

In the Matter of:

Nick Bassen, et al v. USA

March 6, 2024

Condensed Transcript with Word Index



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1 IN THE UNITED STATES COURT OF FEDERAL CLAIMS

2

3 NICK BASSEN, et al.,)

4 Plaintiffs,) Case No.

5 vs.) 23-211C

6 THE UNITED STATES OF AMERICA,)

7 Defendant.)

8 -----)

9 JEREMIAH BOTELLO,)

10 Plaintiff,) Case No.

11 vs.) 23-174C

12 THE UNITED STATES OF AMERICA,)

13 Defendant.)

14

15 Courtroom 4

16 Howard T. Markey National Courts Building

17 717 Madison Place, N.W.

18 Washington, D.C.

19 Wednesday, March 6, 2024

20 1:28 p.m.

21 Oral Argument - Motion to Dismiss

22

23 BEFORE: THE HONORABLE THOMPSON M. DIETZ

24

25 Reported and Transcribed by: Elizabeth M. Farrell, CERT

2

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10 ALSO PRESENT:

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1 P R O C E E D I N G S

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3 (Proceedings called to order, at 1:28 p.m.)

4 LAW CLERK: All rise. The United States Court

5 of Federal Claims is now in session, the Honorable

6 Thompson M. Dietz presiding.

7 THE COURT: Please be seated. Thank you.

8 Good afternoon.

9 COUNSEL: Good afternoon.

10 THE COURT: We are here this afternoon for oral

11 argument on the Government's motion to dismiss in the

12 cases, Bassen versus United States, Case Number 23-211,

13 and Botello versus United States, Case Number 23-174.

14 Let's begin by having the parties state their

15 appearances for the record, beginning with the Plaintiff,

16 please.

17 MR. SARAN: Your Honor, Dale Saran for the

18 Plaintiff.

19 THE COURT: Thank you, Mr. Saran.

20 MR. SARAN: Yes, sir.

21 THE COURT: And was it Bassen? Is that

22 correct?

23 MR. SARAN: Yes, sir, it's Bassen.

24 THE COURT: Okay. I just wanted to make sure

25 it wasn't "Basin." Excellent. Thank you.

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1 MR. SARAN: Thank you.
 2 THE COURT: And for the Government?
 3 MR. BECKRICH: Good afternoon, Your Honor.
 4 Kyle Beckrich on behalf of the United States. Here with
 5 me, I have Captain Stacey Fernandez and Holly Bryant,
 6 both counsel for the Army, and Lieutenant Colonel Michael
 7 Smith is also here, as well.
 8 THE COURT: Thank you all for being here and
 9 thank you for your service.
 10 All right. Let's go ahead and get started.
 11 Just a couple administrative things before we get started
 12 here. I understand we were to go with Bassen first and
 13 argue Bassen first. Is that correct?
 14 MR. SARAN: Yes, yes, Your Honor.
 15 THE COURT: Okay. And then we'd move to
 16 Botello.
 17 I thought that we would hear from the
 18 Government first as the movant and we would just go
 19 claim-for-claim with the Government's points they wanted
 20 to make and then move back to the Plaintiff on Bassen,
 21 and then we would do the same thing for Botello. I know
 22 that there's some clear overlap and some of the same
 23 arguments are being made. So I'll defer to the parties
 24 as to whether or not they want to kind of reemphasize
 25 certain points for Botello. I don't really have a time

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1 constraint today, but I want to keep it within reason.
 2 I'm expecting maybe a couple hours, but we'll do what we
 3 need to and we'll go back and forth as much as we need to
 4 to clarify the points that need to be made.
 5 So is there anything further from either party
 6 with respect to administrative items?
 7 MR. SARAN: No, Your Honor, not from
 8 Plaintiffs.
 9 THE COURT: Okay. Thank you.
 10 All right. So, Mr. Beckrich? I understand
 11 you're waiting for some important news here any minute
 12 now?
 13 MR. BECKRICH: I am, I am.
 14 THE COURT: Feel free to interrupt if you need
 15 to. I understand that's an important moment in your
 16 life.
 17 MR. BECKRICH: Yes, sir. Hopefully, nothing in
 18 the next couple of hours.
 19 THE COURT: Okay.
 20 MR. BECKRICH: Good afternoon, Your Honor. May
 21 it please the Court. The Court should dismiss the
 22 complaints in both Bassen and Botello for either lack of
 23 jurisdiction or for failure to state a claim. Per Your
 24 Honor's instructions, I'll start with the Bassen case and
 25 which all of those arguments will pretty much apply to

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1 Botello, and then when we get to Botello, I'll address
 2 our remaining arguments that are particular to that case.
 3 THE COURT: Okay.
 4 MR. BECKRICH: Turning first to Bassen which
 5 involves Plaintiffs who served either on active duty or
 6 in the Reserves in the Army, Air Force, and Marine Corps,
 7 Plaintiffs first argue that they are entitled to backpay
 8 under Section 525 of the 2023 NDAA. There are two
 9 problems with Plaintiffs NDAA claims.
 10 First, the NDAA does not mandate payment of
 11 money and, thus, this Court lacks jurisdiction over the
 12 claim. Second, the NDAA certainly does not provide for
 13 any retroactive relief and Plaintiffs thus fail to state
 14 a claim for violation of the law.
 15 On the first point, it's a bedrock principle
 16 that this Court only has jurisdiction under the Tucker
 17 Act if a Plaintiff can point to a money-mandating source
 18 of law. This inquiry requires the Court to look at the
 19 plain language of the statute at issue and determine if
 20 it can fairly be interpreted as mandating compensation by
 21 the Government.
 22 Section 525 makes no reference to payment of
 23 money by the Federal Government and, in fact, doesn't
 24 mention any rights of servicemembers, much less the right
 25 to compensation. Instead, the section simply directs the

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1 Secretary of Defense to rescind the mandate and provides
 2 no further instructions.
 3 THE COURT: Can I ask one question here?
 4 MR. BECKRICH: Absolutely.
 5 THE COURT: So the first cause of action in the
 6 complaint, Paragraphs 171, it looks like, through 194, in
 7 one of the paragraphs there, the Plaintiffs argue to your
 8 point that the 2023 NDAA rescission is money-mandating,
 9 but then further down it argues that the NDAA can be
 10 fairly interpreted as money-mandating when read in kind
 11 of conjunction with the Military Pay Act.
 12 How do you -- how should I view the first cause
 13 of action? Is it a Military Pay Act claim for wrongful
 14 separation on the grounds that the rescission made the
 15 mandate unlawful, in essence? So it's really, for
 16 jurisdictional purposes, the Military Pay Act that's
 17 providing the money-mandating source?
 18 MR. BECKRICH: So if Your Honor interpreted the
 19 complaint that way, then we would agree that the Military
 20 Pay Act would provide a money-mandating source and
 21 jurisdiction wouldn't be the issue. Under Count 2, they
 22 also allege a violation of the NDAA and explicitly
 23 reference the Military Pay Act there --
 24 THE COURT: Is it form over substance? Are you
 25 just looking to get rid of Count 1 or Cause of Action

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1 Number 1? I mean, Count 2 talks to the 1107a --
 2 MR. BECKRICH: It talks to the --
 3 THE COURT: -- as kind of a separate
 4 argument --
 5 MR. BECKRICH: Sure.
 6 THE COURT: -- in conjunction with the NDAA.
 7 MR. BECKRICH: It talks to both. I don't think
 8 it's quite form over substance. If they're not alleging
 9 that the NDAA is money-mandating, then obviously we don't
 10 have a problem with that. But this is especially
 11 relevant in Botello where we don't think any of the
 12 Plaintiffs in Botello can state a claim under the
 13 Military Pay Act. And so if the -- if it's the Military
 14 Pay Act that is their source of money-mandating law, we
 15 think that defeats their entire case.
 16 So we don't think it's form over substance. We
 17 think we need to know is this -- are you saying that the
 18 NDAA itself is money-mandating or, like you said, the
 19 Military Pay Act is money-mandating --
 20 THE COURT: Yeah.
 21 MR. BECKRICH: -- and we're alleging a
 22 violation due to the NDAA.
 23 THE COURT: Okay. So if we all agreed that the
 24 Military Pay Act were -- was the source of the money-
 25 mandating -- the source of jurisdiction and then we got

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1 to the 12(b)(6) as to whether or not the Plaintiffs kind
 2 of can state a claim for relief under the Military Pay
 3 Act, that's --
 4 MR. BECKRICH: Mm-hmm.
 5 THE COURT: -- that's kind of where you're
 6 headed, in essence.
 7 MR. BECKRICH: That's where I'm headed, yes.
 8 THE COURT: Okay.
 9 MR. BECKRICH: Yes, Your Honor. Just at the
 10 outset, we want to make clear that to the extent that
 11 they are saying that they have a claim separate from the
 12 Military Pay Act, under the NDAA, we don't think there's
 13 any support in the NDAA for that conclusion.
 14 THE COURT: Okay.
 15 MR. BECKRICH: I'm happy to move on to sort of
 16 the 12(b)(6) aspect --
 17 THE COURT: Yeah, I mean, absolutely. I was
 18 planning on going, you know, count-for-count here --
 19 MR. BECKRICH: Mm-hmm.
 20 THE COURT: -- but I'm happy -- you know, I
 21 think I understand them enough generally --
 22 MR. BECKRICH: Sure.
 23 THE COURT: -- that wherever you kind of go
 24 with your argument, I can ask questions as you go.
 25 MR. BECKRICH: Sure, sure. So assuming that

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1 the Court has jurisdiction based on a violation of the
 2 Military Pay Act, in conjunction with the NDAA,
 3 Plaintiffs fail to state a claim for violation of the
 4 NDAA -- or of Section 525. As I mentioned, all that
 5 Section 525 requires is that the Secretary of Defense
 6 rescind the vaccination requirement. And the Secretary
 7 did that on January 10th, 2023. So all of the
 8 requirements under Section 525 have been complied with.
 9 On this point, the Plaintiffs argue that the
 10 Secretary did not actually rescind the requirement in
 11 accordance with Congress' instruction because what
 12 Congress intended was that the requirement be rescinded
 13 retroactively, meaning that the Secretary should have
 14 created the legal fiction that the vaccination
 15 requirement never existed.
 16 I think there are two problems with that
 17 argument. First is that there's a strong presumption
 18 against retroactivity in the law and that presumption is
 19 only overcome with clear congressional intent. The
 20 Federal Circuit says it will construe a statute to avoid
 21 retroactivity unless there is clear evidence that
 22 Congress intended retroactivity. The Supreme Court says
 23 that "the principle that legislation applies
 24 prospectively only is deeply rooted in this country's
 25 jurisprudence and is only overcome if Congress

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1 unambiguously instructs retroactivity."
 2 And so that brings me to the second problem,
 3 which is that Section 525 evidences no intent to provide
 4 retroactive relief. Now, this is where Plaintiffs argue
 5 about the meaning of the word "rescind," and they argue
 6 that that must signal that Congress wanted the Secretary
 7 to rescind the vaccination requirement retroactively.
 8 But that is simply not supported by the definition of the
 9 word "rescind" or really the language of the law itself.
 10 According to Black's Law Dictionary, to rescind
 11 legislation, one of the definitions is to repeal it. And
 12 I think that's particularly notable because Plaintiffs
 13 argue that Congress would have used the word "repeal" if
 14 they wanted the rescission or repealing to only have
 15 prospective effect. But Black's Law Dictionary also
 16 cites "rescind" as a definition for the word "repeal."
 17 In other words, there's no distinction on the sort of
 18 retroactive effect between those two words and the
 19 argument should be rejected.
 20 What Black's Law Dictionary also states is that
 21 the word "rescission" can carry different meanings in
 22 different contexts and that, for example, in the context
 23 of a contract, it might mean putting the parties back in
 24 their precontractual position, but that's not the context
 25 that we are operating in here.

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1 We think it's clear that in the context of
 2 rescinding legislation, that Congress meant that the
 3 Secretary was to rescind the vaccination requirement
 4 moving forward; in other words, as of the date of
 5 rescission, servicemembers were no longer required to be
 6 vaccinated. But, at best, Plaintiffs could only argue
 7 that the word "rescind" is ambiguous and that would not
 8 be good enough to overcome the presumption against
 9 retroactivity.

10 The fact is is that Congress knows how to make
 11 a statute retroactive, but it chose not to here. And I
 12 think there's no better example than the way explained in
 13 our motion, unless Congress considered an amendment to
 14 Section 525 that would give the servicemembers the exact
 15 relief they're asking for here, and they voted to reject
 16 it.

17 Simply put, Plaintiffs cannot overcome the
 18 presumption against retroactivity and that forecloses
 19 their claims under the NDAA.

20 The next claim in Bassen is for a violation of
 21 the Military Pay Act based on an alleged violation of 10
 22 U.S.C. Section 1107a, which requires Presidential
 23 approval for the mandate of a vaccine approved only for
 24 emergency use. There are at least two fatal problems
 25 with this claim.

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1 First, Plaintiffs have not alleged sufficient
 2 facts to show that they have constitutional standing to
 3 assert the claim. To establish standing, Plaintiffs must
 4 allege facts showing that the injury they allege has a
 5 causal connection to the conduct complained of. So here
 6 Plaintiffs allege that they were either improperly
 7 discharged or otherwise denied pay. That's the injury.
 8 The conduct complained of is a violation of Section
 9 1107a. But they don't allege any facts to support the
 10 causal relationship element. In fact, Plaintiffs allege
 11 that they have a stated objection to the vaccination
 12 requirement. That means that regardless of what vaccines
 13 DoD had available and when, Plaintiffs make no allegation
 14 that they would have received the vaccines.

15 To be sure, if Plaintiffs allege they would
 16 have received a fully licensed vaccine if it was
 17 available, then I think this is a different inquiry and I
 18 wouldn't be making this argument right now. But they
 19 don't make that allegation and I'm not sure they really
 20 can make that allegation, again, given that they have a
 21 stated objection to the vaccine.

22 THE COURT: Can't they make them both, I mean,
 23 at the pleadings stage? Are you suggesting they can't
 24 make the 1107a claim, that it was kind of an
 25 impossibility for them to get an FDA-approved vaccine

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1 because there weren't any available at the time when it
 2 was mandated and, at the same time, claim that, you know,
 3 they had a religious exemption right?

4 MR. BECKRICH: So I'm not sure how they -- I'm
 5 not saying, I guess, that they can't. I'm certainly
 6 saying that they don't make both because they simply
 7 don't say that if there was a fully licensed vaccine
 8 available, that this impossibility problem didn't exist,
 9 that they would have been vaccinated. And I think that's
 10 the crucial element that we're focusing on here is that
 11 there is no causal relationship between 1107a and --

12 THE COURT: You're suggesting that they have to
 13 proactively state that had there been a vaccine that was
 14 FDA-approved, that they would have taken it?

15 MR. BECKRICH: Yeah, I think if they stated --

16 THE COURT: They can't just say that they were
 17 wrongfully separated because they were forced to comply
 18 with a mandate when it was an impossibility to comply?

19 MR. BECKRICH: Well, Your Honor, I would say
 20 the reason it was an impossibility to comply is because
 21 they -- again, there's just no allegation that they would
 22 have complied even if --

23 THE COURT: Do we even get there, whether they
 24 would or would not have, if it were an impossibility?
 25 Why do they need to allege that they would have if it

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1 were an impossibility for them to comply in the first
 2 place?

3 MR. BECKRICH: Because I think that's how they
 4 show that Section 1107a relates to the harm that they're
 5 alleging that they suffered.

6 THE COURT: Okay, okay.

7 MR. BECKRICH: The second problem with
 8 Plaintiffs' claims under Section 1107a is that even if
 9 they have standing, they don't allege facts to show that
 10 this section was violated. FDA approved the COVID
 11 vaccine on August 23rd, 2021, before the Secretary of
 12 Defense implemented the vaccine requirement. That
 13 requirement, on its face, only required members to
 14 receive vaccinations that receive full licensure from the
 15 FDA. So nothing about the vaccination requirement
 16 implicated Section 1107a as it did not require members to
 17 receive an emergency use vaccine, which is what the
 18 statute protects against.

19 Not only did the mandate not require members to
 20 receive emergency use vaccines, but Plaintiffs' own
 21 allegations state that DoD no longer violated Section
 22 1107a as early as June 2022. I think that's particularly
 23 relevant because six of the ten Plaintiffs allege that
 24 they had adverse actions taken against them in or after
 25 June 2022. And, again, it kind of goes back to my

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1 earlier point that if there was no longer a problem then,
 2 then they would have been able to have been violated --
 3 or, no, excuse me, vaccinated -- and would have
 4 alleviated that adverse action.
 5 THE COURT: What was the June date? Was it the
 6 date where you're stating that you claim Plaintiffs said
 7 that what? There was a vaccine available as of that
 8 date?
 9 MR. BECKRICH: It --
 10 THE COURT: So obviously, that's when the 1107a
 11 problem went away?
 12 MR. BECKRICH: Yeah, in Paragraph 130,
 13 Plaintiffs state that "Defendants were mandating EUA
 14 vaccines in violation of 10 U.S.C. Section 1107a, at
 15 least until June 2022 for COMIRNATY® and until September
 16 2022 for SPIKEVAX®."
 17 THE COURT: Okay.
 18 MR. BECKRICH: And so if by June 2022, there
 19 was not even an alleged violation anymore, again, I'm not
 20 sure how those six Plaintiffs, specifically, could
 21 possibly have a claim when, you know, by their own
 22 admission --
 23 THE COURT: Are you alleging that none of them
 24 have a claim?
 25 MR. BECKRICH: I am, I am, because the vaccine

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1 requirement doesn't require any Plaintiffs to receive
 2 a --
 3 THE COURT: With respect to the impossibility
 4 argument, if you had a Plaintiff in this particular case
 5 that actually was discharged before the vaccine --
 6 MR. BECKRICH: Sure.
 7 THE COURT: -- became available --
 8 MR. BECKRICH: Sure.
 9 THE COURT: -- would you concede that that
 10 Plaintiff would have a valid argument that we could take
 11 to the merits?
 12 MR. BECKRICH: I think they might have a valid
 13 argument, Your Honor, but I'm not sure that it's under
 14 Section 1107a, because, again, what Section 1107a says is
 15 that an emergency use vaccine can't be mandated without
 16 Presidential approval, and it wasn't. And that's just
 17 factually true.
 18 Now, maybe their argument is that we were
 19 wrongfully discharged --
 20 THE COURT: For violation of a mandate --
 21 MR. BECKRICH: -- for a violation of --
 22 THE COURT: -- that required compliance with an
 23 FDA-approved vaccine and there wasn't one available, so
 24 how --
 25 MR. BECKRICH: Sure.

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1 THE COURT: -- could we have been discharged
 2 for that?
 3 MR. BECKRICH: Maybe that's the claim, but I'm
 4 not sure that it's the claim under Section 1107a because,
 5 again, the mandate itself, it complied with -- there's
 6 nothing about the mandate that violated the section.
 7 THE COURT: That requires use, yeah, without --
 8 yeah, exactly, in violation of 1107a. It doesn't say
 9 that we're going to mandate something that violates
 10 1107a.
 11 MR. BECKRICH: Exactly.
 12 THE COURT: Yeah.
 13 MR. BECKRICH: Exactly.
 14 THE COURT: Okay.
 15 MR. BECKRICH: Unless Your Honor has further
 16 questions, I'll move on to the next claim.
 17 THE COURT: That's fine. Please. Thank you.
 18 MR. BECKRICH: Next, the Bassen Plaintiffs
 19 allege they are entitled to relief under the Military Pay
 20 Act because their discharges violated the Religious
 21 Freedom Restoration Act. However, seven of the ten
 22 Plaintiffs fail to allege sufficient facts to bring a
 23 claim for a violation of RFRA. In order to allege a RFRA
 24 violation, Plaintiffs must allege that the challenged
 25 policy substantially burdened a sincerely held religious

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1 belief. For seven of the ten Plaintiffs, the complaint
 2 contains no allegations that they even submitted a
 3 religious accommodation request to their respective
 4 service or why submitting such a request would have
 5 burdened their religious beliefs.
 6 For those seven Plaintiffs, there are simply no
 7 facts in the complaint alleged -- that allege any
 8 sincerely held religious belief or how that belief was
 9 burdened, and so they can't state a claim.
 10 And to be sure, a RFRA claim is inherently
 11 fact-based, but the fact that the complaint is void of
 12 facts for those seven Plaintiffs is why those claims must
 13 be dismissed for failure to state a claim.
 14 THE COURT: So you're suggesting for each
 15 Plaintiff, they would need to allege the elements you
 16 just discussed from the Religious Freedom Restoration
 17 Act?
 18 MR. BECKRICH: I certainly -- yeah, I certainly
 19 think that each Plaintiff would have to bring their own
 20 claim. I mean --
 21 THE COURT: We're getting into class concept
 22 where there's like -- you know, obviously, it's a class
 23 action complaint. If there is a representative Plaintiff
 24 that fits within the third cause of action, but you have
 25 other Plaintiffs who only fit within the first cause of

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1 action, are you suggesting that that's not acceptable?
 2 MR. BECKRICH: I'm suggesting it's not -- that
 3 the other Plaintiffs don't have a claim.
 4 THE COURT: Okay. The ones who don't -- the
 5 ones who don't set forth the requisite pleading elements
 6 under this cause of action don't have a claim under this
 7 cause of action?
 8 MR. BECKRICH: Right.
 9 THE COURT: So would the Court dismiss them
 10 from the third cause of action is what you're suggesting?
 11 MR. BECKRICH: That is what I'm suggesting,
 12 Your Honor.
 13 THE COURT: Okay.
 14 MR. BECKRICH: I mean, not to get ahead of
 15 ourselves, but, for example, in Botello, we argue that
 16 Mr. Botello can't bring a RFRA claim under Section 1500,
 17 and we don't think that argument disposes of all RFRA
 18 claims for all of the Plaintiffs in that case --
 19 THE COURT: Just Mr. Botello's RFRA claim.
 20 MR. BECKRICH: Exactly.
 21 THE COURT: But his claim might survive in
 22 other potentially --
 23 MR. BECKRICH: Sure.
 24 THE COURT: Yeah, under that way of viewing it.
 25 MR. BECKRICH: Sure.

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1 THE COURT: Okay.
 2 MR. BECKRICH: But for the remaining three
 3 Plaintiffs who did submit a religious accommodation
 4 request, they are simply not entitled to relief under the
 5 Military Pay Act. For those three Plaintiffs -- for two
 6 of them, Mr. Hall and Mr. Chisholm, they served in the
 7 Air Force Reserves and they claim that they're entitled
 8 to backpay as Reservists because they were participating
 9 in full-time active duties when the Government took the
 10 allegedly wrongful action.
 11 But the Federal Circuit has held that the
 12 decision to remove a Reserve member from active duty is
 13 largely beyond judicial review and, in fact, is only
 14 subject to judicial review if the Secretary concerned
 15 provides a reason for that removal. That's the Sargisson
 16 and Groves cases.
 17 When the Secretary provides a reason for
 18 removal, the only judicial review is whether the
 19 Secretary complied with the stated basis for removal.
 20 Here, the Plaintiffs allege that the stated basis for
 21 removal was each of their unvaccinated status, but the
 22 Plaintiffs don't allege that they were, in fact,
 23 vaccinated, and so the Secretary complied with the
 24 instructions that served as the basis for their removal
 25 and, thus, they failed to state a claim under the

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1 Military Pay Act.
 2 In other words, they were paid for the entire
 3 time they were on active duty. There's no allegation
 4 otherwise. They cannot state a claim for their removal
 5 from active duty because the Secretary complied with the
 6 instructions under which that basis was -- the basis for
 7 their removal was made, and I don't think anybody argues
 8 that they don't get money for unperformed duties.
 9 THE COURT: Are you pretty much stating that
 10 they don't fit within the four categories under the
 11 Military Pay Act?
 12 MR. BECKRICH: That's right, Your Honor.
 13 THE COURT: Okay.
 14 MR. BECKRICH: And for the third Plaintiff who
 15 submitted a religious accommodation request, Mr.
 16 Rodriguez, he can't state a claim in the Military Pay Act
 17 because he voluntarily separated from the Air Force.
 18 When a member voluntarily separates from service, the
 19 Military Pay Act does not impose a burden on the
 20 Government to continue paying that member.
 21 Here, Mr. Rodriguez was offered the protections
 22 of a preliminary injunction in a different litigation --
 23 the Doster case -- that would have prevented him from
 24 being separated on the basis of his vaccination status.
 25 He responded to that protection by stating that he was

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1 willing to separate from the military. He offers no
 2 facts to show why that decision was not voluntary. When
 3 this Court considers whether a Plaintiff can overcome the
 4 presumption of voluntary -- that a resignation was
 5 voluntary, what the Court looks at is whether a member
 6 had any other alternative but to accept the terms of the
 7 Government. Here, Mr. Rodriguez fails to show how he
 8 didn't have another alternative. He could have remained
 9 in service and remain unvaccinated under the protection
 10 of Doster. He chose not to do so and he cannot now
 11 recover under the Military Pay Act for that voluntary
 12 decision.
 13 THE COURT: Okay.
 14 MR. BECKRICH: Next, the Plaintiffs allege that
 15 they are entitled to relief based on a theory of a legal
 16 exaction. The complaint only contains one possible
 17 allegation regarding an illegal exaction. That's Mr.
 18 Bassen's allegation that he seeks a cessation of the
 19 Government's signing bonus recoupment against him. I
 20 think there's at least two problems with that claim.
 21 First, it's not clear from the allegation
 22 whether any money has actually been taken from him. It
 23 sounds like he's asking the Court to stop the Government
 24 from trying to take money from him, but until any money
 25 is actually taken, there's no legal exaction claim.

1 But second, probably more importantly, even if
 2 money had been taken from him, he doesn't allege why he
 3 remained eligible for the signing bonus. Under 37 U.S.C.
 4 Section 303a(e), recoupment of a signing bonus is proper
 5 if a member does not satisfy eligibility requirements.
 6 Mr. Bassen offers no facts as to his eligibility for the
 7 signing bonus and so he can't state a claim that any
 8 exaction, to the extent one took place, was illegal.
 9 THE COURT: Okay.
 10 MR. BECKRICH: Then the final claim in
 11 Plaintiffs' complaint is for a violation of 10 U.S.C.
 12 Section 1552. We understand from Plaintiffs' response
 13 that they're not actually alleging a violation of Section
 14 1552, but rather are seeking relief under that section to
 15 the extent that the Court grants relief on any of the
 16 other counts, which they're permitted to do. But based
 17 on that explanation, we think that to the extent that
 18 there's a separate count in the complaint for a violation
 19 of Section 1552, that should be dismissed.
 20 THE COURT: Okay. Thank you for that. Now,
 21 how would you suggest kind of if the Government had their
 22 way here, you're handling Plaintiffs on a plaintiff-by-
 23 plaintiff basis or are you viewing these on a count-by-
 24 count basis? I mean, it sounds like you're trying to
 25 attack some jurisdictional elements of the different

1 causes of action --
 2 MR. BECKRICH: Mm-hmm.
 3 THE COURT: -- which could be handled as a
 4 cause of action, but then with respect to each individual
 5 Plaintiff, your 12(b)(6) arguments go to their ability to
 6 state a claim based upon the facts set forth in the
 7 complaint.
 8 MR. BECKRICH: I think -- well, for the legal
 9 exaction claim, I mean, I think we have to look
 10 plaintiff-by-plaintiff because there's only one Plaintiff
 11 that has any sort of allegations to support that claim.
 12 For the RFRA claims, as we kind of talked
 13 about, I also think that is sort of a plaintiff-by-
 14 plaintiff analysis. I mean, the fact is if this case
 15 proceeds to the merits, what we'll end up doing is filing
 16 administrative records for each of these Plaintiffs and
 17 so each Plaintiff is going to have to prove their claim.
 18 THE COURT: Has the Government conceded -- I
 19 mean, there are -- I mean, the Military Pay Act provides
 20 jurisdiction for a wrongful separation claim and it's
 21 conceivable, while I can't put my finger on it at this
 22 exact moment, that some of these Plaintiffs fall within a
 23 wrongful pay -- a wrongful discharge claim under the MPA.
 24 MR. BECKRICH: Mm-hmm.
 25 THE COURT: Whether it's RFRA or even some of

1 these other arguments, not getting into the merits of
 2 those arguments, if they fall within the four categories
 3 under the Military Pay Act --
 4 MR. BECKRICH: Right.
 5 THE COURT: -- and they allege that they were
 6 wrongfully separated for whatever reason, would the
 7 Government concede that, you know, as long as it passes
 8 the 12(b)(6) standards that it moves on?
 9 MR. BECKRICH: Yeah. I mean --
 10 THE COURT: The claim? Yeah.
 11 MR. BECKRICH: -- I think that's right.
 12 THE COURT: Okay.
 13 MR. BECKRICH: I mean, for the reasons I have
 14 stated, we don't think that, for example, Section 1107a
 15 can pass the 12(b)(6) standard because the mandate didn't
 16 require members to receive an emergency use vaccine and
 17 for -- under RFRA, for seven of the Plaintiffs, we don't
 18 think that they can survive a 12(b)(6) standard because
 19 there's no facts alleged regarding a sincerely held
 20 religious belief.
 21 But to the extent that Your Honor determined
 22 that the pleadings did satisfy 12(b)(6), I agree with the
 23 premise in your question --
 24 THE COURT: Okay.
 25 MR. BECKRICH: -- that they could move on.

1 THE COURT: Okay. I appreciate it.
 2 MR. BECKRICH: Thank you, Your Honor. If you
 3 have no further questions on Bassen, that's --
 4 THE COURT: No, I think we can -- Bassen is
 5 good. We'll hear from Plaintiff on Bassen. Thanks a
 6 lot.
 7 (Pause in the proceedings.)
 8 MR. SARAN: Your Honor, may it please the
 9 Court. My name is Dale Saran. On behalf of my co-
 10 counsel, Brandon Johnson, Andy Meyer, Barry Steinberg,
 11 and the Plaintiffs, we're grateful for the opportunity to
 12 discuss our case with you today.
 13 Your Honor, you've heard from the Government
 14 regarding this and rather than kind of pick at what
 15 they've done, I'll save that, kind of, to go through some
 16 of these and maybe we'll cover it as we go along. But,
 17 Your Honor, it was an unlawful order that was impossible
 18 to comply with and it was carried into execution
 19 illegally. This entire mandate from top to bottom, stem
 20 to stern, is rife with the illegal actions by government
 21 actors against the Plaintiffs.
 22 And at the highest level, we want to bring to
 23 the Court's attention, this case involves a very real
 24 separation of powers conflict between Congress' power
 25 under Article I, Section 8, to make rules for the land

1 and naval forces, and the Executive prerogatives as
 2 Commander-in-Chief of the Armed Forces.
 3 Notwithstanding how the Plaintiffs have been
 4 characterized and their beliefs have been characterized,
 5 we want to be clear that we're not challenging the
 6 President's authority as Commander-in-Chief to immunize
 7 servicemembers generally. However, looming large in the
 8 case is the legality of the order to take these shots.
 9 Your Honor, as we referenced in our complaint and the
 10 motion to dismiss response, this isn't the first rodeo
 11 for the Government with these issues with the DoD with
 12 experimenting on servicemembers. And, in fact, 10 U.S.C.
 13 1107's and 1107a's origins have pointed directly to prior
 14 litigation over the same issue of injecting members with
 15 products that the Government stands up and loudly
 16 proclaims are licensed when, in fact, they're not.
 17 And that was the Doe v. Rumsfeld litigation,
 18 which we've cited, and that directly bore the fruit of
 19 1107a, which is to say that Congress cabined the Chief
 20 Executive's authorities as Commander-in-Chief that if he
 21 wants to use an EUA product, then he has to accept the
 22 political liability of signing his name, making the
 23 appropriate written finding under 1107a. There's no
 24 question the Government admits that did not happen. That
 25 was not done.

1 Now, this is where we take issue with the
 2 Government's characterization of the facts. We just
 3 think it's wrongful. It's just wrong. The Government
 4 has said that the mandate, on its face, was not unlawful.
 5 The mandate from the Secretary of Defense on August 24th
 6 came on the heels of the FDA's approval of COMIRNATY® on
 7 August 23rd. But the Government has not rebutted --
 8 offers no evidence to contradict the well-pleaded facts,
 9 which is the Plaintiffs have shown you that on August
 10 23rd, the FDA did, in fact, license COMIRNATY®, and they
 11 pulled it from the market the exact same day. And so it
 12 would have been illegal for anyone to have COMIRNATY® in
 13 commerce in the U.S. market post August 23rd.
 14 If the Secretary of Defense comes in on August
 15 24th, it's our belief, Your Honor, that knowledge has to
 16 be imputed to him. He can read. He's got an army of
 17 lawyers. And so given how closely that Operation Warp
 18 Speed worked with the FDA, there's no doubt that he knew
 19 there was no COMIRNATY®. It was illegal to have
 20 COMIRNATY® in commerce.
 21 THE COURT: Mr. Saran, let me just kind of back
 22 up. You know, obviously, I want to hear everything you
 23 have to say. For the purposes of the instant motion, my
 24 primary objective is to weigh the sufficiency of the
 25 pleading.

1 MR. SARAN: For sure.
 2 THE COURT: Not necessarily the arguments on
 3 the merits as to whether or not the mandate was unlawful,
 4 whether or not the rescission retroactively applied.
 5 It's whether or not the complaint is sufficient to
 6 survive a motion to dismiss. And there's obviously two
 7 aspects of that, a jurisdictional grounds and then, you
 8 know, 12(b)(6), failure to state a claim.
 9 Now, on jurisdictional grounds, I mean, I'm
 10 trying to understand the basis of the claim. There's
 11 five or six counts, depending upon whether you're looking
 12 at Bassen or Botello.
 13 MR. SARAN: Yes, Your Honor.
 14 THE COURT: And the way I view them at this
 15 point is that it's a Military Pay Act wrongful separation
 16 claim at the highest level. But then the complaint kind
 17 of tries to attach money-mandating aspects to the NDAA
 18 Section 525, which merely says that the mandate is
 19 rescinded or shall be rescinded within 30 days, or
 20 attaches money-mandating aspects to the Militia Clauses
 21 of the Constitution. At the end of the day, it's -- you
 22 know, without having concluded on those two points that
 23 are made in the complaint, I'm just trying to understand
 24 the jurisdictional grounds for these complaints. Right
 25 now, we're talking Bassen.

1 MR. SARAN: For --
 2 THE COURT: And then --
 3 MR. BECKRICH: Oh, sorry.
 4 THE COURT: -- for the Plaintiffs identified,
 5 whether those Plaintiffs kind of fit within the
 6 allegations being made, whether their facts are
 7 sufficient to pass 12(b)(6).
 8 MR. SARAN: Your Honor, I'll do it this way,
 9 perhaps it will make it easier. The Bassen Plaintiffs
 10 are all -- with one exception, are all straight down-the-
 11 middle-of-the-fairway Military Pay Act cases. Just as
 12 you noted in your questions to counsel, aren't we really
 13 talking about servicemembers who got kicked out
 14 illicitly? And the answer is yes.
 15 And so -- but it is -- our purpose in
 16 discussing the nature of the illegality is that if we are
 17 correct, that the DoD was well aware there were no
 18 vaccines available -- there was no licensed vaccine
 19 available, then the order from the beginning, ab initio,
 20 was unlawful. And now everything that happens to them is
 21 -- flows from that.
 22 THE COURT: That still goes to the merits of
 23 whether or not it was a wrongful separation. The basis
 24 of the separation was the noncompliance of the vaccine
 25 mandate and you allege the vaccine mandate was unlawful

1 and you had an active duty servicemember who was
 2 discharged on those grounds who was now seeking backpay
 3 under the Military Pay Act for wrongful discharge, you
 4 know, that's -- compartmentalized, it probably survives
 5 12(b)(1) and 12(b)(6).
 6 MR. SARAN: That is the complaint, Your Honor.
 7 That is, for each of the -- so Sergeant Bassen was on
 8 active duty; PFC Dailey was on active duty, got kicked
 9 off; Special Merjil, kicked off active duty; Tech
 10 Sergeant Rodriguez, kicked off of active duty; PFC
 11 Springer, kicked off of active duty.
 12 THE COURT: Is that all in the complaint?
 13 MR. SARAN: Yes, Your Honor.
 14 THE COURT: Okay. So, I mean, the Government
 15 points out that there's four Plaintiffs in Bassen who are
 16 Reservists and they are saying that four of those
 17 Plaintiffs don't fit within the four buckets under the
 18 Military Pay Act, whether they were active duty or
 19 whether they were Reservists who actually performed full-
 20 time duties -- you're familiar with the statute.
 21 MR. SARAN: We're talking about --
 22 THE COURT: So within the complaint, it needs
 23 to set forth specific facts for each Plaintiff to fall
 24 within those criteria to be able to make a claim under
 25 the Military Pay Act. If there's not sufficient facts in

1 the complaint, then, you know, I have to, you know,
 2 dismiss that Plaintiff's claim, correct?
 3 MR. SARAN: Yes, Your Honor. But there's -- if
 4 you look at paragraph -- it's our view in the amended --
 5 in the first amended complaint, between Paragraphs 16 and
 6 26, you have for each of the Plaintiffs -- Sergeant
 7 Bassen was involuntarily discharged for being
 8 unvaccinated prior to the expiration of his enlistment.
 9 And so that's a fairly clear statement that he was
 10 involuntarily discharged because he did not receive
 11 the -- he did not comply with the mandate. It's a fairly
 12 straightforward concise statement.
 13 Additionally, Your Honor, again, using -- it
 14 seems to me that we're talking around it. What we're
 15 talking about is the Palmer framework for viewing these
 16 claims, which is to say -- which we think is an excellent
 17 explication of how this is supposed to work. But
 18 Sergeant Bassen was being paid pursuant to 37 U.S.C.
 19 204(a)(1). He is a right-down-the-middle Military Pay
 20 Act person.
 21 But the same is true of Lieutenant Colonel
 22 Chisholm, the Reservist. We believe, Your Honor, Palmer
 23 is very clear that people who are serving on full-time
 24 duty -- and whether we're talking about Palmer or
 25 Radziewicz, this Court and the Federal Circuit has said

1 repeatedly that a Reservist -- and Palmer does as well --
 2 that a Reservist on full-time active duty states a claim
 3 if they are illicitly removed, if they are on active duty
 4 when the unlawful act happens.
 5 And so for Lieutenant Colonel Chisholm, who is
 6 a Reservist, who was on full-time active duty orders --
 7 in fact, Lieutenant Colonel Chisholm's declaration that's
 8 in the motion to dismiss response includes all that's
 9 needed for the Court to understand what happened to him.
 10 He was full-time active duty orders and, in fact, when he
 11 was removed, he stayed right in the same job as a
 12 civilian, and then when the mandate was rescinded, they
 13 turned around and made him a Lieutenant Colonel again.
 14 And so he was discharged, but he was a 204(a)(1). He was
 15 straight -- he was on active duty orders full-time.
 16 THE COURT: How about Master Sergeant Davis?
 17 MR. SARAN: Master Sergeant Davis -- and this
 18 is where we also would like to correct the record for Mr.
 19 Beckrich -- is that Master Sergeant Davis also states an
 20 exaction claim and he states a 206(a) claim because he
 21 alleges that he was not paid for drills performed, and
 22 that's -- under the Military Pay Act, 206 provides a
 23 money mandate where a Reservist has performed drills and
 24 not received the pay for those drills.
 25 And so --

1 THE COURT: Okay. I mean, so I am going to be
 2 looking, and I have looked, but in the course of putting
 3 together the opinion on this motion, the pending motion,
 4 I'm going to look at each individual Plaintiff to assess
 5 whether they've adequately stated a claim. And so we're
 6 all aware of what's required to state a claim under the
 7 Military Pay Act, and I'm going to look to, say, at the
 8 most basic level, do they kind of meet that plausibility
 9 standard.
 10 So, you know, I just want to -- we're on the
 11 same page there. I mean, that's kind of what I'm going
 12 to be looking at.
 13 MR. SARAN: Yes, Your Honor.
 14 THE COURT: Okay.
 15 MR. SARAN: And we think -- he's a Reservist.
 16 He states that in August of '22, after being told you
 17 can't come here, you can't drill, you're unvaccinated,
 18 the command still said -- he happens to be the IT guy --
 19 whoops, we need you to come in here and do the drills.
 20 He did the drills and did not get paid for them.
 21 THE COURT: And I will say a lot of the facts
 22 that you're explaining right now are not in this
 23 complaint.
 24 MR. SARAN: They were in the declarations in
 25 the motion to dismiss response.

1 THE COURT: Again, so that's where -- you know,
 2 if it's in a response to a motion to dismiss, I'm looking
 3 at the sufficiency of the complaint.
 4 MR. SARAN: Understood, Your Honor.
 5 THE COURT: So, you know, at the end of the
 6 day, you know, this is the first amended complaint. If
 7 there are aspects that cure some of these deficiencies,
 8 that might be something worth considering. But, you
 9 know, given the Government's filed a motion to dismiss, I
 10 think there are some elements there that potentially
 11 warrant dismissal without getting into it point-by-point
 12 because there's ten individual Plaintiffs and there's
 13 multiple different claims --
 14 MR. SARAN: Sure.
 15 THE COURT: -- and I have to go through and
 16 make sure that each one kind of meets the pleadings
 17 standard.
 18 MR. SARAN: Yes, sir, but we would just point
 19 the Court to Paragraph 19. He actually performed drills
 20 -- drill periods for which he was not paid.
 21 THE COURT: Okay.
 22 MR. SARAN: That seems to me to at least be
 23 a -- put the Government on notice that just by what they
 24 said, that there's no allegation of that, that seems to
 25 me a pretty clear allegation that he performed drills and

1 was not paid for it.
 2 THE COURT: Okay.
 3 MR. SARAN: So, Your Honor, with respect to
 4 Staff Sergeant Endress, the same applies. He was being
 5 paid under 204(a)(1). Even though he was a Reservist, he
 6 was on full-time active duty operation support orders in
 7 Romania -- or Poland, excuse me -- in Poland.
 8 So it appears to us, Your Honor, that every
 9 single one of the Plaintiffs, with the exception of
 10 Master Sergeant Davis who falls under 206, everyone else
 11 is a straight 204(a) active duty pay case.
 12 THE COURT: Specialist Merjil, Paragraph 22?
 13 MR. SARAN: Yes, Your Honor. He was a
 14 specialist in the Army with two years of service --
 15 THE COURT: Oh, here we go. Yep.
 16 MR. SARAN: -- when he was involuntarily
 17 discharged for refusing one of the unlicensed EUA shots
 18 prior to the expiration of his enlistment contract on May
 19 22nd, 2025. So he was slated to be on active duty until
 20 2025 and he was given -- he was a five -- roughly on a
 21 five-year contract from 2020 to 2025, and he was cut
 22 short, involuntarily discharged.
 23 We'd also note, Your Honor, getting -- we don't
 24 want to get to the merits, but it's -- at the granular
 25 level in each of these cases, we'd note that there is a

1 problem because none of these Plaintiffs were given any
 2 of the process they would normally attend being
 3 discharged from the military -- and you can see that from
 4 both the declarations and the complaint itself -- which
 5 is no one got to talk to a lawyer, no one got any of the
 6 due process that they should under 635-200, the AR, the
 7 Army Regulation regarding separations, the DoD
 8 instruction regarding enlisted administrative
 9 separations. None of that was complied with.
 10 So even if the order were legal, even if it was
 11 possible to comply with, it was not. And, indeed, the
 12 Plaintiffs themselves tell you, I tried to ask for the
 13 licensed vaccine, it wasn't there. Tech Sergeant
 14 Rodriguez said that, I tried to get it, it wasn't there.
 15 And so -- but even if it were, they would still have
 16 claims under 204(a) because the Government, in its
 17 carrying out of the mandate, simply ignored all of the
 18 process that these members are entitled to in kicking
 19 them out. It was vaccinate uber allas and anybody who
 20 stood in the way of that was going to be steam-rolled.
 21 To wit, Sergeant Wynne was already in a Medical
 22 Board proceeding. That's supposed to have precedence
 23 over other processing. What did they -- he was just
 24 about to get a medical discharge for his back being
 25 busted up for while he was on active duty and what

1 happened? He had that pulled away -- the Medical Board
 2 pulled away and now he was processed for misconduct under
 3 the Army separation statute.
 4 So it's our belief, Your Honor, from top to
 5 bottom at every level, these are fundamentally illicit
 6 discharges and, therefore, there's a money mandate under
 7 the Military Pay Act. These are just straight Military
 8 Pay Act claims.
 9 THE COURT: And so the five causes of action,
 10 are these just these individuals will fit into one or
 11 more of these causes of action is your point?
 12 MR. SARAN: That is correct, Your Honor. They
 13 stand in for -- for example, two people have exactions,
 14 both Sergeant Wynne who had money recouped from him, they
 15 took his money --
 16 THE COURT: And is that set forth in the
 17 complaint --
 18 MR. SARAN: Yes, Your Honor.
 19 THE COURT: -- because that's one of the
 20 Government's arguments is that there's no allegation of
 21 money taken by the Government.
 22 MR. SARAN: Your Honor, I'll have to look
 23 for -- I don't know if his recoupment is, but in the
 24 complaint, Master Sergeant Davis certainly complains that
 25 he had money taken back from him, which is while he was

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1 prohibited from coming to drills and getting paid under
 2 206, he was still being charged for SGLI and then the
 3 money was extracted from him. So he got money taken
 4 out that -- for benefits that he couldn't access and had
 5 no --

6 THE COURT: So the plausibility standard for
 7 12(b)(6) is low, but there still must be something other
 8 than there was an illegal exaction because somebody took
 9 money from me. It's got to be a little bit more than
 10 that. It's got to be a little bit more specificity, you
 11 know. So if what you just described is in a declaration
 12 that was attached to your response to the motion to
 13 dismiss, I'm not going to pay it any attention as part of
 14 a ruling on the motion to dismiss, because I have to look
 15 at the complaint.

16 And so if the complaint doesn't contain illegal
 17 exactions -- it's kind of the same thing with each one of
 18 these causes of action. I'm not looking at the merits of
 19 the arguments at all and, frankly, I'm applying a pretty
 20 low standard when it comes to 12(b)(6) and I'm going to
 21 apply that low standard, but if it's an illegal exaction
 22 claim and there's no claim as to what amount of money was
 23 taken within the complaint, then, you know, that's
 24 relatively conclusory, that there's a violation of the --
 25 that there was an illegal exaction.

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1 So I think we're on the same page. I mean --
 2 MR. SARAN: Absolutely, Your Honor.
 3 THE COURT: Okay.
 4 MR. SARAN: Understood, understood. I think
 5 that's all we have on the exactions.

6 I would note, also, Your Honor -- and this is
 7 sort of a preview, but I believe there's something
 8 hanging out there that needs to at least be brought to
 9 the Court's attention, which is the Plaintiffs allege
 10 that they were not merely discharged, but that this was
 11 part of an illicit punishment of all of them. And it's
 12 our view that that's the lens through which all of this
 13 should be viewed. In other words, all the processes
 14 being ignored, all of these regulations being steam-
 15 rolled was because this was really about making an
 16 example out of those who stood up and said I'm not going
 17 to take these unlicensed products.

18 And that goes part and parcel as part of the
 19 RFRA claims here. There were -- not everyone -- and we
 20 would disagree -- again, we believe the Government has
 21 misstated. It's clear on the pleading from Sergeant
 22 Wynne, he didn't -- he never asked for a religious
 23 exemption. In fact, when he was given the order, he went
 24 right down and said, I'll take it, I'll take the licensed
 25 vaccine, and he went in and there was none. And he told

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1 his command that there is no licensed vaccine and then he
 2 was promptly given a GOMOR and canned from the military.

3 So we think that -- to the extent that the
 4 Government talks about this, well, they would have had to
 5 assert that they didn't -- they weren't going to take it,
 6 Your Honor asked some questions about that alternative
 7 world, why do we have to allege. We'd also like to
 8 clarify, the Plaintiffs' complaint says that there were
 9 no vaccines available until at least June of 2022. Your
 10 Honor, that's not a statement that, "and after that,
 11 there were." The Government's taken that and created a
 12 strawman and said, well, there were.

13 THE COURT: Well, some of these are fact
 14 questions --

15 MR. SARAN: Right.

16 THE COURT: -- which really the allegations in
 17 the complaint just need to get past 12(b)(6). There
 18 needs to be jurisdiction and we have to get past 12(b)(6)
 19 and then we can get into the facts.

20 MR. SARAN: Well, we're just saying we take
 21 issue with the Government's characterization of saying
 22 there were no vaccines that -- for certain, we can say
 23 there were none up to June 2022. The fact that we can't
 24 say whether there were or aren't, it's our view there
 25 weren't. There were not, period. But we can only say

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1 conclusively through June of 2022, there weren't, but
 2 that doesn't mean -- one cannot interpret that statement
 3 to mean that logically means that there were, suddenly
 4 they appeared in June, that that's what we're saying in
 5 our pleading. We're not saying that.

6 There never were. As we've already said, it
 7 was legally impossible. They couldn't be. We've already
 8 made that point to the Court. We're just saying we take
 9 issue with the complaint being characterized because we
 10 say we can only trace it for certain up to June of 2022.
 11 That's not the issue.

12 The real issue, Your Honor, is if they had
 13 licensed vaccines, let the Government produce them. Let
 14 them show that, hey, we had this on this date for these
 15 Plaintiffs. The way this has been worded is sort of a
 16 rhetorical question with a double negative. Well, the
 17 Plaintiffs haven't pleaded that they couldn't receive it
 18 out in town. Your Honor, that's not the standard. It's
 19 not the standard at all. We've pleaded that it wasn't
 20 there for very good reasons. It wasn't allowed to be
 21 there, and so they couldn't comply with it. It was
 22 impossible to follow the order and, yet, they were
 23 punished anyway.

24 THE COURT: Okay. Two questions.
 25 MR. SARAN: Yes, Your Honor.

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1 THE COURT: So we're kind of jumping amongst
 2 the claims, which is fine, because I'm familiar enough to
 3 kind of understand the points you're making. With
 4 respect to Cause of Action Number 1, where you basically
 5 do say that the NDAA Section 525 is money-mandating --
 6 MR. SARAN: We do, Your Honor. That is our
 7 view.
 8 THE COURT: Okay.
 9 MR. SARAN: And we view the NDAA as part of --
 10 as we've pleaded, that first the NDAA -- Congress said to
 11 DoD, after they passed the mandate, they said, you cannot
 12 discharge anybody worse than either a general under
 13 honorable conditions or an honorable. So they limited
 14 what the DoD could do year one. The mandate went
 15 forward. By the -- when it rolled around the next year,
 16 Congress said, okay, rescind it.
 17 And it's our view that in light of what
 18 Congress did in Collins, which is the repeal of "don't
 19 ask, don't tell" -- Congress has buckets of lawyers, more
 20 than 300 last I checked in the House -- that there's a
 21 distinct difference between the words "repeal" and
 22 "rescind." And when they wanted to repeal "don't ask,
 23 don't tell," they used "repeal." When they wanted this,
 24 they "rescind" it."
 25 THE COURT: Doesn't that just seem

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1 unnecessarily ambiguous? It's almost like if they didn't
 2 just want to instruct the Secretary of Defense to rescind
 3 a previously issued mandate and just do that alone and
 4 they wanted it to apply retroactively and they wanted to
 5 go even further and say to everybody that was previously
 6 discharged solely on the grounds that they failed to
 7 comply with this mandate should be reinstated, why
 8 wouldn't they just do that?
 9 MR. SARAN: Well, Your Honor, they did. That's
 10 what the word "rescind" means. And we -- I hear that,
 11 well, maybe --
 12 THE COURT: You kind of see what I'm saying,
 13 don't you?
 14 MR. SARAN: Well, yes.
 15 THE COURT: I mean, it seems pretty easy to say
 16 this is what Congress intended, we actually think this
 17 mandate should never have been issued and we're going to
 18 rescind it. Oh, and by the way, it was unlawful to begin
 19 with, we actually want to just dispose of it entirely to
 20 the point where we're going to bring everybody back in
 21 one fell swoop versus kind of what happened where the
 22 Secretary says for servicemembers administratively
 23 discharged on the sole basis that failed to obey the
 24 order, they can apply to their Boards to seek a
 25 correction to their records, which I'm assuming could

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1 involve a correction back to active duty or whatever
 2 status they were in when they were discharged.
 3 MR. SARAN: Well, Your Honor, our response to
 4 that would be if you look subsequently, some members of
 5 the House thought they had been hoodwinked and, in fact,
 6 subsequent acts by them thought, hey, we thought we
 7 rescinded.
 8 And, more importantly, Your Honor, we would say
 9 that the best way to judge what the intent was is --
 10 particularly from the DoD's perspective, is to see what
 11 did they do. Well, what did the Secretary of Defense do?
 12 He took -- he retroactively corrected the records of
 13 those who were still around. In other words, he went and
 14 said -- his rescission memoranda, when it was put into
 15 action, all the people who had also gotten bad paper,
 16 GOMORs and all these things for this order, if the DoD
 17 truly believed that it was a lawful order, those papers
 18 should have stayed in there. In other words, they were
 19 people who either in the Doster --
 20 THE COURT: Who hadn't been discharged yet.
 21 MR. SARAN: Who hadn't been discharged yet.
 22 THE COURT: Who were kind of in the process
 23 potentially and who had gotten bad papers in their files.
 24 MR. SARAN: Yes, Your Honor, because there were
 25 multiple.

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1 THE COURT: And you're suggesting that -- okay.
 2 I mean, you know, from the actual rescission document,
 3 the Secretary does mention that -- he addresses
 4 individuals currently serving and says that no individual
 5 shall be separated on the basis of the mandate alone.
 6 MR. SARAN: And further, he --
 7 THE COURT: He kind of -- go ahead.
 8 MR. SARAN: And further, Your Honor, he directs
 9 that the records -- any GOMORs, any letters of reprimand,
 10 all of those adverse actions be removed. And so it's
 11 hard for us to understand how he is taking retroactive
 12 effect with respect to servicemembers who merely were the
 13 ones who happened to be later in the line for being
 14 chucked.
 15 THE COURT: In essence, to make the NDAA -- to
 16 interpret the NDAA and its use of the word "rescind" to
 17 be money-mandating in the sense that it mandates
 18 previously discharged servicemembers to be reinstated and
 19 paid backpay, all because of the use of the word
 20 "rescind," versus kind of where we are now which is it's
 21 been rescinded pursuant to 525, and there seems to be
 22 treatment of two separate categories of servicemembers,
 23 those who are currently still active and have had some
 24 papers put in their files as a result of their failure to
 25 comply, they're kind of being -- the slate's wiped clean,

1 in a sense, with respect to at least the COVID-19 mandate
 2 noncompliance. And then you have others who were
 3 previously discharged who are instructed that if they
 4 want a correction to their records, they should go to the
 5 Boards.
 6 MR. SARAN: Right. And, Your Honor -- correct.
 7 And we're saying isn't that -- that seems an odd result
 8 that -- the Government's argument would be that Congress,
 9 in passing "rescind," meant to create a two-tiered
 10 military in which those who happened to get in under the
 11 door in the Air Force, who filed a RFRA claim and got in
 12 under the Doster injunction and were hanging around, that
 13 Congress intended to have this split system now where if
 14 you just happened to be first in line, you're out the
 15 door, you get nothing and, yet, the --
 16 THE COURT: I'm not sure if it matters, but
 17 what's the most orderly process here? I mean -- and it
 18 probably doesn't matter.
 19 But like if Congress wanted kind of this like
 20 big result, which is, oh, we're going to rescind the
 21 mandate and everybody who was previously discharged for
 22 noncompliance with it, we're going to make them be
 23 reinstated and forget the whole process for reinstatement
 24 and forget anything else that might have kind of gone
 25 into that discharge decision or that involuntarily

1 separation decision versus, oh, let's just direct them to
 2 rescind it, and then for those servicemembers who are
 3 previously discharged, they can come back and ask to get
 4 their records corrected, presumably, and if the record
 5 wasn't corrected properly, then, you know, obviously, you
 6 could come to this claim and seek relief.
 7 I mean, it seems like to have the Court kind of
 8 -- I don't know. I don't know that necessarily it's
 9 relevant for where we stand today on the pending motions,
 10 but I'm just trying to get to the heart of the argument
 11 that the NDAA being a money-mandating source.
 12 MR. SARAN: Your Honor, we look at it the same
 13 way we did -- and we believe that the Collins case covers
 14 this perfectly well. In Collins, military members were
 15 discharged as a result of homosexual conduct,
 16 homosexuality, and after that was repealed, this Court
 17 dealt with the issue of whether separations pay was
 18 money-mandating and --
 19 THE COURT: Well, the money-mandating -- the
 20 separations pay statute kind of really dealt with money,
 21 you know, 100 percent separation pay, 50 percent
 22 separation pay. It talked about like how much money
 23 somebody was going to get. I mean, the problem with the
 24 NDAA, and a similar problem with the Militia Clause, is
 25 it just doesn't speak to money at all.

1 MR. SARAN: Your Honor, it's a --
 2 THE COURT: Maybe -- maybe slightly indirectly
 3 as a result of the argument could be made, I guess, that
 4 as a result of rescinding this mandate, that the
 5 rescission made it unlawful from the start --
 6 MR. SARAN: Yes, Your Honor.
 7 THE COURT: -- and as a result of it being
 8 unlawful, individuals were wrongfully discharged, and as
 9 a result, they're entitled to backpay and reinstatement
 10 under the Military Pay Act, that's the Military Pay Act.
 11 I'm kind of working from this angle this way versus from
 12 where you're working from that way. You see what I'm
 13 saying?
 14 MR. SARAN: Exactly, Your Honor. But it's --
 15 what you -- what the Court has just stated is exactly the
 16 Plaintiffs' view, which is that the mandate -- much like
 17 in Collins, the mandate had put a bar, had said this is a
 18 requirement for service; you have to get this thing, this
 19 shot, whatever it is; and that what Congress did in
 20 rescinding was removing that bar as if it had never been
 21 there -- which is to say what really happened in this
 22 case, as a matter of administrative law, when Secretary
 23 Austin said everyone's got to get the COVID-19 vaccine,
 24 fundamentally what he did is that he added COVID-19
 25 vaccines to the list of required shots that is in AR

1 40-562. And we made this point in our brief. AR 40-562
 2 Appendix D, is the list of required vaccines for everyone
 3 in the military. He put that on there.
 4 When Congress said rescind it, what Congress
 5 was instructing was, take that off of the list as if it
 6 were never on there, you never put it on. And that's
 7 what it means. And that in so doing, as the Court has
 8 said, that's where the NDAA is money-mandating. It's an
 9 appropriations on its face. It is for money to the
 10 members of the Armed Forces. And what it has done is it
 11 has removed the bar that existed that was prohibiting
 12 these members from being paid by saying rescind it. And
 13 so there's no longer -- that bar to your service is gone
 14 as if it hasn't been there.
 15 THE COURT: The standard I'm applying to
 16 determine whether a statute is money-mandating is whether
 17 it could be fairly interpreted as mandating the payment
 18 of money. And it can be by implication, by -- impliedly
 19 as well. But, I mean, this might be a little bit of a
 20 leap too far.
 21 I just feel like the argument that we were
 22 wrongfully separated for failure to comply with a vaccine
 23 mandate, because it -- look, it's now been rescinded and
 24 the rescission kind of shows that it was unlawful from
 25 the start, it's still a Military Pay Act wrongful

1 separation claim on the basis that it was an unlawful
2 mandate and the merits of that argument, we're not going
3 to talk about today, but at the same time, like, the idea
4 that the NDAA itself, in a vacuum, is money-mandating,
5 against the precedents that I'm required to comply with,
6 you know, and apply here. It seems like it's just
7 tougher for me to kind of understand.

8 MR. SARAN: Understood, Your Honor. Any other
9 questions regarding that?

10 THE COURT: No, sir.

11 MR. SARAN: And then the -- as Mr. Beckrich has
12 already stated, the Count 5, which is the 10 U.S.C. 1552,
13 which we put in our response to the motion to dismiss,
14 obviously, it's not a separate standalone claim. It
15 should -- we're invoking the Court's ancillary
16 jurisdiction. It's got a money mandate. Let's fix the
17 records of these -- the members of this class.

18 THE COURT: Okay.

19 MR. SARAN: That's what --

20 THE COURT: So you kind of concede the
21 point that that's more of a relief stemming from the
22 arguments --

23 MR. SARAN: It shouldn't have been -- it
24 shouldn't have been on there as --

25 THE COURT: -- except for -- except for cause?

1 MR. SARAN: -- it shouldn't have been on there
2 as Roman V.

3 THE COURT: So based upon the fact you've
4 viewed the Government's attack to your complaint, are
5 there any elements that you would seek to amend to kind
6 of address some of the flaws?

7 MR. SARAN: Of course. If -- I mean, the
8 Government hasn't answered yet. On its face, we still
9 have a right to amend prior to the answer. So we would
10 certainly -- would love to have the opportunity to do so,
11 to --

12 THE COURT: Because, you know -- okay. Because
13 what I'm kind of weighing, you know, is granting the
14 Government's motion to dismiss, kind of picking apart the
15 things that don't meet the pleading standards, and maybe
16 if your response contains elements that would kind of
17 resolve the issue, like why are we kind of spending time,
18 you know, when we know, at the end of the day, there
19 could be a complaint that survives that needs to be
20 addressed on the merits as part of an MJAR. I'm just
21 looking for the most efficient way to get there.

22 I tend to write opinions, you know, so I feel
23 like there's multiple ways to do this and I want to be
24 efficient.

25 MR. SARAN: Your Honor, we would -- we do, too.

1 And just for the Court's consideration of this issue,
2 it's separate, but there's a third case. You've got two
3 of these. So we have Bassen, Botello. There's a third
4 one for a Coast Guardsman in front of a different judge,
5 and this same issue is -- this is our second time going
6 through this. And that's the same issue, which is
7 perhaps the -- what needs to happen is an amended
8 complaint with the things that were in the response that
9 might better be in the complaint itself that would make
10 it clear that these are all 204(a)(1) Military Pay Act
11 claims.

12 THE COURT: But the NDAA jurisdictional
13 argument is one that kind of warrants a decision,
14 especially if you're still arguing that, by itself, it's
15 a money-mandating source. So that's one that I feel like
16 we'll have to rule on.

17 With respect to some of the 12(b)(6) arguments
18 on each individual Plaintiff, I do wonder if there's ways
19 to remedy the flaws. But I'll just take it into
20 consideration. I'm not going to decide anything today.
21 I want to go back and, like, look at the complaint again
22 and see if I can pick apart the things that I think kind
23 of pass the very low 12(b)(6) standard and things that
24 are problematic. So I appreciate that. If amending the
25 complaint is the best path forward, I'll include that as

1 part of the order.

2 MR. SARAN: Thank you, Your Honor.

3 THE COURT: Thanks. All right. Would you like
4 to reply on Bassen, Mr. Beckrich?

5 MR. BECKRICH: Sure, Your Honor. I'll keep it
6 brief.

7 Just a few minor points. There are some
8 allegations about the process used in the discharge and
9 whether or not those processes were lawful. We're not
10 aware of any claim in the complaint for a violation of
11 discharge processes. We've walked through each claim now
12 and that's just not one of them. So we ultimately just
13 don't think that's relevant to the Court's decision --

14 THE COURT: Agreed. I haven't seen anything in
15 the complaint myself, so...

16 MR. BECKRICH: Just to -- I mean, I think Your
17 Honor understands this. I think Judge Bonilla understood
18 this, as well. But whenever we are moving to dismiss, we
19 are just basing it on the facts in the complaint and,
20 candidly, there's just not that many facts for each
21 Plaintiff in the complaint relevant to each claim. But
22 we're not making our own factual assertions as to any
23 given Plaintiff --

24 THE COURT: Sure. No, I agree.

25 MR. BECKRICH: -- I mean, at this point.

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1 THE COURT: Yeah. I mean, a little bit form
 2 over substance with the first cause of action, for
 3 instance, like the way -- the NDAA is the money-mandating
 4 source, but the NDAA, when viewed in conjunction with the
 5 MPA, it's like -- there might be an MPA claim there based
 6 upon wrongful discharge because of the NDAA, but it's --
 7 MR. BECKRICH: I totally hear that point, Your
 8 Honor.
 9 THE COURT: Yeah.
 10 MR. BECKRICH: But, again, I think we would
 11 fall back on the point that -- that if there's a problem
 12 with their MPA claim, then theoretically the Plaintiff
 13 could say, okay, fine, I don't have an MPA claim, but I
 14 still have --
 15 THE COURT: Yeah, I'm with you.
 16 MR. BECKRICH: -- I still have a claim in NDAA.
 17 THE COURT: Exactly.
 18 MR. BECKRICH: And that's why we feel like as
 19 long as they're asserting that the NDAA is money-
 20 mandating, that we have to respond to that argument. But
 21 I totally --
 22 THE COURT: Yeah. You're looking at picking it
 23 apart so you can boil it down to kind of what you think
 24 survives the pleading standard.
 25 MR. BECKRICH: Exactly, exactly, Your Honor.

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1 THE COURT: Yeah. Okay.
 2 MR. BECKRICH: But I totally agree with you
 3 that that -- I mean, the conversation seems almost
 4 academic at this point if the claims are just Military
 5 Pay Act claims, because, you know, we're not asserting
 6 that the Military Pay Act --
 7 THE COURT: Well, they're all rooted on that.
 8 They're all looking for backpay. Everybody's looking for
 9 backpay, right?
 10 MR. BECKRICH: Yes, but I would --
 11 THE COURT: Whether they're entitled to it is a
 12 different story.
 13 MR. BECKRICH: Sure, sure. I would say that
 14 there's at least a strong suggestion -- I mean, there's a
 15 lot of briefing on it, right, that they're entitled to
 16 backpay based on the NDAA, as opposed to the Military Pay
 17 Act. That's the only point that we're making. And,
 18 again, we do -- I totally get what you're saying that for
 19 the NDAA claim, maybe it's form over substance, but I
 20 don't think that it's -- I think that's especially
 21 true in Botello where we think that they have -- all of
 22 the Plaintiffs have MPA problems. So if the Militia
 23 Clauses -- not to get ahead of myself --
 24 THE COURT: Yeah.
 25 MR. BECKRICH: -- but if the Militia Clauses

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1 aren't money-mandating and there's not a separate claim
 2 there, there's an MPA problem and there's no claims.
 3 THE COURT: Agreed. Yep.
 4 MR. BECKRICH: I think that's all I had. The
 5 only other, I guess, point that I would make is that in
 6 terms of the NDAA claim, our 12(b)(6) argument -- I mean,
 7 we do think that that is -- it is ripe for decision and
 8 we think that the only way that they can state a claim
 9 under the NDAA, even, you know, assuming that's based on
 10 the Military Pay Act, is if they can show that Congress
 11 provided -- Congress' instructions were to retroactively
 12 rescind this action and --
 13 THE COURT: Are you suggesting that if Congress
 14 had stated -- and we're in the hypothetical world now,
 15 which I don't want to waste anybody's time -- but if
 16 Congress has stated that it applies retroactively, how
 17 would that unfold?
 18 MR. BECKRICH: If Congress had stated --
 19 THE COURT: Had stated that the rescission of
 20 the mandate applies retroactively.
 21 MR. BECKRICH: And essentially that the mandate
 22 never existed --
 23 THE COURT: Yeah.
 24 MR. BECKRICH: -- in other words? I'm not
 25 sure. I think we'd have a bigger problem on our hands if

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1 Plaintiffs were then seeking relief for being discharged
 2 for not being vaccinated under a mandate that, according
 3 to Congress, never existed.
 4 THE COURT: Yeah.
 5 MR. BECKRICH: I would have to think through
 6 that more exactly what our response would be.
 7 THE COURT: It's academic, so --
 8 MR. BECKRICH: Yeah, and it's academic.
 9 THE COURT: -- we can avoid it.
 10 MR. BECKRICH: And that would be my other point
 11 is that, necessarily, that's not what Congress said.
 12 Congress said to rescind it -- the mandate. The mandate
 13 was rescinded. So we're just not sure how there can be a
 14 violation of the NDAA to base a Military Pay Act claim
 15 on.
 16 THE COURT: Okay.
 17 MR. BECKRICH: Which, again, we understand
 18 fundamentally to be their claim under Count 1. Whether
 19 you want to call the NDAA the money-mandating statute or
 20 the MPA, we don't see how the claim could survive in
 21 either situation.
 22 THE COURT: Okay.
 23 MR. BECKRICH: And that's all I have on Bassen.
 24 THE COURT: Do you want to speak to Botello
 25 right now? I mean, as I understand it, the -- you know,

1 the primary distinguishing feature of Botello is the
 2 nature of the Plaintiffs being National Guard members and
 3 also Count 1 being the Militia Clause as a money-
 4 mandating statute or money-mandating source.
 5 MR. BECKRICH: I think that's exactly right.
 6 I'm happy to turn to Botello.
 7 THE COURT: Sure, please.
 8 MR. BECKRICH: I'm going to grab my other
 9 binder real quick.
 10 So Your Honor just hit it. Those are the two
 11 differences between Botello and Bassen first is that
 12 Plaintiffs argue they're entitled to monetary relief
 13 under the Militia Clauses and, second, that Plaintiffs'
 14 entitlement to relief under the Military Pay Act differs
 15 because they're members of the National Guard.
 16 So on the Militia Clauses, we're going to end
 17 up right back where we started with the NDAA, is that our
 18 position is that the Militia Clauses, standing alone, are
 19 not money-mandating. There's nothing in them that refers
 20 to any pecuniary interest. When the Federal Circuit has
 21 held that other constitutional clauses are money-
 22 mandating, they've said that there's explicit reference
 23 to pecuniary interest and that's not found in the Militia
 24 Clauses. Nothing provides for payment of money damages
 25 to individual National Guard members.

1 Now, I'll say again, though, the claim is based
 2 on -- if it's a Military Pay Act claim based on a
 3 violation of the Militia Clauses, then that's a different
 4 situation. But we've understand that the Plaintiffs have
 5 certainly taken the position that the Militia Clauses
 6 themselves are --
 7 THE COURT: Yeah, it's worded that way.
 8 MR. BECKRICH: -- are money-mandating. So I
 9 think that's, again, why we're not trying to make a
 10 purely academic argument here, but if that's the case,
 11 then we think Your Honor has to rule on that point and we
 12 don't see how the plain language -- I mean, there's just
 13 nothing in the language regarding money at all. It has
 14 nothing to do with the rights of National Guard --
 15 members of the National Guard. So we're not sure how it
 16 could be money-mandating.
 17 Do you have any questions on that?
 18 THE COURT: No.
 19 MR. BECKRICH: Okay. With respect to their
 20 status as members of the National Guard, we explained in
 21 our brief that Plaintiffs are not entitled to any relief
 22 under the Military Pay Act because they have not alleged
 23 that they performed duties for which they were not paid.
 24 THE COURT: Yeah, I mean, I have my notes here.
 25 These are my own notes, so they --

1 MR. BECKRICH: Sure.
 2 THE COURT: -- could be wrong. Four Plaintiffs
 3 allege that they were active duty at the time of
 4 separation, but then you distinguished Mr. Taylor, that
 5 he does not allege that he was active duty. Are you
 6 saying that none of them allege or just one of them
 7 doesn't allege that they were active duty or performing
 8 duties?
 9 MR. BECKRICH: Your Honor, I'd have to go back
 10 and see, but definitely some of them do allege that they
 11 were active duty --
 12 THE COURT: Because there's six, right?
 13 There's six total?
 14 MR. BECKRICH: There's six total. But I think
 15 our point is, Your Honor, that under Pohanic, it doesn't
 16 matter. That you have to actually -- if you're a member
 17 of the National Guard, you have to actually perform
 18 duties to be entitled to relief under the Military Pay
 19 Act.
 20 THE COURT: So they would need to allege that
 21 they have actually performed duties or -- yeah, who
 22 actually performed duties.
 23 MR. BECKRICH: Correct. And Pohanic, being
 24 removed from active duty as --
 25 THE COURT: Even if wrongful.

1 MR. BECKRICH: Even if wrongful, you do not
 2 have a claim under the Military Pay Act. That's entirely
 3 consistent with 37 U.S.C. Section 204(d), which states
 4 that full-time duty performed by members of the National
 5 Guard shall constitute active duty. And because only
 6 duty performed is active duty for the purposes of Section
 7 204, Plaintiffs are not entitled to backpay for duties
 8 not performed even if that nonperformance is involuntary.
 9 Now, Plaintiffs argue that Your Honor should
 10 disregard Pohanic, and that's a case from this Court, so
 11 it's not binding on you. But the Court can't disregard
 12 Section 204(d). And to the point in Palmer, Palmer was
 13 dealing with a member of the Reserves, not a member of
 14 the National Guard, and so Section 204(d) just wouldn't
 15 have applied. What Palmer says is where the payment is
 16 contingent on performance, which 204(d) says, active
 17 duty, it requires performance for members of the National
 18 Guard, that you cannot get relief under the Military Pay
 19 Act for duties not performed.
 20 THE COURT: So, I mean, you can have a -- a
 21 National Guard member can have a Military Pay Act claim
 22 seeking payment for duties performed for which they were
 23 not paid.
 24 MR. BECKRICH: Absolutely.
 25 THE COURT: But once they are separated or

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1 discharged, even if it's wrongful, you don't get a claim
 2 for duties not performed?
 3 MR. BECKRICH: Correct, Your Honor. That's
 4 what Pohanich says --
 5 THE COURT: Yeah.
 6 MR. BECKRICH: -- and we think that's entirely
 7 consistent with 204(d). When you're performing duties,
 8 you do, you get paid under 204(a)(1) as if you're on
 9 active duty, but that's because 204(d) says that full-
 10 time duties performed constitute active duty. So there's
 11 that qualification that I don't think that the Court can
 12 ignore.
 13 Also, the -- we cite in our briefs, the Dhne
 14 case, D-H-N-E, that is a Federal Circuit case, and there
 15 the Federal Circuit says -- the Federal Circuit
 16 recognized that a Reserve officer removed while on active
 17 duty may have a Tucker Act claim under the MPA, but then
 18 says that the Plaintiff, however, can point to no statute
 19 or regulation that mandates pay for service never
 20 actually performed by a member of the Air National Guard
 21 of the United States. We certainly think that speaks to
 22 the issue that there is a difference in treatment there.
 23 Palmer acknowledges that there's a difference
 24 in treatment between active duty members and Reserve
 25 members, that Reserve members can wrongfully not be

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1 allowed to work, but they don't -- they don't get
 2 compensation for it, and Palmer says that's an issue for
 3 Congress, but based on what the Military Pay Act sets
 4 forth. When there's a requirement to perform work, you
 5 don't get paid for nonperformance, again, even if it's
 6 involuntary and potentially wrongful.
 7 THE COURT: Okay, okay.
 8 MR. BECKRICH: I'll address their legal
 9 exaction claim in Botello. We only understand one
 10 Plaintiff, Mr. Taylor, to allege that any money was taken
 11 from him. It was for life insurance coverage. But he
 12 doesn't allege that he dropped his life insurance
 13 coverage or, you know, any facts to support why
 14 collecting a premium would be illegal for continuing
 15 coverage. So we think that that claim should be
 16 dismissed for failure to state a claim.
 17 Just a few other minor differences again, I
 18 mentioned this earlier, but we believe that Mr. Botello
 19 is jurisdictionally barred from bringing a RFRA claim in
 20 this Court under Section 1500. He had a RFRA claim
 21 pending when he filed the suit in this case and the fact
 22 that he's seeking relief under the Military Pay Act
 23 shouldn't change this Court's analysis. That's what the
 24 Brandt decision by the Federal Circuit says, that the
 25 question is whether the claims are based on the same

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1 operative facts regardless of whether the relief sought
 2 is the same.
 3 Also, with respect to Botello, we've set this
 4 forth in our briefing, but we're not sure how -- we don't
 5 think any of them have a Military Pay Act claim, but
 6 we're really not sure how he has one because he alleges
 7 that his orders were cut 17 days short, but then he was
 8 immediately put back on active duty and he served the
 9 full term of those orders, and we've attached them to our
 10 motion.
 11 And then, finally, there were two Plaintiffs
 12 that -- Mr. Taylor and Mr. Konie -- who we argue didn't
 13 have Military Pay Act claims for slightly different
 14 reasons than the others, and the Plaintiffs didn't
 15 respond to those in their response. So we think that
 16 those two Plaintiffs should be dismissed.
 17 And just to be clear, again, for Botello, we
 18 think that the Military Pay Act issue is dispositive of
 19 the case, assuming that the Militia Clauses violation is
 20 under the -- is actually claimed under the Military Pay
 21 Act. But even if it's not, we don't think the Militia
 22 Clauses is money-mandating, which only leaves a Military
 23 Pay Act claim, which, again, under Pohanich and Section
 24 204(d) can't survive a motion to dismiss.
 25 THE COURT: Thank you, Mr. Beckrich.

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1 Mr. Johnson?
 2 MR. JOHNSON: Thank you, Your Honor. May it
 3 please the Court, Brandon Johnson on behalf of the
 4 Plaintiffs.
 5 I had a certain order how I wanted to present
 6 things, but based upon the Bassen oral argument, I think
 7 it makes most sense to walk through the complaint and
 8 explain why each Plaintiff has stated a claim, though I
 9 would point Your Honor to -- in addition to the
 10 complaint, the Court has broad discretion to consider the
 11 facts and arguments raised in the briefing and here in
 12 the oral argument, and that would be Wright & Miller,
 13 Section 1364, as well as Campbell Pet Company v. Miale,
 14 542 F.3d 879, Fed. Cir. (2008), citing Section 1364, on
 15 speaking motions.
 16 So Your Honor does have broad discretion in
 17 deciding a motion to dismiss to consider all the facts
 18 presented in the briefing and here today. But based on
 19 the discussion we had earlier, I'm just going to walk
 20 through the complaint and fill in some additional facts,
 21 but we're going to stick with what is in the complaint.
 22 This is Paragraphs 16 to 24.
 23 So first up, our named Plaintiff, Jeremiah
 24 Botello, he's a Captain in the Arizona Army National
 25 Guard, serving on full-time National Guard duty, 32

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1 U.S.C. 502 or -- yes, I mean, full-time National Guard
 2 duty ADOS is 32 U.S.C. 502. That is -- that can be
 3 inferred.
 4 His orders were curtailed. It states here he
 5 was dropped from his orders in active status. He had
 6 pending full-time ADOS orders to go on the COVID Task
 7 Force. They were canceled. He was placed on no points,
 8 no pay status.
 9 Now, subsequently, the Government has
 10 clarified, he did drill -- so this is inaccurate -- he
 11 did drill during 2022, but he did not have any full-time
 12 National Guard duties -- orders. He has not had any
 13 since December 2017. He's been effectively unemployed,
 14 like most of our Plaintiffs, full-time active duty. This
 15 is their livelihood. This is not their weekend hobby.
 16 This is how they support themselves. His orders and his
 17 livelihood were canceled from December 2021 forward. I
 18 provided the statute, the orders, the cancellation, which
 19 shows an entitlement to relief under 204(a)(1).
 20 And I will address in great detail the Pohanic
 21 argument because it's essential, because if the
 22 Government is correct, they don't have a Military Pay Act
 23 claim. Fortunately, they're not. And I'll explain that.
 24 Plaintiff Charles Hood, an F-16 pilot in the
 25 South Carolina National Guard, serving on full-time

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1 orders under -- and I'm in Paragraph 18 here of the
 2 complaint, 32 U.S.C. 503(f). His Title 32 orders were
 3 withdrawn. He was unable to take any new orders after
 4 September 21, and I believe from December 21 through
 5 March 23, effectively inactive status, he lost his
 6 qualification, had to requalify. Now, that's not in
 7 here, but what is in here is that his orders were
 8 canceled, his full-time active duty orders under 32
 9 U.S.C. 502 canceled, and no orders subsequently. Both
 10 Botello and Hood, also importantly, claim lost pay and
 11 benefits as a result of the violations described.
 12 So again, they've made -- they stayed the
 13 orders, the statutory authority under those orders. The
 14 consequence of the illegal mandated implementation, which
 15 was the cancellation or withdrawal of their full-time
 16 active duty orders and the loss of pay and benefits,
 17 which states a claim, we contend, under 204(a)(1).
 18 Benjamin Konie, I'm going to get to him next,
 19 but let's go on to Justin Philips. This is Paragraphs 22
 20 and 23 of the complaint. Also an F-16 pilot on alert
 21 status on ADOS orders. So ADOS, active duty operational
 22 support, those, again, are, by their nature, 32 U.S.C.
 23 502, full-time National Guard duty orders. They were
 24 curtailed 60 to 70 days early due to his unvaccinated
 25 status. He was prohibited from applying. Plaintiff lost

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1 pay and allowances, here we estimate in the amount of
 2 \$44,000. So again, full-time orders, canceled, 32 U.S.C.
 3 502, loss of pay and benefits, 204(a)(1) claim.
 4 Plaintiff Victor Santos, he was on -- five
 5 years into a nine-year enlistment. He was continuously
 6 serving on full-time National Guard duty orders under 32
 7 U.S.C. 502, providing -- acting as Honor Guard for
 8 military funerals. His orders were canceled. In April,
 9 he was, in fact, not just dropped, he was discharged. He
 10 received a DD-214. He was discharged from service as a
 11 result of the vaccine. As a result, Plaintiff lost pay
 12 and allowances, all of them. He did return to service, I
 13 believe, in May '23, but, again, stating a 204(a)(1)
 14 claim.
 15 Let's move on to Plaintiff Sergeant First Class
 16 Brian Taylor. The Government correctly points out he was
 17 a drilling Reservist, but there are some additional
 18 facts. And we think it's important to have the drilling
 19 Reservist here. He does have, if not a Military Pay Act
 20 claim, he does have a Militia Clause claim, and I want to
 21 explain that to also point out the difference between,
 22 yes, most of the Military Pay Act, they're largely
 23 coextensive with the Militia Clause claims. But for
 24 drilling National Guardsmen, like Taylor, they're
 25 different and it provides a distinct money mandate.

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1 And there are tens of thousands -- and we
 2 believe over 50,000 -- drilling National Guardsmen that
 3 are in his position. So he represents maybe not the
 4 biggest dollars on a per person basis, but definitely the
 5 largest numbers of Reservists who were harmed by the
 6 Militia Clause violation, and there is a distinct theory
 7 as to why it's money-mandating and self-executing for
 8 drilling Guardsmen like Taylor.
 9 Finally, Benjamin Konie, he was in active
 10 status continuously on three year sets of orders, also
 11 under 32 U.S.C. 502. That is not stated here, but I can
 12 tell you that. But he is what's called Active Guard
 13 Reserve. So these others were on what's called ADOS,
 14 Active Duty Operational Support full-time duty. He was
 15 Active Guard Reserve. So he's sort of the cadre that is
 16 the backbone of the Guard units for, you know, the
 17 drilling Reservists. So he was in active status and he
 18 did not lose pay.
 19 What happened, though, he was an E-6. He's
 20 been an E-6 since 2013. He has been passed over twice
 21 for a promotion. He's approaching 20 years. So he does
 22 have a distinct kind of Military Pay Act claim under
 23 Smith v. Secretary of the Army. That is where, due to
 24 nonpromotion over two cycles, you're facing a mandatory
 25 statutory discharge. So that's a distinct Military Pay

1 Act claim. But he's also another person -- Plaintiff who
2 has a certainly distinct Militia Clause claim differing
3 from the active ADOS folks on 204(a)(1), and he
4 represents the hundreds or thousands wrongfully denied
5 promotion as a result of the Militia Clause violation and
6 the other violations.

7 We also discussed the religious accommodation
8 requests, but just to open this discussion, I just want
9 to identify how the Plaintiff -- or, excuse me, how the
10 complaint states a claim for these folks in terms of,
11 again, identifying your status, full-time National Guard
12 duty, the statutory authority under which they were
13 serving -- and that's very important for the Pohanic
14 discussion that we're going to get into next -- as well
15 as the harm, the cancellation of order, denial of pay or
16 discharge resulting from the Militia Clause and other
17 violations we've identified and the request for relief,
18 the dollars. They all lost pay and benefits and we
19 provided a good faith attempt to quantify those.

20 But those are the -- that's what Rule 8 of the
21 Rules of the Court of Federal Claims require, as we read
22 it, to state a claim, as well as to identify the basis
23 for the Court's jurisdiction.

24 So if there are any questions about these
25 Plaintiffs, I can move on.

1 THE COURT: Please, please.

2 MR. JOHNSON: Okay. So we've addressed in
3 great detail Pohanic and my colleague has correctly
4 identified the crucial issue is just reading the statute.
5 And I'd just like -- it's not an exhibit. I just printed
6 this off of Westlaw. I did some highlights. I didn't
7 know -- would you all like a copy?

8 And I'd just like to walk through 204, and I
9 think it will make it clear. Now, we do believe -- we do
10 contend Pohanic was wrongfully decided. However, it's
11 also distinguishable and does not apply to this situation
12 for two important reasons. One, in Pohanic, the
13 discharge was by a state adjutant general. Here, what
14 we're alleging is a wrongful discharge due to Secretary
15 Austin's legal directive. That's the core of our claim.
16 That's different than Pohanic.

17 Of equal importance is that the Plaintiff in
18 Pohanic was appealing from a Board of Correction of
19 Military Records. The Court of Federal Claims was
20 applying the deferential abuse of discretion standard.
21 Also, they had a full record before; we don't. So that
22 Court had a lot more before it, a lot more information
23 and, most importantly, deferential abuse of discretion
24 standard that doesn't apply here and the magnitude of the
25 violation was also distinct. In fact, it was a violation

1 of a nonsmoking regulation, which there was some debate
2 about whether or not it existed. Here, we're talking
3 about violation of the Militia Clause. It is one of the
4 foundational bargains upon which the Constitution was
5 ratified.

6 This is one of the most important
7 constitutional provisions, so -- as well as one that
8 affected, we believe, up to 100,000 people. So different
9 authorities, different standard of review, different
10 procedural posture, and different magnitude and scope of
11 the violation. But really it gets down to the statute.

12 So four -- actually, five of the Plaintiffs
13 here, Botello, Hood, Konie, Phillips, Santos, they're all
14 under 32 U.S.C. 502 full-time National Guard duty.
15 They're under 204(a)(1). And a member -- this applies to
16 a member of a uniformed service on active duty. And if
17 you turn the page, the definition of active duty in
18 101(18), which applies here, and I've highlighted it, the
19 term "active duty" means "full-time duty in the active
20 service of a uniformed service, including full-time
21 National Guard duty." That's the definition that
22 applies.

23 Now, then we have 204(a)(2) and 204(d). I
24 would -- as I read Pohanic, the Courts there looked at
25 204(d) as a replacement definition, but 204 already has a

1 definition section. That's in 101(18). 204(d), it looks
2 like a definition, but it's not a definition. So what is
3 it? So 204(a)(2) and 204(d), they're two companion
4 sections. And if you see the highlighted language, full-
5 time training, training duty with pay, or other full-time
6 duty performed, you see that exact same language in
7 204(a)(2) and 204(d). However, they're not generally
8 applicable.

9 This performance requirement only applies --
10 I'm going to disregard Title 10, but under Title 2,
11 Sections 503, 504, 505, and 506. You see what's not
12 there is 502, which all of our Plaintiffs are under.

13 On the following pages after the definition,
14 I've provided 503 through 506. I'll just read the
15 titles. 503, Participation in field exercises; 504,
16 National Guard schools and small arms competitions; 505,
17 Army and Air Force schools and field exercises; and then,
18 finally, 506, Assignment and detail of members of Regular
19 Army for instruction of National Guard.

20 So these are all forms of full-time training
21 where it's a school, but you have to go to that school.
22 Okay? And it has to be under these particular
23 provisions. Again, we're under 32 U.S.C. 502. 204(a)(2)
24 and 204(d) apply to certain full-time active duty
25 training, and Palmer recognizes this. Palmer Category 1

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1 is 204(a)(1). That’s what we’re under. 204(a)(2) are
 2 these full-time active duty trainings where there is a
 3 performance requirement.
 4 So rather than replace the definition in
 5 101(18), what 204(d) does is it’s a supplement. It
 6 doesn’t change the definition. It says -- 101(18)
 7 defines active duty. However, 204(d) says there’s these
 8 additional activities that we’re also going to treat as
 9 active duty, not for definitional services, but for pay
 10 and points.
 11 So as I’m sure Your Honor is aware, National
 12 Guardsmen and Reservists and active duty are paid
 13 differently. National Guardsmen and Reservists are paid
 14 by four-hour drilling sessions, whereas active duty are
 15 paid on a daily basis. Retirement points are calculated
 16 duty. So what it says is someone who’s serving in the
 17 National Guard goes to a federal school, exercise, or
 18 training, they’re going to be treated on active duty for
 19 pay and also for earning retirement points.
 20 So again, it’s not a definition. It doesn’t
 21 look like a definition. It doesn’t have quotation marks
 22 around active duty. It doesn’t say active duty is,
 23 active duty means. Instead, it’s the reverse order. It
 24 identifies some activities and says, these are considered
 25 active duty for the purpose of pay and points. And

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1 there’s a clear limitation on the statutes -- statutory
 2 authorities for these training activities that 204(d) and
 3 204(a)(2)’s performance required. And that’s not what
 4 our Plaintiffs have. They’re 32 U.S.C. 502. They’re
 5 under 204(a)(1), 101(18), with no active duty requirement
 6 -- or, excuse me, no performance requirement. It’s
 7 absolutely active duty.
 8 THE COURT: So you’re talking about active duty
 9 and the meaning of active duty.
 10 MR. JOHNSON: Yes.
 11 THE COURT: You’re arguing under 204(a)(1). So
 12 it says, “The following persons are entitled to the basic
 13 pay of the pay grade to which assigned or distributed, in
 14 accordance with their years of service computed under
 15 Section 205 of this title,” a member -- (a)(1) is a
 16 member of a uniformed service who is on active duty.
 17 MR. JOHNSON: Yes.
 18 THE COURT: Is there a distinguishing feature
 19 between a member of a uniformed service and a member of
 20 the National Guard?
 21 MR. JOHNSON: No. So there’s seven, I believe,
 22 uniformed services, Army, Air Force, now Space Force,
 23 Marine Corps, Navy, the Public Health Service, and I
 24 think NOAA. But whether or not you’re on active or
 25 reserve status, you’re still a uniformed service. The

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1 confusion is active duty, which appears to mean regular.
 2 That’s not what it means here.
 3 THE COURT: Well, why would (a)(2) distinguish
 4 -- (a)(2) says a member of a uniformed service or a
 5 member of the National Guard.
 6 MR. JOHNSON: So it’s a member -- what it is --
 7 what it is identifying here and -- a member of the
 8 National Guard or the Reserve is certainly a member of a
 9 uniformed service.
 10 THE COURT: I’m just -- you know, you’re
 11 explaining the idea of active duty, who is on active
 12 duty, but is the qualifier here a member of a uniformed
 13 service. I’m just trying to understand the argument.
 14 MR. JOHNSON: So I’m very confident that when
 15 you’re in the regular Army, the Army National Guard or
 16 the Army Reserves --
 17 THE COURT: And even the definition, the term
 18 “active duty” means full-time duty in the active service
 19 of a uniformed service --
 20 MR. JOHNSON: Yes.
 21 THE COURT: -- and includes full-time training
 22 duty, annual training duty, full-time National Guard duty
 23 and attendance. Is it kind of like circular at that
 24 point? It has to distinguish National Guard duty to be
 25 included within --

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1 MR. JOHNSON: Well, I think Palmer is very
 2 clear. Palmer has a great discussion -- I think it’s
 3 1313, 1314 -- which says that both the professional
 4 regular Army soldier and the full-time active duty
 5 citizen soldier are treated alike and they both fall
 6 under 204(a)(1). And Palmer is a Fed Circuit. Dhne was
 7 actually a 206(a) case rather than a 204(a)(1) case. It
 8 is Fed Circuit. But Palmer addresses 204(a)(1), and it
 9 says when you -- whether it’s a National Guardsman,
 10 Reservist, regular Army, if they’re serving full-time
 11 active duty, they’re under 204(a)(1) and 204(a)(2) --
 12 THE COURT: So your argument is that your
 13 Plaintiffs fall under a Military Pay Act claim under
 14 204(a)(1).
 15 MR. JOHNSON: Absolutely.
 16 THE COURT: Okay.
 17 MR. JOHNSON: And Pohanic mistakenly -- I
 18 believe, mistakenly, says 204(a)(1), if it’s National
 19 Guard, has a performance requirement. And what I’m
 20 trying to explain is Pohanic was wrongly cited,
 21 misapplies the statute, conflicts with Palmer. However,
 22 Your Honor does not have to overrule Pohanic.
 23 I’ve also explained why it’s distinguishable in
 24 that the illegal action was taken by a state adjutant
 25 general, by a court reviewing the BCMR on a deferential

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1 abuse of discretion standard and the magnitude and
 2 scope of the violation, a single person violating a
 3 nonsmoking regulation versus 100,000 people --
 4 servicemembers denied pay, wrongfully discharged for
 5 violating the core Militia Clause prohibitions in the
 6 Constitution make it different. And there's a number of
 7 ways -- Your Honor can pick any one or all of those to
 8 distinguish it, but --
 9 THE COURT: Okay.
 10 MR. JOHNSON: So that's our Pohanic argument.
 11 THE COURT: Okay.
 12 MR. JOHNSON: And that's essential. I do
 13 concede five of our Plaintiffs, their Military Pay Act
 14 claims rise or fall on whether Pohanic bars their claims.
 15 That's what the Government has argued, so we've got to
 16 take a hit on it and we are.
 17 THE COURT: Okay.
 18 MR. JOHNSON: So that's it for that. Unless
 19 Your Honor has additional questions, I would like to move
 20 on to the Militia Clause claims because, as everyone here
 21 recognizes, that's the essential difference between
 22 Bassen and Botello. So if it may please the Court, I
 23 will proceed.
 24 So before getting into why it is money-
 25 mandating and self-executing, I first want to identify

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1 the common ground here, what the Government disputes and
 2 what they don't. So Abbott v. Biden, Fifth Circuit
 3 decision, the Government had a chance to seek their
 4 hearing, it sought an extension to get a reading en banc
 5 with the Fifth Circuit. Also sought an extension to file
 6 a petition of certiorari with the Supreme Court. In both
 7 cases, they decided not to file anything.
 8 So it appears that they do not contest -- and
 9 they do not contest here -- the central holdings of that
 10 case and there are three of those.
 11 Number one, the second Militia Clause, also the
 12 calling forth clause, Clause 16, the term "govern" equals
 13 the application of martial law and as well as the
 14 punishment for noncompliance. So "govern" there means
 15 punish. I don't believe that's in dispute.
 16 Also, that what the Government did -- what the
 17 Federal -- what Secretary Austin did in his
 18 implementation of the mandate and, most specifically, the
 19 November 30, '21 Militia Directive, which stated that all
 20 unvaccinated National Guard members will be denied pay,
 21 they will be prohibited from drilling or training, and
 22 the third one, which is -- said that they're still
 23 required to drill, they will not be excused for not
 24 attending or performing their drilling duties, but
 25 they're still required to do it and they may be punished

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1 -- and many were punished -- for not performing the duty
 2 that they were prohibited from performing.
 3 What Abbott found was that the denial of pay,
 4 the discharges and the threatened court martials, all of
 5 those constituted punishment and they were illegal
 6 punishments in violation of the Militia Clauses. I have
 7 not seen the Government contest that, so I think we
 8 should treat that as conceded.
 9 The third point is that all of the challenged
 10 actions here were taken for noncompliance with the COVID
 11 mandate. They weren't -- like with Bassen, there was
 12 some suggestion that it was under 10 U.S.C. 12313.
 13 That's -- I don't think that's an issue here. I think
 14 the only issue that the Government contests is whether or
 15 not the Militia Clauses are money-mandating and also
 16 whether it has res judicata effect. We don't claim res
 17 judicata. It's not binding, but it's -- it's persuasive
 18 and I would say it's very persuasive if you -- Your Honor
 19 has read the opinion. It's very well-reasoned in terms
 20 of the constitutional text and history.
 21 And, again, I haven't seen the Government's --
 22 the Government has not contested any of those findings.
 23 But I just wanted to find the issues which are, is it
 24 money-mandating and self-executing.
 25 THE COURT: That case didn't decide whether it

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1 was a money-mandating -- whether the Militia Clauses were
 2 money-mandating, right? I mean --
 3 MR. JOHNSON: They say they're not; we say they
 4 are.
 5 THE COURT: But that hasn't been decided yet,
 6 correct, by any court?
 7 MR. JOHNSON: That's correct. The monetary
 8 damages were not requested by Governor Abbott in Abbott
 9 v. Biden. It was not before the Court. There were no
 10 National Guard plaintiffs before the Court.
 11 So if -- unless there are any questions, I'll
 12 move into why we contend it's money-mandating.
 13 THE COURT: Oh, please move, yeah.
 14 MR. JOHNSON: So first off, I want to get
 15 something out of the way up-front as a threshold issue,
 16 which is the lack of a specific monetary language money
 17 damages. So under the Tucker Act, there's two ways of
 18 findings a money mandate. So there's the Testan
 19 standard, which is what I think the Government is
 20 discussing. Testan addressed a Classification Act claim
 21 where the only remedy provided under the statute was
 22 prospective.
 23 On the other hand, there's the U.S. v. White
 24 Mountain Apache Tribe, different statutory scheme.
 25 There, you had a whole -- I believe the term was a web or

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1 a network of statutes governing the relations between the
 2 tribes and the Federal Government and the issue there was
 3 whether there was a fiduciary relationship. But what
 4 Congress -- between these two extremes, what the Court is
 5 saying with its requirement -- with its discussion of
 6 requiring a clear congressional intent, that's only
 7 against the background of statutory scheme you're dealing
 8 with.
 9 So in Testan, where the statute itself forbid
 10 -- prohibited the remedy that the Plaintiffs said they
 11 were entitled to, which was a retroactive remedy, the
 12 Court said we're going to need a clear indication of
 13 that, a clear statement. They did not require that in
 14 White Mountain. We're closer to the White Mountain
 15 because we're the Military Pay Act. The principal and
 16 presumption remedy under the Military Pay Act is a
 17 retroactive backpay claim for damages. That's the
 18 background of this claim. That's the background, also,
 19 of the NDAA and the background of the Militia Clauses.
 20 We're dealing in the money world where there's already
 21 monetary remedies and that's the primary and principal
 22 remedy this Court can order.
 23 So when it's already available, Congress
 24 doesn't have to remind the Court that they can already do
 25 what they're already empowered to do. So that's why the

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1 required -- the argument you need to see a clear
 2 statement and intent, it doesn't apply here. That
 3 applies when you're in Testan world. We're in White
 4 Mountain world. That's the Plaintiffs' position.
 5 So that's the preliminary point. And as we've
 6 argued in the complaint, the Militia Clauses are both
 7 money-mandating and self-executing by analogy -- I'm
 8 sorry.
 9 THE COURT: No, I wasn't going to say anything
 10 about it. I think what I just gathered from what you
 11 just said was that we're in the Military Pay Act world.
 12 MR. JOHNSON: Yes.
 13 THE COURT: Okay. And it's undisputed that the
 14 Military Pay Act is money-mandating.
 15 MR. JOHNSON: Yes.
 16 THE COURT: Yeah.
 17 MR. JOHNSON: Well, but also the background
 18 that we're operating against is the background of
 19 retroactive backpay claims. We're not in the world where
 20 the statute or the regime -- the regime of remedies
 21 available is only prospective. We're in retroactive
 22 world already.
 23 THE COURT: What I'm thinking you're going to
 24 argue, and what you have argued in the complaint and in
 25 your response, is that the Militia Clauses themselves in

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1 a vacuum are money-mandating.
 2 MR. JOHNSON: That's the grand slam, but I will
 3 take it if they're money-mandating, in conjunction with
 4 the Military Pay Act to meet the Samish conditions of
 5 statutory entitlement, eligibility, and precise amounts.
 6 THE COURT: But so is the basis of the claim
 7 that your Plaintiffs are entitled to backpay because they
 8 were wrongfully separated from the National Guard in
 9 violation of the Militia Clauses?
 10 MR. JOHNSON: I would rephrase that to say they
 11 are entitled to it because they were illegally punished
 12 in violation -- it all goes to punishment --
 13 THE COURT: They were wrongfully -- they were
 14 wrongfully treated.
 15 MR. JOHNSON: They were certainly wrongfully
 16 treated, but the key is they were wrongfully punished --
 17 illegally punished within the meaning of Abbott v. Biden,
 18 meaning they were governed --
 19 THE COURT: But that's the merits of your
 20 wrongful punishment or your wrongful separation claim.
 21 That's the merits. But to get in the front door for
 22 jurisdictional purposes in this Court, you need a money-
 23 mandating or a money-mandating source --
 24 MR. JOHNSON: Yes.
 25 THE COURT: -- and is your money-mandating

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1 source the Military Pay Act or are you arguing you don't
 2 need the Military Pay Act, it's just the Militia Clauses?
 3 MR. JOHNSON: I am arguing -- Plaintiffs are
 4 arguing Militia Clauses on their own are money-mandating.
 5 We may bring in the Military Pay Act or -- most
 6 importantly, the Military Pay Tables to meet the Samish
 7 conditions of defining what that remedy is and, most
 8 importantly, how much. But the Militia Clauses
 9 themselves are money-mandating for the same reasons, we
 10 argue, as the Just Compensation Clause in the Hatter line
 11 of cases, the Expert Clause --
 12 THE COURT: Both of those clauses --
 13 MR. JOHNSON: Mm-hmm.
 14 THE COURT: -- include kind of a reference to a
 15 monetary element. There's some sort of -- you know, one
 16 says, you know, salary shall not be diminished and the
 17 other one says that there shall be no duty or tax placed
 18 upon. So we're talking about money. So it's not -- you
 19 know, the Militia Clauses don't talk anything about any
 20 sort of pecuniary interest or compensation or money --
 21 payment of money by the Government.
 22 MR. JOHNSON: So I have two responses to that.
 23 Number one is like the Court in Abbott v. Biden, we want
 24 to look to the founders, the ratifiers, the majority of
 25 the signers of the Constitution served and fought in the

1 military war. They understood very well what martial law
 2 is, what the demands of martial law were, and equally
 3 what were the punishments under martial law. Primarily,
 4 those punishments that they sought to forbid -- and let's
 5 keep in mind that the Militia Clauses -- the militia is
 6 one of the most frequently used terms. This was central.
 7 And one of their central concerns was that the -- that
 8 federal martial law not be applied to militia members
 9 unless they're in the actual service of the United
 10 States.

11 What does martial law mean? It means no
 12 military punishments. And for the most part that means
 13 no fines, no denial of pay, which were the primary means.
 14 So they were operating against the background of
 15 prohibiting militia members not in federal service from
 16 being financially penalized. What they were prohibiting
 17 in the Militia Clauses, as well as the Militia Due
 18 Process Clause in the Fifth Amendment, was the
 19 prohibition of military punishments, which were primarily
 20 financial, as imposed on militia members when not in the
 21 actual service of the United States. That's what the
 22 Militia Clauses sought to prevent.

23 And this is both to preserve state sovereignty,
 24 but also, as is discussed in great length in Abbott v.
 25 Biden, as a way to make sure that the terms of militia

1 service were not so odious that persons of good character
 2 would not join. If you -- back in those days, most of
 3 the regular Army, these were the outcasts of society,
 4 these were people who were pressed into service and would
 5 go and rob and worse along the countryside. The regular
 6 Army were not considered to be upstanding characters as
 7 they are today.

8 These were the riff-raff of society. They had
 9 no rights; they were treated like animals, whereas a
 10 militia citizen soldier was supposed to be, well, a
 11 citizen soldier. He wasn't supposed to be subjected to
 12 these brutal frequently and degrading and dehumanizing
 13 punishments that the regular Army would suffer because
 14 that would endanger their position as citizen soldiers as
 15 members of society, but also take them apart from
 16 society. The regular Army also is a separate society due
 17 to military discipline. They wanted citizen soldiers to
 18 be a part of society and, as part of that, to not be
 19 subject to martial law and the punishments of martial
 20 law.

21 THE COURT: We're talking about payment of
 22 compensation for services -- for duties performed, right?
 23 I mean, ultimately, we're talking about payment of
 24 National Guardsmen. I mean, that's what we're talking
 25 about. We're not -- so, I mean, I'm still back in the

1 Military Pay Act world. I still haven't been --

2 MR. JOHNSON: Well --

3 THE COURT: -- I'm still having a hard time
 4 grasping how the Militia Clauses are money-mandating by
 5 themselves.

6 MR. JOHNSON: It's understandable because
 7 they've not been violated in the 230-some-odd years since
 8 the founding of the Republic. This is a unique
 9 violation. It's the precise evil that the Militia
 10 Clauses sought to prevent.

11 THE COURT: Well, even a violation wouldn't
 12 necessarily warrant -- like it doesn't state that a
 13 violation, you know, results -- it's not clear. It can't
 14 be reasonably inferred that there's some sort of monetary
 15 -- you know, monetary attribute to the clauses at all.
 16 I'm thinking about like a Fifth Amendment takings case
 17 and it's like just compensation. It talks about like
 18 there should be just compensation. And the other two
 19 that you speak to with the Compensation Clause and the
 20 Expert Clause, it still talks about money to a degree.
 21 It could be reasonably inferred, whether explicitly or by
 22 implication, and that's what I'm having to apply based
 23 upon Federal Circuit precedent --

24 MR. JOHNSON: Sure.

25 THE COURT: -- that from the language of the

1 actual clause, there's a money element.

2 MR. JOHNSON: So then let's turn -- so that's
 3 one line of argument. Another line of argument we
 4 discussed at great length in the motion to dismiss
 5 response is the line of cases going back to Runkle, where
 6 we're dealing the Militia Due Process Clause here, as
 7 well, not just the Militia Clauses, but the Militia Due
 8 Process Clause which does talk about deprivations of
 9 life, liberty, and property.

10 THE COURT: Is that like a District Court
 11 issue, not a Court of Federal Claims issue?

12 MR. JOHNSON: No, and let me explain why.

13 THE COURT: A due process violation, okay.

14 MR. JOHNSON: So again, going back to Runkle,
 15 McClaughry, U.S. v. Brown, up through Clackum, Garner,
 16 Dodson, Your Honor's decision in Driscoll, so what we
 17 have is -- are essentially due process violations where
 18 we're not necessarily talking about money, per se, but
 19 when we have a due process violation that renders the
 20 action legally void, well, the remedy for that is to
 21 constructively award pay and points for service.

22 THE COURT: Still a Military Pay Act, right?
 23 It's still a Military Pay Act claim.

24 MR. JOHNSON: The Military Pay Act, again, it
 25 would define the Samish conditions, but in Runkle -- I

1 mean, Runkle, I guess, in a sense was -- I don't know if
 2 they had the Military Pay Act back then, back in 1887,
 3 but there the remedy for an illegal discharge was to
 4 declare that discharge. And here, to declare these
 5 punishments, which were discharges, cancellation of
 6 orders, denial of pay, we declare those legally void. We
 7 act like they didn't happen.
 8 And so what we do is we create the legal
 9 fiction and award constructive service and pay because
 10 this legally void discharge and denial of pay and
 11 punishment, it didn't happen. So we're going to proceed
 12 as if these servicemembers continued in service and they
 13 should be awarded pay and points as if they had never
 14 been discharged because their discharge and punishment
 15 was a legal nullity due to the violation of the Militia
 16 Clause and the Militia Due Process Clause.
 17 THE COURT: I understand.
 18 MR. JOHNSON: So that's an alternative.
 19 THE COURT: No, I get it. I think it still
 20 kind of roots back to the Military Pay Act and maybe it's
 21 a violation of the Militia Clause, that is the grounds
 22 for the wrongful separation argument, but ultimately the
 23 source of jurisdiction would be -- you know, would
 24 allegedly be the Military Pay Act.
 25 Again, I'm talking not as if I've already

1 concluded, we're not ruling from the Bench today, making
 2 any decisions about understanding the basis of the claim.
 3 MR. JOHNSON: I understand. So again, there
 4 are two lines of authority. We've discussed Just
 5 Compensation Clause, Expert Clause, but then separately
 6 there's the due process -- the Runkle line of cases where
 7 the punishment or legal action is legally void
 8 constructive service. And I think that's the -- that
 9 application is very clear for people -- the Plaintiffs
 10 under 204(a)(1), and that is Botello, Phillips, Hood,
 11 Konie, Sanchez. I want to just talk briefly about Taylor
 12 because he is a person where the Military Pay Act is not
 13 going to do anything for him.
 14 He is subject to the duty to perform
 15 requirement under 206(a), but, again, I think we can get
 16 to the same place and it's the same approach that -- the
 17 illegal punishment rendered the Act void. So the Militia
 18 Clause was violated for the reasons we've already
 19 discussed. There was a void punishment -- what I want to
 20 highlight is just the arbitrary and putative nature of
 21 the directive we're challenging here, and that's the
 22 November 30, '21 directive, which denied pay if you're
 23 unvaccinated, it prohibited you from drilling and
 24 training, and then the third requirement is this bizarre
 25 requirement that you still have to go to drill, you still

1 have to perform your duty that you're prohibited from
 2 performing and we're also going to punish you for not
 3 performing the duty that you're prohibited from
 4 performing. If you're lost, so am I.
 5 It's arbitrary, it's irrational, it's
 6 Kafkaesque. But that is what we're challenging and that
 7 is something that we would argue is legally void and the
 8 -- like in Runkle, like in these other cases, the remedy
 9 should be constructive service in points. There's an
 10 illegal restriction. That illegal restriction has been
 11 removed, so we should look at what would have occurred
 12 but for this illegal restriction.
 13 There's another way to do this, I want to
 14 suggest, and that's what the Federal Circuit recently did
 15 in Taylor v. McDonough, the June '23 en banc decision,
 16 where they looked at a statutory limit and this case was
 17 a statute of limitations that barred the claim. What the
 18 Court did there was say they looked at the serious
 19 constitutional violations and they said, with this
 20 plaintiff, we're going to declare this statutory limit --
 21 statute of limitations unconstitutional as applied to
 22 this plaintiff. That's something the Court would do.
 23 Alternatively, the Court could look at the --
 24 Congress' actions in Section 525 and the Appropriations
 25 Act and say we can read -- Congress expressed its intent,

1 but these servicemembers should receive a remedy and one
 2 way to do that is an implied repeal -- excuse me, implied
 3 waiver of this performance requirement just for them,
 4 just to address this violation. That would be another
 5 approach.
 6 THE COURT: These are like merits types --
 7 MR. JOHNSON: Okay.
 8 THE COURT: Yeah, so, right now, I'm trying to
 9 figure out the jurisdictional grounds and the 12(b)(6).
 10 I'm listening because I want to hear everything,
 11 obviously, but if it's -- you know, if it's not set forth
 12 in the complaint with respect to the cause of action, I'm
 13 looking to the complaint --
 14 MR. JOHNSON: Okay.
 15 THE COURT: -- you know, to determine whether
 16 or not we have jurisdiction and also to determine whether
 17 Plaintiffs have adequately stated their claims. And so I
 18 think I'm able to do that based upon what you have here
 19 and your argument, as well.
 20 MR. JOHNSON: Okay. We've already discussed
 21 how we -- Plaintiffs contend we satisfied the
 22 requirements of Rule 8 stating a claim in the Court's
 23 jurisdiction. But I would just -- to repeat my co-
 24 counsel's claim, part of the violation here we're
 25 challenging is a whole range of procedural violations and

1 procedural irregularities, we don't have the full
2 records, we don't have the full facts because no
3 procedures were followed. So that is part of the reason
4 that the complaint does not have the full set of facts
5 that should be present and it's due to the Government's
6 fault. It's due to the precise violations we're
7 challenging here.

8 THE COURT: Once we get past, you know, the
9 12(b)(1) and the 12(b)(6) motions, obviously, the next
10 step would be if we get to that point, you know, an
11 administrative record and motions for judgment on the
12 administrative record and all those materials will be
13 made available. So, I mean, for now, we're just looking
14 to see if these pleadings are sufficient.

15 MR. JOHNSON: Understood. There's really only
16 one point that -- one remaining point that I -- maybe
17 two, but one major one, and this is the 28 U.S.C. 1500
18 issue that the Government has raised. It is important
19 not just for Botello, but we hope to -- this is a
20 putative class action where several thousand putative
21 class members are currently members of certified classes
22 in the Doster proceeding and the Navy Seals 1 to 26
23 proceeding for the Air Force and Navy, respectively, and
24 Marines, as well, there was a certified class at the time
25 this complaint was filed. So a very large percentage of

1 putative class members could face this obstacle. So I
2 think it's important to address up-front, and I think
3 there's a clear resolution. I hope you'll agree.

4 So the test is set forth in U.S. v. Tohono. So
5 we don't look at relief, we solely look at the legally
6 operative facts. And, also, my reading of the
7 Government's motion to dismiss is all we're concerned
8 about is the RFRA claim Count 4 for Botello, which
9 provides a great illustration because he was a named
10 plaintiff in a class action for military chaplains.

11 So what are the legally operative facts? They
12 are distinct in the two courts -- in the District Court
13 RFRA claim and the Court of Federal Claims and, most
14 importantly, there are two dispositive facts that are
15 dispositive in diametrically opposite directions. One is
16 the discharge and one is the enactment of the 2023 NDAA.
17 So in a District Court RFRA claim, a discharge destroys
18 the Court's jurisdiction because the plaintiff no longer
19 has a personal stake in the outcome of the litigation,
20 has no longer a personal stake in the policies of his
21 former employer.

22 Conversely, discharge here, if wrongful, in
23 violation of RFRA, that creates jurisdiction. That gives
24 you what the Military Pay Act -- and we do concede that
25 the Military Pay Act -- this is a Military Pay Act claim

1 premised on a RFRA violation, so in one case discharge
2 destroys jurisdiction; in another one, it creates it. In
3 this Court, it creates it.

4 It's the same thing with the 2023 NDAA. The
5 enactment of the NDAA destroyed the jurisdiction.
6 The enactment, along with the Secretary's commitment
7 to take full -- to provide full retroactive corrective
8 actions was the basis for courts, dozens of courts,
9 and most of the Courts of Appeals, to dismiss as moot
10 all of the -- one or two of the pending RFRA claims.
11 So destroys jurisdiction. Here, we argue it creates a
12 new claim. Now, I know that's -- there's been a lot of
13 argument, but our complaint asserts that it creates a
14 classwide claim.

15 So those are two important facts that have
16 diametrically opposite results for the two types of
17 claims.

18 There's also a couple of others that I want to
19 point out. So in the District Court, the key facts --
20 the key legally operative facts for jurisdiction are the
21 denial of the religious accommodation request followed by
22 the vaccination order, which puts the servicemember, as
23 the Fifth Circuit put it, to a choice between their jobs
24 or their jobs. They face a crisis of conscience where
25 they must either betray a sincerely held religious

1 conviction to keep their job or else lose their job.
2 These facts establish ripeness of the claim, standing,
3 exhaustion of remedies, also provide irreparable harm for
4 the preliminary injunction. So they establish the
5 jurisdiction and justiciability in an otherwise
6 nonjusticiable claim against the military.

7 These facts alone, however, in this Court don't
8 get you anywhere. And that's why the Court of Federal
9 Claims has not seen the RFRA claims. Another reason is
10 is that the RFRA statute provides for remedy in District
11 Court and not here, but U.S. v. Tohono said don't look at
12 that, what matters is the legally operative facts. What
13 establishes jurisdiction and the merits, the substantial
14 burden on free exercise in terms of the denial of the
15 request, as well as the vaccination order and the crisis
16 of conscience establish jurisdiction and the merits.
17 Standing alone, they don't give you anything in this
18 Court.

19 What you have to do to get to this Court is you
20 have to have a wrongful discharge, a wrongful denial of
21 pay, a wrongful cancellation of orders. So rather than
22 the threat of a First Amendment injury to conscience and
23 religious freedom, you have to have an actual realized
24 concrete monetary harm to get you -- to get this Court to
25 have jurisdiction, to state a claim, to have any

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1 entitlement relief, and how much that relief is.
 2 So the key facts for the RFRA claim versus the
 3 Court of Federal Claims, either they don't apply or they
 4 apply in opposite directions.
 5 And I would also just highlight that Botello
 6 got dismissed because his RFRA claim -- his religious
 7 accommodation request was still pending. So the Court
 8 looked at that -- the District Court there looked at it
 9 as not having established the exhaustion requirements.
 10 In November '22 -- that was November 23, 2022.
 11 A couple weeks later, the 2023 NDAA was
 12 enacted. So that's another crucial fact for his claim,
 13 in particular. The RFRA claims here do incorporate the
 14 occurrence of the later event of the 2023 NDAA enactment.
 15 That was not at issue in his RFRA claim. So --
 16 THE COURT: The operative facts are different.
 17 MR. JOHNSON: Yes, yes.
 18 THE COURT: Yeah. Okay. I appreciate those
 19 points.
 20 MR. JOHNSON: I would like to make one more
 21 point about retroactivity if -- with leave of the Court.
 22 And this also goes back to the Testan versus White
 23 Mountain worlds. So again, Testan, which provided --
 24 dealt with a statutory scheme where only prospective
 25 remedies were provided. Here, we're in military backpay

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1 world.
 2 So there are -- there's retroactive -- and we
 3 mean it retroactive in terms solely of going back in time
 4 to render the mandate a legal nullity. We do not mean it
 5 to have what the Court in Landsgraf described as
 6 genuinely retroactive effect. That's when you go back in
 7 time and create a new liability rule so that conduct
 8 previously legal is declared illegal or you provide a new
 9 set of remedies for that -- whether previously legal or
 10 illegal conduct that a person at that time would have had
 11 no way to know that they would be subject to these
 12 different and increased penalties for their conduct.
 13 That's not the world we're in.
 14 The conduct that was illegal, it was illegal
 15 before the 2023 NDAA. It violated 1107a; it violated
 16 RFRA; it violated the Militia Clauses, we contend. It
 17 was already illegal, so there's no new liability rule,
 18 also no new remedies. Before or after the 2023 NDAA, we
 19 want a retroactive backpay remedy under the Military Pay
 20 Act. That is the remedy it provides. That has not
 21 changed. So no new remedies, no new liability.
 22 As far as why it should be read as retroactive,
 23 my colleague addressed, you know, the statutory text, as
 24 well as the Secretary's actions, but I just want to
 25 emphasize that it's not just the Secretary's action in

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1 sort of arbitrarily identifying one set of servicemembers
 2 to give relief to and others who get nothing. In
 3 addition, it's also the stated position of the agency
 4 that they've represented to courts around the country and
 5 done so successfully in convincing dozens of District
 6 Courts and most of the Courts of Appeals to dismiss as
 7 moot all the pending RFRA claims.
 8 So this requirement for retroactive relief,
 9 it's been adopted by the agency and courts. Courts
 10 have accepted it. They have used -- the DoD has used
 11 this to deprive servicemembers of any injunctive or
 12 declaratory relief, and then they want to come here,
 13 turn around and take the opposite position that it's
 14 not retroactive and deny them monetary relief as well.
 15 That is a situation that cries out for judicial
 16 estoppel where contrary positions have been taken in
 17 different courts successfully in order to give the
 18 Government -- the party an unjust benefit; here, keeping
 19 billions of dollars that Congress said should be paid to
 20 our -- to National Guardsmen in our class and depriving
 21 the other side of that same benefit. And that is what
 22 has occurred here.
 23 THE COURT: Okay. And I'm listening and, you
 24 know, I'm taking it all in. I appreciate it. I
 25 appreciate all the points. My wheels are turning. I've

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1 spent some time on the briefing and absolutely going to
 2 give it the time and attention it deserves. One of the
 3 reasons I can't rule from the Bench today is I have a lot
 4 of thoughts I want to kind of hash out, given the number
 5 of Plaintiffs in each individual case, as well.
 6 MR. JOHNSON: We would welcome -- if there's
 7 any issue that Your Honor would -- where supplemental
 8 briefing might be helpful or --
 9 THE COURT: I'm going to try to make a
 10 decision based upon the argument and the briefings.
 11 You know, if there -- you know, if dismissing something
 12 is kind of a fruitless exercise and a simple amendment
 13 to the complaint could resolve the issue, that's
 14 something that we might consider. For things that I
 15 think don't survive a 12(b)(1) or a 12(b)(6) motion to
 16 dismiss, I'll, you know, honor the Government's request
 17 and probably dismiss it. But let me spend some time on
 18 it. I haven't made any decisions at this point in time.
 19 And I appreciate all the arguments and I'm going to take
 20 it all in and hopefully have a decision here sooner than
 21 later.
 22 MR. JOHNSON: Thank you, Your Honor. On behalf
 23 of the Plaintiffs, we greatly appreciate your Court's
 24 attention to this matter.
 25 THE COURT: Thank you, Mr. Johnson. Appreciate

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1 it.
 2 I believe the Government is entitled to a reply
 3 to the arguments. And we're right at about two hours, so
 4 I feel like we're on schedule here.
 5 MR. BECKRICH: Yeah, I'll keep us on schedule,
 6 Your Honor.
 7 THE COURT: Please. You have more important
 8 things to deal with, I think.
 9 MR. BECKRICH: That's right. No buzzing in my
 10 pocket, though, so I think we're good.
 11 THE COURT: That's good.
 12 MR. BECKRICH: I think I heard them argue that
 13 before the NDAA was passed they had a claim. I mean, if
 14 that's the case, then I certainly doubt they have a claim
 15 for a violation of the NDAA if that claim preexisted the
 16 NDAA being passed. I'm not sure how those two things can
 17 coexist.
 18 On the judicial estoppel piece, I mean, we've
 19 addressed it in our briefs, but I think it's certainly
 20 different to say that the challenge to the vaccination
 21 mandate is moot versus saying that the rescission of the
 22 mandate entitles everybody who is discharged or otherwise
 23 denied pay to monetary relief and I certainly don't think
 24 the Secretary of Defense's actions can change the
 25 language that Congress provided.

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1 On Botello, I mean, the question for the Court
 2 is whether -- the same operative facts. I don't think
 3 the fact that he -- the passage of the NDAA or his
 4 alleged discharge changes the operative facts. The
 5 question is did the vaccination mandate substantially
 6 burden a sincerely held religious belief. That was true
 7 -- I mean, that question could be answered before or
 8 after either of those.
 9 THE COURT: Is his discharge relevant to both
 10 cases?
 11 MR. BECKRICH: Well, I'm not sure that there's
 12 actually an allegation that he's been discharged in the
 13 first instance, but -- I mean, to the extent he's
 14 alleging he was denied pay, like, of course, that's
 15 relevant to this Court's jurisdiction. But it can't be
 16 that the fact that allows this Court to have jurisdiction
 17 deprives the Court of applying Section 1500.
 18 THE COURT: Yeah.
 19 MR. BECKRICH: Otherwise, there basically would
 20 never be a Section 1500, right? Because we're not --
 21 well, we're not alleging specifically that --
 22 THE COURT: The facts you're alleging preclude
 23 jurisdiction in this Court under 1500 are the fact that
 24 if Mr. Botello is alleging that he has a sincerely held
 25 religious belief and that he didn't receive a religious

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1 exemption, that's the fact.
 2 MR. BECKRICH: Exactly. That's --
 3 THE COURT: Whether it's in the District Court
 4 and he's looking to kind of enforce his right in the
 5 District Court or whether it's here in pursuing monetary
 6 compensation, that's the facts.
 7 MR. BECKRICH: It's the same claim. Exactly.
 8 THE COURT: The same facts.
 9 MR. BECKRICH: Yeah, yeah, you got it.
 10 THE COURT: Okay.
 11 MR. BECKRICH: Your Honor pointed this out.
 12 Obviously, Abbott did not address whether the Militia
 13 Clauses are money-mandating, and I certainly don't think
 14 that just because money is available under the Military
 15 Pay Act does that mean that monetary relief is available
 16 independently in a vacuum, as you said, under the Militia
 17 Clauses. Your Honor, I think, understands. I mean, you
 18 have to just look at the language and see if it can
 19 fairly be interpreted as requiring payment. Counsel
 20 spoke to issues that are -- were trying to be confronted
 21 with the Militia Clauses and that very well may all be
 22 true. Obviously, we're not conceding the merits of that
 23 claim at this point. We're just not -- we're just
 24 arguing that Militia Clauses are money-mandating.
 25 But just because it's addressing an alleged

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1 wrong doesn't mean it provides a remedy for that wrong.
 2 We think that potential remedy would be the Military Pay
 3 Act and we think that's what this keeps getting back to.
 4 It's not my job to tell them how to plead their claim.
 5 If they want to plead that the Militia Clauses are money-
 6 mandating, I'll respond to that. But it sounds like what
 7 we're really talking about is whether the Military Pay
 8 Act is money-mandating for a violation of the Militia
 9 Clauses.
 10 And then, lastly, I want to go back to Pohanich
 11 because I think we all agree that that's an important
 12 issue. What Pohanich -- well, first, in terms of
 13 distinguishing Pohanich, I'm not sure that -- I mean, the
 14 fact that it preceded the Correction Board before doesn't
 15 change the fact that this Court is required to apply the
 16 law. And so whether or not he has a claim under the
 17 Military Pay Act isn't entitled to any discretion.
 18 That's a legal question that the Court answered. So I
 19 don't think that has any grounds.
 20 I also don't think that the fact that this
 21 case involves, you know, more people or more money is
 22 any reason to depart from the law either. I don't
 23 think the magnitude has any relevance to Your Honor's
 24 decision.
 25 But what I do want to point out is that what

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1 Pohanic held is that a member of the National Guard
 2 serving on active duty is entitled to pay under
 3 204(a)(1), but what the Court held is that under
 4 204(d)(2), which is what -- or, excuse me, (d), that
 5 active duty, for the purposes of 204, only includes duty
 6 actually performed.
 7 And then the Court went and looked at the list
 8 of definitions that counsel provided, and it's true that
 9 the term active duty means full-time -- I'm looking at 37
 10 U.S.C. Section 101(18). The term "active duty" means
 11 full-time duty in the active service of a uniformed
 12 service and full-time National Guard duty." So that much
 13 is true. But the Court in Pohanic went one step further
 14 and said, okay, but what does full-time National Guard
 15 duty mean?
 16 And that definition comes from 37 U.S.C. -- or
 17 32 U.S.C., I think, Section 101(19), and full-time
 18 National Guard duty means "training or duty performed by
 19 a member of the Air National Guard of the United States."
 20 And so even applying the definitions of active duty, we
 21 still get back to a performance requirement.
 22 Again, Your Honor is not bound by Pohanic, but
 23 Your Honor is bound by the statutes and the statutes have
 24 a performance requirement. The definition of active
 25 baked into it is a performance requirement and Palmer --

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1 I mean, I think it's relatively --
 2 THE COURT: You're saying under (d), 204(d)?
 3 MR. BECKRICH: Yeah, under 204(d), there's a --
 4 THE COURT: Duty performed by?
 5 MR. BECKRICH: Yes, there's a performance
 6 performance requirement, and in Pohanic, the Court cites
 7 the definition of full-time National Guard duty, which
 8 the Court cites it at 32 U.S.C. Section 101(19). And,
 9 again, it says full-time National Guard duty means
 10 training or other duty performed. And so any time that
 11 full-time National Guard duty is equated with active
 12 duty, there's a performance requirement.
 13 What Palmer -- I mean, the law is pretty
 14 settled that when there's a performance requirement,
 15 nonperformance can't be compensated for under the
 16 Military Pay Act, even when that nonperformance is
 17 involuntary.
 18 THE COURT: Okay.
 19 MR. BECKRICH: That's all I have unless Your
 20 Honor has further questions.
 21 THE COURT: Thank you.
 22 All right. I appreciate all of the argument,
 23 all the briefing materials, all the time taken and
 24 effort. As I said, I'm going to, you know, weigh the
 25 briefing, have a decision out here sooner than later, and

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1 if I have the need for any additional supplemental
 2 briefing or if I have questions, I'll be sure to reach
 3 out.
 4 So with that, I think we are adjourned for
 5 today. Thank you all. Have a wonderful afternoon.
 6 (Whereupon, at 3:39 p.m., the hearing was
 7 adjourned.)
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1 CERTIFICATE OF TRANSCRIBER
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 4 transcriber, certify that the foregoing is a correct
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