No. 23-211C
(Judge Dietz)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NICK BASSEN, et al.,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

DEFENDANT'S 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, respectfully requests that the Court dismiss plaintiffs' first amended complaint, ECF No. 21 (Am. Compl.), for lack of jurisdiction and failure to state a claim. In support of this motion, we rely upon the amended complaint, the following brief, and the appendix attached to this brief.

INTRODUCTION

Plaintiffs are a group of ten former and current reservists and active-duty service members who have served in the Army, Air Force, and Marine Corps. They raise challenges to the now-rescinded Department of Defense (DoD) COVID-19 vaccine requirement and seek backpay and other monetary relief for alleged adverse actions taken for their failure to comply with DoD's vaccine requirement. After the Secretary of Defense rescinded the requirement in January 2023 pursuant to Congress's instruction in the Fiscal Year 2023 National Defense Authorization Act (NDAA), plaintiffs filed a class-action complaint before this Court. Plaintiffs seek hundreds of thousands of dollars in backpay and fees under statutory authorities that both fall outside this Court's limited grant of jurisdiction and provide them no relief. Some also seek

to be compensated for unperformed duty, even though precedent makes clear that reservists and members of the National Guard are not entitled to such relief. Further, plaintiffs ask the Court to direct the military boards of correction to grant relief that plaintiffs have failed to seek from the boards themselves. Because each of their claims is either outside this Court's jurisdiction or fails based upon the facts pled, we respectfully request that the Court dismiss the first amended complaint.

QUESTIONS PRESENTED

1. Whether the plaintiffs' claim for violation of the NDAA is within the Court's jurisdiction when the NDAA is not a money-mandating statute.

2. Whether the plaintiffs have stated a claim for violation of the NDAA when the NDAA does not require retroactive rescission of the vaccination requirement and all of their discharges occurred before it was enacted.

3. Whether the plaintiffs have standing to assert, or otherwise state a claim for, wrongful discharge under 10 U.S.C. § 1107a (a statute setting forth certain conditions for emergency use products) when they did not allege facts showing that their discharges were related to that statute.

4. Whether seven of the plaintiffs state a claim for wrongful discharge under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, when they did not allege facts showing that they sought relief from the vaccination requirement based on their religious beliefs.

5. Whether three of the plaintiffs state a claim for entitlement to pay under the Military Pay Act, 37 U.S.C. §§ 204 and 206, when they do not allege that they performed any service for which they were not compensated.

6. Whether the plaintiffs state a claim for illegal exaction when they do not allege

that any money was taken from them in violation of the Constitution, a statute, or a regulation.

7. Whether the plaintiffs' claim under 10 U.S.C. § 1552 (a statute related to the correction of military records) is within the Court's jurisdiction when section 1552 is not a money-mandating statute.

STATEMENT OF THE CASE

I. The Rescinded COVID-19 Vaccination Requirement

On August 24, 2021, the Secretary of Defense directed the Secretaries of the Military Departments to ensure that all members of the Armed Forces were fully vaccinated against COVID-19. Am. Compl. ¶ 27; ECF No. 1-2.[1] Each of the military services implemented that directive by, among other things, requiring the separation of certain service members who refused to vaccinate without an approved exemption. *See* Am. Compl. ¶ 31. Consistent with existing law and policies, the military services permitted service members to seek medical, religious, and/or administrative exemptions from the vaccination requirement based on their individual circumstances. *See* Am. Compl. ¶ 47. Further, the vaccination policy expressly stated that service members were required to receive only "COVID-19 vaccines that receive full licensure . . . in accordance with [U.S. Food and Drug Administration (FDA)]-approved labeling and guidance." *Id.* ¶ 113; ECF No. 1-2 at 1. Likewise, the policy did not require service members to receive a COVID-19 vaccine from Department of Defense (DoD) medical personnel, but rather allowed them to use any medical service provider. *See* ECF No. 1-2 at 1.

On December 23, 2022, the President signed into law the James M. Inhofe National

[1] In addition to the facts pled in the complaint, "courts may consider matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned." 5B Wright & Miller, Fed. Prac. & Proc. Civ. § 1357 (3d ed.); *Dimare Fresh, Inc. v. United States*, 808 F.3d 1301, 1306 (Fed. Cir. 2015).

Defense Authorization Act for Fiscal Year 2023. Pub. L. No. 117-263, § 525, 136 Stat. 2395, 2571–72 (2022). Section 525 of the NDAA directed the Secretary of Defense to rescind the August 2021 COVID-19 vaccination requirement. *See id*. at § 525. In compliance with Congress's directive, on January 10, 2023, the Secretary of Defense rescinded the August 2021 COVID-19 vaccination requirement. Am. Compl. ¶ 4; ECF No. 1-3.

The Secretary's rescission memorandum states that current service members who requested an exemption from the vaccination requirement may not be "separated solely on the basis of their refusal to receive the COVID-19 vaccination" and directs the military services to "update the records of such individuals to remove any adverse actions solely associated with denials of such requests" for exemption. ECF No. 1-3 at 1. Further, the rescission memo directed that former service members who were administratively discharged on the sole basis that they failed to obey an order to receive a COVID-19 vaccine "may petition their Military Department's Discharge Review Boards and Boards for Correction of Military or Naval Records to individually request a correction to their personnel records, including records regarding the characterization of their discharge." *Id*. at 2.

In the months following the Secretary's rescission memorandum, the Department of Defense and the Departments of the Army, Navy, and Air Force issued further guidance implementing the rescission of the COVID-19 vaccination requirement and the removal of adverse actions associated with it. Am. Compl. ¶ 31. On February 24, 2023, the Deputy Secretary of Defense issued guidance making clear that the January 10, 2023 rescission memorandum "rendered all [Department of Defense] Component policies, directives, and guidance implementing [the] vaccination mandates as no longer in effect as of January 10, 2023, including "any COVID-19 vaccination requirements or related theater entry requirements and

any limitations on deployability of service members who are not vaccinated against COVID-19." Appx1. The Deputy Secretary directed commanders to comply with foreign-nation entry requirements, but has otherwise prohibited individual commanders from requiring vaccination against COVID-19 or considering a service member's COVID-19 immunization status when making "deployment, assignment, and other operational decisions, absent establishment of a new immunization requirement" to be approved at the level of the Assistant Secretary of Defense for Health Affairs, which will occur "only when justified by compelling operational needs and . . . as narrowly tailored as possible." Appx2.

In addition to this guidance, each service directed corrections to the records of current service members who had been subject to adverse actions for refusing to receive the COVID-19 vaccination and who sought a medical or administrative exemption, and directed former service members to the relevant service records correction boards to address their claims. Appx3-6; Appx9-11; Appx12-13.

II. Plaintiffs File Their Complaint In This Court

On February 13, 2023, plaintiffs, six former active-duty members of the Army, the Marine Corps, and the Air Force, filed their class action complaint in this case. After we moved to dismiss the complaint, plaintiffs filed an amended complaint on August 4, 2023. In the amended complaint, four members of the Army Reserve and Air Force Reserve joined the suit.[2] The six active-duty plaintiffs plead that they were involuntarily discharged from active duty between February and October 2022 because they were unvaccinated in violation of the military COVID-19 vaccine requirement. Am. Compl. ¶¶ 16, 18, 22, 23, 24, 25. The four Reserve

[2] These four Reserve component plaintiffs previously filed claims in *Botello v. United States*, No. 23-174 (Fed Cl.). They have since voluntarily dismissed those claims and joined this case instead.

component plaintiffs plead that they were dropped from active status and denied pay and benefits between March 2022 and August 2022 because they were unvaccinated in violation of the military COVID-19 vaccine requirement. Am. Compl. ¶¶ 17, 19, 20, 21. Only one of those four plaintiffs, Kyle Davis, alleges that he performed duty for which he was not compensated. *Id.* ¶ 19. The remaining three plaintiffs make no allegations that they were not compensated for any duty actually performed. Further, three plaintiffs—Brent Chisholm, Allen Hall, and Paul Rodriguez—allege that they submitted religious accommodation requests (RAR) to be exempted from the vaccination requirement. *Id.* ¶¶ 17, 21, 23. All three RARs and their subsequent appeals were denied.

Plaintiffs claim their discharges and removals from active status violated the NDAA (*see id.* ¶¶ 171-194)), 10 U.S.C. § 1107a (*see id.* ¶¶ 195-223), and RFRA (*see id.* ¶¶ 224-238), thereby entitling them to money relief under the Tucker Act and the Military Pay Act, 37 U.S.C. §§ 204 and 206.[3] Plaintiffs also allege that the Government illegally exacted money from them, evidently based on the Government's failure to pay them while they were not vaccinated. *Id.* ¶¶ 239-245. No plaintiff alleges any facts that the Government recouped any money from them. *Id.* ¶¶ 16-25. Finally, plaintiffs also seek relief under 10 U.S.C. § 1552, asking the Court to order the correction boards "to correct their military records and remove any adverse paperwork resulting from their vaccinated status or failure to comply with the rescinded and/or unlawful DoD Mandate." *Id.* ¶ 248.

[3] The Military Pay Act provides members of the uniformed services with entitlement to pay, specifically when the member: "(1) was on active duty, 37 U.S.C. § 204(a)(1) (1988); (2) was a reservist who actually performed full-time duties, *id.* § 204(a)(2); (3) was a reservist on inactive status who actually performed duties, 37 U.S.C. § 206(a)(1)-(2); or (4) was a reservist on inactive status who would have performed duties but for disability, disease, or illness, 37 U.S.C. § 206(a)(3)." *Huber v. United States*, 29 Fed. Cl. 260, 263 (1993).

III. Related Litigation

RCFC 9(p) requires parties "[i]n pleading a claim that has been previously presented to another court, whether in whole or in part or directly or indirectly … [to] include a statement identifying the effect, if any, of the prior litigation on this court's subject matter jurisdiction." At least two of the named plaintiffs in the present matter, Mr. Chisholm and Mr. Rodriguez, have interests that are affected by other litigation, *Wilson v. Austin*, 22-cv-438 (E.D. Tex.) and *Doster v. Kendall*, 1:22-cv-00084 (S.D. Ohio).[4]

In *Wilson*, a group of plaintiffs from across the services, along with an "unincorporated association formed for this litigation 'Members of the Armed Forces for Liberty (MAFL),'" filed a class action complaint against the Government in the U.S. District Court for the Eastern District of Texas. *Wilson*, ECF No. 1 ¶ 4. Relevant to this case, they claimed that the vaccination requirement violated 10 U.S.C. § 1107a. Notably, one plaintiff in this case, Mr. Chisholm, has asserted that he is a member of the MAFL.

As explained further below, on September 8, 2022, over 700 individuals, including Mr. Chisholm, filed a motion to intervene as plaintiffs in the *Wilson* matter. *Wilson*, ECF No. 29. In their intervention motion, the proposed intervenors explained that they were members of the MAFL and argued that they "sought status in this case from its inception under the auspices of FRCP Rule 17, which allows that 'a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws.'" *Id.* at 20 (quoting FRCP

[4] We note that in addition to the *Wilson* and *Doster* cases, there have been dozens of other cases filed in various district courts challenging the now-rescinded vaccination requirement. We are only aware of two other cases in this Court raising such challenges, *Botello v. United States*, No. 23-174, and *Harkins v. United States*, No. 23-1238.

17(b)(3)(A)). The *Wilson* case, along with the motion to intervene, remains pending in the district court.

In *Doster*, a group of plaintiffs alleged the Air Force's implementation of the vaccine requirement violated RFRA and the First Amendment of the United States Constitution. *See Doster* ECF No. 1. On July 14, 2022, the United States District Court for the Southern District of Ohio certified a class for certain members of the Air Force and Space Force who were found to have religious objections to receiving the COVID-19 vaccine. *See Doster* ECF No. 72 at 5. On July 27, 2022, the court granted preliminary injunctive relief to the plaintiff class. The injunction prohibited the Department of the Air Force from "taking, furthering, or continuing any disciplinary *or separation* measures against the members of the Class for their refusal to receive the COVID-19 vaccine . . . ." *See Doster* ECF No. 77 at ¶ 2 (emphasis added). The court modified the class to exclude any person who "opts out" by notifying the Government and Class Counsel. *Id.* at ¶ 1. *Doster* is still pending before the district court and the preliminary injunctive relief remains in effect.[5] As explained below, even though Mr. Rodriguez opted out of the *Doster* class, *Doster* directly affects Mr. Rodriguez's claim under RFRA in this Court because the *Doster* injunction was entered prior to his alleged involuntary separation. *See* Am. Compl. ¶ 23 (alleging that he was discharged on September 6, 2022).

ARGUMENT

Plaintiffs raise five claims in this Court, all of which should be dismissed for lack of jurisdiction or failure to state a claim. First, plaintiffs allege that they are entitled to backpay under the NDAA. However, the NDAA is not a money-mandating statute and thus plaintiffs'

[5] On August 16, 2023, the Government filed a petition for a writ of certiorari with the United States Supreme Court. *Kendall v. Doster*, No. 23-154 (U.S.).

request is beyond the Court's jurisdiction. Even if the NDAA were money-mandating, plaintiffs' claim would still fail because the NDAA does not provide retroactive relief.

Second, plaintiffs allege a violation of the Military Pay Act, 37 U.S.C. §§ 204 and 206, as a result of their alleged wrongful discharges or wrongful removals from active status in violation of 10 U.S.C. § 1107a and the NDAA. Once again, the NDAA provides no basis for retroactive relief. Further, plaintiffs have not alleged sufficient facts to show they suffered any harm in violation of 10 U.S.C. § 1107a and thus lack standing to bring that claim.

Third, plaintiffs allege a violation of the Military Pay Act as a result of their alleged wrongful discharges or wrongful removals from active status in violation of RFRA, 42 U.S.C. § 2000bb. Because only three plaintiffs, Mr. Chisholm, Mr. Hall, and Mr. Rodriguez, sought religious accommodations, the remaining seven plaintiffs have failed to state a claim for a RFRA violation. Further, Mr. Rodriguez *voluntarily* opted out of the *Doster* class and *willingly* separated from the Air Force; therefore, he cannot state a claim for wrongful discharge under RFRA.

Moreover, three of the four Reserve component plaintiffs—Mr. Chisholm, Mr. Hall, and Mr. Endress—do not allege that they performed any duty for which they were not compensated, and thus fail to state a claim for monetary entitlement under the Military Pay Act. Accordingly, their claims under counts II and III should be dismissed for this independent reason.

Fourth, plaintiffs allege that the Government illegally exacted money from them through "recoupment of separations pay, special pays, (re)enlistment bonus payments, post-9/11 GI Bill benefits, costs of training and tuition at military schools or academies and public and private universities, and travel and permanent change of station allowances." Am. Compl. ¶ 243. However, none of the plaintiffs allege that they were subjected to any such recoupment. Further,

as demonstrated in Counts I through III, even if plaintiffs did allege any such action, plaintiffs can show no violation of law to support the claim.

Fifth, plaintiffs allege a violation of 10 U.S.C. § 1552. Because 10 U.S.C. § 1552 is not money-mandating, and plaintiffs assert no claims upon which the military record correction boards could grant relief in any event, that claim should be dismissed.

I. Standards Of Review

A. Subject-Matter Jurisdiction

Jurisdiction is a threshold matter, and "[w]ithout jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (cleaned up). Under the Constitution, Congress is authorized to define the jurisdiction of the lower Federal courts and, once it has done so, limits on that jurisdiction may not be disregarded. *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993).

The jurisdiction of this Court is limited to claims where the United States has expressly waived its sovereign immunity from suit. *United States v. Testan*, 424 U.S. 392, 399 (1976); *Booth v. United States*, 990 F.2d 617, 619 (Fed. Cir. 1993). The waiver of sovereign immunity, and hence the consent to be sued, must be expressed unequivocally and cannot be implied. *Testan*, 424 U.S. at 399. In this Court, consent to suit is generally based upon the Tucker Act, 28 U.S.C. § 1491. *Id.* at 397. Pursuant to this statute, the United States waives sovereign immunity only for "claim[s] against the United States" that are "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

The Tucker Act, however, does not create any substantive right of recovery against the

United States for monetary relief. *Testan*, 424 U.S. at 398; *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Rather, the Tucker Act merely confers jurisdiction upon the Court when a substantive right in one of the listed categories already exists. *Testan*, 424 U.S. at 398; *United States v. Connolly*, 716 F.2d 882, 885 (Fed. Cir. 1983) (*en banc*). Accordingly, "Tucker Act jurisdiction requires not only a claim against the United States, but also requires, based on principles of 'sovereign immunity,' that there be a separate money-mandating statute the violation of which supports a claim for damages against the United States." *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997).

Plaintiffs bear the burden of establishing by a preponderance of the evidence that the Court possesses subject-matter jurisdiction over their claims. *Reynolds v. Army and Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); RCFC 12(b)(1); *Visconi v. United States*, 98 Fed. Cl. 589, 590 (2011). "In rendering a decision on a motion to dismiss for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1), this court must presume all undisputed factual allegations to be true and must construe all reasonable inferences in favor of the plaintiff." *Doe v. United States*, 106 Fed. Cl. 118, 122 (2012). "If a motion to dismiss for lack of subject-matter jurisdiction challenges the truth of the jurisdictional facts alleged, the Court may consider relevant evidence outside the complaint when resolving the dispute." *Allen v. United States*, No. 09-33304, 2023 WL 3737120, at *5 (Fed. Cl. May 31, 2023) (citing *Reynolds*, 846 F.2d at 474).

B. Failure to State a Claim Upon Which Relief Can Be Granted

A motion to dismiss pursuant to RCFC 12(b)(6) should be granted if the facts asserted in the complaint do not entitle the plaintiff to a legal remedy. *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002). The complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." RCFC 8(a)(2). The factual allegations need

to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (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. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" and the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). "A motion to dismiss under [former] Rule 12(b)(4) for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not under the law entitle him to a remedy." *Perez v. United States*, 156 F.3d 1366, 1370 (Fed. Cir. 1998) (citing *New Valley Corp. v. United States*, 119 F.3d 1576, 1579 (Fed. Cir. 1997)).

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

As explained above, in order for this Court to possess jurisdiction under the Tucker Act, there must be "a separate money-mandating statute the violation of which supports a claim for damages against the United States." *Holley*, 124 F.3d at 1465. Because the FY 2023 NDAA is not money-mandating, this Court lacks jurisdiction over Count I. And even if this Court were to conclude that the FY 2023 NDAA is money-mandating, plaintiffs have not alleged a violation of the statute, and the count should therefore be dismissed for failure to state a claim.

A. The NDAA Is Not Money-Mandating

"A statute is money-mandating if it 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" *Roberson v. United States*, 115 Fed. Cl. 234, 240 (2014) (quoting *United States v. Mitchell*, 463 U.S. 206, 218 (1983)). Plaintiffs claim for backpay under the NDAA relies on the provision of the NDAA that states that "[n]ot later

than 30 days after the date of the enactment of this Act, the Secretary of Defense shall rescind the mandate that members of the Armed Forces be vaccinated against COVID-19 pursuant to the memorandum dated August 24, 2021, regarding 'Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members.'" NDAA § 525. The Court must look to the plain language of the statute to determine if it can fairly be interpreted as mandating compensation. *New York & Presbyterian Hosp. v. United States*, 881 F.3d 877, 882 (Fed. Cir. 2018). Nothing in the language of section 525 can be interpreted as mandating compensation for service members affected by the vaccination requirement retrospectively or prospectively.

Plaintiffs evidently argue the NDAA is money-mandating because they believe it retroactively voided the vaccination requirement. Am. Compl. ¶ 177. Even if that were true, which it is not, *see infra* section II.B, that would still not turn the NDAA into a money-mandating statute. Plaintiffs argue that "Congress chose" the term "rescind" "to restore Plaintiffs . . . to the position in which they would have been in." *Id.* ¶¶ 176-77. But this language by itself does not mandate monetary compensation or any other particular relief.

Moreover, where, as here, 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). On December 8, 2022, the House voted to pass the NDAA, which included the provision stating that "the Secretary of Defense shall rescind the mandate that members of the Armed Forces be vaccinated against COVID-19." NDAA, § 525; *see* https://www.congress.gov/bill/117th-congress/house-resolution/1512/text. On December 15, 2022, even though the NDAA already included the word "rescind," Senator Ron Johnson proposed an amendment to require the military to reinstate and provide backpay to members who

were discharged "solely on the refusal of such member to receive a vaccine for COVID-19," in order "to compensate [members who received adverse action] for any pay and benefits lost as a result of such punishment." S. Amdt. 6526 to H.R. 7776, https://www.congress.gov/amendment/117th-congress/senate-amendment/6526/text. Senator Johnson explained that NDAA section 525—with the word "rescind"—did not go "far enough," and an amendment was needed that "allows the servicemember to be reinstated with backpay if kicked out of the military solely for refusing the vaccine" and to "redress[] any other types of adverse actions the DOD took against a servicemember for refusing the COVID-19 vaccine." Sen. Rec. Col. 168, Issue 195, page S7233. https://www.congress.gov/117/crec/2022/12/15/168/195/CREC-2022-12-15-pt1-PgS7226.pdf.

There would have been no reason to propose such an amendment if the word "rescind" already required the military to provide the monetary relief the plaintiffs now seek in this case. Senator Reed, who spoke in opposition to the proposed amendment, likewise did not understand the word "rescind" to require the remedies plaintiffs seek in this case. Sen. Rec. Col. 168, Issue 195, page S7233–34. The Senate ultimately rejected the amendment by a vote of 40 to 54. https://www.congress.gov/amendment/117th-congress/senate-amendment/6526/actions.

Further, a month after the President signed the NDAA, 19 senators introduced the Allowing Military Exemptions, Recognizing Individual Concerns About New Shows (AMERICANS) Act of 2023. Jan. 24, 2023, Sen. Cruz Press Release, https://perma.cc/49PR-SQ9Y. Senator Cruz stated that the proposed AMERICANS Act "builds off of the [NDAA]" and "includes measures not incorporated into the NDAA, including a requirement that the Secretary of Defense offer reinstatement to service members who were fired over the military's COVID-19 vaccine mandate." *Id*. Representative Dan Bishop, who has offered a companion

bill in the House, explained that "last year's NDAA . . . didn't provide any meaningful remedies for servicemembers who were kicked out due to the mandate." *Id.* These statements reflect a collective understanding that the NDAA did not provide the remedies sought by Plaintiffs in this case.

Based on the above history, the Court has strong indications that Congress did not intend the NDAA to provide monetary compensation to service members for either past or future losses. Thus, because the statute does not contain an express damages provision, the Court should find that it is not money mandating. *See White Mountain*, 537 U.S. at 478. Accordingly, plaintiffs' claims under Count I must be dismissed as outside the Court's jurisdiction.

B. The NDAA Does Not Provide Retroactive Relief

Even if the NDAA did mandate compensation for future losses – which it does not – plaintiffs' claims still fail because the NDAA did not instruct the Secretary of Defense to rescind the vaccine requirement retroactively—*i.e.*, to render it void from the moment it was adopted. Plaintiffs argue that the services violated the NDAA by failing to provide backpay following Congress's instruction to rescind the vaccination requirement. Am. Compl. ¶ 192. Plaintiffs plead they were all denied pay prior to the passage of the NDAA on December 23, 2022. *See id.* ¶¶ 16-25. Accordingly, to state a claim for violation of the NDAA, plaintiffs must establish that the NDAA's instruction should be applied retroactively.

Plaintiffs' entire theory hinges on their interpretation of Congress's intent behind the word "rescind" to direct the Secretary of Defense to remove the Department's requirement. Citing the Sixth Edition of Black's Law Dictionary's definition of "rescission of contract," plaintiffs argue rescind "means 'an annulling; avoiding, or making void; abrogation; rescission . . .'" and "Congress chose this term to direct the Defendant Agencies and the courts to

apply the rescission with full retroactive effect to restore Plaintiffs and other service members to the position in which they would have been in the absence of the unlawful mandate." *Id.* ¶¶ 176-77. Plaintiffs are wrong.

This Court should not determine that Congress intended a statute to have a retroactive effect unless Congress makes such intent clear. Plaintiffs must overcome the strong "presumption against retroactivity," which "the Supreme Court has made clear '[] is not favored in the law.'" *BP America Production Co. v. United States*, 148 Fed. Cl. 185, 195 (2020) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). The Court of Appeals for the Federal Circuit has held that it "will construe a statute to avoid retroactivity unless there is clear evidence that Congress intended otherwise." *Hicks v. Merit Sys. Prot. Bd.*, 819 F.3d 1318, 1321 (Fed. Cir. 2016). "The principle that legislation usually applies only prospectively 'is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.'" *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1607 (2020) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994)). Under "the principle against retroactive legislation, . . . courts read laws as prospective in application unless Congress has unambiguously instructed retroactivity." *Vartelas v. Holder*, 566 U.S. 257, 266 (2012) (citing *Landgraf*, 511 U.S. at 263); *Landgraf*, 511 U.S. at 272–73 (stating that courts presume a statute is not retroactive unless Congress provides "clear intent" otherwise). Congress has codified the presumption that laws apply only to events that occur in the future and do not apply retroactively "to release or extinguish any" previously imposed consequence "unless the repealing Act shall so expressly provide." *See* 1 U.S.C. § 109.

In short, there is abundant authority that this Court should apply a statute retroactively only where the Congressional intent to do so is clear. And absent clearly expressed

Congressional intent for the Secretary of Defense to rescind the vaccination requirement retroactively, this Court should not conclude that the NDAA directed retroactive relief.

Plaintiffs here argue a single word—"rescind"—shows clear intent to make the NDAA apply retroactively. Am. Compl. ¶¶ 2, 177. Relying on that one word, plaintiffs claim Congress evinced a clear intent to require the military to act as though the vaccine mandate had never been adopted—including providing backpay for failure to comply with the former COVID-19 vaccination requirement. Am. Compl. ¶¶ 185-192. But that word alone does not show a clear intent that their requested relief should apply retroactively.

The current version of Black's Law Dictionary defines "rescind" when used in the phrase to "rescind the legislation" as to "make void; to repeal or annul." RESCIND, Black's Law Dictionary (11th ed. 2019). Merriam-Webster defines "rescind" as "to take away," to "remove," to "take back," to "cancel," or "to make void." RESCIND, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/rescind. The most natural understanding of this term is that Congress intended the repeal of the vaccine mandate to have prospective effect only. Nothing in Congress' use of the term "rescind," without more, supports a conclusion that the repeal of the mandate was intended to apply retroactively.

Plaintiffs attempt to support their retroactivity argument by pointing to how the related term "rescission" is sometimes used in contract law. Am. Compl. ¶ 58 ("in the context of *rescission* of contract").[6] But even in contract law, the "term 'rescission' is often used by lawyers, courts, and businessmen in many different senses." RESCISSION, Black's Law

[6] Plaintiffs' citation to Black's Law Dictionary (6th ed. 1990) is incomplete. Am. Compl. ¶ 176. The Sixth Edition does not independently define the word "rescind." Plaintiffs instead cite to the definition for "Rescission of contract" but never identified the full legal phrase they were defining or reveal that they were citing to that contract-law-specific definition. RESCISSION OF CONTRACT, Black's Law Dictionary (6th ed. 1990).

Dictionary (11th ed. 2019). In some cases, "rescission" means "an agreement by contracting parties to discharge all remaining duties of performance and terminate the contract." *Id.* In other situations, "rescission" means "unilaterally unmaking of a contract for legally sufficient reasons, such as the other party's material breach, or a judgment rescinding the contract." *Id.* And "rescission" can also refer to "a remedy or defense for a nondefaulting party and is accompanied by restitution of any partial performance, thus restoring the parties to their precontractual positions." *Id.* Plaintiffs appear to rely on this last definition of "rescission"—a remedy for a non-defaulting party to seek restitution for partial performance. Am. Compl. at ¶ 58. However, plaintiffs are not non-breaching parties who have elected restitution for a material breach of a mutually agreed upon contractual arrangement. In any event, Congress used the term "rescind" in the NDAA – not the distinct and more technical term "rescission" – and the plain and usual meaning of rescind when applied to a rule or legislation is that the legal provision no longer has prospective force.

The legislative history of the NDAA supports this plain reading of the statute. As explained above, the Senate's consideration—and subsequent rejection—of Amendment 6526 to the NDAA and subsequent consideration of the AMERICANS Act strongly indicate that Congress did not intend to make the NDAA a vehicle for retroactive monetary compensation or any other retroactive relief against the United States.

In sum, plaintiffs have failed to overcome the strong presumption that laws should be read as prospective in application, particularly in light of the NDAA's applicable legislative history. Thus, plaintiffs have failed to establish that the NDAA required retroactive rescission of the vaccination requirement, and Count I should also be dismissed for failure to state a claim.

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

Under Count II, plaintiffs allege that they were wrongfully denied pay under the Military Pay Act because the vaccination requirement violated the NDAA and 10 U.S.C. § 1107a. Am. Compl. ¶¶ 200-204.

As an initial matter, plaintiffs' claim that they were wrongfully denied military pay based on a violation of the NDAA fails for the reasons noted above. The NDAA did not require any retroactive action, and thus plaintiffs' claim that they are entitled to backpay due to a violation of the NDAA must be dismissed for failure to state a claim.

Further, plaintiffs lack standing to pursue their claims based on 10 U.S.C. § 1107a and also fail to state a claim for a violation of this provision.[7] Section 1107a, which sets forth certain conditions for emergency use products, provides that the President may waive a service member's right to refuse a product authorized for emergency use "if the President determines, in writing, that complying with such requirement is not in the interests of national security." 10 U.S.C. § 1107a.

Plaintiffs argue that DoD "mandated unlicensed [Emergency Use Authorization (EUA)] COVID-19 vaccines," and that section 1107a prohibits the military from mandating any service member to take an unlicensed EUA vaccine absent an express Presidential authorization. Am. Compl. ¶¶ 202, 206. Their theory is that "DoD did not have any FDA-licensed COVID-19 vaccines" when the vaccination requirement was instituted, and thus the only way that they could receive a vaccination is by receiving an unlicensed EUA vaccine. *Id.* ¶¶ 115-16.

[7] As discussed below, three of the four Reserve component plaintiffs also fail to state a claim under the Military Pay Act because they do not allege that they performed duty for which they were not paid. *See infra* Section V.

Under the facts pled, plaintiffs lack standing to pursue this claim. In order to invoke this Court's jurisdiction, a plaintiff must establish standing under Article III of the Constitution. *Media Techs. Licensing, LLC v. Upper Deck Co.*, 334 F.3d 1366, 1370 (Fed. Cir. 2003). To demonstrate standing, a plaintiff must satisfy three elements. *Paradise Creations, Inc. v. UV Sales, Inc.*, 315 F.3d 1304, 1308 (Fed. Cir. 2003). First, "the plaintiff must allege that it has suffered an 'injury in fact—an invasion of a legally protected interest." *Id.* Second, "there must be a causal connection between the injury and the conduct complained of." *Id.* Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.*

Here, based on the facts pled, plaintiffs cannot establish a causal connection between their alleged injuries and the conduct complained of. Even accepting as true plaintiffs' allegation that DoD only had unlicensed EUA vaccines available, nothing in the mandate required that plaintiffs receive those unlicensed vaccines. To the contrary, the vaccination requirement stated that 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, and permitted service members to obtain a fully licensed vaccine from a commercially available source. Critically, plaintiffs do not allege that they were prevented by the Government from receiving a fully licensed vaccine from such a source. As a result, plaintiffs cannot show that their denial of pay was causally connected to the conduct complained of – that DoD only possessed unlicensed vaccines.[8] Instead, plaintiffs' own actions demonstrate that they elected

[8] Indeed, as part of the *Wilson* case, the services offered to administer fully licensed and labeled vaccines to all willing plaintiffs, including members of the MAFL, which included Mr. Chisholm, Ms. Williams, and Ms. King. *Wilson*, ECF No. 14-26. Neither Mr. Chisholm, Ms. Williams, nor Ms. King (nor any other individuals in *Wilson*) accepted that offer. *See Wilson*, ECF No. 14 at 23-24.

not to receive a COVID-19 vaccine despite the option to receive it from a fully licensed source, and thus their alleged failure to receive backpay was not caused by any asserted violation of 10 U.S.C. § 1107a.

To be sure, plaintiffs add an allegation in their amended complaint that "[n]o FDA-licensed COVID-19 vaccines were available at all at the time that the August 24, 2021 Mandate was issued." Am. Compl. ¶ 207. Assuming that allegation was meant to encompass commercially available sources, it fares no better. The earliest that any plaintiff alleges they were denied pay was February 2022. Accordingly, whether FDA-licensed vaccines were available on August 24, 2021, is irrelevant to plaintiffs' claims. Even if such vaccines were not available at that time, plaintiffs likewise suffered no adverse action at that time.

For similar reasons, plaintiffs also fail to state a claim that the vaccination requirement violated 10 U.S.C. § 1107a. As noted, DoD's now-rescinded vaccination policy did not require a vaccine authorized only for emergency use and did not implicate, let alone violate, section 1107a. The policy was clear: 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. Plaintiffs do not and cannot dispute that the requirement was limited to COVID-19 vaccines that received full licensure.

Plaintiffs try to muddy the waters by alleging what type of vaccine doses DoD had and when. But those allegations fail to establish that plaintiffs were required to use unlicensed vaccines, given that the vaccination requirement did not limit plaintiffs or any service members to taking only vaccines in DoD's possession. Thus, service members were permitted to obtain commercially available and fully licensed vaccine doses of their choice (which many service members did) to satisfy the requirement. Accordingly, even if DoD only had unlicensed

vaccines available, as plaintiffs allege, DoD's policy did not violate 10 U.S.C. § 1107a because DoD did not require those vaccines to be taken. Thus, plaintiffs have not stated a claim for relief under 10 U.S.C. § 1107a.

IV. Plaintiffs' Claims Under Count III Fail Because Plaintiffs Fail To State A Claim

Under Count III, plaintiffs again allege that they were wrongfully denied military pay under the Military Pay Act, this time based on a violation of RFRA, 42 U.S.C. § 2000bb. Am. Compl. ¶¶ 224-238. Like their claims under Count II, most plaintiffs fail to state a claim for a violation of RFRA.[9]

Plaintiffs allege that the services violated RFRA by "systematically denying" RARs. *Id.* ¶ 231. However, only three plaintiffs, Mr. Chisholm, Mr. Hall, and Mr. Rodriguez, have pled that they submitted an RAR and had their RAR and RAR appeal denied. *Id.* ¶¶ 17, 21, 23. As for the remaining seven plaintiffs, there are no allegations in the complaint that any submitted an RAR or had an RAR denied. *Id.* ¶¶ 16-25. Accordingly, those seven plaintiffs fail to state a claim for a violation of RFRA.[10]

Department of Defense Instruction (DoDI) 1300.17, which sets forth the "Accommodation of Religious Practices Within the Military Services," allows service members

[9] To the extent that plaintiffs' ask this Court to read their claims in Count III as stand-alone RFRA claims unrelated to the Military Pay Act, such claims would fall outside this Court's jurisdiction. *See Klingenschmitt v. United States*, 119 Fed. Cl. 163, 185 (2014).

[10] Even Mr. Chisholm, Mr. Hall, and Mr. Rodriguez, the three plaintiffs who did submit an RAR, make only conclusory allegations that the vaccination requirement violated RFRA, which is insufficient to state a claim. *See Twombly,* 550 U. S. at 555 (a pleading must do more than just offer "a formulaic recitation of the elements of a cause of action"). However, because Mr. Rodriguez willingly separated and because Mr. Chisholm and Mr. Hall did not allege they were not compensated for performed duty, none can state a claim under the Military Pay Act, as shown below. Accordingly, the Court need not reach the issue of whether they have alleged sufficient facts to make out a prima facie RFRA claim.

to submit an RAR to request that they be exempted from certain policies, practices, or duties on religious grounds. DoDI 1300.17 § 3.1(a); *see also* Compl. ¶ 147. In order to allege a RFRA violation, 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). The seven plaintiffs who did not submit RARs do not allege facts showing the vaccination requirement burdened any sincerely held religious belief when they did not attempt to obtain an accommodation and pleaded no basis on which it would have burdened them to seek an accommodation. Indeed, because the basis of their claims is that the services wrongfully denied their RARs, the facts asserted do not entitle them to any relief. *Perez*, 156 F.3d at 1370; *see* Am. Compl. ¶¶ 231-32 (alleging that agency actions violated RFRA by "systematically denying RARs"). For these reasons, the claims of seven of the ten plaintiffs in Count III should be dismissed for failure to state a claim.[11]

The complaint also fails to state a claim under Count III for Mr. Rodriguez, despite alleging that he submitted an RAR. Mr. Rodriguez willingly made a choice that he knew would result in his separation from the Air Force, and therefore he does not have a viable claim to backpay. *Thomas v. United States*, 42 Fed. Cl. 449, 452 (1998) ("[C]laims for post-retirement relief following a voluntary retirement must be denied for failure to state a claim upon which any court can grant relief.").

As discussed above, in *Doster v. Kendall*, 1:22-cv-00084 (S.D. Ohio), a group of

[11] Again, as discussed below, three of the four Reserve component plaintiffs, including Mr. Chisholm, Mr. Hall, and Mr. Endress, fail to state a claim under the Military Pay Act because they do not allege they performed duty for which they were not paid. *See infra* Section V. Accordingly, Mr. Chisholm's and Mr. Hall's claims under RFRA also fail even though they allege they each submitted an RAR.

plaintiffs alleged the Air Force's implementation of the vaccine requirement violated RFRA and the First Amendment of the United States Constitution.[12] *See Doster* ECF No. 1. On July 14, 2022, that court certified a class for certain members of the Air Force and Space Force who were found to have religious objections to receiving the COVID-19 vaccine. *See Doster* ECF No. 72 at 5. On July 27, 2022, the court granted preliminary injunctive relief to the plaintiff class. The injunction prohibited the Department of the Air Force from "taking, furthering, or continuing any disciplinary *or separation* measures against the members of the Class for their refusal to receive the COVID-19 vaccine . . . ." *See Doster* ECF No. 77 at ¶ 2 (emphasis added). The court modified the class to exclude any person who "opts out" by notifying the Government and Class Counsel. *Id.* at ¶ 1. *Doster* is still pending before the District Court and the preliminary injunctive relief remains in effect. Notably, at the time the *Doster* injunction was issued, Mr. Rodriguez had not been discharged from the Air Force. *See* Compl. ¶ 17 (alleging his discharge date was September 6, 2022).

Mr. Rodriguez opted out of the class-wide protection afforded by the preliminary injunction in *Doster*, citing his "willing[ness]" to separate from the military and requesting an Honorable discharge service characterization, which he received. Appx14; *Doster* ECF No. 80. Though he claims he was *wrongfully* discharged in violation of RFRA, that claim is contradicted by the fact that he willingly separated from the Air Force.

This Court has described the analysis as to whether a resignation is voluntary:

> A determination of whether a resignation was voluntary is to be made by examining the totality of the circumstances surrounding it

[12] As noted above, in deciding a motion to dismiss for failure to state a claim, courts may consider matters incorporated by reference to the claim, items subject to judicial notice, and matters of public record. *Dimare Fresh*, 808 F.3d at 1306; 5B Wright & Miller, Fed. Prac. & Proc. Civ. § 1357 (3d ed.). Here, the *Doster* proceedings are matters of public record, subject to judicial notice, and incorporated by reference in the complaint. *See* Compl. ¶ 70 n.4.

> with specific reference to the availability of a free choice to act by the plaintiff. External events and conditions, rather than subjective impressions or perceptions, must guide the court's focused inquiry. Involuntariness, therefore, is not determined by the fact that an individual subjectively perceived no choice in deciding to retire earlier when, in fact, he truly had an option. Rather, what is determinative as to voluntariness is whether such individual did in fact have a choice, notwithstanding the undesirability of the alternatives available.

Longhofer v. United States, 29 Fed. Cl. 595, 601 (1993). *Longhofer* involved a retired Army officer who was selected for mandatory early retirement after being convicted of various offenses at court martial, but while his court martial conviction was still under appellate review. *Id* at 597. Mr. Longhofer decided to voluntarily retire in advance of his mandatory retirement date, but his court-martial conviction was later overturned by military courts, and he sought reinstatement in the military claiming that his retirement was not voluntary. *Id*.

Longhofer provides this Court a lens through which to review Mr. Rodriguez's claim. Once the *Doster* court enjoined the Air Force from separating him, Mr. Rodriguez was free to continue serving in the Air Force, notwithstanding his unvaccinated status and the denial of his RAR. However, he opted for discharge by voluntarily opting out of the *Doster* class, stating he was "willing" to be separated from the military. Appx14; *Doster* ECF No. 80. Had he maintained any opposition to separation from the Air Force after the *Doster* preliminary injunction, his separation could not have been processed. Moreover, given the subsequent rescission of the vaccine mandate, he would still be permitted to be on active duty.

While Mr. Rodriguez was notified of an involuntary separation, he "did in fact have a choice,"[13] and it was his choice that led him to be separated from the Air Force. *Longhofer*, 29

[13] To the extent plaintiffs argue Mr. Rodriguez's discharge was technically involuntary after he opted out of *Doster*'s class protections, the reality is that his decision to opt out was voluntary and he acknowledged that such a decision would lead to his discharge.

Fed. Cl. at 601. But for his voluntary act of removing himself from the class protections of *Doster*, he would not have been separated. Because Mr. Rodriguez's separation from the Air Force was voluntary, he cannot state a claim that he was wrongfully discharged or is entitled to backpay under the Military Pay Act.[14] *Flowers v. United States*, 80 Fed. Cl. 201, 216 (2008).

V. Three Of The Four Reserve Component Plaintiffs Are Not Entitled To Any Relief Under The Military Pay Act And Fail To State A Claim Under Counts II And III

In their complaint, plaintiffs allege that they are entitled to "back pay and other ancillary relief" after they were allegedly wrongfully denied pay for failing to comply with the COVID-19 vaccination requirement. Am. Compl. ¶ 1. As explained above, to the extent plaintiffs allege they are entitled to compensation under the NDAA, they fail to invoke a money-mandating statute and those claims must be dismissed for lack of jurisdiction. Under Counts II and III, however, plaintiffs allege that they were improperly denied pay under the Military Pay Act, which is money-mandating. *Id.* ¶¶ 195-223, 224-38. They allege they are entitled to backpay under the Military Pay Act due to violations of the NDAA, 10 U.S.C. § 1107a, and RFRA. As shown above, those claims should be dismissed because the latter statutes were not violated. *See supra* Section II.B, Section III.A, Section IV.A.

In addition to the reasons stated above, Counts II and III should be dismissed because three of the four Reserve component plaintiffs also fail to state a claim that they can be granted relief under the Military Pay Act. The Federal Circuit construes the Military Pay Act to mandate the payment of money in only four circumstances: where a

[14] For these same reasons, Mr. Rodriguez cannot state a claim under Count II of the complaint, even if that claim did not fail for the reasons we set forth above. *See supra* Section III.

plaintiff "(1) was on active duty, 37 U.S.C. § 204(a)(1) (1988); (2) was a reservist who actually performed full-time duties, *id.* § 204(a)(2); (3) was a reservist on inactive status who actually performed duties, 37 U.S.C. § 206(a)(1)-(2); or (4) was a reservist on inactive status who would have performed duties but for disability, disease, or illness, 37 U.S.C. § 206(a)(3)." *Huber*, 29 Fed. Cl. at 263. Only one plaintiff, Mr. Davis,[15] alleges facts that he fell into one of these categories. For the remaining three Reserve component plaintiffs, their claims under Counts II and III fail even if they could otherwise plead a violation of the NDAA, 10 U.S.C. § 1107a, or RFRA, because they do not allege they performed duties for which they were not compensated.

Those three plaintiffs, Mr. Chisholm, Mr. Endress, and Mr. Hall,[16] served in either the Army or Air Force Reserves. None of these plaintiffs allege that they were not paid for any period for any duty they actually performed. *See* Am. Compl. ¶¶ 17, 20, 21. To be sure, they allege that they would have performed duties but for their vaccination status. *Id.* But a reservist cannot state a claim for 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); *Radziewicz v. United States*, No. 22-90, 2023 WL 4717581, at *4 (Fed. Cl. Jul. 25, 2023) ("[R]eservists on inactive status cannot

[15] Mr. Davis alleges that "he actually performed drill periods for which he was not paid." Am. Compl. ¶ 19.

[16] Mr. Hall alleges that "he was forced to retire" from the Air Force Reserve as a result of his unvaccinated status. Am. Compl. ¶ 21. But he offers no factual support for that legal conclusion. "It is well-established that the court must presume that [a] plaintiff's separation was voluntary." *Lopez-Velazquez v. United States*, 85 Fed. Cl. 114, 136 (2008) (citing *Metz v. United States*, 466 F.3d 991, 999-1000 (Fed. Cir. 2006)). Without alleging facts to overcome the presumption of a voluntary separation, Mr. Hall cannot state a claim for a violation of the Military Pay Act, even if he could otherwise allege a violation of RFRA or 10 U.S.C. § 1107a. *Id.*

receive backpay for any duties that they did not actually perform."); *Palmer v. United States*, 168 F.3d 1310, 1314 (Fed. Cir. 1999) ("[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."); *Riser v. United States*, 97 Fed. Cl. 679, 683 (2011) (applying the rules of § 206(a) "even when a reservist alleges that the military has acted unlawfully and thereby wrongfully prevented his performance of such duties"); *Reeves v. United States*, 49 Fed. Cl. 560, 561 (2001) (reservist failed to state a claim under § 206(a) for retroactive backpay where he alleged that but-for the Army's wrongful failure to consider him for promotion, he was improperly denied pay at a higher grade).

Accordingly, even if plaintiffs could allege violations of the NDAA, 10 U.S.C. § 1107a, or RFRA, those claims would still have to be dismissed for three of the four Reserve component plaintiffs because they have no entitlement to pay under the Military Pay Act.

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

Under Count IV, plaintiffs claim that the Government "punished" plaintiffs "through the illegal exaction and recoupment of separations pay, special pays, (re)enlistment bonus payments, post-9/11 GI Bill benefits, costs of training and tuition at military schools or academies and public and private universities, [and] travel and permanent change of station allowances." Am. Compl. ¶ 243. Plaintiffs' illegal exaction claims should be dismissed for lack of jurisdiction and failure to state a claim because they fail to allege that any plaintiff actually experienced such exaction or recoupment, and even if they had, that it was illegal.

"[A]n illegal exaction occurs . . . when the 'plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum' that was

'improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.'" *Virgin Islands Port Authority v. United States*, 922 F.3d 1328, 1333 (Fed. Cir. 2019) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)). "[T]o establish Tucker Act jurisdiction for an illegal exaction claim, a party that has paid money over to the government and seeks its return must make a non-frivolous allegation that the government, in obtaining the money, has violated the Constitution, a statute, or a regulation." *Boeing Company v. United States,* 968 F.3d 1371, 1383 (Fed. Cir. 2020). Where no violation of law is identified, there is no illegal exaction claim. *E.g., Virgin Islands,* 922 F.3d at 1333-1334 (holding that agency acted within its legal authority).

Here, the complaint lacks any allegations that the Government took money from any plaintiffs that they seek to have returned. *See* Am. Compl. ¶¶ 16-25. To be sure, the complaint lists items that could be recouped by the Government to form the basis of an illegal exaction claim, but no plaintiff alleges that any such exaction occurred. *See* Am. Compl. ¶ 243. Without a payment to the Government that plaintiffs seek to have returned, this Court lacks jurisdiction over plaintiffs' illegal exaction claims. *Boeing,* 968 F.3d at 1383.

Further, even if the complaint could be construed to contain allegations that money was taken from plaintiffs, their claims still fail to state a claim. They argue such exaction was illegal based on the NDAA's instruction for the vaccine requirement to be rescinded. As we have explained, *see supra* Section II.B, the NDAA does not entitle plaintiffs to any retroactive relief. Because the NDAA did not instruct DoD to provide retroactive relief, any exaction that took place would not run afoul of the statute. Accordingly, plaintiffs fail to state a claim that any money was illegally exacted, and their claims under Count IV should be dismissed.

VII. Plaintiffs' Claims Under Count V Fail Because 10 U.S.C. § 1552 Is Not Money-Mandating And Plaintiffs Have Not Otherwise Pled A Claim Entitling Them To Relief From The Correction Boards

Under Count V, plaintiffs invoke 10 U.S.C. § 1552 for correction of their military records and removal of any adverse actions from their records. Am. Compl. ¶¶ 246-49. However, this statute does not provide the Court with jurisdiction because it is not money-mandating. *Martinez v. United States*, 333 F.3d 1295, 1315 (Fed. Cir. 2003) ("section 1552 is not the 'money-mandating' statute that gives rise to the cause of action that provides the basis for a Tucker Act suit in the Court of Federal Claims"); *see also Visconi v. United States*, 98 Fed. Cl. 589 (2011), *aff'd*, 455 F. App'x 986 (Fed. Cir. 2012). Neither does it provide them with any cause of action for which plaintiffs could recover damages under the Tucker Act. Accordingly, to the extent plaintiffs attempt to assert stand-alone claims under section 1552, those claims should be dismissed as beyond this Court's jurisdiction.

Moreover, plaintiffs "seek an order from the Court directing the appropriate BCMR to correct their military records and remove any adverse paperwork resulting from their unvaccinated status or failure to comply" with the vaccination requirement. Am. Compl. ¶ 248. "Although the court has jurisdiction to order the correction of military records, it may only do so as 'incident of and collateral to [an] award of a money judgment.'" *Visconi*, 98 Fed. Cl. at 595 (quoting *Voge v. United States*, 844 F.2d 776, 781 (Fed. Cir. 1988)). Plaintiffs ask the Court to direct the correction of military records beyond a correction incident to a money judgment, which is beyond the Court's jurisdiction. Essentially, plaintiffs' fifth claim asks the Court to do what plaintiffs are free to do on their own: direct their requests for records correction to their respective service boards.

Finally, to the extent that plaintiffs are merely asking the Court to direct the correction boards to correct their records to reflect their entitlement to backpay based on the other claims in their complaint, we have shown why each of those claims fail. Thus, this claim, too, should be dismissed.

CONCLUSION

For these reasons, 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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Dated: August 25, 2023

Attorneys for Defendant

APPENDIX

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DEPUTY SECRETARY OF DEFENSE
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FEB 2 4 2023

MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP
COMMANDERS OF THE COMBATANT COMMANDS
DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS

SUBJECT: Guidance for Implementing Rescission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces

In today's rapidly changing global security environment, vaccines continue to play a critical role in assuring a ready and capable force that is able to rapidly deploy anywhere in the world on short notice. Department leadership is committed to ensuring the safety of our Service members and will continue to promote and encourage vaccinations for all Service members along with continued use of other effective mitigation measures. This includes monitoring changing public health conditions, relevant data, and geographic risks; and updating policies and processes as required to maintain the strategic readiness of our forces and our ability to defend national security interests around the globe.

This memorandum provides additional guidance to ensure uniform implementation of Secretary of Defense Memorandum, "Rescission of the August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces," January 10, 2023 (January 10, 2023 memorandum).

As required by section 525 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, the January 10, 2023 memorandum rescinded the August 24, 2021 and November 30, 2021 Secretary of Defense mandates that members of the Armed Forces be vaccinated against the coronavirus disease 2019 (COVID-19) and thereby also rendered all DoD Component policies, directives, and guidance implementing those vaccination mandates as no longer in effect as of January 10, 2023. These include, but are not limited to, any COVID-19 vaccination requirements or related theater entry requirements and any limitations on deployability of Service members who are not vaccinated against COVID-19.

DoD Component policies, directives, and guidance have not been operative since the January 10, 2023 memorandum was issued, regardless of the status of the DoD Component conforming guidance. DoD Component heads shall formally rescind any such policies, directives, and guidance as soon as possible, if they have not done so already. DoD Component heads shall certify to the Under Secretary of Defense for Personnel and Readiness in writing that these actions have been completed no later than March 17, 2023.

The January 10, 2023 memorandum recognizes that other standing Departmental policies, procedures, and processes regarding immunizations remain in effect, including the ability of commanders to consider, as appropriate, the individual immunization status of personnel in making deployment, assignment, and other operational decisions, such as when vaccination is

required for travel to, or entry into, a foreign nation. This continues to be the case, in accordance with the guidance below.

The Department's Foreign Clearance Guide will be updated to reflect that DoD personnel must continue to respect any applicable foreign nation vaccination entry requirements, including those for COVID-19. Other than to comply with DoD Foreign Clearance Guidance, DoD Component heads and commanders will not require a Service member or group of Service members to be vaccinated against COVID-19, nor consider a Service member's COVID-19 immunization status in making deployment, assignment, and other operational decisions, absent establishment of a new immunization requirement in accordance with the process described below. It is my expectation that any requests to the Assistant Secretary of Defense for Health Affairs (ASD(HA)) for approval to initiate mandatory immunizations of personnel against COVID-19 will be made judiciously and only when justified by compelling operational needs and will be as narrowly tailored as possible.

Department of Defense Instruction (DoDI) 6205.02, "DoD Immunization Program," July 23, 2019, will be updated as follows to establish a process requiring the Secretary of a Military Department, the Director of a Defense Agency or DoD Field Activity that operates medical clinics, or the Commandant of the Coast Guard, to submit a request for approval to initiate, modify, or terminate mandatory immunizations of personnel. Effective immediately, I direct the following action:

Paragraph 2.11. of DoDI 6205.02 is revised by adding a new subsection g., which will read:

> "Submit requests to the ASD(HA) for approval to initiate, modify, or terminate mandatory immunizations of personnel and voluntary immunizations of other eligible beneficiaries determined to be at risk from the effects of deliberately released biological agents or naturally occurring infectious diseases of military or national importance."

The Commander of a Combatant Command must submit a request for approval to initiate, modify, or terminate mandatory immunizations of personnel through the Joint Staff, consistent with existing processes specified in DoDI 6205.02.

The Director of Administration and Management will make the revision directed above as a conforming change to the version of DoDI 6205.02 published on the DoD Issuances website.

SECRETARY OF THE ARMY
WASHINGTON

24 FEB 2023

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Army Policy Implementing the Secretary of Defense Coronavirus Disease 2019 (COVID-19) Vaccination Mandate Rescission

1. References. See enclosure 1.

2. On 10 Jan 23, the Secretary of Defense rescinded the COVID-19 vaccination mandate across the Department of Defense (DoD). Accordingly, I hereby rescind all Department of the Army policies specifically associated with the implementation of the COVID-19 vaccination mandate. This includes rescinding references d, e, f, g, h, and i.

3. No currently serving Soldier[1] shall be separated based solely on their refusal to receive the COVID-19 vaccine if they sought an exemption on religious, administrative, or medical grounds. I want to reinforce that the Department of the Army will:

a. Cease any ongoing reviews of current Soldiers' religious, administrative, or medical exemption requests if those requests are solely for the COVID-19 vaccine. These specific pending requests are deemed resolved through the elimination of the COVID-19 vaccination mandate.

b. Update the records of Soldiers who requested an exemption for the COVID-19 vaccine to remove or correct any adverse actions associated with denials of such requests, as well as favorably remove any flags associated with those adverse actions.

c. No longer require the COVID-19 vaccine for accessions. Those currently in, or seeking admission to pre-commissioning programs, are no longer required to receive the COVID-19 vaccine.

d. In addition to the elimination of travel restrictions directed in reference c, remove any remaining travel restrictions based solely on COVID-19 vaccination status. Other standing Department of the Army policies, procedures, and processes regarding immunization and travel remain in effect, including combatant command, country clearance, and theater entry specific requirements.

[1] For the purposes of this policy, the term Soldier refers to Soldiers currently serving in the Regular Army (RA), Army National Guard (ARNG) / Army National Guard of the United States (ARNGUS), and U.S. Army Reserve (USAR); cadets at the United States Military Academy (USMA); cadet candidates at the United States Military Academy Preparatory School (USAMPS); and cadets in the Senior Reserve Officers' Training Corps (SROTC).

SUBJECT: Army Policy Implementing the Secretary of Defense Coronavirus Disease 2019 (COVID-19) Vaccination Mandate Rescission

4. To prevent any inconsistent disciplinary action based on past actions during the pandemic, I continue to withhold the authority to impose any non-judicial and judicial actions based solely on a Soldier's refusal to receive the COVID-19 vaccine while the mandate was in effect.

5. Furthermore, I am issuing the following guidance for updating the records and adjudicating pending exemption requests for Soldiers who sought an exemption.

a. Completed / Denied Exemption Requests. Personnel records for Soldiers who sought, but were denied, an exemption on religious, administrative, or medical grounds to the COVID-19 vaccination requirement will be updated as follows:

(1) Pending Separations. Effective immediately, Commanders will rescind all pending involuntary separation actions pursuant to reference d. The Soldier's flag (Flag Code B) will be closed as *favorable*.

(2) Suspension of Favorable Actions (Flags). Effective immediately, U.S. Army Human Resource Command (HRC), in coordination with the Deputy Chief of Staff G-1 (DCS G-1) will *favorably* close the flag for Soldiers who sought an exemption and are flagged (Flag Code A) for failure to comply with the lawful order to receive the COVID-19 vaccination.

(3) General Officer Memoranda of *Reprimand* (GOMOR). Effective immediately, HRC, in coordination with DCS G-1, will remove GOMORs from a Soldier's Army Military Human Resource Record (AMHRR) if the GOMOR was issued for the failure to comply with the lawful order to receive the COVID-19 vaccine and the Soldier previously sought an exemption.

(a) Filing authorities will immediately withdraw and destroy locally filed GOMORs issued for the failure to comply with the lawful order to receive the COVID-19 vaccine for Soldiers who previously sought an exemption.

(b) GOMORs that have been issued for the failure to comply with the lawful order to receive the COVID-19 vaccine where the Soldier previously sought an exemption, but are not yet filed, will be rescinded.

(4) Bars to Continued Service. Effective immediately, HRC, in coordination with DCS G-1, will remove all bars to continued service if the bar was based on the Soldier's failure to comply with the lawful order to receive the COVID-19 vaccination and the Soldier previously sought an exemption.

(5) Evaluation Reports. Within 30 days of the publication of this policy, HRC, in coordination with DCS G-1, will contact the Soldier and their rating chain if a negative

evaluation report was based on the Soldier's failure to comply with the lawful order to receive the COVID-19 vaccine and the Soldier previously sought an exemption.

(a) Soldiers, working with their rating chain, will determine if the evaluation should be maintained, modified, or removed from Soldier's AMHRR to achieve the most advantageous outcome for the Soldier.

(b) For evaluations that are pending but not yet filed, rating officials will remove annotations documenting vaccine refusal that were included in the evaluation pursuant to reference d.

(6) Adverse Actions Referencing Additional Misconduct. As stated above, HRC, in coordination with DCS G-1, will update personnel records to remove all adverse actions for Soldiers who sought, but were denied, an exemption on religious, administrative, or medical grounds to the COVID-19 vaccination requirement. If the adverse action was taken due to other instances of misconduct, Commanders may initiate adverse actions based on the other misconduct not associated with the failure to comply with the lawful order to receive the COVID-19 vaccine.

(7) Reporting. Within 45 days of the publication of this policy, HRC will report the actions taken to update Soldiers' personnel records. The General Court Martial Convening Authority (GCMCA) or equivalent authority will validate the report within 15 days of receipt from HRC. Soldiers who were inadvertently excluded in the report will notify their GCMCA.

b. Pending Exemption Requests. Rescission of the DoD COVID-19 vaccination mandate eliminates the need for the Army to adjudicate pending exemption requests based on religious, administrative, or medical grounds.

(1) Notification. Within 30 days of the publication of this policy, the Office of the Surgeon General (OTSG), in coordination with the Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA(M&RA)), will notify Soldiers who sought an exemption (or appealed a denied exemption) solely for the COVID-19 vaccination mandate that no further action will be taken. The Soldier will be notified through the GCMCA or equivalent authority that submitted the request. Commanders will notify each Soldier in writing within seven days of receipt of notification.

(2) Multiple Vaccine Exemption Requests. Within 30 days of the effective date of this policy, Soldiers who sought exemption to other mandatory vaccines along with their request for exemption from the COVID-19 vaccine must resubmit their request if they continue to seek an exemption from the other vaccines.

(a) Soldiers who submitted multiple vaccine exemption requests did not consistently provide information related to non-COVID vaccine requests. To ensure fair

and expeditious processing of these requests, request for exemption should be specific to the vaccine and must address how receipt of each vaccine substantially burdens the Soldier's exercise of religion.

(b) To expedite the process, Soldiers are not required to receive additional counseling or training/education by a Chaplain or Medical Provider if the request is re-submitted within 30 days of notification. The new request must otherwise comply with the existing processes contained in Army Regulation (AR) 600-20, *Army Command Policy*, Appendix P-2.

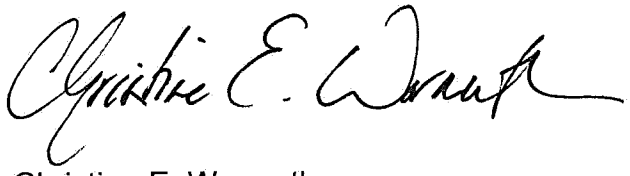
(c) Commanders will ensure resubmissions are processed within 30 days. Commanders have the authority to determine if a new command recommendation is warranted based on the information in the request.

(3) Reporting. On a monthly basis, GCMCAs or equivalent authorities will report the number of Soldiers notified and the projected number of resubmissions. OTSG will validate and report the number of exemption requests and appeals adjudicated to include the number of approvals and denials in each category.

6. Former Soldiers may petition the Army Discharge Review Board and the Army Board for Correction of Military Records to request corrections to their personnel records, including records regarding the characterization of their discharge.

7. Additional Army policy and guidance to effect this rescission and implement DoD policy will be issued by the Assistant Secretary of the Army (Manpower and Reserve Affairs) as necessary and appropriate.

8. I am proud of the efforts the Department of the Army has taken to respond to the COVID-19 pandemic. We will continue to promote and encourage COVID-19 vaccination for all personnel to ensure readiness, facilitate mission accomplishment, and protect our force.



Encls

Christine E. Wormuth

DISTRIBUTION:
Principal Officials of Headquarters, Department of the Army
Commander
U.S. Army Forces Command
U.S. Army Training and Doctrine Command
(CONT)

SUBJECT: Army Policy Implementing the Secretary of Defense Coronavirus Disease 2019 (COVID-19) Vaccination Mandate Rescission

DISTRIBUTION: (CONT)
- U.S. Army Materiel Command
- U.S. Army Futures Command
- U.S. Army Pacific
- U.S. Army Europe and Africa
- U.S. Army Central
- U.S. Army North
- U.S. Army South
- U.S. Army Special Operations Command
- Military Surface Deployment and Distribution Command
- U.S. Army Space and Missile Defense Command/Army Strategic Command
- U.S. Army Cyber Command
- U.S. Army Medical Command
- U.S. Army Intelligence and Security Command
- U.S. Army Corps of Engineers
- U.S. Army Military District of Washington
- U.S. Army Test and Evaluation Command
- U.S. Army Human Resources Command

Superintendent, U.S. Military Academy
Commandant, U.S. Army War College
Director, U.S. Army Civilian Human Resources Agency
Executive Director, Military Postal Service Agency
Superintendent, Arlington National Cemetery
Director, U.S. Army Acquisition Support Center

CF:
Principal Cyber Advisor
Director of Business Transformation
Commander, Eighth Army

REFERENCES

a. Section 525 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023.

b. Secretary of Defense memorandum (Rescission of August 24, 2021, and November 30, 2021, Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces), 10 January 2023.

c. Consolidated Department of Defense Coronavirus Disease 2019 Force Health Protection Guidance, Revision 4, 30 January 2023.

d. Army Directive 2022-02 (Personnel Actions for Active-Duty Soldiers Who Refuse the COVID-19 Vaccination Order and Accession Requirements for Unvaccinated Individuals), 31 January 2022.

e. Secretary of the Army Memorandum (Flagging and Bars to Continued Service of Soldiers Who Refuse the COVID-19 Vaccination Order), 16 November 2021.

f. Secretary of the Army Memorandum (Unvaccinated Cadets at the United States Military Academy and United States Army Senior Reserve Officers' Training Corps), 14 December 2021.

g. Secretary of the Army Memorandum (Delegation of Authority for Consolidated Department of Defense Coronavirus Disease 2019 Force Health Protection Guidance), 25 May 2022.

h. Under Secretary of the Army Memorandum (Updated Guidance on Official Travel), 17 October 2022.

i. All Army Activities (ALARACT) Message 009/2022 (Execution Guidance for Accessions and Active-Duty Soldiers Who Refuse the COVID-19 Vaccination Order), 2 February 2022.

j. Army Regulation 600-8-2 (Suspension of Favorable Personnel Actions (FLAG)).

k. Army Regulation 600-20 (Army Command Policy).

l. Army Regulation 600-37 (Unfavorable Information).

m. Army Regulation 601-280 (Army Retention Program).

n. Army Regulation 623-3 (Evaluation Reporting System).

SECRETARY OF THE AIR FORCE
WASHINGTON

February 24, 2023

MEMORANDUM FOR ALMAJCOM-FOA-DRU/CC
DISTRIBUTION C

SUBJECT: Department of the Air Force (DAF) Guidance on Removal of Adverse Actions and Handling of Religious Accommodation Requests

In accordance with my 23 January 2023 memorandum "Rescission of 3 September 2021 Mandatory Coronavirus Disease 2019 Vaccination of Department of the Air Force Military Members and 7 December 2021 Supplemental Coronavirus Disease 2019 Vaccination Policy Memoranda," I want to reinforce that all policies within the Department of the Air Force associated with the implementation of the Coronavirus Disease 2019 (COVID-19) vaccination mandate for Service members were also rescinded. Commanders at all levels must ensure that associated guidance derived from the mandate is rescinded. Refer to USD(P&R) Re: Consolidated Department of Defense Coronavirus Disease 2019 Force Health Protection Guidance - Revision 4, 30 January 2023 for current force health protection guidance.

I am issuing the following additional guidance with respect to the removal of adverse actions, and the handling of religious accommodation requests for those Service members who refused vaccination. At the time the actions were taken, they were appropriate, equitable and in accordance with valid lawful policy in effect at the time; however, removal of those actions is now appropriate in some circumstances.

a. Removal of Adverse Information: Currently serving Regular Air Force (RegAF), Space Force, Air National Guard, and Air Force Reserve members [including those involuntarily reassigned to the Inactive Ready Reserve] who sought an exemption on religious, administrative, or medical grounds, and who received adverse actions solely due to their refusal to receive a Coronavirus Disease 2019 (COVID-19) vaccine shall have these items removed as detailed below. The Service member must have formally sought an accommodation on religious, administrative, or medical grounds prior to or concurrent with the official initiation of the adverse action in order to receive relief under this memorandum. Commanders will ensure the removal of such adverse actions from currently serving Service members' records in accordance with the below guidance. Members will be notified by their command or record holder (e.g. Air Force Personnel Center, Air Reserve Personnel Center) when the adverse actions have been removed from their records. This policy does not apply to members who refused the COVID-19 vaccination and did not request an exemption. Members who did not seek an exemption may petition their chain of command under existing DAF policy or the Air Force Board for Correction of Military Records (AFBCMR) for removal of adverse information if they believe an injustice or error has occurred. The process to petition the AFBCMR may be found at: https://Afrba-portal.cce.af.mil.

1) Letters of Admonishment, Counseling, or Reprimand, and Records of Individual Counseling issued solely for vaccine refusal after requesting an exemption as described above will be rescinded. Removal of actions for enlisted members will follow the procedures in DAFI 36-2907. Removal of officer adverse actions will follow DAFI 36-2907, except that the removal of Letters of Counseling related to a substantiated finding from an officially documented investigation, Letters of Admonishment and Letters of Reprimand from a Personnel Information File (PIF) or Unfavorable Information File (UIF) is delegated to commanders in the member's current chain of command who are equal or senior in grade to the initial imposing authority. Where the administrative action addresses additional misconduct, the administrative action will be redacted to remove all language associated with the member's refusal to receive the COVID-19 vaccine. Commanders will make new determinations as to whether to uphold, downgrade, or withdraw the administrative action and entry into a PIF or UIF without consideration of the refusal to receive the COVID-19 vaccine. Any requirement for AFBCMR direction for removal of actions from Military Human Resource Records or other files will be accomplished by AFPC/ARPC as appropriate if removal is required under this memorandum. The member's command will inform AFPC/ARPC which adverse actions will be removed, redacted, or replaced.

2) Nonjudicial punishments issued solely for vaccine refusal after requesting an exemption as described above will be set aside in their entirety. Nonjudicial punishments issued partially for such vaccine refusal will have the vaccine refusal portion set aside and the remainder of the nonjudicial punishment reassessed for appropriateness. When the set aside is more than four months after the execution of the punishment, commanders should reference the SecDef Memo dated 10 January 2023 on an attachment to the AF Form 3212.

3) Referral Performance Reports issued solely for vaccine refusal after requesting an exemption as described above will have the referral report removed from the member's personnel record and replaced with a statement of non-rated time. Where the referral report addresses additional misconduct, the report will be redacted to remove all language associated with the member's refusal to receive the COVID-19 vaccine and the rater and/or additional rater will reassess if the remaining report should remain a referral.

4) Promotion Records will be corrected by the record holder (e.g., AFPC, ARPC, SAF/IG) to remove or redact, as appropriate, all adverse actions related to the member's refusal to receive the COVID-19 vaccine.

5) Promotion Propriety Actions will continue processing in accordance with DAFIs 36-2501 and 36-2504 and may only be closed by Secretarial action.

6) Current involuntary discharge proceedings will be terminated IAW the procedures in DAFI 36-3211 if the basis was solely for refusal to receive the COVID-19 vaccine. If there are additional circumstances supporting discharge, commanders should make a determination as to whether to continue discharge proceedings, including re-notification of discharge.

7) Adverse actions removed under the provisions of this guidance memorandum contained in Inspector General files pursuant to AFI 90-301 will be removed from those files.

b. Processing of religious accommodation requests (RARs) requesting an exemption to the COVID-19 vaccination requirement.

1) Due to the recission of the COVID-19 vaccine mandate, all outstanding RARs for COVID-19 vaccination have been cancelled and will be returned without action.

2) Individuals, whose COVID-19 RAR also requested accommodation for other mandated vaccinations, may resubmit their RAR to their unit commander for non-COVID-19 vaccinations in accordance with DAFI 52-201. Previous requests should be updated to provide any additional information the member deems relevant to the specific vaccine(s) the member is requesting an accommodation for. In order to expedite processing, members who desire to submit a new accommodation are requested to do so within 30 days.

3) Commanders will expeditiously review and adjudicate RARs in accordance with DAFI 52-201 with the following exceptions. Upon resubmission by the member, unit commanders will review the revised package and provide a command recommendation. Following unit commander recommendation on the resubmitted package, if the RAR was previously reviewed by a Religious Resolution Team (RRT), it will be forwarded to the initial decision authority. Resubmitted RARs that were not previously reviewed by an RRT will be processed expeditiously through the DAFI 52-201 RRT process. Resubmitted RARs that were at the appellate authority will be forwarded by the unit commander to the initial decision authority. If the initial decision authority disapproves the requested accommodation, it will be forwarded directly to the appellate authority. Personnel at all levels will consider additional information provided by the applicant and the commander's recommendation.

Let me close by expressing my admiration to the men and women of this Department for the tremendous effort and accomplishments in response to the COVID-19 pandemic while also ensuring the readiness of the force and defense of the Nation. We will continue to encourage COVID-19 vaccination for all personnel to ensure readiness, facilitate mission accomplishment, and protect our people.

Frank Kendall
Secretary of the Air Force

cc:
AF/CC
SF/CSO

THE SECRETARY OF THE NAVY
WASHINGTON, D.C. 20350-1000

FEB 24 2023

MEMORANDUM FOR COMMANDANT OF THE MARINE CORPS
CHIEF OF NAVAL OPERATIONS
ASSISTANT SECRETARIES OF THE NAVY
GENERAL COUNSEL OF THE NAVY
JUDGE ADVOCATE GENERAL OF THE NAVY

SUBJECT: Department of the Navy Actions to Implement Coronavirus Disease 2019 Vaccine Rescission

Reference: (a) Secretary of Defense Memorandum, "Rescission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces"
(b) ALNAV 009/23, "Rescission of COVID-19 Vaccination Requirement for Members of the Armed Forces", January 20, 2023

On 10 January 2023, Secretary of Defense (SECDEF) rescinded the COVID-19 vaccine mandate across the Department of Defense in reference (a). Accordingly, I am canceling all COVID-19 vaccine mandates directed by subordinate echelons of command within the Department of the Navy as of that same date. Further, in reference (b), you were directed to cease separating Sailors or Marines for refusal to receive the COVID-19 vaccination if those members had sought accommodation for religious, medical, or administrative reasons.

For those currently serving Sailors or Marines who previously submitted an accommodation request or appeal solely for exemption from the COVID-19 vaccine, you will consider those requests or appeals closed and return them without action. Such members will remain in service with no adverse action related to the COVID-19 vaccine refusal. For those religious accommodation requests that seek relief from the COVID-19 vaccine in addition to other mandatory vaccines, you will return those requests to the Sailor or Marine and engage with that member to ensure the remaining issues are properly focused and to determine how to proceed. These Sailors and Marines have the option to withdraw their religious accommodation request, or the appeal of that request if previously denied, or submit additional information that might support their request, but they are not required to do so. Requests that have been substantially processed may continue to be processed in those instances in which the Sailor or Marine's remaining issues are clearly understood and ready for resolution, or you may return the request to an earlier stage of the review for further effort to resolve the Sailor or Marine's request, at your discretion.

You will ensure the review of the records of all currently serving Service Members who sought and were subsequently denied an exemption from the COVID-19 vaccination. The service records for those Sailors and Marines so identified shall be reviewed and any adverse information related to their COVID-19 vaccine refusal shall be removed from the service record. All additional records corrections, including those for members who were denied an exemption and were discharged, may be reviewed, at the request of such members or veterans, if he or she chooses to petition the Board for Correction of Naval Records. You are hereby directed to

SUBJECT: Department of the Navy Actions to Implement Coronavirus Disease 2019 Vaccine Rescission

modify future selection board convening orders and precepts to include language ensuring the boards do not consider any adverse information related solely to COVID-19 vaccine refusal in cases in which an accommodation was requested.

The Department of the Navy remains committed to protecting our people. I expect you to clearly communicate the processes and procedures of this memorandum and references (a) and (b) to your Sailors and Marines, and provide any necessary amplifying guidance. The Commandant of the Marine Corps and the Chief of Naval Operations will report back to me within 30 days of the date of this memorandum to provide the process, timeline and status of your reviews.

Carlos Del Toro.

Carlos Del Toro

cc:
ACMC
VCNO
DUSN
AUDGEN
CHINFO
DMCS
DNS
JAG
DON CIO
NAVIG
NCIS
OCMO
OLA
OSBP
Echelon 1 and 2 commands

From: Wendy Cox
To: Avallone, Zachary A. (CIV); Snyder, Cassandra M (CIV); Carmichael, Andrew E. (CIV); Yang, Catherine M (CIV)
Cc: chris; "Tom B. Bruns"; Wendy Cox
Subject: [EXTERNAL] Fw: Decision to Opt out
Date: Wednesday, August 3, 2022 11:12:17 AM

Good Morning,

I am forwarding the below request by TSgt Paul Rodriguez to opt out of the class. Thank you.

Wendy Cox, Attorney
Siri | Glimstad
501 Congress Avenue
Suite 150 – #343
Austin, TX 78701
Main: (512) 265 – 5622
Facsimile: 646-417-5967
www.sirillp.com

From: Paul Rodriguez <paul@hotrodspearguns.com>
Sent: Tuesday, August 2, 2022 6:14 PM
To: Wendy Cox <wcox@sirillp.com>
Subject: Decision to Opt out

Hello Wendy,

I am emailing you to inform that I am officially opting out of the protected class and willing to separate from the military.

Paul Joseph Rodriguez
TSgt (E-6)
SSN: 9195

Regards,

Paul Rodriguez