IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JEREMIAH BOTELLO, BENJAMIN KONIE, CHARLES HOOD, VICTOR SANTOS, JUSTIN PHILLIPS, BRIAN TAYLOR, individually and on behalf of all others similarly situated, ***Plaintiffs*,** **v.** **THE UNITED STATES OF AMERICA,** ***Defendant*.**	**Case No. 23-174C** **Judge Dietz**

FIRST AMENDED 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 class action lawsuit for backpay and other ancillary relief owed to unvaccinated, non-federalized National Guard and Reserve service members who were on Title 32 orders and therefore "governed" by their State Commander-in-Chief, yet were unconstitutionally, illegally punished by the President, through the Department of Defense ("DoD"), for non-compliance with the now-rescinded COVID-19 "vaccine" mandate ("Mandate").

2. The National Guard is the modern "Militia". The Militia Clauses of the Constitution, U.S. CONST. ART. I, § 8, cls. 15-16, explicitly and exclusively vest the

governance of—and therefore, the power to punish—non-federalized Militia members with their respective State Commander-in-Chief, rather than the President.

3. The Militia includes the National Guards of the several States. As of September 30, 2022, there were 329,917 members of the Army National Guard and 105,040 members of the Air National Guard.

4. The President and DoD illegally punished unvaccinated, non-federalized Militia members in various ways, including: (1) taking and withholding pay from individual Militia members (vice the States); (2) unlawfully discharging them; (3) involuntarily transferring them to inactive status; (4) prohibiting them from participation in drills, training, and other duties; (5) forcing them into retirement; and (6) threatening criminal prosecution, court-martial, and/or confinement under the Uniform Code of Military Justice ("UCMJ").

5. The President and DoD also sought to enforce compliance, and punish non-compliance, with the unlawful Mandate through systematic violations of service members' religious liberties protected by the First Amendment's Free Exercise Clause, U.S. CONST. AMEND. I, and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-1, *et seq*.; and service members' rights to refuse an unlicensed emergency use authorization ("EUA") product pursuant to 10 U.S.C. § 1107a.

6. Beyond the Government's lack of constitutional or statutory authority to govern and punish non-federalized Militia members, Congress has made it explicitly clear that the Mandate is void *ab initio*. On December 23, 2022, the Mandate was "rescind[ed]" by act of Congress by Section 525 of the Fiscal Year 2023 National Defense Authorization Act (the "2023 NDAA"), which was enacted into law by veto-proof majorities in both the House of Representatives (350-80) and the Senate (83-11).

7. 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 Mandate null and void *ab initio* 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.

8. Plaintiffs and similarly situated unvaccinated, non-federalized Militia Members (which includes National Guardsmen and Reservists on Title 32 orders) have an unconditional right to payment under multiple money-mandating sources of law, including the Militia Clauses, the 2023 NDAA, and the Military Pay Act. The Court also has ancillary equitable powers to correct records and provide other ancillary relief under 10 U.S.C. § 1552.

9. The Government also turned some of these same Reserve and Militia members into debtors by virtue of its own illegal actions, including recoupment of enlistment bonuses, post-9/11 GI Bill benefits, the costs of training and tuition at military schools or academies and public and private universities, and other allowances or special pays to which Militia members were entitled by law. All of these actions constituted illegal exactions for which Class Members have a separate claim under the Tucker Act, the U.S. Constitution, and the federal statutes governing these bonuses and benefits.

JURISDICTION AND VENUE

10. 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.

11. Plaintiffs' and the Class Members' claims against Defendant are founded upon the following money-mandating sources of federal law, whether standing alone or read in conjunction with one or more of the following:

a. the Militia Clauses, U.S. CONST. ART. I, § 8, cls. 15-16;

b. the 2023 NDAA, including Section 525 thereof;

c. the Consolidated Appropriations Act, 2023, Pub. L. 117-328 (Dec. 27, 2022), 136 Stat. 4459 ("FY2023 Appropriations Act");

d. the Military Pay Act, 37 U.S.C. § 204 and § 206;

e. entitlements for military members set forth in Title 37, Chapter 5, Special and Incentive pays, 37 U.S.C. §§ 301, *et seq.*;

f. allowances under Title 37, Chapter 7, such as Basic Allowance for Subsistence ("BAS"), Basic Allowance for Housing ("BAH"), Housing treatment for dependents undergoing a permanent change of station, etc. *See* 37 U.S.C. §§ 402, *et seq.*;

g. the Military Retirement Pay statutes, 10 U.S.C. § 1370 ("Regular Commissioned Officers"), § 1371 ("Warrant Officers"), Chptr. 1223 (§ 12731 *et seq*, "Retired Pay for Non-Regular Service").

h. Involuntary Separation Pay statute, 10 U.S.C. § 1174;

i. 10 U.S.C. § 1552; and

j. the applicable service regulations where agency discretion has been exercised through the publication of rules and regulations governing such entitlements, such as (for example) the DoD Financial Management Regulation 7000.14-R,

Vol. 7a and 7b; National Guard Bureau Pay Regulation, NGR 37–104 (Sept. 25, 2015), and the Joint Federal Travel Regulations, Vols. 1 and 2.

12. Plaintiffs invoke this Court's ancillary equitable powers and 10 U.S.C. §1552 to have their records appropriately corrected. Members were removed from promotion lists after being selected, some were prohibited from competing on selection boards, and almost all have some form of "bad paper" in their records that must *in equity* be removed.

13. This Court also has independent Tucker Act jurisdiction for the Government's illegal exactions from Plaintiffs and Class Members through the recoupment of, among others, enlistment bonuses under Title 37, Chapter 5, Special and Incentive pays, 37 U.S.C. §§ 301 *et seq.*; post-9/11 GI Bill benefits either used or transferred under the educational assistance eligibility statute, 38 U.S.C. §§ 3311, *et seq.*; costs of training and tuition at military schools or academies and public and private universities; and other benefits to which Militia members are entitled by law, such as SGLI (servicemen's group life insurance).

14. The Militia Clauses and the aforementioned federal statutes and regulations constitute an express waiver of the sovereign immunity of the United States of America and mandate compensation by the Government for damages sustained that create a cause of action and/or a substantive 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 Active Duty Operational Support ("ADOS") orders under Title 32 for six to nine months per year. He was ordered to Full Time National Guard Duty

("FTNGD") and ADOS from May 1, 2021 through December 16, 2021. Due to his unvaccinated status, he was removed from and dropped from his orders and active status 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 Benjamin Konie is a Staff Sergeant ("SSG") in the Illinois Army National Guard with 17 years of service. He has been in active status for 6 years. Plaintiff was scheduled to complete Senior Leaders Course ("SLC") in July of 2022, but was disenrolled from the course due to his vaccination status. Plaintiff had been waiting to attend the course for over a year because without the course completed, Plaintiff is not eligible for promotion and has been passed over for promotion as a result. He submitted an RAR in November of 2021; he was allowed to stay on active status in the Guard, but could not attend the necessary SLC in order to be eligible school for promotion. SSG Konie seeks compensation for lost pay and benefits in excess of $100,000, correction of his records, and any other appropriate relief.

18. Plaintiff Charles Hood is an F-16 pilot in the South Carolina Air National Guard, a Major (O-4) with more than 13 years of service. When the mandate was announced in Aug 2021, Plaintiff had been serving on full-time orders under 32 USC 502(f). Plaintiff did not file for an accommodation from the mandate, but had indicated to his chain of command that he would not take the mRNA shot because of the potential harm, legal conflicts, and liability concerns related to his civilian job as an airline pilot.

19. A memorandum from the Secretary of the Air Force published 3 September 2021 stated unvaccinated pilots would have Title 32 orders withdrawn, may not participate in drills or training, and may be forced into IRR status. (*See infra* Ex. 5, 3 Sep 21 SecAF Mandate for DAF.) A Letter of Reprimand was served, but Plaintiff is not certain if the LOR was placed into his record. The plaintiff was unable to take any orders after September 2021, which discontinued his upgrade to instructor pilot. Plaintiff lost pay and allowances as a Major over 13 years (no dependents) at the BAH rate for zip code 29201, along with retirement points. Plaintiff seeks backpay and other financial compensation in excess of $61,562.28, retirement points based on an average of points earned in previous years served, and correction of any adverse records.

20. Plaintiff Victor Santos was a Motor Transport driver (88M) with the New Jersey Army National Guard, a Specialist who served for 6.5 years. Plaintiff was 5 years into a 9-year enlistment when the mandate was promulgated. Plaintiff was on FTNGD under 32 U.S.C. § 502(f) in the State's Honor Guard program, providing funeral support for New Jersey veterans' burials. Plaintiff filed for a Religious Accommodation in response to the mandate. Plaintiff never heard anything back on his RAR. Plaintiff was given a Letter of Reprimand for being unvaccinated. In April of 2022, Plaintiff was dropped from his full-time orders and had to wait 3 weeks before he could get a DD-214 discharge certificate to apply for unemployment benefits, which Plaintiff was able to do on April 17th, 2022. Plaintiff was eventually able to get his Commercial Driver's License (CDL) and obtain full-time employment on Aug. 15, 2022.

21. Plaintiff lost all pay and allowances as a Specialist (E-4) over 6 years, at the BAH rate (no dependents) for zip code 08872, along with points toward retirement. Plaintiff seeks backpay and other financial compensation in excess of $70,000.00,

retirement points based on an average of points earned in previous years served, and correction of any adverse records.

22. Plaintiff Justin Phillips was an F-16 pilot in the Arizona Air National Guard with the 162nd Fighter Squadron, a Major (O-4) with more than 19 years of service, when the mandate was announced in Aug 2021. A memorandum from the Secretary of the Air Force published 3 September 2021 stated unvaccinated pilots would have Title 32 orders withdrawn, may not participate in drills or training, and may be forced into IRR status. (See *infra* Ex. 5, 3 Sep 21 SecAF Mandate for DAF).

23. Plaintiff was dropped from his ADOS orders 60-70 prior to their expiration because he remained "unvaccinated," despite the fact that Plaintiff flew a single-piloted aircraft. Plaintiff was prohibited from flying outside of the local area. Plaintiff lost pay and allowances as a Major over 18 years at the BAH rate for zip code for Tucson, Arizona, along with retirement points. Plaintiff seeks backpay and other financial compensation in excess of $43,925.00, retirement points based on an average of points earned in previous years served, and correction of any adverse records.

24. Plaintiff Brian Taylor is an infantryman (11B) with the Georgia Army National Guard, a Sergeant First Class (SFC) with more than 18 years of service. Plaintiff was a drilling (M-day) soldier and senior enlisted member of his unit. Plaintiff was given a General Officer Reprimand (GOMOR) for being unvaccinated; in May 2022, he was prohibited from drilling, training, or any other activities with his National Guard Unit. During the time Plaintiff was prohibited from drilling and not paid, Servicemen's Group Life Insurance (SGLI) premiums continued, creating indebtedness to the government. Those premiums were recouped from Plaintiff, in the amount of approximately 7 months of SGLI premiums (~$60). Plaintiff seeks backpay in excess of $7500.00, and for all

prohibited drills, Annual Training (AT), and retirement points based on an average of points earned in previous years served, and correction of any adverse records. Plaintiff also seeks a return of the money illegally exacted from him by the U.S. government in SGLI premiums, for the indebtedness the government created by its own unconstitutional acts and orders.

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 the DoD, the National Guard Bureau ("NGB"), the Department of the Air Force ("Air Force"), the Department of the Army ("Army") (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, Militia members.

STATEMENT OF FACTS

I. THE PRESIDENT'S ACTIONS

A. The August 24, 2021 COVID-19 Vaccine Mandate

27. On August 24, 2021, Secretary of Defense Lloyd Austin III issued the 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." Dkt. 1-2, Aug. 24, 2021 Secretary Austin Mandate Memo, at 1.

28. Secretary Austin directed that mandatory vaccination "will only use COVID-19 vaccines that receive full licensure from the Food and Drug Administration (FDA), in accordance with FDA labeling and guidance." *Id.*

29. Under the UCMJ, a service member who disobeys "any lawful general order or regulation" faces sanctions up to a court-martial. UCMJ Art. 92(2), 10 U.S.C. § 892(2).

This punishment may include "dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years." UCMJ Art. 92, 10 U.S.C. § 892. The statute of limitations for violations of UCMJ Article 92 is five years. 10 U.S.C. § 843.

30. Dishonorable discharges are typically given for the most serious offenses such as murder, fraud, desertion, treason, espionage, and sexual assault. *See Manual for Courts-Martial, United States* (2019 ed.), R.C.M. 1003(a)(8). A dishonorably discharged veteran may also lose all retirement and veterans' benefits and is ineligible for a wide array of other governmental benefits. *Id.* Those with a dishonorable discharge lose important civil and constitutional rights, including the right to bear arms protected by the Second Amendment of the United States Constitution. *Id.*; U.S. CONST. AMEND. II.

B. Congressional Action to Limit Punishment of Service Members

31. In Section 736 of the National Defense Authorization Act for Fiscal Year 2022 ("FY2022 NDAA"), Congress prohibited the military from dishonorably discharging, or imposing anything less than a general discharge under honorable conditions, for non-compliance with the Mandate. Pub. L. 117-81 (Dec. 27, 2021), § 736, 135 Stat. 1541.

32. The White House opposed Congressional efforts to limit the military's authority to punish unvaccinated service members. *See* Executive Office, *Statement of Administrative Policy: H.R. 4350 – National Defense Authorization Act for Fiscal Year 2022* at 4 (Sept. 21, 2021), available at: https://www.whitehouse.gov/wp-content/uploads/2021/09/SAP-HR-4350.pdf.

33. Service members with a general discharge under honorable conditions are subject to significant adverse consequences including loss or reduction of, or ineligibility for, earned retirement benefits, the post-9/11 GI Bill, Veterans Administration benefits,

healthcare benefits, and other governmental benefits to which they were or otherwise would have been entitled by law.

34. A general discharge under honorable conditions may also render a service member ineligible for re-enlistment in the military and for future employment with federal civilian agencies; other public employers, such as state and local government, law enforcement, correctional institutions, schools, universities, hospitals and healthcare providers; and federal contractors or non-governmental organizations that receive federal funding.

35. The federal government, federal contractors, and public sector employers are the primary source of employment for former service members.

36. A general discharge under honorable conditions is also a significant barrier for future private employment with employers who are familiar with the military's discharge system and may presume that the discharge is for substance abuse, criminal actions, or other misconduct, even in the absence of specific misconduct code.

37. These adverse consequences are exacerbated where the service member's discharge paperwork, Form DD-214, includes a misconduct code.

38. The general discharges for active-duty military and Militia members for non-compliance with the now-rescinded Mandate have been characterized as misconduct discharges.

C. Punishment of Unvaccinated Militia Members

1. November 30, 2021 Militia Directive and Implementation

39. On November 30, 2021, Secretary Austin issued a supplemental directive setting forth punishments for unvaccinated members of the (non-federalized) National Guard and Reserves. *See* Dkt. 1-3, Nov. 30, 2021 Militia Directive, at 1.

40. Unvaccinated Militia members could not "participate in drills, training or other duty conducted under title 32" unless otherwise exempted. *Id.*

41. Secretary Austin further directed that "[n]o funding may be allocated for payment of duties performed under title 32" for such members and that no "credit or excused absence shall be afforded to members who do not participate in drills, training, or other duty due to" being unvaccinated. *Id.*

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

43. On January 1, 2022, the Air Force Reserve and Air National Guard began implementing 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).

44. On September 14, 2021, the Army issued Fragmentary Order 5 ("FRAGO 5") implementing the Mandate 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* Dkt. 1-8, FRAGO 5, ¶ 3.D.14.

45. Effective July 1, 2022, over 60,000 unvaccinated Army Reserve and National Guard members were barred from service; transferred to the IRR; denied pay, benefits, and points; prohibited them from participation in drills, training, and other duties; and/or prohibited from taking on new orders or a permanent change in station. *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/.

46. The President and DoD leadership punished unvaccinated, non-federalized Militia members through: (a) unlawful discharges; (b) withholding of pay from individual Militia members; (c) prohibiting them from participating in drills, training, and other duties; and (d) threats of courts-martial and punishment under the UCMJ. These actions were "punishments for disobedience—pure and simple." *Abbott v. Biden*, 70 F.4th 817, 843-44, 2023 WL 3945847 (5th Cir. 2023).

47. The President and DoD leadership punished unvaccinated, non-federalized Militia members through the systematic violations of their rights to informed consent protected by 10 U.S.C. § 1107a. *See infra* Section V.

48. The President and DoD leadership punished unvaccinated, non-federalized Militia members through the systematic violations of the religious liberties protected by

the First Amendment Free Exercise Clause and the Religious Freedom Restoration Act. *See infra* Section VI.

49. The President and DoD leadership punished unvaccinated, non-federalized Militia members through the creation of a hostile environment, singling out unvaccinated service members for ridicule and ostracization, and imposing arbitrary, discriminatory and punitive measures, such as oppressive and unnecessary masking and testing requirements for "the unvaccinated" – a significant majority of whom were also those with Religious Accommodations pending at the time.

50. The President and DoD leadership punished unvaccinated, non-federalized Militia members through a wide range of adverse and punitive personnel actions, including letters of reprimand, general officer letters of reprimand ("GOMOR"), adverse fitness evaluations, punitive reassignments, and removals from command or leadership positions, along with denials of promotion.

51. The President and DoD leadership punished unvaccinated, non-federalized Militia members through wrongful discharges that are categorized as "misconduct" that prevent reenlistment and significantly harm their ability to seek future employment in the private or public sectors.

52. The President and DoD leadership punished unvaccinated, non-federalized Militia members through the foregoing actions that, among other things, resulted in the loss or reduction of, or ineligibility for, earned retirement benefits, the post-9/11 GI Bill, Veterans Administration benefits, healthcare benefits, and other governmental benefits to which they were or otherwise would have been entitled by law.

2. Illegal Exactions from Militia Members

53. The President and DoD leadership then used the above enumerated illegal punishments as the basis for additional, collateral consequences. For example, Militia members who were discharged, barred from drilling, or dropped to an inactive status, were then subject to recoupment and indebtedness to the government for their "failure" (*i.e.*, inability due to the Militia Directive's bar on participation) to complete the terms of their service obligation.

54. The President and DoD leadership sought recoupment of enlistment bonuses; denial of or recoupment of already paid or transferred post-9/11 GI Bill benefits, including the costs of training and tuition at military schools or academies and public and private universities; denial of Separations Pay for members involuntarily separated; and denial of entitlements to Special Pays such as Flight Pay, Jump Pay, etc., by removing unvaccinated members from their normal occupational specialty, even while they had Religious Accommodation Requests or medical or administrative exemption requests pending. *See, e.g.*, Plaintiff Taylor's SGLI recoupment, *supra* ¶ 24.

II. RESCISSION OF THE MANDATE AND THE MILITIA DIRECTIVE

A. A "Self-Imposed Readiness Crisis"

55. Nearly 8,500 service members have been discharged for non-compliance with the Mandate, including 1,841 Army Soldiers, 3,717 Marines, 834 airmen and 2,041 Navy sailors. *See* Caitlin Doornbos, *Pentagon Ends COVID-19 Vaccine Mandate for US Troops* NY POST (Jan. 11, 2023), available at: https://nypost.com/2023/01/11/pentagon-ends-covid-19-vaccine-mandate-for-us-troops/.

56. At least 60,000 to 70,000 members of the Army National Guard, Army Reserves, Air National Guard, or Air Force Reserve were involuntarily transferred to the inactive reserves and/or denied pay or benefits. *See supra* ¶¶ 39-45.

57. Congress took notice of the disastrous effects that the Mandate had on military readiness and recruiting across the military, 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" Mandate because, "[a]s a major land war rages in Europe our own military faces a self-imposed readiness crisis." Dkt. 1-9, Sept. 15, 2022 Congressional Letter to Secretary Austin, at 1. These Congress members charged the military with "abus[ing] 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 Mandate as the "primary cause of the [DoD]'s recruiting difficulties," effectively "disqualify[ying] 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", and resulting in the loss of at least 75,000 from the Army alone. *Id.*

B. Expert Consensus That Mandated, FDA-Licensed Vaccines Are Obsolete and Ineffective

58. On January 10, 2022, Pfizer Chief Executive Officer Albert Bourla acknowledged that the mandated two-dose regimen "offer[s] very little, if any" protection against the then-dominant Omicron variant. *New COVID-19 Vaccine That Covers Omicron 'Will Be Ready in March,' Pfizer CEO Says* Yahoo!Finance (Jan. 10, 2022),

available at: https://finance.yahoo.com/video/covid-19-vaccine-covers-omicron-144553437.html.

59. On August 11, 2022, the Centers for Disease Control and Prevention ("CDC") issued updated guidance to "no longer differentiate based on a person's vaccination status." *See* CDC, Press Release *CDC streamlines COVID-19 guidance to help public better protect themselves and understand their risk* (Aug. 11, 2022), available at: https://www.cdc.gov/media/releases/2022/p0811-covid-guidance.html.

60. On August 16, 2022, the White House announced that the U.S. Government, the sole customer and payor for the mandated COVID-19 vaccines, ceased purchasing or providing reimbursement for the mandated monovalent vaccines. *See* CNN, *Biden Administration Wil Stop Buying COVID-19 vaccines, treatments and tests as early as this fall, Jha says* (Aug. 16, 2022), available at: https://www.cnn.com/2022/08/16/health/biden-administration-covid-19-vaccines-tests-treatments/index.html.

61. In related litigation, courts have found that the military has failed to provide any current or relevant data regarding the marginal risks and benefits of the Mandated messenger RNA ("mRNA") treatments for healthy service members under current circumstances, namely, 2022 data for the currently prevalent Omicron sub-variants when ninety-eight percent (98%) of other service members are fully vaccinated. Instead, Defendants have provided only "historical data from the 2020 and 2021 pre-Omicron, pre-vaccine phase" that does not "address the present state of the force." *Colonel Fin. Mgmt. Officer v. Austin*, 622 F.Supp.3d 1187, 1213, 2022 WL 3643512 (M.D. Fla. 2022).

62. The scientific evidence demonstrating the obsolescence and ineffectiveness of the FDA-licensed vaccines is too voluminous to summarize here. It should suffice to

say that these facts are now so widely recognized that the mRNA gene therapies were, at best, a failed experiment. One of the vaccines' loudest champions, Dr. Anthony Fauci, following his retirement as director of the National Institute of Allergy and Infectious Diseases, authored a peer-reviewed article in a prestigious journal acknowledging that viruses like COVID-19 are not "vaccine preventable," even in theory. *See* Anthony Fauci, *et al., Rethinking next-generation vaccines for coronaviruses, influenzaviruses, and other respiratory viruses*, CELL HOST AND MICROBE at 1, Vol. 31, Iss. 2. (Feb. 8, 2023), available at: https://doi.org/10.1016/j.chom.2022.11.016.

C. Congressional Rescission by Section 525 of the 2023 NDAA

63. 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.

64. Section 525 of the 2023 NDAA directed Secretary Austin to "rescind" the August 24, 2021 Mandate. Pub. L. No. 117-263 (Dec. 23, 2022), § 525, 136 Stat. 2395.

65. 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). "Rescind" 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*.

66. Section 525 reflects the determination by veto-proof majorities of Congress that Secretary Austin's Mandate was void *ab initio*. Consequently, the DoD must restore the pre-Mandate status quo. 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.

D. Congressional Funding of Militia Members Denied Pay in FY2022 and FY2023 NDAAs

67. Both the 2022 NDAA and 2023 NDAA included full funding for pay, training, benefits, and other financial compensation for all service members, including unvaccinated, non-federalized Militia members under Title 32 orders for all of FY2022 and FY2023.

68. The 2023 NDAA Rescission removed any legal basis for the President, Secretary Austin or the Defendant Agencies (*i.e.*, DoD, NGB, Air Force, Army or Navy) to withhold any funding, pay, benefits or other compensation for non-compliance with a rescinded directive. Similarly, the 2023 NDAA does not include any funding offsets to reflect the reduction in funding resulting from Secretary Austin's Militia Directive and subsequent discharges, denial of pay or benefits, placement into inactive status for unvaccinated Militia members.

69. The DoD and the Armed Services have retained the funds for payment of Militia members withheld pursuant to the November 30, 2021 Militia Directive.

70. 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.

E. DoD and Armed Services' Post-Rescission Orders

71. On January 10, 2023, Secretary Austin rescinded the August 24, 2021 Mandate and the November 30, 2021 Militia Directive. *See* Dkt. 1-4, Secretary Austin Rescission Memo.

72. 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 Mandate should be halted and that all adverse personnel actions and paperwork should be corrected. *Id.* at 1.

73. Secretary Austin further directed the Service Secretaries to cease adjudication of pending Religious Accommodation Requests and medical or administrative exemptions. *Id.*

74. On December 30, 2023, the Army issued FRAGO 35 partially implementing the 2023 NDAA 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* Dkt. 1-10, FRAGO 35, ¶ 1.R.

75. FRAGO 35 expressly kept in place the November 30, 2021 Militia 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 Militia Directive. *See* Dkt. 1-11, FRAGO 36, ¶ 3.D.29.

76. On February 24, 2023, the DOD issued a memorandum directing DoD components to formally rescind other existing vaccination requirements and stating that the DoD would revised DODI 6205.02 to prohibit commands from taking vaccination status into account in making assignment, deployment and operational decisions, without

express DOD approval. *See* Ex. 1, Deputy Secretary of Defense, *Guidance for Implementing Rescission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces* (Feb. 24, 2023), available at: https://perma.cc/3MXS-2CNR) ("February 24, 2023 Guidance Memo").

77. Each of the Armed Services has issued orders rescinding that Service's mandate. *See* Ex. 2, Compiled Army Guidance Documents: Fragmentary Orders 35-38 to HQDA EXORD 225-21 (various dates); HQDA EXORD 174-23 (Mar. 7, 2023); *Army Policy Implementing the Secretary of Defense COVID-19 Vaccination Mandate Rescission* (Feb. 24, 2023); Ex. 3, Compiled Department of the Navy and Navy Guidance Documents: NAVADMIN 05/23 (Jan. 11, 2023); ALNAV 009/23 (Jan. 20, 2023); NAVADMIN 038/23 (Feb. 15, 2023); *Department of the Navy Actions to Implement Coronavirus Disease 2019 Vaccine Rescission* (Feb. 24, 2023); NAVADMIN 065/23 (March 7, 2023); Ex. 4, Compiled Marine Corps Guidance Documents: MARADMIN 025/23 (Jan. 18, 2023); MARADMIN 109/23 (Feb. 28, 2023); Ex. 5, Compiled Air Force Guidance Documents: *Mem. Re: Rescission of the 3 September 21 Mandatory COVID-19 Vaccination of DAF Military Members and 7 December 2021 Supplemental COVID-19 Vaccination Policy Memo* (Jan. 23, 2023); *AFR Guidance for COVID-19* (Feb. 10, 2023); *DAF Guidance on Removal of Adverse Actions and Handling of RARs* (Feb. 24, 2023); Ex. 6, Compiled National Guard Bureau Guidance Documents: *Mem. re: Return of Non-Federalized T32 National Guard Service Members* (Jan. 18, 2023); *Updated NGB Official COVID-19 Travel Guidance* (Feb. 3, 2023).

78. Neither Secretary Austin nor any of the Defendant Agencies have acknowledged that the Section 525 rescission necessarily requires the payment of backpay

and other financial compensation to unvaccinated, non-federalized Militia members who were denied pay and benefits.

F. The Military Has Exercised Any Discretion It May Have Had in Categorically Refusing Backpay to Service Members Denied Pay.

79. Secretary Austin's January 10, 2023 Rescission Memo retains existing restrictions and either retains or adopts a substantially similar *de facto* mandate, directing that "[o]ther standing Departmental policies, procedures, and processes regarding immunization remain in effect," which includes "the ability of commanders to consider, as appropriate, the individual immunization status of personnel in making deployment, assignment, and other operational decisions …" Dkt. 1-4, Jan. 10, 2023 Secretary Austin Rescission Memo, at 2.

80. Plaintiffs and Class Members continue to face a credible threat of involuntary discharge and even criminal prosecution for past violations of the now-rescinded Mandate. This threat has not been eliminated or mitigated by the military's post-Rescission orders and guidance issued to date.

81. This threat is neither abstract nor speculative, as demonstrated by the testimony of Under-Secretaries from the DoD and the Armed Services at a February 28, 2023 hearing before the House Armed Services Committee ("HASC"), *i.e.*, four days after the February 24, 2023 Guidance Memo was issued. *See* Ex. 7, Partial Transcript for Feb. 28, 2023 HASC Hearing. (The full video is available at: https://www.youtube.com/watch?v=TRSZsKt5j_0 and full transcript without timestamps is available at: https://www.navy.mil/Press-Office/Testimony/display-testimony/Article/3315887/house-armed-services-subcommittee-on-military-personnel-holds-hearing-on-covid/.

82. There, the Under-Secretaries repeatedly confirmed that the military deems service members who did not comply with the now-rescinded Mandate to have disobeyed a lawful order in violation of UCMJ Articles 90 and 92, 10 U.S.C. § 890 and § 892, for which they may be involuntarily discharged, without regard to their sincerely held religious objections. *See* Ex. 7 at 2-3 (Chairman Banks questions and answers) & 5-7 (Rep. Gaetz questions and answers).

83. The DoD and Armed Services have refused to rule out criminal prosecution for violations of either Article 90 or Article 92 UCMJ, 10 U.S.C. § 890 and § 892, for unvaccinated service members who did not request religious accommodation or medical or administrative exemptions. *See id.* at 3 (Army Under-Secretary Camarillo at 31:00 discussing UCMJ prosecution).

84. The statute of limitations for charges under UCMJ Article 90 and Article 92 charges is five years, *see* 10 U.S.C. § 843, so Plaintiffs and Class Members will continue to face a credible threat of prosecution for years to come.

85. The DoD and Armed Services have repeatedly confirmed that no service members who were discharged or denied pay and benefits pursuant to the November 30, 2021 Militia Directive would receive backpay or other financial compensation or to which they which they would otherwise be entitled. *See* Paul D. Shinkman, *Pentagon: No Back Pay to Troops Discharged for Refusing COVID-19 Vaccine*, U.S. News & World Report (Jan. 17, 2023), available at: https://www.usnews.com/news/national-news/articles/2023-01-17/pentagon-no-back-pay-to-troops-discharged-for-refusing-covid-19-vaccine.

86. The DoD and Service Under-Secretaries also confirmed that the military has no plans or procedures to reinstate discharged service members or to provide take specific

corrective actions for current members. *See* Ex. 7 at 4-5, 40:55-41:18; *see also* Ex. 8, DoD Under-Secretary Henry Cisneros Feb. 27, 2023 Response to HASC, at 3.

87. Instead, service members must pursue the existing remedies that failed them before and that several courts have found to be futile and/or inadequate.

88. The military has not taken full corrective actions to restore the pre-Mandate status quo or committed to take such corrective actions in the future.

89. There is no reason to believe that Defendant Agencies will take corrective actions in the future because they have insisted in related litigation that Militia members have not been subject to final disciplinary action for non-compliance and that service members have not suffered any final adverse actions at all.

90. The military has not rescinded related and unlawful vaccination policies and regulations, in particular, the DoD's Interchangeability Directives, *see infra* Sections V.C and V.D & ECF & Dkt. 1-15 and 1-16, which remain in full force and continue to be deemed lawful directives.

III. THE CONSTITUTIONAL STRUCTURE OF THE U.S. MILITARY

A. The Ratification Debates

91. "At the Founding, few issues garnered more attention and debate than did the Constitution's allocation of power over the military. The Federalists and Anti-Federalists feared that a standing army would lead ineluctably to tyranny. The Founders also recognized, however, that our then-fledgling Nation needed a strong national defense. The Constitution's solution to this dilemma is embodied in its Militia Clauses. Those clauses reflect a delicate compromise that gives the States power over their respective militias—subject to the President's power to call those militias into national service when necessary." *Abbott*, 70 F.4th at 821.

92. "Informed in no small part by their experiences with British troops on American soil, the Founding generation worried that professional soldiers would imperil the promises of a free government" because "professional soldiers—unlike the citizen-populated militia—were removed from the freedoms enjoyed by the republican political community that they were defending." *Abbott*, 70 F.4th at 821 (citation and quotation marks omitted).

93. The Founding generation balanced the need for a strong national defense against their fear of professional, standing armies by establishing the Militia, "which was first and foremost a *state* prerogative—unless and until federalized by the general government." *Id.* at 838 (emphasis in original).

B. State and Federal Power to Govern and Punish Militia Members

94. The first Militia Clause is referred to as the "Calling Forth Clause", and it assigns to Congress the power:

> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions[.]

U.S. CONST. ART. I, § 8, cl. 15.

95. The second Militia Clause is referred to as the "Organizing Clause", and it assigns to Congress the power:

> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]

U.S. CONST. ART. I, § 8, cl. 16.

96. Together, the Calling Forth and Organizing Clauses empower Congress to provide for "organizing," "arming," and "disciplining" of the Militia at all times.

97. Congress can also provide for "governing" the Militia, but only when the Militia is called into "actual service" of the United States. *See* U.S. CONST. ART. I, § 8, cls. 15-16; U.S. CONST. art. II, § 2, cl. 1 (the President becomes "the Commander in Chief of … the Militia of the several States, when called into the actual Service of the United States.").

98. The calling forth of the Militia into the actual service of the United States is referred to hereinafter as "federalizing" the Militia.

99. The Militia members or units called into actual service are referred to as the "federalized" Militia.

100. At all other times, the Militia members are the "non-federalized" Militia.

101. **Organize:** At the time the Constitution was written, to "organize" in the military context meant to "distribute into suitable parts and appoint proper officers, that the whole may act as one body; as, to organize an army." 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 214 (1828); *see also* RECORDS OF THE FEDERAL CONVENTION, *reprinted in* 3 THE FOUNDERS' CONSTITUTION 205, 206 (Philip B. Kurland & Ralph Lerner eds., 1987)

102. **Arm:** "Arm" had much the same meaning at the Founding as it does today. Samuel Johnson's 1785 dictionary defined "arm" as "To furnish with armour of defence, or weapons of offence." 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 178 (6th ed. 1785); *accord* 1 WEBSTER at 185 ("To furnish or equip with weapons of offense, or defense; as, to arm the militia.") & at 186 ("Equipping with arms; providing with the means of defense or attack.").

103. **Discipline:** Founding-era dictionaries primarily associated "discipline" with education and instruction in the occupation or skills peculiar to military service as opposed, for example, to the training required for civilian professions or trades. For

example, Samuel Johnson's 1785 dictionary lists the first definition of "discipline" as "Education; instruction; the act of cultivating the mind; the act of forming the manners." 1 Johnson at 601. *See also* THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY 229 (3d ed. 1740) ("education, instruction, teaching"); Bailey at 264 ("Education, Instruction, Management, strict Order"); 1 WEBSTER at 579 ("To instruct or educate; to inform the mind; to prepare by instructing in correct principles and habits; as, to discipline youth for a profession, or for future usefulness."); *see also Orloff v. Willoughby*, 345 U.S. 83, 94, 73 S.Ct. 534, 97 L.Ed. 842 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian.").

104. Congress in 1792 passed "An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States." 1 Stat. 271. In § 7 of that Act, Congress adopted "Baron von Steuben's 'Rules of Discipline,' which had originally been adopted by [the Continental] Congress in 1779." Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 214 n.188 (1940) (citation omitted).

105. Von Steuben's disciplinary rules were not, as modern usage might suggest, a forerunner to the manual for Courts-Martial, but instead were a "150-plus-page manual regulat[ing] all manner of military operations," from "the proper positioning of soldiers within a company and a regiment on the battlefield" to detailed "instructions for loading and firing rifles." Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 332 (2008).

106. The Founding generation understood militia "discipline" as the training and standards the United States wanted the militia to be instructed in so that militia men would be uniformly prepared when "call[ed] forth." U.S. CONST. ART. I, § 8, cl. 15.

107. **Govern:** The Founding generation understood the "governing" power to encompass, *inter alia*, the power to command and control the troops as well as to enforce the relevant laws against them. *See, e.g., Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 9, 5 L.Ed. 19 (1820) ("The power of governing the militia, is the power of subjecting it to the rules and articles of war."); DYCHE & PARDON at 358 ("to rule over, direct, keep in awe or subjection, to manage or take care of.").

108. "Govern" is used the same way here as in Article I, Section 8, Clause 14, which assigns Congress the authority "[t]o make Rules for the Government and Regulation of the land and naval Forces." As the Supreme Court explained in *Tarble's Case*, such power includes the ability to "define what shall constitute military offences, and *prescribe their punishment*." 80 U.S. (13 Wall.) 397, 408, 20 L.Ed. 597 (1871)(emphasis added).

109. The Organizing Clause reserves to the States the power to govern the non-federalized Militia. *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 424 (Jonathan Elliot ed., 1836) (James Madison, Virginia) ("The state governments are to govern the militia when not called forth for general national purposes; and Congress is to govern such part only as may be in the actual service of the Union. Nothing can be more certain and positive than this.").

C. The Federal Government May Not Govern or Punish The Militia Except When in the "Actual Service" of the United States

110. Because the Constitution only grants the United States governing authority over the militia after the Militia has successfully been called forth "to execute the Laws of the Union, suppress Insurrections and repel Invasions," U.S. CONST. ART. I, § 8, cls. 15, 16, it follows that "the Constitution gave the federal government no power to punish the

militia in peacetime[.]" Benjamin Daus, Note, *The Militia Clauses and the Original War Powers*, 11 J. NAT'L SECURITY L. & POL'Y 489, 508 (2021); *see also Moore*, 18 U.S. (5 Wheat.) at 9 ("[I]t is a principle manifestly implied in the constitution, that the militia cannot be subject to martial law, except when in actual service, in time of war, rebellion, or invasion.").

111. The Organizing Clause reserves to the States "the Authority of training the Militia according to the discipline prescribed by Congress." U.S. CONST. ART. I, §8, cl. 16. It would make little sense to train someone "according to the [*punishments*] prescribed by Congress." *Ibid.* But it makes perfect sense to educate and teach the militia by training them "according to the [*training* or *instructions*] prescribed by Congress." *Ibid.*; *see also* Daus, *supra*, at 508–09 & n.131 (arguing that in the Organizing Clause, the word "'discipline' mean[s] skill or training" rather than "punishment" in large part because the "Constitution's text itself link[s] training and discipline").

112. "[T]the *only* time the Founding-era Congress provided *any* punishments for non-federalized militiamen was when they refused the President's call to serve." *Abbott*, 70 F.4th at 842 (emphasis in original) (*citing* Act of May 2, 1792, ch. 28, 1 Stat. 264) (listing punishments for failure to obey the President's call)); U.S. CONST. ART. I, § 8, cl. 15; *id.* ART. II, § 2, cl. 1; *Moore*, 18 U.S. (5 Wheat.) at 1.

113. "[T]the Constitution is clear that only the States can enforce the discipline Congress enacts" against the non-federalized Militia. *Abbott*, 70 F.4th at 844. If the President wants to enforce such discipline directly against Militia members, the President must federalize them first. *Id.*

114. Near-contemporaneous court precedent, as well as Defendant's own regulations and military (Art. I) court-martial statutes and precedent, make this

disjunction clear beyond argument. *See Meade v. Deputy Marshal*, 16 F. Cas. 1291, 1292 (C.C.D. Va. 1815).

115. The principle has mutuality as well. A Militia member in federal, Title 10 status, is not amenable to the discipline of the State Militia. *See United States v. DiMuccio*, 61 M.J. 588 (A.F. Ct. Crim. App. 2005).

116. Army Regulation 135-300, *Active Duty for Missions, Projects, and Training for Reserve Component Soldiers* (Oct. 20, 2020), confirms that the federal government's authority to punish (*i.e.*, govern) service members under the UCMJ is limited to those in Title 10 federal service:

> **1-12. Uniform Code of Military Justice.**
>
> a. All Soldiers reporting for AT, OTD, or ADOS in federal status are subject to the Uniform Code of Military Justice (UCMJ) jurisdiction (*see* 10 USC).
>
> b. [Army National Guard of the United States] Soldiers on AT orders under 32 USC are not subject to UCMJ; however, they are subject to the military code of the state or territory of their National Guard unit.

AR 135-300, ¶ 1-12. By contrast, non-federalized National Guard and Reserve members serving under Title 32 orders are not subject to punishment under the UCMJ. *See infra* ¶ 156 & Ex. 11.

117. This class action is on behalf of those non-federalized members of the Reserve or National Guard who were wrongfully subject to punishment by the President when he had no authority to do so. The President and Secretary Austin's actions are exactly the kind of actions that the Militia Clauses were intended to prevent and which give rise to the money-mandating claims before this Court.

D. The Militia Clauses Are Central to Both the Horizontal and Vertical Separation of Powers in the U.S. Constitution.

118. The Constitution divides the military power through the horizontal separation of powers in the federal government; federalism and the horizontal separation of powers between the States and the federal government; and checks and balances. *See* Robert Leider, *Federalism and the Military Power of the United States*, 73 VAND. L. REV. 989, 995–96 (2020).

119. "The Founders created a vertical separation of powers over the militia precisely to prevent the federal government from treating the [M]ilitia just like the Army. Today—just as in 1789—the Organizing Clause ensures that the militia remains under state governance unless and until it is properly federalized." *Abbott*, 70 F.4th at 843.

120. To the Founders, the Militia "was the 'great Bulwark of our Liberties and independence,' and they structured the Constitution with this bulwark in mind. The term 'Militia' appears in the Constitution four times in three separate clauses, a fifth time in the crucial-to-ratification Second Amendment, and a sixth time in the Fifth Amendment. Between the Constitution and Bill of Rights, [the term Militia] features four times more than 'commerce,' 'army/armies,' 'navy,' and 'religion/religious,' once more than 'jury,' and the same number of times as 'tax.' It also receives extended analysis in six *Federalist* Papers and reference in eight others." Daus, *supra*, at 489, 490 & nn.3-6.

121. "The compromises over the Constitution's military clauses derive from the Framers' desire to gain the benefits of having both professional soldiers and an armed citizenry--that is, to have a strong national defense without risking national oppression. To do this, the Constitution created two interoperable-- but partially separate--military structures: first, full-time professional servicemen under plenary federal control [*i.e.*, the

Regular Military]; and second, citizen-soldiers who would be organized into a hybrid national-state militia system [*i.e.*, the Militia]." Leider, *supra*, at 989 & 995–96.

122. "The Framers then used the partial separation of these forces both to limit federal military power and to provide checks against the use of illegitimate force by private parties, state actors, and federal officials." Leider, *supra*, at 996.

E. Withholding Pay, Discharge and Imposition of Martial Law Constitute Punishment or "Govern[ing]" under the Militia Clauses.

123. As explained above, the "governing" power encompasses the authority to punish Militia members and otherwise enforce the relevant laws against them.

124. "[B]oth court-martialing and firing noncompliant Guardsmen are punishments. So are preventing those Guardsmen from training and withholding their pay." *Abbott*, 70 F.4th at 835.

125. It is "hard to imagine a more obvious exercise of the 'governing' power than punishing someone for disobedience." *Id.* at 843.

126. Such punitive actions taken against non-federalized Militia members "unlawfully usurp [the] exclusive constitutional authority" of States to "govern" the non-federalized Militia. *Id.* at 835.

F. The Militia Clauses Are Independent, Self-Executing Sources of Federal Law Providing for the Payment of Money Damages

127. Like the U.S. Constitution's Compensation Clause, U.S. CONST. ART. III, § 1, and Export Clause, U.S. CONST. ART. I, § 9, cl. 5, the Militia Clauses are independent, self-executing Constitutional provisions that confer to Militia members a substantive right for money damages to remedy violations.

128. The *Hatter v. United States* line of cases established the Compensation Clause as an independent, self-executing, money-mandating source of law that prohibits any diminution in compensation for Article III federal judges.

129. "[A] power over a man's subsistence amounts to a power over his will." *United States v. Hatter*, 523 U.S. 557, 121 S.Ct. 1782, 1791, 149 L.Ed.2d 820 (1992) (*quoting The Federalist No. 79,* at 472 (Alexander Hamilton) (emphasis in original) (Clinton Rossiter ed., 1961)).

130. This is no less true for a Militia member, and quite likely even more so, than it is for Article III judges who are the elite of a highly-paid profession and thus have lucrative alternatives to federal service.

131. As discussed below, the President and DoD leadership (though tellingly, ***not*** Congress) did not merely diminish the compensation of unvaccinated, non-federalized Militia members. They withheld ***all*** compensation and even housing allowances—as well as illegally exacting and recouping monies and educational benefits already paid and entitlements already earned—as a means of punishing Militia members and coercing them to comply with the illegal Mandate. *See infra* Section I.C.

132. The "observations by the framers of the compensation clause" apply equally to the Militia Clauses to "suggest that [non-federalized Militia members] deprived of [all] compensation need not rely on legislative or executive action for a remedy. To require further legislative or executive actions to enforce the compensation clause would frustrate Article III's purpose of judicial independence." *Hatter v. United States*, 953 F.2d 626, 628-29 (Fed.Cir.1992). The language and purpose of the Militia Clauses similarly "embrace[] a self-executing compensatory remedy." *Id.* at 629.

133. This prohibition on punishment of non-federalized Militia members was enacted not for the benefit of the individual Militia members, but as "a limitation in the public interest," *Hatter*, 121 S.Ct. at 1791, to preserve the vertical and horizontal separation of powers and State sovereignty established by the Founders. The Militia Clauses are thus "essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution." *Beer v. U.S.*, 696 F.3d 1174, 1198-99 (Fed.Cir.2012) (O'Malley, C.J., concurring) (*citing Evans v. Gore,* 253 U.S. 245, 253, 40 S.Ct. 550, 64 L.Ed. 887 (1920)), *overruled on other grounds by United States v. Hatter,* 532 U.S. 557, 571, 121 S.Ct. 1782 (2001)).

134. Also like the Compensation Clause and Export Clauses, the Militia Clauses use absolute and unconditional language. *See Cyprus Amax Coal Co. v. U.S.*, 205 F.3d 1369, 1375 (Fed.Cir.2000) (comparing the Compensation Clause and Export Clause in holding that the Export Clause is an independent, self-executing, money-mandating source of federal law). The Militia Clauses impose a similar absolute and unconditional prohibition on punishment of non-federalized Militia members not in the "actual service of the United States." *See supra* Section III.C.

135. The Militia Clauses, like the Compensation Clause, forbid the creation of two distinct classes of unvaccinated, non-federalized Militia members who have "diametrically different vaccination status": (A) unvaccinated, non-federalized Militia members hired after the rescission of the Mandate and (B) unvaccinated, non-federalized Militia members subject to the August 24, 2021 Mandate and the November 30, 2021 Militia Directive who were discharged and denied all compensation based on their vaccination status. *Abbott*, 70 F.4th at 843-44. *Cf. Hatter v. United States*, 185 F.3d 1356, 1361-62 (Fed.Cir.1999) (finding statute affecting judicial compensation to violate

Compensation Clause because it created "two different classes of judges", one class holding office "from and after 1983 … entitled the full benefit of congressionally-granted salary increase," and those holding officer prior to 1983 who would not).

136. Like the Compensation Clause, the Militia Clauses, "fairly interpreted, mandate[] the payment of money in the event of a prohibited compensation diminution," in the amount of the unlawful diminution. *Hatter v. U.S.*, 953 F.2d 626, 628 (Fed.Cir.1992).

137. The Militia Clauses, whether standing alone or read in conjunction with the 2023 NDAA, the Military Pay Statutes and other applicable federal laws and regulations, *see supra* ¶ 11, "include a correlative right to money damages as a remedy for [their] violation." *Cyprus Amax*, 205 F.3d at 1374.

138. The amount of payment or monetary damages for the violation of the Militia Clauses' prohibition on punishment or "govern[ance]" of the non-federalized Militia is set forth in federal statutes, namely the Military Pay Statutes, *see* 37 U.S.C. § 204 and § 206, the Military Retirement Pay Statutes, 10 U.S.C. § 1370 and §12731, and other federal money-mandating statutes and regulations governing Militia members entitlement to pay and benefits set forth above. *See supra* ¶ 11.

IV. THE STRUCTURE AND ORGANIZATION OF THE MODERN MILITIA

A. The National Guard Is the Modern Militia.

139. "The National Guard is the modern Militia reserved to the States by Art. I, s 8, cl. 15, 16, of the Constitution." *Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46, 85 S.Ct. 1293, 14 L.Ed.2d 205, *vacated on other grounds*, 382 U.S. 159, 86 S.Ct. 305, 15 L.Ed.2d 227 (1965).

140. "There are 54 separate National Guard organizations: one for each state and one each for Puerto Rico, Guam, and the U.S. Virgin Islands." Ex. 9, Congressional Research Service, *Defense Primer: Reserve Forces* at 1 (Jan. 17, 2023) ("CRS Report"), at 1. With the exception of the District of Columbia National Guard, each of these organizations "operate[s] as state or territorial organizations" and "is controlled by its respective governor." *Id.*

141. As of September 30, 2022, there were 329,917 members of the Army National Guard and 105,040 members of the Air National Guard.

B. Federal and State Governance of The National Guard.

142. The relationship among the National Guard, the States, and the federal military is complex. *See Perpich v. Dep't of Def.*, 496 U.S. 334, 110 S.Ct. 2418, 110 L.Ed.2d 312 (1990).

143. The National Guard includes two "overlapping but distinct organizations"—the National Guards of the various States (the "National Guard") and the National Guard of the United States ("NGUS"). *Perpich*, 496 U.S. at 345.

144. "Since 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States." *Id.*

145. Under this "dual enlistment" system, National Guardsmen, when not on active duty in the NGUS, are state employees of their respective state National Guard units. *See* Maj. Michael E. Smith, *Federal Representation of National Guard Members*, 1995 ARMY LAW. 41, 42 (1995).

146. When on active duty as NGUS members, however, National Guardsmen are relieved of duty in their state National Guard units and are federal employees. 10 U.S.C. § 325.

147. "The National Guard is the only United States military force that operates across both State and Federal responses, leveraging State Active Duty (SAD); Full-Time National Guard Duty (Title 32); and [federal] Active Duty (Title 10)." Ex. 10, NGAUS Fact Sheet, *Understanding the Guard's Duty Status* (Sept. 27, 2018), at 1. *See also infra* Section IV.D.

148. "The President of the United States is Commander in Chief of the United States Armed Forces and the National Guard of the United States at all times." *Abbott*, 70 F.4th at 822.

149. The President becomes "the Commander in Chief of … the Militia of the several States, when called into the actual Service of the United States." U.S. CONST. ART. II, § 2, cl. 1. *See also* Ex. 9, CRS Report, at 1 ("National Guard units and personnel can be ordered into federal service. When this happens, control passes from the governor of the affected units and personnel to the President of the United States.").

C. Traditional National Guard and State Active Duty: State Funding and Pay with State Command and Control.

150. "The Governor can activate National Guard personnel to "State Active Duty" in response to natural or man-made disasters or Homeland Defense missions. SAD is based on State statue and policy as well as State funds. Soldiers and Airmen remain under the command and control of the Governor." Ex. 10, NGAUS Fact Sheet, at 1.

D. Title 32 Non-Federalized National Guard: Federal Funding and Pay Under State Command and Control.

151. As explained above in Section III.B, Congress is responsible for providing the funds to organize, arm, and discipline the National Guard, under Title 32

152. "[T]he Governor remains in charge of the National Guard in each [S]tate except when the Guard is called into active federal service." *Holdiness v. Stroud*, 808 F.2d 417, 421 (5th Cir. 1987).

153. The States train the members of the National Guard.

154. The State appoints National Guard officers. U.S. CONST. ART. I, § 8, cl. 15; 32 U.S.C. §§ 501–02.

155. The State Commander-in-Chief retains the authority to activate the State's Guardsmen to assist with State missions.

156. National Guard members serving on Full-Time National Guard Duty or in the Active Guard and Reserve under Title 32 are not subject to the UCMJ. *See* Ex. 11, Army Regulation (AR) 135-18, *The Active Guard Reserve (AGR) Program*, ¶ 2-7.b (Nov. 1, 2004) ("AR 135-18"); Ex. 12, Air National Guard Instruction 36-101, *Air National Guard and Reserve (AGR) Program* (21 Apr. 2022) ("ANGI 36-101").

157. Neither the NGUS nor any Federal entity has authority to grant entry into, or dismissal from, a state guard unit, a wholly state organization.

158. National Guard members serving on State Active Duty, FTNGD, AGR, or traditional, drilling status National Guardsmen, are statutorily excluded from the Posse Comitatus Act, 18 U.S.C. § 1385, and thus "may be used by the Governor in a law enforcement capacity while the chain of command rests in the State." Ex. 10, NGAUS Fact Sheet, at 1.

159. **Full-Time National Guard Duty**. Full-Time National Guard Duty is full-time training or other duty performed by a member of the National Guard.

160. Title 32 "provides the Governor with the ability to place a [National Guard] soldier in a full-time duty status under the command and control of the State but is directly funded with federal dollars." Ex. 10, NGAUS Fact Sheet, at 1.

161. 32 U.S.C. § 502(f) "allows members of the National Guard to be ordered to full-time National Guard duty to perform operational activities." *Id.*

162. **Active Guard and Reserve.** National Guard members may serve in a full-time military status under the Active Guard and Reserve program. *See* 32 U.S.C. § 502(f).

163. AGR personnel are ordered to duty by the State governor, but they are paid by federal money appropriated for that purpose.

164. AGR members are under state command and control, and "their actions are normally considered state action." *Smith*, *supra*, at 45.

165. AGR personnel are not federal employees. *See* 10 U.S.C. § 101(d)(1) (AGR personnel are not on active duty).

166. National Guard members serve an AGR tour under 32 U.S.C. § 502(f) in state status on Full-Time National Guard Duty. *See* Ex. 11, AR 135-18, ¶ 3-1.d; Ex. 12, ANGI 36-101 at 66, Attach. 1, *Terms* ("Full-Time National Guard Duty").

167. **Traditional or "Drilling Status" National Guard**. "As with AGR personnel, traditional National Guard members are called to duty by the Governor of a state and are paid with federal funds. This is the most common type of National Guard duty. These individuals also are normally considered state actors." *Smith*, *supra*, at 44.

E. Title 10 Federalized National Guard: Federal Funding and Pay under Federal Command and Control.

168. Title 10 "allows the President to 'federalize' the National Guard forces by ordering them to active duty in their reserve component status or by calling them into Federal service in their [M]ilitia status in accordance with" various provisions of Title 10. Ex. 10, NGAUS Fact Sheet, at 1-2 (*discussing* 10 U.S.C. § 12301(d) (voluntary order to active duty); 10 U.S.C. § 12302 (partial mobilization); 10 U.S.C. § 12304 (selected reserve call-up); 10 U.S.C. § 331 (federal aid to State governors); 10 U.S.C. § 332 (use of Militia to enforce federal authority); 10 U.S.C. § 333 (interference with state and federal law)).

169. National Guard members serving under Title 10 are subject to the UCMJ. *See* AR 135-18, ¶ 2-7.a; ANGI 36-101, ¶ 2.5.1.

170. National Guard members serving under Title 10 are federal employees. *See Smith*, *supra*, at 44.

V. PREVIOUS MANDATES AND THE INFORMED CONSENT LAWS.

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

171. Prior to the first Gulf War, the DoD sought to pretreat service members with several unlicensed, "investigational" new drugs, including pyridostigmine bromine and a botulinum toxoid 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. service members' rights 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).

172. 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 service members' right to informed consent.

173. 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).

174. 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*").

175. 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 service members' informed consent rights applicable to the EUA statute, 10 U.S.C. §1107a.

176. 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.

177. After the EUA statute's passage, the FDA granted the first ever Emergency Use Authorization for the anthrax vaccine. Then both the DOD and FDA 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 service members 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* 70 Fed. Reg. 5452, IV "Conditions of Authorization",

178. 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).

179. 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).

180. Army Regulation 40-562, *Immunization and Chemoprophylaxis for the Prevention of Infectious Diseases* (Oct. 7, 2013) ("AR 40-562") implements and complements DoDI 6205.02. AR 40-562 was signed on October 7, 2013, went into effect on November 7, 2013, and remains in effect today. It applies to all branches of the

military, and is designated as AFI 48-110 for the Air Force and BUMEDINST 6230.15B for the Navy and Marine Corps.

181. Appendix D of AR 40-562 contains the list of required vaccines for members of the military. AR 40-562 applies to all military vaccines, whether they are "Investigational New Drugs" as defined in 21 CFR 56.104(c); an EUA product governed by 21 USC § 360bbb-3 and 10 U.S.C. § 1107a; or a fully approved FDA vaccine.

182. Secretary Austin's Aug. 24, 2021 Mandate Memo amended the Defendants' immunization policies to place the COVID-19 vaccines on the list of required vaccinations in Appendix D of AR 40-562. *See Abbott v. Biden*, 608 F.Supp.3d 467, 471, 2022 WL 2287547 (E.D. Tex. 2022), *vacated and remanded by Abbott v. Biden*, 70 F.4th 817 (5th Cir. 2023).

183. Secretary Austin's January 10, 2023 Rescission Memo should have removed the COVID-19 vaccines from the list of required vaccines in AR 40-562 with retroactive effect, *i.e.*, restoring AR 40-562 Appendix D to the pre-Mandate list. In other words, COVID-19 vaccines were and are not required.

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

184. 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.

185. In March 2021, members of Congress sent a letter 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%.

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.

186. In earlier reporting, State Guard Commanders openly admitted that the vaccination rates for the National Guard were far worse than those 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.

Oren Liebermann & 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.

C. FDA Licensure and Interchangeability Determinations

187. 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.

188. Also on August 23, 2021, the FDA re-issued the EUA for the Pfizer COVID-19 vaccine. *See* Dkt. 1-13, 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.

189. In fact, it appears that the Purple Cap COMIRNATY® approved by the FDA was never manufactured or marketed in the United States. *See* Package Insert for COMIRNATY, available at: https://dailymed.nlm.nih.gov/dailymed/archives/fdaDrugInfo.cfm?archiveid=595377#section-13 (FDA-approved product labeling for Purple Cap COMIRNATY® lists the "Marketing Start Date" and "Marketing End Date" both as "23 Aug 2021." *See*, *e.g.*, Archived FDA Approved Labeling and Package); Sept. 13, 2021 Pfizer Announcement, available at: https://dailymed.nlm.nih.gov/dailymed/dailymed-announcements-details.cfm?date=2021-09-13 (Pfizer 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.").

190. 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.

191. Neither the manufacturers (Pfizer and BioNTech) nor the FDA followed these statutorily mandated requirements to make an "interchangeability" finding or determination. In related litigation the FDA has acknowledged that it has not made a "statutory" interchangeability determination.

192. 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.

193. Also on January 31, 2022, the FDA re-issued the EUA for Moderna's unlicensed COVID-19 vaccine because the FDA-licensed product was not available in sufficient quantities. Dkt. 1-14, Jan. 31, 2022 Moderna EUA Re-Issuance Letter.

194. 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

195. On August 24, 2021, Secretary Austin issued the 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®.

196. The Mandate Memo stated that mandatory vaccination "will only use COVID-19 vaccines that receive full licensure from the [FDA], in accordance with FDA labeling and guidance." Dkt. 1-2, Aug. 24, 2021 Secretary Austin Mandate Memo, at 1.

197. The DoD has consistently asserted that EUA vaccines may be mandated.

198. 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 August 24, 2021 Mandate Memo and the November 30, 2021 Militia Directive was issued. *See Doe #1-#14 v. Austin,* 572 F.Supp.3d 1224, 1233-34, 2021 WL 5816632 (N.D. Fla. 2021) (defense counsel for Defendant Agencies admitted in a November 3, 2021 hearing that the DoD and Armed Services were "mandating vaccines from EUA-labeled vials").

199. Because there was no COMINARTY® available, all DoD components and the Armed Service 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.

200. 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.

Dkt. 1-15, Asst. Secretary of Defense Memorandum, *Mandatory Vaccination of Service Members Using the Pfizer-BioNTech COVID-19 and COMIRNATY COVID-19 Vaccines* at 1 (Sept. 14, 2021) ("Pfizer Interchangeability Directive").

201. 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 Dkt. 1-16, May 3, 2022 Asst. Secretary of Defense Memorandum, *Mandatory Vaccination of Service Members Using the Moderna and Spikevax Coronavirus Disease 2019 Vaccines* at 1 ("Moderna Interchangeability Directive").

202. Only the FDA has the statutory authority to make a determination of legal interchangeability, which the FDA has expressly disclaimed having done. Ex. 13, Oct. 21, 2022 Declaration of Peter Marks, M.D., Ph.D., ¶ 10.

203. 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.

204. The President acting as the Commander-in-Chief is prohibited from mandating unlicensed EUA products (absent an express national security authorization) 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. Accordingly, no lesser officer may do so in the absence of express Presidential authorization required by law.

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

205. The 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.

206. 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.

207. 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.

208. 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.

209. 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; (2) are in fact unlicensed, EUA "bivalent" vaccines; and/or (3) are expired or adulterated products that may not be administered, much less mandated, to anyone.

210. The small number (approx. 770) of SPIKEVAX® doses obtained would have been sufficient to vaccinate less than one percent (1%) of Class Members. In any

case, all SPIKEVAX® in DoD's possession as of January 23, 2023, has expired and can no longer be ordered. *See* Dkt. 1-17, 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.

211. 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.

212. 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, etc. through the present.

VI. THE GOVERNMENT HAS SYSTEMATICALLY VIOLATED MILITIA MEMBERS' RELIGIOUS LIBERTIES.

A. The Religious Freedom Restoration Act

213. The Religious Freedom Restoration Act 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).

214. The DoD has implemented RFRA through DoD Instruction 1300.17, *Religious Liberty in the Military Services* (Sept. 1, 2020). Each Armed Service 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. The Military's Sham Religious Accommodation Process

215. The DoD and Armed Services have implemented a process for religious accommodations that courts have described as a "sham," *Navy SEAL 1 v. Biden*, 574 F.Supp.3d 1124, 1139, 2021 WL 5448970 (M.D. Fla. 2021), and a "quixotic quest" that amounts to little more than "theater." *Navy SEALs 1-26 v. Austin,* 578 F.Supp.3d 822, 826 2022 WL 34443 (N.D. Tex. 2022).

216. 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. *See Navy SEALs 1-26 v. Austin*, 596 F.Supp.3d 767, 2022 WL 1025144 (N.D. Tex. 2022) ("*Navy SEALs 1-26*") (Navy); *Doster v. Kendall*, 2022 WL 2974733 (S.D. Ohio July 27, 2022) (Air Force), *aff'd*, 54 F.4th 398 (6th Cir. 2022) ("*Doster*"); *Colonel Fin. Mgmt. Officer v. Austin*, 622 F.Supp.3d 1187, 2022 WL 364351216 (M.D. Fla. 2022) (Marine Corps); *see also Schelske v. Austin*, --- F.Supp.3d ---, 2022 WL 17835506 (N.D. Tex. Dec. 21, 2023) (Army soldiers).

217. While certain courts have held that the rescission of the August 24, 2021 Mandate has mooted service members' RFRA claims, the proceedings in *Doster* (Air Force), *Navy SEALs 1-26* (Navy), and *Schelske* (Army) have not been dismissed as moot.

218. These cases are not moot because the military's Religious Accommodation Request process has resulted in ongoing and irreparable harms from the deprivation of service members religious members for all services and all statuses (active-duty, reserve or National Guard). The military has not rescinded or reformed the sham process, which 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.

219. The Armed Services have denied at least ninety-nine percent (99%) of Religious Accommodation Requests that were adjudicated.

220. The true number likely approaches one-hundred percent (100%) given that the small number of Religious Accommodations requests that were approved all appear to have been disguised administrative exemptions granted to service members on terminal leave in their final months of service.

221. All Plaintiffs who have submitted Religious Accommodation Requests have either had their requests denied, or if they were still pending when the Mandate was rescinded, these requests will not be adjudicated pursuant to Secretary Austin's January 10, 2023 Rescission Memorandum.

222. Section 525 retroactive rescission of the 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.

223. 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. The 2023 NDAA Rescission means that Congress has deprived the government of any ability to raise a defense or to justify the now-rescinded policy.

VII. CLASS ACTION ALLEGATIONS

A. Class Definition

224. 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 class.

225. The Class consists of all non-federalized Militia Members (which includes Reserves on Title 32 orders and excludes anyone on Title 10 orders) 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 Mandate, 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 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;

(B) 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

(C) 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 (or "SAT") year for retirement, promotion, and service obligation purposes; and

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

RCFC.

B. The Proposed Class Satisfies RCFC 23(a).

226. **Numerosity.** The Class consists of 70,000 or more members of the Air Force and Army National Guard and Reservists from all branches serving under Title 32.

227. 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.

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

229. **Commonality.** The proposed Class has 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, requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the Class.

230. There are many questions of law and fact common to the claims of Plaintiffs and the proposed Class Members, 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).

231. Common questions of law and fact affecting members of the proposed class include, but are not limited to, the following:

i. Whether the Militia Clauses are self-executing "money mandating" Constitutional Provisions that confer a substantive right for money damages on Plaintiffs and Class Members;

ii. Whether Defendant Agencies violated the Militia Clauses by attempting to unconstitutionally "govern" Plaintiffs and Class Members with respect to the Mandate and thereby unlawfully punished Plaintiffs and Class Members through the means outlined herein for failure to comply with the Mandate;

iii. Whether the 2023 NDAA and Section 525 thereof is a "money mandating" statute providing a substantive right to compensation for Plaintiffs and Class Members, either standing alone or in conjunction with the Militia Clauses and the federal statutes and regulations enumerated herein, *see supra* ¶ 11;

iv. Whether the rescission of the Mandate should be applied retroactively such that the Mandate is void *ab initio*;

v. Whether Defendant Agencies' violations of the Militia Clauses and 2023 NDAA Section 525 requires Plaintiffs and Class Members to be restored to the pre-Mandate status quo before adverse actions taken thereunder;

vi. To the extent the Court may find that Plaintiffs and Class Members are not entitled to relief under the Militia Clauses or 2023 NDAA Section 525, whether the Mandate of unlicensed EUA vaccines nevertheless was unlawful in violation of 10 U.S.C. § 1107a;

vii. In that instance, whether Defendant Agencies' 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;

viii. Regardless of whether 2023 NDAA is a money-mandating statute, does Section 525 rescission render all discharges unlawful for the purposes of 37 U.S.C. § 204 & § 206;

ix. Whether the Defendant Agencies' systematic denial of Plaintiffs' and Class Members' Religious Accommodation Requests substantially burdened their rights to free exercise of religion protected by the First Amendment and RFRA;

x. Whether the Defendant Agencies' policy of systematically denying Religious Accommodation Requests can survive strict scrutiny where the 2023 NDAA Rescission has eliminated any compelling governmental interest for denying religious accommodations; and

xi. Whether the 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.

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

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

234. 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 Mandate, while counsel J. Andrew Meyer has significant experience in representing Class Members as court-appointed class counsel under Rule 23.

235. 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; 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.

C. The Proposed Class Satisfies RCFC 23(b)(3).

236. The proposed Class is maintainable under Rule 23(b)(3) RCFC as each of the prerequisites to certification under that Rule are met as alleged below.

237. **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 Class based on the answers to the common legal and factual questions listed above.

238. **Superiority.** A class action is superior to other available methods for fairly and efficiently adjudicating these issues. There are 70,000 or more Class Members, the majority of which 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 absent the present class action.

239. 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 the "FY22 Monthly Basic Pay Table", Dkt. 1-18, which states the statutory payment rates for all service members.

240. The amount each Plaintiff and Class Member is entitled for 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 November 30, 2021 Militia Directive. Alternatively, the amounts can be calculated by the Defendant Agencies 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.

241. 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 ("BCMRs") can apply as appropriate to individual Class Members' military records.

242. 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 do not require individualized determinations and may be calculated mechanically with a matrix like that proposed by Plaintiffs based on statutorily defined pay rates and confirmed using the government's own centralized computerized payroll and personnel 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.

243. While there are many court challenges to the lawfulness of the 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 Court of Federal Claims.

244. 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 Member's 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 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.

FIRST CAUSE OF ACTION
VIOLATION OF THE MILITIA CLAUSES

245. Plaintiffs reallege the foregoing paragraphs and facts in Sections I-IV and VII as if fully set forth in this count.

246. The Militia Clauses are self-executing "money mandating" sources of federal law that confer a substantive right for money damages on Plaintiffs and Class Members.

247. Like the Compensation Clause for Art. III judges and the Export Clauses, the Militia Clauses are fairly interpreted as stand-alone, independent, self-executing "money-mandating" source of federal law that confers substantive rights to monetary damages for Plaintiffs and Class Members.

248. Alternatively, the Militia Clauses are money-mandating provisions for non-federalized Militia members when read in conjunction with the 2023 NDAA, the Military Pay Statutes, and other applicable federal statutes and regulations, that confer substantive rights to monetary damages for Plaintiffs and Class Members. *United States v. Hatter*, 523 U.S. 557, 121 S.Ct. 1782, 1791, 149 L.Ed.2d 820 (1992) (*quoting The Federalist No. 79,* at 472 (Alexander Hamilton) (emphasis in original) (Clinton Rossiter ed., 1961)).

249. The President and DoD leadership did not merely diminish the compensation of unvaccinated, non-federalized Militia members, the DoD completely expropriated non-federalized Militia members' compensation, as a means of punishing and coercing Militia members to comply with the unlawful Mandate. *See supra* Section I.C.

250. "To require further legislative or executive actions to enforce the compensation clause would frustrate Article III's purpose of judicial independence." *Hatter v. United States*, 953 F.2d 626, 628-29 (Fed.Cir.1992). The language and purpose of the Militia Clauses "embraces" the same "self-executing compensatory remedy" that was requisite for the judiciary. *Hatter*, 953 F.2d. at 629.

251. This prohibition on punishment of non-federalized Militia members was enacted not for the benefit of the individual Militia members, but as "a limitation in the public interest", *Hatter*, 121 S.Ct. at 1791, to preserve the vertical and horizontal separation of powers and State sovereignty established by the Founders.

252. The Militia Clauses are, therefore, a self-executing, money mandating source of federal law that "is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution." *Beer v. U.S.*, 696 F.3d 1174, 1198-99 (Fed.Cir.2012) (O'Malley, C.J., concurring) (*citing Evans v. Gore,* 253 U.S. 245, 253, 40 S.Ct. 550, 64 L.Ed. 887 (1920)), *overruled on other grounds by Hatter,* 532 U.S. at 571, 121 S.Ct. 1782)).

253. Like the Compensation Clause, the Militia Clauses, "fairly interpreted, mandate[] the payment of money in the event of a prohibited compensation diminution," in the amount of the unlawful diminution. *Hatter v. U.S.*, 953 F.2d 626, 628 (Fed.Cir.1992).

254. The amount of payment or monetary damages for the violation of the Militia Clauses' prohibition on punishment or "govern[ance]" of the non-federalized Militia is set forth in federal statutes, namely the Military Pay Statutes, *see* 37 U.S.C. § 204 and § 206, the Military Retirement Statutes, and other federal statutes and regulations governing Militia members entitlement to pay and benefits. *See supra* ¶ 11.

255. The Federal Circuit has observed that "[t]he necessary implication of the Export Clauses unqualified proscription is that the remedy for its violation entails a return of money unlawfully exacted." *Cyprus Amax*, 205 F.3d at 1373 (citations omitted) (finding that constitutional provisions, whether granting or prohibiting a power to Congress, should be enforced with equal and full effect)).

256. The Militia Clauses, whether standing alone or read in conjunction with the 2023 NDAA and the Military Pay Statutes, should be read to "include a correlative right to money damages as a remedy for [their] violation." *Id.* at 1374.

257. The remedy for violation of the Militia Clause is to provide monetary damages in the precise amount of their statutory entitlements under the Military Pay Statutes, the Military Retirement Statutes and other applicable federal statutes and regulations governing Militia members' pay and benefits. *See supra* ¶ 11.

Punishment of Unvaccinated, Non-Federalized Militia Members

258. The President and DoD leadership punished unvaccinated, non-federalized Militia members through discharges, withholding of pay from individual Militia members, prohibiting them from participating in drill, training, and other duties, and threats of courts-martial and punishment under the UCMJ.

259. These actions were "punishments for disobedience—pure and simple." *Abbott*, 70 F.4th at 843-44.

260. The President and DoD leadership systematically punished unvaccinated, non-federalized Militia members by: involuntarily transferring them from active status to inactive status; cancelling of orders to full-time active status; violations of their rights to informed consent protected by 10 U.S.C. § 1107a (*see supra* Section V); violations of the

religious liberties protected by the First Amendment Free Exercise Clause and the Religious Freedom Restoration Act. *See supra* Section VI.

261. The President and DoD leadership punished unvaccinated, non-federalized Militia members the creation of hostile environment and singling out unvaccinated service members for ridicule and ostracization and by imposing arbitrary, discriminatory and punitive measures such as oppressive and unnecessary masking and testing requirements.

262. The President and DoD leadership punished unvaccinated non-federalized Militia members through a wide range of adverse and punitive personnel actions, including letters of reprimand, GOMORs, adverse fitness evaluations, punitive reassignments and removals from command or leadership positions, and denials of promotion.

263. The President and DoD leadership punished unvaccinated non-federalized Militia members through wrongful discharges that are categorized as "misconduct" that prevent reenlistment and significantly harm their ability to seek future employment in the private or public sector.

264. The President and DoD leadership punished unvaccinated non-federalized Militia members through the foregoing actions that, among other things, result in the loss or reduction of, or ineligibility for, earned retirement benefits, the post-9/11 GI Bill, Veterans Administration benefits, healthcare benefits, and other governmental benefits to which they were or otherwise would have been entitled by law.

265. The President and DoD leadership punished unvaccinated non-federalized Militia members by requiring recoupment of already earned post-9/11 GI Bill benefits, the costs of training and tuition at military schools or academies and public and private

universities, the recoupment of bonuses, denial of allowances, and the denial of special pays.

266. Plaintiffs and Class Members are entitled to backpay and other financial compensation, as well as equitable ancillary relief, to which they are entitled under the Military Pay Statutes and other applicable federal laws, *see supra* ¶ 11, and regulations to remedy the unconstitutional punishments inflicted upon them for non-compliance with the Mandate.

SECOND CAUSE OF ACTION
VIOLATION OF SEC. 525 OF THE FY2023 NDAA

267. Plaintiffs reallege the foregoing paragraphs and facts in Sections I-IV and VII as if fully set forth in this count.

268. A statute is money-mandating if "it can fairly be interpreted as mandating compensation for damages sustained as a result of the breach of the duties [it] impose[s]." *Fisher v. United States,* 402 F.3d 1167, 1173-74 (Fed.Cir.2005) (en banc) (citations and quotation omitted). For a "fair interpretation," "[i]t is enough ... that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages." *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 473, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003).

269. The money-mandating requirement "may ... be satisfied if the Government retains discretion over the disbursement of funds but the statute: (1) provides 'clear standards for paying' money to recipients; (2) states the 'precise amounts' that must be paid; or (3) as interpreted, compels payment on satisfaction of certain conditions." *Samish Indian Nation v. United States*, 657 F.3d 1330, 1336 (Fed.Cir.2011) (*quoting Perri v. United States,* 340 F.3d 1337, 1342–43 (Fed.Cir.2003)).

270. The 2023 NDAA Rescission is a "money mandating" source of federal law that confers substantive rights to monetary damages for Plaintiffs and similarly situated unvaccinated, non-federalized Militia members.

271. The 2023 NDAA Rescission, in conjunction with the Militia Clauses, the 2023 Appropriations Act, the Military Pay Statutes and other applicable federal laws and regulations, *see supra* ¶ 11, is fairly interpreted as a "money-mandating" source of federal law that confers substantive rights to monetary damages for Plaintiffs and Class Members.

272. "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).

273. 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 Mandate and Militia Directive.

274. Secretary Austin's January 10, 2023 Rescission Memo acknowledges this Congressional directive by rescinding the 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 2023 NDAA Rescission for backpay and financial compensation.

275. To the extent Congress left any discretion to implement the 2023 NDAA Rescission, the 2023 NDAA, in conjunction with the 2023 Appropriations Act, the Military Pay Statutes, and other applicable federal laws and regulations, *see supra* ¶ 11, provide clear standards for payment, provide the precise amounts for payment (*i.e.*, the

FY 2022 and FY 2023 statutory rates for salaries, allowances, benefits, and other compensation), and compel payment on satisfaction of the conditions therein.

276. The military has already exercised any discretion it may have through the issuance of its post-Rescission implementation orders. *See supra* Sections II.D-II.F. *See also Collins v. U.S.*, 101 Fed.Cl. 435, 450 (Fed.Cl.2011) (where the DoD issued regulations implementing the NDAA providing "a servicemember who qualifies for pay under those regulations would be entitled to pay under the statute as not otherwise disqualified by the Secretary", the court found that the Secretary's discretion had "already ... been exercised in the form of the DoDI and is no longer available to the Secretary.").

277. Even if the military retains some limited discretion, these statutes are money-mandating requirements because they: "(1) provide[] 'clear standards for paying' money to recipients; (2) state[] the 'precise amounts' that must be paid; or (3) ... compel[] payment on satisfaction of certain conditions." *Samish Indian Nation*, 657 F.3d at 1336 (citation and quotation omitted).

278. The Military Pay Statutes and other applicable federal statutes and DoD regulations governing pay and benefits, *see supra* ¶ 11, provide clear standards for payment, the precise amounts for payment, and the conditions for payment.

279. This Court has routinely found provisions of previous National Defense Authorization Acts and other money-authorizing or appropriations statutes to be "money mandating" where there was a separate source of federal law for determining the standards, amounts and conditions for payment. *See, e.g. Collins*, 101 Fed.Cl. at 457-59 (holding that NDAA provisions repealing the unconstitutional "Don't Ask, Don't Tell" policy were money-mandating in conjunction with the Separation Pay Statute, 10 U.S.C. § 1174); *Striplin v. U.S.*, 100 Fed.Cl. 493, 500-01 (Fed.Cl.2011) (holding that NDAA

provisions to be money-mandating where they established conditions for waiver of pay limitations). *See also San Antonio Housing Authority v. United States*, 143 Fed.Cl. 425, 475-76 (Fed.Cl.2019) (appropriations act money-mandating where separate statute prohibited diminution in funding to specific group); *Lummi Tribe of Lummi v. U.S.*, 99 Fed.Cl. 584, 603-04 (Fed.Cl.2011) (holding that statute providing grants to specific Indian tribes was money-mandating).

280. Statutes governing pay and benefits for service members or federal employees that were not money-mandating on their own are money-mandating when read in conjunction with other federal statutes or applicable military regulations that established conditions for entitlement to such pay and benefits. *See, e.g., Colon v. United States*, 132 Fed.Cl. 665 (Fed.Cl.2017) (living quarters allowance statute in conjunction with the Department of State Standardized Regulations and applicable agency regulations); *Stephan v. United States,* 111 Fed.Cl. 676 (Fed.Cl.2013) (same); *Roberts v. U.S.*, 745 F.3d 1158, 1165-66 (Fed.Cir.2014) (same); *Agwiak v. United States*, 347 F.3d 1375, 1379-80 (Fed.Cir.2003) (remote duty pay statute money-mandating).

281. The 2023 NDAA Rescission, in addition to being an independent "money-mandating" source of federal law, removes any bar or prohibition on payment to unvaccinated service members, or any grounds for differential treatment or payment, on the basis of their COVID-19 vaccination status or non-compliance with the now-rescinded Mandate.

282. The 2023 NDAA Rescission applies uniformly to eliminate the Mandate for all service members. The statutory text, structure, and purpose of the 2023 NDAA Rescission all support the conclusion that Congress intended to exclude unvaccinated, non-federalized Militia members from the benefits, protections or remedies to which they

are entitled under the Military Pay Statues and other applicable laws and regulation governing basic pay, retirement, or other military benefits. *See supra* ¶ 11.

283. "When a statute has been repealed, the regulations based on that statute automatically lose their vitality. Regulations do not maintain an independent life, defeating the statutory change." *Aerolineas Argentinas v. U.S.*, 77 F.3d 1564, 1575 (Fed.Cir.1996). This applies *a fortiori* to regulations, rules or policies based on an agency rule rescinded by Congress.

284. Failure to provide backpay and other relief required to restore unvaccinated, non-federalized Militia members to the pre-Mandate status quo would have the effect of creating a two-tier governance and payment structure for Militia members, where some are made whole through the 2023 NDAA Rescission, while other similarly situated members receive nothing.

285. The 2023 NDAA Rescission applies to all service members equally, and the military was required to provide monetary and other remedies on the same basis or conditions to all Militia members.

286. There is no indication that Congress intended to create such a two-tiered system or to prohibit Militia members from receiving the pay and benefits to which they are otherwise entitled, or to permit the illegal exaction and recoupment of payments and benefits that they have been paid or earned.

287. Accordingly, no fair interpretation of the 2023 NDAA Rescission, whether standing alone or in conjunction with the Militia Clauses, would permit the military to exercise its discretion to create a two-tiered system for the governance and payment of Militia members. *See, e.g., Abbott*, 70 F.4th at 843-44; *Hatter*, 185 F.3d at 1361-62; *Collins*, 101 Fed.Cl. at 457-459.

288. Defendant Agencies' refusal to provide backpay required by the 2023 NDAA Rescission is an unlawful act in defiance of an express Congressional directive.

289. The Secretary cannot "defeat an otherwise money-mandating statute merely by reserving last-ditch discretion. … The ability to change the nature of a statute by issuing regulations that provide a veto would completely upend this area of law." *Collins*, 101 Fed.Cl. at 459. "Such a perverse understanding of Congress's purpose cannot be the law … [for] [i]t is the statute, not the Government official, that provides for the payment." *Fisher,* 402 F.3d at 1175.

290. Plaintiffs' and Class Members' Tucker Act claims for backpay do not require any showing that the Mandate and Militia Directive were unlawful or wrongful or are simply legal nullities (though they are both). Instead, to give full effect to the 2023 NDAA Rescission, Plaintiffs must be provided backpay and other compensation to which they are entitled to restore the pre-Mandate status quo.

THIRD CAUSE OF ACTION
WRONGFUL DISCHARGE IN VIOLATION 10 U.S.C. § 1107a & FY 2023 NDAA

291. Plaintiffs reallege the foregoing paragraphs and facts in Sections I-V and VII as if fully set forth in this count.

292. The Military Pay Act, in conjunction with the Militia Clauses, 10 U.S.C. § 1107a, the 2023 NDAA Rescission, and the 2023 Appropriations Act, is fairly interpreted as a "money-mandating" source of federal law that confers substantive rights to monetary damages for Plaintiffs and Class Members.

293. 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.

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

295. The August 24, 2021 Mandate permits only COVID-19 mRNA gene therapy "vaccines" with "full licensure from the [FDA], in accordance with FDA-approved labeling and guidance." Dkt. 1-2, Aug. 24, 2021 Secretary Austin Mandate Memo, at 1

296. The DoD and other Defendant Agencies mandated gene therapy products that do not meet the DoD's own definition for being vaccines.

297. A "therapy" or "treatment," even if lifesaving, cannot be mandated.

298. The DoD and other Defendant Agencies have mandated unlicensed, EUA COVID-19 gene therapies from the issuance of the Mandate on August 24, 2021, until at least the 2023 NDAA Rescission of the 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.

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

300. No FDA-licensed COVID-19 vaccines were available at all at the time the November 30, 2021 Milita Directive was issued.

301. In related litigation, Defendant Agencies have admitted that they have mandated unlicensed EUA vaccines. *See supra* ¶ 197.

302. 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 Mandate. *See supra* Section V.D.

303. Defendant Agencies did not have "Comirnaty-labeled" vaccines until at least June 2022.

304. Defendant Agencies did not have any "Spikevax-labeled vaccines" until at least September 2022.

305. 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. *See supra* ¶¶ 208-209.

306. All "Spikevax-labeled" vaccines have expired, as confirmed by Defendant Agencies on January 23, 2023. *See supra* ¶ 210.

307. 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 Secretary Austin's August 24, 2021 Mandate Memo that permitted only FDA-licensed products to be mandated.

The Military Pay Act, 37 U.S.C. § 204

308. 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 …"

309. 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).

310. All Plaintiffs and Class Members who were on FTNGD, ADOS, AGR or other Title 32 "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.

311. 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.

312. 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," 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.

313. 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 constructive service doctrine provides payment for those members "ready, willing, and able" to serve, yet were illegally denied the ability to do so by unconstitutional acts of the President and the Secretary of Defense.

The Military Pay Act, 37 U.S.C. § 206

314. 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 the FY22 Monthly Basic Pay Table. Dkt. 1-18.

315. 37 U.S.C. § 206(a) is a money-mandating statute for National Guard or Reserve members for drills, training, or duties actually performed.

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

317. 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).

318. Defendant Agencies' actions are unlawful in violation of the 2023 NDAA Rescission, which retroactively rendered the Mandate and all other orders based on the Mandate null and void *ab initio*.

319. The 2023 NDAA Rescission of the 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.

FOURTH CAUSE OF ACTION
VIOLATION OF 42 U.S.C. §§ 2000bb-1, et seq, and 37 U.S.C. § 204 & § 206

320. Plaintiffs reallege the paragraphs and facts in Sections I-IV and Sections VI-VII as if fully set forth in this count.

321. The Religious Freedom Restoration Act is fairly interpreted as a "money-mandating" source of federal law that confers substantive rights to monetary damages for Plaintiffs and similarly situated unvaccinated, non-federalized Militia Members.

322. The Religious Freedom Restoration Act, in conjunction with the 2023 NDAA Rescission, the 2023 Appropriations Act, and the Military Pay Statutes, is fairly interpreted as a "money-mandating" source of federal law that confers substantive rights to monetary damages for Plaintiffs and Class Members.

323. 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).

324. 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).

325. 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).

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

327. The Defendant Agencies each adopted a policy of systematically denying Religious Accommodation Requests 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.

328. The 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.*, religious accommodations, by granting thousands of medical and administrative exemptions, while granting zero or only a handful of Religious Accommodation Requests.

329. 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).

330. Plaintiffs and Class Members have carried their burden of demonstrating that the Mandate and the Government's religious accommodation policies 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).

331. The 2023 NDAA Rescission retroactively removes any compelling governmental interest in compelling vaccination of service members over their religious objections.

332. The 2023 NDAA Rescission retroactively eliminates the Mandate as a permissible means for achieving that goal, necessarily entailing that it was not the least restrictive means for doing so.

333. Accordingly, the Government's policies necessarily fail strict scrutiny.

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

FIFTH CAUSE OF ACTION
ILLEGAL EXACTION

335. Plaintiffs reallege the foregoing paragraphs and facts in Sections I-IV and VII as if fully set forth in this count.

336. An illegal exaction claim generally involves money "improperly paid, exacted, or taken from the claimant[.]" *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. 599, 372 F.2d 1002, 1007 (Ct.Cl.1967).

337. An illegal exaction has occurred when "the Government has the citizen's money in its pocket." *Clapp v. United States,* 127 Ct.Cl. 505, 512, 117 F.Supp. 576, 580 (Cl.Ct.1954), *cert. denied,* 348 U.S. 834, 75 S.Ct. 55, 99 L.Ed. 658 (1954).

338. Suit can then be maintained under the Tucker Act to recover the money exacted. *Clapp*, 127 Ct.Cl. at 513; *Pan American World Airways v. United States,* 129 Ct.Cl. 53, 55, 122 F.Supp. 682, 683–84 (Cl.Ct.1954) ("the collection of money by Government officials, pursuant to an invalid regulation" is an illegal exaction and not a tort).

339. The President and DoD leadership punished unvaccinated non-federalized Militia members through the illegal exaction and recoupment of separations pay, special

pays, (re)enlistment bonus payments, post-9/11 GI Bill benefits, costs of training and tuition at military schools or academies and public and private universities, travel and permanent change of station allowances, all of which Plaintiffs were entitled to by law.

340. "When a statute has been repealed, the regulations based on that statute automatically lose their vitality. Regulations do not maintain an independent life, defeating the statutory change." *Aerolineas Argentinas v. U.S.*, 77 F.3d 1564, 1575 (Fed.Cir.1996); *see also Carriso v. United States,* 106 F.2d 707, 712 (9th Cir.1939) (when a government agent construes a statute as remaining in effect after it has been repealed and uses it as a basis to collect fees, a claim to recover the fees is "founded upon a law of Congress" and "does not sound in tort"). This applies *a fortiori* to regulations, rules or policies based on an agency rule rescinded by Congress.

341. The 2023 NDAA Rescission of the Mandate eliminated any legal basis for the recoupment or withholding of bonuses, post-9/11 GI Bill, the costs of training and tuition at military schools or academies and public and private universities, and other benefits and special pays.

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

342. Plaintiffs reallege the foregoing paragraphs and facts in Sections I-VII as if fully set forth in this count.

343. 10 U.S.C. § 1552, in conjunction with the Military Pay Statutes, the 2023 NDAA, and the 2023 Appropriations Act, is fairly interpreted as a "money-mandating" source of federal law that confers substantive rights to monetary damages for Plaintiffs and similarly situated unvaccinated, non-federalized Militia Members.

344. 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 Mandate.

345. For any Plaintiffs or 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 Mandate, Plaintiffs request that the Court direct these matters to the appropriate BCMR or Special Selection Board.

RELIEF REQUESTED

WHEREFORE, Plaintiffs pray that this Court:

346. Certify the Class under Federal Court of Claims Rule 23 as the Class is defined in this Complaint;

347. Appoint Plaintiffs as the representatives of the Class certified by the Court;

348. Appoint undersigned Counsel as counsel for the Class certified by the Court;

349. 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;

350. Award and enter a judgment for (approximately) $500,000.00 due in military backpay and other monies owed 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;

351. 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 Defendant Agencies;

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

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

Date: August 4, 2023

Respectfully submitted,

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