IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NICK BASSEN, *et al.*,

***Plaintiffs*,**

v.

THE UNITED STATES OF AMERICA,

***Defendant*.**

Case No. 23-211

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

For the reasons set forth below, this Court must deny Defendant's August 25, 2023, motion to dismiss, Dkt. 22, Plaintiffs' August 4, 2023, First Amended Class Action Complaint ("Complaint" or "FAC"). Dkt. 21. This Court has jurisdiction because the Plaintiffs here are military members with back pay claims for wrongful discharge of one kind or another. Plaintiffs also allege that Section 525 of the National Defense Authorization Act of 2023 ("2023 NDAA") can be fairly interpreted as a money-mandating statute that provides them relief. Plaintiffs have standing for their informed consent claim (Count II) because they were punished for non-compliance with the Department of Defense's ("DoD") COVID-19 mandate ("Mandate") when compliance was physically and legally impossible. Plaintiffs have stated claims under the Military Pay Act for violations of the 2023 NDAA (Count I), 10 U.S.C. § 1107a (Count II), and the Religious Freedom Restoration Act ("RFRA") (Count III), and for illegal exactions (Count IV).

LEGAL STANDARDS

I. RULE 12(b)(1) CHALLENGE TO SUBJECT MATTER JURISDICTION.

This Court has jurisdiction over claims where the United States has waived its sovereign immunity from suit. *See U.S. v. Testan*, 424 U.S. 392, 399 (1976). Waiver is typically based on the Tucker Act, 28 U.S.C. § 1491, which requires "that there be a separate money-mandating statute the violation of which supports a claim for damages against the United States." *Holley v. U.S.*, 124 F.3d 1462, 1465 (Fed.Cir. 1997).

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. U.S.,* 402 F.3d 1167, 1173-74 (Fed.Cir. 2005) (*en banc*) (cleaned up). "The exact nature of a plaintiff's claim is irrelevant to determining subject matter jurisdiction

because, at the jurisdictional stage, the court examines only whether a successful plaintiff under the statute is entitled to money damages." *Collins v. U.S.*, 101 Fed. Cl. 435, 449 (2011) (citations omitted). "The question of whether the claimant actually falls within the terms of the statute or regulation is a merits issue." *Perry v. U.S.*, 149 Fed. Cl. 1, 12-13 (2012) (quoting *Greenlee County v. U.S.*, 487 F.3d 871, 876 (Fed.Cir. 2007)).

A plaintiff carries his jurisdictional burden by making "a nonfrivolous assertion that it is within the class of plaintiffs entitled to recover under the money-mandating source," *Jan's Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299, 1307 (Fed.Cir.2008), and by producing a declaration setting forth "specific facts" to support standing. *Military-Veterans Advocacy v. Sec. of Veterans Affairs*, 7 F.4th 1110, 1121-1122 (Fed.Cir. 2021)

II. RULE 12(B)(6) FAILURE TO STATE A CLAIM.

In *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), the Supreme Court set forth the "plausibility" standard that Plaintiffs must meet to survive a Rule 12(b)(6) motion to dismiss. A complaint "does not need detailed factual allegations," but there must "be enough to raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 544. "In ruling on a motion to dismiss, the Court is 'obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor.'" *Henke v. U.S.*, 60 F.3d 795, 797 (Fed.Cir.1995).

ARGUMENT

I. THE 2023 NDAA IS A MONEY-MANDATING STATUTE THAT REQUIRES DEFENDANT TO PROVIDE RETROACTIVE RELIEF.

A. The 2023 NDAA Is a Money-Mandating Statute.

The 2023 NDAA Rescission, in conjunction with the 2023 Appropriations Act, the Military Pay Act and other applicable federal laws and regulations on which Plaintiffs rely, *see* FAC, ¶ 11, is fairly interpreted as a "money-mandating" source of federal law that

confers substantive rights to monetary damages for Plaintiffs and Class Members.[1] The 2023 NDAA and Appropriations Acts authorize, appropriate, obligate, and direct military funding, including the payment and benefits for all service members for Fiscal Year 2023. The Military Pay Act and the other federal laws and regulations governing military pay cited in the Complaint, *see* FAC, ¶ 11, establish the entitlement to, conditions of eligibility for, and the specific amounts of pay due to each service member, based on their rank, years of service, and other relevant conditions and qualifications for payment.

This Court has routinely found provisions of previous NDAAs 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.[2] In *Collins v. U.S.*, 101 Fed. Cl. 435 (2011), this Court held the NDAA provisions that repealed—not *rescinded*, but only repealed—the unconstitutional "Don't Ask, Don't Tell" policy were money-mandating in conjunction with the Separation Pay Statute, 10 U.S.C. § 1174, which Plaintiffs here have identified as a money-mandating statute. *See* FAC, ¶ 11(g). Additionally, statutes governing pay and benefits for service members or federal employees that may not be money-mandating on their own are money-mandating

[1] Defendant's claim that Plaintiffs have failed to identify a separate, money-mandating statute appears to apply only to the 2023 NDAA under Count I. Defendant appears to concede, or at least does not dispute, that the Military Pay Act is a money-mandating statute for the backpay claims in Counts I, II and III. Accordingly, the Plaintiffs here address only the 2023 NDAA.

[2] *See, e.g.*, *Striplin v. U.S.*, 100 Fed. Cl. 493, 500-01 (2011) (holding NDAA provisions to be money-mandating where they established conditions for waiver of pay limitations). *See also San Antonio Hous. Auth. v. U.S.*, 143 Fed. Cl. 425, 475-76 (2019) (appropriations are 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 (2011) (holding that statute providing grants to specific Indian tribes was money-mandating).

when read in conjunction with other federal statutes or regulations that establish conditions for entitlement to such pay and benefits.[3]

Congress authorized, appropriated, and obligated monies to be paid to service members in FY2022 (October 1, 2021, to September 30, 2022) and FY2023 (October 1, 2022, to September 30, 2023) without regard to COVID-19 vaccination status. The Rescission of the Mandate eliminated any legal basis for differential treatment based on vaccination status. Accordingly, the DoD must pay all service members the amounts to which they are entitled by law (*i.e.*, at the rates set forth in the Military Pay Act, and other applicable laws and regulations), without regard to whether or not they took the shots.

Defendant's rejoinder—that Plaintiffs are different because they were discharged for failing to obey the order to take the shot—faces insurmountable legal and factual obstacles. First, this is a merits-based argument and not a jurisdictional bar to the Plaintiffs' claims. Second, it assumes the factual legality of the underlying order, which the Plaintiffs here explicitly challenge on two separate and distinct grounds. Plaintiffs challenge the lawfulness of the order to take the shot, a well-recognized exception to the general rule of obeying orders.

> The word 'lawful' is indeed surplusage, and would have been implied from the word 'command' alone, but, being used, it goes to point the conclusion affirmed by all the authorities that a command not lawful may be disobeyed, no matter from what source it proceeds. n. 24
>
> (n. 24) That an illegal order emanating from the President or Secretary of War can confer no authority, *see Little v. Barreme*, 2 Cranch 179. 'In time of peace at least an officer is not obliged to obey an illegal order.' *Ide v. United States*, 25 Ct. Cl. 401, 407."

[3] *See, e.g., Colon v. U.S.*, 132 Fed. Cl. 665 (2017) (living quarters allowance statute in conjunction with applicable agency regulations); *Stephan v. U.S.,* 111 Fed. Cl. 676 (2013) (same); *Roberts v. U.S.*, 745 F.3d 1158, 1165-66 (Fed.Cir.2014) (same); *Agwiak v. U.S.*, 347 F.3d 1375, 1379-80 (Fed.Cir.2003) (remote duty pay statute is money-mandating).

Winthrop, "Military Law and Precedents," Part I, (2d ed.), Twenty-First Article. Second, Plaintiffs raise the factual issue of *impossibility* of compliance with the Secretary's order, *see, e.g.,* FAC, ¶¶ 131; Dailey Decl. ¶ 15; Hall Decl. ¶ 13; Wynne Decl. ¶¶ 6-10, another long-recognized defense to being cashiered for failing to comply with an order or regulation. *See id.* ("nothing short of a physical impossibility ordinarily excus[es] a complete performance"). Third, Plaintiffs' claims are not collateral attacks on courts-martial because no Plaintiff has been subject to a court-martial, a punishment for non-compliance that Congress prohibited in the 2022 NDAA. *See infra* note 6.

Despite Congress' elimination in the 2023 NDAA of any legal basis for denying Plaintiffs the pay to which they are entitled by law, the DoD's position is that it may withhold this FY2023 funding from unvaccinated service members and keep these funds for itself. The DoD cannot dispute the validity of Plaintiffs' and Class members' entitlement to pay for FY2022 and FY2023 because it has paid and is paying all other vaccinated and unvaccinated service members the amounts required by law. This fact alone—that the DoD is following the money-mandating statutes cited by Plaintiffs to pay all other service members but has denied to Plaintiffs payments due under those statutes—meets the threshold requirement of making "a nonfrivolous assertion" that they are "within the class of plaintiffs entitled to recover under the money-mandating source[s]." *Jan's Helicopter*, 525 F.3d at 1307.

Stated another way, Plaintiffs have alleged that they are within a class of service members that Congress intended to "protect[]" by enacting Section 525, *id.* at 1309, and they are also within the class to which Defendant Agencies themselves have provided (albeit inadequate) retroactive relief. There is no indication in the 2023 NDAA that Congress intended to deny monetary relief to every service member or to any subset

thereof; all available evidence demonstrates the opposite. Nor is there any evidence that Congress intended to create a two-tiered system where some service members who suffered adverse actions for non-compliance, but managed to be protected by an injunction would be made whole, while others who were processed more quickly receive nothing. No fair interpretation of the 2023 NDAA would permit the military to exercise its discretion to create a two-tiered system for the payment of service members. *See, e.g.*, *Abbott v. Biden*, 70 F.4th 817, 843-44 (5th Cir. 2023); *Collins*, 101 Fed. Cl. at 457-459.

The evidence that Congress intended to provide monetary relief to the class of service members that Plaintiffs represent, in an amount determined by the Military Pay Act and other applicable laws and regulations, is clear and convincing. It easily exceeds the low hurdle of being "non frivolous," *Jan's Helicopter*, 525 F.3d at 1309, that Plaintiffs must clear to survive Defendant's motion to dismiss.

To the extent Congress left any discretion, the 2023 NDAA, in conjunction with the 2023 Appropriations Act, the Military Pay Act, and other federal laws and regulations identified in the Complaint, *see* FAC, ¶ 11, are money-mandating because they provide clear standards for payment; state the precise amounts for payment; and set forth eligibility conditions for such payments. *See Samish Indian Nation v. U.S.*, 657 F.3d 1330, 1336 (Fed.Cir.2011). The military has already exercised any limited discretion it may have been delegated by Congress through the issuance of its post-Rescission implementation orders, *see* FAC, ¶¶ 69-72 & Dkt. 16-1 to 16-5,[4] and by announcing a policy to categorically

[4] *See Collins v. U.S.*, 101 Fed. Cl. 435, 450 (2011) (finding that DoD had already exercised its discretion by issuing regulations establishing eligibility conditions). An agency cannot "defeat an otherwise money-mandating statute merely by reserving last-ditch discretion" to deny payment, *Collins*, 101 Fed. Cl. at 459, because it "is the statute, not the Government official, that provides for the payment." *Fisher,* 402 F.3d at 1175.

deny backpay to service members denied pay or benefits.[5] Instead, service members must pursue the existing remedies that failed them before and that several courts have found to be futile and/or inadequate. *See infra* Section III.B & cases cited therein.

B. The 2023 NDAA Requires Retroactive Relief.

On December 23, 2022, the 2023 NDAA was signed into law, including Section 525 thereof in which Congress directed Secretary Austin to "rescind" the August 24, 2021 Mandate. "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). By definition, "rescind" has retroactive effect back to the date of the rule's issuance.

First, Congress used the term "rescind," rather than more commonly used terms like "repeal" or "amend," to unambiguously direct Defendant and the courts to go back in time to undo the Mandates from the August 24, 2021 issuance through the present. Rescission means that the rule is eliminated by the issuing authority, effective as of the issuance date (August 24, 2021), rather than the date the rescission was announced (January 10, 2023); the rescinded rule is thus erased from the rulebook. *See, e.g., Paulson v. Dean Witter Reynolds, Inc.*, 906 F.2d 1251, 1256 (9th Cir. 1990) (arbitration clause enforceable because SEC rule barring such clauses that was in effect at time of contract

[5] The DoD and Armed Services have repeatedly confirmed that no service members who were discharged, transferred to inactive status, or denied pay and benefits for non-compliance with the Mandate would receive backpay or other financial compensation to which they which they would otherwise be entitled. *See, e.g.,* 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. The DoD and Service Under-Secretaries also confirmed that the military has no plans or procedures to reinstate discharged service members. *See* FAC, ¶ 80.

formation had been rescinded). *Cf. In re M-S-*, 22 I. & N. Dec. 349, 353 (BIA 1998) (recognizing legislative purpose "is expressed by the ordinary meaning of the words used" and "rescission" in immigration context "means to annul ab initio"). Congress previously used the term "repeal" to indicate prospective relief in regard to ending prior DoD policies, as it did when it ended the unconstitutional "Don't Ask, Don't Tell" policy. *See Collins v. U.S.*, 101 Fed. Cl. 435 (2011). The Defendant cannot explain why Congress chose to use "repeal" there, but here this Court should somehow treat the unambiguous term "rescind" as if Congress instead had used "repeal."

Second, requiring Defendant to provide retroactive relief is consistent with the statutory text (*i.e.*, "rescind"), structure,[6] and purpose. Section 525 was enacted to address a "self-imposed readiness crisis" that had resulted in the loss of nearly 100,000 service members, disqualified up to 50% of eligible recruits, and damaged morale. FAC, ¶ 50 (quoting Dkt. 1-9, Sept. 15, 2022, Congressional Letter to Secretary Austin, at 1). The most direct and rational means of achieving the legislative purpose of restoring pre-Mandate levels of morale, retention, recruiting, and total force strength is full and retroactive restoration of pay and benefits. In the 2022 and 2023 NDAAs and Appropriations Act,

[6] A related provision of the 2023 NDAA further confirms that Congress intended rescission to have retroactive effect. Section 736 of the 2022 NDAA provides that "[d]uring the period of time beginning on August 24, 2021, and ending … two years after the … the enactment of [the 2022 NDAA]," any discharge for non-compliance with the Mandate must be an honorable discharge or a general discharge under honorable conditions (*i.e.,* not a dishonorable or bad conduct discharge). Pub. L. 117-81 (Dec. 27, 2021), § 736, 135 Stat. 1541. Section 524 of the 2023 NDAA struck the quoted language, *see* Pub. L. No. 117-263 (Dec. 23, 2022), § 524, 136 Stat. 2395, and thereby eliminated the 2022 NDAA's retroactive limitation on punishment for the period from August 24, 2021, through December 23, 2022 (*i.e.*, the 2023 NDAA enactment date). This retroactive limitation on punishment was no longer necessary because Congress retroactively nullified the legal grounds for punishment (*i.e.*, non-compliance with the Mandate).

Congress authorized and appropriated full funding of pay and benefits for the 100,000 or more unvaccinated service members who were denied pay and benefits.

Third, the strongest evidence that the rescission should have retroactive effect is the DoD's own actions to implement Section 525. Secretary Austin's January 10, 2023, Rescission Memo acknowledges 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. Dkt. 1-3, Jan. 10, 2023, Secretary Austin Rescission Memo, at 1; *see also* FAC, ¶¶ 69-72 & Dkt. 16-1 to 16-5 (Armed Services' post-Rescission orders implementing Secretary Austin's directive to provide retro-active relief). If the rescission had not been retroactive—depriving the Mandate of any legal effect from its issuance date forward—there would be no basis to take such corrective actions or to halt separations and discharges. Further, Defendant has consistently and successfully represented to courts, in support of dismissing as moot challenges to the Mandate, that it has "completely and irrevocably eradicated the effects," *Continental Serv. Group, Inc. v. U.S.*, 132 Fed. Cl. 570, 577 (2017) (quoting *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1978)), of the rescinded Mandate during the period between its issuance and rescission.

Accordingly, there is no dispute as to *whether or not* the 2023 NDAA Rescission is retroactive: it is. The only dispute is whether in ordering the Secretary to provide retroactive relief, Congress meant to categorically deny monetary relief to service members or any specific subset thereof, including those like the Plaintiffs who were the first to be pushed out over it.

C. The Presumption Against Retroactivity Does Not Apply to Curative or Remedial Statutes Like Section 525.

Neither Congress nor the Supreme Court have adopted a broad "presumption against retroactivity," as Defendants claim. Mot. at 16 (citation omitted).[7] This presumption does not apply to jurisdictional, procedural, remedial, or curative statutes. *See Landsgraf v. USI Film Products*, 811 U.S. 244, 273-76 (1994). Section 525 is a textbook example of "curative legislation enacted to cure defects in prior law", which "are viewed with favor by the courts even when applied retroactively." *Fern v. U.S.*, 15 Ct.Cl. 580, 591 (1988) (citations and quotation marks omitted). Section 525 followed Congress' action in the 2022 NDAA limiting DoD's ability to punish service members for refusing the shot. It was enacted to address the self-imposed readiness crisis caused by the Mandate, *see* FAC, ¶ 50; to remedy Defendant's manifestly unjust policy of discharging and/or denying pay and benefits to 100,000 or more service members; and to remove any legal basis for denying them pay and benefits to which they are otherwise entitled by law. Section 525 is also remedial because it confirms or clarifies rights, *see* 2 Sutherland Statutory Construction §§ 41:3 (8th ed. Nov. 2022 Update), *i.e.*, that service members may not be punished for noncompliance with the now rescinded Mandate.

D. Defendant's Two-Tier Payment System Violates The 2023 NDAA.

Section 525 does not impose conditions or create classifications for the relief it requires. The 2023 NDAA Rescission applies uniformly to eliminate the Mandate for all service members. All service members must receive the same relief, which requires uniform implementation equally applicable to all adversely affected service members. In

[7] Defendants also erroneously claim that 1 U.S.C. § 109 bars the retroactive application of Section 525. *See* Mot. at 16. This section is entitled "Repeal of statutes affecting existing liabilities", and by its own term does not apply to Congress' rescission of an agency rule.

the 2022 and 2023 NDAAs and Appropriations Acts, Congress authorized, appropriated, and obligated full funding of pay and benefits for the 100,000 or more unvaccinated service members—including the 8,500 putative Class members discharged from active duty—who were discharged and/or denied pay and benefits for non-compliance.

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 payment, on the basis of vaccination status or non-compliance with the now-rescinded Mandate. "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.

Failure to provide backpay and other relief required to restore service members to the pre-Mandate status quo creates a two-tier payment structure, where some are made whole, while others similarly situated receive nothing. No fair interpretation of the 2023 NDAA permits such a result. Defendant's refusal to provide backpay required by the 2023 NDAA Rescission is an unlawful act in defiance of an express Congressional directive.

E. Defendant Is Judicially Estopped from Taking Position Contrary to Position Taken in Related Litigation That It Has Successfully Used to Get Nearly All Other Challenges Dismissed as Moot.

Defendant's position here—that 2023 NDAA Rescission is not retroactive—is not only contradicted by its own actions in the January 10, 2023, Rescission Memo and subsequent orders, *see supra* Section I.B, it is contrary to the litigation position that the DoD and Armed Services have uniformly taken in district courts and appellate courts around that country. In dozens of proceedings, the DoD and Armed Services have

represented to courts that: (i) the 2023 NDAA Rescission has full retroactive effect; (ii) they have fully remedied all adverse actions taken for non-compliance with the Mandate; and (iii) these corrective actions were involuntary actions mandated by Congress.

Nearly all U.S. District Courts and Circuit Courts of Appeals have accepted the Defendant Agencies' contrary litigation position at face value and dismissed pending challenges to the Mandate as moot. Based on these (mis)representations, these courts found that DoD and Armed Services have provided all relief requested by service members in those proceedings so that there is no further relief those courts could grant.[8] These same courts have also accepted Defendant Agencies' position that these corrective

[8] The Courts of Appeals for the Fourth, Fifth, Eighth, Ninth, Tenth, Eleventh and District of Columbia Circuits have found that rescission mooted challenges to the Mandate in whole or in part. *Navy Seal 1 v. Austin*, Nos. 22-5114, 22-5135, 2023 WL 2482927 (D.C. Cir. Mar 10, 2023) (per curiam) (dismissing appeals and vacating judgments as moot); *Alvarado v. Austin*, No. 23-1419 (4th Cir. Aug. 3, 2023) (order granting motion to dismiss as moot pending appeal); *U.S. Navy SEALs 1-26 v. Austin*, 72 F.4th 666 (5th Cir. 2023) (dismissing appeal as moot, but not underlying case before trial court); *Roth v. Austin*, 62 F.4th 1114 (8th Cir. 2023); *Short v. Berger*, Nos. 22-15755, 22-16607 (9th Cir. Feb. 24, 2023); *Dunn v. Austin*, No. 22-15286 (9th Cir. Feb. 27, 2023) (same); *Robert v. Austin*, 72 F.4th 1160 (10th Cir. July 6, 2023); *Navy SEAL 1 v. Sec'y of Defense*, No. 22-10645 (11th Cir. May 9, 2023) (remanding preliminary injunction appeal in light of district court's indicative ruling dismissing the case as moot); Order, *Captain v. Secretary of Defense*, No. 22-12029 (11th Cir. May 12, 2023) (same); Order, *Chief Warrant Officer 4 v. Secretary of Defense*, No. 22-13522 (11th Cir. May 12, 2023) (same).

Several district courts have likewise found that the remaining cases that did not have pending appeals dismissed and the underlying orders vacated were moot. *See, e.g., Bazzrea v. Mayorkas*, --- F.Supp.3d ---, 2023 WL 3958912 (S.D. Tex. June 12, 2023); *Bongiovanni v. Austin*, No. 3:22-cv-580, 2023 WL 4352445 (M.D. Fla. July 5, 2023); *Chancey v. Biden*, No. 1:22-cv-110, ECF 32 (N.D. Fla. Feb. 14, 2023); *Colonel Fin. Mgmt. Officer v. Austin*, No. 8:21-CV-2429-SDM-TGW, 2023 WL 2764767 (M.D. Fla. Apr. 3, 2023) ("*CFMO*"); *Coker v. Austin*, No. 3:21-cv-1211, ECF 156 (N.D. Fla. Aug. 25, 2023); *Crocker v. Austin*, No. 5:22-cv-00757, 2023 WL 4143224 (W.D. La. June 22, 2023); *Creaghan v. Austin*, No. 1:22-cv-981, ECF No. 69 (D.D.C. Mar. 10, 2023); *Davis v. Austin*, No. 3:22-cv-237, 2023 WL 4352444 (M.D. Fla. July 5, 2023); *Jackson v. Mayorkas*, No. 4:22-CV-0825-P, 2023 WL 5311482 (N.D. Tex. Aug. 17, 2023); *Wilson v. Austin*, No. 4:22-cv-438, ECF 61 (Sept. 1, 2023). *See also Clements v. Austin*, No. 2:22-2069, 2023 WL 2386118 (D.S.C. Mar. 7, 2023) (denying injunction as moot).

actions were compelled by Congress so that service members' claims could not be saved by the "voluntary cessation" exception to mootness.[9]

Defendant is therefore barred from taking a contrary position here by the doctrine of judicial estoppel. "[W]here a party successfully urges a particular position in a legal proceeding, it is estopped from taking a contrary position in a subsequent proceeding where its interests have changed." *Buckley v. U.S.*, 57 Fed. Cl. 328, 341 (Fed.Cir.2003) (citations omitted). "A party has successfully asserted a position when that party has 'received a benefit from the previously taken position in the form of judicial success.'" *Id.* (citation omitted).[10] This Court routinely applies judicial estoppel where, as here, the government has "flip-flop[ped]" its litigation position to suit its interests.[11]

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[9] *See, e.g., Bazzrea*, 2023 WL 3958912, at *6-7; *Bongiovanni*, 2023 WL 4352445, at *9-10; *CFMO*, 2023 WL 2764767, at *2; *Coker*, No. 3:21-cv-1211, ECF 156, at 13; *Crocker*, 2023 WL 4143224, at *6; *Davis*, 2023 WL 4352444, at *9-10; *Jackson*, 2023 WL 5311482, at *4-5; *Navy SEALs 1-26*, 72 F.4th at 673-74; *Robert*, 72 F.4th at 1164; *Roth*, 62 F.4th at 1119-1120 (Stras, C.J., concurring), *Wilson*, 4:22-cv-438, ECF 61 at 13.

[10] The Supreme Court has identified three factors in considering whether judicial estoppel applies: (1) whether "a party's later position [is] clearly inconsistent with its earlier position"' (2) "whether the party has succeeded in persuading a court to accept the party's earlier position, … create[ing] the perception that either the first or the second court was misled"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine,* 532 U.S. 742, 750–51 (2001) (cleaned up).

[11] *Seventh Dimension, LLC v. U.S.*, 160 Fed. Cl. 1, 29 (2022). *See also Sumecht NA, Inc. v. U.S.*, 923 F.3d 1340, 1348 (Fed.Cir.2019) (government may "be judicially estopped from taking a contrary position" in a subsequent legal proceeding); *Carson v. U.S.*, 161 Fed. Cl. 696, 705 (2022) ("having successfully argued a contrary position in a previous legal proceeding, [the government] is judicially estopped from arguing that section 7454(b)(3) alone entitled Plaintiff to weekend premium pay."); *Wavelink, Inc. v. U.S.*, 154 Fed. Cl. 245, 277-78 (2021) (estopping the government from "tak[ing] a different position – regarding nearly identical language … from what it argued, and prevailed upon" in separate case and "applie[d] judicial estoppel to preclude the government from invoking its newly inspired, creative reading of" that language).

The Defendant cannot have it both ways to dismiss district court challenges by arguing that it has applied the 2023 NDAA Rescission with full retroactive effect there, while arguing before this Court that the 2023 NDAA Rescission does not have retroactive effect. The circumstances here arguably present the strongest possible circumstances for judicial estoppel. The Defendant's previous, contrary litigation position—that Congress required it to provide full retroactive relief that has "completely … eradicated" the legal effects of challenged policy, *Davis*, 440 U.S. 625, 631—was the primary, if not exclusive, grounds for courts to dismiss pending challenges as moot and in finding that the voluntary cessation exception to mootness did not apply.

Now that nearly all challenges have been dismissed, denying service members any prospect for injunctive or declaratory relief, the Defendant has reversed positions in this Court to foreclose any prospect of monetary relief as well. In doing so, the Defendant seeks to avoid payment of billions of dollars in backpay that Congress expressly appropriated, authorized, and obligated to pay service members who were unlawfully discharged and denied pay and benefits. This action is in defiance of Congress' express directive to provide retroactive relief, a directive it has acknowledged through its actions and representations to other courts. Judicial estoppel is required to prevent the Defendant from "deriv[ing] an unfair advantage" and from "impos[ing] an unfair detriment on [Plaintiffs] if not estopped." *New Hampshire,* 532 U.S. at 751.

F. Section 525's Legislative History Supports Plaintiffs' Position.

Defendant points to Senator Ron Johnson's defeated amendment providing backpay as evidence that Congress did not intend to provide retroactive relief. *See* Mot. at 13-14 (citing S. Amdt. 6526 to H.R. 7776). This evidence is equivocal at best: the defeat of that amendment is equally consistent with the view that the Senators voting against it

thought it was unnecessary because the 2023 NDAA already provided for retroactive relief.[12] In any case, "statements of individual Members of Congress" are not a "reliable indication of what a majority of both Houses of Congress intended when they voted" for the 2023 NDAA. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 391 (2000) (Scalia, J., concurring). Senator Ted Cruz's post-enactment sponsorship of the proposed AMERICANS Act, *see* Mot. at 14-15, also provides no support for Defendant's position. Amendments proposed after passage are not legislative history and cannot shed any light on pre-passage congressional intent.[13]

II. PLAINTIFFS HAVE STANDING AND STATE A CLAIM FOR COUNT II.

A. DoD Violations of 10 U.S.C. § 1107a Caused Plaintiffs' Injuries.

Defendant asserts that Plaintiffs "lack standing" to pursue Count II because they "cannot establish a causal connection between their alleged injuries" and the alleged violation of 10 U.S.C. § 1107a. Mot. at 20.[14] Defendant asserts Plaintiffs fail to "allege that

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[12] The House Armed Services Committee ("HASC") Report indicates that House members expected service members to be reinstated and made whole through existing military remedies. *See* 168 Cong. Rec. H9425, H9441 (daily ed. Dec. 8, 2022) (noting that DoD "has mechanisms to correct a servicemember's military record" and for reinstatement). After passage, the DoD categorically refused to grant backpay or reinstatement, *see* FAC, ¶¶ 80-82, a position that outraged several HASC members who thought that was exactly what the 2023 NDAA ordered it to do. *See generally* Dkt. 16-6, Feb. 27, 2023, HASC Hearing Trans., at 2-3 (Chairman Banks) & 5-7 (Rep. Gaetz). Defendant's post-enactment orders say nothing about congressional intent; far from affirming DoD's position, the HASC Report provides further evidence that DoD has acted contrary to Congress' intent.

[13] *See, e.g., Chapman v. U.S.*, 500 U.S. 453, 464 n.4 (1991) (post-enactment statements are an "unreliable guide to legislative intent"); *see also TVA v. Hill*, 437 U.S. 153, 209 (1978) ("post-enactment statements by individual Members of Congress as to the meaning of a statute are entitled to little or no weight") (Powell, J., dissenting).

[14] Defendant's arguments regarding standing challenge only the causation element and appear to concede that the other two elements of injury in fact and redressability are met. Plaintiffs' injuries are set forth in the Complaint and in the attached declarations. *See generally* FAC, ¶¶ 16-25. These injuries would be redressed by an order of the Court granting the monetary and equitable relief requested. *See* FAC, "Relief Requested."

they were prevented *by the Government* from receiving a fully licensed vaccine …. from a commercially available source;" and that, even if the "DoD only had unlicensed EUA vaccines available, nothing *in the mandate* required that the plaintiffs receive those unlicensed vaccines." *Id.* (emphasis added).

Plaintiffs could not obtain a Food and Drug Administration ("FDA") licensed vaccine when the Mandate was issued and for at least several months thereafter because no FDA-licensed vaccines *existed*.[15] But even if they had been available, these products could not have been legally marketed or sold. Yet despite the physical and legal impossibility of compliance, Defendant denied them pay and benefits and/or discharged them for exercising their express statutory right under 10 U.S.C. § 1107a to refuse unlicensed, Emergency Use Authorization ("EUA") products.

It is undisputed that Secretary Austin's August 24, 2021, memorandum states that service members are required to take only "COVID-19 vaccines that receive[d] full [FDA] licensure." Dkt. 1-2 at 1. But because no FDA-licensed products were available, the DoD and Armed Services directed that unlicensed EUA products "should" be mandated "as if" they were FDA-licensed and labeled products because they deemed the two products to be legally "interchangeable." *See* FAC, ¶¶ 112-118. Since the outset, the DoD and Armed Services have uniformly mandated EUA-labeled products.[16]

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[15] In an opinion issued November 12, 2021, the U.S. District Court for the Northern District of Florida first found that "the plaintiffs have shown that the DOD is requiring injections from vials not labeled 'Comirnaty.'" *Doe #1-#14 v. Austin*, 572 F.Supp.3d 1224, 1233 (N.D. Fla. 2021), and that "defense counsel could not even say whether vaccines labeled 'Comirnaty' exist at all. … Although the DOD's response said it had an adequate Comirnaty supply, it later clarified that it was mandating vaccines from EUA-labeled vials.") (citation omitted).

[16] *See* FAC, ¶ 131; Chisholm Decl., ¶¶ 12-14; Hall Decl., ¶¶ 13-15; Rodriguez Decl., ¶¶ [16-18]. *See also Doe#1-#14 v. Austin*, 572 F.Supp.3d 1224, 1233 (N.D. Fla. 2021) (DoD counsel admitting "it was mandating vaccines from EUA-labeled vials"); *Coker v. Austin*,

In the Complaint, Plaintiffs not only allege that no FDA-licensed products were available from the DoD, but that no FDA-licensed products were available from any source, commercial or otherwise.[17] Indeed, even if Purple Cap COMIRNATY® had been physically available, it would have been a criminal violation of the Food, Drug and Cosmetic Act ("FDCA") for anyone to have attempted to sell the only licensed product once the Mandate was announced on Aug. 24, 2021, because the FDA terminated its U.S. marketing authorization the day before, on Aug. 23, 2021.[18] The FDA continued to grant EUAs for the Pfizer/BioNTech and Moderna COVID-19 treatments *precisely because* the FDA found that no FDA-licensed vaccines were available (or were not available in sufficient quantities). *See* FAC, Section III.C., ¶¶ 103-111. The finding that FDA-licensed products were unavailable, which necessarily covered "commercially available" sources, is an express statutory requirement under the FDCA for the FDA to grant or re-issue an EUA. *See* 21 U.S.C. §§ 360bbb-3(C)(3) (requiring finding that "there is no adequate, [FDA-]approved, available alternative to the product").

Defendant's assertions regarding "commercially available" sources are more than simply disingenuous because they fail to acknowledge that *every single dose* of the Pfizer/BioNTech and Moderna vaccines, whether licensed or not, was purchased by

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No. 3:21-cv-1211, 2022 WL 19333274, at *6 (N.D. Fla. Nov. 7, 2022) (service members had stated a claim that military violated 10 U.S.C. § 1107a by mandating EUA vaccines).

[17] Defendant states that FDA-licensed vaccines were offered to "all willing plaintiffs" in *Wilson v. Austin*, including Plaintiff Chisholm. Mot. at 20 n.8. Plaintiff Chisholm was never a plaintiff or a party in *Wilson*. In the Complaint, Plaintiffs explain why the products were not FDA-licensed products. *See* FAC, ¶¶ 124-129.

[18] *See* FAC, ¶ 105. *See, e.g.*, 42 U.S.C.§ 262(a)(1) (Public Health Safety Act labeling requirements) & § 262(f) (fines for violations); 21 U.S.C. § 331 & § 352 (misbranding); 21 U.S.C. § 331 (criminal fines and imprisonment up to $250,000 and 10 years for knowing violations of FDA requirements).

Defendant pursuant to the exclusive contracts between the manufacturers, Pfizer and Moderna, and the DoD and Department of Health and Human Services ("HHS").[19] Accordingly, *there were no alternative sources or distribution channels* outside the DoD/HHS exclusive contracts. Any doses that may have been "commercially available" from third parties would have been downstream from the DoD/HHS distribution sources, such that DoD had exclusive control and knowledge regarding any "commercially available" supplies.[20] Service members had no such knowledge and were entirely reliant on DoD for supply, sourcing, and administration of FDA-licensed vaccines.

It was incumbent on the military to make such doses available to active-duty military personnel to comply with the DoD Mandate.[21] Service member were required to

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[19] *See generally* U.S. Dept. of Defense, Press Release, *U.S. Government Engages Pfizer to Produce Millions of Doses of COVID-19 Vaccine* (July 22, 2020), available at: https://www.defense.gov/News/Releases/Release/Article/2310994/us-government-engages-pfizer-to-produce-millions-of-doses-of-covid-19-vaccine/; U.S. Dept. of Defense, Press Release, *Trump Administration Purchases Additional 100 Million Doses of COVID-19 Investigational Vaccine from Pfizer* (Dec. 23, 2020), available at: https://www.defense.gov/News/Releases/Release/Article/2455698/trump-administration-purchases-additional-100-million-doses-of-covid-19-investi/; U.S. Dept. of Defense, Press Release, *Trump Administration Collaborates with Moderna to Produce 100 Million Doses of COVID-19 Investigational Vaccine* (Aug. 11, 2020), available at: https://www.defense.gov/News/Releases/Release/Article/2309561/trump-administration-collaborates-with-moderna-to-produce-100-million-doses-of/.

[20] In any case, some Plaintiffs did inquire as to the availability of FDA-licensed products from commercially available sources off base, but they did not locate any. *See, e.g.*, Rodriguez Decl., ¶¶ 21-23; Wynne Decl., ¶ 10. The circumstances regarding COVID-19 vaccines are easily distinguished from the vaccines addressed in *Coalition for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275 (D.C. Cir. 2012). There, the D.C. Circuit found that the plaintiffs lacked standing because there were "readily available" alternative vaccines to which plaintiffs did not object (*i.e.*, mercury-free vaccines), even if these alternatives were "unavailable … at a few individual outlets". *Id.* at 1283. Here, Plaintiffs have alleged and demonstrated that FDA-licensed vaccines were both physically and legally unavailable, and that no Plaintiff was able to locate FDA-licensed vaccines from the DoD or from third parties.

[21] Defendant claims "many service members did" "obtain commercially available and fully licensed vaccines doses." Mot. at 21. This is a naked factual assertion lacking any

demonstrate compliance through specific documentation in their electronic medical records. The Mandate was deemed a critical "medical readiness" requirement and national security priority; it is not plausible that the military would have permitted service members to ignore these rules by using any vaccination card off the street given how rife with fraud and forgeries such civilian records were back in 2021.[22]

B. Plaintiffs Have Stated a Claim for Violation of 10 U.S.C. § 1107a.

Plaintiffs have stated a claim for violation of 10 U.S.C. § 1107a, which prohibits the mandate of an unlicensed, EUA product, by alleging that: (1) the DoD and Armed Services "have mandated unlicensed, EUA COVID-19 gene therapies from the issuance of the Mandate on August 24, 2021, until at least … January 10, 2023," FAC, ¶ 206; (2) "[t]here has not been a Presidential authorization to mandate an unlicensed EUA product from the issuance of the Mandate through the present," FAC, ¶ 202; (3) "[n]o FDA-licensed vaccines were available at all at the time that the August 24, 2021 Mandate was issued," *id.* ¶ 207; (4) they "did not have any 'Comirnaty-labeled' vaccines until at least June 2022," *id.* ¶ 210; and (4) they "did not have any 'Spikevax-labeled' vaccines until at least September 2022," *id.* ¶ 210. Each Plaintiff was punished for non-compliance and/or for

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evidentiary support. It contradicts the FDA's repeated findings that FDA-licensed products were not available—a statutory pre-condition for the FDA to grant and maintain the EUAs for these products—and the court's finding in *Doe#1-#14 v. Austin*. But even if some unidentified service members somewhere were able to find these doses at some time, Defendant has not even claimed that that any FDA-licensed products were commercially available *to Plaintiffs*, much less that that Plaintiffs could have obtained them prior to being punished for non-compliance and thereby avoided their injuries.

[22] *See, e.g.*, Sasha Pezenik & Kaitlyn Folmer, *Feds warn of alarming rise in reports of fake vaccine cards sold and used*, ABC News (Aug. 27, 2021), available at: https://abcnews.go.com/Health/feds-warn-alarming-rise-reports-fake-vaccine-cards/story?id=79666216; JBSN, *HHS warns against COVID-19 scams* (Aug. 31, 2021), available at: https://www.jbsa.mil/News/News/Article/2760148/hhs-warns-against-covid-19-scams/.

not being vaccinated during the time when no FDA-licensed vaccines were available to them such that compliance was impossible. *See* FAC, ¶¶ 16-25, 131, 214. Accordingly, "[a]ll Plaintiffs' and Class Members' harms, financial and otherwise, … are a direct result of the Defendant Agencies' unlawful order mandating an unlicensed EUA product in violation of 10 U.S.C. § 1107a." FAC, ¶ 214.

C. Defendant Is Estopped From Taking a Litigation Position Contrary to Their Position in Related Litigation.

Defendant has from the outset "mandat[ed] vaccines from EUA-labeled vials," *Doe #1-#14*, 572 F.Supp.3d at 1233, because no FDA-licensed products were available. For the past two years, the DoD and Armed Services have treated EUA vaccines as legally interchangeable with FDA-licensed vaccines and directed that unlicensed, EUA vaccines "should" be mandated "as if" they were FDA-licensed vaccines. Dkt. 1-15, at 1 & Dkt. 1-16 at 1. This has also been their consistent litigation position, which they have successfully used to defeat service members' claims that this policy (which remains in place unchanged after the 2023 NDAA Rescission) violates 10 U.S.C. § 1107a.[23]

Now, however, Defendant Agencies have abandoned and reversed this litigation position. Instead, they assert that "service members were required to receive only 'COVID-19 vaccines that receive full [FDA] licensure.'" Mot. at 21 (quoting Dkt. 1-2 at 1).

Defendant is judicially estopped from taking this contrary litigation position for the same reasons it is judicially estopped from reversing its litigation positions regarding retroactive relief and mootness. *See supra* Section I.E & cases cited therein. It is directly contrary to the Defendant's actual policy and its previous litigation positions. The

[23] *See, e.g., Navy SEAL 1 v. Biden*, 574 F. Supp. 3d 1124, 1130 (M.D. Fla. 2021); *Crosby v. Austin*, No. 8:21-cv-2730, 2022 WL 603784, at *1–2 (M.D. Fla. Mar. 1, 2022); *Miller v. Austin*, No. 4:22-cv-1739 (S.D. Tex. June 1, 2022).

inconsistency leads to the unavoidable conclusion that it has misled the district courts or this Court. "[I]f not estopped" Defendant would "derive an unfair advantage" and "impose an unfair detriment" on Plaintiffs. *New Hampshire*, 532 U.S. at 750–51.

III. PLAINTIFFS HAVE STATED A RFRA CLAIM.

A. Plaintiffs Have Adequately Pled Plausible RFRA Claims.

In Count III, Plaintiffs have easily met their burden for alleging a wrongful discharge because of the DoD's RFRA violations, namely, that Defendant Agencies' religious accommodation policy "substantially burdened a sincerely held religious belief." Mot. at 23 (citing 42 U.S.C. § 2000bb-1); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694-95 (2014).

Plaintiffs' Complaint describes in great detail, with supporting documents attached and incorporated by reference, the military's religious accommodation process, which Courts have described as a "sham," *Navy SEAL 1*, 574 F.Supp.3d at 1139, and a "quixotic quest" that amounts to little more than "theater". *Navy SEALs 1-26 v. Austin,* 578 F.Supp.3d 822, 826 (N.D. Tex. 2022), because this process has resulted in the denial of 99%-100% of requests adjudicated. *See generally* FAC, Section IV.B., ¶¶ 137-147. The Complaint sets forth the military's policy of systematically denying Religious Accommodation Requests using form letters, without providing the "to the person" individualized determinations required by RFRA, DoD Instruction 1300.17, and the individual Services' implementing regulations. *See* FAC, ¶¶ 137-147.

In the Complaint and in the attached declarations and religious accommodation requests, Plaintiffs set forth their sincerely held religious objections to the mandated COVID-19 vaccines and how the Mandate and their vaccination orders forced them to choose between their conscience and compliance with a Mandate they believed to be at

least immoral, possibly illegal, and in all cases impossible. *See* Rodriguez Decl. ¶¶ 10, 16, 21-23; Hall Decl., ¶ 8-10, 12-16; Springer Decl., ¶¶ 5-8; Endress Decl., ¶ 47. Plaintiffs and Class Members have thus adequately pled that the Mandate and the Defendant's religious accommodation policies substantially burdened service members free exercise of religion.[24]

Plaintiffs' allegations of RFRA violations are inherently plausible because Plaintiffs allege that the DoD and Armed Services implemented the same religious accommodation process, and blanket denial policy, that several district and appellate courts found likely violated RFRA and enjoined, including nation-wide injunctions against three of the four Armed Services.[25] Further, five of the Plaintiffs pursued this futile process, three of whom had their requests and appeals denied using form letters, while the requests of two others languished for over a year without action.

B. All Plaintiffs Have Pled RFRA Claims.

The Complaint alleges RFRA violations for all ten Plaintiffs, whether they filed a religious accommodation request or not. Chisholm, Endress, Hall, Rodriguez, and

[24] Having done so, the burden shifts to the Defendant 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). While rescission has removed any legal basis for the Defendant's affirmative defense (*i.e.*, that its policy satisfies strict scrutiny), Plaintiffs are not required to allege facts showing that it can overcome a fact-dependent affirmative defense like strict scrutiny. *Cf. Larson v. U.S.*, 89 Fed.Cl. 363, 382-83 (2009)(citations and quotation marks omitted).

[25] *See Navy SEALs 1-26 v. Austin*, 594 F.Supp.3d 767 (N.D. Tex. 2022) (Navy); *Doster v. Kendall*, 2022 WL 2974733 (S.D. Ohio July 27, 2022) (Air Force), *aff'd*, 54 F.4th 398 (6th Cir. 2022); *Colonel Fin. Mgmt. Officer v. Austin*, 622 F.Supp.3d 1187 (M.D. Fla. 2022) (Marine Corps); *see also Schelske v. Austin*, --- F.Supp.3d ---, 2022 WL 17835506 (N.D. Tex. Dec. 21, 2023) (issuing injunction for individual Army soldiers and cadets, while class certification motion is pending). While nearly all challenges have been dismissed as moot, *see supra* note 8, those in *Doster*, *Navy SEALs 1-26*, and *Schelske* have not.

Springer submitted religious accommodation requests. *See* FAC, ¶ 17 (Chisholm request and appeal denied), ¶ 18 (same for Hall), ¶ 19 (same for Rodriguez); Endress Decl., ¶ 9 (request submitted but never adjudicated); Springer Decl., ¶¶ 5-6 (same). Plaintiffs were removed from their positions, denied pay or benefits, and suffered other adverse actions while their requests or appeals were pending, in violation of applicable DoD and Service regulations.

Plaintiffs Bassen, Dailey, Davis, Merjil, and Wynne did not file religious accommodations because they either had another medical or administrative exemption that was in process, *see, e.g.,* Bassen Decl., ¶¶ 5-7, Wynne Decl., ¶¶ 8-10, or knew the process was futile based on service-wide policies or orders, direct statements by their commanders or chain of command, and experiences of others in their units. *See, e.g*., Dailey Decl. ¶ 13. Service members' right to free exercise was substantially burdened, in violation of RFRA, just as much by the requirement to pursue accommodation for their sincerely held beliefs through a futile, sham accommodation process with a "pre-determined" denial, *Navy SEALs 1-26*, 578 F.Supp.3d at 832, as it was by the subsequent, inevitable denial using a fill-in-the-blank form letter.

Courts that enjoined the Defendant's religious accommodation process found that it was futile and/or inadequate so that service members were excused from exhausting it.[26] Submission or denial of a request was not addressed in the Rule 12(b)(6) analysis; instead, it was considered with respect to ripeness, exhaustion, and class certification.[27]

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[26] *See, e.g., Navy SEALs 1-26*, 578 F.Supp.3d at 830-32; *Navy SEAL 1 v. Biden,* 586 F.Supp.3d 1180, 1197 (M.D. Fla. 2022); *Air Force Officer v. Austin*, 588 F.Supp.3d 1338, 1349-50 (M.D. Ga. 2022); *Doster v. Kendall*, 54 F.4th 398, 437, 2022 WL 17261374 (6th Cir. 2022) (Air Force admission that RFRA is "triggered only in judicial proceedings").

[27] *See, e.g., Doster v. Kendall*, 2022 WL 982299, at *8-10 (S.D. Ohio Mar. 31, 2022) (ripeness and exhaustion); *Navy SEAL 1,* 586 F.Supp.3d at 1196-97 (same); *Navy SEALs*

IV. RESERVIST PLAINTIFFS STATE A CLAIM FOR COUNTS II AND III.

A. Plaintiffs Chisholm, Endress and Hall Were on Active-Duty When They Were Unlawfully Removed from Active-Duty.

Defendant asserts that Plaintiffs Chisholm, Endress and Hall are not entitled to relief and fail to state a claim under Counts II and III because "none of these [three] plaintiffs allege that they were not paid for any period for any duty they actually performed." Mot. at 27.[28] Defendants misstate the law. "Reservists are able to state a claim for backpay if they were participating in full-time active duties until the government's wrongful action." *Radziewicz v. U.S.*, --- Fed.Cl. ---, 2023 WL 4717581 (Fed. Cl. July 25, 2023). *See also Groves v. U.S.*, 47 F.3d 1140, 1142 (Fed.Cir.1995) (Army reserve officer whose court-martial was overturned awarded constructive service, backpay, and special pays for period following defective discharge), *reh'g denied* (1995); *Reilly v. U.S.*, 93 Fed. Cl. 643, 648 (2010) (explaining that the Military Pay Act "applies to reserve officers … when they are removed while on active duty"); *Faerber v. U.S.*, 156 Fed. Cl. 715 (2021) (granting active-duty reservist's motion for judgment on Military Pay Act claim).

Chisholm, Endress and Hall were reservists serving on full-time, active-duty, Title 10 orders at the time of the Defendant's wrongful actions. Lieutenant Colonel Chisholm was on full-time Title 10 orders to serve from October 31, 2022, through September 30, 2022, when his orders were illegally cancelled June 16, 2022, and involuntarily placed

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1-26 v. Austin, 594 F.Supp.3d 767, 777, 2022 WL 1025144 (N.D. Tex. 2022) (ascertainability); *Colonel Fin. Mgmt. Officer v. Austin*, 622 F.Supp.3d 1187, 1206, 2022 WL 3643512 (M.D. Fla. 2022) ("*CFMO*") (same).

[28] It is undisputed that Plaintiff Davis has stated a claim for backpay for duties that he actually performed. *See* FAC, ¶ 19 (stating that he "was prohibited from participating in drills, training, and other duties from August 01, 2022, to February 01, 2023, and that "despite this prohibition, he actually performed drill periods for which he was not paid").

into "no points/no pay" status June 17, 2022. *See* FAC, ¶ 17. Staff Sergeant Endress was ordered into full-time Active-Duty Operational Support ("ADOS") federal service under Title 10 from June 27, 2019, to May 31, 2021, and then again from October 30, 2021, through October 29, 2022, when he was wrongfully removed from active duty. *See* FAC, ¶ 20. Senior Master Sergeant Hall was ordered into full-time active-duty federal service under Title 10 from April 2, 2019, through January 31, 2023, when he was forced into retirement effective April 2, 2023, due to the Defendant's illegal actions. *See* FAC, ¶ 21. As such, they have each stated a claim in Counts II and III for backpay under 37 U.S.C. § 204(a), rather than 37 U.S.C. § 206(a), the provision cited by Defendant that requires actual performance. *See* Mot. at 27 (citation omitted). *Cf.* FAC, ¶ 221 (Plaintiffs seek backpay only for "duties [Plaintiffs] actually performed").

B. Hall's Retirement and Rodriguez's Separation Were Involuntary.

Plaintiffs Hall and Rodriguez did not voluntarily retire or separate from active-duty service, as Defendant contends. *See* Mot. at 23-26 (Rodriguez) & 27 n.16 (Hall). To establish that retirement or separation was involuntary, a plaintiff "must demonstrate that: (1) he involuntarily accepted the terms of the government; (2) circumstances permitted no other alternative; and (3) said circumstances were the result of the government's coercive acts." *Carmichael v. U.S.*, 298 F.3d 1367, 1372 (Fed.Cir.2002) (citation omitted). The first two elements are satisfied because each Plaintiff has alleged their removal from active-duty service was involuntary and that the government provided no alternative to remain on active-duty without complying with the vaccination order, an order they believed to be illegal in violation of 10 U.S.C. § 1107a and RFRA, *see* Hall Decl., ¶ 12; Rodriguez Decl., ¶¶ 10, 15-23, because it "put them to the choice of either betraying

a sincerely held religious belief or facing a substantial threat of serious discipline." *CFMO*, 622 F.Supp.3d at 1215 (cleaned up).

The Defendant's violations of its own rules or other applicable laws and regulations, as all Plaintiffs have alleged, "may qualify as coercive, rendering a discharge involuntary." *Faerber*, 156 Fed. Cl. at 727 (citing *Carmichael*, 298 F.3d at 1372). There can be no question that Plaintiffs have pled these policies violated 10 U.S.C. § 1107a and RFRA. Whether the Defendant's illegal actions in fact rise to the level of coercion or duress "goes directly to the merits of the Plaintiff's case," *Faerber*, 156 Fed. Cl. at 728; to survive a motion to dismiss, however, Plaintiffs need only plead "facts providing facial plausibility for [their] claim" that the Defendant's wrongful actions made their choice involuntary, *id.* (denying motion to dismiss), a standard Plaintiffs easily meet here.

To remove any doubt, each Plaintiff has submitted a sworn declaration. Hall's Declaration provides additional factual support to his allegation that he was "forced to retire." Hall Decl., ¶¶ 8-11. Rodriguez's declaration shows the Air Force involuntarily discharged him on July 14, 2022, the date of his first DD-214. Rodriguez Decl., ¶¶ 24-25. The very same day, the *Doster* injunction was promulgated, and the Air Force then placed Rodriguez on "Excess Leave" of their own accord. Defendants now baselessly claim that Rodriguez's decision to opt out of *Doster* and the Air Force's issuing a new DD-214 in September of 2022 somehow evince that he "voluntarily" left the Air Force. The facts alleged in the Amended Complaint and set forth in Rodriguez's declaration are more than sufficient to plausibly allege the contrary, *i.e.,* Rodriguez was involuntarily discharged July 14, 2022 and was never a member of the *Doster* class. *See* Rodriguez Decl., ¶¶ 25, 29. Beyond that, the issue of "voluntariness" is a matter best suited for Summary Judgment and not dueling versions of disputed facts in a Motion to Dismiss.

Even assuming *arguendo* that Hall's retirement and Rodriguez's separation were voluntary, their claims are distinguishable from the cases cited by Defendant. Those cases addressed claims by individual service members who were: facing a choice between retirement and court martial or other discipline for misconduct, *see Longhofer v. U.S.*, 29 Fed. Cl. 595 (1993) and *Flowers v. U.S.*, 80 Fed. Cl. 201 (2008); not paid due to erroneous and/or unreviewable individual military personnel decisions, *see Palmer v. U.S.*, 168 F.3d 1310, 1314 (Fed.Cir.1999) and *Reeves v. U.S.*, 49 Fed. Cl. 560, 561 (2001); or had no record evidence that they had actually performed the duties for which they sought compensation, *see Riser v. U.S.*, 97 Fed. Cl. 679, 683 (2011).

None of the cases cited addressed a situation where, as here, service members had filed a class-action complaint that challenged the lawfulness of a generally applicable policy or regulation that was the basis for the discharge or denial of pay or benefits for thousands or tens of thousands of service members. There is no suggestion that the statutes addressed in those cases would bar backpay claims where pay had been denied pursuant to unlawful and/or unconstitutional policies, much less where the challenged policy had been expressly rescinded by an Act of Congress that retroactively eliminated the legal basis for the challenged policy; where there is clear and convincing evidence from the statutory text, structure, and purpose that Congress intended to provide class members with retroactive monetary relief to remedy the violation, and that foreclose any reading that would create a two-tier military where those on active duty would receive full relief, while Title 10 Reservists serving right alongside them on active duty would receive nothing at all; and where Defendant agreed it was required to provide such retroactive relief, has provided retroactive relief, and represented that it had provided such relief in successfully getting court challenges to that policy dismissed as moot. *See supra* Section

I. Such a reading would not only result in a manifest injustice and unjustifiable and arbitrary discrimination, but it would also give the DoD a windfall from the pay unlawfully withheld from Title 10 Reservists. In the event the Court finds there is a statutory limit on backpay for Title 10 Reservices, this Court has the statutory authority to order that compensation be paid and to disregard that limit on payment to Class members harmed by the unlawful policy. *See, e.g., Taylor v. McDonough*, 71 F.4th 909, 943-44 (Fed.Cir.2023).

V. DEFENDANT'S OTHER ARGUMENTS ARE WITHOUT MERIT.

A. Plaintiffs' Claims Are Not Precluded by 28 USC § 1500.

Defendant appears to argue that Plaintiff Chisholm's claims are barred by 28 U.S.C. § 1500 because he has "interests that are affected by" the *Wilson v. Austin* litigation. Mot. at 7. The *Wilson* case was dismissed as moot, *see supra* note 8, denying his motion to intervene by operation of law. Accordingly, Plaintiff Chisholm was never a "party" to the *Wilson* proceeding and never had a "pending" claim in another court for purposes of 28 U.S.C. § 1500. *See, e.g., Nycal Offshore Dev. Corp. v. U.S.*, 148 Fed. Cl. 1, 17 (2020).

As discussed above, Rodriguez was involuntarily separated on July 12, 2022, meaning as of that point, he was not a member of the *Doster* class. To the extent he somehow remained within the *Doster* class definition, his decision to opt out unequivocally removed him from that class. As such, he is not a party to the *Doster* proceeding and does not have another pending claim for purposes of 28 U.S.C. § 1500.

B. Plaintiffs Have Stated a Claim for Illegal Exactions (Count IV).

Plaintiff Bassen has alleged that the Army recouped his enlistment bonus and thereby illegally exacted from him that amount. *See* FAC, ¶ 16; Bassen Decl. ¶ 12. Plaintiff Davis had $175 taken from him by the Defense Finance and Accounting Service while he

was simultaneously prohibited by the government from drilling to earn money to pay for said insurance. Davis Decl. ¶ 9.

C. Plaintiffs Have Stated a Claim under 10 U.S.C. § 1552 (Count V).

The Court should also reject Defendant's arguments regarding Count V, which are premised on misunderstanding or mischaracterization of Plaintiffs' claim. Plaintiffs "ask the Court to direct the correction of military records" as an "incident of and collateral to [an] award of money judgment," Mot. at 30 (citation omitted), that the Court may grant under Counts I-IV. To the extent there is any confusion, Plaintiffs clarify that they do not assert a stand-alone claim under Count V and that any relief requested thereunder would be an incident of and collateral to an award of money judgment under Counts I-IV.

VI. CONCLUSION

Defendant's Motion to Dismiss should be denied in its entirety. All ten of the Plaintiffs here are military service members – nine of the ten allege plausible, factually explicit claims for backpay under 37 U.S.C. § 204. They were all Title 10 active duty members of the military, even if several were members of the Reserve. The one non-active duty Plaintiff - an active status, drilling Reservist - MSG Davis, alleges that (1) he performed duties for which he was not paid, and (2) monies were illegal exacted from him due entirely to the fault of the military's own actions in prohibiting him from drilling.

The specific factual and legal theory that ties the class together is that all of these harms were as a direct result of violations of statutory law, or applicable regulations, and that there additional money-mandating statutes and harms that apply class-wide. The present ten comprise a sample of the ways in which the DoD violated its own rules and regulations in order to force unlicensed biologics on members of the military – again.

Dated: September 22, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 22nd day of September 2023, the foregoing document was e-filed using the CM/ECF system.

/s/ Dale Saran