IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NICHOLAS BASSEN, *et al.*, ***Plaintiffs*,** **v.** **THE UNITED STATES OF AMERICA,** ***Defendant*.**	**Case No. 23-211C** **Judge Dietz**

PLAINTIFFS' MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD, OR IN THE ALTNERNATIVE, MOTION FOR SUMMARY JUDGMENT

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QUESTIONS PRESENTED

1. Whether Defendant wrongfully and/or constructively discharged, cancelled or curtailed orders, illegally transferred to inactive status, and/or denied pay and benefits to Plaintiffs: (a) for non-compliance with the COVID-19 vaccine mandate ("Mandates") promulgated by the Department of Defense ("DoD") and by the Air Force, Army, Marine Corps and Navy (collectively, the "Armed Services"), and with the individual COVID-19 Vaccination Orders addressed to Plaintiffs, which required them to take only a Food and Drug Administration ("FDA") *licensed* vaccine, where Plaintiffs confirmed that no FDA-licensed vaccines were physically or legally available; and (b) for refusing to take an *illegally substituted* Emergency Use Authorization ("EUA") product that could not be lawfully mandated.
2. Whether Defendant illegally discharged, cancelled or curtailed orders, transferred to inactive status, and/or denied pay and benefits to Plaintiffs in violation of due process and procedures required by law and military regulations.
3. Whether Defendant illegally denied Plaintiffs' Religious Accommodation Requests ("RARs") in violation of the Religious Freedom Restoration Act ("RFRA").
4. Whether Defendant illegally exacted, or recouped, enlistment bonuses or other benefits and entitlements from Plaintiffs.

STATEMENT OF THE CASE

This case is about the DoD's and Armed Services' Mandates to take an FDA-licensed vaccine, and Defendant's illegal discharge, curtailment and cancellation of orders, involuntary transfer to inactive or retired status, and denial of pay and benefits to Plaintiffs for non-compliance where no FDA-licensed vaccines were physically or legally available. The Mandate, each Service Branch's implementation of it, and Plaintiffs'

individual orders were all subject to an explicit condition precedent—the availability of FDA-licensed vaccines—that was never satisfied.

Plaintiffs are challenging the lawfulness of the discharges, punishments and other adverse actions imposed for non-compliance with the Mandates and their individual Vaccination Orders because: (1) each of the DoD and Armed Services Mandates expressly stated that "only" FDA-licensed vaccines were to be mandated; (2) Plaintiffs' individual Vaccination Orders required them to take only an FDA-licensed vaccine, "subject to" the availability of FDA-licensed vaccines; (3) no FDA-licensed vaccines were physically and legally available; and (4) the only products that were available were unlicensed, EUA products that could not lawfully be mandated.

Plaintiffs' claims do not involve, or do not solely involve, review of a final agency decision based on an existing administrative record. Instead, they are "disputing the process followed by" the Armed Services "in reaching the decision to involuntarily" and illegally discharge them, curtail or cancel their orders, transfer them to inactive status or force them into retirement, and/or deny them pay and benefits, "rather than bringing a challenge to the [Service]'s underlying decision." *Lippmann v. U.S.*, 127 Fed.Cl. 238, 248 (2016). Plaintiffs' claims and the Defendant's mass involuntary discharges without any legal authorization are similar to those that this Court addressed in *Tippins v. U.S.*, 154 Fed.Cl. 373 (2021), *aff'd* 93 F.4th 1370 (Fed.Cir.2024), where this Court granted, and the Federal Circuit affirmed, summary judgment in favor of the service member plaintiffs.

Plaintiffs raise purely legal issues as to the construction of federal statutes and military regulations and procedures. There are no material facts in dispute, in particular, as to whether: (1) Defendant mandated only FDA-licensed vaccines; (2) there was no Presidential Authorization to mandate EUA products; (3) Plaintiffs' discharges and other

adverse actions were for failure to take an FDA-licensed vaccine; (4) FDA-licensed vaccines were unavailable; and (5) Defendant denied Plaintiffs' RARs and RAR appeals.

Like the plaintiff service members in *Tippins*, Plaintiffs here are "not requesting that the court review an agency decision"; instead, are "requesting a *de novo* review of whether [they are] entitled to backpay" and other relief "under applicable law." *Lewis v. U.S.*, 114 Fed.Cl. 682, 685 (2014). "Therefore, the most appropriate lens through which the court can analyze" Plaintiff's claims and "the government's contentions is by way of a motion of summary judgment." *Id.* To the extent that Court finds there are material disputed facts, the AR confirms the Plaintiff's allegations and provides more than sufficient evidence for the Court to grant judgment for Plaintiffs on the AR.[1]

STATEMENT OF FACTS AND LEGAL FRAMEWORK

I. STATEMENT OF UNDISPUTED FACTS

A. COVID-19 Mandate and Rescission

1. On August 24, 2021, Secretary Austin issued the COVID-19 vaccination mandate. DOD AR Tab 3. 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."[2]

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[1] On June 17, 2024, Defendant filed the AR, which was broken down into six different PDFs with separate numbering: Dkt. 37-1 (Chisholm, Hall, Rodriguez); Dkt. 37-2 (Bassen, Dailey, Davis); Dkt. 37-3 (Endress, Merjil, Wynne); Dkt. 37-4 (Army and Air Force orders, instructions and policies); Dkt. 37-5 (Springer); and Dkt. 37-6 (DoD orders, instructions and policies). This motion also refers to facts and evidence in or attached to the Plaintiffs' August 4, 2023 Amended Complaint ("FAC"), Dkt. 21; Plaintiffs' September 22, 2023 Response to Defendant's Motion to Dismiss, Dkt. 23 and the Plaintiffs' sworn declarations attached thereto. Plaintiffs also rely upon an additional a Supplemental Admin Record ("SAR") that is the subject of a forthcoming Joint Motion to Supplement the AR.

[2] Secretary of Defense, *Mandatory Coronavirus Disease 2019 Vaccination of Dept. of Defense Service Members* at 1 (Aug. 24, 2021) ("DoD Mandate"), AR DOD 000005.

2. Each of the Armed Services issued a COVID-19 vaccine mandate stating that only FDA-licensed vaccines may be mandated.[3]

3. Defendant was obligated to provide FDA-licensed vaccines.[4]

4. On December 23, 2022, President Biden signed into law the 2023 National Defense Authorization Act ("NDAA"). Section 525 of the 2023 NDAA directed Secretary Austin to "rescind" the DoD Mandate. Pub. L. No. 117-263 §525, 136 Stat. 2395.

5. On January 10, 2023, Secretary Austin rescinded the DoD Mandate.

6. Each Armed Service rescinded its mandate in January 2023.[5]

B. FDA-Licensed Comirnaty

7. On August 23, 2021, the FDA approved the Biologic License Application submitted by Pfizer and BioNTech for the original "Purple Cap" formulation of Comirnaty. *See* FDA, Comirnaty Approval Letter (Aug. 23, 2021), DOD AR, AR Tab 5.

8. The Purple Cap Comirnaty COVID-19 vaccine licensed by the FDA was never manufactured nor marketed in the United States, because the FDA marketing authorization for Comirnaty started *and ended* on August 23, 2021, *i.e.*, the same day as

[3] *See* Dept. of the Air Force ("DAF"), *COVID-19 Mandatory Vaccination Implementation Guidance for Service Members* ¶3.1.3 (Sept. 3, 2021) ("Air Force Mandate"), AR 0000534; Dept. of the Army, *FRAGO 5 to HQDA EXORD 225-21 Covid-19 Steady State Operations* ¶3.D.8.A (Sept. 14, 2021) ("Army Mandate"), AR000022; MARADMIN 462/21, ¶3.b (Sept. 1, 2021), SAR 50-56 ("Marine Corps Mandate").

[4] *See* Army Mandate ¶3.D.8.B.1 (Army "Commanders will ensure sufficient doses of Department of Defense approved vaccines are on hand and available for their unit."), AR 000023. *See also* AR 40-562, AR 000136 ("B-1. Standard #1: Immunization Availability – a. Ensure immunizations are available when required").

[5] *See* FAC, ¶71; Dkt. 16-2 (Army Rescission Order); Dkt. 16-3 (Navy Rescission Order); Dkt. 16-4 (Marine Corps Rescission Order); and Dkt. 16-4 (Air Force Rescission Order).

FDA approval, and the day before the DoD Mandate was issued August 24.[6]

9. The unavailability of FDA-licensed Comirnaty was confirmed by the FDA's repeated re-authorizations for the Pfizer-BioNTech EUA COVID-19 vaccines, because the unavailability of FDA-licensed products is an express statutory requirement for the issuance or re-issuance of the EUA. *See* 21 USC § 360bb-3(C)(3) (requiring finding that "there is no adequate, [FDA-]approved, available alternative to the product").

10. Plaintiffs, who were stationed at different facilities spread across the United States and abroad, inquired and confirmed that no FDA-licensed Comirnaty was available at the location(s) and time(s) specified in their individual Vaccination Orders, at their base or military clinic, or anywhere at all in the United States. *See infra* ¶33.

11. Following issuance of the Mandates Defendant publicly claimed that it had an adequate supply of FDA-licensed Comirnaty, including in court filings in other actions.

12. In response to questioning by a federal judge, the DoD was forced to admit that it had misrepresented that it had an adequate supply of FDA-licensed Comirnaty; that it did not have FDA-licensed Comirnaty at all; that it did not know if any FDA-licensed Comirnaty even existed; and that it was mandating unlicensed EUA products.[7]

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[6] *See* FAC ¶105 (citing Package Insert for Comirnaty (FDA-approved product labeling for Purple Cap Comirnaty lists the "Marketing Start Date" and "Marketing End Date" both as "23 Aug 2021") & Sept. 13, 2021 Pfizer Announcement (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.").

[7] *See Doe #1-#14 v. Austin*, 572 F.Supp.3d 1224, 1233-34 (N.D. Fla. 2021). Defendant's statements to the *Doe #1* court are consistent with those in a contemporaneous affidavit, dated December 2, 2021, by Air Force Technical Sergeant Tyler Whitney who stated that he could "confirm that there are currently no licensed product with the name of 'Comirnaty' that have ever been available at the 22nd MDG on McConnell AFB, nor has any product with the name 'Comirnaty' ever been available for purchase within the entire [DoD vaccine logistics] system, as of 19 November 2021." *Wilson v. United States*, 4:22-cv-00438-ALM (E.D. Tex.), Dkt. 53-2 (filed May 26, 2023).

13. None of the Armed Services provided FDA-licensed Comirnaty to any Plaintiff when the Mandates were issued, when Plaintiffs' Vaccination Orders were issued, or when Plaintiffs were involuntarily discharged or punished for non-compliance.

14. In this proceeding, Defendant has not asserted that the DoD or any Armed Service had any FDA-licensed Comirnaty at any relevant time.

15. Nothing in the AR indicates that Defendant had FDA-licensed Comirnaty.

C. Mandate of Pfizer-BioNTech EUA COVID-19 Vaccine[8]

16. On August 23, 2021, the FDA re-issued the EUA for the Pfizer-BioNTech COVID-19 EUA vaccine (tradename: BNT-162b2) and declared that the FDA-licensed, "legally distinct" Comirnaty (approved on the same day) was "not available".[9]

17. As required by 21 USC §360bbb-3, the FDA factsheet for the Pfizer BioNTech COVID-19 vaccine informs recipients that: "[u]nder the EUA, it is your choice to receive or not receive the vaccine."[10]

18. The FDA's EUA letter and factsheet stated that the two legally distinct products were "medically" interchangeable, so that the two "legally distinct" products—FDA-licensed Comirnaty and the Pfizer-BioNTech EUA product BNT-162b2—"can be

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[8] The FDA licensed Moderna's Spikevax on January 31, 2022. The FDA-licensed Spikevax also was not available at any relevant time. *See* FAC ¶¶109-111 & ¶118. Defendant has not asserted that Moderna's Spikevax was available at any relevant time. The AR does not include any records relating to the mandate of Moderna's EUA COVID-19 vaccine or Moderna Spikevax or showing that Defendant had FDA-licensed Spikevax. Accordingly, this motion addresses only the Pfizer-BioNTech EUA COVID-19 vaccine (BNT-162b2) and Pfizer's FDA-licensed Comirnaty COVID-19 vaccine.

[9] *See* FDA, Pfizer-BioNTech COVID-19 Vaccine EUA Re-Issuance Letter (Aug. 23, 2021) ("Pfizer-BioNTech EUA Letter"), at 5 n.9, AR DOD 000009.

[10] FDA, *Vaccine Information Fact Sheet for Recipients and Caregivers about Comirnaty and Pfizer-BioNTech COVID-19 Vaccine to Prevent Coronavirus Disease 2019 (COVID-19)* at 9 ("Pfizer-BioNTech EUA Factsheet"), AR DOD 000029.

used interchangeably to provide the [two-shot] vaccination series without presenting any safety or effectiveness concerns",[11] *i.e.*, one shot of BNT-162b2 and one of Comirnaty.

19. In a September 14, 2021 Memorandum, a DoD official cited the FDA's statement that the two "legally distinct" products were medically (but not legally) interchangeable for purposes of administering the two-shot vaccination series, *see supra* ¶18, in directing that DoD health care providers "should" (*i.e.*, replacing the FDA's permissive "can" with the mandatory "should") "use doses distributed under the EUA to administer the vaccination series as if the doses were the licensed vaccine … for the purpose of vaccinating Service members in accordance with" the DoD Mandate.[12]

20. The Armed Services followed the DoD Asst. Secretary's directive to treat the two products as legally interchangeable (*i.e.*, rather than "medically" interchangeable) and ordered commanders and healthcare providers to mandate EUA products.[13]

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[11] Aug. 23, 2021 Pfizer-BioNTech COVID-19 Vaccine EUA LOA Reissued at 2 n.8, AR DOD 000009. Plaintiffs attached the Oct. 21, 2022 declaration of Peter Marks, who explained the difference between the "medical" interchangeability guidance in the EUA letter and a legal or "statutory" interchangeability determination, which the FDA did not make. *See* Dkt. 1-11, Oct. 21, 2022 Marks Decl., ¶9 ("medical" interchangeability) & ¶10 (legal or "statutory" interchangeability). Mr. Marks explained that the FDA provided this information "to make clear that pharmacies and other healthcare practitioners *could* provide the vaccination series to recipients using Pfizer-BioNTech, Comirnaty, or both (e.g., first dose of Pfizer-BioNTech followed by second dose of Comirnaty, or vice versa)[.]" *Id.* (emphasis added), ¶9. *See also* Pfizer-BioNTech EUA Letter at 2 (explaining that the EUA product and FDA-licensed Comirnaty "can be used interchangeably … to provide the COVID-19 vaccination series."), AR DOD 000009; Pfizer-BioNTech EUA Factsheet; Pfizer-BioNTech Factsheet at 1 (same), AR DOD 000021.

[12] Asst. Secretary of Defense Memorandum, *Mandatory Vaccination of Service Members Using the Pfizer-BioNTech COVID-19 and COMIRNATY COVID-19 Vaccines* (Sept. 14, 2021) ("DoD Pfizer/Comirnaty Interchangeability Directive"), AR DOD 000001.

[13] *See* Air Force Mandate ¶1.2.1.2, AR 000528 & ¶5.3.2.1, AR 000541; Army Mandate, FRAGO 6, Annex JJ, AR 000242 (adopting DoD Pfizer/Comirnaty Interchangeability Directive); BUMED Memo 6300, Ser M00/21M00035, ¶3 (Sept. 3, 2021) (Navy and Marine Corps), SAR 65. *See also Doe #1*, 572 F.Supp.3d at 1233 (DoD "was mandating

21. There was no Presidential Waiver under 10 USC 1107a to mandate EUA vaccines.[14]

D. Orders Requiring Punishment & Discharge of those Unvaccinated

22. Each Armed Service issued multiple general orders and guidance documents stating that the failure to receive a COVID-19 vaccination constituted a failure to obey a lawful order punishable under Article 90 or Article 92 of the UCMJ.[15]

23. The Armed Services issued implementing orders authorizing the involuntary administrative discharge of any service member who did not receive a COVID-19 vaccination when ordered and/or by the Service's deadline for 100% vaccination and who did not have a pending exemption request.[16]

24. The Army Mandate directed commanders to initiate separation proceedings of unvaccinated enlisted soldiers for "Commission of a Serious Offense".[17]

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vaccines from EUA-labeled vials."). Certain Plaintiffs were counseled by their commands or healthcare providers that the two legally distinct products were legally interchangeable and/or that they had to take the only COVID-19 vaccines available, which were EUA products. *See* Chisholm Decl. ¶13 ("I received guidance and orders stating that Pfizer [EUA] COVID-19 vaccine was interchangeable with FDA-licensed Comirnaty COVID-19 vaccine."); Hall Decl. ¶15 (the base clinic doctor stated that "they had the EUA product and that the EUA product could be used as if it were Comirnaty.").

[14] *See* FAC ¶202 & *Doe #1,* 572 F.Supp.3d at 1233-34 ("The DOD acknowledges that the President has not executed a waiver under this section, … so as things now stand, the DOD cannot mandate vaccines that only have an EUA.").

[15] *See* DAF Sept. 10, 2021 Memo ¶4, AR 000547; Army Mandate, FRAGO 5 ¶3.D.8.B.2, AR 000024 (Sept. 14, 2021); MARADMIN 462/21 ¶3.l, SAR 53.

[16] *See* DAF Supplemental COVID-19 Vaccination Policy at 1-2 (Dec. 7, 2021), AR S1_000057-58; Army Directive 2022-02, ¶4.c.(1) AR000383; Army Mandate, FRAGO 5 ¶3.D.8.B.2, AR 000024 (Sept. 14, 2021); MARADMIN 533/21 ¶2.c.4, SAR 59 (authorizing immediate initiation of administrative or judicial proceedings prior to compliance deadline); MARADMIN 612/21 ¶¶3.a & 3.b (Oct. 23, 2021), SAR 62.

[17] FRAGO 5 ¶3.D.8.B.2, AR 000024. *See also* Army Directive 2022-02 ¶4.d(1)(a), AR000383 (directing immediate involuntary separation under AR 635-200 ¶14-12c).

25. On December 7, 2021, the Air Force issued a supplemental policy directing that unvaccinated airmen without a pending exemption were to be involuntarily discharged; and, that members of the Air Force Reserve and Active Guard Reserve were to be involuntarily transferred the Inactive Ready Reserve ("IRR"); placed in "no points/no pay" status; and subject to recoupment of special pays, incentive pays and certain training costs.[18]

26. On October 23, 2021, the Marine Corps directed that unvaccinated marines without an approved or pending exemption would be subject to immediate involuntary discharge; recoupment of bonuses, special pays, and costs of educational benefits; and involuntary transfer to IRR. MARADMIN 612/21 ¶¶3.a, 3.h & 4.d SAR 61-63.

27. The Armed Services issued general orders providing that each unvaccinated service member would be subject to adverse personnel and disciplinary actions, including: (i) removal from or relief of command, *see* FRAGO 5 ¶3.D.8.B.1.A, AR000023; MARADMIN 612/21 ¶¶3.d & 3.f, SAR 62-63; (ii) curtailment of current orders, removal from assignments, schools and training, and cancellation of future orders, assignments, schools and trainings, *see* MARADMIN 612/21 ¶3.e, SAR 63; (iii) denial or delay of promotions, *see id.*; (iv) placing a "flag" on their file prohibiting favorable personnel actions, *see* FRAGO 5 ¶3.D.8.B.1.E, AR000024; (v) prohibition on Permanent Change of Station ("PCS") (*i.e.*, accepting new assignments), *see* Army Directive 2022-02, ¶4.i AR000386; MARADMIN 612/21 ¶3.d, SAR 62; (vi) travel restrictions, *see* Army FRAGO 6 ¶3.D.15.B, AR000239; (vii) prohibition or restrictions on in-person meetings, *see id.*

[18] *See* DAF Supplemental COVID-19 Vaccination Policy at 1-2 (Dec. 7, 2021) (involuntary discharge), AR S1_000057-58; *id.* Attach. 1 AR S1_000059-60 (transfer to IRR, "no points/no pay" status, and recoupment).

¶3.D.15.D; and (viii) leave and liberty restrictions.

28. The DoD's and Armed Services' Mandates and implementing orders provided for temporary exemption and/or prohibited punishment of service members with pending requests for religious accommodation or exemptions. *See* AR 40-562 ¶2-6.b.3, AR DOD 000736; DAFI 52-201 ¶2.1, AR 000148-49.

E. Plaintiffs' Counseling, Vaccination Orders and Challenges to Legality of Mandate & Individual Vaccination Orders

29. Plaintiffs received individual Vaccination Orders directing them to receive an FDA-licensed COVID-19 vaccine within specified time frame.[19]

30. The Vaccination Orders were also "subject to the availability of vaccines."[20]

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[19] *See* Bassen LOC & Vaccination Order ¶4 (Sept. 16, 2021) (ordered to receive FDA-licensed vaccine "NLT 23 Sept" 2021), AR 000159; Chisholm Vaccination Order ¶2 (Feb. 17, 2022), AR S2_000044; Dailey LOC & Vaccination Order (Sept. 23, 2021) ordered to receive FDA-licensed vaccine "NLT 15 Oct 21"), AR 000453-54; Endress LOC & Vaccination Order (Oct. 16, 2021) (ordered to receive FDA-licensed vaccine "NLT June 2022"), SAR 1; Hall Vaccination Order (Sept. 21, 2021), SAR 26; Hall Decl. ¶18 (stating that he received vaccination order December 7, 2021); Merjil LOC & Vaccination Order (Sept. 20, 2021) (ordered to receive FDA-licensed vaccine "NLT 14 Oct 21"), AR 001691; Rodriguez Vaccination Order ¶1.a (May 2, 2022), AR S4_000016 ("Report to the 23 Medical Group Clinic (3278 Mitchell Blvd., Moody AFB, GA), at 1430 hours on 2 May with a copy of DHA Form 207."); Springer Vaccination Order (Oct. 6, 2021), SAR 42 (directing Springer "to report to the Parris Island Medical Facility and receive your first dose of the COVID-19 vaccine within 24 hours …"); Springer LOC & Vaccination Order (Jan. 10, 2022), USMC AR, Dkt. 37-5, AR0021 (directing Springer to receive vaccination within five days or else face punishment under UCMJ or administrative separation); Wynne LOC & Vaccination Order ¶4 (Oct. 20, 2021) (order to receive FDA-licensed vaccine "NLT 24 Aug 2021, subject to the availability of vaccines."), AR 001955. Davis does not appear to have received a written vaccination order.

[20] *See* Bassen LOC & Vaccination Order ¶4, AR 000159; Dailey LOC & Vaccination Order ¶4 (same), AR 000453; Endress LOC & Vaccination Order ¶4 (same), SAR 1; Merjil LOC & Vaccination Order ¶4, AR 001692 (Sept. 22, 2021) (same); Wynne LOC & Vaccination Order ¶4 (Oct. 20, 2021), AR 001955. Springer's Oct. 6, 2021 vaccination order stated that the order was subject to vaccine availability, *see* Springer Vaccination Order ¶3 (Oct. 6, 2021), SAR 42, but his January 10, 2021 counseling and vaccination order did not. *See* Springer LOC & Vaccination Order (Jan. 10, 2022), USMC AR, Dkt. 37-5, AR0021.

31. No Plaintiff's Vaccination Order directed him to search for, source, procure or receive a "commercially available" FDA-license vaccine.

32. Plaintiffs received one or more letters of counseling ("LOC") or reprimand ("LOR"),[21] or a General Officer Memorandum of Reprimand ("GOMOR")[22] for not taking the unlicensed, EUA vaccine(s) available.

33. Plaintiffs expressly challenged the legality of the discharges and other adverse actions taken against them for non-compliance because the mandated FDA-licensed Comirnaty was not available and the only products that were available were EUA products that could not lawfully be mandated.

a. In his November 30, 2021 GOMOR response, Bassen challenged the lawfulness of the mandate and his punishment for being unvaccinated because "according to the FDA [FDA-licensed] Comirnaty has not even begun manufacturing in the United States" and that the EUA version "is the only Pfizer vaccine being offered to the public at this time." Nov. 30, 2021 GOMOR Response ¶3, AR000148-49.

b. In his sworn declaration, Chisholm stated that "[a] number of his fellow airmen at Scott Air Force Base inquired whether the based had FDA-licensed Comirnaty" and "[t]hey confirmed that there was no FDA-licensed Comirnaty" available. Chisholm Decl. ¶12.

c. In his November 23, 2021 GOMOR response, Dailey explained that "it is currently impossible to follow the vaccine mandate" because the only vaccines available were EUA and that "until Comirnaty is available to service members, any punishment

[21] *See* Bassen LOC & Vaccination Order (Sept. 16, 2021), AR 000159-60; Dailey LOC & Vaccination Order (Sept. 23, 2021), AR 000453-54; Dailey LOC (Oct. 7, 2021), AR 000457-58; Endress LOC & Vaccination Order (Oct. 16, 2021), SAR 1; Endress LOC (Jan. 20, 2022), SAR 3; Merjil LOC & Vaccination Order (Sept. 20, 2021), AR 001691; Merjil LOC & Clarification of Vaccination Order (Sept. 29, 2022), AR 001691; Merjil LOR (May 10, 2022), AR S4_000013; Rodriguez LOR (May 10, 2022), AR S4_000013; Springer LOC (Jan. 10, 2022), AR AR0021 (failure to be vaccinated); Spring LOC (Jan. 11, 2022), AR AR0022 ("Lack of Reasonable Effort" due to failure to be vaccinated); Wynne LOC & Vaccination Order (Oct. 20, 2021), AR 001955-56; Wynne LOC (Nov. 1, 2021), AR 001957-58.

[22] *See* Bassen Nov. 8, 2021 GOMOR, AR 000144; Dailey Oct. 28, 2021 GOMOR, AR 000444-45; Merjil Oct. 6, 2021 GOMOR, AR 001685; Wynne Nov. 2, 2021 GOMOR, AR 001928.

for non-compliance with vaccine order is improper because compliance with the order is not possible."[23]

d. In his May 14, 2022 RAR, Endress cited information from the FDA and CDC demonstrating that "the only vaccine mandated by the DoD (Comirnaty) is not produced and not available[.]" Endress RAR ¶5.a (May 14, 2022), SAR 15. *See also* Endress Decl. ¶46 (same).

e. In a January 12, 2022 email, Hall explained that "I DO NOT REFUSE to take the FDA approved COVID vaccine (COMIRNATY). But since COMIRNATY is unavailable, the only options for a COVID vaccine is under the EUA (Emergency Use Authorization). Per the Emergency Use Authorization of Medical Products …, I have the LEGAL right to refuse any product under the EUA."[24]

f. Rodriguez confirmed through his own investigation and from those of his fellow airmen that no Comirnaty was available at his base.[25]

g. In his November 2, 2021 GOMOR response, Wynne challenged the lawfulness of the mandate and his vaccination order because only EUA vaccines were available.[26]

34. Plaintiffs received one or more counseling forms or orders stating that they

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[23] Nov. 23, 2021 GOMOR Response ¶4, AR 000449-51; *see also* Dailey Decl. ¶¶11&15 (challenging lawfulness of order due to unavailability of Comirnaty); *id.* ¶12 ("I knew of and spoke to others who had gone to the base clinic and off-base to try and find Comirnaty, and they were not able to find it anywhere.").

[24] Hall Email to Brig. Gen McKaye (Jan. 12, 2021), SAR 24. In his October 30, 2021 RAR Appeal, Hall challenged the lawfulness of the mandate and vaccination orders because "Comirnaty is not yet available in the United States." Hall RAR Appeal ¶5.a (Oct. 30, 2021), AR S3_000023; *id.* ¶7 (same), AR S3_000024-25. *See also id.* ¶5.b (explaining that the governing regulation, AR 40-562, provided a temporary exemption for lack of supply), AR S3_000024 (citing AR 40-562, App. C, AR 000139); Hall Decl. ¶13 ("I asked the base clinic whether they had Comirnaty or FDA-licensed products. My base did not have FDA-licensed vaccines to comply with the mandate."); *id.* ¶14 ("I objected that it was illegal for the Air Force to mandate an unlicensed [EUA] product.").

[25] *See* Rodriguez Decl. ¶21 ("I never saw any Comirnaty on my base."); *id.* ¶22 ("Other airmen told me that they had inquired whether Comirnaty was available on base or went to the base clinic to inspect the vials available. All the vials available were labeled as Emergency Use Authorization. There were no vials labeled as Comirnaty.").

[26] *See* Nov. 2, 2021 GOMOR Response, AR 001931; *see also id.* (presentation included in GOMOR Response), AR 001934-52; Wynne Decl. ¶7 ("I agreed to take a 'fully-licensed' vaccine, but was only ever offered [EUA] vaccines. There were none – zero – fully-licensed vaccines ever available at the clinic on Fort Hood, Texas at the time I was being reprimanded."); *id.* ¶8 ("I expressed to my leadership at every opportunity that the reason I was not complying with the order, was because it was impossible for me to do so.").

had violated the UCMJ and that continued failure to receive the COVID-19 vaccination could or would result in involuntary administrative separation.[27]

F. Plaintiffs' Requests for Religious Accommodation & Medical Exemptions

35. Plaintiffs Chisholm, Hall and Rodriguez each filed an RAR.[28]

36. Chisholm and Rodriguez's commanders recommended approval.[29]

37. An Air Force Chaplain recommended approval of the RAR.[30]

38. The Air Force denied each Plaintiffs' RAR using a standard form letter.[31]

39. Each Air Force Plaintiff appealed the denial of their RAR.[32]

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[27] *See* Bassen LOC & Vaccination Order ¶4, AR 000159; Chisholm Vaccination Order ¶2, AR S2_000044; Dailey LOC & Vaccination Order, AR 000453; Endress LOC & Vaccination Order, SAR 1; Hall Decl. ¶18; Merjil LOC & Vaccination Order, AR 001692; Rodriguez Vaccination Order ¶1.a, AR S4_000016; Springer LOC (Jan. 10, 2022), AR 000021; Wynne LOC & Vaccination Order ¶4, AR 001955.

[28] *See* Chisholm RAR (Oct. 6, 2021), AR S2_000001-2; Hall RAR (Sept. 24, 2021), AR S3_000001-2; Rodriguez RAR (Sept. 16, 2021), AR S1_000001-2.

[29] Chisholm's Commander, General Michael Minihan, initially granted his request for religious accommodation, *see* Memo, Decision Regarding Religious Accommodation Request – Lt Col Brent Chisholm (undated), AR S2_000038, but then subsequently disapproved the request. *See* Memo, Decision Regarding Religious Accommodation Request – Lt Col Brent W. Chisholm (Feb. 16, 2022), AR S2_000042. Rodriguez's Squadron Commander recommended approval of Rodriguez's request for accommodation "until he is required to deploy" because his Commander determined that such accommodation would have no adverse effect on the Air Force's interest. The approval was condition on the requirement that Rodriguez must be vaccinated when he is required to deploy. *See* Memo, Squadron Commander's Recommendation on TSgt Rodriguez's Religious Accommodation Waiver (Oct. 29, 2021), AR S1_000040.

[30] *See* Memo, Religious Accommodation Request (Lt. Col. Chisholm) ¶4 (Oct. 13, 2021), AR S2_000006; Memo, Religious Accommodation Request for Immunization Waiver by SMSgt. Allen Hall ¶7 (Oct. 5, 2021), AR S3_000010; Memo, Religious Accommodation Request for Exemption of COVID-19 Vaccination – Rodriguez, Paul J. – Chaplain Interview ¶4 (Nov. 4, 2021), AR S1_000012.

[31] *See* Chisholm RAR Denial (Feb. 16, 2022), AR S2_000042; Hall RAR Denial (Oct. 27, 2021), AR S3_000020; Rodriguez RAR Denial (Mar. 28, 2022), S1_000029-30.

[32] *See* Chisholm RAR Appeal (Mar. 4, 2022), AR S2_000048-55; Hall RAR Appeal (Oct. 30, 2021), S3_000021-25; Rodriguez RAR Appeal (Apr. 5, 2022), AR S1_000031.

40. Defendant denied each RAR Appeal using the standard denial template.[33]

41. Plaintiffs Endress and Springer also submitted an RAR. Endress' RAR was not adjudicated and remained pending until the Mandate was rescinded in January 2023, while Springer's was denied on November 4, 2021.[34]

42. On August 18, 2020, the Army granted Endress's permanent medical exemption ("ME") based on his family history of myocarditis, infarctions, and other heart-related issues, but his exemption was subsequently revoked.[35]

43. Davis, Chisholm and Rodriguez requested MEs, which were not granted.[36]

G. Discharge and Other Adverse Actions for Non-Compliance

44. Active-Duty Plaintiffs received a notification or letter of intent to discharge from their command stating that they would be discharged for Misconduct, Commission of a Serious Offense in violation of Art. 90 or 92 of the UCMJ, under the applicable Armed

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[33] *See* Chisholm RAR Appeal Denial (May 15, 2022), AR S2_000174; Hall RAR Appeal Denial (Nov. 2021), AR S3_000033; Rodriguez RAR Appeal Denial (May 5, 2022), AR S4_000023.

[34] *See* Endress Decl. ¶¶49-50; Endress RAR (May 14, 2022), SAR 14-17; *See* Springer Decl. ¶8; Springer RAR (Oct. 7, 2021), SAR 36-37; Springer RAR Denial Letter (Nov. 4, 2021), USMC AR , Dkt. 37-5, AR0020. The Court's May 2, 2024 Order determined that Endress and Springer had not adequately stated a RFRA claim in the FAC. Plaintiffs submit the information regarding Endress and Springer's RAR for the purpose of showing that the Army and Marine Corps violated applicable military regulations and policies prohibiting adverse personnel actions, punishment, curtailment of orders and discharged of service members with pending religious accommodation requests.

[35] *See* Endress Decl. ¶¶12&13; Endress ME Request, SAR 5-13. On November 9, 2021, his medical exemption was revoked. *See id.* ¶20. Endress subsequently submitted additional requests for temporary medical exemptions, as well as additional documents and correspondence regarding his appeal and temporary requests. *See id.*, ¶¶25-39. On March 4, 2022, his requests and appeals were denied. *See id.*, ¶40.

[36] *See* Davis Decl. ¶¶4&6; Rodriguez Decl. ¶20; Chisholm RAR Appeal ¶5.b (Mar. 4, 2022), AR S4_000024 (Chisholm requested a temporary medical exemption (Code MS) for lack of supply, because no Comirnaty was available).

Service's administrative separation regulation.[37]

45. Each Active-Duty Plaintiff was involuntarily discharged prior to his ETS:

a. Bassen was discharged on October 3, 2022, *see* Bassen DD-214, AR 000169, over two years short of his October 15, 2024 ETS date, *see* Bassen Reenlistment Contract, AR 000132.

b. Dailey was discharged June 21, 2022, *see* Dailey DD-214, AR 000470, over three years before his August 24, 2025 ETS, *see* Dailey Enlistment Contract, AR 000305.

c. Merjil was discharged May 27, 2022, *see* Merjil DD-214, AR 001700, over three years before his May 19, 2025 ETS, *see* Merjil Enlistment Contract, AR 001553.

d. Rodriguez was discharged September 6, 2022, *see* Rodriguez DD-214, AR S4_000071, approx. one year and ten months before his July 17, 2024 ETS, *see* Rodriguez Decl. ¶35.

e. Springer was discharged Feb. 8, 2022, *see* Springer DD-214, AR0029, over 3.5 before his August 30, 2025 ETS, *see* Springer Enlistment Contract, AR0062.

f. Wynne was discharged June 29, 2022, *see* Wynne DD-214, AR 001924, two years before his September 2024 ETS date, *see* Wynne Enlistment Contract, AR 001763.

46. Each Active-Duty Plaintiff except Springer received a DD-214 stating that he had been discharged for "Misconduct".[38]

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[37] *See* Bassen Letter of Intent (Feb. 10, 2022) (informing Bassen that he would be separated under AR 635-200, Chapter 14-12c), AR 000252; Bassen LOC (Feb. 10, 2022) (same), AR 000265-66; Dailey Letter of Intent (undated) (same), AR 000532; Dailey LOC (Feb. 14, 2022) (same), AR 000548-49; Wynne Notification of Separation (Apr. 22, 2022) (same), AR 001970-71; Rodriguez Notification Memorandum – Board Hearing (June 6, 2022) (informing Rodriguez that he would be separated pursuant to AFI 36-3208), AR S4_000010. *See also* Springer Discharge Determination (Dec. 14, 2021) (informing Springer that he would be discharged for "lack of reasonable effort" with the "Justification: SNR immunization exemption has been denied"), AR 000023.

[38] The DD-214s for Bassen, Dailey, Merjil and Wynne states as follows: (1) Block 24 (COS): Honorable or General Under Honorable Conditions; (2) Block 25 (Separation Authority) AR 635-200; (3) Block 26 (Separation Code) JKQ; (4) Block 27 (Reentry Code): 3; and (5) Block 28 (Narrative Reason): Misconduct (Serious Offense). *See* Bassen Oct. 3, 2022 DD-214, AR 000169; Dailey June 21, 2022 DD-214, AR 000470; Merjil May 23, 2022 DD-214, AR 001700; Wynne June 29, 2022 DD-214, AR 001924. Plaintiff Rodriguez received multiple DD-214s. Rodriguez's declaration shows the Air Force involuntarily discharged him on July 14, 2022, the date of his first DD-214. Rodriguez

47. Springer's DD-214 stated that he was discharged for "lack of reasonable effort", but his discharge determination stated that he would be discharged for being unvaccinated, and his counseling statements stated that he would be discharged for violating the UCMJ.39

48. Each Reservist Plaintiff (Chisholm, Endress and Hall) was on full-time active-duty orders that were curtailed for failure to take an FDA-licensed vaccine.

a. Chisholm's Title 10 orders were curtailed by approx. 3.5 months. *See* AR S5_000031 ("Tour end date curtailed to 2022/06/16."); Chisholm Decl. ¶17 (same) & ¶18 ("On June 17, 2022, I was placed on 'no points/no pay status'.").

b. Endress' Title 10 active-duty orders were curtailed by 6.5 months. *See* Endress ADOS Orders (ADOS orders under 10 USC 12301(d) for 365 Days from 10/30/21 – 10/29/22) (Oct. 4, 2021), AR001507; Endress Mar. 15, 2022 Orders (releasing him from active duty), AR 001413.

c. Hall's Title 10 active-duty order were curtailed by nearly a year from January 31, 2023 to Feb. 11, 2022. *See* Special Order (Mar. 31, 2022), S7_000029 (curtailing orders to Feb. 11, 2022); Hall Decl. ¶¶8&10-11. Hall was then forced to retire and did so effective Apr. 2, 2022. AR S7_000011.

49. Starting August 1, 2022, Davis was involuntarily removed from active status; placed on "no points/no pay" status; and prohibited from participating in drills, training, and other duties until February 01, 2023. *See* FAC ¶17 & Davis Decl. ¶7. Despite

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Decl., ¶¶24-25. Rodriguez's second DD-214 issued October 3, 2022 states as follows: Block 24 (COS): Honorable; Block 25 (Separation Authority) AFI 36-3208; Block 26 (Separation Code) HKQ; Block 27 (Reentry Code): 2C; Block 28 (Narrative Reason): Misconduct (Serious Offense). Rodriguez DD-214 (Oct. 3, 2022), AR S4_000071-72.

39 Plaintiff Springer received a DD-214 after discharge stating as follows: Block 23 (Type of Separation): Entry Level Separation; Block 24 (COS): Uncharacterized; Block 25 (Separation Authority) MARCORSEPMAN 6205; Block 26 (Separation Code) JGA1; Block 27 (Reentry Code): RE-3F; Block 28 (Narrative Reason): Entry Level Performance and Conduct. Springer's December 14, 2021 Discharge Determination stated that he would be discharged for "lack of reasonable effort" with the "Justification: SNR immunization exemption has been denied"). *See* AR 000023. Springer's counseling statements stated that his refusal to take the vaccines available was misconduct in violation of the UCMJ and constituted grounds for involuntary discharge. *See* AR 000021.

this, Davis's commander requested that Davis come to drill and provide assistance the weekend of August 6-7, 2022. Davis was not paid for this drill. *See id.* ¶8.

50. When the DoD Mandate was issued, Bassen had started the medical retirement process, and he had an approved medical board package for a medical retirement. He requested permission to complete the medical retirement process, but instead he was involuntarily discharged for non-compliance. *See* Bassen Decl. ¶¶4-5.

51. Neither Bassen nor Rodriguez were offered or received involuntary separation pay, despite having served more than six years when they were involuntarily discharged and were therefore entitled to separation pay under 10 USC §1174(b)(1).

52. Defendant recouped Bassen's reenlistment bonus, *see* Bassen Decl. ¶12.

II. STATEMENT OF ADDITIONAL AND/OR DISPUTED FACTS.

53. Plaintiffs were involuntarily discharged (Bassen, Dailey, Merjil, Rodriguez, Springer, and Wynne), had their orders involuntarily curtailed and/or cancelled (Chisholm, Endress and Hall), and/or was involuntarily transferred to inactive or "no points/no pay" status (Chisholm and Davis).

54. Each Plaintiff was illegally denied pay and benefits as a result of the foregoing illegal actions.

55. Each Armed Service mandated EUA COVID-19 vaccines. *See* FAC ¶¶112-121; *Doe #1*, 572 F.Supp.3d at 1233 (DoD "mandat[ed] vaccines from EUA-labeled vials").

56. Prior to the January 2023 rescission, none of the DoD or Armed Services reconsidered their respective Mandates, their RAR processes that denied 99-100% of requests, or their refusal to consider any less restrictive means, despite changed

circumstances that eliminated the factual basis for these judgments.[40]

57. The U.S. District Court for the Southern District of Ohio issued a nation-wide injunction against the Air Force based on its findings that the Air Force's religious accommodation process likely violated RFRA.[41]

58. Defendant has not asserted, and there is nothing in AR, showing that the Air Force or any other Armed Service granted any RAR for a COVID-19 Mandate.

59. The Air Force and other Armed Services freely granted thousands of administrative and secular exemptions. *See, e.g., Doster*, 54 F.4th at 409 (finding that as of December 2021, the Air Force had granted 2,047 medical exemptions and 2,247 administrative exemptions).

60. There were no "commercially available" FDA-licensed vaccines available. All FDA-licensed EUA COVID-19 vaccines were purchased through exclusive contract

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[40] The DoD and Services' Mandates remained in place unchanged despite: (1) achieving vaccination rates of 95% or more; (2) evidence of rapidly declining vaccine efficacy; (3) the Centers for Disease Control & Prevention's ("CDC") August 11, 2022 recommendation not to treat vaccinated and unvaccinated persons differently, *see* FAC ¶52; (4) the White House's August 2022 decision to no longer purchase or provide reimbursement for the monovalent vaccines they mandated, *see id.* ¶82; (5) President Biden's September 18, 2022 declaration that "[t]he pandemic is over", *see* D. Cohen, *Biden on '60 Minutes': 'The Pandemic is Over*, POLITICO (Sept. 18, 2022); and (6) the imminent rescission of the policy in the 2023 NDAA.

[41] *See generally Doster v. Kendall*, 2022 WL 2974733 (S.D. Ohio July 27, 2022), *aff'd* 54 F.4th 398 (6th Cir. 2022). U.S. District Courts also issued nation-wide injunctions against the Navy and Marine Corps, and at least one injunction against the Army, based on findings that their respective RAR process likely violated RFRA. *See Navy SEALs 1-26 v. Austin*, 578 F.Supp.3d 822 (N.D. Tex. 2022) ("*Navy SEALs*") (Navy); *Col. Fin. Mgmt. Officer v. Austin*, 622 F.Supp.3d 1187 (M.D. Fla. 2022) ("*CFMO*") (Marine Corps); *Schelske v. Austin*, 649 F.Supp.3d 254 (N.D. Tex. 2023) ("*Schelske*") (Army). Following the January 2023 rescission of the DoD and Armed Services' Mandates, the cases against the Air Force, Army, and Marine Corps were dismissed as moot and the injunctions dissolved. On July 24, 2024, the *Navy SEALs 1-26* court approved a class action settlement agreement. *See Navy SEALs 1-26 v. Austin*, NDTX No. 4:21-cv-1236, ECF 320, Order Approving Settlement Agreement (July 24, 2024).

between the manufacturers of the only FDA-licensed vaccines and DoD/HHS.[42]

III. REFERENCED STATUTES AND REGULATION

A. Emergency Use Authorization Statutes & Regulations

21 USC §360bbb-3 prohibits the mandate of EUA products. This statute directs the FDA to require that each EUA product include a statement informing recipients of their statutory right to refuse an EUA product. *See* 21 USC § 360bbb-3(e)(1)(A)(ii)(III).

10 USC §1107a prohibits the military from mandating EUA products without Presidential authorization. This statute further provides that *only* the President of the United States in his role as Commander-in-Chief can mandate EUA products and he must do on the grounds of national security in writing.

Military regulations prohibit the Armed Services from mandating EUA products without Presidential Authorization pursuant to 10 USC § 1107a. The DoD and FDA adopted this restriction contemporaneously with the enactment of 10 USC § 1107a and 21 USC § 360bbb-3. The DoD and FDA's contemporaneous interpretation was ratified by the U.S. District Court for the District of Columbia in granting their emergency petition for a

[42] *See* U.S. Dept. of Defense, Press Release, *U.S. Government Engages Pfizer to Produce Millions of Doses of COVID-19 Vaccine* (July 22, 2020); U.S. Dept. of Defense, Press Release, *Trump Administration Purchases Additional 100 Million Doses of COVID-19 Investigational Vaccine from Pfizer* (Dec. 23, 2020); 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). *See also* Dkt. 27, Plaintiffs' Motion to Submit Additional Authority (Jan. 26, 2024) & Dkt. 27-2, Pfizer Inc.'s Plea to the Jurisdiction and Answer and Affirmative Defenses, *State of Texas v. Pfizer*, No. 5:23-cv-312-C (N.D. Tex. Dec. 23, 2023), ECF 1 ¶7.a ("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."). In its May 15, 2024 Order, the Court denied Plaintiffs' motion to submit the Pfizer filing. *See* Dkt. 33. Plaintiffs respectfully request that the Court take judicial notice of this document, which demonstrates that Defendant was the sole purchaser and customer of the Pfizer-BioNTech COVID-19 vaccine at all relevant times, and there were no other commercially available supplies.

voluntary consent decree prohibiting the military from mandating an EUA anthrax vaccine.[43] The prohibition on mandating EUA products was codified in contemporaneous DoD regulations that remain in effect,[44] which is reflected in the DoD and Armed Services Mandates' requirement that "only" FDA-licensed be used for mandatory vaccination. *Supra* Facts ¶1 (DoD Mandate) & ¶2 (Armed Services Mandates).

B. Military Immunization Regulations & Exemptions

AR 40-562, *Immunization and Chemoprophylaxis for the Prevention of Infectious Diseases* (Oct. 7, 2013), *see* DOD AR Tab 80, is the joint service regulation governing immunization for service members and provides a list of required immunizations in Appendix D. *See* AR 40-562, App. D, AR 000140. Under AR 40-562, the Armed Services are required to "[e]nsure immunizations are available when required[.]" *Id.*, App. B ("B-1. Standard #1: Immunization Availability"), AR 000136.

AR 40-562 also provides the joint service rules governing medical exemptions, including medical exemptions for natural immunity and individual health conditions, *see* AR 40-562 ¶2-6.a, AR DOD 000736. AR 40-562 provides a specific temporary medical

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[43] *See* FAC, ¶¶89-94 (discussing injunctions and consent decrees issued in *Doe v. Rumsfeld*, 297 F. Supp. 2d 119 (D.D.C. 2003), *modified sub nom. John Doe No. 1 v Rumsfeld*, 341 F. Supp. 2d 1 (D.D.C. 2004), *modified sub nom. John Doe No. 1 v. Rumsfeld*, 2005 WL 774857 (D.D.C. Feb. 6, 2005) and FDA, *Authorization of Emergency Use of Anthrax Vaccine Adsorbed for Prevention of Inhalation Anthrax by Individuals at Heightened Risk of Exposure Due to Attack With Anthrax; Availability*, 70 Fed.Reg. 5452-02, 5455-56 (Feb. 2, 2005) (Section IV., "Conditions of Authorization").

[44] *See* DODI 6200.02, *Application of Food and Drug Administration (FDA) Rules to Department of Defense Health Protection Programs* (Feb. 27, 2008) ¶¶E3.3-4, AR DOD 000722; AR 40-562 ¶8-3, AR DOD 000751 (same). The prohibition on mandating EUA products was re-affirmed by the DoD the month before it issued the mandate. *See* Dept. of Justice, Office of Legal Counsel, *Whether Section 564 for the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization*, 45 Op. O.L.C. 1, 2021 WL 3418599, at *10 (July 6, 2021) (citing DODI 6200.02 ¶E3.3, AR DOD 000722).

exemption (Code "MS") so that a service member is "[e]exempt due to lack of supply." *Id.*, Table C-1 ("Medical Exemption Codes"), AR DOD 000758. "Per AR 40-562 'Medical Readiness' immunization status does not make a soldier non-deployable." FRAGO 5 ¶3.D.8.O, AR 000027.

C. RFRA and Military Religious Accommodations

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 USC §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 USC § 2000bb-1(b).

DODI 1300.17, *Religious Liberty in the Military Services* (Sept. 1, 2020), *see* DOD AR Tab 82, implements RFRA and provides that a Service member expression of sincerely held beliefs "may not, in so far as practicable, be used as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment." DODI 1300.17 ¶1.2.b, AR DOD 000790. "DoD components will normally accommodate practices of a Service member based on sincerely held religious belief." *Id.* ¶1.2.e, AR DOD 000790.

The Air Force has implemented RFRA and DODI 1300.17 in DAFI 52-501, *Religious Freedom in the Department of the Air Force* (23 June 2021). *See* Army AR, Tab 12, AR 000147-183. DAFI 52-501 provides that "Commanders may only impose limits on [religious] expression when there is a real (not theoretical) adverse impact on military readiness, unit cohesion, good order and discipline, health or safety of the member or unit." DAFI 52-501 §2.1, AR 000148-49; *see also id.* §2.3 (DAF "will approve" RAR

"unless the request would have a real (not theoretical) adverse impact" on the foregoing interests), AR 000149. "Commanders will approve the religious accommodation request unless a compelling governmental interest exists for the policy, practice, or duty from which the member is seeking religious accommodation." *Id.* §2.4, AR 000149.

DAFI 52-501 further requires that "[a]ny restriction on the expression of sincerely held religious beliefs must use the least restrictive means with respect to the applicant," which may include "partial approval, approval with specified conditions, or other means that are less burdensome to the member's religious beliefs." *Id.* DAFI 52-501 defines "least restrictive means" as "an individualized determination that, in realizing its compelling interest, the government could not have employed means that were less burdensome on the military member's religious liberties." *Id.*, Glossary, AR 000171. If the requested accommodation cannot be made, then "reassignment, reclassification or voluntary separation" may be considered. *Id.* §2.7, AR 000150.

D. Armed Services' Discharge Procedures

The procedures for involuntary discharge or separation of service members are set forth in the following documents. of AR 635-200, *Active Duty Enlisted Administrative Separations* (28 June 2021); DAFI 36-3211, *Military Separations* (24 June 2022); MCO 1900.16, *Separation and Retirement Manual* (15 Feb. 2019).

E. Involuntary Separation Pay

10 USC § 1174(b)(1) provides that a regular enlisted member "who is discharged involuntarily … and who has completed six or more, but less than 20, years of active service immediately prior to that discharge is entitled to separation pay … unless the Secretary concerned determines that the conditions under which the member is discharged do not warrant payment of such pay." This Court's precedent has confirmed

that SEP PAY is a statutory entitlement that cannot be denied absent misconduct, *see McMullen v. United States*, 50 Fed.Cl. 718, 727 (Fed.Cl.2001), or express Secretarial authorization and justification. *Collins v. U.S.*, 101 Fed.Cl. 435, 443 (Fed.Cl.2011).

LEGAL STANDARDS

RCFC 52.1 JUDGMENT ON THE ADMINISTRATIVE RECORD

When ruling upon an RCFC 52.1 motion, the court must decide "whether, given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record." *A&D Fire Prot., Inc. v. U.S.,* 72 Fed.Cl. 126, 131 (2006) (citing *Bannum v. U.S.*, 404 F.3d 1346, 1356 (Fed.Cir.2005)). The existence of genuine issues of material fact neither precludes the court from granting judgment upon the AR nor requires it to conduct evidentiary proceedings. *Johnson v. U.S.,* 93 Fed.Cl. 666, 672 (2010). "[J]udgment on the administrative record is properly understood as intending to provide for an expedited trial on the administrative record." *Bannum,* 404 F.3d at 1356.

RCFC 56 SUMMARY JUDGMENT

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a). The moving party's initial burden to produce evidence showing the absence of a genuine issue of material fact may be discharged if the moving party can demonstrate there is no evidence supporting the nonmovant's case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). Disputes over facts which are not outcome determinative will not preclude summary judgment. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48 (1986). The motion must be granted when the record could not lead a rational trier of fact to find for the nonmoving party or there is no genuine issue for trial. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

ARGUMENT

I. DEFENDANT WRONGFULLY DISCHARGED PLAINTIFFS FOR FAILING TO COMPLY WITH AN IMPOSSIBLE ORDER.

A. The DoD and Armed Services Mandated Only FDA-Licensed Vaccines, But They Never Had Any FDA-Licensed Vaccines.

Each of the DoD and Armed Service Mandates stated that "only" FDA-licensed vaccines could be used for mandatory vaccination. *See supra* Facts ¶¶1-2. When the Mandates were issued, Comirnaty, which had been approved on August 23, 2021 (*i.e.*, the day before the DoD Mandate was issued on August 24, 2021), was the only FDA-licensed vaccine, *see id.* ¶7, and thus was the only vaccine that could be mandated. ...But no FDA-licensed Comirnaty was physically or legally available at that time.

On August 23, 2021, the same day that the FDA granted the BLA for Comirnaty, the FDA re-issued the EUA for the Pfizer-BioNTech EUA COVID-19 based on the FDA's declaration that Comirnaty was "not available". *Id.* ¶16 (quoting FDA, Pfizer-BioNTech COVID-19 Vaccine EUA Re-Issuance Letter at 5 n.9). The FDA's finding—that FDA-licensed Comirnaty was not available—was an express statutory requirement for the EUA, *see supra* Section III.A (discussing 21 USC § 360bbb-3), and it would have been contrary to law for the FDA to have re-issued the EUA if a licensed product was available. Moreover, the FDA marketing authorization for Comirnaty terminated on August 23, 2021, *see supra* Facts ¶8, so it would have been a violation of numerous federal criminal statutes and FDA regulations for anyone to market Comirnaty in the United States. *See* Dkt. 23 at 17 & n.18 (federal criminal statutes prohibiting sale of unlicensed products).

It is now undisputed that none of the DoD or Armed Services had any FDA-licensed Comirnaty when the DoD and individual service Mandates were issued in August and September 2021. At that time, the DoD and the Armed Services publicly claimed to have

FDA-licensed Comirnaty, including in filings to federal courts defending the mandate from legal challenges by service members. In an opinion issued November 12, 2021, the U.S. District Court for the Northern District of Florida first noted that, "[a]lthough the DOD's response said it had an adequate Comirnaty supply," it later clarified that it did not in fact have FDA-licensed Comirnaty, and that "defense counsel could not even say whether vaccines labeled 'Comirnaty' exist[ed] at all" at that time. *Doe #1*, 572 F.Supp.3d at 1233. The court further found that the service member plaintiffs had "shown that the DOD is requiring injections from vials not labeled 'Comirnaty'," based in part on Defendant's admission that "it was mandating vaccines from EUA-labeled vials" at that time. *Id.*[45]

Notably, at the same time the DoD and Armed Services were being forced to admit in federal court that they had no FDA-licensed Comirnaty (November 2021), several Plaintiffs had received letters of reprimand and GOMORs; had been counseled that they had violated the UCMJ by pointing out the impossibility of following orders to take a "fully licensed" vaccine that wasn't available; and had been informed that they could or would

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[45] Plaintiffs note that in *Doe #1* and in other litigation challenging the Mandates in U.S. District Courts, Defendant had claimed that the Pfizer-BioNTech EUA COVID-19 vaccines *are* FDA-licensed Comirnaty: "the DOD argues that once the FDA licensed Comirnaty, all EUA-labeled vials essentially *became* Comirnaty, even if not so labeled" so that 10 USC §1107a's prohibition on mandating EUA-labeled vaccines "does not apply." *Doe #1*, 572 F.Supp.3d at 1233 (emphasis added). The DoD's argument in this regard was based on misinterpreting the FDA's finding that the two "legally distinct" products were "medically" interchangeable, *i.e.*, that one shot of each "can be used interchangeably" to administer the two-shot series, *see supra* Facts ¶18, to mean that the two legally distinct product were legally interchangeable and therefore the EUA product "should" be used "as if" it were FDA-licensed Comirnaty and therefore could be legally mandated. *See id.* Facts ¶19. The *Doe #1* court rejected both the claim that the two products are legally interchangeable and that 10 USC §1107a did not apply to prohibit mandating EUA-labeled products. *See Doe #1*, 572 F.Supp.3d at 1233-34. Because Defendant appears to have abandoned this argument, Plaintiffs will not address it further here, but reserve the right to do so if Defendant raises it in its cross-motion for judgment on the AR.

be discharged for misconduct or would have their orders cancelled or curtailed. *See supra* Facts Section I.E.

In this proceeding, Defendant has not asserted that it subsequently obtained FDA-licensed vaccines. Nor has Defendant provided any record in the AR demonstrating that it had any FDA-licensed vaccine at any relevant time. Further, Defendant appears to have conceded that it may have "only had unlicensed vaccines available," Dkt. 22 at 21-22.

Defendant instead claims that Plaintiffs have no standing to seek relief because they were not harmed by the unavailability of FDA-licensed vaccines. *See id.* The Court rejected Defendant's absurd standing arguments, based on the pleadings, in its May 2, 2024 Order denying Defendant's motion to dismiss for Count II. *See* Dkt. 32 at 11.

The AR confirms what Plaintiffs alleged in the FAC and puts to lie the absurdity of the Defendant's stranding claim that the Plaintiffs weren't harmed by the violation of §1107a. Defendant's stated justification for the harms Plaintiffs suffered—involuntary discharge, curtailment and cancellation of orders, involuntary transfer to inactive status, and/or denial of pay and benefits—was that Plaintiffs had failed to obey a lawful order to take FDA-licensed vaccines, which Defendant deemed to be misconduct in violation of the UCMJ, *see supra* Facts Section I.G, despite the physical and legal unavailability of FDA-licensed vaccines. Defendant's claim also ignores the requirement for the military to actually prove their claim before "finding" misconduct – i.e. that the military services have to give a member accused of misconduct at least some due process – either an administrative board under the applicable service regulation or a court-martial under the UCMJ – before it can make such a finding and discharge a servicemember. *See, e.g.*, *Clackum v. United States*, 296 F.2d 226, 228 (Ct. Cl. 1960) ("It is as if a prosecuting attorney were authorized, in a case where he concluded that he didn't have enough

evidence to obtain a conviction in court, to himself impose the fine or imprisonment which he thought the accused person deserved.")

Because there is no record evidence that could give rise to a factual dispute regarding the unavailability of FDA-licensed Comirnaty and the consequent impossibility of compliance with the Vaccination Orders, the Court must grant Plaintiffs' motion for judgment on the AR and/or summary judgment on Count II.[46]

B. Defendant Concedes That The DoD Mandate Required Plaintiffs To Take Only Fully Licensed Vaccines.

10 USC § 1107a expressly prohibits the military from mandating any product that is not FDA-licensed in the absence of an express Presidential Authorization. It is undisputed that there was no Presidential Authorization to mandate unlicensed COVID-19 vaccines. *See supra* Facts ¶21. Defendant appears to concede this point in its August 25, 2023 motion to dismiss and its October 20, 2023 reply brief, where it repeatedly asserts that the DoD and Armed Services mandated only FDA-licensed Comirnaty and denies that EUA vaccines were ever mandated. *See, e.g.,* Dkt. 22 at 19-21 & Dkt. 26 at 9. As there is no factual or legal dispute that Defendant could not mandate an EUA vaccine, this Court must grant Plaintiffs' motion for judgment on the AR or summary judgment.

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[46] In its August 25, 2023 motion to dismiss, Defendant argued that, "even if DoD only had unlicensed vaccines available, DoD's policy did not violate 10 USC § 1107a because it did not require those vaccines to be taken", Dkt. 22 at 21-22, and that Plaintiffs could have complied with the mandate by locating and procuring "commercially available" FDA-licensed vaccines. This *post-hoc* argument is completely betrayed by the record evidence that Plaintiffs were discharged precisely because they refused to take the unlicensed vaccines the DoD did have available. Moreover, there record is devoid of any generally applicable order from the DoD or the Armed Services requiring service members to receive a vaccine from any third-party commercial source, and Plaintiffs' individual Vaccination Orders did not use the term "commercially available" or order them to receive a "commercially available" FDA-licensed vaccine (assuming such a vaccine was available, which it was not). *See supra* Facts ¶31.

C. Plaintiffs Did Not Disobey The Mandate or Vaccination Orders But Were Nevertheless Unlawfully Punished for Failing to Take an Unlicensed Vaccine.

As reflected in the AR, each Plaintiff was involuntarily discharged for misconduct, had his orders curtailed and cancelled, was involuntarily transferred to inactive status and/or denied pay or benefits for failing to take an FDA-licensed vaccine ostensibly in violation of the Mandates, their individual Vaccination Orders and the UCMJ. *See supra* Facts Section I.G.

In reality, no Plaintiff violated the applicable Mandate or his individual Vaccination Order to receive "only" an FDA-licensed vaccine at the specified location(s) and time(s). It is undisputed that "only" FDA-licensed vaccines could be - and were - mandated. Moreover, Plaintiffs' Vaccination Orders were expressly "subject to the availability of [FDA-licensed] vaccines", *supra id.* ¶30, which the military was required to provide. *See* FRAGO 5 ¶3.D.8.B.1, AR 23.

Plaintiffs inquired and confirmed, on or before the deadline set in the Vaccination Order, that the location(s) specified in the Vaccination Order did not in fact have FDA-licensed Comirnaty. *See supra* Facts ¶10. By researching and reviewing publicly available documents from the FDA, CDC and Pfizer, Plaintiffs also confirmed that FDA-licensed Comirnaty had not been manufactured, was not available anywhere in the United States, and/or could not legally be marketed or administered because the FDA marketing authorization terminated August 23, 2021, the day before the DoD Mandate was issued. *See supra id.* ¶8 (FDA marketing authorization terminated Aug. 23, 2021) & ¶31.

Plaintiffs expressly, vigorously, and repeatedly tried to tell their leaders, and challenged the lawfulness of their punishments for purported non-compliance with the express terms of the Mandates and their individual Orders, which only required them to

take FDA-licensed vaccines, subject to availability. They raised their legal challenges in formal, written responses to their counseling statements, reprimands, GOMORs, and discharge notifications; in their RARs and RAR appeals; and informally in conversations and emails with their commands, commanders, healthcare providers, and chaplain interviews. *See supra* Facts ¶¶10&33.

SMSgt Hall explained his legal challenge as follows:

I DO NOT REFUSE to take the FDA approved COVID vaccine (COMIRNATY). But since COMIRNATY is unavailable, the only options for a COVID vaccine is under the EUA (Emergency Use Authorization). Per the Emergency Use Authorization of Medical Products …, I have the LEGAL right to refuse any product under the EUA.

Hall Email to Brig. Gen McKaye (Jan. 12, 2021), SAR 24. Wynne explained his legal challenge in similar terms:

I agreed to take a "fully-licensed" vaccine, but was only ever offered vaccines [EUA products]. There were none – zero – fully-licensed vaccines ever available at the clinic on Fort Hood, Texas at the time I was being reprimanded.

I reported this to my command. I expressed to my leadership at every opportunity that the reason I was not complying with the order, was because it was impossible for me to do so.

Wynne Decl. ¶¶7-8. In his GOMOR response, Dailey explained that:

[I]it is currently impossible to follow the vaccine mandate. … Until Comirnaty is available to service members, any punishment for non-compliance with vaccine order is improper because compliance with the order is not possible.

Dailey Nov. 23, 2021 GOMOR Response ¶4, AR 000449-51.

Finally, it bears repeating that Plaintiffs challenged the lawfulness of punishing them at the same time that Defendant was forced to admit to a federal judge that it had misrepresented the (un)availability of Comirnaty in court filings and that it did not know whether any FDA-licensed Comirnaty "exist[ed] at all." *Doe #1*, 572 F.Supp.3d at 1233. Thus, for those Plaintiffs whose individual Vaccination Orders expressly stated they were to receive FDA-licensed vaccine "subject to availability," they did not violate the terms of their individual Vaccination Orders because no FDA-licensed vaccine was available. But for all Plaintiffs, military law recognizes impossibility as a defense to a charge of disobeying a lawful order. *See, e.g.,* Rule for Court-Martial 916(i)("Inability. It is a defense to refusal or failure to perform a duty that the accused was, through no fault of the accused, not physically or financially able to perform the duty."), *accord U.S. v. Cooley*, 36 C.M.R. 180, 183 (C.M.A.2006); *U.S. v. Pinkston*, 21 C.M.R. 22, 29 (C.M.A.1956); *see also* I William Winthrop, Military Law and Precedents, Twenty-First Article (2d ed. 1920) (recognizing impossibility defense). Accordingly, Defendant could not lawfully punish or discharge Plaintiffs for non-compliance where compliance was impossible due to the unavailability of any FDA-licensed vaccines at the location(s) and time(s) specified in their individual Vaccination Orders, or in fact, anywhere at all.

II. DEFENDANT VIOLATED RFRA BY DENYING PLAINTIFFS' RARS.

A. Defendant Denied Plaintiffs' RARs.

The Air Force denied the RARs and appeal submitted by Chisholm, Hall, and Rodriguez using the Air Force's standard denial letter template.[47] These requests and

[47] *Cf.* Chisholm RAR Denial, S2_000042, Hall RAR Denial, AR S3_000020, & Rodriguez RAR Denial, S1_000029-30, *and cf.* Chisholm RAR Appeal Denial, AR S2_000174; Hall RAR Denial, AR S3_000033, and Rodriguez RAR Denial, AR S4_000023.

appeals were denied despite each having been approved by a Chaplain and despite the fact that Chisholm's and Rodriguez's commanders had recommended approval. *See supra* Facts ¶¶36&37. The Air Force Plaintiffs were not alone. Court filings in the *Doster* and Air Force indicate that the Air Force denied—through adjudication or inaction—99% to 100% of the more than 10,000 RARs submitted. *See supra id.* ¶57. Moreover, the AR does not provide any evidence that the Air Force granted any RARs. By contrast, the Air Force freely granted thousands of administrative and medical exemptions, while denying 99-100% of RARs.[48]

B. Defendant Failed to Provide "To the Person" Analysis Required by RFRA.

To satisfy RFRA's strict scrutiny as applied "to the person", each service branch must explain its denial with some "meaningful degree of specificity the factual circumstances of the applicant's service" and make some attempt to assess the marginal "risk of contagion incurred by granting the requested accommodation" with the marginal benefit from "denial of the applicant's request[]." *CFMO*, 649 F.Supp.3d at 1212. The AR demonstrates that Defendant failed to provide any individualized assessment by uniformly deny all religious accommodation requests using the standardized templates. District courts and courts of appeals have lambasted the Air Force, Army, Marine Corps and Navy for using similar processes to uniformly deny all requests without any individualized assessment. *See Navy SEALs 1-26*, 578 F.Supp.3d at 836-37; *Doster* 54 F.4th at 422-26; *CFMO*, 622 F.Supp.3d at 1211-12; *Schelske*, 649 F.Supp.3d at 836-37.

[48] *See, e.g., Doster*, 54 F.4th at 409 (finding that as of December 2021, the Air Force had granted 2,047 medical exemption and 2,247 administrative exemptions). The Army, Marine Corps and Navy each adopted "sham" RAR processes that systematically denied all or nearly all RARs without the individualized assessment required by RFRA, while freely granting medical and administrative exemptions. *See* FAC ¶¶137-147.

Defendant denied all RARs solely on the basis of broadly formulated interests without considering individual characteristics. *See Doster*, 54 F.4th at 434. To be clear, Plaintiffs' claim is not that Defendant should have considered some different set of factors or evidence or given more or less weight to specific factors; that it should have permitted one or more specific less restrictive means; or that it should have adopted different metrics or target vaccination rates. Instead, Plaintiffs claim—and the AR confirms—that the Defendant did not consider ***any*** individual facts or less restrictive means and did not perform ***any*** individualized analysis at all. Defendant considered only one factor—vaccination status—and its decision was solely a function of that single variable to deny and all requests without exception. Accordingly, this Court should grant Plaintiffs' motion for judgment on the AR or summary judgment as to the RFRA count in the complaint.

C. Defendant Had No Legitimate Interest to Protect by Discharging Plaintiffs.

With no licensed vaccine available, the government had no legitimate interest to balance against Plaintiff's sincere religious beliefs. Even the military's generalized interest in health and readiness is cabined by the laws governing the licensure of drugs and biologics, and particularly by 10 USC §1107a. Furthermore, Congress and the President retroactively rescinded the Mandate, and along with it any legal basis to assert that the Mandate furthered a compelling government interest. The Defendant also appears to have abandoned its previous litigation position defending its practice of requiring servicemembers to take EUA products, *cf. supra* Facts ¶19 (describing policy mandating EUA products) & Dkt. 22 at 19-21 (denying that EUA products were mandatory), as it is self-evident that there is no legitimate government interest in enforcing a mandate that facially violated 10 USC §1107a.

The AR confirms Plaintiffs' allegations that Defendant systematically deceived members regarding the products mandated by applying the Mandates as though they required servicemembers to take EUA product when the Mandates' express terms required servicemembers to take only fully licensed vaccines. In so doing, Defendant forced servicemembers to reveal, justify, be interrogated about, and defend their most intimate religious beliefs in violation of their right to free exercise where it had no legitimate countervailing interest – and then denied the requests and punished servicemembers. Defendant did so in circumvention of federal law and deprived members of their constitutional, statutory, and procedural rights. The DoD's actions can only be explained by institutional hostility to religion and irrational animus against unvaccinated members, as shown by its refusal to reconsider the policy in light of new evidence and CDC guidance, *see id.* ¶56.

III. PLAINTIFFS WERE ILLEGALLY DISCHARGED, HAD THEIR ORDERS CURTAILED, WERE TRANSFERRED TO INACTIVE STATUS AND/OR DENIED PAY AND BENEFITS FOR NOT TAKING AN FDA-LICENSED VACCINE WHEN COMPLIANCE WAS LEGALLY AND PHYSICALLY IMPOSSIBLE.

A. Active-Duty Plaintiffs Were Illegally Discharged for Misconduct.

The orders implementing the DoD and Armed Services Mandates stated that failure to receive an FDA-licensed vaccine would constitute serious misconduct for failure to obey a lawful order in violation of UCMJ Article 90 and 92 and/or that such misconduct would be grounds for involuntary discharge. *See supra* Facts ¶¶22-26.

With the exception of Springer, each Active-Duty Plaintiff (Bassen, Dailey, Merjil, Rodriguez, and Wynne) received one or more counseling statements or reprimands stating that their failure to receive an FDA-licensed vaccine constituted misconduct, was a failure to obey a lawful order in violation of the UCMJ and was grounds for involuntary

discharge; a discharge notification stating that they would be discharged for the foregoing grounds; and a DD-214 for each Active-Duty Plaintiff stated that they were discharged for "Misconduct (Serious Offense)". *See supra id.* ¶32 (LOCs, LORs, GOMORs), ¶34 (UCMJ violation), ¶44 (Discharge Notification) & ¶46 (DD-214s). While Springer's DD-214 did not cite misconduct as grounds for his discharge, his counseling statements and discharge determination made it clear that the asserted basis for discharge, "lack of reasonable effort", was in fact due to lack of vaccination. *See supra id.* ¶46.

The Armed Services initiated adverse personnel actions, issued negative LOCs, LORs, and GOMORs, and punished Active-Duty Plaintiffs almost immediately after the DoD and Armed Services Mandates were issued in August and early September 2021, and when no FDA-licensed vaccines were available. Bassen was required to receive a vaccine "NLT 23 Sept", 2021, AR 000159; Dailey "NLT 15 Oct 21", AR 000453-54; Merjil "NLT 14 Oct 21", AR 001691; Springer by October 7, 2021 (ordered to receive "first dose … within 24 hours of the date of this order," which was October 6, 2021), SAR 42; and Wynne "NLT 24 Aug 2021", AR 001955, *i.e.*, the date the DoD Mandate was issued, and before the Army Mandate had been issued. Rodriguez was supposed to be exempted from compliance while his RAR and appeal were pending, but he received his vaccination order May 2, 2022, before his appeal had been denied, and his discharge notification June 6, 2022, just one month after his appeal was denied on May 5, 2022. *See supra id.* ¶¶29&44.

Each Plaintiff serving on active-duty was involuntarily and illegally discharged years before the end of the active-duty obligation in their enlistment or reenlistment

contracts.[49] Accordingly, pursuant to 37 USC §204, each Active-Duty Plaintiff is due backpay, allowances, constructive service, points, and other records corrections financial compensation from the date of their illegal discharge at least through the ETS date stated in their enlistment or reenlistment contracts.

B. Reservist Plaintiffs Were on Active-Duty Orders When Their Orders Were Curtailed and When Comirnaty Was Unavailable.

Lieutenant Colonel Chisholm was on full-time Title 10 orders to serve from October 31, 2021, through September 30, 2022. His full-time, active-duty order were illegally curtailed by approximately 3.5 months - to June 16, 2022, and he was involuntarily placed into "no points/no pay" status June 17, 2022. *See supra* Facts ¶48.a.

Endress was ordered into full-time federal service under Title 10 ADOS orders from June 27, 2019, to May 31, 2021, and then again from October 30, 2021, through October 29, 2022. His full-time ADOS orders were illegally curtailed by approximately 6.5 months, and he was involuntarily removed from active duty effective March 15, 2022, *see id.* ¶48.b. His orders were curtailed despite the fact that, as a member of the Army Reserve, Endress was not required to be vaccinated until June 30, 2022, and his Vaccination Order stated a deadline of "NLT June 2022", SAR 1.

Plaintiff Hall was ordered into full-time AGR duty under Title 10 from April 2, 2019, through January 31, 2023. His full-time AGR orders were illegally curtailed by

[49] Bassen was discharged on October 3, 2022, more than two years short of his October 15, 2024 ETS date. Dailey was discharged June 21, 2022, more than three years before his August 24, 2025 ETS date. Merjil was discharged May 27, 2022, more than three years before his May 22, 2025 ETS date. Rodriguez was discharged September 6, 2022, one year and ten months before his July 17, 2024 ETS date. Springer was discharged Feb. 8, 2022, more than three years and six months before his August 30, 2025 ETS date. Wynne was discharged June 29, 2022, more than two years before his September 2024 ETS date. *See supra* Facts ¶45.

approximately one year to February 11, 2022. He was involuntarily removed from active duty as of that date and was required to go on terminal leave until his forced retirement date of April 1, 2022. *See supra* Facts ¶48.c & Hall Decl. ¶8.

Each Reservist Plaintiff had their active-duty Title 10 orders illegally curtailed for failure to receive an FDA-licensed vaccine when it was impossible to do so. Accordingly, pursuant to 37 USC §204, each Reservist Plaintiff is due backpay, allowances, constructive service, points, and other records corrections financial compensation from the date of they were illegally removed from active duty through the date specified in their original orders prior to the illegal curtailment.

C. Davis Was Involuntarily Removed From Active Status And Was Denied Pay For Duties He Actually Performed.

Starting August 1, 2022, Davis was dropped from active status; was placed on "no points/no pay" status; and was prohibited from attending drills, training or other duties from August 1, 2022, to February 1, 2023; and. *See supra* Facts ¶49. Despite this, Davis's commander requested that Davis come to drill and provide assistance the weekend of August 6-7, 2022. Davis was not paid for this drill. *See id.*; *see also* FAC ¶17 & Davis Decl. ¶¶7-8. It is thus undisputed that Davis was denied pay for duties he actually performed, as reflected in this Court's decision in its May 2, 2024 Order to deny Defendant's motion to dismiss Davis' MPA claim. Davis is therefore entitled to relief under 37 USC §206(a) for the pay denied for duties actually performed, as well as to additional compensation requested in the FAC and to records correction and retirement points for the period from August 1, 2022, to February 1, 2023.

D. Hall's Retirement & Rodriguez's Separation Were Involuntary.[50]

To establish that retirement or separation was involuntary, a plaintiff "must demonstrate that: (1) he involuntarily accepted the terms of the government; (2) circumstances permitted no other alternative; and (3) said circumstances were the result of the government's coercive acts." *Carmichael v. U.S.*, 298 F.3d 1367, 1372 (Fed.Cir.2002) (citation omitted). The first two elements are satisfied because each Plaintiff has alleged their removal from active-duty service was involuntary and that the government provided no alternative to remain on active-duty without complying with the vaccination order, an order they believed to be illegal in violation of 10 USC § 1107a and RFRA, *see* Hall Decl., ¶12; Rodriguez Decl., ¶¶10&15-23, because it "put them to the choice of either betraying a sincerely held religious belief or facing a substantial threat of serious discipline." *CFMO*, 622 F.Supp.3d at 1215 (cleaned up).

The Defendant's violations of its own rules or other applicable laws and regulations, as all Plaintiffs have alleged, "may qualify as coercive, rendering a discharge

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[50] In Defendant's brief supporting its August 25, 2023 motion to dismiss, Defendant argued that Hall and Rodriguez failed to state a claim for relief under the Military Pay Act claim because Hall's retirement and Rodriguez's separation were voluntary. *See* Dkt. 22 at 23-26 (Rodriguez) & 27 n.16 (Hall). In its May 2, 2024 Order, the Court found that Hall and Rodriguez had each stated a claim for relief and denied Defendant' motion. *See* Dkt. 32 at 10 & n.10.

Plaintiffs note that Hall has two distinct claims. First, Hall's full-time Title 10 AGR orders were involuntarily curtailed by approximately one year (from January 1, 2023 to February 11, 2023), and that he seeks backpay, allowances, and other compensation, as well as records correction and retirement points, for this one-year period. Defendant has not previously asserted that the curtailment of Hall's orders were voluntarily curtailed, nor could it. Second, Hall was forced retire effective April 1, 2022, and he seeks reinstatement, constructive service and other compensation for the period starting April 1, 2022 and thereafter. It appears that the Defendant's contention that Hall's retirement was voluntary addresses this second claim for relief, and the discussion in this section addresses this second claim, rather than the first claim regarding the involuntary curtailment of Hall's orders, which Defendant does not appear to dispute.

involuntary." *Faerber*, 156 Fed. Cl. at 727 (citing *Carmichael*, 298 F.3d at 1372). Plaintiffs here have demonstrated that Defendant's actions in curtailing Hall's active-duty orders and illegally discharging Rodriguez violated 10 USC §1107a and that the denial of Hall and Rodriguez's RARs and RAR appeals violated RFRA. *See supra* Section I (10 USC §1107a) Section & II (RFRA).

But the coercion went far beyond the illegality of the orders. The military used every means of coercion and pressure in its considerable arsenal to compel compliance, means that go far beyond that available to a civilian employer and are only exceeded by the authority a prison warden has over prisoners. Each of the Armed Services issued general orders providing that each unvaccinated service member would be subject to career and life destroying adverse personnel and disciplinary actions, including: removal from or relief of command; removal from assignments, schools and training, and cancellation of future orders, assignments, schools and trainings; denial or delay of promotions; prohibiting all but "mission-critical" travel; and prohibiting personal leave and liberty to travel off base to church, attend weddings and funerals, vacation, visit relatives, or any other personal matters. *See supra* Facts ¶27. Unvaccinated members were also subject to invasive testing, masking and mitigation measures that telegraphed their vaccination status; prohibited them from accessing facilities, attending meetings, or otherwise performing their duties; and/or directed to perform menial tasks typically assigned as punishment for misconduct or criminal violations. *See infra* Section III.E.

The Air Force's treatment of Rodriguez—who was supposed to be "protected" by the *Doster* injunction from punishment and discharge, but was instead treated like he was a convicted criminal—provides an illustrative example of how the military abused its authority to force out those with sincerely held religious objections. The Air Force

involuntarily discharged Rodriguez on July 14, 2022, the date of his first DD-214. Rodriguez Decl., ¶¶24-25. The very same day the *Doster* injunction was promulgated, and the Air Force placed Rodriguez on "Excess Leave", which is normally for service members who have been convicted of a criminal offense,[51] meaning that he "would not be paid anything," but he "would still be subject to the UCMJ," Rodriguez Decl. ¶26. He was also "subject to recall by the Air Force," *id.*, meaning that:

> [I]f the Air Force ordered me back to duty as a result of what was going on in Doster that I would have to come and that if I didn't, I would be considered AWOL and they would send the U.S. Marshals to bring me back to Moody [Air Force Base].

Id., ¶27. Rodriguez explained that he

> [O]pted out of Doster for several reasons, but chief among them was that being in a legal hold with no pay was stressful and potentially put the life I was building for my wife and children at risk. … I was already kicked out of base housing and the Air Force. I was no longer a [Para Jumper]. I was not getting paid by the military and I did not want to be subject to its authority while working to build a new life for my wife and children.

Id. ¶29. Had it not been for the denial of his request for accommodation, and the arbitrary and gratuitously punitive measures to illegally enforce a mandate for which compliance was both legally and physically possible, Rodriguez "absolutely" would have "stayed in [the] military" and his "plan was to serve until [he] was eligible to retire after 20 years or more." *Id.* ¶30. Instead, the Air Force, immediately after a federal judge enjoined its likely violations of RFRA, showed its contempt for the law and the *Doster* court's order to pile

[51] "'[E]xcess leave' is hereinafter referred to in this opinion as 'appellate leave'… [A]ppellate leave is a particular status on which a military member can be placed by the appropriate military authority whereby he or she is not on full duty status, as defined above, and is awaiting the completion of the appellate process of his or her court-martial conviction. … [A] member on appellate leave is usually not entitled to be paid at all." *Combs v. U.S.*, 50 Fed. Cl. 592, 594–95 (2001).

on further punishment and illegal denial of pay to force him out. The Air Force's illegal actions were so coercive as to render Rodriguez's separation involuntary.

Defendants' contention that his separation was "voluntary" has no more merit than its other claims that it had FDA-licensed Comirnaty when in fact it did not even know if any Comirnaty existed at all; that vaccines vials labeled as EUA products vaccines automatically transformed into or "became" FDA-licensed Comirnaty when the FDA licensed Comirnaty, *Doe #1*, 572 F.Supp.3d at 1233; and that Plaintiffs have no standing because they suffered no harm from the mandate of only FDA-licensed vaccines when it did not have any, notwithstanding the fact that their failure to take an unavailable FDA-licensed vaccine was the stated basis for all of the actions that Defendant took against them, up to and including their discharge. The *Doe #1* court and this Court have rejected these latter claims, and this Court should do the same for Defendant's claim that Rodriguez separated voluntarily.

E. Defendants' Procedures in Discharging Certain Plaintiffs Violated Medical Regulations and UCMJ Prohibition on Pretrial Punishment.

When the DoD and Army Mandates were issued, Bassen had started the medical board evaluation process for a medical retirement and had an approved rating that qualified him for a medical retirement. Bassen's command supported his request for a medical retirement, but he was involuntarily separated as a "vaccine refuser". *See supra* Facts ¶50. This action violated the Army's separation regulations in AR 635-200, which provides that medical processing "takes precedence over administrative separation proceedings", AR 635-200 ¶1-34.a, SAR 47, and prohibits the separation authority from taking "final action" (*i.e.,* separating the soldier) prior to the completion of medical processing. *Id.* ¶1-34.d, SAR 47.

Endress had an approved, permanent ME based on his documented family history of myocarditis and myocardial infarctions, *see supra* Facts ¶42, which caused four deaths on his father's side and placed Endress at heightened risk from the vaccine. *See* Aug. 12, 2021 Johnstone Letter at 1, SAR 9. The Army violated AR 40-562 by summarily revoking his ME and denying his subsequent appeals and requests without considering Endress' heightened risks from taking the vaccine, the growing body of evidence specifically linking the vaccine to myocarditis, or the safe and effective alternatives to vaccination recommended by Endress' physician. *See* Endress Decl. ¶¶25-40.

When the Mandates were issued, Dailey and Wynne were recovering from injuries suffered during Special Forces and Ranger training, respectively. Dailey had been injured during his Special Forces training program and had been placed on medical hold and assigned to a medical rehab group, *see* Dailey Decl. ¶7. Just one week later and prior to the issuance of the Army's own Mandate, Dailey was removed from the medical rehab group and "placed in the 'refuser' group." *Id.*

Everyone in the "refuser" group was assigned to mandatory details over Christmas 2021 holiday as punishment for non-compliance. Everyone was denied leave across the board, supposedly because we were in "training" group, though there was no training. Instead, we had to do landscaping, cleaning and other details.

Dailey Decl. ¶10. Because Wynne was unvaccinated, the Army failed to process or pay the enlistment bonus he had earned or provide adequate treatment for his injuries. *See* Wynne Decl. ¶¶12-13. In challenging his subsequent discharge for misconduct, he urged the Army to characterize his service as Honorable, due to his otherwise exemplary service record and the fact that he was the "sole provider" for his mother, his sister and her five children. *See* AR 001980.

This left me unemployed and unable to draw unemployment (due to a lack of honorable discharge), injured, with bad paper from the military, and with no place to live. But for the generosity of others, I would have been on the street. I am still piecing my life back together.[52]

The foregoing actions not only violated the military's regulations, but also constituted pre-trial punishment prohibited by Article 13 of the UCMJ. 10 USC §813. As such, these actions provide a separate legal basis for finding these discharges unlawful.

CONCLUSION

The DoD and Armed Services Mandates were subject to a condition precedent—the availability of FDA-licensed vaccines—that was not satisfied, making it impossible to comply with the order to receive "only" fully-licensed vaccines. Plaintiffs are a group of diverse service members in all regards: completely geographically dispersed, running the gamut from the junior enlisted ranks (Springer, Merjil, Wynne) through the middle ranks (Dailey, Bassen, Rodriguez, Endress) to higher enlisted ranks (Davis, Hall), including officers (Chisholm), across a diverse array of occupational fields, representing all Departments of the Armed Services – and yet all had the exact same result when they pointed out that there were no FDA licensed vaccines. Every one of them was punished for Misconduct, and had their career ended, by whatever means were most expeditious in their particular circumstances.

Plaintiffs were, by order, presumptively removed from jobs they had been accomplishing throughout the preceding pandemic, in all cases in fine fashion, but if they had any reason for not taking the government's preferred unlicensed biologic product,

[52] Wynne Decl. ¶14. The Army subsequently determined that Wynne's general discharge was an administrative error and that he should have received an Honorable discharge.

every regulation promise or statutory requirement was voided in pursuit of vaccination *uber alles*. For example, some plaintiffs were in process for medical discharge (Bassen), or being treated for injuries sustained in service (Dailey, Wynne); some had prior medical exemptions and history that strongly counseled against any vaccine (Endress, Davis), and/or valid administrative reasons (Chisholm, Hall, Rodriguez) in addition to the fact that there was no FDA licensed available. In all cases, those processes, prior exemptions and even the right to seek counsel, were stopped, voided, terminated, and disallowed. Plaintiff Rodriguez, for one example, was an Air Force "PJ" instructor – and he received no administrative separation board, nor even get to talk to a lawyer, despite receiving a letter of reprimand, getting kicked out of base housing with his family, and getting discharged with a Misconduct Code ("HKQ") and "Misconduct (Serious Offense)" Narrative Reason on his DD-214. On the same day that the injunction came down from the federal court in the *Doster* case enjoining such actions.

All of the adverse actions taken against Plaintiffs were downstream of the missing, critical fact necessary for the Mandate to be carried out lawfully and for Plaintiffs to comply with their individual vaccination orders: there was no FDA licensed vaccine. The Court must therefore grant Plaintiffs' motion for judgment on the AR, or in the alternative, summary judgment. All of the adverse actions, remarks, comments or any kind must be removed from Plaintiffs' records and all of the adverse consequences that flowed from these void discharges and actions must be, to the extent possible, remunerated. Plaintiffs are entitled to backpay and associated records correction in order to restore lost entitlements, benefits, and emoluments earned by their service.[53]

[53] Because of the number of plaintiffs and AR citations, Plaintiffs have included an Index with the

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CERTIFICATE OF SERVICE

This is to certify that on this 16th day of August 2024, the foregoing document was e-filed using the CM/ECF system.

/s/ Dale Saran