No. 23-1238C
(Judge Bonilla)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CHRISTOPHER HARKINS, et al.,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

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

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

PATRICIA M. McCARTHY
Director

WILLIAM J. GRIMALDI
Assistant Director

KYLE S. BECKRICH
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 616-9322
Fax: (202) 305-7644
Kyle.Beckrich@usdoj.gov

Attorneys for Defendant

OF COUNSEL:

BRIAN JUDGE
CDR JARED HOOD
LT JAMES FERGUSON
United States Coast Guard
Office of Claims and Litigation (CG-LCL)

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

ARGUMENT

I. Plaintiffs' Claims Must Be Limited To Those Pled In The Complaint

Plaintiffs open their response to our motion to dismiss by adding new facts in support of new claims for wrongful discharge. They start with a lengthy discussion of discharge procedures relevant to the Coast Guard and citations to declarations filed by each plaintiff that are attached to their response to our motion to dismiss. Recognizing that the question of wrongful discharge is inherently individual to each plaintiffs' case,[1] plaintiffs allege that the Coast Guard failed to

[1] Indeed, plaintiffs recognize that "the separation of Coast Guard members is governed by a number of statutes and regulations, depending upon various factors particular to the individual's case, such as whether they are an officer, or enlisted, or an academy cadet, their years of service, if they are retirement eligible, or have a medical disability, to name just a few examples." Pl. Resp. at 3. Although the issue is not yet before the Court, plaintiffs' own arguments highlight one of the reasons why class actions, such as this one, are generally

follow certain procedures with respect to certain plaintiffs. Plaintiffs rely on the Supreme Court's decision in *Runkle v. United States*, 122 U.S. 543 (1887), which they claim stands for the proposition that plaintiffs were necessarily entitled to backpay if their discharges were unlawful. Pl. Br. at 9 ("These discharges were of no legal effect, and the Plaintiffs are entitled to the pay and benefits as if they had continued in service for their applicable terms of service, as required by the *Runkle-Brown* and *Clackum-Garner* lines of cases."). This entire discussion is misplaced.

First, plaintiffs' response relies on claims and facts found nowhere in their complaint. Allegations included for the first time in plaintiffs' response or plaintiffs' declarations do not amend their complaint. *Mendez-Cardenas v. United States*, 88 Fed. Cl. 162, 166-67 (2009) (holding that a complaint "may not be amended by the briefs in opposition to a motion to dismiss"); *Davis v. United States*, 108 Fed. Cl. 331, 337 n.4 (2012) (holding that the Court will not consider allegations not raised in a complaint). If plaintiffs wish to bring wrongful discharge claims based on certain Coast Guard procedures, they would need to amend their complaint or file a new lawsuit. Plaintiffs cannot add more claims to their complaint in an opposition to a motion to dismiss.

Second, *Runkle* is inapposite to the issues before the Court. In *Runkle*, the Supreme Court held that Mr. Runkle's court-martial was legally void and that he was consequently entitled to "longevity pay." 122 U.S. at 560. To the extent *Runkle* (or *United States v. Brown*, 206 U.S. 240 (1907), *Shapiro v. United States*, 107 Ct. Cl. 650 (1947), *Clackum v. United States*, 148 Ct. Cl. 404 (1960), or *Garner v. United States*, 161 Ct. Cl. 73 (1963)) has any bearing on this case, each case simply establishes that members of the military may recover, in certain

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incompatible with military pay claims: resolving a pay claim requires the Court to consider the individual factors in each individual's case.

circumstances, pay when illegally discharged. We do not contend otherwise. But plaintiffs must show that the specific sources of law they rely on in their complaint provide a basis for the recovery they seek. Notably, none of the sources of law at issue in *Runkle* (or *Brown*, *Shapiro*, *Clackum*, or *Garner)* are at issue in this case, and as discussed below, the sources of law that plaintiffs do invoke do not provide a basis for recovery.

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

A. The NDAA Is Not Money-Mandating

As we set forth in our motion, this Court lacks jurisdiction over Count I of plaintiffs' complaint, which alleges a violation of section 525 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 525, 136 Stat. 2395, 2571-72 (2022) (NDAA). Because Count I is based on a stand-alone violation of section 525 of the NDAA and because this section is not money-mandating, plaintiffs' claims should be dismissed.

While plaintiffs assert in their response that section 525 of the NDAA is money-mandating, they do not engage with the language of this section. But that is what the Court looks to in determining if a statute can fairly be interpreted as mandating compensation. *See New York & Presbyterian Hosp. v. United States*, 881 F.3d 877, 882 (Fed. Cir. 2018). As we explained in our motion, nothing in the language of section 525 can be interpreted as mandating compensation for service members affected by the vaccination requirement either retrospectively or prospectively. Def. Mot. at 11. That is particularly true for the Coast Guard, which is subject to neither DoD's vaccination policy nor the NDAA. Def. Mot. at 10-11. Nor do plaintiffs meaningfully engage with the extensive legislative history cited in our motion. *See* Def. Mot. at 11-13. Where there are "strong indications that Congress did not intend to mandate money

damages," the Court should not find that a statute is money-mandating absent an express damages provision. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 478 (2003).

Instead of rebutting our arguments as to why section 525 of the NDAA is not money-mandating, plaintiffs make three other arguments.

First, they point out that the Coast Guard's own mandate and subsequent rescission are in alignment with DoD. But regardless of whether the Coast Guard's policies were consistent with DoD's policies, the NDAA did not require the Coast Guard to rescind its vaccination policy. Accordingly, the NDAA could not have mandated payment of money for members of the Coast Guard because the statute does not contemplate *any* effect on the Coast Guard.

Second, plaintiffs say that they are entitled to pay under the Military Pay Act. But that is not at issue in Count I. We have not denied that the Military Pay Act is money-mandating. Nor have we argued that the Court lacks jurisdiction to consider whether an alleged violation of the NDAA could result in an entitlement to pay under the Military Pay Act. Indeed, plaintiffs make that claim under Count II. *See* Compl. ¶ 212 ("The Military Pay Act, in conjunction with . . . the 2023 NDAA Rescission, . . . is fairly interpreted as a 'money-mandating' source of federal law."). But under Count I, where plaintiffs allege they are entitled to relief *solely* based on an alleged violation of section 525 of the NDAA, they must show that section 525 of the NDAA itself is money-mandating.[2]

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

Third, plaintiffs note that some provisions of previous NDAAs were money mandating. But the fact that *some* historical NDAA provisions may have been money-mandating does not support plaintiffs' contention that section 525 of *this* NDAA is money-mandating. The cases invoked by plaintiffs demonstrate the textual differences between those historical provisions and the one at issue here.

For instance, plaintiffs rely on *Collins v. United States*, 101 Fed. Cl. 435 (2011), for the proposition that "[t]his Court has routinely found provisions of previous NDAAs . . . to be 'money mandating.'" Pl. Resp. at 11. But in *Collins*, the Court considered only whether a particular provision – 10 U.S.C. § 1174, which was amended by the 1991 NDAA – is money-mandating. 101 Fed. Cl. at 443. The Court held that section 1174 is money-mandating, noting that the statute provides that "the concerned servicemember '*is entitled to separation pay computed under subsection (d) unless* the Secretary concerned determines that the conditions under which the member is discharged do not warrant payment of such pay.'" *Id.* at 457 (quoting 10 U.S.C. § 1174(b)(1)). Here, Congress could have chosen to include language in section 525 of the NDAA that personnel were entitled to pay but chose not to do so. Instead, section 525 merely directs the Secretary of Defense to rescind the vaccination requirement. NDAA § 525. Accordingly, *Collins* does not support plaintiffs' implicit assertion that all NDAA provisions – no matter the specific language of those provisions – are money-mandating.

Similarly, *Striplin v. United States*, 100 Fed. Cl. 493 (2011), on which plaintiffs also rely, Pl. Resp. at 11, involves provisions of the 2007 NDAA specifically addressed raising a pay limitation. *Id.* at 500 ("the [FY 2007 NDAA] provides the authority to waive the pay limitation up to $212,100 in 2007"). Even so, this did not end the Court's analysis, because the NDAA provisions on which the plaintiff in *Striplin* relied were discretionary. *Id.* at 499, 500 (finding

that statutes are not money-mandating when "they vest discretion in the Government to authorize an increase in pay, instead of mandating such increases"). Only after the Court determined that DoD had exercised its discretion by identifying criteria to determine whether an employee was eligible for the increased pay limitation did the Court find that this particular provision of the 2007 NDAA was money-mandating. Here, as we have explained, any such pay mandate is completely absent from section 525 of the NDAA.

For the same reasons, *San Antonio Housing Authority v. United States*, 143 Fed. Cl. 425 (2019), and *Lummi Tribe of Lummi v. United States*, 99 Fed. Cl. 584 (2011), do not support plaintiffs' NDAA claims. Pl. Resp. at 11. In *San Antonio Housing Authority*, the provisions of the statute at issue specifically addressed monetary assistance by prohibiting diminishment of such assistance for certain operating and grant subsidies. 143 Fed. Cl. at 475. Because the plaintiff sought damages for a violation of the specific language in that statute, the Court held that the statute was money-mandating and that it possessed jurisdiction. *Id.* at 476. *Lummi* considered whether a statute that provided that the Secretary of the Department of Housing and Urban Development "shall . . . make grants" and "shall allocate any amounts" among Indian tribes was money-mandating. 99 Fed. Cl. at 594. Because the statute required the Secretary "to pay a qualifying tribe the amount to which it is entitled under the formula," the Court held the statute was money-mandating. *Id.* at 594, 597. Once again, unlike these statutory provisions, section 525 of the NDAA makes no reference to any monetary entitlement for servicemembers who failed to comply with the vaccination requirement. These cases underscore that section 525 lacks the type of language that is required to render a provision money-mandating. Accordingly, the Court should dismiss Count I for lack of jurisdiction.

B. The NDAA Does Not Apply To The Coast Guard Or Provide Retroactive Relief

The Court should also dismiss Count I for failure to state a claim. Plaintiffs fail to show how the NDAA applies to the Coast Guard *at all*. As mentioned above, plaintiffs argue that the Coast Guard's policies were consistent with DoD's policies. Pl. Resp. at 10 n.4. But even if the underlying policies aligned, that does not address whether the NDAA's recission provision applied to both policies. The Coast Guard is "a service in the Department of Homeland Security," rather than DoD. 14 U.S.C. § 103(a). Plaintiffs acknowledge that "the Coast Guard is not subject to" to DoD's vaccination requirement. Compl. ¶ 75. So, section 525, which instructs only DoD to rescind its requirement, likewise does not apply to the Coast Guard. *Id.*

Even setting aside that the NDAA does not apply to the Coast Guard, plaintiffs' claims fail because the NDAA does not provide retroactive relief. While plaintiffs make several arguments as to why the NDAA should be treated as retroactive, none are availing.

First, plaintiffs argue that the text and purpose of the NDAA show that it should be applied retroactively. But the text of the NDAA, combined with the presumption against retroactivity and the NDAA's legislative history, compels the opposite conclusion. Def. Mot. at 13-16.

This Court, the Federal Circuit, and the Supreme Court have all held that statutes are presumptively not retroactive unless Congress has "unambiguously instructed retroactivity." *Vartelas v. Holder*, 566 U.S. 257, 266 (2012); *Hicks v. Merit Sys. Prot. Bd.*, 819 F.3d 1318, 1321 (Fed. Cir. 2016); *BP America Production Co. v. United States*, 148 Fed. Cl. 185, 195 (2020). Plaintiffs argue that the presumption does not apply to remedial or curative statutes, and that the NDAA is a "textbook example" of a curative statute that should be applied retroactively. Pl. Resp. at 16 (quoting *Fern v. United States*, 15 Cl. Ct. 580, 591 (1988)). In *Fern*, however, the

Court considered whether it should give retroactive application to a statute that was *expressly* retroactive. 15 Cl. Ct. at 586-87. The Court noted that the statute, which was enacted in September 1982, was meant to apply to "pay periods beginning after June 25, 1981," well over a year earlier. *Id.* Accordingly, *Fern* does not stand for the proposition that all allegedly curative statutes should be applied retroactively, even absent a clear indication that they were intended to be retroactive.

Because the presumption against retroactivity applies here, the Court looks to see if Congress unambiguously instructed that section 525 of the NDAA should apply retroactively. Plaintiffs argue a single word – "rescind" – provides that unambiguous instruction.[3] But as we have explained, that one word is far from an unambiguous instruction of retroactivity. Def. Mot. at 15-16. Moreover, plaintiffs' reliance on that single word is further undermined by the NDAA's legislative history. *Id.* at 16. While plaintiffs argue little weight should be given to that history, they notably do not point to legislative history indicating that Congress intended section 525 of the NDAA to apply retroactively.

Second, plaintiffs argue that failing to apply section 525 of the NDAA retroactively would create "a two-tier payment structure, where some service members who suffered adverse actions for non-compliance, but managed to be protected by an injunction would be made whole, while others who were processed more quickly receive nothing." Pl. Resp. at 13. This argument suggests that, for policy reasons, the Court should apply section 525 retroactively so that

[3] Plaintiffs also argue we fail to explain why Congress chose to use the word "rescind" rather than "repeal" if section 525 was only intended to have prospective effect. *See* Pl. Resp. at 16. But plaintiffs confuse the burden. The burden is on plaintiffs to overcome the presumption against retroactivity. Further, plaintiffs do not explain why Congress chose to use the word "rescind," rather than expressly state the NDAA is retroactive, if Congress intended the NDAA to have retroactive effect.

servicemembers are not treated differently. However, plaintiffs fail to explain how the NDAA itself results in any servicemembers being treated differently. The terms of the NDAA are being applied equally to all servicemembers as none are required to receive the COVID-19 vaccination any longer under the Secretary of Defense's prior directive. That some unvaccinated servicemembers suffered adverse consequences before the NDAA's enactment does not address, much less demonstrate, that the NDAA treats servicemembers differently. Moreover, policy arguments are not generally a basis for ignoring the text of the statute or Congress's intent. *Small v. United States*, 158 F.3d 576, 580 (Fed. Cir. 1998) (citations omitted) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

Third, plaintiffs point out that DoD has opted to provide some retroactive relief. But DoD's discretionary decision does not turn the NDAA into a retroactive statute. The question before the Court is not whether DoD or the Coast Guard could provide any retroactive relief to unvaccinated service members, if they so chose.[4] Instead, the pertinent question is whether Congress unambiguously intended section 525 of the NDAA to have a retroactive effect. As we have made clear, the presumption is *against* retroactivity, *Vartelas*, 566 U.S. at 266, and no language or legislative history negates that presumption. Accordingly, that the statute does not prohibit the granting of retroactive relief does not support plaintiffs' argument that the statute *mandates* retroactive relief.

[4] Nor is it clear from plaintiffs' response how DoD could even provide any retroactive relief to members of the Coast Guard, when the Coast Guard falls under the purview of the Department of Homeland Security and not DoD.

Finally, plaintiffs argue that the United States, and particularly DoD, is judicially estopped from arguing that section 525 of the NDAA does not authorize retroactive backpay. Plaintiffs rely on the district court litigation involving the vaccination requirement, where plaintiffs challenged the DoD vaccination requirement itself. The United States argued in those matters that once that requirement was rescinded, those plaintiffs were no longer required to receive a COVID-19 vaccine and their claims became moot.[5] We are not aware of any district court case in which the United States has previously addressed whether section 525 of the NDAA entitles unvaccinated service members retroactively to backpay, much less has argued that it does. And plaintiffs certainly have not identified any prior case where the United States argued that section 525 of the NDAA entitles unvaccinated members of the Coast Guard to backpay. Accordingly, estoppel is unwarranted because the United States has not advanced a position here that is "clearly inconsistent" with a prior position. *Agility Pub. Warehousing Co. K.S.C.P. v. United States*, 969 F.3d 1355, 1368 (Fed. Cir. 2020) (quotation omitted).

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

In our motion to dismiss, we demonstrated that plaintiffs cannot establish that they have standing to bring a claim for relief based on a purported violation of 10 U.S.C. § 1107a. Specifically, we argued that plaintiffs did not allege facts showing that they would have received a fully licensed vaccine if it was available to them. Def. Mot. at 18-19. Further, because the vaccination mandate did not require plaintiffs to receive a vaccine authorized for emergency use, it did not implicate (or violate) section 1107a. Def. Mot. at 19.

[5] We note that the Supreme Court recently confirmed that the challenges to the vaccination requirement are moot. *See Kendall v. Doster*, No. 23-154 (U.S. Dec. 11, 2023).

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

First, these factual allegations are not in plaintiffs' complaint. As noted above, allegations included for the first time in plaintiffs' response or plaintiffs' declarations do not amend their complaint. *See supra* Section I. But even if those allegations are considered, they still do not establish that plaintiffs have standing. In order to show that their harm has a "causal connection" to the conduct complained of, plaintiffs must allege facts showing that (1) no fully licensed vaccine was available to them at the time they suffered the alleged harm, and (2) they would have received such a fully licensed vaccine had it been available. *See* Def. Mot. at 18. They still do not adequately allege any such facts. With respect to the availability of a fully licensed vaccine, Mr. Byrd's declaration does not provide any detail as to when he inquired as to what vaccines could be obtained through commercial sources. *See* ECF No. 8-5 at 2. As for Mr. Powers, his declaration establishes he was told there were vaccines available, but that he did not want to receive one. ECF No. 8-6 at 3. Moreover, because no plaintiff claims either in their complaint or in their declaration that they would have received a fully licensed vaccine had it been available (and in fact Mr. Powers' declaration says the opposite), they are unable to show how the unavailability of a fully licensed vaccine (even if true) contributed to their harm. Given plaintiffs' expressed opposition to the vaccine, it cannot be assumed that plaintiffs would have agreed to take any COVID-19 vaccine (absent an allegation to that effect) – and thus plaintiffs still have failed to allege that a violation of section 1107a caused their claimed harm.

Second, plaintiffs' argument that the military services did not have any fully-licensed vaccines until June 2022 undermines rather than advances their claims. To show that they state a claim, plaintiffs point to their allegation that the earliest any "Comirnaty-labeled" or "Spikevax-labeled" vaccines were available through the services was June 2022. Pl. Resp. at 23-24. But no plaintiff alleges that they were discharged prior to June 2022. Compl. ¶¶ 17-23. Plaintiffs cannot state a claim when the alleged violation of section 1107a was cured at the time the adverse action was taken. Compl. ¶ 140 ("Defendants were mandating EUA vaccines, in violation of 10 U.S.C. § 1107a, at least until June 2022"). But even setting that issue aside, plaintiffs cannot state a claim for a violation of section 1107a because the vaccine requirement provided that service members were required to receive only "the Pfizer-BioNTech COVID-19 vaccine" that "was granted license by the Food and Drug Administration." ECF No. 1-3 at 2; *see also* ECF No. 1-2 at 2 ("Mandatory vaccination against COVID-19 will only use COVID-19 vaccines that receive full licensure . . . in accordance with FDA-approved labeling and guidance."). As another court considering this exact issue noted, "on its face, the mandate does not require anyone to take an EUA vaccine." *Doe #1-#14 v. Austin*, 572 F. Supp. 3d 1224, 1233 (N.D. Fla. 2021). The vaccination requirement likewise did not require service members to receive the vaccine from a DoD or Coast Guard source. So even if a fully licensed vaccine was not available in June 2022, plaintiffs have still not pled a violation of section 1107a because nothing in the vaccination requirement mandated the use of anything other than licensed vaccines.

Third, plaintiffs' judicial estoppel argument is once again misplaced. Although plaintiffs assert that the Government has taken inconsistent positions on when fully licensed vaccines became available to the services, at this stage of the litigation, we have not asserted any facts as

to when and where particular vaccines were available. Instead, our arguments are based on both the facts set forth by plaintiffs and a plain reading of the vaccination requirements, which has been adopted in other courts. It is plaintiffs' burden to state a claim for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When the challenged requirement facially complies with section 1107a, and plaintiffs do not allege facts showing that the requirement, as applied to them, violated the statute, they do not meet their burden.

IV. Plaintiffs Fail To State Claims Under Count III

As we explained in our motion, no plaintiff in this case alleges that they submitted a religious accommodation request (RAR) or otherwise attempted to obtain relief from the Coast Guard. Def. Mot. at 20-22. In order to state a claim under the Religious Freedom Restoration Act (RFRA), plaintiffs must allege that the challenged policy substantially burdened a sincerely held religious belief. 42 U.S.C. § 2000bb-1; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694-95 (2014). Plaintiffs have not alleged facts that meet this standard, especially when they did not attempt to obtain an accommodation, or alleged facts establishing that it would have burdened them to seek an accommodation.

Plaintiffs attempt to cure these defects in their claims by attaching declarations from all of the plaintiffs explaining that they did submit an RAR (even though the complaint fails to allege such facts) and that even the requirement to submit an RAR violated their rights. *See* Pl. Resp. at 25-26. Again, plaintiffs cannot amend their complaint through their brief in opposition to the government's motion to dismiss. *See supra* Section I.

Nor does plaintiffs' reliance on district court cases granting injunctive relief change the analysis in this case. Plaintiffs argue that numerous district courts have held that submitting an RAR was unnecessary for those courts to consider claims under RFRA because the "religious

accommodation process . . . was futile and/or inadequate." Pl. Resp. at 26. Even assuming plaintiffs' claims do not suffer from an exhaustion problem, plaintiffs still must allege facts showing that the vaccination requirement substantially burdened a sincerely held religious belief. There are simply no facts pled regarding a sincerely held religious belief or how that belief was burdened, much less any reference to the fact that they believed filing an RAR would be futile or inadequate.

Because the complaint does not contain facts demonstrating that any of the plaintiffs harbored any religious objection to the vaccine or had an RAR wrongly denied, plaintiffs fail to state a claim for relief under Count III.

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

As explained in our opening brief, reserve members are not entitled to backpay for unperformed duties "even where the lack of performance was involuntary and improperly imposed." *Reilly v. United States*, 93 Fed. Cl. 643, 649 (2010). Because two plaintiffs—Ms. Gagnon and Mr. Morrissey—do not allege that they performed any work for which they were not compensated, we explained that they are not entitled to any relief for the time in which they were on inactive status. Def. Mot. at 23. In response, plaintiffs argue that they can state a claim because (1) Ms. Gagnon was on active duty "at the time of the Defendant's wrongful actions" and (2) Mr. Morrissey was improperly denied points from annual training that would have in turn resulted in additional "statutory and regulatory protections." Pl. Resp. at 27-28. Neither argument saves their claims.

With respect to Ms. Gagnon, although it is true that a reserve member can "state a claim for backpay if they were participating in full-time active duties until the government's wrongful

action," *Radziewicz v. United States*, 167 Fed. Cl. 62, 68 (2023), Ms. Gagnon alleges that she was removed from active duty because her contract expired, not for any wrongful reason. Compl. ¶ 18. Ms. Gagnon does not allege that she was not paid for any time while on active duty or that her time on active duty was improperly cut short. Instead, the basis of her claim is that she should have received an extension to her contract. But she is not alleging that she was unpaid for any time on active status or that her active duty orders were curtailed before they expired of their own accord. Accordingly, there is no basis for backpay for her unperformed duties, even if she believes the lack of performance was involuntary. *Reilly v. United States*, 93 Fed. Cl. 643, 649 (2010); *Barnick v. United States*, 591 F.3d 1372, 1379 (Fed. Cir. 2010) ("a reservist is entitled to active duty pay only for the period that he is actually on active duty").

As for Mr. Morrissey, he does not claim he was deprived of pay for any work actually performed. Indeed, he does not allege that he was deprived of any pay at all, but instead that by failing to credit him points for certain training duties, he lost out on certain separation protections. Pl. Resp. at 28. Because he alleges that he should have received those protections and did not, he argues that his discharge was wrongful. *Id.* There are two issues with Mr. Morrissey's arguments. First, he has not alleged that he was denied pay for any performed duty. Indeed, the Federal Circuit is clear that even if a reservist is wrongfully removed from inactive status, the reservist has no pay claim against the United States for unattended drills or for unperformed training duty. *Palmer v. United States*, 168 F.3d 1310, 1314 (Fed. Cir. 1999). Second, although the Court need not reach this issue, Mr. Morrissey is not entitled to the separation protections based on the allegations in the complaint. Mr. Morrissey cites Coast Guard Commandant Instruction (COMDTINST) 1001.28D, which provides certain protections for members of the Reserve who have served at least 18 years. Pl. Resp. at 28. But as the quote

indicates, those protections apply when a Reserve member is "serving in an active status." COMDTINST 1001.28D. Here, Mr. Morrissey does not allege that he was serving in an active status, and thus the instruction does not apply.

Finally, contrary to plaintiffs' suggestion, the potential class action nature of their complaint does not require a result that differs from the established law discussed above. *See* Pl. Resp. at 30. If a class were certified in this case, each member of the class would still have to show an entitlement to backpay. *See Lohmann v. United States*, 154 Fed. Cl. 355, 370 (2021) ("Determining entitlement . . . under Plaintiffs' FY 2015 claim will likely require an individualized assessment of each proposed class member's orders . . . ."). That plaintiffs propose that this case may be suitable for class certification does not relieve them of their burden to sufficiently plead their claims.

In sum, Ms. Gagnon and Mr. Morrissey fail to state a claim under the Military Pay Act regardless of the underlying violation upon which their claims are allegedly based, and the Court must dismiss their claims for this independent reason.

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

In our motion to dismiss, we explained that plaintiffs failed to allege that the Government took money from them that they seek to have returned, and that to the extent that they do make such allegations, they do not allege that any money was *illegally* taken from them. Def. Mot. at 25-26. In response, plaintiffs do not contend that any plaintiff other than Mr. Powers has a claim for illegal exaction. Pl. Resp. at 31. Plaintiffs contend that Mr. Powers has stated a claim for illegal exaction "because he had money taken from him in violation of an explicit Coast Guard

policy that forbids recoupment of enlistment bonuses," even if he was discharged prior to the expiration of his term of enlistment. *Id.*

Notably, plaintiffs cite no Coast Guard policy that forbids such recoupment, and we are not aware of any such policy. In fact, repayment of unearned bonuses is the policy of the Coast Guard. COMDTINST 7220.2A at 1-7 ("Except under conditions described in 37 U.S.C. § 373, the Coast Guard will demand repayment of the unearned portion of the bonus payment for which the service obligation was not met."). Accordingly, Mr. Powers fails to show how the alleged recoupment of his enlistment bonus constitutes an illegal exaction.

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

In their response brief, plaintiffs clarify that "they do not assert a stand-alone claim under Count V and that any relief requested thereunder would be an incident of and collateral to an award of money judgment under Counts I-IV." Pl. Resp. at 31. Accordingly, plaintiffs' claims under Count V, based on a "violation of 10 U.S.C. § 1552," should be dismissed.

CONCLUSION

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

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

PATRICIA M. McCARTHY
Director

s/ William J. Grimaldi
WILLIAM J. GRIMALDI
Assistant Director

OF COUNSEL:

BRIAN JUDGE
CDR JARED HOOD
LT JAMES FERGUSON
United States Coast Guard
Office of Claims and Litigation (CG-LCL)

s/ Kyle S. Beckrich
KYLE S. BECKRICH
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 616-9322
Fax: (202) 305-7644
Kyle.Beckrich@usdoj.gov

Dated: December 21, 2023

Attorneys for Defendant