IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CHRISTOPHER HARKINS, *et al.*, ***Plaintiffs*,** **v.** **THE UNITED STATES OF AMERICA,** ***Defendant*.**	**Case No. 23-1238C**

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The President of the United States, through the Secretaries of Defense and Homeland Security, and the Coast Guard Commandant, unlawfully punished and discharged Plaintiffs in violation of the federal laws and regulations governing Coast Guard members. 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, Plaintiffs and class members are entitled to be compensated for these illegal discharges. Accordingly, this Court must deny Defendant's October 30, 2023, Motion to Dismiss ("Mot."), Dkt. 7, Plaintiffs' August 4, 2023, Class Action Complaint ("Compl."). Dkt. 1.

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* Compl., Section III.C-D., ¶¶ 121-131 & *infra* Section III. Service members have the statutory right to informed consent and to refuse an EUA product under 10 U.S.C. § 1107a. This statute provides a mechanism for the President to waive service members' right to informed consent if the President makes the requisite written finding "that complying with such requirement is not in the interests of national security." *Id.* The President made no such written finding.

The Department of Defense ("DoD") and the Coast Guard ignored federal informed consent laws and the express terms of the DoD and Coast Guard Mandates, which require

members to take only fully FDA-licensed products, *see* Dkt. 1-2, Sec. Austin Aug. 24, 2021 Memo ("DoD Mandate") & Dkt. 1-3, ALCOAST 315/21 ("Coast Guard Mandate"). Instead, the DoD mandated unlicensed, EUA products and the Coast Guard followed right along. The sole legal basis for this modified Mandate was a September 14, 2021 memo issued, without statutory authority, by Asst. Sec. of Defense Terry Adirim declaring that an unlicensed EUA product is "interchangeable" with, and could be mandated "as if" it were FDA-licensed COMIRNATY®. Dkt. 1-13. This *ultra vires* directive was also the sole basis for punishing unvaccinated service members, despite the impossibility of their compliance with the Mandates due to the unavailability of COMIRNATY®.

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 [he] 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. PLAINTIFFS ARE ENTITLED TO BACKPAY FOR ILLEGAL DISCHARGES.

A. Defendant Illegally and Summarily Discharged Plaintiffs.

The separation of Coast Guard members is governed by a number of statutes and regulations, depending upon various factors particular to the individual's case, such as whether they are an officer, or enlisted, or an academy cadet, their years of service, if they are retirement eligible, or have a medical disability, to name just a few examples. *See, e.g.,* references listed in COMDTINST M1000.4, *Military Separations*, Ch. 6 (Aug. 21, 2018).[1] While Commanders may separate enlisted personnel before their normal end of enlistment, such separation "does not deprive a member of any right, privilege or benefit to which otherwise entitled." *See id.*, ¶ 1.B.7.a. Furthermore, "[t]he member is entitled to a travel allowance and lump sum payment for leave and does not have to pay back a pro-rated portion of any reenlistment bonus he or she previously received." *Id.* Plaintiff PO1 Powers had his last paycheck withheld without notice in the amount of $4,503.59, the day after his discharge. *See* Powers Decl., ¶ 12. Additionally, Plaintiff Powers was notified by the Coast Guard they would be recouping his enlistment bonus in the amount of

[1] In response to Coast Guardsmen refusing to take the COVID-19 vaccine for religious and other reasons presented in this complaint, the Coast Guard significantly re-wrote its Separations Manual. *See id.* ¶ N.4.b. As the Defendant concedes, all of the Plaintiffs were discharged or dropped prior to that date. Mot. at 5. Plaintiffs therefore refer only to the version in effect at the time of their separation.

$13,135.51 in direct violation of Coast Guard regulation. *Id.* Plaintiff Harkins was only given 30 days' notice of his discharge, barring him of the opportunity to go through the Veteran's Affairs Benefits Delivery at Discharge ("BDD") process, to which he was entitled. *See* Harkins Decl., ¶ 15.

"Members who have eight or more years of total active duty and/or reserve military service that meet the reenlistment eligibility criteria… but are not recommended for enlistment by their commanding officer are entitled to a reenlistment board."[2] All of the Plaintiffs here had well over 8 years of service, met the criteria for re-enlistment, and yet not a single Plaintiff was ever afforded the requisite board. Plaintiff PO1 Gutierrez was given only seven days' notice of his discharge from the Coast Guard after 16 years of service, denying him the opportunity to apply for any VA programs and benefits to which he is entitled. Gutierrez Decl., ¶ 10-11. Additionally, Plaintiff Gagnon was given a six-day notice of her separation from the Coast Guard, despite being 10 days short of reaching 20 years of service and retirement eligibility. Gagnon Decl., ¶ 23. Plaintiff Gagnon even made written requests to delay such separation until she reached her 20-year mark, so that she could retire. Plaintiff Gutierrez was also only notified that he was being given an "RE-3" reenlistment code when he received his separation package the day he was discharged. *See* Gutierrez Decl., ¶ 11.

According to the Separation Manual,

> Commanding officers must notify in writing a member whose performance record (12 months preferred in most cases, but at least six months for

[2] COMDTINST M.1000.4, ¶ 1.B.5.c. *See also* PSCINST M1910.1, *Enlisted Personnel Administrative Boards Manual*, ¶ 1.B.1 (June 1, 2014) ("Coast Guard members with eight or more years of military (active and/or Reserve) service are entitled to a board ***before*** they are involuntarily administratively separated ***or*** denied reenlistment. This right is established in the MILSEP for each of the bases for administrative action listed below…")(emphasis added).

> extremely poor performers) is such that he or she may be eligible for discharge under this Article and that his or her unsatisfactory performance may result in discharge if that performance trend continues for the next six months. The official notice will be in memorandum format using the example below. ...
>
> RE-3 (unsatisfactory performance). The member's overall performance of duty is the reason for discharge, and the commanding officer determines the member may be eligible to reenlist at later date.

COMDTINST M1000.4, ¶ 1.B.9.d. There is no record of any Plaintiff being afforded their rights to a board before being denied reenlistment or discharged because the Coast Guard patently ignored and violated its own regulations, as well as these servicemembers rights because they were unvaccinated. By illegally curtailing orders, involuntarily transferring Plaintiffs to inactive status, blacklisting the unvaccinated from professional schools with pending Religious Accommodation Requests, and other adverse actions, Defendant Agencies violated the Fifth Amendment's Due Process Clause, and the Sixth Amendment right to counsel, as well as the federal statutes and regulations governing separation, discharge, punishment, and courts-martial of Coast Guard members.[3]

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

The remedy for the illegal punishment and discharge without due process of Coast Guard members is to ignore the illegal discharges and to repay the equivalent amount of money damages in the exact amounts—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 Coast Guard in both the FY2022 and the FY2023 NDAAs, as well as other applicable

[3] The President could not punish Coast 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 without giving them the requisite administrative board for enlisted members with eight or more years of service or a Board of Inquiry for officers.

federal laws and regulations governing military pay and benefits. *See* Compl., ¶ 12.

In a long line of cases stretching back to Reconstruction, the Supreme Court has consistently held that illegal military discharges are void *ab initio*, and 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. The Supreme Court held that, because "Major Runkle was never legally cashiered or dismissed from the army", he was entitled to longevity pay and regular pay for the period before and after the illegal discharge. *Runkle*, 122 U.S., at 560.

Clackum v. United States, 148 Ct.Cl. 404 (Fed.Cir.1960), and *Garner v. United States*, 161 Ct.Cl. 73 (1963), extended *Runkle* to illegal or improper administrative discharges. Under *Clackum* and *Garner*, a discharge in violation of applicable military regulations is of no legal effect, and the illegally discharged service member 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).

Plaintiffs' view is consistent with the unbroken line of cases from *Runkle*, through *Clackum* and *Garner*, 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. *See, e.g.*, Mot. at 17-18.

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 did not 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, Coast Guard members were given none of the requisite due process

protections; Plaintiffs received not even the barest legal assistance to which they were entitled by military regulation and the Sixth Amendment. For example, the *Enlisted Personnel Administrative Boards Manual* states:

> 1.C.1. Before Board Hearing.
>
> A respondent identified in Article 1.B. of this Manual *shall* be notified of the following information and afforded the following rights before a board is convened:
>
> a. Reason for Administrative Action. The facts that caused the convening authority to believe the respondent should be considered for administrative action.
>
> b. Administrative Board. That the respondent is entitled to a board.
>
> c. Military Lawyer. That the respondent may consult with a military lawyer before deciding whether to exercise or waive his or her right to go before a board.
>
> d. Civilian Lawyer. That the respondent may elect to consult with a civilian lawyer at his or her own expense. However, if the respondent elects to consult with a civilian lawyer, then he or she is not entitled to also consult with a military lawyer at the Coast Guard's expense.
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> e. Voluntary Retirement. That a respondent with 18 or more years of creditable active service (or 20 or more years of satisfactory federal service for a Reserve respondent) may waive his or her right to appear before a board conditioned on being permitted to voluntarily retire. See Article 2.E.3.d.(2) of this Manual.

PSCINST M1910.1, ¶ 1.C.1 (emphasis added).

This Court has the authority, the jurisdiction, and the mandate to look beneath a court-martial or administrative discharge to determine whether it is void due to violations of rights guaranteed by the U.S. Constitution, or set forth in federal law or military regulations, particularly if the circumstances raise legitimate questions about the fairness of the process utilized. Likewise, given what is alleged to have occurred here, Plaintiffs have demonstrated that there is more than a "fair inference" that the due process

violations, coupled with the statutory and regulatory violations alleged, confer a substantive right to money damages.

C. Plaintiffs Are Entitled to Backpay Until Lawfully Discharged.

It is undisputed that the DoD and Coast Guard Mandates 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 Coast Guard members for non-compliance with the Mandates. 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., Appx. 1, ALCOAST 315/21, ¶ 7. This defense should be given no weight, however, first and foremost 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 then claims 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* I WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, Twenty-First Article (2d ed. 1920). 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 been 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 all illegally punished, dropped, or summarily discharged without any process at all.

II. 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* Compl., ¶ 12, 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 DoD and Coast Guard Mandates eliminated any legal basis for differential treatment based on vaccination status.[4] *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 and the

[4] Defendant asserts that the "DoD's vaccination policy did not apply to members of the Coast Guard" and that "Section 525 likewise did not apply to the Coast Guard." Mot. at 10. This claim is contradicted by the terms of the Coast Guard Mandate, *see* Dkt. 1-3, ALCOAST 315/21, the Commandant's rescission thereof "in alignment with the DoD" rescission of the DoD Manadate, *see* Dkt. 1-5, ALCOAST 012/23, ¶ 2, and Defendant Agencies' representations to other federal courts in seeking to dismiss as moot other pending challenges to the mandate. *See infra* note 12 & cases cited therein.

Coast Guard must pay all Coast Guard 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.

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.[5] 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 (10 U.S.C. § 654) 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* Compl., ¶ 12(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.[6]

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* Compl., ¶ 12, are money-mandating because they provide

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[5] *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).

[6] *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 Coast Guard has already exercised any limited discretion it may have been delegated by Congress through the issuance of its post-Rescission implementation orders, *see* Compl., Section II.E., ¶¶ 67-81 & Dkt. 1-4 & 1-5,[7] and by categorically denying backpay to discharged Coast Guard members.[8]

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

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[7] *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.

[8] The DoD and Coast Guard 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* Compl., Sec. II.F., ¶¶ 82-93; Dkt. 1-8 & 1-9.

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., Collins*, 101 Fed.Cl. at 457-459.

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. In compliance with Congress' directive, Secretary Austin and the Coast Guard Commandant rescinded the DoD and Coast Guard Mandates on January 10, 2023, *see* Dkt. 1-2, and January 11, 2023, *see* Dkt. 1-3, ¶ 1, respectively.

"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.[9] 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 instead be read as "repeal" with only prospective effect. *See* Mot. at 13-15.

Requiring Defendant to provide retroactive relief is consistent with the statutory text (*i.e.*, "rescind"), structure,[10] and purpose. Section 525 was enacted to address a "self-

[9] *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").

[10] 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, ¶ 50 (quoting Dkt. 1-6, 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 all Coast Guard members without regard to vaccination status.

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, Sec. Austin Rescission Memo, at 1; *see also* Compl., Sec. II.E., ¶¶ 67-81 & Dkt. 1-5, ALCOAST 012/13. If the rescission had not been retroactive—depriving the Mandate of any legal effect from its issuance date forward—there would be no basis to take such corrective actions or to halt separations and discharges. Further, Defendant has consistently and successfully represented to courts, in support of dismissing as moot challenges to the Mandate, that it has "completely and irrevocably eradicated the effects," *Continental Serv. Group, Inc. v. U.S.*, 132 Fed. Cl. 570, 577 (2017) (quoting *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1978)), of the rescinded Mandate during the period between its issuance and rescission.

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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).

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 *supra* in Sections II.A & II.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 14 (citation omitted). [11] 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* Compl., ¶ 50 & Dkt. 1-6; to remedy Defendant's manifestly unjust policy of discharging and/or denying pay and benefits to 100,000 or more service members; and to remove any legal basis for denying them pay and benefits to which they are otherwise entitled by law. Section 525 is also remedial because it confirms or clarifies rights, *see* 2 SUTHERLAND STATUTORY CONSTRUCTION §§ 41:3 (8th ed. Nov. 2022 Update), *i.e.*, that service members may not be punished for noncompliance with the now rescinded Mandate.

[11] Defendant erroneously claims that 1 U.S.C. § 109 bars the retroactive application of Sec. 525. *See* Mot. at 14-16. This section is entitled "Repeal of statutes affecting existing liabilities", and by its own term does not apply to Congress' rescission of an agency rule.

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 II.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, Defendant Agencies 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 Defendant Agencies have provided all relief requested by service members in those proceedings so that there is no further relief those courts could grant.[12]

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[12] 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., Bazzrea v. Mayorkas*, --- F.Supp.3d ---, 2023 WL 3958912 (S.D. Tex. June 12, 2023); *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); *Jackson v. Mayorkas*, No. 4:22-CV-0825-P, 2023 WL 5311482 (N.D. Tex. Aug. 17, 2023); *Wilson v. Austin*, No. 4:22-cv-438, ECF 61 (Sept. 1, 2023). Most of these decisions also accepted Defendant Agencies' representation that the "voluntary cessation" exception did not apply because their corrective actions were compelled by Congress. *See, e.g., Bazzrea*, 2023 WL 3958912, at *6-7; *CFMO*, 2023 WL 2764767, at *2; *Jackson*, 2023 WL 5311482, at *4-5; *Navy SEALs 1-26*, 72 F.4th at 673-74; *Robert*, 72 F.4th at 1164.

Defendant Agencies are therefore barred from taking a contrary position here by the doctrine of judicial estoppel.[13] 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 any 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 did not apply.

Now that nearly all challenges have been dismissed, denying service members any prospect for injunctive or declaratory relief, Defendant Agencies have reversed positions in this Court to foreclose any prospect of monetary relief as well. In doing so, the Defendant seeks to avoid payment of billions of dollars in backpay that Congress expressly appropriated, authorized, and obligated to pay service members who were unlawfully discharged and denied pay and benefits. This action is in defiance of Congress' express

[13] 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).

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 11-12. 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.[14] 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.[15]

[14] 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. 1-8, 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.

[15] *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 12-13, 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).

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

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

Defendant asserts that Plaintiffs "lack standing" to pursue Count II 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 18.[16] 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 and Coast Guard 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*.[17] Yet despite the physical and legal impossibility of compliance, Defendant 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, Sec. Austin Aug. 24, 2021 Memo, at 1. But because no FDA-licensed

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[16] 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* Compl., ¶¶ 17-23. These injuries would be redressed by an order of the Court granting the monetary and equitable relief requested. *See id.*, "Relief Requested."

[17] 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).

products were available, the DoD and Armed Services directed that unlicensed EUA products should be mandated "as if" they were FDA-licensed and labeled products because the DoD deemed the two products to be legally "interchangeable." *See* Compl., Sec. III.D., ¶¶ 121-131; Dkt. 1-13 & Dkt. 1-14. Defendant has uniformly mandated unlicensed, EUA products.[18]

Plaintiffs not only allege that no FDA-licensed products were available from the DoD or the Coast Guard, but that no FDA-licensed products were available from any source, commercial or otherwise. 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.[19] 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., ¶¶ 112-120. 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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[18] *See* Compl., ¶¶ 213-226. *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).

[19] *See* Compl., ¶ 114. 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").[20] 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 the DoD and Coast Guard had exclusive control and knowledge regarding any "commercially available" supplies.[21] Service members had no such knowledge and were entirely reliant on DoD for supply and administration of FDA-licensed vaccines.

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[20] *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/.

[21] 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* Powers Decl., at ¶ 8; Byrd Decl. at ¶¶ 7-8. 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 third parties.

It was incumbent on the military to make such doses available to active-duty military personnel to comply with the DoD and Coast Guard Mandates.[22] 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.[23] Indeed, despite Defendant's attempt in its Motion to shift the burden onto the military members, Plaintiff Powers' and Byrd's declarations both illustrate that Coast Guard (or other military) clinics, or commercial sources such as Costco, had no licensed products. *See* Powers Decl., at ¶ 8; Byrd Decl. at ¶¶ 7-8.

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

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 Coast Guard "have mandated unlicensed, EUA COVID-19 gene therapies from the issuance of the

[22] Defendant claims "many service members did" "obtain commercially available and fully licensed vaccines doses." Mot. at 19. 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.

[23] *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/.

Mandate on August 24, 2021" through at least January 2023, Compl., ¶ 218; (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.* ¶ 214; (3) "[n]o FDA-licensed vaccines were available at all at the time that the August 24, 2021 Mandate was issued," *id.* ¶ 219; (4) they "did not have any 'Comirnaty-labeled' vaccines until at least June 2022," *id.* ¶ 222; and (5) they "did not have any 'Spikevax-labeled' vaccines until at least September 2022," *id.* ¶ 223. 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.* ¶¶ 17-23 & ¶¶ 132-141. 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.* ¶ 226.

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 Coast Guard 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. 1-13 & Dkt. 1-14. 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 19 (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 II.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.

IV. DOD RFRA VIOLATIONS SUPPORT MILITARY PAY ACT CLAIM.

Notwithstanding Defendant's argument to the contrary, *see* Mot. at 20-22, Count III states a claim for wrongful discharge and denial of pay based on Defendant's systematic RFRA violations. The Complaint 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, DoDI 1300.17 and the Coast Guard's implementing regulation, COMDTINST 1000.15. *See* Compl., Section IV.B., ¶¶ 147-159.

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.[24] Further, Plaintiffs Powers, Byrd, Harkins, Gagnon, Nolan, Gutierrez, and Morrissey *all* submitted accommodation or exemption requests that were denied or ignored without action. *See supra* Section I.

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.[25]

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

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[24] *See Navy SEALs 1-26 v. Austin*, 594 F.Supp.3d 767 (N.D. Tex. 2022) (Navy); *Doster v. Kendall*, 2022 WL 2974733 (S.D. Ohio July 27, 2022) (Air Force), *aff'd*, 54 F.4th 398 (6th Cir. 2022); *Colonel Fin. Mgmt. Officer v. Austin*, 622 F.Supp.3d 1187 (M.D. Fla. 2022) ("*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 12, *Doster*, *Navy SEALs 1-26*, and *Schelske* have not.

[25] *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").

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).

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

A. Plaintiff Gagnon Was on Active-Duty When Unlawfully Removed, while Morrissey Was Retroactively Dropped; Neither Received the Requisite Due Process.

Defendant asserts that Plaintiffs Gagnon and Morrissey are not entitled to relief and fail to state a claim under Counts II and III because "neither plaintiff alleges that they were not paid for any period for any duty they actually performed." Mot. at 23. Defendants misstate the law. "Reservists are able to state a claim for backpay if they were participating in full-time active duties until the government's wrongful action." *Radziewicz v. U.S.*, --- Fed.Cl. ---, 2023 WL 4717581 (Fed. Cl. July 25, 2023). *See also Groves*, 47 F.3d at 1142 (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).

Plaintiff Gagnon was serving on full-time, active-duty orders at the time of the Defendant's wrongful actions. As such, she has stated a claim in Counts II and III for backpay under 37 U.S.C. § 204(a), rather than 37 U.S.C. § 206(a), the provision cited by Defendant that requires actual performance. *See* Mot. at 23 (citation omitted). *Cf.* Compl., ¶ 233 (Plaintiffs seek backpay only for "duties [Plaintiffs] actually performed"). Plaintiff Morrissey also performed annual training duties in August 2022 that were later removed from his record, which he didn't learn until a month later when he showed up for his

annual training. Morrissey Decl. ¶¶ 12-14. That is also when he learned that he had lost his military health insurance for himself and family, retroactive to a month earlier. *Id.* Plaintiff Morrissey's points, if properly attributed, would have put him over 18 years of service, triggering additionally statutory and regulatory protections.

> In accordance with Reference (d), Title 10 U.S.C. § 12646 and § 1176, a Reserve officer or enlisted member serving in an active status who is selected to be involuntarily separated (other than for physical disability or for cause), or whose term of enlistment expires and who is denied reenlistment (other than for physical disability or for cause), and who on the date on which the member is to be discharged or transferred from an active status at least 18 but less than 20 years of satisfactory qualifying federal service as computed in accordance with Reference (d), Title 10 U.S.C. § 12732, may not be discharged, denied reenlistment, or transferred from an active status without the member's consent…

ComdtInst 1001.28D, Reserve Policy Manual, Ch. 8.C "Sanctuary". As it was, Plaintiff did not receive the physical examination required by Coast Guard regulations. *See Id.*, Ch. 8.B.1 ("Before retirement, involuntary separation, or release from active duty (RELAD) into the Ready Reserve (SELRES or IRR), ***every*** enlisted member…shall be given a complete physical examination in accordance with Reference (d)[.]"); *see also id.* ¶1.b.15.d (rights to written notice of reasons, to submit a written statement, and to consult with military counsel). The Defendant is simply wrong, legally and factually, with regards to its claims that either Reserve member has not stated a claim for backpay. Their drops from service were riddled with egregious violations of both governing federal law and Coast Guard regulations.

B. Gagnon and Morrissey's Separations Were Involuntary.

Plaintiffs Gagnon and Morrissey did not voluntarily retire or separate from active-duty service, as Defendant contends. *See* Mot. at 21. To establish that retirement or separation was involuntary, a plaintiff "must demonstrate that: (1) he involuntarily

accepted the terms of the government; (2) circumstances permitted no other alternative; and (3) said circumstances were the result of the government's coercive acts." *Carmichael v. U.S.*, 298 F.3d 1367, 1372 (Fed.Cir.2002) (citation omitted). The first two elements are satisfied because each Plaintiff has alleged their removal from active-duty service was involuntary and that the government provided no alternative to remain on active-duty without complying with the vaccination order, an order they believed to be illegal in violation of 10 U.S.C. § 1107a and RFRA, *see* Gagnon Decl., ¶¶ 8-9, 15, 18-19, Morrissey Decl., ¶¶ 9-11, because it "put them to the choice of either betraying a sincerely held religious belief or facing a substantial threat of serious discipline." *CFMO*, 622 F.Supp.3d at 1215.

The Defendant's violations of its own rules or other applicable laws and regulations, as all Plaintiffs have alleged, "may qualify as coercive, rendering a discharge involuntary." *Faerber*, 156 Fed. Cl. at 727 (citing *Carmichael*, 298 F.3d at 1372). There can be no question that Plaintiffs have pled these policies violated 10 U.S.C. § 1107a and RFRA, as well as shown that they were denied procedural rights to a Board under the Coast Guard's own regulations. If these were voluntary, then the burden should be on the government to explain why NONE of the requisite procedures for voluntary separations contained in the Coast Guard Separations Manual or Reserve Policy Manual were followed, particularly for two members with more than 18 years of service. Whether the Defendant's illegal actions in fact rise to the level of coercion or duress "goes directly to the merits of the Plaintiff's case," *Faerber*, 156 Fed. Cl. at 728; to survive a motion to dismiss, however, Plaintiffs need only plead "facts providing facial plausibility for [their] claim" that the Defendant's wrongful actions made their choice involuntary, *id.* (denying motion to dismiss), a standard Plaintiffs easily meet here. To remove any doubt, each

Plaintiff has submitted a sworn declaration. Beyond that, the issue of "voluntariness" is a matter best suited for Summary Judgment and not dueling versions of disputed facts in a Motion to Dismiss.

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

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

agreed it was required to provide such retroactive relief, has provided retroactive relief, and represented that it had provided such relief in successfully getting court challenges to that policy dismissed as moot. *See supra* Section II. Such a reading would not only result in a manifest injustice and unjustifiable and arbitrary discrimination, but it would also give Defendant a windfall from the pay unlawfully withheld from Coast Guard Reservists. In the event the Court finds there is a statutory limit on backpay for Coast Guard Reservices, this Court has the statutory authority to order that compensation be paid and to disregard that limit on payment to Class members harmed by the unlawful policy. *See, e.g., Taylor v. McDonough*, 71 F.4th 909, 943-44 (Fed.Cir.2023).

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

Plaintiff Powers has stated a claim for illegal exaction (Count IV) because he had money taken from him in violation of an explicit Coast Guard policy that forbids recoupment of enlistment bonuses, even for a person being discharged prior to the expiration of their term of enlistment.

The Court should also reject Defendant's arguments regarding Count V, which are premised on misunderstanding or mischaracterization of Plaintiffs' claim. Plaintiffs "ask the Court to direct the correction of military records" as an "incident of and collateral to [an] award of money judgment," Mot. at 27 (citation omitted), that the Court may grant under Counts I-IV. To the extent there is any confusion, Plaintiffs clarify that they do not assert a stand-alone claim under Count V and that any relief requested thereunder would be an incident of and collateral to an award of money judgment under Counts I-IV.

VII. CONCLUSION

Defendant's Motion to Dismiss should be denied in its entirety.

Dated: November 27, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Dale Saran