IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CHRISTOPHER HARKINS, SHANE NOLAN, MARK BYRD, AARON GUTIERREZ, CHRISTOPHER MUSGRAVE, and MATTHEW POWERS, individually and on behalf of all others similarly situated, ***Plaintiffs*,** **v.** **THE UNITED STATES OF AMERICA,** ***Defendant*.**	**Case No. 23-1238 C**

SECOND AMENDED CLASS ACTION COMPLAINT

Plaintiffs Christopher Harkins, et al., on behalf of themselves and a class of similarly situated persons, bring this class action against Defendant United States of America (the "Government") and allege as follows upon personal knowledge as to themselves and their own acts and experiences, and, as to all other matters, upon reasonable information and belief, including investigation conducted by their attorneys.

NATURE OF THE CASE

1. This is a class action for military backpay under the Military Pay Act, as well as other pays due, along with ancillary relief, for all members of the United States Coast Guard ("Coast Guard"), in the regular or reserve components, who were unlawfully discharged from the Coast Guard for failure to comply with the Coast Guard's illegal Covid-19 vaccine mandate, which adopted Secretary of Defense Lloyd Austin, III's unlawful August 24, 2021 COVID-19 vaccine mandate, see Dkt. 1-2. The Coast Guard

adopted the mandate in an August 26, 2021 ALCOAST Message 305/21, citing the SecDef Memo. See Dkt. 1-3 (Ref A) (collectively, the "Mandate").[1]

2. On December 23, 2022, the DoD Mandate was "rescind[ed]" by act of Congress by Section 525 of the Fiscal Year 2023 National Defense Authorization Act (the "2023 NDAA"). On January 10, 2023, Secretary Austin issued a memorandum rescinding the August 24, 2021 Mandate. See Dkt. 1-4, Jan. 10, 2023 Rescission Memo. In the Rescission Memo, Secretary Austin acknowledged the Congressional directive to apply the Rescission retroactively by, among other things, committing to correct military records and adverse personnel actions resulting from non-compliance with the now voided Mandate and orders issued pursuant to it.

3. On January 11, 2023, the Coast Guard rescinded the Coast Guard Mandate "[i]n alignment with the DoD." Dkt. 1-5, ALCOAST 012/23, ¶ 1.

4. The Class in this case consists of all Coast Guard members on active duty orders who were unlawfully discharged, involuntarily separated, withheld a promotion for which they were selected, or forced to retire due to their non-compliance with the Mandate.

5. Each member of the Class has a claim to backpay under the Military Pay Act, including Chapter 3 of Title 37, for duties performed, (37 U.S.C. § 204 or § 206), and/or other associated entitlements and emoluments under Chapter 5 (Special and Incentive Pays), Chapter 7 (Allowances Other than Travel and Transportation

[1] DoDI 6205.02 requires the Coast Guard to comply with DoD policy regarding immunizations. ("¶ 1.1. APPLICABILITY. This issuance applies to: a. OSD, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department))…".

Allowances), Chapter 8 (Travel and Transportation Allowances), and Chapter 9 (Leave) because of their wrongful discharges.

6. Each member of the Class was unlawfully and wrongfully discharged because (a) the Mandate, the Order itself, was illegal in violation of 10 U.S.C. § 1107a (*infra* IV); (b) compliance with the Mandate was impossible on its own terms (*infra* IV.C - IV.F); (c) the Coast Guard carried out the Mandate illegally (*infra* II.A - II.C).

7. In executing the Mandate, the Coast Guard also created independent causes of action under additional money-mandating statutes for (a) denial of separations pay under 10 U.S.C. § 642 and § 1174 for all Class members who met the eligibility requirements; and (b) denial of the protections afforded by the Sanctuary statute, 10 U.S.C. §1176, for Plaintiff Harkins, and many other similarly-situated class members, who had more than 18 but less than 20 years of service. Plaintiff Harkins was over 19 years of active service at the time of his discharge; Plaintiff Nolan would have been in sanctuary at the time of his ETS but for his illegal discharge.

8. Other violations by the Coast Guard implicated due process rights, such as denial of Guardsmen's right to consult with counsel, be free of pre-trial punishment or denial of liberty under the Uniform Code of Military Justice, 10 U.S.C. § 813, and to challenge the charges of misconduct and present evidence at either a court-martial or an administrative separation board. All named Plaintiffs had more than 8 years of service, yet none received an administrative separation board. ("Coast Guard members with eight or more years or military (active and/or Reserve) service are entitled to a board before they are involuntarily separated or denied reenlistment." COMDTINST M1910.1, ¶ 1.B.1.) Three different Plaintiffs – Mark Byrd, Chris Harkins, and Shane Nolan all explicitly requested defense counsel during their involuntary discharge process. All were denied

any legal assistance while being treated as if they had already been adjudicated guilty of misconduct under the UCMJ.

9. Still other violations implicated additional benefits with money-mandating consequences, such as the right to have a pre-separation physical to assess service-related injuries and document them for possible medical retirement or veteran's benefits, or continuing treatment. See 14 U.S.C. § 2156 and 14 U.S.C. § 2513; see also COMDTINST M1000.4, ¶ 1.B.6. and COMDTINST 6000.2. *See, e.g.*, Plaintiff Harkins' Decl., ¶¶ 31 – 34.

10. Another of the Coast Guard's violations with independent money-mandating significance include illegally exacting money from Plaintiffs like Matthew Powers and Christopher Musgrave, by recouping bonuses or forcing Class members like Plaintiff Harkins and Nolan to sell back and/or lose earned leave in direct violation of applicable statutes. COMDTINST M1000.4, ¶ 1.B.7.a. ("The member… does not have to pay back a pro-rated portion of any reenlistment bonus he or she previously received[.]"); *see also* COMDTINST M7220.29, Ch. 4.F.1 ("Recoupment of unearned portions of an enlistment or selective reenlistment bonus is required when a member *voluntarily*, or *because of misconduct*, does not complete the term of reenlistment, extension or enlistment…") (emphasis added).

11. The Class also includes Coast Guard members whose request for religious accommodation for the Mandate was unlawfully denied in violation of the Religious Freedom Restoration Act ("RFRA"), the First Amendment's Free Exercise Clause, DoD Instruction 1300.17 *Religious Liberty in the Military Services* (Sept. 1, 2020), and the Coast Guard's implementing regulation, COMDTINST 1000.15, *Military Religious Accommodations* (Aug. 30, 2021). *See* Ex. 1.

12. The Court has ancillary equitable powers to correct records and provide other ancillary relief under 10 U.S.C. § 1552. All Plaintiffs seek such relief in order to have all negative actions, marks, or remarks resulting from the Mandate corrected or removed from *all* of their military records.

JURISDICTION AND VENUE

13. This Court has jurisdiction under the Tucker Act, 28 U.S.C. §1491(a). The Tucker Act provides, in relevant part, as follows:

> (1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
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> (2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

14. Plaintiffs' and Class Members' claims against Defendant are founded as noted above ¶¶ 5, 7 - 10 upon money-mandating sources of federal law – including the Military Pay Act, and/or Separations Pay statute. For class members whose terms of service would go past 20 years, the Military Retirement Pay statutes, 14 U.S.C. § 2152 and 14 U.S.C. § 2306, would obtain.

15. The 2023 NDAA, the Military Pay Act, and the other aforementioned federal statutes and regulations constitute an express waiver of the sovereign immunity of the United States of America and mandate compensation by the Government for damages

sustained that create a cause of action and/or a substantive right to recover money damages against the Government.

16. Venue is proper in this Court pursuant to 28 U.S.C. §1491(a)(1).

PARTIES

17. **Plaintiff Mark Byrd** was a Marine Science Technician First Class (PO1/E-6 pay grade) serving on full-time active-duty in the Coast Guard prior to his discharge over the Mandate. Plaintiff Byrd initially enlisted October 17, 2006 and remained on active duty up through his most recent reenlistment in July 2019 for a four-year term scheduled to end in May 2023. In response to the Mandate, on September 22, 2021 Plaintiff Byrd exercised his rights under RFRA and COMDTINST 1000.15, submitted his Religious Accommodation Request ("RAR"), which was denied on February 24, 2022, well past the requisite processing deadlines in Enclosure (1) of the Commandant Instruction. On March 10, 2022, PO1 Byrd submitted the appeal for his RAR. On May 18, 2022, Plaintiff Byrd was ordered to report to a scheduled appointment at his base in to receive injection; On June 1, 2022, Plaintiff Byrd received a negative Form 3307 that falsely stated that he had failed to report as ordered to receive the vaccination and found him in violation of Articles 90 and 92 of the UCMJ. Plaintiff Byrd, however, had gone to the medical centers at Marine Corps Base Camp Lejeune and Marine Corps Air Station Cherry Point, North Carolina, both clinics informed Plaintiff that there was no FDA-licensed Comirnaty available. In addition, Plaintiff called every pharmacy in a 50-mile radius, none of whom had FDA-licensed Comirnaty. Plaintiff emailed his command showing that no FDA-licensed Comirnaty available. *See* Byrd Decl., ¶¶ 15-17. Plaintiff Byrd's RAR Appeal was denied on June 2, 2022 (also past the requisite deadlines in the Instruction).

18. On October 28, 2022, Plaintiff Byrd was discharged with approximately seven months remaining on his contract, after having served 16 years and 11 days on Active Duty; he lost all pay and benefits until returning to service in July 2023. Plaintiff Byrd was not given either an AdSep or Re-Enlistment Board and told it was because he was being discharged for the Convenience of the Government (COG). *Id.*, ¶ 20. Block 25 of Plaintiff's DD-214 lists the Separation Authority as "COMDTINST M1000.4.[¶]1.B.26." Paragraph 1.B.26 of the extant version of CI M1000.4 at the time (Aug. 2018) authorizes the Commandant to "release" "enlisted Reserve and retired members" from active duty during War or National Emergency." Plaintiff was neither in Coast Guard Reserve nor even eligible to retire. Plaintiff's DD-214 also contained a Re-Entry Code of "RE-3 Eligible for reenlistment except for a disqualifying factor." COMDTINST 1000.4, ¶1.b.2.g (3).

19. Plaintiff was rushed through the separation process in roughly 30 days, not given statutory house-hunting leave under 10 U.S.C. § 1149, nor allowed to complete the Veterans Administration disability and benefits processing, nor did he receive the required medical examination prior to discharge. *See* Byrd Decl. ¶¶ 21-25. In addition to loss of pay and benefits and time toward retirement, this gap in service prevented his promotion to E-7 due to not being allowed to take the annual Service Wide Exam in May 2023. Plaintiff subsequently was hired by the Coast Guard as a civilian and then contacted by the Coast Guard's Re-Accession Team. Plaintiff re-enlisted on July, 5, 2023.

20. **Plaintiff Aaron Gutierrez** was a PO1 (E-6 pay grade) serving on full-time active-duty in the Coast Guard prior to his illegal discharge. Plaintiff Gutierrez initially enlisted in June 2006, his most recent reenlistment was for a three-year term ending in May 2023, and he intended to reenlist for at least an additional term to reach at least 20 years and retirement eligibility. In response to the Mandate in October 2021, Plaintiff

Gutierrez submitted his RAR, which was denied on February 14, 2022, months after the processing deadlines in the USCG instruction. On March 3, 2022, he submitted the appeal for his RAR, which was denied on May 13, 2022 (also past the deadlines). On June 21, 2022, Plaintiff Gutierrez was ordered to report to scheduled appointment to receive the injection; Plaintiff refused to take it because of his religious beliefs. On June 23, 2022, Plaintiff Gutierrez received a negative Form 3307 for violation of Articles 90 and 92 of the UCMJ and a Notice of Intent to Discharge by the Coast Guard. Plaintiff was given his separation package on June 30, 2022. Plaintiff was not given an opportunity to consult with counsel, nor an Administrative Separation or Re-Enlistment Board. Plaintiff was rushed through the separation process in roughly 30 days, not given statutory house-hunting leave under 10 U.S.C. § 1149, nor allowed to complete the Veterans Administration disability and benefits processing, although he did receive the required medical examination prior to discharge.

21. On July 30, 2022, Plaintiff Gutierrez was discharged with approximately ten months remaining on his term of enlistment; after having served over 16 years on Active Duty, he lost all pay and benefits. Just like Plaintiff Mark Byrd, PO1 Gutierrez's DD-214 lists the Separation Authority as "COMDTINST M1000.4.[¶]1.B.26." Paragraph 1.B.26 of the extant version of CI M1000.4 at the time (Aug. 2018) authorizes the Commandant to *release* "enlisted Reserve and retired members" from active duty during War or National Emergency. Plaintiff was neither in Coast Guard Reserve nor eligible to retire when he was *discharged*, rather than *released*. Post-discharge, Plaintiff Gutierrez was rated at 80% disability by the VA, which would have qualified him for medical retirement had such a medical finding occurred while he was still on active duty under 10 U.S.C. § 1201 *et seq*.

22. **Plaintiff Christopher Harkins** was a PO1 (E-6 pay grade) serving on full-time active-duty in the Coast Guard. Plaintiff Harkins initially enlisted December 1, 2003; his most recent reenlistment was for a six-year term ending March 31, 2024, and he had an approved retirement date of January 1, 2024. In response to the Mandate, in October 2021, Plaintiff Harkins submitted his RAR, which was denied on February 1, 2022, well past the requisite processing deadlines under the CG regulation. On February 9, 2022, he submitted the appeal for his RAR, which was denied on or about August 15, 2022 – also months after the requisite deadlines. Plaintiff and some of his colleagues had been "continuously polling ALL local military clinics and pharmacies for the FDA approved vs. EUA version. In all of this time from August 2021 through [his] discharge in December 2022, not a single place could ever produce the FDA-approved version." Harkins Decl. ¶ 16.

23. During that same summer 2022, in advance of his anticipated retirement, Plaintiff traveled to North Carolina to purchase a home for his family. On August 22, 2022, Plaintiff Harkins was ordered to report to a scheduled appointment to receive the unlicensed injection. Plaintiff invoked his rights under 10 U.S.C. §1107a and the EUA statute, 21 U.S.C. § 360bbb-3, to not be forced to take an unlicensed product. On August 22, 2022 and again on September 6, 2022, Plaintiff Harkins received a negative Form 3307 that summarily found him in violation of Articles 90 and 92 of the UCMJ, along with a Notice of Intent to Discharge. Plaintiff requested a court-martial, requested to consult with counsel, and invoked the sanctuary provisions of 10 U.S.C. § 1176. Plaintiff had previously asked about an administrative discharge board because he had more than 8 years of service. Shortly thereafter, in September 2022, Plaintiff's new commander

accused Plaintiff of lying about his RAR submission and used that as the justification to deny Plaintiff access to secure spaces necessary for Plaintiff to do his job. Id., ¶¶ 17-25.

24. On December 1, 2022—roughly a week before the House passed the 2023 NDAA and three weeks before it was signed by President Biden—Plaintiff Harkins was summarily discharged after having served 19 years on Active Duty, with approximately sixteen months remaining on his contract that expired after his 20-year mark and his approved retirement date; he lost all pay and benefits. In its rush to illegally discharge Plaintiff Harkins, the Coast Guard did not provide him with the opportunity to avail himself of the statutorily required transition assistance, including applying for VA benefits. Plaintiff's DD-214 "Separation Authority" block (#25) lists "COMDTINST 1000.4 1.B.12." Plaintiff Harkins Plaintiff was not offered Separations Pay. Plaintiff had existing dental problems with a lost portion of a tooth for which he received no treatment, in violation of Cast Guard regulations. Plaintiff Harkins was also forced to sell back 60 days of leave and to forfeit an additional 14 days of leave, which constituted an *illegal exaction*. Plaintiff was forced to forfeit money – i.e. pay the price – by Defendant's rules for Defendant's repeated failure to follow its own rules and significant parts of its statutory obligations to Plaintiff. Harkins Decl., ¶¶ 30-35.

25. **Plaintiff Christopher Musgrave** originally enlisted in the Coast Guard in July 2007 and served for 6 years before being discharged Honorably in 2013. Plaintiff went to college from 2013 – 2017. Plaintiff Musgrave then re-enlisted in December 2017 for a term of 4 years. Plaintiff had to complete boot camp a second time and then returned to duty in Newport, Oregon, where he had previously been stationed. Plaintiff went to Philadelphia, PA, after Oregon and in summer of 2021, Plaintiff learned he would be getting orders for Galveston, TX. Right before leaving for Texas, August 9, 2021, just

before Covid-19 vaccine Mandate was about to begin, Plaintiff re-enlisted for a term of 4 years that would put his ETS into 2025. Prior to the Covid-19 vaccine mandate, Plaintiff Musgrave had sought religious accommodations for other injections, including the flu shot, though none had been granted. Plaintiff was told repeatedly that despite his deeply held and practiced faith, there was no system to opt-out or request any kind of accommodation. While in Philadelphia, Plaintiff took the flu vaccine and felt deep regret and impingement of his conscience. Plaintiff also had a history of seeking dietary accommodations for his faith throughout his service and had always been accommodated in that regard.

26. When the Covid-19 vaccine mandate came down, Plaintiff learned that there was, in fact, a religious accommodation process. Plaintiff informed his new Command shortly after arriving that he would be submitting a Religious Accommodation. Plaintiff submitted his RAR package on October 10th, 2021. It was subsequently denied on February 2, 2022. The denial was a blanket denial and did not include any information about Plaintiff's personal religious convictions and contained a multitude of inaccuracies. Plaintiff was given 10 days to appeal the RAR denial and did so. The appeal was denied on May 27, 2022. After submitting the appeal, Plaintiff had a phone call with his sector Captain to convey, again, the sincerity of his religious beliefs. At the end, the Captain told Plaintiff, "Well… anyone not taking this shot is a drag on the Coast Guard and I want them out."

27. Because Plaintiff was unvaccinated, as per ALCOAST 285/21 he was not allowed to leave a 50mi radius, despite having no contact with the public for his job nor any health risk. At the time, Plaintiff's church group was 52 miles away and Plaintiff was told he would need to put in a request to go to church. Thankfully, the Chaplain stepped

in and Plaintiff was allowed to attend services. After Plaintiff's appeal was denied, likely in June 2022, Plaintiff was ordered to report to medical to get an FDA licensed shot. Plaintiff reported to medical and asked if there were any FDA licensed shots. There were not, so Plaintiff left. Plaintiff informed his command that he had reported to medical as they asked, but that the shots were not available and even if it had been, Plaintiff would not be getting one. Shortly thereafter, in June 2022, Plaintiff received a 3307 negative counseling for not getting the unlicensed vaccine. The fact that there was no licensed vaccine was not considered. In July 2022, Plaintiff was called to the XOs office and told that he would be getting kicked out of the Coast Guard. Throughout this time, I was unable to advance despite being signed off to promote to the next rank. I was barred from attending schools and from sitting the advancement exam, despite having all the prerequisites complete and being recommended. It was clear there was no possible future for me in the Coast Guard, despite the fact I had intended to stay in beyond my 20-year mark.

28. At the time, Plaintiff's wife was 6 months pregnant, and Plaintiff was worried about getting health coverage. Plaintiff was never notified that he was entitled to transition health care and didn't learn it until after his discharge. Plaintiff was never offered an attorney or any assistance through this process. On a Friday in September or October of 2022, Plaintiff's XO texted him that "discharge came through, come in Monday to sign papers." Plaintiff had three months (90 days) of leave saved up and presumed he would be going on terminal leave. When Plaintiff Musgrave reported on the following Monday, he was told that he had to sell back his leave and his last paycheck would be taken in order to pay back his enlistment bonus. Plaintiff did not get his DD-214 at the time. Plaintiff left the meeting and was given a letter about the repayment of the

remainder of the enlistment bonus, which was almost $10,000 and that the amount owed would accrue monthly interest and there were administration fees on top of that. Plaintiff and his spouse took out a loan to pay off the indebtedness and avoid the fees and interest. Plaintiff's wife contacted the Coast Guard several times to get a tax form regarding the bonus, but the Coast Guard never provided with any.

29. During this time, Plaintiff could not obtain unemployment because he had not been given his DD214 and was unable to get a new job on such short notice. Plaintiff finally got his DD214 some 3 months after discharge, but it was incorrect. Plaintiff finally received a corrected DD214 in February 2022. It had an RE3 re-entry code and "JND" as the Separation reason. Plaintiff never received an out-processing physical.

30. **Plaintiff Shane Nolan** is an Operations Specialist First Class (OS1 and E-6 pay grade) serving on full-time active-duty in the Coast Guard. Plaintiff Nolan initially enlisted in December 2005, his most recent reenlistment was for a six-year term ending in June 2026, which would have allowed him to reach sanctuary status and his 20-year service mark, at which point he could have applied for and presumably obtained approval for retirement pay. On November 15, 2022, Plaintiff Nolan was summarily and illegally discharged after having served over 17 years on Active Duty and with over three years remaining on his contract; he lost all pay and benefits until he reenlisted in May 2023. On October 13, 2021, Plaintiff Nolan submitted his RAR, which was denied on February 10, 2022, and on February 25, 2022, he submitted the appeal for his RAR, which was denied on or about May 6, 2022. On May 17, 2022, Plaintiff Nolan was ordered to report to scheduled appointment to receive injection. Plaintiff went and asked and there was no fully-licensed vaccine available at the Kodiak Base Clinic.

31. Plaintiff had been "frocked" to E-7 in April of 2022 – he could wear the rank but not receive the pay – until his official advancement to E-7. On May 31, 2022, just before Plaintiff's official advancement, Plaintiff was informed that his promotion would not happen because he was unvaccinated. Later the same day, notwithstanding that the Clinic had no fully-licensed vaccine available, Plaintiff received a negative Form 3307 that found him in violation of Articles 90 and 92 of the UCMJ. Plaintiff requested counsel, and an administrative separation board, which were denied. Nolan Decl., ¶¶ 21-22. Plaintiff was rushed to be discharged and was given none of the statutory rights to which he was entitled, including Permissive TAD for househunting leave, nor enough time to complete the Veterans Administration disability and benefits processing and to receive a complete medical examination and any recommended treatments prior to discharge. Further, Plaintiff Nolan was forced to sell back 39 days of earned leave, which constitutes an *illegal exaction*. Plaintiff was discharged with 16 years and 11 months of service, as an E-6, with three years and seven months remaining on his enlistment. Plaintiff's DD214 discharge certificate includes a negative "RE3" code (JND), which meant that he was not eligible for reenlistment without a waiver. The "Separation Authority" block (#25) lists "COMDTINST M1000.4 1.B.12". Plaintiff was later contacted by the Coast Guard to re-enlist and did so for four years as an E-7 beginning on May 16, 2023. Plaintiff's rank has not been backdated to June 1, 2022, his original date of advancement.

32. **Plaintiff Matthew Powers** is an Operations Specialist First Class (OS1 and E-6 pay grade) serving on full-time active-duty in the Coast Guard. Plaintiff Powers initially enlisted in February 2011, his most recent reenlistment was for a five-year term ending on May 25, 2026, and he intended to reenlist to reach at least 20 years and retirement eligibility. On October 25, 2021, Plaintiff Powers submitted his RAR, which

was denied on January 25, 2022, and on February 5, 2022, he submitted the appeal for his RAR, which was denied on or about May 31, 2022. On June 3, 2022, Plaintiff Powers was ordered to get the "fully licensed" vaccine by June 13, 2022, at either Bartlett Hospital or Costco. Plaintiff contacted both Bartlett Hospital and Costco to see if they had any FDA approved vaccines. Bartlett Hospital informed Plaintiff that "they do not vaccinate non-employees and Costco" told the Plaintiff that they "did not have any FDA-approved vaccines." Powers Decl., ¶¶ 12-13. After informing his command of this, Plaintiff was told, but could not verify, that the Base Clinic had Comirnaty – the licensed vaccine. Plaintiff

33. After these phone calls, Plaintiff emailed his command informing them that the order could not be obeyed because there were no FDA-approved vaccines available. Plaintiff received no other response except a phone call from an admin officer saying, "Coast Guard legal said it's lawful." On June 21, 2022, Plaintiff Powers received a negative Form 3307 for violation of Articles 90 and 92 of the UCMJ. Plaintiff attempted to consult with counsel during this time but Coast Guard legal offices informed him that they could not help him. Plaintiff did not receive an Administrative Discharge Board, a Reenlistment Board, or the opportunity to complete the Veterans Administration disability and benefits processing and to receive a complete medical examination and any recommended treatments prior to discharge. (Post-discharge, Plaintiff was subsequently saw the VA and given a 100% disability rating.) On November 14, 2022, Plaintiff was discharged DD214 discharge certificate includes a negative "RE3" code, which meant that he was not eligible for reenlistment without a waiver. Plaintiff's DD-214 "Separation Authority" block (#25) lists "COMDTINST 1000.4 1.B.12." Plaintiff was not offered Separations Pay. Plaintiff Powers also filed an Equal Employment Opportunity complaint, which was dismissed without explanation. On November 15, Plaintiff was supposed to pick up a check for his

final pay in the amount of $4,503.59, however the Coast Guard withheld it without warning. Two days prior, Plaintiff had received a notice of indebtedness that the Coast Guard was recouping his enlistment bonus in the amount of $13,135.51. Plaintiff requested a waiver for this debt, and it was denied. Powers Decl. ¶¶ 18-22. Plaintiff Powers was discharged after having served over 15 years on Active Duty and with over 3.5 years remaining on his contract; he lost all pay and benefits following his discharge.

34. Defendant is the United States of America (the "Government"), a sovereign entity and body politic. Defendant is responsible for the actions of its various agencies, including the DoD, the Department of Homeland Security ("DHS"), and the Coast Guard (collectively, "Defendant Agencies").

STATEMENT OF FACTS

I. THE MILITARY COVID-19 MANDATES

A. THE AUGUST 24, 2021 COVID-19 VACCINE MANDATE

35. On August 24, 2021, Secretary of Defense Lloyd Austin, III directed the "Secretaries of the Military Departments" "to immediately begin full vaccination of all members of the Armed Forces … or in the Ready Reserve …, who are not fully vaccinated against COVID-19." Dkt. 1-2, Aug. 24, 2021 Secretary Austin Mandate Memo, at 1.

36. Secretary Austin directed that mandatory vaccination "will only use COVID-19 vaccines that receive full licensure from the Food and Drug Administration (FDA), in accordance with FDA labeling and guidance." *Id.*

37. Under the Uniform Code of Military Justice ("UCMJ"), a service member who disobeys "any lawful general order or regulation" faces sanctions up to a court-martial. UCMJ Art. 92(2), 10 U.S.C. § 892(2). This punishment may include "dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2

years." UCMJ Art. 92, 10 U.S.C. § 892. The statute of limitations for violations of UCMJ Article 92 is five years. 10 U.S.C. § 843.

B. THE COAST GUARD MANDATE

38. On August 26, 2021, the Coast Guard Commandant implemented Secretary Austin's August 24, 2021 directive in ALCOAST Message 305/21. *See* Dkt. 1-3, ALCOAST 305/21, *MANDATING COVID-19 VACCINATION FOR MILITARY MEMBERS* (Aug. 26, 2021).

39. Secretary Austin's August 24, 2021 Mandate Memo applies to "Secretaries of the Military Departments" which, in the context of adding the Covid-19 mRNA biologics to the list of required military immunizations under the all-service DoD regulation AR 40-562, App. D, is binding upon the Coast Guard.

40. If there were any question about this, DoDI 6205.02 (DOD Immunization Program) removes it.

> 1.1. APPLICABILITY. This issuance applies to:
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> a. OSD, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff (CJCS) and the Joint Staff… (referred to collectively in this issuance as the "DoD Components").

The Coast Guard interpreted Secretary Austin's Mandate Memo to apply to the Coast Guard and to require all active-duty and reserve Coast Guard members to comply with its terms.

C. CONGRESSIONAL ACTION TO LIMIT PUNISHMENT OF SERVICE MEMBERS

41. In Section 736 of the National Defense Authorization Act for Fiscal Year 2022 ("FY2022 NDAA"), Congress prohibited the military from dishonorably discharging, or imposing anything less than a general discharge under honorable

conditions, for non-compliance with the Mandate. Pub. L. 117-81 (Dec. 27, 2021), § 736, 135 Stat. 1541.

42. The White House vigorously opposed Congressional efforts to limit the military's authority to punish unvaccinated service members. *See* Executive Office, *Statement of Administrative Policy: H.R. 4350 – National Defense Authorization Act for Fiscal Year 2022* at 4 (Sept. 21, 2021), available at: https://www.whitehouse.gov/wp-content/uploads/2021/09/SAP-HR-4350.pdf.

43. Coast Guard members with a general discharge under honorable conditions are subject to significant adverse consequences including loss or reduction of, or ineligibility for, earned retirement benefits, the post-9/11 GI Bill, Veterans Administration benefits, healthcare benefits, and other governmental benefits to which they were or otherwise would have been entitled by law.

44. A general discharge under honorable conditions may also render a service member ineligible for re-enlistment in the military and for future employment with federal civilian agencies; other public employers, such as state and local government, law enforcement, correctional institutions, schools, universities, hospitals and healthcare providers; and federal contractors or non-governmental organizations that receive federal funding.

45. The federal government, federal contractors, and public sector employers are the primary source of employment for former service members.

46. A general discharge under honorable conditions is also a significant barrier for future private employment with employers who are familiar with the military's discharge system and may presume that a general discharge is for substance abuse, criminal actions, or other misconduct, even in the absence of a misconduct code.

47. These adverse consequences are exacerbated where the service member's discharge paperwork, Form DD-214, includes a misconduct code.

48. The general discharges for Coast Guard members for non-compliance with the now-rescinded Mandate have for some Class Members been characterized as misconduct discharges.

II. ILLEGAL PUNISHMENTS, DISCHARGES AND EXACTIONS

A. ILLEGAL PUNISHMENT OF UNVACCINATED COAST GUARD MEMBERS

49. Defendant punished unvaccinated Coast Guard members, including each Plaintiff, through the systematic violations of their rights to informed consent protected by 10 U.S.C. § 1107a, which prohibits the DoD from mandating products that are not licensed by the FDA, unless the President has made an express written finding that such mandate is required in the interests of national security. *See infra* Section IV.

50. Defendant punished each Plaintiff for non-compliance with the Coast Guard Mandate, despite the fact that compliance was both physically and legally impossible. *See infra* Section IV.D. Several Plaintiffs specifically inquired as to the availability of FDA-licensed vaccines, and confirmed that no FDA-licensed Comirnaty at the time and place they were ordered to receive the vaccine. *See* Byrd Del., ¶¶ 13-17; Harkins Decl., ¶ 15; Nolan Decl., ¶ 15; Musgrave Decl., ¶ 17; and Powers Decl., ¶¶ 12-15.

51. Defendant punished unvaccinated Coast Guard members, including each Plaintiff, through systematic violations of the religious liberties protected by the First Amendment's Free Exercise Clause and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1. *See generally infra* Section V.

52. Each Plaintiff submitted a Religious Accommodation Request, which was denied, and each Plaintiff appealed the denial, which was also denied. *See infra* ¶¶ 17 - 33

& Table 1. Each Plaintiff was forced to defend their religious convictions through a farcical, templated, government-directed religious (non)-accommodation process. This is not hyperbole. It was the subject of investigation by the House Committee of Government Oversight and Reform in October 2022. In an October 18, 2022, letter sent by the House Committee on Oversight and Reform to the Commandant of the Coast Guard asking about the Coast Guard's 99% denial rate for religious accommodations and how it fit in the DoD Inspector General's report regarding the entire DoD's handling of those requests. *See* Ex. 2 ("The USCG even created a digital tool to assist in more efficiently denying appeals of the vaccine mandate instead of focusing on the merits of each individual case.")[2]

53. Each Plaintiff and class member who submitted an RAR was forced to reveal and defend their religious beliefs while they were being subjected to professional calumny and ridicule, ostracization, removal from jobs, threat of punishment for violating an illegal order to receive the EUA, not fully-licensed, Covid-19 mRNA shot. At the end of the inevitable appeal denial, Plaintiff faced likely discharge. To make it worse, Plaintiffs were subjected to additional deprivations of rights, denial of procedural protections, pay, and benefits as set forth herein. At the same time, Plaintiffs were expected to continue to perform their duties at a high level and not cause trouble. *See infra* Section II.B.

54. Defendant punished unvaccinated Coast Guard members through the creation of a hostile environment; singling out unvaccinated service members for ridicule

[2] The "digital tools" mentioned in the Committee' letter to Admiral Linda Fagan were filed in a motion in *Bazzrea, et al. v. Mayorkas, et al.*, 3:22-cv-00265 (S.D. Tx). A case with Coast Guard plaintiffs seeking injunctive relief from the Mandate. Screenshots of the digital tools created by the Coast Guard to generate denials of religious accommodation requests: the "Religious Accommodation Appeal Generator" ("RAAG") and the Denial Letter Template. *See* Ex. 3, (ECF 44-1) and Ex. 4 (ECF 44-2).

and ostracization; and imposing arbitrary, discriminatory and punitive measures such as oppressive and unnecessary, EUA masking and testing requirements.

55. Defendant punished unvaccinated Coast Guard members through a wide range of adverse and punitive personnel actions, including letters of reprimand, adverse fitness evaluations, reassignments, removals from command or leadership positions, denials of promotion, and restrictions on liberty and leave that didn't apply to the "vaccinated." *See, e.g.*, ALCOAST 285/21.

B. ILLEGAL AND LEGALLY VOID DISCHARGES AND SEPARATIONS

56. In Title 10 of the U.S. Code, the terms "armed forces" and "uniformed services" include the Coast Guard. 10 U.S.C. § 101(a)(4) ("armed forces") and § 101(a)(5) ("uniformed services").

57. The Coast Guard is subject to the strictures of Chapter 59 (Separation) of Title 10 U.S. Code, including 10 U.S.C. § 1169 "Regular enlisted members: limitations on discharge":

> No regular enlisted member of an armed force may be discharged before his term of service expires, except—
>
> (1) as prescribed by the Secretary concerned;
> (2) by sentence of a general or special court martial; or
> (3) as otherwise provided by law.

58. So far as Plaintiffs and their counsel are aware, Defendant did not court-martial any Class Members solely for refusing the mRNA shots, eliminating (2) from consideration in this case and leaving only Secretarial authority (i.e. regulations) and any other provisions of law as the possible bases for lawfully, involuntarily discharging Coast Guard members prior to the expiration of their enlistments.

59. The principal Coast Guard regulation governing the discharge of its officers and enlisted members is COMDTINST M1000.4, Military Separations, (the "MILSEP"); the extant version for all of the events surrounding the Plaintiffs was the August 2018 edition. The regulation that amplifies the MILSEP is PSCINST M1910.1, the Enlisted Personnel Administrative Boards Manual (the "EPAB").

60. Defendant discharged Coast Guard members, including each Plaintiff, prior to the expiration of their term of service. *See supra* ¶¶ 17 - 3331 (Byrd approx. seven months; Gutierrez approx. 10 months; Harkins approx. 16 months; Musgrave approx. 20 months; Nolan over 3.5 years; Powers approx. 2.5 years).

61. Defendant discharged and denied reenlistment to Coast Guard members in "sanctuary" status, including Plaintiffs Harkins and Nolan, who were each within two years of qualifying for retirement when they were involuntarily separated, implicating 10 U.S.C. § 1176, the so-called "Sanctuary" statute. The relevant provision states:

> (a) Regular Members.-
> A regular enlisted member who is selected to be involuntarily separated, or whose term of enlistment expires and who is denied reenlistment, and who on the date on which the member is to be discharged is within two years of qualifying for retirement under section 7314 or 9314 of this title... shall be retained on active duty until the member is qualified for retirement... unless the member is sooner retired or discharged under any other provision of law.

62. Generally speaking, a Coast Guardsman with more than 8 years of creditable service is entitled to an Administrative Separation Board if being involuntarily discharged. *See* Ex. 5, COMDTINST M1000.4, ¶ 1.B.5.c; and Ex. 6, PSCINST M1910.1, EPAB, ¶ 1.B.1 (June 1, 2014). The EPAB states:

> Coast Guard members with eight or more years of military (active and/or Reserve) service are entitled to a board before they are involuntarily administratively separated or denied reenlistment. This right is established in the MILSEP for each of the bases for

administrative action listed below.

a. Reenlistment Ineligibility, see MILSEP Article 1.B.5.c.
b. Unsatisfactory Performance, see MILSEP Article 1.B.9.e.
c. Unsuitability, see MILSEP Article 1.B.15.i.
d. Misconduct, see MILSEP Article 1.B.17.d.

63. The MILSEP also gives all Coast Guardsmen the right to consult with military counsel, even in actions short of a possible discharge by a Board. For example, if a Commander determines that an enlisted member will not be eligible to re-enlist, then that Member is entitled to consult with a military counsel. MILSEP, ¶1.B.5.a.(2).

64. Additionally, members with more than 8 years of service that "meet the reenlistment eligibility criteria… but are not recommended for reenlistment by their commanding officer are entitled to a reenlistment board." MILSEP, ¶1.B.5.c.

65. Defendant discharged Plaintiffs, and other Coast Guard members, without providing any assistance from military counsel, including to each Plaintiff, in violation of requirements set forth in governing Coast Guard regulations and depriving them of rights protected by the Sixth Amendment of the U.S. Constitution. *See* MILSEP, ¶¶ 1.B.5.a.2, 1.B.12.d, 1.B.13.j, and 1.B.23.a; *see also* EPAB, ¶¶ 1.C.1.c & 1.C.1.d. Plaintiffs Byrd, Harkins, Nolan, and Powers each expressly requested military counsel, and were each told that military counsel could not and would not assist despite the fact that each member was (1) a senior enlisted, (2) not being recommended for reenlistment, (3) accused of a UCMJ violation, (4) and facing possible adverse action affecting their careers. *See* Byrd Del., ¶ 20; Harkins Decl., ¶¶ 27-28; Musgrave Decl. ¶ 24; Nolan Decl., ¶ 22; and Powers Decl., ¶¶ 17-18.

66. Defendant also discharged Coast Guard members, including some Plaintiffs, without providing a complete physical and medical examination prior to

discharge, in violation of 10 U.S.C. § 1145 and 14 U.S.C. § 2313. Instead, Plaintiffs received at best a cursory interview with a military healthcare provider that failed to address any serious medical conditions that required treatment. *See, e.g.*, Harkins Decl. ¶ 32 (describing serious dental condition that required post-discharge treatment); Byrd Decl. ¶ 22 (describing cursory meeting with doctor); Musgrave Decl. ¶ 31 (no separation physical at all).

67. Defendant discharged Coast Guard members, including most of the Plaintiffs, without providing benefits and services required by federal law and Coast Guard regulations, in violation of 10 U.S.C. §§ 1141-1155. *See generally* MILSEP, Ch. 1.B ("Separating Active-Duty Enlisted Members") & Ch. 1.C ("Retirement"). In the rush to illegally discharge Plaintiffs in as little as 30 days or less, the Coast Guard failed to provide legally required vocational training and counseling on post-discharge benefits for Plaintiffs and their spouses, and in most cases failed to permit Plaintiffs to apply for Veteran's Administration ("VA") benefits and to receive their VA disability ratings in violation of 10 U.S.C. § 1142. *See* Byrd Decl., ¶¶ 21-23; Gutierrez Decl., ¶¶ 18-19; Harkins Decl., ¶¶ 30-32; Musgrave Decl., ¶¶ 23 – 27; Nolan Decl., ¶¶ 23-24; and Powers Decl., ¶ 19.

68. Defendant involuntarily discharged Plaintiffs under non-misconduct discharge bases as listed in each Plaintiff's DD-214 Block 25, "Separation Authority," but no member was even offered or had discussed with them their entitlement to Involuntary Separation Pay under 10 U.S.C. § 1174. *See also* COMDTINST 7220.29D (Nov. 2019), "Coast Guard Pay Manual", Ch. 10, ¶ H.1.b.

69. Defendant discharged Coast Guard members who were in "sanctuary" status, or who would have completed 20 years of service or entered sanctuary status at

the expiration of their terms of service, including Plaintiffs Harkins and Nolan, without permitting them to request retirement or denying their approved retirement dates, in violation of 14 U.S.C. § 2306. *See* Harkins Decl., ¶ 7 (discharged despite having contract running through March 31, 2024, and an approved retirement date of January 1, 2024); Nolan Decl., ¶¶ 6-7 (discharged despite having contract running through January 2026, past his 18th year of service when he could have applied for retirement and his 20th year of service when he was eligible for retirement).

70. Defendant violated 10 U.S.C. § 1168 by discharging Plaintiff Musgrave without providing him with his DD214.

71. Defendant punished unvaccinated Coast Guard members through wrongful discharges that begin with negative counseling for "misconduct" and purported UCMJ violations that result in unfavorable re-entry codes that prevent reenlistment, but then are subsequently categorized as "Convenience of the Government" to deny Plaintiffs all of their procedural rights and significantly harm their ability to seek future employment in the private or public sectors.

72. The President and Defendant Agencies punished unvaccinated Coast Guard members through the foregoing actions that, among other things, resulted in the loss or reduction of, or ineligibility for, earned retirement benefits, the post-9/11 GI Bill, Veterans Administration benefits, healthcare benefits, and other governmental benefits to which they were or otherwise would have been entitled by law.

C. ILLEGAL EXACTIONS FROM SERVICE MEMBERS

73. Defendant used the above enumerated illegal punishments as the basis for additional, collateral consequences. For example, service members who were involuntarily discharged at the "Convenience of the Government" were then subject to

recoupment and indebtedness to the government for their "failure" (*i.e.*, inability due to unlawful discharge or transfer to inactive status) to complete the terms of their service obligation, despite Coast Guard's own explicit regulation to the contrary. MILSEP, ¶ 1.B.7.a ("Under certain circumstances enlisted members may be separated before their normal enlistment expiration date provided such early departure is in the Government's best interest… The member is entitled to a travel allowance… and does not have to pay back a pro-rated portion of any re-enlistment bonus he or she previously received.")

74. Defendant did so in some cases where class members had Religious Accommodation Requests or medical or administrative exemption requests still pending and unacted upon.

75. Defendant recouped Plaintiff Powers' reenlistment bonus when the Coast Guard discharged him with approx. 2.5 years prior to the expiration of his term of service, including withholding all of his final paycheck and seeking collection of a "debt" of over $13,000. *See supra* ¶ 31. Plaintiff Harkins was forced to sell back 60 days of leave and forfeit an additional 14 days of leave, *see supra* ¶ 21; while Plaintiff Nolan had to sell back 39 days of leave. *See supra* ¶ 30. Plaintiff Musgrave had leave taken, his final paycheck taken, and then had to borrow money to pay off the indebtedness for his enlistment bonus recoupment. *Supra* ¶ 28.

III. RESCISSION OF THE MANDATE

A. EXPERTS KNEW THAT THE MANDATED MRNA VACCINES DID NOT PREVENT TRANSMISSION

76. The Centers for Disease Control and Prevention ("CDC") eliminated the word "immunity" from its definitions of "Vaccine" and "Vaccination" within days of the Mandate commencing and changed the long-standing definition of "vaccine." The CDC

did so because senior members knew then, in August 2021, that the mRNA injections *did not produce immunity* to prevent transmission of the disease known as COVID-19 and therefore did not qualify as "vaccines." This is an undisputed matter of fact demonstrated by contemporaneous internal CDC emails produced in response to a Freedom of Information Act ("FOIA") request. *See* Ex. 7, CDC FOIA Response Emails from Aug. 13, 2021 - Sept. 1, 2021), at 2 ("The definition of vaccine we have posted is problematic and people are using it to claim that the COVID-19 vaccine is not a vaccine based on our own definition.")

77. CDC leadership internally acknowledged that it had changed the definitions of "vaccine" and "vaccination" in direct response to correct and legitimate public criticism that the COVID-19 vaccines did not meet the CDC's own (then-current) definitions of "vaccine" and "vaccination" because the mRNA shots did not provide "immunity." *Id.* at 3 ("these definitions are outdated and being used by some to say COVID-19 vaccines are not vaccines per CDC's own definition.")

78. If a "vaccine" does not produce immunity from the disease and therefore does not prevent transmission of the virus, then there is ***no rational basis for mandating it***.

79. On January 10, 2022, Pfizer Chief Executive Officer Albert Bourla acknowledged that the mandated two-dose regimen "offer[s] very little, if any" protection against the then-dominant Omicron variant. *New COVID-19 Vaccine That Covers Omicron 'Will Be Ready in March,' Pfizer CEO Says* Yahoo!Finance (Jan. 10, 2022), available at: https://finance.yahoo.com/video/covid-19-vaccine-covers-omicron-144553437.html.

80. One of the vaccines' loudest champions, Dr. Anthony Fauci, following his retirement as director of the National Institute of Allergy and Infectious Diseases, authored a peer-reviewed article in a prestigious journal acknowledging that viruses like COVID-19 were not even "vaccine preventable," not even in theory, and never were. *See* Anthony Fauci, et al., "Rethinking next-generation vaccines for coronaviruses, influenzaviruses, and other respiratory viruses," Cell Host and Microbe at 1, Vol. 31, Iss. 2. (Feb. 8, 2023), available at: https://doi.org/10.1016/j.chom.2022.11.016.

81. On August 11, 2022, the CDC issued updated guidance to "no longer differentiate based on a person's vaccination status." *See* CDC, Press Release *CDC streamlines COVID-19 guidance to help public better protect themselves and understand their risk* (Aug. 11, 2022), available at: https://www.cdc.gov/media/releases/2022/p0811-covid-guidance.html.

82. On August 16, 2022, the White House announced that the U.S. Government, the sole customer and payor for the mandated COVID-19 vaccines, ceased purchasing or providing reimbursement for the mandated monovalent vaccines. *See* CNN, *Biden Administration Wil Stop Buying COVID-19 vaccines, treatments and tests as early as this fall, Jha says* (Aug. 16, 2022), available at: https://www.cnn.com/2022/08/16/health/biden-administration-covid-19-vaccines-tests-treatments/index.html.

83. In litigation at the time, courts found that the military has failed to provide any current or relevant data regarding the marginal risks and benefits of the Mandated messenger RNA ("mRNA") treatments for healthy service members under current circumstances, namely, 2022 data for the then prevalent Omicron sub-variants when ninety-eight percent (98%) of other service members were fully vaccinated. Instead,

Defendants provided only "historical data from the 2020 and 2021 pre-Omicron, pre-vaccine phase" that does not "address the present state of the force." *Colonel Fin. Mgmt. Officer v. Austin*, 622 F.Supp.3d 1187, 1213, 2022 WL 3643512 (M.D. Fla. 2022).

84. The scientific evidence demonstrating the obsolescence and ineffectiveness of the FDA-licensed vaccines is too voluminous to summarize here. It should suffice to say that it is widely recognized that the mRNA gene therapies were, at best, a failed experiment.

B. CONGRESSIONAL RESCISSION BY SECTION 525 OF THE 2023 NDAA

85. On December 23, 2022, President Biden signed into law the 2023 NDAA, which was enacted by veto-proof majorities in the Senate (83-11) and the House of Representatives (350-80).

86. Section 525 of the 2023 NDAA directed Secretary Austin to "rescind" the August 24, 2021 Mandate. Pub. L. No. 117-263 (Dec. 23, 2022), § 525, 136 Stat. 2395.

87. "Rescind" is derived from the Latin "rescission", which means "an annulling; avoiding, or making void; abrogation; rescission". Black's Law Dictionary at 1306 (6th ed. 1990). "Rescind" is normally used in the context of "rescission of contract", which means to "abrogate, annul, avoid or cancel a contract;" "void in its inception"; or "an undoing of it from the beginning." Id. "Rescind" thus necessarily has retroactive effect and renders the rescinded contract, policy or rule void ab initio.

88. Congress intentionally used the term "rescind", rather than "amend" or "repeal", to instruct Secretary Austin and the courts that Section 525 must be applied retroactively.

89. Section 525 reflects the determination by veto-proof majorities of Congress that Secretary Austin's Mandate was void ab initio.

90. Consistent with this Congressional determination and directive, the Defendant must restore unvaccinated service members to the pre-Mandate status quo. All adverse personnel actions and denial of pay and benefits taken as a result of non-compliance with an order that is now a legal nullity must be undone from the beginning and corrected.

C. CONGRESSIONAL FUNDING OF ALL COAST GUARD MEMBERS

91. Both the 2022 NDAA and 2023 NDAA included full funding for pay, training, benefits, and other financial compensation for all service members, including unvaccinated Coast Guard members who were discharged, constructively discharged, separated, transferred to inactive status, had their orders curtailed and/or denied pay or benefits for all of FY2022 and FY2023.

92. The 2023 NDAA does not include any funding offsets to reflect the reduction in funding resulting from these discharges, separations, transfers, and/or denials of pay and benefits for service members.

93. The Defendant Agencies have retained the funds for payment of Coast Guard members whose pay and benefits were withheld due to non-compliance with the Mandate.

94. Congress' rescission creates no new financial outlay, but rather restores the Total Force to troop levels for which Congress has already budgeted by its unequivocal removal of the barrier to, and payment for, service in the armed forces that Defendant Agencies' actions created.

D. DOD AND COAST GUARD POST-RESCISSION ORDERS

95. On January 10, 2023, Secretary Austin rescinded the August 24, 2021 Mandate. See Dkt. 1-4, Jan. 10, 2023 Secretary Austin Rescission Memo.

96. In the Rescission Memo, Secretary Austin acknowledged that Section 525 applies retroactively by ordering that all separations and discharges resulting solely from non-compliance with the Mandate should be halted and that all adverse personnel actions and paperwork should be corrected. *Id.* at 1.

97. Secretary Austin further directed the Service Secretaries to cease adjudication of pending Religious Accommodation Requests and medical or administrative exemption requests. *Id.*

98. On January 11, 2023, the Coast Guard issued ALCOAST 012/23 that rescinds the Coast Guard Mandate "[i]n alignment with the DoD." Dkt. 1-5, ALCOAST 012/23, ¶ 1.

99. On January 25, 2023, the Coast Guard issued additional guidance implementing the Coast Guard's rescission of the Mandate. *See* Dkt. 1-7, Compiled Coast Guard Orders and Guidance.

100. While the January 11, 2023 Coast Guard Rescission Memo formally rescinded the Mandate for Coast Guard members and stopped involuntary separations for non-compliance, the Coast Guard has not taken corrective actions to fully restore unvaccinated Coast Guard members who were discharged, separated, transferred to inactive status, and/or denied pay and benefits to the pre-Mandate status quo.

101. On February 24, 2023, the Deputy Secretary of Defense issued a memorandum directing DoD components to formally rescind other existing vaccination requirements and stating that the DoD would revise DODI 6205.02 to prohibit commands from taking vaccination status into account in making assignment, deployment and operational decisions, without express DOD approval. *See* Deputy Secretary of Defense, Guidance for Implementing Rescission of August 24, 2021 and

November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces (Feb. 24, 2023), available at: https://perma.cc/3MXS-2CNR) ("February 24, 2023 Guidance Memo").

102. None of the named Plaintiffs have been reinstated, two have re-enlisted, and none have received backpay, and most have not had their records corrected.

E. THE MILITARY HAS EXERCISED ANY DISCRETION IT MAY HAVE HAD IN CATEGORICALLY REFUSING BACKPAY TO SERVICE MEMBERS DENIED PAY.

103. Secretary Austin's January 10, 2023 Rescission Memo retains existing restrictions and either retains or adopts a substantially similar de facto mandate, directing that "[o]ther standing Departmental policies, procedures, and processes regarding immunization remain in effect," which includes "the ability of commanders to consider, as appropriate, the individual immunization status of personnel in making deployment, assignment, and other operational decisions …" Dkt. 1-4, Jan. 10, 2023 Secretary Austin Rescission Memo, at 2.

104. Plaintiffs and Class Members continue to face a credible threat of involuntary discharge and even criminal prosecution for past violations of the now-rescinded Mandate. This threat has not been eliminated or mitigated by the military's post-Rescission orders and guidance issued to date.

105. This threat is neither abstract nor speculative, as demonstrated by the testimony of Under-Secretaries from the DoD and the Armed Services at a February 28, 2023 hearing before the House Armed Services Committee ("HASC"). See Dkt. 1-8, Partial Transcript for Feb. 28, 2023 HASC Hearing. (The full video is available at: https://www.youtube.com/watch?v=TRSZsKt5j_0 and full transcript without timestamps is available at: https://www.navy.mil/Press-Office/Testimony/display-

testimony/Article/3315887/house-armed-services-subcommittee-on-military-personnel-holds-hearing-on-covid/).

106. There, the Under-Secretaries repeatedly confirmed that the military deems service members who did not comply with the now-rescinded Mandate to have disobeyed a lawful order in violation of UCMJ Articles 90 and 92, 10 U.S.C. § 890 and § 892, for which they may be involuntarily discharged, without regard to their sincerely held religious objections. See Dkt. 1-8 at 2-3 (Chairman Banks questions and answers) & 5-7 (Rep. Gaetz questions and answers).

107. Defendant has refused to rule out criminal prosecution for violations of either Article 90 or Article 92 UCMJ, 10 U.S.C. § 890 and § 892, for unvaccinated service members who did not request religious accommodation or medical or administrative exemptions.

108. The statute of limitations for charges under UCMJ Article 90 and Article 92 charges is five years, see 10 U.S.C. § 843, so Plaintiffs and Class Members will continue to face a credible threat of prosecution for years to come.

109. The DoD has confirmed that no service members who were discharged, transferred to inactive status, or denied pay and benefits for non-compliance with the Mandate would receive backpay or other financial compensation to which they which they would otherwise be entitled. *See* Paul D. Shinkman, Pentagon: No Back Pay to Troops Discharged for Refusing COVID-19 Vaccine, U.S. News & World Report (Jan. 17, 2023), available at: https://www.usnews.com/news/national-news/articles/2023-01-17/pentagon-no-back-pay-to-troops-discharged-for-refusing-covid-19-vaccine.

110. The DoD has confirmed that the military has no plans or procedures to reinstate discharged service members or to take corrective actions for current members

to fully restore them to the pre-Mandate status quo. *See* Dkt. 1-8 at 4-5, 40:55-41:18; see also Dkt. 1-9, DoD Under-Secretary Cisneros Feb. 27, 2023 Response to HASC, at 3.

111. Instead, service members must pursue the existing remedies that failed them before and that several courts have found to be futile and/or inadequate. *See infra* Section V.B & cases cited therein.

112. The military has not taken full corrective actions to restore service members to the pre-Mandate status quo or committed to take such corrective actions in the future.

113. There is no reason to believe that Defendant Agencies will take corrective actions in the future because they have insisted in related litigation that service members have not been subject to final disciplinary action for non-compliance and that service members have not suffered any final adverse actions at all.

114. The military has not rescinded related and unlawful vaccination policies and regulations, in particular, the DoD's Interchangeability Directives that enabled the coercive mandate of unlicensed products, *see infra* Sections IV.C and IV.D, which remain in full force and continue to be deemed lawful directives.

IV. PREVIOUS MANDATES AND THE INFORMED CONSENT LAWS

A. THIS IS NOT THE FIRST VACCINE RODEO – FOR MILITARY OR CONGRESS.

115. Prior to the first Gulf War, the DoD sought to pretreat service members with several unlicensed, "investigational" new drugs, including pyridostigmine bromine and a botulinum toxoid vaccine, which under U.S. law could not be administered to military members without informed consent. The DoD successfully petitioned the FDA to establish a new rule waiving U.S. service members' rights to informed consent. In numerous hearings in the aftermath of the Gulf War, the administration of these experimental drugs has been correlated with "Gulf War Illness" or "Gulf War Syndrome,"

which "debilitated over 174,000 service members." *See generally* Efthimios Parasidis, "Justice and Beneficence in Military Medicine and Research," 73 Ohio St. L.J. 723, 732-39 & 759-60 (2012).

116. After extensive hearings in Congress across multiple committees documenting systemic, repeated failures by the DoD involving the health of America's all-volunteer force, including the ill-fated and disastrous anthrax vaccine, the U.S. Congress passed Title 10 U.S.C. §1107 in 1997.

117. 10 U.S.C. § 1107 requires that, in any instance in which the DOD sought to use any unlicensed, investigational product on members of the Armed Forces, no one short of the Commander-in-Chief could waive a service members' right to informed consent.

118. In the following years, as the anthrax vaccine program remained mired in failed FDA inspections and controversy, Congress continued to hold hearings on the subject and strengthened 10 U.S.C. §1107's protections and requirements for both the Secretary of Defense and Commander-in-Chief. Compare 10 U.S.C. §1107 (1997) with 10 U.S.C. §1107 (2000). See also 144 Cong. Rec. H. 4616 (June 16, 1998).

119. In 2003, the U.S. District Court for the District of Columbia issued a preliminary injunction against the DoD and FDA for their violations of that statute, and in 2004 that same court issued a permanent nation-wide injunction prohibiting the DoD's anthrax vaccine mandate. *See Doe v. Rumsfeld*, 297 F. Supp. 2d 119 (D.D.C. 2003)("Rumsfeld I"), *modified sub nom. John Doe No. 1 v Rumsfeld*, 341 F. Supp. 2d 1 (D.D.C. 2004) ("Rumsfeld II"), *modified sub nom. John Doe No. 1 v. Rumsfeld*, 2005 WL 774857 (D.D.C. Feb. 6, 2005) ("Rumsfeld III").

120. In the middle of that litigation in 2004, and in part as a result of the anthrax letter attacks that occurred the week after 9/11, Congress passed the current EUA statute, 21 U.S.C. §360bbb-3, as part of the Project BioShield Act.

121. Shortly thereafter, Congress also passed another mirror image statute for the protection for service members' informed consent rights to refuse EUA products, 10 U.S.C. §1107a.

122. Much like its predecessor statute that was passed in 1997, 10 U.S.C. §1107a states in pertinent part:

> (a) Waiver by the President —
>
> (1) In the case of the administration of a product authorized for emergency use under section 564 of the Federal Food, Drug, and Cosmetic Act to members of the armed forces, the condition described in section 564(e)(1)(A)(ii)(III) of such Act and required under paragraph (1)(A) or (2)(A) of such section 564(e), designed to ensure that individuals are informed of an option to accept or refuse administration of a product, may be waived only by the President only if the President determines, in writing, that complying with such requirement is not in the interests of national security.

10 U.S.C. § 1107a.

123. After the EUA statute's passage, the FDA granted the first ever Emergency Use Authorization for the anthrax vaccine. After doing so, both the DoD and FDA jointly filed an emergency petition in the D.C. District Court to modify the injunction already in place against the anthrax vaccine program in order to allow the vaccine to be administered to service members solely on a *voluntary basis* in *Rumsfeld III*. *See Rumsfeld III*, 2005 WL 774857, at *1 ("ORDERED that the Court's injunction of October 27, 2004, is modified by the addition of the following language: 'This injunction, however, shall not preclude defendants from administering AVA, on a *voluntary* basis, pursuant to the

terms of a *lawful* emergency use authorization ("EUA")[.]'")(emphasis in original). *See also* 70 Fed. Reg. 5452-56, IV "Conditions of Authorization."

124. At that time, the FDA's Agency interpretation of what constituted informed consent was that informed consent includes:

> (3) the option to accept or refuse administration of AVA; of the consequences, if any, of refusing administration of the product; and of the alternatives to AVA that are available, and of their benefits and risks.
>
> With respect to condition (3), above, relating to the option to accept or refuse administration of AVA, the AVIP will be revised to give personnel the option to refuse vaccination. *Individuals who refuse anthrax vaccination will not be punished. Refusal may not be grounds for any disciplinary action under the Uniform Code of Military Justice. Refusal may not be grounds for any adverse personnel action. Nor would either military or civilian personnel be considered non-deployable or processed for separation based on refusal of anthrax vaccination. There may be no penalty or loss of entitlement for refusing anthrax vaccination.*

70 FR 5455 (Feb. 2, 2005) (emphasis added).

125. In 2008, the DoD issued DoD Instruction 6200.02 ("DoDI 6200.02") the currently effective regulation governing the mandate of EUA products. Consistent with the EUA statute, 10 U.S.C. § 1107a, and the nation-wide consent decree in *Rumsfeld III*, the instruction requires that the DoD include an option to refuse an EUA product.

> E3.3 Implementation of EUA. DoD Components using medical products under an EUA shall comply with all requirements of section 564 of Reference (d), FDA requirements that are established as a condition of granting the EUA (except as provided in section E3.4 concerning a waiver of an option to refuse), guidance from the Secretary of the Army as Lead Component, and instructions from the ASD(HA).
>
> E3.4. Request to the President to Waive an Option to Refuse. In the event that an EUA granted by the Commissioner of Food and Drugs includes a condition that potential recipients are provided an option to refuse administration of the product, the President may, pursuant to section 1107a of Reference (e), waive the option to refuse for

> administration of the medical product to members of the armed forces. Such a waiver is allowed if the President determines, in writing, that providing to members of the armed forces an option to refuse is not in the interests of national security. Only the Secretary of Defense may ask the President to grant a waiver of an option to refuse.

DoDI 6200.02, *Application of Food and Drug Administration (FDA) Rules to Department of Defense Force Health Protection Programs*, ¶¶ E3.3, 3.4 (Feb. 27, 2008).

126. DoDI 6205.02 is the extant governing regulation for routine military immunizations. This instruction defines a "vaccine" and "vaccination" as:

> **vaccination**. The administration of a vaccine to an individual for inducing *immunity*.
>
> **vaccine.** A preparation that contains one or more components of a biological agent or toxin and induces a protective immune response against that agent when administered to an individual.

DoDI 6205.02, ¶ G.2 ("Definitions").

127. Army Regulation 40-562, *Immunization and Chemoprophylaxis for the Prevention of Infectious Diseases* (Oct. 7, 2013) ("AR 40-562") implements and complements DoDI 6205.02. AR 40-562 was signed on October 7, 2013, went into effect on November 7, 2013, and remains in effect today. It applies to all branches of the military, and it is designated as COMDTINST M6230.4G for the Coast Guard.

128. Appendix D of AR 40-562 contains the list of required vaccines for members of the military. AR 40-562 applies to all military vaccines, whether they are "Investigational New Drugs" as defined in 21 CFR 56.104(c); an EUA product governed by 21 USC § 360bbb-3 and 10 U.S.C. § 1107a; or a fully licensed FDA vaccine.

129. Secretary Austin's August 24, 2021 Mandate Memo amended the DoD and Coast Guard's immunization policies to place the FDA-licensed COVID-19 vaccines on the list of required vaccinations in Appendix D of AR 40-562. *See Abbott v. Biden*, 608

F.Supp.3d 467, 471, 2022 WL 2287547 (E.D. Tex. 2022), *vacated and remanded by Abbott v. Biden*, 70 F.4th 817 (5th Cir. 2023).

130. Secretary Austin's January 10, 2023 Rescission Memo should have removed the COVID-19 vaccines from the list of required vaccines in AR 40-562 with retroactive effect, *i.e.*, restoring AR 40-562 Appendix D to the pre-Mandate list. In other words, no COVID-19 vaccines are now required, whether FDA-licensed or not.

B. NOT ENOUGH GUINEA PIGS; FROM VOLUNTEER TO VOLUN-TOLD

131. In December 2020, after only two months of clinical testing, the FDA granted EUAs for COVID-19 vaccines developed by Pfizer-BioNTech and Moderna.

132. In March 2021, members of Congress sent a letter to President Biden asking him to invoke 10 U.S.C. § 1107a to "waive servicemembers right to informed consent" to refuse unlicensed, EUA vaccines because of low voluntary vaccine participation.

> Seven Democratic members of Congress signed the letter, including House Rules Committee Chairman Rep. James McGovern and House Armed Services Committee members Rep. Jimmy Panetta, Rep. Marilyn Strickland, Rep. Sara Jacobs and Rep. Marc Veasey…
>
> The Department of Defense has said publicly that the opt-out rate among service members eligible to be vaccinated is about 33%, but last week military officials and service members CNN spoke with from several bases and units across the country suggest the current rejection rate may be closer to 50%.

Ellie Kaufman, *Lawmakers ask Biden to issue waiver to make Covid-19 vaccination mandatory for members of military*, CNN (Mar. 24, 2021), available at: https://www.cnn.com/2021/03/24/politics/congress-letter-military-vaccine/index.html.

C. FDA LICENSURE AND INTERCHANGEABILITY DETERMINATIONS

133. On August 23, 2021, the FDA approved the Biologic License Application ("BLA") submitted by Pfizer and BioNTech for the original "Purple Cap" formulation of COMIRNATY®. *See* FDA, Aug. 23, 2021 Purple Cap COMIRNATY® BLA Approval Letter at 1-2, available at: https://www.fda.gov/media/151710/download.

134. Also on August 23, 2021, the FDA re-issued the EUA for the Pfizer COVID-19 vaccine. *See* Dkt. 1-10, Aug. 23, 2021 Pfizer/BioNTech EUA Re-Issuance Letter. This letter stated that the EUA for Pfizer's different, "legally distinct" mRNA injectable (BNT-162b2) would remain in place because the licensed product COMIRNATY was "not available… in sufficient quantities" for the eligible population. *Id.* at 5 n.9.

135. This point cannot be overemphasized: both of these regulatory letters acknowledge that the governing statute has a condition precedent to issuing an EUA that there *cannot be any* "adequate, approved, and available alternative to the product for diagnosing, preventing, or treating such disease or condition." 21 U.S.C. § 360bbb-3(C)(3).

136. As a matter of fact and law, the Purple Cap COMIRNATY® COVID-19 vaccine licensed by the FDA was never manufactured nor marketed in the United States outside of its single day approval; it was removed from the market the same day that it was "fully licensed." *See* Package Insert for COMIRNATY, available at https://dailymed.nlm.nih.gov/dailymed/archives/fdaDrugInfo.cfm?archiveid=595377#section-13 (FDA-approved product labeling for Purple Cap COMIRNATY® lists the "Marketing Start Date" and "Marketing End Date" both as "23 Aug 2021"); *see also* Sept. 13, 2021 Pfizer Announcement, available at: https://dailymed.nlm.nih.gov/dailymed/dailymed-announcements-

details.cfm?date=2021-09-13 (Pfizer confirmed that it did "not plan to produce any product with these new NDCs [*i.e.,* National Drug Codes 0069-1000 for Purple Cap COMIRNATY®] and labels over the next few months.").

137. Plaintiffs aver and allege that not only were no FDA-licensed products available from the DoD, but that no FDA-licensed products were available from any source, commercial or otherwise, because there legally could not be any available. Purple Cap COMIRNATY®, the only product licensed when the Mandate was issued, could not have been available because FDA declared it physically unavailable on the same day it licensed it and therefore terminated its U.S. marketing authorization on Aug. 23, 2021. The FDA continued to grant EUAs for the Pfizer/BioNTech and Moderna COVID-19 treatments precisely because the FDA found that the FDA-licensed vaccines were not available (or were not available in sufficient quantities).[3]

138. The FDA's August 23, 2021 EUA Re-Issuance Letter included a footnote claiming that:

> The licensed vaccine [COMIRNATY] has the same formulation as the EUA-authorized vaccine and the products can be used interchangeably to provide the vaccination series without presenting any safety or effectiveness concerns. The products are legally distinct with certain differences that do not impact safety or effectiveness.

Dkt. 1-10 at 2 n.8. This footnote is significant because "interchangeability" is a statutorily defined term in the Public Health Safety Act ("PHSA"). The PHSA requires the manufacturer to separately apply for, and receive, FDA approval to treat a product as interchangeable with another licensed product.

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[3] It would also have been a criminal violation to sell or administer Purple Cap Comirnaty. *See, e.g.*, 42 U.S.C.§ 262(a)(1) & § 262(f) (criminal penalties for marketing or labeling violations); 21 U.S.C. § 331 & § 352 (misbranding); 21 U.S.C. § 331 (criminal fines and imprisonment up to $250,000 and 10 years for knowing violations of FDA requirements).

139. Neither the manufacturers (Pfizer and BioNTech) nor the FDA followed these statutorily mandated requirements to make an "interchangeability" finding or determination.

140. In related litigation, the Director the FDA's Center for Biologics Evaluation and Research, Dr. Peter Marks, has acknowledged that the FDA has not made a "statutory" interchangeability determination. *See* Dkt. 1-11, Oct. 21, 2022 Declaration of Peter Marks, M.D., Ph.D., ¶ 10.

141. On January 31, 2022, the FDA approved the BLA for Moderna's SPIKEVAX® COVID-19 vaccine. *See* FDA, Jan. 31, 2022 SPIKEVAX® BLA Approval Letter, available at: https://www.fda.gov/media/155815/download.

142. Also on January 31, 2022, the FDA re-issued the EUA for Moderna's unlicensed COVID-19 vaccine because the FDA-licensed product was not available in sufficient quantities. Dkt. 1-12, Jan. 31, 2022 Moderna EUA Re-Issuance Letter.

143. The Moderna EUA letter similarly acknowledged that the FDA-licensed SPIKEVAX® and EUA product were "legally distinct" and asserted that the unlicensed Moderna EUA COVID-19 vaccine "can be used interchangeably" with the FDA-licensed SPIKEVAX®. *See id.* at 3 n.9.

D. MANDATE OF UNLICENSED EUA PRODUCTS

144. Secretary Austin's August 24, 2021 Mandate Memo was issued one day after FDA approved Purple Cap COMIRNATY® and also reissued the EUA for the unlicensed Pfizer/BioNTech COVID-19 vaccine on the legal basis that the products were "legally distinct" and the factual basis that the only licensed product, Purple Cap COMIRNATY® was "unavailable."

145. Secretary Austin's memo stated that mandatory vaccination "will only use COVID-19 vaccines that receive full licensure from the Food and Drug Administration (FDA), in accordance with FDA labeling and guidance." Dkt. 1-2, Aug. 24, 2021 Secretary Austin Mandate Memo, at 1.

146. The DoD has consistently asserted that EUA vaccines may be mandated.

147. The DoD has admitted in related litigation that the DoD did not have any FDA-licensed COVID-19 vaccines when the August 24, 2021 Mandate Memo. *See Doe #1-#14 v. Austin,* 572 F.Supp.3d 1224, 1233-34, 2021 WL 5816632 (N.D. Fla. 2021) (defense counsel for Defendant Agencies admitted in a November 3, 2021 hearing that the DoD and Armed Services were "mandating vaccines from EUA-labeled vials").

148. Because there was no COMINARTY® available, all DoD components and the Armed Service began using and mandating the unlicensed, EUA Pfizer/BioNTech COVID-19 vaccine based on the DoD's determination that the EUA vaccine and the FDA-licensed vaccine are "interchangeable" and should be mandated.

149. In a September 14, 2021 Memorandum, Assistant Secretary of Defense for Health Affairs, Terry Adirim, expressly relied on and quoted the FDA's footnote in directing all DoD components to treat the unlicensed, EUA version "as if" it were FDA-licensed. Asst. Sec. Adirim then went well beyond the FDA's guidance in asserting that the licensed and unlicensed products are legally interchangeable for the purposes of the Mandate.

> Per FDA guidance, these two vaccines are "interchangeable" and DoD health care providers should "use doses distributed under the EUA to administer the vaccination series as if the doses were the licensed vaccine.
>
> Consistent with FDA guidance, DoD health care providers will use both the Pfizer-BioNTech COVID-19 vaccine and the Comirnaty

> COVID-19 vaccine interchangeably for the purpose of vaccinating Service members in accordance with Secretary of Defense Memorandum.

Dkt. 1-13, Asst. Secretary of Defense Memorandum, *Mandatory Vaccination of Service Members Using the Pfizer-BioNTech COVID-19 and COMIRNATY COVID-19 Vaccines* at 1 (Sept. 14, 2021) ("Pfizer Interchangeability Directive").

150. On May 3, 2022, due to the unavailability of FDA-licensed SPIKEVAX®, the Assistant Secretary of Defense issued the same directive that EUA Moderna COVID-19 vaccines were to be used interchangeably with, and "as if," they were the FDA-licensed and labeled Moderna Spikevax vaccine. *See* Dkt. 1-14, May 3, 2022 Asst. Secretary of Defense Memorandum, *Mandatory Vaccination of Service Members Using the Moderna and Spikevax Coronavirus Disease 2019 Vaccines* at 1 ("Moderna Interchangeability Directive").

151. Only the FDA has the statutory authority to make a determination of legal interchangeability, which the FDA has expressly disclaimed having done. *See supra* ¶ 140 & Dkt. 1-11, Marks Decl., ¶ 10.

152. The Assistant Secretary of Defense for Health Affairs is a DoD employee without any authority to declare an unlicensed, EUA biologic product to be interchangeable with an FDA-licensed one.

153. This official also lacks the authority to mandate any product for service members, much less to mandate an unlicensed EUA product in violation of 10 U.S.C. § 1107a and the PHSA's statutory interchangeability requirements.

154. The President acting as the Commander-in-Chief is prohibited from mandating unlicensed EUA products (absent an express national security authorization) by three separate and unequivocal acts of Congress. *See* 10 U.S.C. § 1107a, 42 U.S.C. §262,

and 21 U.S.C. §360bbb-3. Accordingly, no lesser officer may do so in the absence of express Presidential authorization required by law.

E. PLAINTIFFS AND CLASS MEMBERS HAVE BEEN WRONGFULLY DISCHARGED DESPITE UNAVAILABILITY OF ANY FDA-LICENSED VACCINES.

155. Defendant Agencies have consistently misrepresented that they had FDA-licensed COVID-19 vaccines available to service members when they did not and that unlicensed EUA vaccines are legally interchangeable with FDA-licensed vaccines.

156. In *Robert v. Austin*, 1:21-cv-228-RM-STV (D. Co.), a medical technician in the Air Force submitted a letter with screenshots of the military medical logistics system showing that the licensed vaccine was not orderable and had not been orderable through that system from the inception of the Mandate through Nov. 19, 2021. *See Robert v. Austin*, 1:21-cv-228-RM-STV (D. Co.), ECF 43-4.

157. Defendant Agencies do not currently have, and never did have, any FDA-licensed COMIRNATY® or SPIKEVAX® COVID-19 vaccines.

158. A number of Plaintiffs inquired as to the availability of FDA-licensed vaccines, and they confirmed that no FDA-licensed Comirnaty at the time and place they were ordered to receive the vaccine. *See supra* ¶ 50.

F. THERE WERE NO "COMMERCIALLY AVAILABLE" SOURCES OF FDA-LICENSED VACCINES.

159. Defendant has erroneously asserted that, notwithstanding the unavailability of FDA-licensed vaccines, Plaintiffs and other Coast Guard members could have obtained FDA-liensed vaccines from "commercially available" sources. This is incorrect, as confirmed by the DoD's contracts with the manufacturers, Pfizer and

Moderna, as well as records filed or produced by Pfizer and Moderna in separate litigation.

160. Every single dose of the Pfizer/BioNTech and Moderna vaccines, whether licensed or not, was purchased by Defendant pursuant to the exclusive contracts between the manufacturers, Pfizer and Moderna, and the DoD and Department of Health and Human Services ("HHS"). *See generally* U.S. Dept. of Defense, Press Release, *U.S. Government Engages Pfizer to Produce Millions of Doses of COVID-19 Vaccine* (July 22, 2020), available at: https://www.defense.gov/News/Releases/Release/Article/2310994/us-government-engages-pfizer-to-produce-millions-of-doses-of-covid-19-vaccine/; U.S. Dept. of Defense, Press Release, *Trump Administration Purchases Additional 100 Million Doses of COVID-19 Investigational Vaccine from Pfizer* (Dec. 23, 2020), available at: https://www.defense.gov/News/Releases/Release/Article/2455698/trump-administration-purchases-additional-100-million-doses-of-covid-19-investi/; U.S. Dept. of Defense, Press Release, *Trump Administration Collaborates with Moderna to Produce 100 Million Doses of COVID-19 Investigational Vaccine* (Aug. 11, 2020), available at: https://www.defense.gov/News/Releases/Release/Article/2309561/trump-administration-collaborates-with-moderna-to-produce-100-million-doses-of/

161. On December 28, 2023, Pfizer filed a "Notice of Removal" in *State of Texas v. Pfizer*, No. 5:23-cv-312-C (N.D. Tex.), ECF 1, including the "Plea to Jurisdiction" filed in the underlying Texas state court proceeding and attached hereto as Exhibit 8, stating that the Texas court lacks jurisdiction over the State of Texas' petition for violations of Texas' Deceptive Trade Practices Act because: "At all times relevant to the Petition, the

sole consumer of [Pfizer's] COVID-19 vaccine was the United States Government, not the State [of Texas] or any of its citizens or residents." Ex. 8, ¶ 7.a. *See also id.*, ¶ 23 (same).

162. On December 4, 2023, in *DTR v. FDA*, No. 3:22-cv-1237-E (N.D. Tex.), the FDA produced the minutes from a January 20, 2022 meeting between FDA officials and Moderna representatives, in which Moderna officials informed the FDA that "Moderna does not have a plan to produce any [FDA-licensed] SPIKEVAX material as there is currently no demand … beyond what has been supplied under" the FDA's emergency use authorization. Ex. 9, January 20, 2022 Meeting Minutes, at 1. This filing further confirms that no FDA-licensed SPIKEVAX was available, or even existed, at the time that Defendant mandated the Moderna COVID-19 vaccine and punishing service members like Plaintiffs for non-compliance where compliance was both physically and legally impossible.

163. There were no alternative sources or distribution channels outside the DoD/HHS exclusive contracts. DoD and Coast Guard had exclusive control and knowledge regarding any "commercially available" supplies; service members had no such knowledge and were entirely reliant on DoD for supply and administration of FDA-licensed vaccines.

V. THE GOVERNMENT HAS SYSTEMATICALLY VIOLATED SERVICE MEMBERS' RELIGIOUS LIBERTIES.

A. THE RELIGIOUS FREEDOM RESTORATION ACT

164. The Religious Freedom Restoration Act states that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). If the Government substantially burdens a person's exercise of religion, it can do so only if it "demonstrates that

application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

165. The DoD has implemented RFRA through DoD Instruction 1300.17, *Religious Liberty in the Military Services* (Sept. 1, 2020).

166. The Coast Guard has implemented RFRA and DoDI 1300.17 through COMDTINST 1000.15, *Military Religious Accommodations* (Aug. 30, 2021). *See* Ex. 1.

B. THE MILITARY'S SHAM RELIGIOUS ACCOMMODATION PROCESS

167. Defendant has punished and illegally discharged unvaccinated Coast Guard members, including each Plaintiff, through the systematic violations of the religious liberties protected by the First Amendment's Free Exercise Clause and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1.

168. The DoD and Armed Services have implemented a process for religious accommodations that courts have described as a "sham," *Navy SEAL 1 v. Biden*, 574 F.Supp.3d 1124, 1139, 2021 WL 5448970 (M.D. Fla. 2021), and a "quixotic quest" that amounts to little more than "theater." *Navy SEALs 1-26 v. Austin,* 578 F.Supp.3d 822, 826, 2022 WL 34443 (N.D. Tex. 2022).

169. Several district and appellate courts have issued nation-wide injunctions, against three of the four Armed Services, finding a substantial likelihood of success on the merits for Plaintiff service members' RFRA claims. *See Navy SEALs 1-26 v. Austin*, 596 F.Supp.3d 767, 2022 WL 1025144 (N.D. Tex. 2022) (Navy); *Doster v. Kendall*, 2022 WL 2974733 (S.D. Ohio July 27, 2022) (Air Force), *aff'd*, 54 F.4th 398 (6th Cir. 2022); *Colonel Fin. Mgmt. Officer v. Austin*, 622 F.Supp.3d 1187, 2022 WL 364351216 (M.D. Fla. 2022)

(Marine Corps); *see also Schelske v. Austin*, --- F.Supp.3d ---, 2022 WL 17835506 (N.D. Tex. Dec. 21, 2023) (injunction for individual Army soldiers and cadets).

170. The military has not rescinded or reformed the sham process, which has resulted in nearly uniform denials of service members requests for religious accommodations, using nearly identical form letters with only names, dates, and titles or duties changed.

171. The Armed Services have denied at least ninety-nine percent (99%) of Religious Accommodation Requests that were adjudicated.

172. The true number likely approaches one hundred percent (100%) given that the small number of Religious Accommodations requests that were approved all appear to have been disguised administrative exemptions granted to service members on terminal leave in their final months of service.

C. COAST GUARD DIGITAL TOOLS USED TO DENY PLAINTIFFS' REQUESTS

173. The Coast Guard has achieved such high denial rates through the use of "Digital Tools" disclosed by Coast Guard whistleblowers to congressional committees. *See* Dkt. 1-16, Oct. 18, 2022 Congressional Letter to Coast Guard Commandant Linda Fagan (including the Religious Accommodation Appeal Generator and Denial Template). The Congressional Letter and whistleblower documents demonstrate the Coast Guard denied all, or nearly all, Religious Accommodation Requests and dismissed appeals "*en masse* with the help of computer-assisted technology, indicating that no case-by-case determinations were taking place." *Id.* at 2.

174. Defendant repeatedly violated the religious liberties of each Plaintiff by requiring them to request religious accommodation through a sham process with a pre-determined denial using a computer-generated form letter while it simultaneously

pressured, threatened, fired, harassed, subject to ridicule, and otherwise made Plaintiff's lives as miserable as possible.

175. Each Plaintiff submitted a Religious Accommodation Request, which was denied. Each Plaintiff appealed the denial, which was also denied. *See supra* ¶¶ 17-31 & Table 1.

176. Each Plaintiff's request and each Plaintiff's appeal was denied using a nearly identical, computer-generated form letter that did not address their religious objections, the requirements of their positions, proposed accommodations, or otherwise provide the "to the person" analysis required by RFRA. *See* Byrd Del., ¶¶ 11-12; Harkins Decl., ¶¶ 10-11; Nolan Decl., ¶¶ 9-11; and Powers Decl., ¶ 11.

177. Following the denial of their respective appeals, each Plaintiff was ordered to receive the injection or else face further punishment followed by discharge and the deprivations of rights, procedures, pay, benefits, and services to which they were entitled by law as set forth below, despite the unavailability of any FDA-licensed vaccines and the consequent impossibility of compliance with the Secretary's Mandate, which required only FDA-licensed vaccines. *See supra* ¶¶ 17-31 & Table 1.

178. Plaintiffs and Class Members have suffered ongoing and irreparable harms from the deprivation of religious liberties and the resulting unlawful discharges, constructive discharges, separations, curtailment of orders, transfers to inactive status and denial of pay and benefits.

VI. CLASS ACTION ALLEGATIONS

A. CLASS DEFINITION

179. Plaintiffs bring this action pursuant to Rule 23 of the Rules of the United States Court of Federal Claims ("RCFC") on behalf of themselves and the Class of all

current and former Coast Guard members who were discharged, separated, or constructively discharged due to their unvaccinated status, and as a result lost pay, benefits, retirement points, training, promotion, or any other emoluments to which they are entitled by law under the 2023 NDAA, the Military Pay Act, and the other money-mandating sources of federal law enumerated herein. *See supra* ¶ 14.

B. THE PROPOSED CLASS SATISFIES RCFC 23(A).

180. **Numerosity.** The Class consists of at least 1,300 service members who were discharged, separated, constructively discharged, involuntarily transferred to inactive status, and/or denied pay or benefits.

181. The exact size of the Class and the identities of the individual members thereof are ascertainable through Defendant Agencies' records and centralized computer payroll and personnel systems.

182. The large class size and geographical dispersion makes joinder impractical, in satisfaction of RCFC 23(a)(1).

183. **Commonality.** The proposed Class has a well-defined community of interest. The Defendant has acted and failed to act on grounds generally applicable to each Plaintiff and putative Class Member, requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the Class.

184. There are many questions of law and fact common to the claims of Plaintiffs and the proposed Class Members, and those questions predominate over any questions that may affect individual Class Members within the meaning of RCFC 23(a)(2) and 23(b)(2).

185. Common questions of law and fact affecting members of the proposed Class include, but are not limited to, the following:

i) Whether the 2023 NDAA and Section 525 thereof is a "money mandating" statute that confers a substantive right to compensation for Plaintiffs and Class Members;

ii) Whether the 2023 NDAA Rescission of the Mandate made the Mandate void *ab initio*;

iii) Whether Section 525 requires Plaintiffs and Class Members to be restored to the *status quo ante* before the imposition of the Mandate and adverse actions taken thereunder;

iv) If the Court determines that rescission of the Mandate is in no way retroactive, whether the Defendant Agencies' mandate of unlicensed EUA vaccines was unlawful in violation of 10 U.S.C. § 1107a;

v) Whether Defendant Agencies' discharge of Plaintiffs and other Class Members for not accepting injection with an unlicensed, EUA vaccine was unlawful for the purposes of the Military Pay Act;

vi) Regardless of whether 2023 NDAA is a money-mandating statute, does the 2023 NDAA Rescission render all discharges unlawful for the purposes of Military Pay Act, 37 U.S.C. § 204 & § 206;

vii) Whether the Defendant Agencies' systematic denial of Plaintiffs' and Class Members' Religious Accommodation Requests substantially burdened their free exercise of religion;

viii) Whether the Defendant Agencies' policy of systematically denying religious accommodations can survive strict scrutiny where the 2023 NDAA Rescission has eliminated any compelling governmental interest for denying religious accommodations; and,

ix) Whether the Mandate and the systematic denial of religious accommodations was the least restrictive means in light of the fact that the Mandate is no longer a permissible means of further a legitimate governmental interest.

186. **Typicality.** The claims of Plaintiffs are typical of the claims of all of the other Class Members as required by RCFC Rule 23(a)(3). The claims of the Plaintiffs and Class Members are based on the same legal theories and arise from the same unlawful conduct, resulting in the same injury to the Plaintiffs and the Class.

187. **Adequacy.** Plaintiffs will fairly and adequately represent and protect the interests of the proposed Class. As an opt-in class action, there is no conflict of interest between Plaintiffs and putative Class Members who choose to opt-in.

188. Plaintiffs' undersigned counsel are adequate to serve as class counsel under RCFC Rule 23(g). Plaintiffs' counsel have expended significant time identifying and investigating the claims brought in this action, and collectively, they have substantial experience in prosecuting complex cases, including class actions, military backpay cases, and cases challenging the legality of military vaccine mandates.

189. Counsel Dale Saran is a retired judge advocate with significant experience in cases involving military backpay, employment, and vaccine mandate matters, including cases challenging the military's anthrax vaccine mandate. Counsel Brandon Johnson has significant experience litigating class action cases challenging Mandate, while counsel J. Andrew Meyer has significant experience in representing Class Members as court-appointed class counsel under Rule 23.

190. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of the Class; appreciate their duty to fairly and adequately represent the interests of Class Members; are able to faithfully discharge those duties; and have the resources to do so. Neither Plaintiffs nor their counsel have any interests adverse to those of the other Class Members.

C. THE PROPOSED CLASS SATISFIES RCFC 23(B)(3).

191. The proposed Class is maintainable under Rule 23(b)(3) RCFC as each of the prerequisites to certification under that Rule are met as alleged below.

192. **Predominance.** Common issues of fact and law predominate over any individual questions or determinations as required by Rule 23(b)(3). The Government's

liability can be determined on a class-wide basis for the Class based on the answers to the common legal and factual questions listed above.

193. **Superiority.** A class action is superior to other available methods for fairly and efficiently adjudicating these issues. There are at least 1,0000 Class Members, the majority of which have a claim in the range of $10,000 to $100,000. Absent a class action, most members would find the cost of litigating their individual claims to be prohibitive and will have no effective and complete remedy absent the present class action.

194. Calculation of backpay and other compensation will not require individualized determinations. All amounts can be calculated mechanically using a matrix like that set forth in the "FY22 Monthly Basic Pay Table", Dkt. 1-17, which states the statutory payment rates for all service members.

195. The amount to which each Plaintiff and Class Member is entitled for Backpay can be determined from their rank, years in service, and similar criteria to calculate their statutorily defined pay per drill period, training or duty day for which they were entitled to pay but were not paid due to the unlawful Mandate.

196. Alternatively, the amounts can be calculated by the Defendant Agencies in the same manner using the Defendant Agencies' payroll system and the corresponding personnel records to confirm the dates of drills, training, or other duty for which they were not paid. The value of lost points can be calculated in a similar manner.

197. With respect to collateral relief such as correction of individual records, the Court's rulings in the present class action will provide guidance on questions of law and fact on a class-wide basis that the Coast Guard Board for Corrections of Military Records ("BCMR") can apply as appropriate to individual Class Members' military records.

198. There are no obstacles that would present heightened difficulties for managing a class action. There is a relatively small number of common questions of law and fact that can produce common answers on a class-wide basis. The backpay and damages calculations do not require individualized determinations and may be calculated mechanically with a matrix like that proposed by Plaintiffs based on statutorily defined pay rates and confirmed using the government's own centralized computerized payroll and personnel systems. Similarly, the identity of Class Members and best method of providing notice to them can be obtained from the government's own centralized computerized payroll and personnel systems.

199. While there have been many court challenges to the lawfulness of the Mandate seeking injunctive and declaratory relief, as far as Plaintiffs are aware, this is the only class action filed post-Rescission seeking backpay for the Class Members and the only such action of its kind filed in the Court of Federal Claims.

200. The class treatment of common questions of law and fact is also superior to multiple individual actions or piecemeal litigation in that it conserves the resources of the courts and the litigants and promotes consistency and efficiency of adjudication. There are numerous threshold issues of law and fact that the Court can resolve through an adjudication of the Plaintiffs' claims that will serve to resolve those same issues present in each Class Member's claims. On the other hand, requiring each class member to file an individual claim would likely result in unnecessary, duplicative judicial labor and runs the risk of inconsistent rulings from the Court. For example, by determining the legal significance of rescission of the Mandate on the propriety of Defendants' refusal to pay Plaintiffs, the Court will necessarily determine the legal significance of that rescission for all Class Members.

FIRST CAUSE OF ACTION
VIOLATION OF FY2023 NDAA § 525 & COAST GUARD RESCISSION

201. Plaintiffs reallege the foregoing paragraphs and facts in Sections I-III and VI as if fully set forth in this count.

202. A statute is money-mandating if "it can fairly be interpreted as mandating compensation for damages sustained as a result of the breach of the duties [it] impose[s]." *Fisher v. United States,* 402 F.3d 1167, 1173-74 (Fed.Cir.2005) (en banc) (citations and quotation omitted). For a "fair interpretation," "[i]t is enough … that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages." *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 473, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003).

203. The money-mandating requirement "may … be satisfied if the Government retains discretion over the disbursement of funds but the statute: (1) provides 'clear standards for paying' money to recipients; (2) states the 'precise amounts' that must be paid; or (3) as interpreted, compels payment on satisfaction of certain conditions." *Samish Indian Nation v. United States*, 657 F.3d 1330, 1336 (Fed.Cir.2011) (*quoting Perri v. United States,* 340 F.3d 1337, 1342–43 (Fed.Cir.2003)).

204. The 2023 NDAA Rescission is a "money mandating" source of federal law that confers substantive rights to monetary damages for Plaintiffs and Class Members.

205. Alternatively, the 2023 NDAA Rescission, in conjunction with the Military Pay Act and other applicable federal laws and regulations, *see supra* ¶ 14, is fairly interpreted as a "money-mandating" source of federal law for Plaintiffs and Class Members.

206. "Rescind" means "an annulling; avoiding, or making void; abrogation; rescission", while "rescission" means "void in its inception"; or "an undoing of it from the beginning." BLACK'S LAW DICTIONARY at 1306 (6th ed. 1990).

207. Congress chose this term to direct the Defendant Agencies and the courts to apply the rescission with full retroactive effect to restore Plaintiffs and other similarly situated Coast Guard members to the position in which they would have been in the absence of the unlawful Mandate.

208. Secretary Austin's January 10, 2023 Rescission Memo acknowledges this Congressional directive by rescinding the Mandate with limited retroactive effect by committing to correct service members' records and adverse personnel actions.

209. The Rescission Memo and the Coast Guard's implementing orders, *see* Dkt. 1-5 and Dkt. 1-7, fail to give retroactive effect to the 2023 NDAA Rescission for backpay and financial compensation.

210. To the extent Congress left any discretion to implement the 2023 NDAA Rescission, the 2023 NDAA, in conjunction with the Military Pay Act and the other money-mandating federal laws and regulations enumerated herein, *see supra* ¶ 14, provide clear standards for payment, provide the precise amounts for payment (*e.g.*, the 2022 NDAA and 2023 NDAA provide the statutory rates for salaries, allowances, benefits, and other compensation), and compel payment on satisfaction of the conditions therein.

211. The military has already exercised any discretion it may have through the issuance of its post-Rescission implementation orders. *See supra* Sections III.C-III.E. *See also Collins v. U.S.*, 101 Fed.Cl. 435, 450 (Fed.Cl.2011) (where the DoD issued regulations implementing the NDAA providing "a servicemember who qualifies for pay under those regulations would be entitled to pay under the statute as not otherwise disqualified by the

Secretary", the court found that the Secretary's discretion had "already … been exercised in the form of the DoDI and is no longer available to the Secretary.").

212. Even if the military retains some limited discretion, these statutes are money-mandating requirements because they: "(1) provide[] 'clear standards for paying' money to recipients; (2) state[] the 'precise amounts' that must be paid; or (3) … compel[] payment on satisfaction of certain conditions." *Samish Indian Nation*, 657 F.3d at 1336 (citation and quotation omitted).

213. This Court has routinely found provisions of previous National Defense Authorization Acts and other money-authorizing or appropriations statutes to be "money mandating" where there was a separate source of federal law for determining the standards, amounts and conditions for payment. *See, e.g. Collins*, 101 Fed.Cl. at 457-59 (holding that NDAA provisions repealing the unconstitutional "Don't Ask, Don't Tell" policy were money-mandating in conjunction with the Separation Pay Statute, 10 U.S.C. § 1174); *Striplin v. U.S.*, 100 Fed.Cl. 493, 500-01 (Fed.Cl.2011) (holding that NDAA provisions to be money-mandating where they established conditions for waiver of pay limitations). *See also San Antonio Housing Authority v. United States*, 143 Fed.Cl. 425, 475-76 (Fed.Cl.2019) (appropriations act money-mandating where separate statute prohibited diminution in funding to specific group); *Lummi Tribe of Lummi v. U.S.*, 99 Fed.Cl. 584, 603-04 (Fed.Cl.2011) (holding that statute providing grants to specific Indian tribes was money-mandating).

214. Statutes governing pay and benefits for service members or federal employees that may not be money-mandating on their own are money-mandating when read in conjunction with other federal statutes or regulations that establish conditions for entitlement to such pay and benefits. *See, e.g., Colon v. United States*, 132 Fed.Cl. 665

(Fed.Cl.2017) (living quarters allowance statute in conjunction with the Department of State Standardized Regulations and applicable agency regulations); *Stephan v. United States,* 111 Fed.Cl. 676 (Fed.Cl.2013) (same); *Roberts v. U.S.*, 745 F.3d 1158, 1165-66 (Fed.Cir.2014) (same); *Agwiak v. United States*, 347 F.3d 1375, 1379-80 (Fed.Cir.2003) (remote duty pay statute money-mandating).

215. The 2023 NDAA Rescission, in addition to being an independent "money-mandating" source of federal law, removes any bar or prohibition on payment to unvaccinated service members, or any grounds for differential treatment or payment, on the basis of their COVID-19 vaccination status or non-compliance with the now-rescinded Mandate.

216. The 2023 NDAA Rescission applies uniformly to eliminate the Mandate for all service members. The statutory text, structure, and purpose of the 2023 NDAA Rescission all support the conclusion that Congress could not have intended to exclude unvaccinated service members from the benefits, protections or remedies to which they are entitled under the Military Pay Act and the other applicable laws and regulation governing basic pay, retirement, or other military benefits. *See supra* ¶ 14.

217. "When a statute has been repealed, the regulations based on that statute automatically lose their vitality. Regulations do not maintain an independent life, defeating the statutory change." *Aerolineas Argentinas v. U.S.*, 77 F.3d 1564, 1575 (Fed.Cir.1996). This applies *a fortiori* to regulations, rules or policies based on an agency rule rescinded by Congress.

218. Failure to provide backpay and other relief required to restore service members to the pre-Mandate status quo would have the effect of creating a two-tier governance and payment structure for service members, where some are made whole

through the 2023 NDAA Rescission, while other similarly situated members receive nothing.

219. The 2023 NDAA Rescission applies to all service members equally, and the military was required to provide pay and benefits on the same basis or conditions to all service members.

220. There is no indication that Congress intended to create a two-tiered system or to prohibit unvaccinated service members from receiving the pay and benefits to which they are otherwise entitled, or to permit the illegal exaction and recoupment of payments and benefits that they have been paid or earned.

221. Accordingly, no fair interpretation of the 2023 NDAA Rescission would permit the military to exercise its discretion to create a two-tiered system for the payment of service members. *See, e.g., Abbott*, 70 F.4th at 843-44; *Hatter*, 185 F.3d at 1361-62; *Collins*, 101 Fed.Cl. at 457-459.

222. Defendant Agencies' refusal to provide backpay required by the 2023 NDAA Rescission is an unlawful act in defiance of an express Congressional directive.

223. The Secretary cannot "defeat an otherwise money-mandating statute merely by reserving last-ditch discretion. … The ability to change the nature of a statute by issuing regulations that provide a veto would completely upend this area of law." *Collins*, 101 Fed.Cl. at 459. "Such a perverse understanding of Congress's purpose cannot be the law … [for] [i]t is the statute, not the Government official, that provides for the payment." *Fisher,* 402 F.3d at 1175.

224. Plaintiffs' and Class Members' Tucker Act claims for backpay do not require any showing that the Mandate was unlawful or wrongful (though it is both). Instead, to

give full effect to the 2023 NDAA Rescission, Plaintiffs must be provided backpay and other compensation to which they are entitled to restore the pre-Mandate status quo.

SECOND CAUSE OF ACTION
WRONGFUL DISCHARGE IN VIOLATION OF REQUIRED PROCEDURES

225. Plaintiffs reallege the foregoing paragraphs and facts in Sections I-IV and VI as if fully set forth in this count.

226. Defendant summarily and illegally discharged each Plaintiff in violation of the due process and other procedural requirements set forth in the U.S. Constitution, federal law, and governing Coast Guard regulations, procedures, and policy manuals. *See supra* ¶¶ 17 - 33, 72

227. The Coast Guard's systematic violations of Plaintiffs' due process rights and the specific procedural requirements set forth below renders their discharges legally void and of no effect. Accordingly, each plaintiff must be deemed to have continued in service until lawfully discharged, must be awarded constructive service, and is entitled to any basic pay, points, benefits, special pays, separation pay, and/or retirement pay to which they are or would be entitled by law for such constructive service. *See, e.g., Runkle v. United States*, 122 U.S. 543 (1887); *Clackum v. United States*, 148 Ct.Cl. 404 (Fed.Cir.1960); *Garner v. United States*, 161 Ct.Cl. 73 (1963); *Shapiro v. United States*, 107 Ct.Cl. 650 (1947); *Dodson v. Army*, 988 F.2d 1199, 1208 (Fed.Cir.1993); *Groves v. United States*, 47 F.3d 1140, 1145 (Fed.Cir.1995).

37 U.S.C. § 204 and § 206 Are Money-Mandating Statutes

228. Under 37 U.S.C. § 204(a)(1), a service member is "entitled to the basic pay of their …, in accordance with their years of service" if they are "a member of a uniformed service on active duty".

229. Each Plaintiff and each Class Member was "a member of a uniformed service on active duty" when the Mandate was issued up until the time that they were wrongfully discharged, constructively discharged, separated, involuntarily transferred to inactive status, had their orders curtailed, and/or were denied pay and benefits.

230. 37 U.S.C. § 204 is a money-mandating statute for all Plaintiffs and Class Members who satisfy the foregoing conditions.

231. 37 U.S.C. § 206(a) requires that any Reservists who participated in and performed drills, annual training, or any other required training, instruction or duties to be paid in accordance with the statutory rates for drill periods and training as set forth in the FY22 Monthly Basic Pay Table. Dkt. 1-17.

232. 37 U.S.C. § 206(a) is a money-mandating statute for Reserve members for drills, training, or duties actually performed.

233. All Plaintiffs and Class Members were ready, willing, and able to perform their duties at all relevant times. The proposed class definition excludes those who were physically disabled from performing their duties.

234. The constructive service doctrine provides payment for those members "ready, willing, and able" to serve, yet were illegally denied the ability to do so by unconstitutional acts of the Defendant Agencies.

Due Process and Procedural Violations

235. In Title 10 of the U.S. Code, the terms "armed forces" and "uniformed services" include the Coast Guard. 10 U.S.C. § 101(a)(4) ("armed forces") and § 101(a)(5) ("uniformed services").

236. Defendant discharged Coast Guard members, including each Plaintiff, prior to the expiration of their term of service, in violation of 10 U.S.C. § 1169. *See supra* ¶¶ 17

- 31 (Byrd approx. seven months; Gutierrez approx. 10 month; Harkins approx.. 16 months; Morrissey over three years; Nolan over 3.5 years; Powers approx. 2.5 years).

237. Defendant illegally discharged and denied reenlistment of Coast Guard members in "sanctuary" status, including Plaintiffs Harkins and Nolan who were each within two years of qualifying for retirement when they were involuntarily separated, in violation of 10 U.S.C. § 1176.

238. Defendant illegally discharged and denied reenlistment to Coast Guard members more than eight years of service without convening an administrative discharge board, including each Plaintiff, in violation of express requirements set forth in governing Coast Guard regulations and depriving them of due process rights guaranteed by the Fifth Amendment of the U.S. Constitution. *See, e.g.*, ¶¶ 17 - 33, Exs. 1 - 6.

239. Defendant illegally discharged Coast Guard members without providing assistance from military counsel, including each Plaintiff, in violation of express requirements set forth in governing Coast Guard regulations and depriving them of rights protected by the Sixth Amendment of the U.S. Constitution. *See, e.g.*, ¶¶ 17 - 33, Exs. 1 - 6.

240. Defendant illegally discharged Coast Guard members, including most of the Plaintiffs, without providing a complete physical and medical examination prior to discharge, in violation of 10 U.S.C. § 1145 and 14 U.S.C. § 2313. Instead, Plaintiffs received at best a cursory interview with a military healthcare provider that failed to address any serious medical conditions that required treatment. *See, e.g.*, ¶¶ 17 - 33, Exs., 1 - 6.

241. Defendant illegally discharged Coast Guard members, including each Plaintiff, without providing benefits and services required by federal law and Coast Guard regulations, in violation of 10 U.S.C. §§ 1141-1155. *See generally* Ex. 5, COMDTINST

M1000.4, Ch. 1.B ("Separating Active-Duty Enlisted Members") & Ch. 1.C ("Retirement"). In the rush to illegally discharge Plaintiffs in 30 days or less, the Coast Guard failed to provide legally required vocational training and counseling on post-discharge benefits for Plaintiffs and their spouses, and in most cases failed to permit Plaintiffs to apply for Veteran's Administration ("VA") benefits and to receive their VA disability ratings. *See* Exs. 1-6.

242. Defendant involuntarily discharged Coast Guard members who had completed at least six years but less than 20 years of service, including each Plaintiff, and not for misconduct without providing separation pay in violation of 10 U.S.C. § 1174.See, generally, ¶¶ 49 - 72.

243. Defendant illegally discharged Coast Guard members who had completed 20 years of service, who were in "sanctuary" status, or who would have completed 20 years of service or entered sanctuary status at the expiration of their terms of service, including Plaintiffs Harkins and Nolan, without permitting them to request retirement or denying their approved retirement dates, in violation of 14 U.S.C. § 2306.

244. Defendant punished unvaccinated Coast Guard members through wrongful discharges that are initially framed as "misconduct" for violating the UCMJ, and thereby prevent reenlistment and significantly harm their ability to seek future employment in the private or public sectors, and then are characterized as "Convenience of the Government" in an obvious attempt to avoid providing Plaintiffs with counsel, a chance to present evidence, or any other resources or benefits.

245. Each Plaintiff and Class Member has a claim for Backpay for the full period from that date on which they were wrongfully discharged, constructively discharged, separated, forced to retire, or involuntarily transferred to inactive status through the end

of the term of service during which the discharge occurred and any subsequent terms of reenlistment for which they would have been eligible absent the now-rescinded Mandate.

246. The Coast Guard's systematic violations of Plaintiffs' due process rights and the specific procedural requirements set forth below renders their discharges legally void and of no effect. Accordingly, each plaintiff must be deemed to have continued in service until lawfully discharged, must be awarded constructive service, and is entitled to any basic pay, points, benefits, special pays, separation pay, and/or retirement pay to which they are or would be entitled by law for such constructive service.

THIRD CAUSE OF ACTION
WRONGFUL DISCHARGE IN VIOLATION OF 10 U.S.C. § 1107a

247. Plaintiffs reallege the paragraphs and facts in Sections I-III and Sections V-VI as if fully set forth in this count.

248. The Military Pay Act, in conjunction with 10 U.S.C. § 1107a, the 2023 NDAA Rescission, and the other money-mandating sources of federal law enumerated herein, *see supra* ¶ 14, is fairly interpreted as a "money-mandating" source of federal law that confers substantive rights to monetary damages for Plaintiffs and Class Members.

249. 10 U.S.C. § 1107a expressly prohibits the military from mandating any service member to take an unlicensed EUA product, absent an express Presidential authorization on the grounds of national security.

250. There has not been a Presidential authorization to mandate an unlicensed EUA product from the issuance of the Mandate through the present.

251. The August 24, 2021 Mandate permits only COVID-19 mRNA gene therapy "vaccines" with "full licensure from the [FDA], in accordance with FDA-approved labeling and guidance." Dkt. 1-2, Aug. 24, 2021 Secretary Austin Mandate Memo, at 1

252. The Defendant Agencies mandated gene therapy products that do not meet the DoD's own definition for being vaccines. *See supra* ¶ 126.

253. A "therapy" or "treatment," even if lifesaving, cannot be mandated.

254. The Defendant Agencies have mandated unlicensed, EUA COVID-19 gene therapies from the issuance of the Mandate on August 24, 2021, until at least the 2023 NDAA Rescission of the Mandate was partially implemented by the DoD on January 10, 2023.

255. No FDA-licensed COVID-19 vaccines were available at all at the time that the August 24, 2021 Mandate was issued.

256. In related litigation, Defendant Agencies have admitted that they have mandated unlicensed EUA vaccines from the date the mandate was issued and extending through the discharge date of each Plaintiff. *See supra* ¶ 146.

257. Defendant Agencies' consistent and generally applicable policy—as reflected in the September 14, 2021 Pfizer Interchangeability Directive, the May 3, 2022 Moderna Interchangeability Directive, and their litigation position in all related litigation—is that unlicensed EUA COVID-19 vaccines are legally interchange with FDA-licensed vaccines and that the unlicensed EUA vaccines should be mandated "as if" they were the FDA-licensed product for the purposes of the Mandate. *See supra* Section IV.D.

258. Compliance with the Coast Guard Mandate was both legally and physically impossible when the Mandate was issued and for several months thereafter. *See supra* Section IV.D.

259. Each Plaintiff specifically inquired as the availability of FDA-licensed vaccines, confirmed that no FDA-licensed vaccine was available, informed their commands that no FDA-licensed vaccines were available, and formally or informally

objected that it was not possible to comply with the vaccination order due to the unavailability of FDA-licensed vaccines. *See supra* ¶¶ 17-31 & Table 1. *See also* accompanying Plaintiff Declarations.

260. Despite the impossibility of compliance, the Coast Guard illegally punished and illegally discharged each Plaintiff for failing to comply with the Coast Guard Mandate's requirement to take an FDA-licensed vaccine. *See supra* ¶¶ 17-31 & Table 1.

261. Defendant Agencies did not have "Comirnaty-labeled" vaccines at any tie relevant to Plainiff's cases and it was well-known by the Defendant before and during the Mandate that the "vaccines" did not provide any immunity at all.

262. All Plaintiffs' and Class Members' harms, financial and otherwise, described above are a direct result of the Defendant Agencies' unlawful order mandating an unlicensed EUA product in violation of 10 U.S.C. § 1107a and express requirements of the Secretary Austin's August 24, 2021 Mandate Memo that permitted only FDA-licensed products to be mandated when there were none at all available.

FOURTH CAUSE OF ACTION
WRONGFUL DISCHARGE IN VIOLATION 42 U.S.C. §§ 2000bb-1, et seq.

263. Plaintiffs reallege the paragraphs and facts in Sections I-III and Sections V-VI as if fully set forth in this count.

264. The Religious Freedom Restoration Act is fairly interpreted as a "money-mandating" source of federal law that confers substantive rights to monetary damages for Plaintiffs and Class Members.

265. The Religious Freedom Restoration Act, in conjunction with the 2023 NDAA Rescission, the Military Pay Act and the other money-mandating sources of federal law enumerated herein, *see supra* ¶ 14, is fairly interpreted as a "money-mandating"

source of federal law that confers substantive rights to monetary damages for Plaintiffs and Class Members.

266. RFRA applies to Defendant Agencies, each of which is a "branch, department, agency, instrumentality, and official of the United States." 42 U.S.C. § 2000bb-2(1).

267. RFRA expressly creates a remedy in district court, granting any "person whose religious exercise has been burdened in violation of" RFRA to "assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the government." 42 U.S.C. § 2000bb-1(c).

268. RFRA states that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a).

269. The Mandate and other challenged Defendant Agency actions substantially burdened the free exercise of religion in violation of RFRA.

270. The Defendant Agencies each adopted a policy of systematically denying Religious Accommodation Requests using form letters, without providing the "to the person" individualized determinations required by RFRA, DoDI 1300.17, and COMDTINST 1000.15.

271. The Mandate and Defendant Agencies' religious accommodation policies substantially burdened and unlawfully discriminated against religious exercise by treating comparable secular activities, *i.e.*, medical and administrative exemptions, more favorably than comparable religious exercise, *i.e.*, religious accommodations, by granting thousands of medical and administrative exemptions, while granting zero or only a

handful of Religious Accommodation Requests. *See supra* ¶¶ 169-178 & cases cited therein.

272. If the Government substantially burdens a person's exercise of religion, it can do so only if it "demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

273. Each Plaintiff submitted a Religious Accommodation Request, which was denied. Each Plaintiff appealed the denial, which was also denied. *See supra* ¶¶ 17-31 & Table 1.

274. Each Plaintiff's request and each Plaintiff's appeal was denied using a nearly identical, computer-generated form letter that did not address their religious objections, the requirements of their positions, proposed accommodations, or otherwise provide the "to the person" analysis required by RFRA. *Supra* ¶¶ 17-31, 52 - 55, and Plaintiff Declarations.

275. Following the denial of their respective appeals, each Plaintiff was ordered to receive the injection or else face further punishment followed by discharge and the deprivations of rights, procedures, pay, benefits, and services to which they were entitled by law as set forth below, despite the unavailability of any FDA-licensed vaccines and the consequent impossibility of compliance with the Secretary's Mandate, which required only FDA-licensed vaccines. *Supra* ¶¶ 17 - 33 & Table 1.

276. Plaintiffs and Class Members have carried their burden of demonstrating that the Mandate and the Government's religious accommodation policies substantially burdened service members free exercise of religion, shifting the burden to the government to demonstrate that its policy satisfy strict scrutiny with respect "to the person" seeking

religious accommodation. *See O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 429 (2006).

277. The 2023 NDAA Rescission retroactively removes any compelling governmental interest in mandating vaccination against COVID-19 of service members over their religious objections.

278. The 2023 NDAA Rescission retroactively eliminates the Mandate as a permissible means for achieving that goal, necessarily entailing that it was not the least restrictive means for doing so.

279. Accordingly, the Government's policies necessarily fail strict scrutiny.

280. Plaintiffs and Class Members may seek backpay for their wrongful discharges due to these RFRA violations. *See Klingenschmitt v. U.S.*, 119 Fed.Cl. 163 (Fed.Cl.2014).

FIFTH CAUSE OF ACTION
ILLEGAL EXACTION

281. Plaintiffs reallege the foregoing paragraphs and facts in Sections I-III and VI as if fully set forth in this count.

282. An illegal exaction claim generally involves money "improperly paid, exacted, or taken from the claimant[.]" *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. 599, 372 F.2d 1002, 1007 (Ct.Cl.1967).

283. An illegal exaction has occurred when "the Government has the citizen's money in its pocket." *Clapp v. United States,* 127 Ct.Cl. 505, 512, 117 F.Supp. 576, 580 (Cl.Ct.1954), *cert. denied,* 348 U.S. 834, 75 S.Ct. 55, 99 L.Ed. 658 (1954).

284. Suit can then be maintained under the Tucker Act to recover the money exacted. *Clapp*, 127 Ct.Cl. at 513; *Pan American World Airways v. United States,* 129

Ct.Cl. 53, 55, 122 F.Supp. 682, 683–84 (Cl.Ct.1954) ("the collection of money by Government officials, pursuant to an invalid regulation" is an illegal exaction).

285. Defendant punished Plaintiffs and Class Members through the illegal exaction and recoupment of separations pay, special pays, (re)enlistment bonus payments, post-9/11 GI Bill benefits, costs of training and tuition at military schools or academies and public and private universities, travel and permanent change of station allowances, all of which Plaintiffs were entitled to by law.

286. "When a statute has been repealed, the regulations based on that statute automatically lose their vitality. Regulations do not maintain an independent life, defeating the statutory change." *Aerolineas Argentinas v. U.S.*, 77 F.3d 1564, 1575 (Fed.Cir.1996); *see also Carriso v. United States,* 106 F.2d 707, 712 (9th Cir.1939) (when a government agent construes a statute as remaining in effect after it has been repealed and uses it as a basis to collect fees, a claim to recover the fees is "founded upon a law of Congress" and "does not sound in tort"). This applies *a fortiori* to regulations, rules or policies based on an agency rule rescinded by Congress.

287. Defendant illegally recouped Plaintiff Powers' reenlistment bonus when the Coast Guard illegally discharged him with approx. 2.5 years prior to the expiration of his term of service, including withholding all of his final paycheck and seeking collection of a "debt" of over $13,000. *See supra* ¶ 31.

288. Plaintiff Harkins was forced to sell back 60 days of leave and forfeit an additional 14 days of leave. *See supra* ¶ 21.

289. Plaintiff Nolan had to sell back 39 days of leave. *See supra* ¶ 30.

290. The 2023 NDAA Rescission of the Mandate eliminated any legal basis for the recoupment or withholding of bonuses, post-9/11 GI Bill, the costs of training and tuition, and other benefits and special pays.

RELIEF REQUESTED

WHEREFORE, Plaintiffs pray that this Court:

291. Award and enter a judgment of at least $ 1.1 million due in military backpay and other financial compensation for the Plaintiffs, and in an additional amount to be determined for a common fund for all members of the Class who opt into the Class;

292. Reinstate and correct the military records of Plaintiffs and Class Members pursuant to 10 U.S.C. § 1552 as requested herein;

293. Alternative, if the Court finds any Plaintiff or Class Member was lawfully discharged, Award separation pay pursuant to 10 U.S.C. § 1174 to those members otherwise qualified for it;

294. For any Plaintiff or Class Member who becomes eligible for either sanctuary or retirement as a result of relief granted by this Court, order the Defendant to process requests for Sanctuary or Retirement as per normal processes;

295. For any Plaintiff or Class Member who had monies wrongfully taken from them by Defendant, including bonuses recouped, entitlements previously granted revoked, or otherwise had money exacted from them by Defendant, Award them that exacted amount in judgment;

296. For any Plaintiff or Class Member who was unlawfully removed from a promotion list, Order backpay at the rank as of the date they should have originally been promoted;

297. For any Plaintiff or Class Member who was rendered ineligible for promotion by their unvaccinated status and now is behind their year group, order the Defendant to convene Special Selection Boards or other such Boards under the applicable statutes and regulations;

298. Certify the Class under Federal Court of Claims Rule 23 as the Class is defined in this Complaint;

299. Appoint Plaintiffs as the representatives of the Class certified by the Court;

300. Appoint undersigned Counsel as counsel for the Class certified by the Court;

301. Direct that appropriate notice be given to Class Members in order to allow Class Members to opt-in as required by Federal Court of Claims Rule 23;

302. Award Plaintiffs and Class Members the above monetary judgment, plus interest, costs, and attorney's fees, as a result of the improper actions of the Defendant and Defendant Agencies; and

303. Grant such other relief as the Court may deem just and proper to provide Plaintiff and Class Members "full and fitting relief."

Date: March 29, 2024

Respectfully submitted,

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