 525 requires Plaintiffs and Rescission Class members to be restored to the *status quo ante* before the imposition of the DoD Mandate and adverse actions taken thereunder.

b) **Wrongfully Discharged Class**

i) Whether the Defendants' mandate of unlicensed EUA vaccines was unlawful in violation of 10 U.S.C. § 1107a;

ii) Whether Defendants' discharge of Plaintiffs and other class members for not accepting injection with an unlicensed, EUA vaccine was unlawful for the purposes of 37 U.S.C. § 204 & § 206; and

iii) Regardless of whether 2023 NDAA is a money-mandating statute, does Rescission render all discharges unlawful for the purposes of 37 U.S.C. § 204 & § 206.

iv) Whether the Defendants' systematic denial of Plaintiff and Class Members' RAR substantially burdened their free exercise of religion;

v) Whether the Defendants' policy of systematically denying RARs can survive strict scrutiny where the Section 525 Rescission has eliminated any

compelling governmental interest for denying religious accommodations;

iv) Whether the DoD Mandate was the least restrictive means in light of the fact means that the mandate is no longer a permissible means of further a legitimate governmental interest.

99. **Typicality.** The claims of Plaintiffs are typical of the claims of all of the other members of the class as required by Rule 23(a)(3), RCFC. The claims of the Plaintiffs and the proposed Rescission Class and alternative Wrongfully Discharged Class are based on the same legal theories and arise from the same unlawful conduct, resulting in the same injury to the Plaintiffs and the Classes.

100. **Adequacy.** Plaintiffs will fairly and adequately represent and protect the interests of the proposed Rescission Class and alternative Wrongfully Discharged Class. As an opt-in class action, there is no conflict of interest between Plaintiffs and putative class members who choose to opt-in.

101. The proposed Rescission Class and alternative Wrongfully Discharged Class are each maintainable under Rule 23(b)(3) RCFC as each of the prerequisites to certification under that Rule are met as alleged below.

102. **Predominance.** Common issues of fact and law predominate over any individual questions or determinations as required by Rule 23(b)(3). The government's liability can be determined on a class-wide basis for the Rescission Class or ,the Wrongfully Discharged Class based on the answers to the legal questions above.

103. **Superiority.** A class action is superior to other available methods for fairly and efficiently adjudicating these issues. There are approximately 70,000 class members, the vast majority of which will have a claim in the range of $1,000 to $10,000. Absent a class action, most members would find the cost of litigating their individual claims to be prohibitive, and will have no effective and complete remedy.

104. Calculation of backpay and other compensation will not require individualized determinations. All amounts can be calculated mechanically using a matrix like that set forth in Exhibit 17 ("FY22 Monthly Basic Pay Table") using the payment rates established by law. The amounts each plaintiff and class member are entitled to as back pay can be determined from their rank, years in service, and similar criteria to calculate their statutorily defined pay per drill period, training or duty day for which they were entitled to pay but were not paid due to the Nov. 30, 2021 Supplemental Directive. Alternatively, the amounts can be calculated by the Defendants in the same manner using the DoD's payroll system and the corresponding personnel records to confirm the dates of drills, training, or other duty for which they were not paid. The value of lost points can be calculated in a similar manner.

105. With respect to collateral relief such as correction of individual records, the Court's rulings in the present class action will provide guidance on questions of law and fact on a class-wide basis that the relevant Boards for Corrections of Military Records can apply as appropriate to individual class members' military records.

106. There are no obstacles that would present heightened difficulties for managing a class action. There is a relatively small number of common questions of law and fact that can produce common answers on a class-wide basis. The backpay and damages calculations can be calculated mechanically with a matrix like that proposed by Plaintiffs based on statutorily defined pay rates and/or confirmed using the government's own centralized computerized payroll and personnel systems (DFAS and unit diary systems). Similarly, the identity of class members and best method of providing notice to them can be obtained from the government's own centralized computerized payroll and personnel systems.

107. While there are many court challenges to the lawfulness of the DoD Mandate seeking injunctive and declaratory relief, as far as Plaintiffs are aware, this is the only class action filed post-Rescission seeking backpay for the class members and the only such action of its kind filed in the Federal Court of Claims.

108. The class treatment of common questions of law and fact is also superior to multiple individual actions or piecemeal litigation in that it conserves the resources of the courts and the litigants, and promotes consistency and efficiency of adjudication. There are numerous threshold issues of law and fact that the Court can resolve through an adjudication of the Plaintiffs claims that will serve to resolve those same issues present in each class members' claims. On the other hand, requiring each class member to file an individual claim would likely result in unnecessary, duplicative judicial labor and runs the risk of inconsistent rulings from the Court. For example, by determining the legal significance of rescission of the DoD Mandate on the propriety of Defendants' refusal to pay Plaintiffs, the Court will necessarily determine the legal significance of that rescission for all class members.

109. Plaintiffs' undersigned counsel are adequate to serve as class counsel under Rule 23(g), RCFC. Plaintiffs' counsel have expended significant time identifying and investigating the claims brought in this action, and collectively, they have substantial experience in prosecuting complex cases, including class actions, military backpay cases, and cases challenging the legality of military vaccine mandates. Specifically, Counsel Dale Saran has significant experience with cases involving military, employment, and vaccine mandate matters, including cases challenging the military's anthrax vaccine mandate. Counsel Brandon Johnson has significant experience litigating class action cases challenging military COVID vaccine mandates, while counsel J. Andrew Meyer has

significant experience in representing class members as court-appointed class counsel under Rule 23.

110. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of the class, appreciate their duty to fairly and adequately represent the interests of class members and are able to faithfully discharge those duties, and have the resources to do so. Neither Plaintiffs nor their counsel have any interests adverse to those of the other Class members.

FIRST CAUSE OF ACTION [RESCISSION CLASS]
VIOLATION OF SEC. 525 OF THE FY2023 NDAA

111. Plaintiff realleges the foregoing paragraphs and facts in Section I as if fully set forth in this count.

112. The 2023 NDAA Rescission of the DoD Mandate and Supplemental Directive, in conjunction with the 2023 Appropriations Act is "money mandating" statutes that confer a substantive right to Plaintiffs and Rescission Class members. "Rescind" means "an annulling; avoiding, or making void; abrogation; rescission", while "rescission" means "void in its inception"; or "an undoing of it from the beginning." BLACK'S LAW DICTIONARY at 1306 (6th ed. 1990).

113. Congress chose this term to direct the Defendant Agencies and the courts to apply the rescission with full retroactive effect to restore Plaintiffs and other service members to the position in which they would have been in the absence of the unlawful DoD Mandate and Supplemental Guidance.

114. Secretary Austin's January 10, 2023 Rescission Memo acknowledges this Congressional directive by rescinding the DoD Mandate with limited retroactive effect by

committing to correct service members' records and adverse personnel actions. The Rescission Memo and the Air Force and Army implementing orders, fail to give retroactive effect to the Rescission for backpay and financial compensation.

115. Plaintiffs' and Rescission Class members' Tucker Act claims for backpay do not require any showing that the DoD Mandate or Supplemental Directive were unlawful or wrongful or are simply legal nullities (though they are both). Instead, to give full effect to the Rescission requires that Plaintiffs be provided backpay and other requested compensation to which they are entitled as a result of the Rescission of the legal basis for which they were denied payment and to restore the *status quo ante*.

116. Defendant Agencies' refusal to provide backpay required by the Rescission is the unlawful act in defiance of an express Congressional directive.

117. Further, failure to provide backpay and other requested compensation would have the effect of creating a two-tier Reserve and National Guard system, where some are made whole through the Rescission, while other similarly situated members receive nothing.

SECOND CAUSE OF ACTION [WRONGFUL DISCHARGE CLASS]
VIOLATION OF 37 U.S.C. § 204 & § 206
WRONGFUL DISCHARGE IN VIOLATION 10 U.S.C. § 1107A & FY 2023 NDAA

The Military Pay Act, 37 U.S.C. § 204

118. Plaintiff realleges the foregoing paragraphs and facts in Section I and II as if fully set forth in this count.

119. Under 37 U.S.C. § 204(a), a service member is "entitled to the basic pay of their …, in accordance with their years of service" if they are "(1) a member of a uniformed service on active duty; and (2) … a member of the National Guard … who is participating in full-time training, training duty with pay, or other full-time duty, provided by law …"

120. Under 37 U.S.C. § 204(d), "Full-time training, training duty with pay, or other full-time duty performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in his status as a member of the National Guard, is active duty for the purposes of this section," including 37 U.S.C. § 204(a).

121. All Plaintiffs and Class Members who were on FTNGD, ADOS, AGR or other "active duty" orders, or who performed "Full-time training, training duty with pay, or other full-time duty … in [their] status as a member of the National Guard" are entitled to their basic pay for their rank and years of service pursuant to 37 U.S.C. § 204(a)(1) or § 204(a)(2), for the full period from which they were removed from active status or were denied pay, benefits, or points, regardless of whether they actually performed the service where the failure or inability to perform is due to the wrongful or unlawful act, rule, regulation or order.

122. Under 37 U.S.C. § 204(c), any "member of the National Guard who is called into Federal service for a period of 30 days or less is entitled to basic pay from the date on which the member … contacts the member's unit." This entitlement to pay under 37 U.S.C. § 204 applies regardless of whether the where the failure or inability to perform is due to the wrongful or unlawful act, rule, regulation or order.

123. All Plaintiffs and Class Members who were on FTNGD, who performed "Full-time training, training duty with pay, or other full-time duty … in [their] status as a member of the National Guard", or who were called into federal service, were ready, willing and able to perform their duties at all relevant times. The proposed class definition excludes those who were physically disabled from performing their duties.

124. 37 U.S.C. § 204 is a money-mandating statute for all Plaintiff and Class Members who are members of the National Guard and satisfy the foregoing conditions.

The Military Pay Act, 37 U.S.C. § 206

125. 37 U.S.C. § 206(a) requires that any National Guard or Reserve members who participated in and performed drills, annual training, or any other required training, instruction or duties to be paid in accordance with the statutory rates for drill periods and training as set forth in Exhibit 17 ("FY22 Monthly Basic Pay Table"). 37 U.S.C. § 206(a).

126. 37 U.S.C. § 206(a) is a money-mandating statute for National Guard or Reserve members drills, training, or duties actually performed.

127. The November 30, 2021 Supplemental Directive prohibited unvaccinated National Guard and Reserve members from participating in drills, training or other duties and prohibited them from being paid for duties actually performed.

128. Plaintiffs and Class Members who performed drills, training, and other duties pursuant to 37 U.S.C. § 206(a) are entitled to pay, benefits, points, and other compensation for any duties they actually performed. *Palmer v. United States*, 168 F.3d 1310 (Fed. Cir. 1999).

129. 10 U.S.C. § 1107a expressly prohibits the military from mandating any service member to take unlicensed EUA product, absent an express Presidential authorization on the grounds of national security.

130. There has not been a Presidential authorization to mandate an unlicensed EUA product from the issuance of the DoD Mandate through the present.

131. The August 24, 2021 DoD Mandate permits only COVID-19 mRNA gene therapy "vaccines" with "full licensure from the [FDA], in accordance with FDA-approved labeling and guidance."

132. The DoD and other Defendant Agencies gene therapy products that do not meet the DoD's own definition for being vaccines. A "therapy" or "treatment," even if lifesaving, cannot be mandated.

133. The DoD and other Defendant Agencies have mandated unlicensed EUA COVID-19 vaccines from the issuance of the DoD Mandate on August 24, 2021, until at least the Section 525 Rescission of the DoD Mandate was partially implemented by the DoD on January 10, 2023, the Air Force on January 23, 2023, and the Army with respect to the Army National Guard and Army Reserves on January 5, 2023.

134. No FDA-licensed COVID-19 vaccines were available at all at the time that the DoD Mandate was issued on August 24, 2021.

135. In related litigation, Defendant Agencies have admitted that they have mandated unlicensed EUA vaccines.

136. Defendant Agencies' consistent and generally applicable policy—as reflected in the September 14, 2021 Pfizer Interchangeability Directive, the May 3, 2022 Moderna Interchangeability Directive, and their litigation position in all related litigation—is that unlicensed EUA COVID-19 vaccines are legally interchange with FDA-licensed vaccines and that the unlicensed EUA vaccines should be used "as if" they were the FDA-licensed product for the purposes of the DoD Mandate.

137. It is undisputed that Defendant Agencies did not have "Comirnaty-labeled" vaccines until at least June 2022 and "Spikevax-labeled vaccines" until at least September 2022.

138. Military Whistleblowers and filings in related litigation in *Coker v. Austin*, No. 3:21-cv-1211 (N.D. Fla.) and *Bazzrea v. Austin*, No. 3:22-cv-265 (S.D. Tex.) have demonstrated that all doses of "Comirnaty-labeled" vaccines that are not only unlicensed

EUA products, but are also misbranded, expired, and/or adulterated. As such these products may not be legally given to anyone, much less mandated, and must be removed from the market and destroyed.

139. All "Spikevax-labeled" vaccines have expired, as confirmed by Defendant Agencies on January 23, 2023. In related litigation, service members plaintiffs have demonstrated that all "Spikevax-labeled" vaccines expired months ago.

140. All Plaintiffs' and Class Members' harms, financial and otherwise, described above are a direct result of the Defendant Agencies' unlawful order mandating an unlicensed EUA product in violation of 10 U.S.C. § 1107a and express requirements of the DoD Mandate that permit only FDA-licensed products to be mandated.

141. Defendant Agencies' actions also unlawful in violation of the 2023 NDAA Rescission, which retroactively rendered the DoD Mandate and all other orders based on the DoD Mandate null and void *ab initio*. Among other things, the rescission of the DoD Mandate eliminated any legal basis or authority for the Pfizer and Moderna Interchangeability Directives to treat unlicensed EUA products as legally interchangeable with FDA-licensed products or to use the unlicensed EUA products "as if" they were FDA-licensed products for the purposes of the now-rescinded mandate.

THIRD CAUSE OF ACTION [WRONGFUL DISCHARGE CLASS]
VIOLATION OF 37 U.S.C. § 204 & § 206
WRONGFUL DISCHARGE IN VIOLATION OF 42 U.S.C. § 2000bb

142. Plaintiff realleges the paragraphs and facts in Section I and Section III as if fully set forth in this count.

143. RFRA applies to Defendant Agencies, as they constitute a "branch, department, agency, instrumentality, and official of the United States." 42 U.S.C. § 2000bb-2(1).

144. RFRA expressly creates a remedy in district court, granting any "person whose religious exercise has been burdened in violation of" RFRA to "assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the government." 42 U.S.C. § 2000bb-1(c).

145. RFRA states that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a).

146. The DoD Mandate and other challenged Defendant Agency actions substantially burdened the free exercise of religion in violation of RFRA.

147. The Defendant Agencies each adopted a policy of systematically denying RARs using form letters, without providing the "to the person" individualized determinations required by RFRA, DoDI 1300.17, and the Air Force and Army implementing regulations.

148. The DoD Mandate and other challenged Defendant Agency actions discriminated against religious exercise by treating comparable secular activities, *i.e.*, medical and administrative exemptions, more favorably than comparable religious exercise, *i.e.*, RARs, by granting thousands of medical and administrative exemptions, while granting zero or only a handful (and less than 1%) of RARs.

149. If the Government substantially burdens a person's exercise of religion, it can do so only if it "demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

150. Plaintiffs and Wrongfully Discharged Class members have carried their burden of demonstrating that DoD Mandate and other challenged Defendant Agency

Actions substantially burdened service members free exercise of religion, shifting the burden to the government to demonstrate that its policy satisfy strict scrutiny with respect "to the person" seeking religious accommodation. *See O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 429 (2006).

151. The Rescission of the DoD Mandate by Congress retroactively removes any compelling governmental interest in compelling vaccination of service members over their religious objections, and retroactively eliminates a 100% vaccination mandate as permissible means, much less the least restrictive means. Accordingly, the Defendant Agencies' policies necessarily fail strict scrutiny.

152. In addition to backpay, Plaintiffs and Wrongfully Discharged Class Members may seek monetary damages for wrongful discharges due to RFRA violations. *See Klingenschmitt v. U.S.*, 119 Fed.Cl. 163 (Ct.Cl.2014).

FOURTH CAUSE OF ACTION
VIOLATION OF 10 U.S.C. § 1552

153. Plaintiff realleges the foregoing paragraphs and facts as if fully set forth in this count.

154. Plaintiffs seek an order from the Court directing the appropriate BCMR to correct their military records and remove any adverse paperwork resulting from their unvaccinated status or failure to comply with the rescinded and/or unlawful DoD Mandate.

155. For any Plaintiffs or putative Class members who may have been denied promotion, removed from promotion selection lists, or not selected due to adverse actions or loss of points due to non-compliance with the rescinded and unlawful DoD Mandate, Plaintiffs request that the Court direct these matters to the appropriate BCMRs, Special

Selection Boards, and/or orders promotion and backpay for those Plaintiffs can meet the requirements laid out in this Court's jurisprudence. *See Dysart v. United States*, 369 F.3d 1303, 1315 ("In such cases, redress may be afforded for a promotion improperly denied. It is apparently assumed that the constitutionally-mandated steps in the appointment process — nomination, confirmation, and actual appointment — would be followed absent improper action by subordinate officials, and that the rare exercise of Presidential (or Senate) discretion not to make the appointment creates no Article III bar to the action in the Court of Federal Claims.")

RELIEF REQUESTED

WHEREFORE, Plaintiffs pray that this Court:

156. Certify either the Recission Class or the Wrongfully Discharged Class under Federal Court of Claims Rule 23 as those respective Classes are defined in this Complaint;

157. Appoint Plaintiffs as the representatives of the class certified by the Court;

158. Appoint undersigned Counsel as counsel for the class certified by the Court;

159. Direct that appropriate notice be given to Class Members in order to allow Class Members to opt-in as required by Federal Court of Claims Rule 23;

160. Award and enter a judgment for (approximately) $2.1 million due in military backpay for the Plaintiffs, and in an amount to be determined for a common fund for all members of the Class who opt in to the Class;

161. Award Plaintiffs and Class Members the above monetary judgment, plus interest, costs, and attorney's fees, as a result of the improper actions of the Defendant and his agents;

162. Reinstate and correct the military records of Plaintiffs and Class Members as requested herein; and

163. Grant such other relief as the Court may deem just and proper to provide Plaintiff and Class Members "full and fitting relief."

Date: February 7, 2023

Respectfully submitted,

/s/ Dale Saran
Dale Saran, Esq.
19744 W 116th Terrace
Olathe, KS 66061
Telephone: 480-466-0369
E-mail: dalesaran@gmail.com

/s/ Brandon Johnson
Brandon Johnson, Esq.
DC Bar No. 491370
Defending the Republic
2911 Turtle Creek Blvd.,
Suite 300 Dallas, TX 75219
Tel. 214-707-1775
Email: bcj@defendingtherepublic.org
(PHV Motion Pending)

/s/ J. Andrew Meyer
J. Andrew Meyer, Esq.
FL Bar No. 0056766
FINN LAW GROUP, P.A.
8380 Bay Pines Blvd.,
St. Petersburg, FL 33709
Tel. 727-709-7668
Email: ameyer@finnlawgroup.com
(PHV Motion Pending)

Attorneys for the Plaintiffs