No. 23-174C
(Judge Dietz)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JEREMIAH BOTELLO, et al.,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT FOR LACK OF SUBJECT-MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM

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Pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, submits this reply in support of its motion to dismiss plaintiffs' claims for lack of jurisdiction and failure to state a claim (Def. Mot.). We respectfully request that the Court dismiss each of plaintiffs' claims.

ARGUMENT

I. Plaintiffs' Claims Under Count I Fail Because The Militia Clauses Are Not Money-Mandating

As we set forth in our motion, this Court lacks jurisdiction over Count I of plaintiffs' complaint, which alleges that the United States violated the Militia Clauses by allegedly "withholding pay" from members of the National Guard, "prohibiting them from participating in drill, training, and other duties," "involuntarily transferring them from active status to inactive status," and cancelling their "order to full-time active status." Am. Compl. ¶¶ 258, 260.

Because the Militia Clauses are not money-mandating, plaintiffs' claims are not within this Court's jurisdiction.[1]

In response, plaintiffs primarily argue that the Federal Government, and specifically the President, overstepped its role with respect to members of the National Guard and violated the Militia Clauses in doing so. Plaintiffs still fail to explain, however, why the Militia Clauses are money-mandating such that they could provide a basis for this Court to exercise jurisdiction.[2]

Plaintiffs argue that the President[3] lacked authority to "punish" members of the National Guard by removing them from full-time orders or, along with other officials, to promulgate various vaccine mandates. Plaintiffs rely on the Supreme Court's decision in *Runkle v. United States*, 122 U.S. 543 (1887), which they claim stands for the proposition that plaintiffs were

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[1] We do not understand Count I to be a claim under the Military Pay Act for a violation of the Militia Clauses. Instead, Count I is a stand-alone claim based on an alleged "violation of the militia clauses." Am. Compl. at 60. However, even if Count I were alleging a claim under the Military Pay Act, we have explained why such a claim should also be dismissed for failure to state a claim. *See infra* Section V.

[2] Plaintiffs also argue for the first time that the Government violated their Fifth Amendment due process rights and Sixth Amendment right to counsel. These newly added claims should be dismissed. It is well-settled that plaintiffs' complaint "may not be amended by the briefs in opposition to a motion to dismiss." *Mendez-Cardenas v. United States*, 88 Fed. Cl. 162, 166-67 (2009) (holding that a complaint "may not be amended by the briefs in opposition to a motion to dismiss"); *Davis v. United States*, 108 Fed. Cl. 331, 337 n.4 (2012) (holding that the Court will not consider allegations not raised in a complaint). Moreover, this Court lacks jurisdiction to consider claims arising under the Due Process Clause of the Fifth Amendment or under the Sixth Amendment. *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (holding that this Court lacks jurisdiction to consider Fifth Amendment due process claims); *Dupre v. United States*, 229 Ct. Cl. 706, 706 (1981) (holding that this Court lacks jurisdiction to consider Sixth Amendment claims).

[3] We note that plaintiffs do not plead any facts to show that the President, rather than a state official in their respective National Guard organizations, ordered the removal any of the plaintiffs from full-time orders. Accordingly, plaintiffs' claims fail for the independent reason that they have not alleged that the President took an action with respect to plaintiffs that violated the Militia Clauses. The Court need not reach this issue, though, as the Court lacks jurisdiction over a claim for a violation of the Militia Clauses.

necessarily entitled to backpay if their discharges were unlawful. Pl. Br. at 15 ("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."). *Runkle* is inapposite to the issue before the Court. In *Runkle*, the Supreme Court held that Mr. Runkle's court-martial was legally void and that he was consequently entitled to "longevity pay." 122 U.S. at 560. To the extent *Runkle* (or *United States v. Brown*, 206 U.S. 240 (1907), *Clackum v. United States*, 148 Ct. Cl. 404 (1960), or *Garner v. United States*, 161 Ct. Cl. 73 (1963)) has any bearing on this case, it simply establishes that members of the military may recover, in certain circumstances, pay when illegally discharged. We do not contend otherwise.

The relevant jurisdictional question for purposes of Count I, however, is not whether the plaintiffs may have a right to seek backpay generally, but whether the Militia Clauses provide a specific source of authority for any such recovery. None of the cases cited by plaintiffs address or even consider whether the Militia Clauses satisfy the Tucker Act's requirement that the source of substantive law "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, 463 U.S. 206, 218 (1983). As we explained in our motion, nothing in the language of the Militia Clauses – the substantive law that plaintiffs claim in Count I entitles them to pay – can fairly be interpreted as mandating compensation by the Federal Government. Because the *Runkle* line of cases did not decide whether the Militia Clauses are money-mandating, those decisions are irrelevant to the threshold jurisdictional issue before the Court.[4]

[4] The plaintiffs' invocation of the Fifth Circuit's holding in *Abbott v. Austin,* 70 F.4th 817 (5th Cir. 2023), does not change their misplaced reliance on *Runkle*. Aside from the fact that *Abbott* is not binding on this Court, that decision involved an allegation that the Militia Clauses

As they did in their complaint, plaintiffs also invoke the Federal Circuit's decisions in *Hatter v. United States*, 953 F.2d 626 (Fed. Cir. 1992), and *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1375 (Fed. Cir. 2000), to establish that the Militia Clauses are money-mandating. As we explained in our motion, neither case is applicable to the Militia Clauses. Def. Mot. at 15-16. *Hatter* involved a claim by Article III judges that social security tax withholdings from their paychecks were illegal diminutions in their pay in violation of the Compensation Clause in Article III of the Constitution. 953 F.2d at 627. The Federal Circuit held that the Compensation Clause is money-mandating because it states that judges' salaries "shall not be diminished during their Continuance in Office" and thus "presupposes damages as the remedy for a governmental act violating the compensation clause." *Id.* at 628. *Cyprus* concerned the claims of coal producers, sellers, and exporters, who argued that the Coal Sales Tax violated the Constitution's Export Clause and Takings Clause. 205 F.3d at 1371. The Federal Circuit held that the Export Clause, which states that "[n]o Tax or Duty shall be laid on Article exported from any State," necessarily implies that that the remedy for its violation entails a return of money unlawfully exacted. *Id*. at 1372. Like *Hatter*, *Cyprus* did not concern the Militia Clauses and does not establish they are money-mandating.

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were violated by the Federal Government's enforcement of the vaccine mandate prior to its recission. *See Abbott,* 70 F. 4th at 824. The case did not raise the question of what remedy was appropriate to members of the National Guard, and in particular whether the remedy for any violation was the payment of money. Governor Abbott did not allege, and the Fifth Circuit did not address, whether the Militia Clauses were money-mandating. The case was subsequently remanded by the Fifth Circuit and remains in litigation on the merits in district court. Thus, the issues in the case are wholly distinguishable and offer no support for the plaintiffs' argument that they may recover money damages based on an alleged violation of the Militia Clauses.

To the extent they have any relevance, *Hatter* and *Cyprus* confirm that this Court must look to the specific language of the Militia Clauses to determine if they are money-mandating. The Militia Clauses state:

> The Congress shall have Power . . .
>
> > To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
> >
> > To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

U.S. Const. Art. I, § 8, cls. 15, 16. Nothing in that language mandates or even contemplates compensation or a right of recovery for damages.

In short, plaintiffs unsuccessfully attempt to establish this Court's jurisdiction over Count I by arguing that the President violated the Militia Clauses by allegedly punishing plaintiffs for their vaccination status. Even if this argument were supported by the facts alleged in the complaint, which it is not, it does not follow that a violation of the Militia Clauses is money-mandating. Because nothing in these clauses provides for monetary relief in the event of a violation, the plaintiffs' claims predicated on these clauses should be dismissed for lack of jurisdiction.

II. Plaintiffs' Claims Under Count II Fail Because The FY 2023 NDAA Is Not Money-Mandating, And Plaintiffs Can Show No Violation Of The Statute

A. The NDAA Is Not Money-Mandating

As we set forth in our motion, this Court lacks jurisdiction over Count II of plaintiffs' complaint, which alleges a violation of section 525 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 525, 136 Stat. 2395, 2571-72

(2022) (NDAA). Because Count II is based on a stand-alone violation of section 525 of the NDAA and because this section is not money-mandating, plaintiffs' claims should be dismissed.

While plaintiffs assert in their response that section 525 of the NDAA is money-mandating, they fail to engage at all with the language of this section. But as noted above, that is what the Court looks to in determining if a statute can fairly be interpreted as mandating compensation. *See New York & Presbyterian Hosp. v. United States*, 881 F.3d 877, 882 (Fed. Cir. 2018). As we explained in our motion, nothing in the language of section 525 can be interpreted as mandating compensation for service members affected by the vaccination requirement either retrospectively or prospectively. Def. Mot. at 16-17. Nor do plaintiffs meaningfully engage with the extensive legislative history cited in our motion. *See* Def. Mot. at 17-19. Yet, where there are "strong indications that Congress did not intend to mandate money damages," the Court should not find that a statute is money-mandating absent an express damages provision. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 478 (2003). Accordingly, plaintiffs fail to meaningfully respond to our arguments as to why section 525 of the NDAA is not money-mandating.

Instead, plaintiffs argue that the NDAA is money-mandating because plaintiffs are entitled to pay under the Military Pay Act and that courts have held that previous versions of NDAAs were money-mandating. As to their first point, we have not argued that the Military Pay Act is not money-mandating. Nor have we argued that the Court lacks jurisdiction to consider whether an alleged violation of the NDAA could result in an entitlement to pay under the Military Pay Act. Indeed, plaintiffs make that claim under Count II. *See* Am. Compl. ¶ 292 ("The Military Pay Act, in conjunction with . . . the 2023 NDAA Rescission, . . . is fairly interpreted as a 'money-mandating' source of federal law."). But under Count II, where

plaintiffs allege they are entitled to relief *solely* based on an alleged violation of section 525 of the NDAA, they must show that section 525 of the NDAA itself is money-mandating, which they cannot do.[5]

As to their second point, the fact that *some* historical NDAA provisions may have been money-mandating does not support plaintiffs' contention that section 525 is money-mandating. First, plaintiffs rely on *Collins v. United States*, 101 Fed. Cl. 435 (2011), for the proposition that "[t]his Court has routinely found provisions of previous NDAAs . . . to be 'money mandating.'" Pl. Resp. at 21. In *Collins*, the Court considered whether 10 U.S.C. § 1174, which was amended by the 1991 NDAA, is money-mandating. 101 Fed. Cl. at 443. The Court held that section 1174 is money-mandating, noting that the statute provides that "the concerned servicemember '*is entitled to separation pay computed under subsection (d) unless* the Secretary concerned determines that the conditions under which the member is discharged do not warrant payment of such pay.'" *Id.* at 457 (quoting 10 U.S.C. § 1174(b)(1)). Here, Congress could have chosen to include language in section 525 of the NDAA that personnel were entitled to pay but chose not to do so. Instead, section 525 merely directs the Secretary of Defense to rescind the vaccination requirement. NDAA § 525. Accordingly, *Collins* is inapposite, and fails to support plaintiffs' implicit assertion that all NDAA provisions – no matter the specific language of those provisions – are money-mandating.

[5] Even though the Court has jurisdiction to consider whether a violation of the NDAA results in an entitlement to pay under the Military Pay Act, we have explained that, for multiple reasons, plaintiffs cannot state a claim under the Military Pay Act. *See infra* Sections III-V. Because the Court lacks jurisdiction over a stand-alone claim under the NDAA and the plaintiffs cannot state a claim under the Military Pay Act, all of plaintiffs' claims based on an alleged violation of the NDAA – either directly or in reliance on the Military Pay Act – should be dismissed.

Likewise, plaintiffs' reliance on *Striplin v. United States*, 100 Fed. Cl. 493 (2011), is misplaced. Pl. Resp. at 21. The provisions of the 2007 NDAA in *Striplin* specifically addressed raising a pay limitation. 100 Fed. Cl. at 500 ("the [FY 2007 NDAA] provides the authority to waive the pay limitation up to $212,100 in 2007"). Even so, this did not end the Court's analysis, because the NDAA provisions on which the plaintiff in *Striplin* relied were discretionary. *Id.* at 499, 500 (finding that statutes are not money-mandating when "they vest discretion in the Government to authorize an increase in pay, instead of mandating such increases"). Only after the Court determined that DoD had exercised its discretion by identifying criteria to determine whether an employee was eligible for the increased pay limitation did the Court find that this particular provision of the 2007 NDAA was money-mandating. Here, as we have explained, any such pay mandate is completely absent from section 525 of the NDAA.

Finally, *San Antonio Housing Authority v. United States*, 143 Fed. Cl. 425 (2019), and *Lummi Tribe of Lummi v. United States*, 99 Fed. Cl. 584 (2011), are similarly of no help to plaintiffs' NDAA claims. Pl. Resp. at 21. In *San Antonio Housing Authority*, the provisions of the statute at issue specifically addressed monetary assistance by prohibiting diminishment of such assistance for certain operating and grant subsidies. 143 Fed. Cl. at 475. Because the plaintiff sought damages for a violation of the specific language in that statute, the Court held that the statute was money-mandating and that it possessed jurisdiction. *Id.* at 476. *Lummi* considered whether a statute that provided that the Secretary of the Department of Housing and Urban Development "shall . . . make grants" and "shall allocate any amounts" among Indian tribes was money-mandating. 99 Fed. Cl. at 594. Because the statute required the Secretary "to pay a qualifying tribe the amount to which it is entitled under the formula," the Court held the statute was money-mandating. *Id.* at 594, 597. Once again, these statutory provisions are wholly

distinguishable from section 525 of the NDAA, which makes no reference to any monetary entitlement for servicemembers who failed to comply with the vaccination requirement. Thus, yet again the cases invoked by plaintiffs merely underscore that they have failed to identify the type of language that is required to render a provision money-mandating. Accordingly, Count II should be dismissed for lack of jurisdiction.

B. The NDAA Does Not Provide Retroactive Relief

Count II should also be dismissed for failure to state a claim, given that the NDAA does not provide retroactive relief. While plaintiffs make several arguments as to why the NDAA should be treated as retroactive, none are availing.

First, plaintiffs argue that the text, purpose, and legislative history of the NDAA show that it should be applied retroactively. But the text of the NDAA, combined with the presumption against retroactivity and the NDAA's legislative history, compels the opposite conclusion. Def. Mot. at 19-23.

This Court, the Federal Circuit, and the Supreme Court have all held that statutes are presumptively not retroactive unless Congress has "unambiguously instructed retroactivity." *Vartelas v. Holder*, 566 U.S. 257, 266 (2012); *Hicks v. Merit Sys. Prot. Bd.*, 819 F.3d 1318, 1321 (Fed. Cir. 2016); *BP America Production Co. v. United States*, 148 Fed. Cl. 185, 195 (2020). Plaintiffs argue that the presumption does not apply to remedial or curative statutes, and that the NDAA is a "textbook example" of a curative statute that should be applied retroactively. Pl. Resp. at 10 (quoting *Fern v. United States*, 15 Cl. Ct. 580, 591 (1988)). In *Fern*, however, the Court considered whether it should give retroactive application to a statute that was *expressly* retroactive. 15 Cl. Ct. at 586-87. The Court noted that the statute, which was enacted in September 1982, was meant to apply to "pay periods beginning after June 25, 1981," well over a

year earlier. *Id.* Accordingly, *Fern* does not stand for the proposition that all allegedly curative statutes should be applied retroactively, even absent a clear indication that they were intended to be retroactive.

Given that the presumption against retroactivity applies here, the Court looks to see if Congress unambiguously instructed that section 525 of the NDAA should apply retroactively. Plaintiffs argue a single word – rescind – provides that unambiguous instruction.[6] But as we have explained, that one word is far from an unambiguous instruction of retroactivity. Def. Mot. at 21. Moreover, plaintiffs' reliance on that single word is further undermined by the NDAA's legislative history. *Id.* While plaintiffs argue little weight should be given to that history, they notably do not point to *any* legislative history indicating that Congress intended section 525 of the NDAA to apply retroactively.

Second, plaintiffs argue that failing to apply section 525 of the NDAA retroactively would create "a two-tier payment structure, where some [servicemembers] are made whole, while others similarly situated receive nothing." Pl. Resp. at 23. Plaintiffs seemingly contend that as a matter of policy, the Court should apply section 525 retroactively so that servicemembers are not treated differently. However, plaintiffs fail to explain how any servicemembers are being treated differently. The terms of the NDAA are being applied to all servicemembers as none are required to receive the COVID-19 vaccination any longer under the Secretary of Defense's prior directive. Moreover, even if there were policy concerns about a

[6] Plaintiffs also argue we fail to explain why Congress chose to use the word "rescind" rather than "repeal" if section 525 was only intended to have prospective effect. *See* Pl. Resp. at 24. But plaintiffs confuse the burden. The burden is on plaintiffs to overcome the presumption against retroactivity. Further, applying plaintiffs' own logic, plaintiffs fail to explain why Congress chose to use the word "rescind," rather than expressly state the NDAA is retroactive, if Congress intended the NDAA to have retroactive effect.

non-retroactive application of the NDAA, those policy concerns are not a basis for ignoring the text of the statute or Congress's intent. *Small v. United States*, 158 F.3d 576, 580 (Fed. Cir. 1998) (citations omitted) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

Third, plaintiffs' reliance on the fact that DoD has provided some retroactive relief to argue that the NDAA is retroactive is a red herring. The question before the Court is not whether DoD and the services could provide any retroactive relief to unvaccinated service members. Instead, the pertinent question is whether Congress unambiguously intended section 525 of the NDAA to have a retroactive effect. As we have made clear, the presumption is *against* retroactivity, *Vartelas*, 566 U.S. at 266, and plaintiffs have failed to point to any language or legislative history to negate that presumption. Accordingly, that the statute does not prohibit the granting of retroactive relief does not support plaintiffs' argument that the statute *mandates* retroactive relief.

Finally, plaintiffs argue that the United States is judicially estopped from arguing that section 525 of the NDAA does not authorize retroactive backpay. Plaintiffs rely on the district court litigation involving the vaccination requirement, where plaintiffs challenged the requirement itself. The United States argued in those matters that once that requirement was rescinded, those plaintiffs were no longer required to receive a COVID-19 vaccine and their claims became moot. We are not aware of any case in which the United States has previously addressed whether section 525 of the NDAA entitles unvaccinated service members retroactively to backpay, much less has argued that it does. Accordingly, estoppel is unwarranted because the United States has not advanced a position here that is "clearly inconsistent" with a prior position.

Agility Pub. Warehousing Co. K.S.C.P. v. United States, 969 F.3d 1355, 1368 (Fed. Cir. 2020) (quotation omitted).

III. Plaintiffs' Claims Under Count III Fail Because Plaintiffs Lack Standing And Otherwise Fail To State A Claim

In our motion to dismiss, we demonstrate that plaintiffs cannot establish that they have standing to bring a claim for relief based on a purported violation of 10 U.S.C. § 1107a. Specifically, we argued that plaintiffs did not allege facts showing that they would have received a fully licensed vaccine if it was available to them. Def. Mot. at 23-25. Further, because the vaccination mandate did not require plaintiffs to receive a vaccine authorized for emergency use, it did not implicate (or violate) section 1107a. Def. Mot. at 25-26.

In response, plaintiffs argue that: (1) they "inquire[d] as to the availability of FDA-licensed products from commercially available sources off base" and that none were available;[7] (2) the military services did not have any fully licensed vaccines until June 2022; and (3) once again the United States should be judicially estopped from making its arguments. None of these arguments have merit.

First, allegations included for the first time in plaintiffs' response or plaintiffs' declarations do not amend their complaint. *Mendez-Cardenas*, 88 Fed. Cl. at 166-67 (holding that a complaint "may not be amended by the briefs in opposition to a motion to dismiss"); *Davis*, 108 Fed. Cl. at 337 n.4 (holding that the Court will not consider allegations not raised in a

[7] Plaintiffs attach three declarations from Mr. Hood, Mr. Botello, and Mr. Phillips to their response. In those declarations, no plaintiff asserts he would have taken an FDA-licensed vaccine in compliance with the mandate. Mr. Botello states he requested permission to receive a Novavax vaccine. ECF No. 24-2 at 3. Notably, Novavax was authorized for emergency use in the United States in July 2002. *See* https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-authorizes-emergency-use-novavax-covid-19-vaccine-adjuvanted (last visited November 7, 2023).

complaint). But even if those allegations are considered, they still do not establish that plaintiffs have standing. To show that their asserted harm has a "causal connection" to the conduct complained of, plaintiffs must allege facts that (1) no fully licensed vaccine was available to them at the time they suffered the alleged harm, and (2) they would have received such a fully licensed vaccine had it been available. They still do not adequately allege these facts. With respect to the availability of a fully licensed vaccine, none of the declarations provides any detail as to each plaintiff's search for vaccines that could be obtained through commercial sources. *See* ECF Nos. 24-1, 24-2, 24-3. Moreover, because no plaintiff pleads that he would have actually received a fully licensed vaccine, none of them shows how the alleged unavailability of a fully licensed vaccine contributed to their asserted harms. Given plaintiffs' expressed opposition to the vaccine, it cannot be assumed that plaintiffs would have agreed to take any COVID-19 vaccine (absent an allegation to that effect) – and thus plaintiffs still have failed to allege that a violation of section 1107a caused their claimed harm.

Second, plaintiffs' argument that they state a claim based on the vaccine availability dates pled in the complaint should be rejected. Plaintiffs point to their allegation that the earliest any "Comirnaty-labeled" or "Spikevax-labeled" vaccines were available through the services was June 2022. Plaintiffs fail to explain why Mr. Konie, who alleges adverse action was taken against him after June 2022, is able to state a claim when the alleged violation of section 1107a was, by plaintiffs' own admission, apparently cured at the time the adverse action was taken. Am. Compl. ¶ 208 ("Defendants were mandating EUA vaccines, in violation of 10 U.S.C. § 1107a, at least until [June 2022]"). But even setting that issue aside, plaintiffs cannot state a claim for a violation of section 1107a because the vaccine requirement stated service members were required to receive only "COVID-19 vaccines that receive full licensure . . . in accordance

with FDA-approved labeling and guidance." ECF No. 1-2 at 1. As another court considering this exact issue noted, "on its face, the mandate does not require anyone to take an EUA vaccine." *Doe #1-#14 v. Austin*, 572 F. Supp. 3d 1224, 1233 (N.D. Fla. 2021). The vaccination mandate likewise did not require service members to receive the vaccine from a DoD source. So even if a fully licensed vaccine was not available from DoD in June 2022, plaintiffs have still not pled a violation of section 1107a, because servicemembers were free to seek licensed vaccines from another source and were required to take only licensed vaccines.

Third, plaintiffs' judicial estoppel argument is once again misplaced. Although plaintiffs assert that the Government has taken inconsistent positions on when fully licensed vaccines became available to the services, at this stage of this litigation, we have not asserted any facts as to when and where particular vaccines were available. Instead, our arguments are based on both the facts set forth by plaintiffs and a plain reading of the vaccination requirements, which has been adopted in other courts. It is plaintiffs' burden to state a plausible claim upon which relief may be granted. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When the challenged requirement facially complies with section 1107a, and plaintiffs do not allege facts showing that the requirement, as applied to them, violated the statute, they do not meet their burden.

IV. Plaintiffs' Claims Under Count IV Should Be Dismissed For Lack Of Jurisdiction Or Because They Fail To State A Claim

A. The Court Lacks Jurisdiction Over Mr. Botello's Claim Under 28 U.S.C. § 1500

As set forth in our motion, Mr. Botello's claim under Count IV should be dismissed under 28 U.S.C. § 1500 because it was pending in Federal district court when he filed his complaint in this court. Def. Mot. at 29. Plaintiffs attempt to distinguish Mr. Botello's RFRA claim in *Alvarado v. Austin*, No. 22-cv-876 (E.D. Va.), as being specific to the rights of

conscience of chaplains, but that argument is unavailing. To be sure, the *Alvarado* plaintiffs did raise what they styled as a chaplain-specific claim under section 533 of the 2018 NDAA that alleged DoD and the services had not heeded a Congressional requirement to provide comprehensive religious liberty training to "recognize the importance of protecting the rights of conscience of members of the Armed Forces." *See Alvarado*, ECF No. 1 at 90-93. That claim was entirely separate from their RFRA claim, which highlighted the plaintiffs' personal religious objections to the COVID vaccine that were not dependent on any plaintiff's status as a chaplain. *See id.* at 93-100.

Thus, in both *Alvarado* and this case, Mr. Botello attempts to bring a claim based on the vaccination mandate's alleged burden on a sincerely held religious belief. Moreover, it matters not that Mr. Botello's claim in this Court is based on a violation of the Military Pay Act, as plaintiffs allege. *See* Pl. Resp. at 39. "[T]he legal theories underlying the asserted claims are irrelevant to" the Court's inquiry under section 1500. *Brandt v. United States*, 710 F.3d 1369, 1375 (Fed. Cir. 2013). Nor is it relevant that the NDAA had not yet been passed when the *Alvarado* suit was filed. *See* Pl. Resp. at 39. The alleged violation in both cases arose from the mandate, not the rescission of the mandate. In short, although Mr. Botello now seeks pay for an alleged violation of RFRA, the RFRA claim he asserted in *Alvarado* is the same RFRA claim he raises here. *See Brandt v. United States*, 710 F.3d 1369, 1374 (Fed. Cir. 2013). He brings the same challenge to the same policies based on the same legal authority as he did in *Alvarado*. Because *Alvarado* was pending when he filed suit in this Court, his claim should be dismissed.

B. Four Of Six Plaintiffs Fail to State a Claim

As we explained in our motion, four of the six plaintiffs in this case fail to allege that they submitted a religious accommodation request (RAR) or otherwise attempted to obtain relief

from their respective services. Def. Mot. at 27. To state a claim under the Religious Freedom Restoration Act (RFRA), plaintiffs must allege that the challenged policy substantially burdened a sincerely held religious belief. 42 U.S.C. § 2000bb-1; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694-95 (2014). Those four plaintiffs failed to allege either facts showing the vaccination requirement burdened any sincerely held religious belief when they did not attempt to obtain an accommodation, or facts establishing that it would have burdened them to seek an accommodation.

Plaintiffs attempt to cure these defects in their claims by (1) attaching declarations from three of the four plaintiffs explaining that they did submit an RAR (even though the complaint fails to allege such facts), and (2) arguing that submitting an RAR is unnecessary because district courts have highlighted concerns with the accommodation process. *See* Pl. Resp. at 35-36. But, as noted earlier, plaintiffs' complaint "may not be amended by the briefs in opposition to a motion to dismiss." *Mendez-Cardenas*, 88 Fed. Cl. at 166-67; *Davis*, 108 Fed. Cl. at 337 n.4 (holding that the Court will not consider allegations not raised in a complaint). Indeed, our argument under RFRA was not new; we made it in response to plaintiffs' original complaint. *See* ECF No. 11 at 19-23. Yet, plaintiffs failed to include these new allegations even in their amended complaint. They should not be permitted now to make new allegations that have twice been omitted from their complaints to defeat a motion to dismiss.

Nor do plaintiffs' citations to district court cases granting injunctive relief change the analysis in this case. Plaintiffs argue that numerous district courts have held that submitting an RAR was unnecessary for those courts to consider claims under RFRA because the "religious accommodation process . . . was futile and/or inadequate." Pl. Resp. at 36. Even assuming plaintiffs' claims do not suffer from an exhaustion problem because they neglect to plead that

they availed themselves of the religious accommodation process, plaintiffs still must allege facts showing that the vaccination requirement substantially burdened a sincerely held religious belief. For those plaintiffs who did not allege they submitted an RAR, there are simply no facts pled regarding a sincerely held religious belief or how that belief was burdened, much less any reference to the fact that they believed filing an RAR would be burdensome to their religious beliefs, futile, or inadequate.

V. Plaintiffs Are Not Entitled To Any Relief Under The Military Pay Act Regardless Of Any Alleged Violations Of 10 U.S.C. § 1107a Or RFRA And Fail To State A Claim Under Counts III And IV

As explained in our opening brief, National Guard members are not entitled to backpay for unperformed duties "even where the lack of performance was involuntary and improperly imposed." *Reilly v. United States*, 93 Fed. Cl. 643, 649 (2010). Because none of the plaintiffs allege that he performed any work for which he was not compensated, whether in a drilling status or when they were removed from full-time National Guard duty orders, we explained that they are not entitled to any relief under the Military Pay Act. Def. Mot. at 31-35 (citing *Pohanic v. United States*, 48 Fed. Cl. 166, 167-68 (2000)). In response, plaintiffs argue that *Pohanic* conflicts with *Palmer v. United States*, 168 F.3d 1310 (Fed. Cir. 1999) and should be ignored. Pl. Resp. at 16-20. *Pohanic* and *Palmer* do not conflict.

Palmer involved an Army reservist who was serving in a reserve unit until he was ordered to transfer out of that unit and consequently no longer drilled with or received pay from any reserve unit. 168 F.3d at 1312. In Mr. Palmer's reserve unit, he "performed forty-eight paid drills each year, as well as an annual period of active duty." *Id.* Mr. Palmer sued, alleging that he was wrongfully transferred out of his reserve unit and was thus denied the opportunity to perform duties for pay. *Id.* at 1313. The Federal Circuit held that "a member who is serving in

part-time reserve duty in a pay billet, or was wrongfully removed from one, has no lawful pay claim against the United States for unattended drills or for unperformed training duty." *Id.* at 1314.

Pohanic involved a member of the Air National Guard serving on "full-time National Guard duty." 48 Fed. Cl. at 166. While serving, Mr. Pohanic was discharged for smoking on board an aircraft, which he alleged was a wrongful basis for his discharge. *Id.* at 167. This Court recognized that Mr. Pohanic was entitled to pay pursuant to 37 U.S.C. § 204(a)(1) until his involuntary separation as "a member of a uniformed service who is on active duty." *Id.* at 168. However, the Court held that 37 U.S.C. § 204(d) limits that entitlement to duties actually performed. *Id.* Indeed, section 204(d) provides that "full-time duty *performed* by a member of the Army National Guard of the United States or the Air National Guard of the United States in his status as a member of the National Guard, is active duty for the purposes of this section." 37 U.S.C. § 204(d). Accordingly, although section 204(a) entitled Mr. Pohanic to pay for being on active duty, section 204(d) limited his time on active duty to duties actually performed. *Pohanic*, 48 Fed. Cl. at 168. "This is so even though his separation was involuntary." *Id.* (citing *Palmer*, 168 F.3d at 1314).

Accordingly, there is no merit to plaintiffs' argument that *Pohanic* is contrary to *Palmer* because it "wrongly conflates 'reservists' with 'guardsman'." Pl. Br. at 18-19. *Pohanic* does no such thing. Rather, *Pohanic* and *Palmer* both recognized that when performance of duties is necessary for an entitlement to pay, such as for the reservist in a reserve unit in *Palmer* or the member of the National Guard on full-time duty in *Pohanic*, a plaintiff cannot state a claim

under the Military Pay Act for unperformed duties. Here, like Mr. Pohanic, Mr. Botello,[8] Mr. Hood, Mr. Santos, and Mr. Phillips allege that they were dropped from full-time National Guard duty involuntarily.[9] However, they do not allege that they were not paid for any duty actually performed. Under *Pohanic* and 37 U.S.C. § 204(d), they cannot state a claim.

VI. Plaintiffs' Claims Under Count V Fail Because Plaintiffs Do Not Allege Any Money Was Illegally Exacted From Them

In our motion to dismiss, we explained that plaintiffs failed to allege that the Government took money from them that they seek to have returned, and that to the extent that they do make such allegations, they do not allege that any money was *illegally* taken from them. Def. Mot. at 35-37. In response, plaintiffs admit they are only raising an illegal exaction claim for Mr. Taylor. Pl. Resp. at 39-40. However, as we explained in our motion, he, too, fails to state a claim upon which relief may be granted. Mr. Taylor alleges that "approximately 7 months of

[8] Plaintiffs assert that Mr. Botello's claim is based on the curtailment of his active duty orders by 17 days (from September 30, 2021 to September 13, 2021) and based on his inability to fill subsequent assignments. Pl. Resp. at 16 n.11. However, as explained in our motion, although Mr. Botello's initial orders were amended to end on September 13, he was ordered to active duty again beginning *September 14* through December 16, 2021. Def. Mot. at 33 n.16. Mr. Botello fails to explain what additional pay he could be entitled to when he served on active duty and was paid for the period in which he bases his claim. With respect to his inability to fill subsequent assignments, it is undisputed that service members not on active duty are not entitled to pay for duties not performed. *Palmer*, 168 F.3d at 1314. Accordingly, Mr. Botello's claims should be dismissed for lack of standing or failure to state a claim as he suffered no harm.

[9] In our motion, we explained why Mr. Taylor and Mr. Konie also fail to state a claim under the Military Pay Act. Def. Mot. at 32, 34. Namely, Mr. Taylor seeks pay for time when he was "prohibited from" performing Title 32 training and Mr. Konie seeks pay from an unrealized promotion for which he concedes he did not meet the qualifications. *Id.* Plaintiffs offer no response to our arguments and thus waive any argument that Mr. Taylor or Mr. Konie can state claims under the Military Pay Act. *Gaynor v. United States*, 150 Fed. Cl. 519, 527 n.10 (2020).

SGLI premiums (~$60)" were recouped from him because the premiums accrued while he was not drilling and not getting paid. Am. Compl. ¶ 24.

This single allegation does not state a claim for illegal exaction. Mr. Taylor does not identify any violation of law that would render such action illegal. As we have previously briefed, *see* Def. Mot. at 36-37, these premiums are contractual obligations that a servicemember volunteers to assume when he elects SGLI coverage. Mr. Taylor continued to owe them to the insurance provider even when he was not getting paid. Mr. Taylor does not describe an illegal exaction or identify why his ongoing obligation to pay premiums was unlawful. Accordingly, all of the plaintiffs' claims for illegal exaction should be dismissed.

VII. Plaintiffs Do Not Assert A Claim For A Violation Of 10 U.S.C. § 1552

In their response brief, plaintiffs clarify that "they do not assert a stand-alone claim under Count V[I] and that any relief requested thereunder would be an incident of and collateral to an award of money judgment under Counts I-V." Pl. Resp. at 40. Accordingly, plaintiffs' claims under Count VI, based on a "violation of 10 U.S.C. § 1552," should be dismissed.

CONCLUSION

For these reasons and those set forth in our motion to dismiss, we respectfully request that the Court dismiss this case for lack of subject-matter jurisdiction and for failure to state a claim upon which relief may be granted.

Respectfully submitted,

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