IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JEREMIAH BOTELLO, *et al.*,

***Plaintiffs*,**

v.

THE UNITED STATES OF AMERICA,

***Defendant*.**

Case No. 23-174C

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

The President of the United States, through the Secretary of Defense, unlawfully *governed*, *punished*, and *summarily discharged* Plaintiffs while they were serving as members of State militia—along with up to 100,000 non-federalized, National Guard members in Title 32 status, not "in the actual service" of the United States—in patent violation of the U.S. Constitution's Militia Clauses, the Fifth and Sixth Amendments, and the federal laws and regulations governing Guardsmen. Those actions were void *ab initio* and of no legal effect. In accordance with a long line of precedent from the Supreme Court down through this Court and the Federal Circuit, Plaintiffs and class members are entitled to be compensated for these illegal deprivations by the Executive. For the reasons set forth below, this Court must deny Defendant's September 29, 2023, motion to dismiss, Dkt. 23, Plaintiffs' August 4, 2023, First Amended Class Action Complaint ("Amended Complaint" or "FAC"). Dkt. 20.

In August and September 2021, the federal government issued COVID-19 vaccine mandates for nearly the entire U.S. population and all service members. The mandates for private employees, federal employees and contractors and for children and teachers were promptly enjoined nation-wide as *ultra vires* acts in excess of statutory authority.

When the mandates were issued, the only available COVID-19 vaccines were unlicensed, experimental Emergency Use Authorized ("EUA") products: the only COVID-19 vaccine the Food and Drug Administration ("FDA") had licensed, Pfizer/BioNTech's COMIRNATY®, was neither physically nor legally available. *See* FAC, Section V.C-D., ¶¶ 187-204 & *infra* Section IV. Every citizen, including service members, has at least the statutory right to informed consent, which expressly includes the right to refuse to take an EUA product. 10 U.S.C. § 1107a. This statute also provides a mechanism for the

President to waive service members' right to informed consent but only if the President makes the requisite written finding "that complying with such requirement is not in the interests of national security." *Id.* The Present made no such written finding.

The Department of Defense ("DoD") ignored federal informed consent laws and the express terms of Secretary Austin's Mandate—which stated that only fully FDA-licensed products labeled may be mandated, *see* Dkt. 1-2—and instead mandated the use of unlicensed, EUA products. The sole legal basis for this modified Mandate was a September 14, 2021 memo issued, without any statutory authority, by Asst. Sec. of Defense for Health Affairs Terry Adirim declaring that an unlicensed EUA product is "interchangeable" with, and could be mandated "as if" it were FDA-licensed COMIRNATY®. Dkt. 1-15. This *ultra vires* directive is also the sole basis for punishing unvaccinated service members, despite the impossibility of their compliance with Secretary Austin's actual mandate due to unavailability of COMIRNATY®.

In his November 30, 2021 memo, Dkt. 1-3, Secretary Austin ordered non-federalized Militia members who did not take the unlicensed, EUA products to be punished by barring them from (a) drilling with their Guard units, (b) training, (c) attending professional schools, (d) performing duties, and (e) receiving pay and benefits. As was the case for the EUA Mandate, there were statutory mechanisms the President could have employed to call Militia members into federal service to enforce the Mandate and punish non-compliance—in which case the federal government would have had to pay them and follow all of the procedures required by federal law—but the President chose not to. Instead, the Executive unlawfully took and deprived Militia members of money that Congress had appropriated and obligated to pay them. That is the legal wrong the Court must address.

LEGAL STANDARDS

This Court has jurisdiction over claims where the United States has waived its sovereign immunity from suit 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). 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). "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).

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff's allegations must be plausible such that the claims "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007). "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 PRESIDENT CANNOT PUNISH NON-FEDERALIZED MILITIA.

A. The Constitution Limits Punishment of National Guardsmen.

At the Constitutional convention in 1787, the Federalists and Anti-Federalists settled their debate over the respective roles of the new nation's standing, regular army

and of the Militias of the several states. The Constitution's compromise is embodied in the Militia Clauses, which leave Militias under State command and control, unless and until they are "federalized", *i.e.*, called forth into the service of the United States. *See Abbott v. Biden*, 70 F.4th 817, 821 (5th Cir. 2023).

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. 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[.]

Id., cl. 16 (emphasis added). Otherwise, "only the States can enforce the discipline Congress enacts." *Abbott*, 70 F.4th at 844. *Accord Houston v. Moore,* 18 U.S. 1, 9 (1820).

Thus, Congress and the President may "govern" the Militia only when called into the actual service of the United States. *Id.*; *see also id.*, ART. II, § 2, cl. 1 (President is "Commander in Chief of ... the Militia of the several States, when called into the actual Service of the United States."). In case this explicit limitation on the President's and Congress' authority to punish Militia members was not clear enough, the Founders repeated it *ad alta voce* in the Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger*[.]

Id., AMEND. V, cl. 1 (emphasis added).

B. Federal Law Limits Punishment of National Guardsmen.

To "modernize" the militia to meet the demands of modern, industrialized warfare in World War I, Congress passed the National Defense Act of 1916. This Act created the National Guard Bureau ("NGB") and the dual-enlistment system, under which members of the National Guards simultaneously enlist in their State National Guard and the National Guard of the United States ("NGUS"), which is a federal organization paid for with federal dollars – but which rides on the back of the Militia itself. *See Perpich v. United States*, 496 U.S. 334, 347 (1990). The Act's dual-enlistment system preserves State control and governance of non-federalized Militia members, consistent with the Founders' constitutional design.[1] The Act's foundational elements—the dual-enlistment system and the delineation federal and State control and governance—have remained in place and are now codified in Title 32 and various regulations.

The "federal recognition" statutes and regulations include specific protections for Guardsmen, and limitations on the President's authority to punish or discharge non-federalized Guardsmen while they are in Title 32 status, even as members of the NGUS. For example, once a State National Guard officer passes their federal recognition board, they receive a certificate of eligibility, and as long as "…he is originally appointed or promoted within two years to that office, he is entitled to Federal recognition without further examination, except as to physical condition." 32 U.S.C. § 307(c). Under 32 U.S.C. § 323, an officer's federal recognition may be withdrawn only if he voluntarily resigns, or

[1] *See, e.g., Bianco v. Austin,* 204 A.D. 34, 36–37, 197 N.Y.S. 328, 330–31 (App. Div. 1922) (the State "Governor is commander in chief of the National Guard until Congress declares an emergency to exist and the guard becomes an actual part of the National Army, when the President becomes commander in chief."); *State v. Johnson*, 186 Wis. 1, 202 N.W. 191, 193 (Wis. 1925) ("Nowhere in the act can be found a provision which in times of peace alters the control which the state has over the [National] Guard.").

(i) an "efficiency board" composed of commissioned officers conducts an individualized review and makes findings of unfitness or incapacity, and (ii) the board's findings are approved by the NGB Chief.[2] Enlisted members enjoy similar protections and may be separated only by the State Adjutant General. *See* NGR 600-200, *Enlisted Personnel Management*, ¶ 6-2.c & ¶ 6-32 (25 Mar. 2021). Withdrawal of federal recognition from a National Guard unit requires State review and approval.[3]

Non-federalized Guardsmen are also not subject to the Uniform Code of Military Justice ("UCMJ").[4] Instead, they are subject to "courts-martial constituted like similar courts of the Army and the Air Force," with the same jurisdiction, powers, and procedures as under Title 10, "except as to punishments," which are governed by State law. *See* 32 U.S.C. § 326. Thus, Guardsmen must receive at least the same procedural protections as a Title 10 soldier would, but punishments are governed by State law.

C. Backpay Is the Remedy for Illegal and Legally Void Discharges.

In a long line of cases stretching back to Reconstruction, the Supreme Court has consistently held that illegal discharges by military courts are void *ab initio*, and

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[2] *See generally* Nation Guard Regulation ("NGR") 635-100, *Personnel Separations: Termination of Appointment and Withdrawal of Federal Recognition* (8 Sept. 1978); NGR 635-101, *Personnel Separations: Efficiency and Physical Fitness Boards* (15 Aug. 1977). National Guard officers have the right to "appear in person before the Board"; to "be provided copies of the records that will be submitted"; to "submit statements"; to "be represented by appointed military counsel"; and to 30 days' notice. NGR 635-101, ¶ 15.

[3] State National Guard units obtain federal recognition by passing federal inspection. *See* generally NGR 10-1, *Organization and Federal Recognition of Army National Guard Units* (22 Nov. 2002). Federal recognition may be withdrawn only after failing an inspection and then failing to take corrective actions. Any requests to withdraw federal recognition require the Governor's approval. *See* NGR 10-1, ¶ 2-11.

[4] *See* Dkt. 13-11, AR 135-18, *The Active Guard Reserve (AGR) Program*, ¶ 2-7.b (Nov. 1, 2004); Dkt. 13-12, ANGI 36-101, *Air National Guard and Reserve (AGR) Program*, ¶ 2.5.1 (21 Apr. 2022); AR 135-200, *Active Duty for Missions, Projects, and Training for Reserve Component Soldiers*, ¶ 1-12.b (Oct. 20, 2020).

therefore, that an illegally discharged service member is entitled to backpay from the date of the illegal discharge until his discharge is properly and legally effected. The seminal case is *Runkle v. United States*, 122 U.S. 543 (1887), where the Supreme Court reviewed the petition of retired U.S. Army Major Benjamin Runkle who, had been court-martialed, cashiered, and confined years after he had retired and began collecting retirement or "longevity" pay. The applicable law required the President personally sign and approve an officer's discharge for it to become legally effective, and the court found no definitive evidence that this had occurred. "Consequently, Major Runkle was never legally cashiered or dismissed from the army", and he was entitled to longevity pay and regular pay for the period before and after the illegal discharge. *Runkle*, 122 U.S., at 560.

Runkle's holding applies equally to Militia members. In *McClaughry v. Deming*, 186 U.S. 49 (1902), the Supreme Court found that the discharge, court-martial, and confinement of a Volunteer Army officer was void because his court-martial was composed entirely of regular Army officers in violation of federal law requiring the court-martial of volunteers to "be composed entirely of Militia officers." *Deming*, 186 U.S. at 58. In *United States v. Brown*, 206 U.S. 240 (1907), the eminent Justice Holmes, a thrice-wounded, Civil War brevet-Colonel himself, held that a Volunteer Army officer's court-martial was void due to the inclusion of a regular Army officer. *Brown*, 206 U.S. at 244. Both officers were entitled to pay until they were legally discharged from their regiments.

Clackum v. United States, 148 Ct.Cl. 404 (Fed.Cir.1960), and *Garner v. United States*, 161 Ct.Cl. 73 (1963), extended *Runkle*'s to illegal administrative discharges. A service member who has been illegally discharged in violation of applicable military regulations is deemed to have continued in service and is due backpay until the date of their *legally effective* discharge. *See Garner*, 161 Ct.Cl. at 75. *Cf. Service v. Dulles*, 354

U.S. 363 (1957) (applying same rule to illegally discharged foreign service officer). For enlisted service members, backpay is due through the end of their term of enlistment, while officers are entitled to receive pay indefinitely. The *Clackum-Garner* line of cases remain doctrinal bedrocks in the Federal Circuit. *See, e.g.*, *Dodson v. Army*, 988 F.2d 1199, 1208 (Fed.Cir.1993); *Groves v. United States*, 47 F.3d 1140, 1145 (Fed.Cir.1995).

II. THE MILITIA CLAUSES ARE MONEY-MANDATING.

A. The United States Illegally and Summarily Discharged Plaintiffs as Punishment for Non-Compliance with the Mandate.

By illegally curtailing orders, involuntarily transferring Plaintiffs to inactive status, blacklisting the "unvaccinated" from professional schools with pending Accommodation Requests, etc., the Defendant federal agents engaged in governance of state militia without any lawful authority, violating the Militia Clauses, including the Fifth Amendment's Militia Due Process Clause, and the Sixth Amendment right to counsel, U.S. CONST., AMEND. VI, cl. 3, as well as the federal statutes and regulations governing withdrawal of federal recognition, separation or discharge and courts-martial of non-federalized National Guard members in Title 32 service. The federal government did not seek to withdraw federal recognition from Plaintiffs or their units;[5] nor did the federal authorities convene a court-martial for, nor an administrative discharge board for any member with more than 6 years.[6] Members, like plaintiff Charles Hood, who asked to

[5] Even assuming *arguendo* that the DoD, NGB or other federal authorities *could* have withdrawn federal recognition for non-compliance with the Mandate, they did not do so. Defendant Agencies did not attempt to withdraw federal recognition from any Plaintiff, and as far as Plaintiffs are aware, federal authorities did not commence proceedings to withdraw federal recognition or funding from their National Guard units, or any other National Guard, for their members' non-compliance with the Mandate.

[6] The President could not punish non-federalized National Guard members by court-martial because Congress had prohibited punitive discharges in the 2022 NDAA, *see* Pub. L. 117-81 (Dec. 27, 2021), § 736, 135 Stat. 141, or discharge by administrative action

consult with legal counsel, were denied access to judge advocates, *see* Hood Decl., ¶ 10, in violation of the Sixth Amendment and applicable military regulations; nor did the federal authorities comply with any of the procedures for the removal of State officers or enlisted members. Plaintiff Santos served as an Honor Guard member to provide proper military burial honors for deceased New Jersey veterans, Compl. at ¶ 20. What federal equities were at stake by Plaintiff Santos remaining unvaccinated while performing his entirely State Militia duties that justify summary termination without due process?

Defendant's actions constituted unconstitutional governance and punishment of non-federalized National Guardsmen.[7] Significantly, the President declined to take the one action that would have authorized him to govern and punish National Guardsmen: call them into the actual service of the United States. If he had done so, however, the federal government would have had to pay those Militia members during that time; would have had to provide them with counsel; would have had to comply with the requirements and limitations of the UCMJ, including the prohibition on pre-trial punishments under Art. 13, UCMJ; and would have had to follow the procedures and embedded due process protections provided for by the applicable administrative discharge regulations.

It is undisputed that none of these procedures or regulations were followed. The federal government engaged in wholesale governance of, and constructively discharged

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without giving them the requisite administrative board for enlisted members with six or more years of service or an Efficiency Board for officers.

[7] In *Abbott*, the Fifth Circuit held that discharging and withholding Guardsmen's pay "are punishment[s]" that "unlawfully usurp [the] exclusive constitutional authority" of States to "govern" the non-federalized Militia. *Abbott*, 70 F.4th at 845. After filing and receiving extensions to file a petition for rehearing *en banc* in the Fifth Circuit and a petition for certiorari in the Supreme Court, Defendant declined to seek further review. Defendant is now bound by the Fifth Circuit's judgment and mandate, which issued on August 25, 2023. *See Abbott v. Biden*, No. 22-40399 (Aug. 25, 2023), ECF 91-1, Judgment.

and/or denied pay to, 10% or more of Militia members, without the due process required by the U.S. Constitution and federal law. Plaintiff Botello had been on full-time active-duty orders for 6-12 months each year up to and including 2021; after requesting religious accommodation in October 2021, he was told he would not be able to work as a chaplain, had two offers to fill full-time orders revoked, and has not had any full-time active-duty orders since December 2021. *See* Botello Decl., ¶¶ 12-17. Plaintiff Konie was disenrolled from the Senior Leaders Course he was scheduled to attend while he had a Religious Accommodation Request pending, and thereby became ineligible for promotion. FAC, ¶ 17. Plaintiffs Hood, Phillips, and Santos were all dropped from full-time orders when they indicated that they would not take the shots. Major Hood raised the problems of unavailability of licensed products (i.e. he invoked his rights under § 1107a). Hood Decl., ¶¶ 10-14, 17. Phillips and Santos both had RARs pending that went unanswered; they were punished even with that statutory process still unanswered by State or federal authorities. *See* Phillips Decl., ¶ 10; *see also* FAC, ¶ 20. Plaintiffs Hood and Santos both received a letters of reprimand. Plaintiff Taylor was given a General Officer Reprimand (GOMOR) and then ordered not to come to drill because he was unvaccinated. FAC, ¶ 24.

The remedy for the illegal governance, punishment, and discharge without due process of Militia members is to ignore the illicit discharges, and repay the equivalent amount of money damages in restitution in the exact amounts of the punishment, day for day, dollar for dollar, and point for point, specified by the Military Pay Act and lawfully appropriated by Congress for the training of the Militia in both the FY2022 and the FY2023 NDAAs, as well as other applicable federal laws and regulations governing entitlement to military pay and benefits. *See* FAC, ¶ 11.

B. The Militia Clauses Are Self-Executing and Money-Mandating.

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. "[A] power over a man's subsistence amounts to a power over his will." *United States v. Hatter*, 121 S.Ct. 1782, 1791 (1992) (citation and quotation marks omitted). This applies with even greater for to the Militia members here, who, unlike Article III judges, do not have lucrative alternatives to federal service and who were deprived of all compensation and even housing allowances, and in many cases had to repay bonuses or educational benefits already paid.

The language and purpose of the Militia Clauses similarly "embrace[] a self-executing compensatory remedy." *Hatter v. United States*, 953 F.2d 626, 628-29 (Fed.Cir.1992). To require further federal "executive actions to enforce the [Militia Clauses] would frustrate their purpose", *id.* at 629, because it would permit the very persons committing the constitutional violations—the President and Secretary Austin—to bar any remedy through their inaction.[8] 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), prohibiting federal punishment of non-federalized Militia members not in the "actual service of the United States." If there

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[8] 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) (citation omitted).

were any doubts as to the unconditional and absolute nature of this prohibition, the Founders repeated it in the Fifth Amendment's Militia Due Process Clause. *See* U.S. CONST. AMEND. V, cl. 1. Further, the Militia Clauses, like the Compensation Clause and the 2023 NDAA, *see infra* Section III.B, forbid the creation of two distinct classes of unvaccinated, non-federalized Militia members who have "diametrically different vaccination status": (1) unvaccinated, non-federalized Militia members who were discharged and denied all compensation; and (2) other unvaccinated service members who were not discharged and and/or have received corrective actions restoring them to the pre-Mandate status quo.[9]

C. The Founders Understood Military Punishments as Pecuniary, Just as the Remedy for an Illegal Deprivation Must Be Pecuniary.

Defendant summarily dismisses Plaintiffs' Militia Clause claims with cursory assertions that these provisions "lack … money-mandating language". Mot. at 14. This facile argument ignores the Founders' Militia service and personal knowledge of military law and punishment, which is reflected in the Ratification Debates and embodied in the Militia Clauses and the Fifth Amendment.

Colonel Winthrop's landmark review of military justice leaves *this* question beyond argument: military punishment in the Anglo-American tradition has always included loss of pay, as well as the payment of fines, as part of the palette of punishments that could be, and was, meted out at military tribunals. *See* I WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, Ch. XXV, "The Forty Fifth and Forty-Sixth Articles" (2d ed. 1920)

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[9] *See infra* Section III.B; *Abbott*, 70 F.4th at 843-44; *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).

("imprisonment and fine[s] [are] the forms of punishment usually resorted to."). The Army historical society is right to remind us of the "often overlooked" fact "that 23 of the 40 men (to include the secretary of the Convention) who signed the Constitution had served in uniform during the Revolutionary War." ROBERT K. WRIGHT, JR. & MORRIS J. MACGREGOR, JR., SOLDIER-STATESMEN OF THE CONSTITUTION 2 (U.S. Army Center of Military History, 1987). The Founding Fathers were painfully familiar with martial law and military fines and punishments to which they had been subject while in uniform. Consequently, the limits on military law and punishment were central to the ratification debates and the compromise on federal-state authority embodied in the Militia Clauses and the Fifth Amendment, *see generally* FAC, Section III.A-.D., ¶¶ 91-122, while the first laws they passed expressly provided for the imposition of fines and loss of pay as military punishments.[10] Accordingly, any fair interpretation of the Militia Clauses, as informed by the Ratification Debates and historical and Supreme Court precedent, must acknowledge that the Militia Clauses could require backpay and other emoluments as remedies for unconstitutional, illegal deprivation or taking of the same from Militia members.

Defendant also ignores the fact that the Militia Clauses' restrictions on military punishments are repeated in the Fifth Amendment, which has been understood to be a self-executing money mandating provision since the inception of this Court.

Finally, Plaintiffs' view of the Militia Clauses as self-executing follows the unbroken line of cases from *Runkle*, *Deming* and *Brown* through *Clackum* and *Garner*

[10] *See, e.g.,* Act of February 28, 1795, ch. 36, §§ 4–5, 1 Stat. 424, 424 ("[T]he militia *employed in the service of the United States* ... who shall fail to obey the orders of the President of the United States ... shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court martial") (cited and discussed in *Abbott*, 70 F.4th at 842 & n.28).

to *Dodson* and *Groves,* where the Supreme Court and this Court have held that unconstitutional or illegal discharges are legally void and do not terminate the illegally discharged service member's entitlement to pay or the military's obligation to pay them. The Defendant now seeks to invert this analysis by having the Court *presume* the deprivation of pay was lawful so that this Court is deprived of jurisdiction to review whether it was lawful or not.

This principle supporting Plaintiffs' claims—and refuting Defendant's—is perhaps best illustrated in *Shapiro v. United States*, 107 Ct.Cl. 650 (1947). Lieutenant Shapiro was an attorney who may have overzealously defended a client facing a court-martial, and then promptly found himself charged, denied counsel, and summarily convicted by court-martial on rather ambiguous charges. The Court of Claims found that the Army's court-martial and discharge violated Shapiro's Fifth and Sixth Amendment rights, such that the resulting "conviction [was] void and the dismissal based on it illegal." *Id.* at 655. Because "the plaintiff did not thereby lose his right to emoluments of his office," *i.e.*, his military pay, "this court may render judgment for any amount he may be able to prove he is entitled to." *Id. See also Shaw v. United States*, 174 Ct.Cl. 899, 954 (1966) ("our opinions have consistently stated or assumed that denial of significant constitutional rights would render the military conviction invalid, and permit this court to award back-pay."). The *Shapiro* principle applies equally to illegal administrative discharges. *See, e.g.*, *Cole v. United States*, 171 Ct.Cl. 178, 187 (1965).

Here, the Plaintiffs didn't even get the benefit of either a sham court-martial like Lieutenant Shapiro, nor a board, albeit one that had command interference in it, as did Major Cole. Indeed, the Title 32 Militia were given none of the equivalent procedural due process protections of their Title 10 counterparts, despite the explicit commands noted

supra Section I.B. Plaintiffs received not even the barest legal assistance to which they were entitled by military regulation and the Sixth Amendment. *See, e.g.,* Hood Decl., ¶ 10. This Court has the authority, the jurisdiction, and the mandate to look beneath a court-martial or administrative discharge where it is void because of violations of rights guaranteed by the U.S. Constitution, or set forth in federal law or military regulations, that raise questions about the fairness of the process utilized. Likewise, given what is alleged to have happened here, Plaintiffs have demonstrated that there is more than a "fair inference" that Militia Clause violations, coupled with the statutory and regulatory violations alleged, confer a substantive right to money damages.

D. Plaintiffs Are Entitled to Backpay Until Lawfully Discharged.

It is undisputed that the Mandate and Secretary Austin's National Guard Directive have been rescinded by Congress and Secretary Austin. The orders that are alleged to have been violated are therefore void *ab initio*. The same conclusion applies to the measures taken to punish National Guardsmen for non-compliance with the Mandate and Militia Directive. No determination of fitness or unfitness was ever made over these officers and enlisted members, and they are entitled to be made whole for the unlawful harm to their wallets and their careers. These discharges were of no legal effect, and the Plaintiffs are entitled to the pay and benefits as if they had continued in service for their applicable terms of service, as required by the *Runkle-Brown* and *Clackum-Garner* lines of cases.

Defendant has consistently justified its unlawful actions and the adverse actions taken against Plaintiffs by claiming that unvaccinated service members disobeyed a *lawful order*. *See* Mot. at 4. This defense should be given no weight, first, because the Defendant has sought to moot litigation in every court where the underlying legality of the mandate has been challenged. The underlying "lawfulness" of the Mandate is a merits

issue that the Plaintiffs seek to have adjudicated, but Defendant presumes the answer in its favor and claims that this somehow serves as a jurisdictional bar to Plaintiffs' suit. Second, Plaintiffs' challenge to the lawfulness of the order to take the shot is a well-recognized exception to the general rule of obeying orders. *See supra* I WINTHROP, Twenty-First Article. Third, Plaintiffs also raise the factual issue of *impossibility* of compliance with the Secretary's order due to the unavailability of any licensed vaccines, another long-recognized defense to being cashiered for failing to comply with an order or regulation. *See id*. Fourth, Plaintiffs' claims are not collateral attacks on courts-martial because no Plaintiff has even had the benefit of being subject to a court-martial and thereby afforded procedural due process of being charged, having counsel, examining the evidence, confronting witnesses, etc. Instead, they were illegally punished, dropped, and summarily discharged without any process at all.

E. DoD Relies on a Single Decision That Misstates Controlling Law.

The government relies on a single decision, *Pohanic v. United States*, 48 Fed.Cl. 166 (2000), to support dismissal of Plaintiffs' claims. In the government's view, *Pohanic* stands for the broad proposition that *no* National Guardsman in Title 32 status may state a claim for backpay, even those who, like the Plaintiffs here, were illegally discharged while serving on full-time active-duty and who are paid under 37 U.S.C. § 204(a)(1).[11] *Pohanic*, however, misinterprets the principal authority on which it relies, *Palmer v.*

[11] *See* Mot. at 32-34. Defendant's argument that Botello fails to state a Military Pay Act claim because he drilled in 2022 is without merit. *See* Mot. at 33 n.16. The basis for his Military Pay Act claims is that he had full-time orders curtailed (cut 17 days short); *and* because, having spent 6 to 12 months on full-time active-duty for each year up to and including 2021, and despite being asked to fill two vacant chaplain positions, that he can no longer get orders because he was unvaccinated and requested religious accommodation. *See* Botello Decl., ¶¶ 5-7 & 14-17. This has deprived him of his calling, livelihood, and other emoluments to which he is otherwise entitled.

United States, 168 F.3d 1310 (Fed. Cir. 2003), cites the wrong statute, and requires abandoning and contradicting controlling Supreme Court and Federal Circuit precedent.[12] *Palmer* also never confronted the questions presented here: (1) whether illegal deprivation of pay as punishment by federal authorities in violation of the Militia Clauses would provide a separate "money mandate" for improper federal removal of Title 32 officers and enlisted members; or (2) whether Militia members have a separate and distinct cause of action for federal violations of "federal recognition" and associated statutory protections as members of the NGUS.

In *Palmer*, the Federal Circuit held that a reservist not serving on full-time active-duty orders could not claim backpay for duties he had not performed because the applicable military pay statute, 37 U.S.C. § 206, mandated payment only for duties *actually performed*. The *Palmer* court began by explaining the two basic categories for military pay entitlements. The first category (hereinafter, "*Palmer* Category 1") is for service members on full-time duty as military members.

> This [first category] includes those members for whom service is a professional career, as well as those individuals, following in this country's tradition of the citizen-soldier, who though not initially trained as professionals serve their country full-time. For purposes of pay, the statutes treat both the professional and the citizen-soldier alike. By virtue of their status, arising from full-time active duty service, they are entitled to the pay and allowances attributable to their rank and station.

Palmer, 168 F.3d at 1313–14.

These Category 1 plaintiffs are paid under 37 U.S.C. § 204(a)(1). The second *Palmer* category ("*Palmer* Category 2") is for service members "not in full-time active

[12] Even if *Pohanic* had been correctly decided, it still would be inapposite because the plaintiff there alleged he had been wrongfully separated by the *State* Adjutant General, a person authorized to do so, not *federal* officials. *See supra* Section II.A.

duty service" – commonly called 'reservists' – who are typically required to perform annual training and a specified number of drills per year. Service members serving part-time reserve duty are paid pursuant to 37 U.S.C. § 204(a)(2) or 37 U.S.C. § 206(a)(1). *Palmer* held that these service members have "no lawful pay claim against the United States for unattended drills or for unperformed training duty," even if the failure to perform is due to a wrongful discharge. *Id.* at 1314 (citations omitted).[13]

The plaintiff in *Pohanic* was in *Palmer* Category 1, serving on full-time national guard duty, and was entitled to pay under 37 U.S.C. § 204(a)(1). The *Pohanic* court began by acknowledging that 37 U.S.C. § 204(a)(1) "is money-mandating for servicemen paid pursuant to it who allege improper separation and seek back pay and ancillary relief." *Pohanic*, 48 Fed. Cl. at 167 (citing *Palmer*, 168 F.3d at 1314). In the next paragraph, however, *Pohanic* reverses course and concludes that the plaintiff, despite serving on full-time national guard duty, falls under *Palmer* Category 2. The *Pohanic* court does this by asserting that Pohanic's "entitlement to pay is predicated on performance of duties" because he is "normally" a Guardsman – a citizen soldier – and therefore he cannot "state a claim for back pay for duties not performed, whether the lack of performance is voluntary or involuntary."[14] This explicitly contradicts the *Palmer* Court's holding. The *Pohanic* Court wrongly conflates 'reservists' with 'guardsman' and ignores that the Militia

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[13] Plaintiffs Botello, Hood, Phillips, and Santos were on full-time active duty orders at the time of their drops/changes to their orders and therefore have *Palmer* Category 1 claims.

[14] *Pohanic*, 48 Fed.Cl. at 167 (citing *Palmer*, 168 F.3d at 1314). *Pohanic* uses "involuntary" or "voluntary" six times in the opinion, mostly in reference to *Palmer*'s holding. The word "voluntary" does not appear anywhere in *Palmer*; the word "involuntary" is used only once in the background section to describe Colonel Palmer's transfer out of his unit, *Palmer*, 168 F.3d at 1312. *Palmer* does not say anything about "voluntary" discharges and entitlement to backpay for constructive service, nor is "voluntariness" relevant to the duty-performed requirement under *Palmer* Category 2.

and National Guard, just like the "regular" Title 10 standing forces, have full-time "active" and part-time "reserve" members.

The *Pohanic* court also commits two other errors. First, in conducting a detailed exegesis of the word "performed" in a variety of statutory locations in Title 32, the *Pohanic* court acknowledges that the governing statute "appears not to contain an identical duty-performed requirement", *id.* at 168 (citing 37 U.S.C. § 101(18)), "which provides the definition of 'active duty' applicable to Title 37", *id.*). Inexplicably, the *Pohanic* court then imports the definition of "full-time national guard duty" from Title 32 into Title 37, by claiming that "under 37 U.S.C. § 101(19), the term 'Full-time National Guard duty means … duty …*performed* … under … [Title 32] …'" *Pohanic*, 48 Fed. Cl. at 168 (emphasis in original). But this provision of Title 37 does not include the word "performed" or define "Full-time National Guard duty"; instead the cited section defines "active duty for a period of 30 days." *See* 37 U.S.C. § 101(19).[15]

The final error of the *Pohanic* court is that it requires abandoning bedrock Supreme Court and Federal Circuit cases, such as *Service v. Dulles*, *Runkle* and *Clackum*, to justify the premises for which the government holds it out. It is perhaps sufficient in closing the *Pohanic* discussion to note that no other Court of Federal Claims or Federal Circuit decision cites *Pohanic* as authority for the government's position and subsequent cases have held that a wrongfully discharged reservist has a backpay claim for

[15] The legislative history and version of 37 U.S.C. § 101(19) in effect in 1994 and 2000 did not contain the quoted definition. Whether the *Pohanic* court's conclusion is based on a previous version of the statute or is simply a mistake, *Pohanic* is an erroneous statement of the law. In the event the Court finds there is a statutory limit on backpay for National Guardsmen, this Court has the authority to order that compensation be paid and to disregard that limit on payment to Class members harmed by the constitutional violation. *See, e.g., Taylor v. McDonough*, 71 F.4th 909, 943-44 (Fed.Cir.2023).

constructive service after being illegal discharged.[16]

III. THE 2023 NDAA IS A MONEY-MANDATING STATUTE.

A. Section 525 Is Money-Mandating Because It Removes Any Bar to Payment and Any Grounds for Withholding Pay Due to Plaintiffs.

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 removes the unlawful bar to entitlement to military pay that Secretary of Defense Austin put in place for Plaintiffs and Class Members. 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. *See, e.g., Aerolineas Argentinas v. U.S.*, 77 F.3d 1564, 1575 (Fed.Cir.1996) (regulations based on repealed statute "automatically lose their vitality."). 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 they took the shots. The Military Pay Act and the other federal laws and regulations governing

[16] *See, e.g., Radziewicz v. United States*, 167 Fed.Cl. 62, 68 (2023) ("Reservists are able to state a claim for backpay if they were participating in full-time active duties until the government's wrongful action."); *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). *Cf. Christian v. United States*, 337 F.3d 1338, 1347 (Fed.Cir.2003) ("military personnel who have been illegally or improperly separated from service are deemed to have continued in active service until their legal separation.").

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.[17] In *Collins*, 101 Fed. Cl. 435, 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(h). Additionally, statutes governing pay and benefits for service members or federal employees that may not be money-mandating on their own are money-mandating when read in conjunction with other federal statutes or regulations that establish conditions for entitlement to such pay and benefits.[18]

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

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[17] *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).

[18] *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).

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, Section II.E., ¶¶ 71-78 & Dkt. 13-1 to 13-6,[19] and by announcing a policy to categorically deny backpay to service members denied pay or benefits.[20]

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 and Class members payments due under those statutes—meets the threshold requirement of making "a nonfrivolous

[19] *See Collins*, 101 Fed.Cl. at 450 (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, *id.* at 459, because it "is the statute, not the Government official, that provides for the payment." *Fisher,* 402 F.3d at 1175.

[20] 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, Section II.F., ¶¶ 79-90; Dkt. 13-7 & 13-8.

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.

B. 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. Defendant's refusal 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.

There is no indication in the 2023 NDAA that Congress intended to deny monetary relief to every service member or to any subset thereof; in fact, 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*, 70 F.4th at 843-44; *Collins*, 101 Fed.Cl. at 457-459. *Cf. Hatter*, 185 F.3d at 1361-62.

C. The 2023 NDAA Requires Retroactive Relief.

In Section 525 of the 2023 NDAA, 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.

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.[21] Where Congress intended to provide prospective relief, it has instead used the term "repeal", as it did when it ended the unconstitutional "Don't Ask, Don't Tell" policy. *See generally Collins*, 101 Fed.Cl. 435. This Court should therefore deny Defendant's arguments that the statutory term "rescind", which requires retroactive relief, should be read as "repeal" with only prospective effect. *See* Mot. at 19-20.

Requiring Defendant to provide retroactive relief is consistent with the statutory text (*i.e.*, "rescind"), structure,[22] and purpose. Section 525 was enacted to address a "self-

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[21] *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 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").

[22] Section 524 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

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, ¶ 57 (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, 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.

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. 1-4, Jan. 10, 2023, Secretary Austin Rescission Memo, at 1; *see also* FAC, Section II.E., ¶¶ 71-78 & Dkt. 13-1 to 13-6 (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.

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punishment was no longer necessary because Congress retroactively nullified the legal grounds for punishment (*i.e.*, non-compliance with the Mandate).

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. Congress did not, as explained above in Sections III.A & III.B.

D. The Presumption Against Retroactivity Does Not Apply.

Neither Congress nor the Supreme Court have adopted a broad "presumption against retroactivity," as Defendant claims. Mot. at 20 (citation omitted).[23] This presumption does not apply to jurisdictional, procedural, remedial, or curative statutes. *See Landsgraf v. USI Film Products*, 511 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 Cl.Ct. 580, 591 (1988) (citations and quotation marks omitted). Section 525 was enacted to address the self-imposed readiness crisis caused by the Mandate, *see* FAC, ¶ 57 & Dkt. 1-9; 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

[23] Defendant also erroneously claims that 1 U.S.C. § 109 bars the retroactive application of Section 525. *See* Mot. at 20. 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.

CONSTRUCTION §§ 41:3 (8th ed. Nov. 2022 Update), *i.e.*, that service members may not be punished for noncompliance with the now rescinded Mandate.

E. DoD Is Estopped from Arguing 2023 NDAA Is Not Retroactive.

Defendant's position here—that the 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 III.C, 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) their 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.[24]

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[24] 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); *Alvarado v. Austin*, No. 23-1419 (4th Cir. Aug. 3, 2023); *U.S. Navy SEALs 1-26 v. Austin*, 72 F.4th 666 (5th Cir. 2023); *Roth v. Austin*, 62 F.4th 1114 (8th Cir. 2023); *Short v. Berger*, Nos. 22-15755, 22-16607 (9th Cir. Feb. 24, 2023); *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). Several district courts have dismissed remaining cases as moot. *See, e.g.*, *Colonel Fin. Mgmt. Officer v. Austin*, No. 8:21-CV-2429-SDM-TGW, 2023 WL 2764767 (M.D. Fla. Apr. 3, 2023); *Crocker v. Austin*, No. 5:22-cv-00757, 2023 WL 4143224 (W.D. La. June 22, 2023);*Wilson v. Austin*, No. 4:22-cv-438, ECF 61 (Sept. 1, 2023). Most of these decisions also accepted Defendant Agencies' representation that the "voluntary cessation" exception did not apply because their

Defendant is therefore barred from taking a contrary position here by the doctrine of judicial estoppel.[25] The Defendant cannot have it both ways, successfully obtaining dismissal of district and appeals court challenges by arguing that it has applied the 2023 NDAA Rescission with full retroactive effect, 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. 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

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corrective actions were compelled by Congress. *See, e.g., CFMO*, 2023 WL 2764767, at *2; *Navy SEALs 1-26*, 72 F.4th at 673-74; *Robert*, 72 F.4th at 1164.

[25] 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). This Court routinely applies judicial estoppel where, as here, the government has "flip-flop[ped]" its litigation position to suit its interests. *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); *Carson v. U.S.*, 161 Fed. Cl. 696, 705 (2022); *Wavelink, Inc. v. U.S.*, 154 Fed. Cl. 245, 277-78 (2021).

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. Accordingly, 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 17-18. 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.[26] The actions or statements of individual legislators are not a "reliable indication of what a majority of both Houses of Congress intended when they voted" for the 2023 NDAA.[27]

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[26] 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, ¶¶ 81-86, a position that outraged several HASC members who thought that was exactly what the 2023 NDAA ordered it to do. *See generally* Dkt. 13-7, 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.

[27] *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 18-19, 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. *See, e.g., 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).

IV. PLAINTIFFS HAVE STANDING AND STATE A CLAIM FOR COUNT III.

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

Defendant asserts that Plaintiffs "lack standing" to pursue Count III because they "have not established a causal connection between their injury, their alleged entitled to backpay," and the alleged violation of 10 U.S.C. § 1107a. Mot. at 24.[28] In Defendant's view, Plaintiffs fail to "allege that 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).

This is incorrect. Plaintiffs could not obtain an FDA-licensed vaccine when the Mandate was issued and for at least several months thereafter because no FDA-licensed vaccines *existed*.[29] Yet despite the physical and legal impossibility of compliance, Defendant illegally and summarily punished and discharged plaintiffs for exercising their express statutory rights codified in 10 U.S.C. § 1107a to refuse unlicensed 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

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[28] 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, ¶¶ 16-24. These injuries would be redressed by an order of the Court granting the monetary and equitable relief requested. *See* FAC, "Relief Requested."

[29] In a November 12, 2021 opinion, the 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).

and Armed Services directed that unlicensed EUA products should be mandated "as if" they were FDA-licensed and labeled products because the DoD deemed the two products to be legally "interchangeable." *See* FAC, Section V.D., ¶¶ 195-204; Dkt. 1-15 & Dkt. 1-16. Defendant has uniformly mandated unlicensed, EUA products.[30]

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.[31] Indeed, even if Purple Cap COMIRNATY®, the only product licensed when the Mandate was issued, had been *physically* available (and it was not), it was not *legally* available because the FDA terminated its U.S. marketing authorization the day before, on Aug. 23, 2021.[32] 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., ¶¶ 187-194. The finding that FDA-licensed products were unavailable, which necessarily covered "commercially available" sources, is an express statutory requirement 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").

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[30] *See* FAC, ¶¶ 298-305. *See also Doe#1-#14*, 572 F.Supp.3d at 1233 (DoD counsel admitting "it was mandating vaccines from EUA-labeled vials"); *Coker v. Austin*, 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).

[31] Defendant states that FDA-licensed vaccines were offered to "all willing plaintiffs" in *Wilson v. Austin*, including Plaintiffs Hood and Phillips. Mot. at 25 n.10. Plaintiffs Hood and Phillips were not parties in *Wilson*, because the court did not grant their motion to intervene. In the Amended Complaint, Plaintiffs explain why the products were not FDA-licensed products. *See* FAC, Section V.C., ¶¶ 205-210.

[32] *See* FAC, ¶ 188. It likely would have been a criminal violation to sell or administer it. *See, e.g.*, 42 U.S.C.§ 262(a)(1) & § 262(f) (criminal penalties for marketing or labeling 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'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 Defendant pursuant to the exclusive contracts between the manufacturers, Pfizer and Moderna, and the DoD and Department of Health and Human Services ("HHS").[33] 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.[34] Service members had no such knowledge and were entirely reliant on DoD for supply, sourcing, and administration of FDA-licensed vaccines.

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[33] *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/.

[34] 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.,* Hood Decl., ¶¶ 13-17. 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 could locate FDA-licensed vaccines from the DoD or from third parties.

It was incumbent on the military to make such doses available to active-duty military personnel to comply with the DoD Mandate.[35] Service members were required to 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.[36]

B. Plaintiffs Have Stated a Military Pay Act Claim in Count III.

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" through at least January 2023, FAC, ¶ 298; (2) "[t]here has not been a Presidential authorization to mandate an unlicensed EUA product from the issuance of the Mandate through the present," *id.* ¶ 202; (3) "[n]o FDA-licensed vaccines were available at all at the time that the August 24, 2021 Mandate was issued," *id.* ¶ 299;

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[35] Defendant claims "many service members did" "obtain commercially available and fully licensed vaccines doses." Mot. at 26. This is a naked factual assertion lacking any 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.

[36] *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/.

(4) "[n]o FDA-licensed vaccines were available at all at the time that the November 30, 2021 Militia Directive was issued," *id.* ¶ 300; (5) they "did not have any 'Comirnaty-labeled' vaccines until at least June 2022," *id.* ¶ 303; and (6) they "did not have any 'Spikevax-labeled' vaccines until at least September 2022," *id.* ¶ 304. Each Plaintiff was punished for non-compliance and/or for not being vaccinated during the time when no FDA-licensed vaccines were available to them such that compliance was impossible. *See id.* ¶¶ 16-24 & ¶¶ 211-212. 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." *Id.* ¶ 307.

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 could and 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. *See, e.g., Navy SEAL 1 v. Biden*, 574 F. Supp. 3d 1124, 1130 (M.D. Fla. 2021).

Now that Defendant has abandoned and reversed this litigation position, it asserts that "service members were required to receive only 'COVID-19 vaccines that receive full [FDA] licensure.'" Mot. at 24-25 (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 III.E. It is directly contrary to the Defendant's actual policy and its previous litigation positions, leading 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.

V. DOD RFRA VIOLATIONS SUPPORT MILITARY PAY ACT CLAIM.

A. Count IV States a Claim for Wrongful Discharge.

Notwithstanding Defendant's argument to the contrary, *see* Mot. at 26-29, Count IV states a claim for wrongful discharge and denial of pay based on Defendant's systematic RFRA violations. The FAC describes Defendant's religious accommodation policy and processes, which courts have found to be 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). The process is a sham because it has resulted in the denial of 99%-100% of requests adjudicated using nearly identical form letters, without providing the "to the person" individualized determinations required by RFRA, DoD Instruction 1300.17, and the individual Services' implementing regulations. *See generally* FAC, Section IV.B., ¶¶ 215-223.

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.[37] Further, Botello, Phillips, Konie, and Santos all submitted accommodation or exemption requests that were ignored without action. *See supra* II.A.

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.[38]

Plaintiffs set forth 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. Plaintiffs have thus adequately pled that the Defendant's religious accommodation policies substantially burdened service members free exercise of religion, shifting the burden to Defendant to demonstrate that its policy satisfies strict scrutiny as applied to each Plaintiff, as required by RFRA. *See* 42 U.S.C. § 2000bb-1(b); *O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (burden shifts to Defendant).

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[37] *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); *Col. Fin. Mgmt. Officer v. Austin*, 622 F.Supp.3d 1187 (M.D. Fla. 2022) ("*CFMO II*") (Marine Corps); *see also Schelske v. Austin*, 2022 WL 17835506 (N.D. Tex. Dec. 21, 2023) (individual Army soldiers). While nearly all challenges have been dismissed, *see supra* note 24, *Doster*, *Navy SEALs 1-26*, and *Schelske* have not.

[38] *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 (6th Cir. 2022) (Air Force admission that RFRA is "triggered only in judicial proceedings").

B. Botello's Claim in Count IV Is Not Precluded by 28 USC § 1500.

Plaintiff Botello's claim in Count IV is not, as Defendant claims, barred by 28 U.S.C. § 1500. *See* Mot. at 29-30. Captain Botello joined the proceeding in *Alvarado v. Austin*, No. 22-cv-876 (E.D. Va.)—commenced May 18, 2022, *see id.* ECF 1, and dismissed November 23, 2022, *see id.* ECF 86—a class action complaint by military chaplains alleging that the military's chaplain-specific rules were unconstitutional and violated chaplains' express statutory rights and protections for chaplains' rights of conscience.[39]

28 U.S.C. § 1500 applies where the claims pending in the district court and the claim in this Court are "based on substantially the same operative facts", *United States v. Tohono O'dham Nation*, 536 U.S. 307, 311 (2011), without regard to the relief sought, "except insofar as it affects what facts the parties must prove." *Id.* at 315. *See also id.* at 315-16 (28 U.S.C. § 1500 is to applied "consistent with the doctrine of claim preclusion, or res judicata" using the transaction and evidence tests). Botello's claim in Count IV is not barred because Count IV and the RFRA claim in *Alvarado* arose from distinct actions, policies, and time periods ("Transaction Test") and would rely on different evidence to prove the violation and entitlement to relief ("Evidence Test"), such that a trial and judgment in *Alvarado* would not have preclusive effect for Botello's Count IV.

The class action complaint in *Alvarado* raised constitutional and statutory claims distinct from those of other service members based on military chaplains' unique constitutional role to protect and enable the free exercise rights of the service members

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[39] The discussion that follows is limited to Botello's claim under Count IV because: (i) this is the only claim Defendant challenges; (ii) Count IV is the only claim that overlaps with the nine claims in *Alvarado* alleging violations of constitutional or statutory protections for chaplains' in their unique role as ministers and denominational representatives; and (iii) the preclusion analysis in 28 U.S.C. § 1500 is to be applied on a "claim-by-claim basis." *Trusted Integration, Inc. v. U.S.*, 659 F.3d 1159, 1165 (Fed.Cir.2011).

to whom they minister.[40] Accordingly, Count IV is not precluded because the agency conduct "that would give rise to breach of" RFRA in *Alvarado* is "not legally operative for establishing" the Military Pay Act claim here. *Trusted Integration*, 659 F.3d at 1168.

To the extent the claims overlap by alleging that the military systematically denied all religious accommodation requests, Count IV is not barred because this policy is "relevant to each case for substantially different reasons." *Beberman v. United States*, 755 Fed.Appx. 973, 978-79 (Fed.Cir.2018). In *Alvarado* and other district court cases challenging this policy, the military's policy and/or the denial of individual requests was relevant to demonstrate that the claim was justiciable (*i.e.*, for standing, ripeness, exhaustion) and for purposes of class definition and ascertainability.[41] Moreover, in these district court challenges, the military's policy was dispositive for establishing that the military had violated RFRA, and the consequent order to take the jab in violation of their conscience or else lose their jobs was dispositive for establishing irreparable harm required for injunctive relief.[42]

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[40] In *Alvarado*, chaplains challenged policies coercing chaplains to be complicit in the military's sham religious accommodation process to deprive other service members of their free exercise rights protected by RFRA. *See, e.g., In re England*, 375 F.3d. 1169, 1171 (D.C. Cir. 2004) (Chaplains are "unique" military officers "involving simultaneous service as clergy or a 'professional representative[]' of a particular religious denomination and as a commissioned … officer."), *cert denied*, 543 U.S. 1152 (2005); *Katcoff v. Marsh*, 755 F.2d 223, 234 (2d Cir. 1985) (chaplain corps required because, absent a chaplaincy, the military "would deprive the soldier of his right under the Establishment Clause not to have his religion inhibited and of his right under the Free Exercise Clause to practice his freely chosen religion."). Count IV, by contrast, addresses generally applicable policies to deny all requests without regard to Botello's position as a chaplain.

[41] *See, e.g., Doster*, 54 F.4th at 413-418 (ripeness, exhaustion); *Navy SEAL 1,* 586 F.Supp.3d at 1196-97 (same); *CFMO II*, 622 F.Supp.3d at 1202-03 (same) & 1206 (ascertainability); *Navy SEALs 1-26*, 578 F.Supp.3d at 830-31 (exhaustion, futility).

[42] *See, e.g., Navy SEALs 1-26*, 578 F.Supp.3d at 836 (likelihood of success) & 839 (irreparable harm); *Doster*, 54 F.4th at 422-25 (likelihood of success) & 428-29

For a Military Pay Act claim in this Court, the legally operative facts are Plaintiffs' non-federalized status and their constructive discharge, cancellation of full-time active-duty orders, and deprivation of pay without due process. The allegation and/or proof of these facts provide this Court with jurisdiction; are required elements for stating a claim under 37 U.S.C. § 204(a)(1); and must be proven to establish an entitlement to military pay and the amount of monetary relief due. While systematic denial of requests and the "crisis of conscience" would be dispositive for jurisdiction, merits and relief in the district court, it would "require *far more*", *Higbie v. United States*, 113 Fed. Cl. 358, 363 (2013), *i.e.*, the foregoing operative facts, to establish jurisdiction, a substantive violation and relief in this Court. Thus, a judgment in *Alvarado* would not preclude Count IV here.

Finally, 28 U.S.C. § 1500 does not apply because the two cases address events that occurred in a different time periods, even if there is some overlap. *See, e.g., Stockton East Water Dist. V. United States,* 101 Fed.Cl. 352, 360-61 (2011). The enactment of Section 525 on December 23, 2022, was not legally operative in *Alvarado*, which was dismissed November 23, 2022. It is legally operative here, *inter alia*, because it retroactively eliminated the sole legal basis for the government's RFRA defense. In *Alvarado* the military could defend the policy by proving that it was narrowly tailored to further compelling governmental interest, while this defense and evidence would be barred here.

VI. PLAINTIFFS HAVE STATED CLAIMS FOR COUNTS V AND IV.

Plaintiff Taylor has stated a claim for illegal exaction (Count V) because, during the time Plaintiff was prohibited from drilling and not paid, Servicemen's Group Life Insurance ("SGLI") premiums continued, creating indebtedness to the government.

(irreparable harm) (6th Cir. 2022); *CFMO II*, 622 F.Supp.3d at 1211-14 (likelihood of success) & 1215 (irreparable harm).

Those premiums were recouped from Plaintiff, in the amount of approximately 8-10 months of SGLI premiums. *See* FAC, ¶ 24.

The Court should also reject Defendant's arguments regarding Count VI, 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 38 (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-V.

VII. CONCLUSION

Defendant's Motion to Dismiss should be denied in its entirety. In the event the Court dismisses Botello's claim in Count IV, Plaintiffs respectfully request the Court do so with leave to refile and for Plaintiffs to move to consolidate the refiled claim with this case as was done in. *Pellegrini v. United States*, 103 Fed.Cl. 47, 53 (2012).

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Respectfully submitted,

/s/ Dale Saran
Dale Saran, Esq.
19744 W. 116th Terr.
Olathe, KS 66061
Tel. (727) 709-7668
E-mail: dale.saran@militarybackpay.com

/s/ Barry Steinberg
Barry Steinberg, Esq.
Kutak Rock
1625 Eye Street, NW, Suite 800
Washington, DC 20006-4099
Tel. (202) 828-2316
Email: barry.steinberg@kutakrock.com

/s/ Brandon Johnson
Brandon Johnson, Esq.
8380 Bay Pines Blvd.,
St. Petersburg, FL 33709
Tel. (727) 709-7668
brandon.johnson@militarybackpay.com

/s/ J. Andrew Meyer
J. Andrew Meyer, Esq.
8380 Bay Pines Blvd.,
St. Petersburg, FL 33709
Tel. (727) 709-7668
Email: a.meyer@militarybackpay.com

CERTIFICATE OF SERVICE

This is to certify that on this 27th day of October 2023, the foregoing document was e-filed using the CM/ECF system.

/s/ Dale Saran