

**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 T. Dietz**

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

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## **QUESTIONS PRESENTED**

### **Preliminary Questions – Challenges to COVID-19 Mandate**

1. Did the Defendant have any mRNA vaccine “fully licensed” by the Food and Drug Administration (“FDA”), as required by the explicit terms of the then-Department of Defense (“DoD”) (now Department of War (“DoW”)) COVID-19 vaccine Mandate?
2. Did Defendant violate 10 USC § 1107a and military regulations implementing that statute by wrongfully and/or constructively discharging and/or denied pay, benefits, and entitlements to Plaintiffs for non-compliance with the COVID-19 vaccine Mandate, which required them to provide only an FDA-licensed vaccine, where no FDA-licensed vaccines were physically or legally available?
3. Did Defendant ignore and/or deny Plaintiffs’ Religious Accommodation Requests (“RARs”) from the Mandate, and/or take adverse actions against Plaintiffs with RARs pending, and in so doing violate both the Religious Freedom Restoration Act (“RFRA”) and military regulations implementing RFRA?

### **Challenges to Board Decisions**

4. Does the Military Pay Act, 37 USC § 204, and/or 10 USC § 1552 authorize Defendant, by unilateral executive action, to add pre-conditions to, or restrictions of, relief thereunder (*i.e.*, reinstatement or time in service) that have no basis in the statutory text, Federal Circuit precedent, or pre-COVID-19 Board decisions?
5. May the Boards selectively deny Plaintiff Wynne a promotion that follows from his constructive service award and that was granted to identically situated Army Plaintiffs?
6. Can Defendant deny involuntary separation pay under 10 USC § 1174 to a Plaintiff who has completed six or more years of service, has been involuntarily separated, and

whose records have been corrected to remove the disqualifying misconduct separation?

**STATEMENT OF THE CASE**

In August 2024, the ten named Plaintiffs filed their initial Motion for Judgment on the Administrative Record (“MJAR”), ECF 43. There, they alleged that Defendant violated the Military Pay Act, 37 USC § 204, when it: (a) wrongfully and/or constructively discharged and/or denied pay, benefits, and entitlements to Plaintiffs solely based on their non-compliance with the COVID-19 Mandate to take an FDA-licensed vaccine, where no FDA-licensed vaccines were physically or legally available (Count II); and (b) denied their RAR and/or RAR appeals in violation of RFRA (Count III).

While Plaintiffs’ MJAR was pending, Defendant moved to remand Plaintiffs’ claims to the respective Service Boards for Correction of Military Records (“BCMR” or “BCNR” for Navy/Marine Corps Plaintiff Springer). This Court granted Defendant’s motion to permit the Services to implement President Donald J. Trump’s Executive Order 14,184, “Reinstating Service Members Discharged Under Military’s COVID-19 Vaccination Mandate” (“Reinstatement EO”), which was issued on January 27, 2025, just one week after his second inauguration to fulfill one of his leading campaign promises.

On remand, consistent with the findings in the Reinstatement EO and DoW guidance, each Board decision found and/or conceded that no FDA-licensed vaccine was available, so that compliance was impossible; that the military’s systematic denial of RAR was unlawful and unjust; and that each Plaintiff suffered an injustice from the resulting involuntary separation and/or other adverse personnel actions, as well as from adverse actions that contributed to or followed from their involuntary separation. Yet notwithstanding these findings of multiple injustices, the Air Force BCMR and the BCNR

categorically denied backpay and other monetary relief to Air Force Plaintiffs Hall and Rodriguez and Navy/Marine Corps Plaintiff Springer. These Boards denied relief based solely on their imposition of two novel pre-conditions to, or restrictions of, relief: a reinstatement requirement, and in Springer's case, based on his time in service.

On February 5, 2026, this Court issued an order, ECF 104, dismissing as moot Plaintiffs' August 2024 MJAR, and setting a briefing schedule for a new round of MJARs to address the changes in circumstances and intervening events—the Reinstatement EO, DoW guidance implementing the EO and the Boards' decisions—that had occurred since MJAR briefing concluded in December 2024. In this MJAR, Air Force and Navy/Marine Corps Plaintiffs challenge the Boards' complete denial of relief because they have not requested or accepted reinstatement, and in Springer's case, due to his entry-level separation. These pre-conditions or restrictions have no basis in the statutory text; are contrary to long-standing and well-established Federal Circuit doctrines applying these statutes; nor are they required by the Reinstatement EO, the sole legal basis cited by the Boards. Wynne also challenges the Army Board's selective denial of relief, *i.e.*, promotion to E-5, which should have followed from the award of constructive service promotion and that was granted to other identically situated Army Plaintiffs.

Plaintiffs further request that, after granting their MJAR with respect to the reinstatement and time-in-service requirements, this Court award Hall, Rodriguez, and Springer constructive service and associated backpay on the same terms as the Army Plaintiffs or direct the Air Force BCMR or BCNR to do so on remand. In addition, the Air Force Board did not award Plaintiff Rodriguez involuntary separation pay under 10 USC § 1174, despite having corrected his records so that he meets the statutory criteria (*i.e.*, involuntary separation) and is no longer disqualified by a misconduct separation. He

requests that Court award separation pay or order the Board to do so on remand.

## **STATEMENT OF FACTS AND LEGAL FRAMEWORK**

### **I. STATEMENT OF UNDISPUTED FACTS**

#### **A. COVID-19 Mandate and Rescission**

1. On August 24, 2021, Secretary of Defense (“SecDef”) Lloyd 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 [FDA], in accordance with FDA labeling and guidance.”<sup>1</sup>

2. Each of the Armed Services issued a COVID-19 vaccine mandate stating that only FDA-licensed vaccines may be mandated.<sup>2</sup>

3. Defendant was obligated to provide FDA-licensed vaccines.<sup>3</sup>

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.<sup>4</sup>

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<sup>1</sup> SecDef Memorandum, “Mandatory Coronavirus Disease 2019 Vaccination of Dept. of Defense Service Members” at 1 (Aug. 24, 2021) (“DoD Mandate”), AR DOD 000005.

<sup>2</sup> 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; MARADMINS 462/21, ¶3.b (Sept. 1, 2021), SAR 50-56 (“Marine Corps Mandate”).

<sup>3</sup> 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”).

<sup>4</sup> 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).

**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, but for only for that single day - its marketing end-date is the same day as its marketing start date. *See* FDA, Comirnaty Approval Letter (Aug. 23, 2021), DOD AR, AR Tab 5.<sup>5</sup>

8. 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 a specific finding that there is no adequate, [FDA-]approved, available alternative to the product”).

9. Many service members, including a number of the Plaintiffs here, stationed at 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 Order, at their base or military clinic.

10. 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.

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<sup>5</sup> It appears that 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 August 23, 2021, *i.e.*, the same day as FDA approval, and the day before the DoD Mandate was issued August 24. *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”) and 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.”).

11. In this proceeding, Defendant has not asserted, nor adduced any evidence at all, that the DoD or any Armed Service had FDA-licensed vaccine at any relevant time.

**C. Mandate of Pfizer-BioNTech EUA COVID-19 Vaccine**

12. On August 23, 2021, the FDA re-issued the EUA for the Pfizer-BioNTech COVID-19 EUA vaccine because the FDA-licensed and “legally distinct” Comirnaty (approved on the same day) was “not available.”<sup>6</sup>

13. 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.”<sup>7</sup>

14. There was no “Presidential Authorization” to mandate unlicensed, EUA vaccines for military members, as is required by 10 USC § 1107a.<sup>8</sup>

15. The DoD mandated the EUA version based on a DoD official’s assertion that the EUA version and FDA-licensed versions were *interchangeable*.<sup>9</sup>

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<sup>6</sup> 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. 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—“can be used interchangeably to provide the [two-shot] vaccination series without presenting any safety or effectiveness concerns”, *e.g.*, one shot of EUA and one of Comirnaty. *Id.*

<sup>7</sup> 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.

<sup>8</sup> See FAC ¶202 & *Doe #1-14 v. Austin*, 572 F. Supp. 3d at 1233-34 (N.D. Fla. 2021) (“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.”).

<sup>9</sup> 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, 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

16. The Armed Services followed the DoD Assistant Secretary’s directive to treat the two products as legally interchangeable (rather than only “medically” interchangeable) for purposes of the two-shot series and ordered commanders and healthcare providers to mandate EUA products.<sup>10</sup>

17. Each Armed Service issued multiple general orders and guidance documents stating that failure to receive a COVID-19 vaccination constituted failure to obey a lawful order punishable under Article 90 or Article 92 of the UCMJ.<sup>11</sup> Each Service required 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.<sup>12</sup>

#### **D. Plaintiffs’ Vaccination Orders and Challenges to the Mandate**

18. Plaintiffs received individual Vaccination Orders directing them to receive

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the doses were the licensed vaccine ... for the purpose of vaccinating Service members in accordance with” the DoD Mandate. 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.

<sup>10</sup> 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 64. See also *Doe #1*, 572 F. Supp. 3d at 1233 (DoD “was mandating vaccines from EUA-labeled vials.”).

<sup>11</sup> See DAF Sept. 10, 2021, Memo ¶4, AR 000547; Army Mandate, FRAGO 5 ¶3.D.8.B.2, AR 000024 (Sept. 14, 2021); MARADMINS 462/21 ¶3.l, SAR 53.

<sup>12</sup> 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); MARADMINS 533/21 ¶2.c.4, SAR 58 (authorizing immediate initiation of administrative or judicial proceedings prior to compliance deadline); MARADMINS 612/21 ¶¶3.a & 3.b (Oct. 23, 2021), SAR 61.

an FDA-licensed COVID-19 vaccine within a specified time frame.<sup>13</sup>

19. The Vaccination Orders were “subject to the availability of vaccines.”<sup>14</sup>

20. No Plaintiff’s Vaccination Order directed him to search for, source, procure, or receive a “commercially available” FDA-license vaccine.

21. Plaintiffs received one or more letters of counseling (“LOC”) or reprimand (“LOR”), or a General Officer Memorandum of Reprimand (“GOMOR”), for not taking the unlicensed, EUA vaccines.<sup>15</sup> They also received one or more counseling forms or orders stating that they had violated the Uniform Code of Military Justice (“UCMJ”), 10 USC §§ 801, *et seq.*, and that continued failure to receive the COVID-19 vaccination could or would result in involuntary administrative separation.<sup>16</sup>

22. 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.

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<sup>13</sup> See Chisholm Vaccination Order ¶2 (Feb. 17, 2022), AR S2\_000044; Hall Vaccination Order (Sept. 21, 2021), SAR 26; Hall Decl. ¶18 (stating that he received vaccination order December 7, 2021); Rodriguez Vaccination Order ¶1.a (May 2, 2022), AR S4\_000016; Springer Vaccination Order (Oct. 6, 2021), SAR 37 (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; Wynne LOC & Vaccination Order ¶4 (Oct. 20, 2021), AR 001955.

<sup>14</sup> See, *e.g.*, Wynne Vaccination Order ¶4 (Oct. 20, 2021), AR 001955; Springer Vaccination Order ¶3 (Oct. 6, 2021), SAR 37.

<sup>15</sup> See Rodriguez LOR (May 10, 2022), AR S4\_000013; Springer LOC (Jan. 10, 2022), AR AR0021 (failure to be vaccinated); Springer LOC (Jan. 11, 2022), AR AR0022; Wynne LOC & Vaccination Order (Oct. 20, 2021), AR 001955-56; Wynne LOC (Nov. 1, 2021), AR 001957-58; Wynne Nov. 2, 2021, GOMOR, AR 001928

<sup>16</sup> See Chisholm Vaccination Order ¶2, AR S2\_000044; Hall Decl. ¶18; Merjil Vaccination Order, AR 001692; Rodriguez Vaccination Order ¶1.a, AR S4\_000016; Springer LOC (Jan. 10, 2022), AR 000021; Wynne Vaccination Order ¶4, AR 001955.

**E. Plaintiffs' Requests for Religious Accommodation**

23. Air Force Plaintiffs Chisholm, Hall, and Rodriguez each filed an RAR.<sup>17</sup> Chisholm and Rodriguez's commanders recommended approval.<sup>18</sup>

24. The Air Force denied each Air Force Plaintiffs' RAR<sup>19</sup> and RAR Appeal.<sup>20</sup>

25. Plaintiff Springer also submitted an RAR, which was hastily denied on November 4, 2021. *See* Springer RAR Denial Letter (Nov. 4, 2021), USMC AR0020.

**F. Discharge and Other Adverse Actions for Non-Compliance**

26. Each Plaintiff was wrongfully and/or constructively discharged, had their orders cancelled or curtailed, was illegally transferred to inactive status, and/or denied pay, benefits, and entitlements, as set forth in greater detail in the FAC, *see* FAC ¶¶16-25, and in their respective Board Decisions.<sup>21</sup>

**II. COURT PROCEEDINGS IN *BASSEN v. UNITED STATES***

27. On February 8, 2023, Plaintiffs filed their original complaint. ECF 1.

28. On August 4, 2023, Plaintiffs filed the operative First Amended Class Action Complaint ("FAC"). ECF 21.

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<sup>17</sup> *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.

<sup>18</sup> *See* Memo, Decision Regarding Religious Accommodation Request – Lt. Col. Brent Chisholm (undated), AR S2\_000038; Memo, Squadron Commander's Recommendation on TSgt Rodriguez's Religious Accommodation Waiver (Oct. 29, 2021), AR S1\_000040.

<sup>19</sup> *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.

<sup>20</sup> *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.

<sup>21</sup> *See* Springer Decision, ECF 75, at 3-4; Bassen Decision, ECF 80, at 2-4; Dailey BC MR Decision, ECF 81, at 2-4; Davis Decision, ECF 83, at 1-3; Endress Decision, ECF 82, at 2-4; Merjil Decision, ECF 84, at 2-3; Wynne Decision, ECF 85, at 1-4; Chisholm Decision at 1-4; Hall Decision at 1-4; Rodriguez Decision at 1-4.

29. On May 2, 2024, this Court issued an order, *see* ECF 32 (reported as *Bassen v. U.S.*, 171 Fed. Cl. 273 (2024)), denying Defendant’s August 25, 2023, motion to dismiss, ECF 22, Plaintiffs’ August 4, 2023, FAC (“May 2, 2024, MTD Decision”).

30. On May 17, 2024, the Court issued an order directing Defendant to file the certified administrative record and setting a briefing schedule for the Parties to file their respective MJARs and responses. Scheduling Order. ECF 35.

31. On August 16, 2024, Plaintiffs filed their MJAR, *see* ECF 43. On October 15, 2024, Defendant filed its MJAR cross-motion and response to Plaintiffs’ MJAR. ECF 50. On November 19, 2024, Plaintiffs filed their reply to Defendant’s MJAR. ECF 53. On December 17, 2024, Defendant filed its reply to Plaintiffs’ MJAR. ECF 54.

32. On January 27, 2025, President Donald J. Trump issued Executive Order 14,184, “Reinstating Service Members Discharged Under Military’s COVID-19 Vaccination Mandate,” 90 FR 8,761 (Jan. 27, 2025) (“Reinstatement EO”).

33. On January 29, 2025, Defendant filed a motion to stay proceedings for 60 days for the DoD and the Armed Services to determine how to implement the Reinstatement EO. ECF 57. On February 19, 2025, the Court granted Defendant’s motion to stay proceedings. ECF 60.

34. On April 8, 2025, Defendant filed a motion for voluntary remand. ECF 63.

35. On May 22, 2025, the Court granted Defendant’s remand motion. ECF 68 (reported as *Bassen v. United States*, 177 Fed. Cl. 69 (2025)).

36. On June 16, 2025, the Court formally remanded Plaintiffs’ claims to their respective Services’ Board and ordered each Plaintiff to submit his application within 30 days. ECF 70.

37. On July 16, 2025, each Plaintiff submitted an application to the respective

Service Board. *See* Defendant's Status Report, ECF 74 (July 31, 2025).

38. On August 20, 2025, Defendant filed the BCNR Decision for Plaintiff Springer. ECF 75. On September 19, 2025, Plaintiff Springer filed his objections to the BCNR's decision. ECF 86.

39. On September 17, 2025, Defendant filed the Army BCMR decisions for Plaintiffs Bassen, Dailey, Davis, Endress, Merjil, and Wynne. ECF 80-85.

40. On January 21, 2026, the Air Force BCMR issued decisions on the petitions filed by Chisholm, Hall, and Rodriguez, but these decisions have not yet been filed with the Court.

41. On February 5, 2026, the Court issued an order finding that the Plaintiffs' August 2024 MJAR, ECF 43, and Defendant's Cross MJAR, ECF 50, are moot; ordered the parties to file new MJARs; and set a briefing schedule for the new MJARs. ECF 104.

42. On March 2, 2026, Defendant filed a supplement to the administrative record, including the DoW Guidance and Air Force Board Decisions. ECF 112.

### **III. REINSTATEMENT EO, DOW GUIDANCE, AND BOARD DECISIONS**

43. **Reinstatement EO.** In the Reinstatement EO, President Trump, in his role as Commander-in-Chief, found that the “[t]he vaccine mandate was an unfair, overbroad, and completely unnecessary burden on our service members[;]” that “the military unjustly discharged those who refused the vaccine ... after failing to grant many of them an exemption that they should have received[;]” and that “redress of any wrongful dismissals is overdue.” Reinstatement EO § 1, 90 FR at 8761.

44. **DoW Guidance.** Following the issuance of the Reinstatement EO, SecDef (now SecWar) Pete Hegseth and the DoW Office of the Undersecretary of Defense or War for Personnel & Readiness (“OUSD P&R” or “OUSW P&R”) have issued a series of

directives and guidance memoranda (collectively, “DoW” Guidance”), including:

- OUSW P&R, “Updated Guidance on Correction of Military Records for Service Members Involuntarily Separated for Refusal to Comply with Coronavirus Disease 2019 Vaccination Requirements” (Apr. 1, 2025) (“April 1 Guidance”).
- OUSW P&R, “Supplemental Guidance to the Military Department Discharge Review Boards and Boards of Correction of Military / Naval Records Considering Requests from Service Members Adversely Impacted by Coronavirus Disease 2019 Vaccination Requirements” (May 7, 2025) (“May 7 Guidance”).
- OUSW P&R, “Supplemental Guidance to the Military Department Discharge Review Boards and Boards of Correction of Military / Naval Records Considering Requests from Service Members Adversely Impacted by Coronavirus Disease 2019 Vaccination Requirements” (Dec. 10, 2025) (“December 10 Guidance”).<sup>22</sup>

45. The SecDef/SecWar Directives and the DoW Guidance repeated and expanded on President Trump’s admissions that the mandate’s implementation and resulting discharges constituted an “error or injustice.”<sup>23</sup>

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<sup>22</sup> See also SecDef Memorandum, “Providing Remedies for Service Members and Veterans Negatively Impacted by the Department of Defense Defunct Coronavirus Disease 2019 Vaccination Mandate” (Feb. 6, 2025); OUSD P&R, “Correction of Military Records for Service Members Involuntarily Separated for Refusal to Comply with Coronavirus Disease 2019 Vaccination Requirements” (Feb. 7, 2025) (rescinded by April 1 Guidance) (“February 7 Guidance”); SecDef Memorandum, “Providing Supplemental Remedies for Service Members and Veterans Negatively Impacted by the Department of Defense Defunct Coronavirus Disease 2019 Vaccination Mandate” (Apr. 23, 2025); OUSW P&R, “Supplemental Guidance to the Military Department Discharge Review Boards and Boards of Correction of Military / Naval Records Considering Requests from Service Members Adversely Impacted by Coronavirus Disease 2019 Vaccination Requirements” (July 21, 2025); OUSW P&R, “Additional Guidance on Process for Reinstating Service Members Negatively Impacted by the Coronavirus Disease 2019 Vaccination Mandate” (Oct. 2, 2025); SecWar Memorandum, “Restoring Honor to Service Members Separated under the Coronavirus Disease 2019 Vaccine Mandate” (Dec. 6, 2025) (“December 6 Directive”).

<sup>23</sup> See Feb. 7 Guidance at 1 (the “mandate was an unfair, overbroad, and completely unnecessary burden on our Service members. ... [T]he requirement that Service members receive a non-critical and unnecessary COVID-19 vaccine without an adequate due process mechanism for vaccine accommodations was an injustice.”); December 6 Directive at 1 (“it is important to recognize that others face continuing injustice. It is unconscionable that thousands of former Service members who held true to their personal and religious convictions were not just separated, but separated with General

46. **Air Force Board Decisions.** Each of the three Air Force Board decisions—Chisholm, Hall, and Rodriguez—conceded their petitioners’ claims that no FDA-licensed COVID-19 vaccine was available to them, and that the vaccines administered were Emergency Use Authorization (EUA) products that could not lawfully be mandated under 10 USC § 1107a without informed consent. The AFBCMR did not dispute or reject this factual contention in any of the three decisions.

47. Each Air Force Board decision found that the mandate and its implementation constituted an injustice. Each Air Force Board Decision found as follows: “The Board determined that the COVID-19 mandate, and the limited due process afforded to those seeking religious accommodation, constituted an injustice.” Chisholm Decision at 6; Hall Decision at 7; Rodriguez Decision at 8.

48. Rodriguez received the most explicit finding: “The applicant is the victim of an error or injustice.” Rodriguez Decision at 8. Despite the denial of constructive service and backpay, the Board recommended significant record corrections for Rodriguez, including the expungement of all adverse actions and misconduct references related to the COVID-19 mandate. *Id.* at 9–10.

49. Yet despite the concession that no FDA-licensed vaccine was available and the finding that each Air Force Plaintiff suffered an injustice, the Air Force BCMR denied all relief requested by Hall and Rodriguez because they did not request reinstatement

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(Under Honorable Conditions), rather than Honorable, discharge characterizations. While many have applied for and received relief from our Military Department review boards, I believe the onus is on us to make this right.”); December 10 Guidance at 1 (“While the Department has made great strides supporting individuals who requested relief, amends sometimes requires taking it upon oneself to make things right. ... [I]t is time for the Department to take proactive steps to correct these injustices so these Service members can apply for and receive the post-service benefits that they rightly earned.”).

“which is a prerequisite for constructive service credit, backpay” and other relief requested. Rodriguez Decision at 8; *see also* Hall Decision at 8 (same). Chisholm was granted partial relief because he had returned to service in 2023, which the Air Force Board determined “meets the intent of fulfilling a service obligation normally associated with ... reinstatement.” Chisholm Decision at 6.

50. **Army Board Decisions (ECF 80-85).** Each of the six Army BCMR decisions repeats the Petitioner’s central factual allegation and then leaves it untouched: “Due to the absence of any licensed vaccine for the COVID-19 vaccine mandate, the applicant was unable to adhere to the order as stipulated. The COVID-19 vaccine implementation was unlawful as it utilized available but unlicensed products instead of licensed ones that were not accessible. Rendering all actions taken thereafter legally invalid as they stemmed from unlawful orders in execution.” Bassen Decision at 2; Dailey Decision at 2; Davis Decision at 2; Endress Decision at 2; Merjil Decision at 2.

51. Each Army BCMR decision also states: “The Board found by a preponderance of the evidence that the Applicant’s separation from service solely on the basis of his refusal to take the COVID-19 vaccine was an injustice.” Bassen Decision at 5; Dailey Decision at 4; Davis Decision at 3; Endress Decision at 4; Merjil Decision at 4; Wynne Decision at 4.

52. **Navy/Marine Corps Board Decision (ECF 75).** The Springer Decision similarly conceded that only EUA products were available and that the mandate violated 10 USC § 1107a. The BCNR did not reject this factual claim, and the Board’s analysis proceeded on the basis that the mandate and its implementation constituted injustices.

53. The Springer BCNR decision acknowledged that the mandate of “a non-critical and unnecessary COVID-19 vaccine without an adequate due process mechanism

for vaccine accommodations was an injustice.” Springer Decision at 6 (citation omitted). The BCNR “therefore found an injustice in that [Springer] was involuntarily separated from the Navy solely for refusing the former COVID-19 vaccination mandate,” and “the Board also found an injustice in all adverse actions that followed from or contributed to the separation.” *Id.*

54. The BCNR denied Springer any relief because, notwithstanding the concession that no FDA-licensed vaccine was available and the finding that Springer had suffered an injustice, he did not request reinstatement: “Petitioner *negated* any credible claim that he may have had ... by electing not to seek reinstatement[.]” (emphasis added). *Id.* at 7.

55. The BCNR also denied relief based on Springer’s “entry-level separation” (i.e. because he had served less than 180 days before being unlawfully and involuntarily discharged). The BCNR reasoned that: (1) “there is nothing adverse about an uncharacterized separation,” *id.* at 8–9; (2) Springer “did not demonstrate how he was further harmed” because “[h]e was not deprived of any pay or allowance earned,” *id.* at 9; (3) constructive service credit “would provide a significant financial windfall by rewarding him for service not actually performed,” *id.*; and (4) Springer “excluded himself from the applicability of” Executive Order 14,184 by not requesting reinstatement, *id.*

#### **IV. REFERENCED STATUTES AND REGULATION**

##### **A. Monetary Relief under the Military Pay Act, 37 USC § 204**

The Military Pay Act, codified at 37 USC § 204, provides that members of the uniformed services are “entitled to the basic pay of the pay grade to which assigned or distributed.” This statute has long been recognized as a “money-mandating” provision sufficient to confer Tucker Act jurisdiction on the Court of Federal Claims. *See Holley v.*

*United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997); *Metz v. United States*, 466 F.3d 991, 997-99 (Fed. Cir. 2006). When a service member is wrongfully discharged or separated, this statutory right to pay persists, and this Court has jurisdiction to award backpay as monetary damages under 28 USC § 1491(a)(1).

**B. Boards for Correction of Military Records, 10 USC § 1552**

10 USC § 1552 authorizes the Secretary of each military department to correct military records through the military branch's respective BCMR (or BCNR for the Navy/Marine Corps). When records are corrected, service members may be entitled to backpay, allowances, and other monetary benefits incident to the correction.

**C. EUA Statutes, 10 USC § 1107a & 21 USC § 360bbb-3**

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 on the grounds of national security. 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, which was codified in contemporaneous DoD regulations that remain

in effect,<sup>24</sup> which is reflected in the DoD and Armed Services Mandates' requirement that "only" FDA-licensed vaccines be used for mandatory vaccination. *Supra* Facts ¶¶1-2.

**D. Religious Freedom Restoration Act, 42 USC § 2000bb-1, et seq.**

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).

The Department of Defense has implemented RFRA at DODI 1300.17. The Air Force has implemented RFRA in DAFI 52-501, "Religious Freedom in the Department of the Air Force" (June 23, 2021). *See also* 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. "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.

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<sup>24</sup> *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).

## 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. United States*, 72 Fed. Cl. 126, 131 (2006) (citing *Bannum v. United States*, 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. United States*, 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 non-movant’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. THIS COURT MUST APPLY *LOPER BRIGHT* STANDARD OF REVIEW.**

In *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Supreme Court overruled the longstanding *Chevron* deference doctrine that had governed judicial review of agency statutory interpretations for four decades. The Court held that the Administrative Procedure Act (“APA”), 5 USC § 706, “requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority.” *Loper Bright*, 603 U.S. at 392. The deferential arbitrary and capricious standard continues to apply where courts review agency findings of fact or policymaking discretion. *See id.* at 392-93; accord *Seven County Infrastructure Coalition v. Eagle County*, 605 U.S. 168, 181 (2025).

The Federal Circuit followed *Loper Bright* in applying a bifurcated standard of review: (1) the “independent judgment” standard for challenges to agency action as “not in accordance with law” or exceeding statutory authority; and (2) the deferential arbitrary and capricious standard for factual findings or policy judgments. *See Lesko v. United States*, 161 F.4th 1352, 1358-61 (Fed. Cir. 2025) (en banc); *Lashify, Inc. v. International Trade Comm’n*, 130 F.4th 948, 955-56 (Fed. Cir. 2025); accord *Solar Energy Industries Ass’n v. United States*, 111 F.4th 1349, 1357 (Fed. Cir. 2024) (“*SEIA*”).

Plaintiffs’ challenges to the Air Force and Navy/Marine Corps Boards’ determination that reinstatement is a pre-condition to relief under the Military Pay Act, 37 USC § 204, and 10 USC § 1552 are purely questions of statutory construction. As such, these challenges are subject to the non-deferential “independent judgment” standard where this Court must apply a *de novo* standard of review to identify “best reading” of these statutes. *See SEIA*, 111 F.4th at 1354 (applying *de novo* standard in reviewing

agency’s interpretation of governing statute).<sup>25</sup> These statutes do not delegate to the Boards or to the DoW the authority to impose extra-statutory pre-conditions or restrictions. Moreover, the Boards do not cite these statutes or any Congressional grant of discretion to justify the reinstatement or time-in-service requirements;<sup>26</sup> nor do the Boards purport to ground their decisions on any factual findings or policy judgments. Instead, the sole basis cited is a legal one, namely, the Reinstatement EO (and the DoW Guidance interpreting it), which does not and cannot impose these extra-statutory pre-conditions or requirements. *See infra* Section V. As set forth below in Sections IV and VI, the “best reading” of these statutes is that they do not impose any requirement for reinstatement or minimum time in service as a pre-condition to relief.

## **II. THIS COURT MUST GRANT PLAINTIFFS’ MJAR ON COUNT II.**

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. But no FDA-licensed vaccine was physically or legally available at any relevant time. *See id.* ¶¶8-11. Defendant has not produced any record in this proceeding that even suggests it had any FDA-licensed vaccine at any relevant time, notwithstanding this Court’s explicit invitation

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<sup>25</sup> While Plaintiffs’ claims allege violations of the Military Pay Act and other statutes, rather than the APA, this Court “reviews the decision of a Secretary acting through a Correction Board according to a standard borrowed from the [APA].” *Brooks v. United States*, 65 Fed. Cl. 135, 140 (2005)(citation omitted).

<sup>26</sup> Even if the Air Force and Navy/Marine Corps Boards had justified their decision on this ground (and they have not), such a novel assertion of statutory authority would be foreclosed by these agencies’ failure to assert such authority contemporaneously with the statutes’ enactment or during the 70+ years since enactment. *See, e.g., West Virginia v. EPA*, 597 U.S. 697, 725 (2022) (“just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.”)(citation omitted).

to produce such evidence in its May 2, 2024, MTD Decision.<sup>27</sup> Any question as to the (un)availability of FDA-licensed vaccines has now been put to rest by the Board decisions, which, echoing Secretary Hegseth's public comments, declared and admitted that the DoD and Armed Services' Mandates were predicated on the existence of a licensed vaccine that was not physically or legally available.

Plaintiffs were involuntarily discharged, had their orders curtailed or cancelled, and/or were denied pay or benefits for non-compliance with the Mandate where compliance was impossible due to the unavailability of any FDA-licensed vaccine. As in civilian law, military law recognizes impossibility as a defense to a charge of disobeying a lawful order.<sup>28</sup> 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. Each of the Board decisions acknowledged and did not dispute Plaintiffs' claims that no FDA-licensed vaccine was available, and that each Plaintiff had suffered injustices as a result. *See supra* Facts ¶¶46-49 (Air Force), ¶¶50-51 (Army), ¶¶52-54 (Navy). 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

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<sup>27</sup> *See* ECF 32 at 11 (“The plaintiffs claim that complying with the Mandate was impossible because “[n]o FDA-licensed COVID-19 vaccines were available at all at the time that the August 24, 2021, Mandate was issued[.]” ... These allegations warrant further discovery to understand the circumstances surrounding the military's implementation of the Mandate with respect to each plaintiff and to determine whether, in implementing and enforcing the Mandate, the military adhered to its requirement that only FDA-licensed vaccines be utilized.”)(quoting FAC ¶ 207).

<sup>28</sup> *See, e.g., 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).

of compliance with the Vaccination Orders, the Court must grant Plaintiffs' MJAR and/or motion for summary judgment on Plaintiffs' Count II.

### **III. THIS COURT MUST GRANT PLAINTIFFS' MJAR ON COUNT III.**

The Air Force denied the RARs and appeal submitted by Chisholm, Hall, and Rodriguez using the Air Force's standard denial letter template. *See supra* Facts ¶23. These requests and appeals were denied despite Chaplain approval of each one and the fact that Chisholm and Rodriguez's commanders had recommended approval. *See id.* ¶24. The Marine Corps similarly denied Springer's RAR with a form letter denial. *See id.* ¶25.

The Reinstatement EO, DoW Guidance, and the Board Decisions uniformly found that each of the respective military branch's RAR process violated RFRA, was unjust and unlawful, and thus constituted an "error or injustice." *See supra* Facts ¶¶43-54.<sup>29</sup> Accordingly, this Court must grant Plaintiffs' Count III.

### **IV. DEFENDANT'S POSITION THAT REINSTATEMENT IS A PRE-CONDITION TO RELIEF IS NOT IN ACCORDANCE WITH LAW.**

#### **A. The Governing Statutes Do Not Require or Authorize Defendant to Require Reinstatement as a Pre-Condition to Relief.**

Defendant denied all relief to Plaintiffs Hall, Rodriguez, and Springer solely because they did not seek reinstatement, and despite findings that: there was no FDA-licensed vaccine available; that they each suffered an injustice from the denial of their RARs; and that they each suffered further injustice from being separated solely due to their non-compliance with the mandate to take an unlicensed vaccine. *See supra* Facts

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<sup>29</sup> Multiple district courts found that the Air Force, Navy and Marine Corps RAR processes likely violated RFRA and issued nation-wide injunctions on that ground prior to the rescission of the mandate in 2023. *See, e.g., Doster v. Kendall*, 2022 WL 2974733 (S.D. Ohio July 27, 2022), *aff'd* 54 F.4th 398 (6th Cir. 2022) (Air Force); *Navy SEALs 1-26 v. Austin*, 578 F. Supp. 3d 822 (N.D. Tex. 2022), *aff'd*, 27 F.4th 336 (5th Cir. 2022) (Navy); *Col. Fin. Mgmt. Officer v. Austin*, 622 F. Supp. 3d 1187 (M.D. Fla. 2022) (Marine Corps).

¶¶46-49 (Hall and Rodriguez) & ¶¶52-54 (Springer).

It is well-established that the Military Pay Act, 37 USC § 204, grants “an enlisted serviceman who has been improperly discharged [the] entitle[ment] to recover pay and allowances ... to the date on which his term of enlistment would otherwise have expired had he not been so discharged.” *Dodson v. United States*, 988 F.2d 1199, 1208 (Fed. Cir. 1993). Similarly, under 10 USC § 1552, the Boards have a “statutory mandate to correct records when ‘necessary to correct an error or injustice.’” *Kelly v. United States*, 69 F.4th 887, 899 (Fed. Cir. 2023) (quoting 10 USC § 1552)).

The governing statutes—37 USC § 204 and 10 USC § 1552—do not require reinstatement or reenlistment as a pre-condition to granting monetary relief or records correction for unlawful discharges.<sup>30</sup> This Court must reject Defendant’s attempt to “read in specific requirements that find no support in the statute.” *Mosaic Co. v. United States*, 160 F.4th 1340, 1349 (Fed. Cir. 2025), or “attribute limitations” to the governing statutes “not found there.” *Lashify*, 130 F.4th at 959. Accordingly, this Court must apply the *Loper Bright* “independent judgment” standard and find that the challenged Board decisions are not in accordance with law because “statutory silence” on this issue (reinstatement as a pre-condition to relief) precludes the government from applying a “narrowing limitation” that “the statute does not contain.” *SEIA*, 111 F.4th at 1353.

**B. The Government’s Position Is Contrary to Core Federal Circuit Doctrines Applying the Military Pay Act and 10 USC § 1552.**

Plaintiffs’ counsel has not identified any case where this Court or Federal Circuit have held that reinstatement is a pre-condition to monetary relief under the constructive

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<sup>30</sup> Nor do the challenged Board decisions cite or rely on these statutes in denying relief to Plaintiffs. Instead, these decisions cite the Reinstatement EO, which does not prohibit relief to those not seeking reinstatement, *see infra* Section V.

service doctrine. In fact, this appears to be the first time in the long history of the Military Pay Act that the government has ever tried to do so. The sole authority cited in the challenged Board decisions is the Reinstatement EO.

Instead, this Court and Federal Circuit have consistently awarded monetary relief and ordered records correction without requiring reinstatement as a pre-condition to such relief.<sup>31</sup> This result follows ineluctably from core Federal Circuit doctrines applying the Military Pay Act and 10 USC § 1552, the constructive service doctrine, and its corollaries and limitations like the “no right to reenlist” articulated in *Dodson*.<sup>32</sup>

In *Dodson*, the Federal Circuit addressed a service member’s claim that he was improperly discharged and barred from reenlistment due to an error by the Army. The Federal Circuit held that “courts cannot order the military to reenlist a service member” because “[t]hat decision is properly for the [military], not the court.” *Dodson*, 988 F.2d at 1204. *Dodson*’s holding cuts both ways. While courts cannot order reenlistment, the logical corollary is that the government likewise cannot require reenlistment as a pre-

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<sup>31</sup> Under the Tucker Act, this Court is a court of limited jurisdiction. It may award monetary damages like back pay, but generally may not grant equitable relief such as reinstatement, injunctions, or specific performance. *See* 28 USC § 1491(a)(2) (permitting equitable relief only as “incident of and collateral to” a monetary judgment). The Federal Circuit has recognized an important corollary to this doctrine: the Court of Federal Claims’ inability to order equitable relief does not diminish its authority to award monetary damages. Thus, even when a court cannot order reenlistment or reinstatement, it retains full authority to award backpay.

<sup>32</sup> 10 USC § 1552(d) limits continued pay to one year *after* correction unless the member reenlists. This provision creates a statutory framework in which reenlistment extends—but is not a prerequisite to—monetary relief. A member who does not reenlist is still entitled to backpay for the period of wrongful discharge up to the correction date, plus one additional year (potentially). Reenlistment *extends* the period of continued pay beyond that one-year window, but does not function as a *condition precedent* to the initial backpay award. Section 1552(d) thus governs the scope of *administrative* relief available through records correction; it does not limit the *judicial* relief available in this Court.

condition to judicial relief. If this Court lacks authority to order reenlistment, then conditioning a monetary award on reenlistment would effectively delegate a judicial function to the military's discretionary personnel decisions. The Federal Circuit has not endorsed such a framework.

In *Barnick v. United States*, 591 F.3d 1372 (Fed. Cir. 2010), the Federal Circuit addressed whether a wrongfully discharged service member's constructive service extends beyond the original enlistment term. The court held that constructive service "places the service member in the position he or she would have occupied but for the wrongful discharge." *Barnick*, 591 F.3d at 1380. Critically, the court applied a "but for" causation test: if the member would have reenlisted but for the wrongful action, constructive service may extend beyond the original term.<sup>33</sup>

The Federal Circuit most recently applied the constructive service doctrine in *Tippins v. United States*, 93 F.4th 1370 (Fed. Cir. 2024).<sup>34</sup> The court calculated backpay

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<sup>33</sup> See also *Thomas v. United States*, 42 Fed. Cl. 449, 456 (1998) (this Court "lacks authority to order reenlistment beyond the enlistment term" and that constructive service generally extends only through the original term absent evidence that the member would have reenlisted."). The *Barnick* and *Thomas* courts thus distinguished between: (1) the evidentiary question of whether the member would have reenlisted (relevant to the duration of the award); and (2) the jurisdictional question of whether this Court can award backpay at all. This evidentiary requirement is distinct from a government-imposed pre-condition. The court does not require the member to *actually* reenlist as a condition of relief; instead, it considers whether reenlistment would have occurred hypothetically. If the service member can meet this evidentiary burden, then he is entitled to backpay for the period of wrongful discharge through the end of the enlistment term—and his reenlistment term—as a matter of statutory right.

<sup>34</sup> In this class action, several senior enlisted Coast Guard members challenged their involuntary retirement through Career Retention Screening Panels ("CRSPs"). The Court of Federal Claims determined that the CRSPs were unlawfully convened because they were not part of a legitimate "reduction in force" as required by statute. The Federal Circuit affirmed, holding that the wrongfully separated plaintiffs were entitled to constructive service credit. *Tippins*, 93 F.4th at 1378. The court stated that "[t]he starting

based on what each plaintiff would have earned under their service obligations—including High Year Tenure limits for their respective pay grades—without requiring any plaintiff to reenlist or be reinstated as a pre-condition. The court treated reenlistment eligibility as a factor in the “but for” calculation, not as a pre-condition to the award.

It should go without saying that the President has no authority to condition a servicemember’s statutory entitlement to backpay on reenlistment.<sup>35</sup> Nor can the President unilaterally require this Court to do so in contravention of the governing statutes and controlling Federal Circuit precedent.

**C. These Board Decisions Would Strip this Court of Jurisdiction Where the Service Member Does Not Agree to Reinstatement.**

A related line of cases addresses whether the voluntariness of a discharge is a jurisdictional prerequisite or a question on the merits. In *Metz v. United States*, the Federal Circuit overturned the previous doctrine and held that the voluntariness of a discharge is *not* a jurisdictional question but rather a question on the merits. The *Metz* court reasoned that, because 37 USC § 204 establishes a right to pay that is sufficient for Tucker Act jurisdiction, the question of whether the discharge was wrongful (including whether it was voluntary) goes to the merits of the claim, which is a 12(b)(6) issue, rather than to the court’s subject-matter jurisdiction, which is a 12(b)(1) issue. 466 F.3d 991, 998-99 (Fed. Cir. 2006). By moving voluntariness from jurisdiction to the merits, the

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point for calculating entitlements is to place plaintiffs in the position they would have occupied absent the illegal separation.” *Id.*

<sup>35</sup> Rather pointedly, seemingly anticipating this, the May 7 Guidance goes out of its way to disclaim that the President’s EO did any such thing. See May 7 Guidance (“This guidance is not intended to interfere with or impede the BCM/NRs’ statutory independence, nor does it limit the Boards from considering additional claims related to harms caused by the Department’s previous COVID-19 vaccine mandate and providing appropriate remedies.”)(emphasis added).

Federal Circuit foreclosed the argument that a service member's refusal to reenlist or accept reinstatement could be characterized as a "voluntary" separation that strips the court of jurisdiction. Once this Court has identified 37 USC § 204 as the money-mandating statute, *see* ECF 32, May 2, 2024, MTD Order, at 9-10, this Court has jurisdiction regardless of whether the member has reenlisted or agreed to reinstatement.

The Court of Federal Claims has independent jurisdiction to award monetary relief incident to records correction. When the BCMR corrects records but denies full (or any) monetary relief, this Court retains authority to determine and award the correct amount of backpay owed. *See, e.g., Voge v. United States*, 844 F.2d 776, 780 (Fed. Cir. 1988) (affirming an award of backpay based on what the member was owed under the records corrections required by the BCNR, without conditioning award on reenlistment or reinstatement); *McCord v. United States*, 943 F.3d 1354, 1359 (Fed. Cir. 2019) (calculating disability retirement backpay based on corrected entitlement without conditioning recovery on reenlistment).

**D. The Board Decisions Are Contrary to Federal Circuit Decisions on Tucker Act Statute of Limitations and Claims Accrual.**

The Tucker Act imposes a six-year statute of limitations on claims against the United States. 28 USC § 2501. Military pay claims generally accrue on the date of discharge, and filing an application with the BCMR does not toll the statute of limitations. *See Martinez v. United States*, 333 F.3d 1295, 1303-06 (Fed. Cir. 2003) (en banc); *accord Bias v. United States*, 722 Fed. Appx. 1009, 1012 (Fed. Cir. 2018). If the government could require a member to complete BCMR proceedings and accept reenlistment before filing suit, the six-year limitations period might expire before the member could file their claim. The *Martinez* framework thus reinforces the principle that this Court's jurisdiction is

independent of administrative processes and conditions.

**E. Any Defense Government Counsel May Raise Is Necessarily *Post Hoc* Rationalization That May Not Be Given Deference.**

Finally, Defendant's defense of the Air Force and Navy/Marine Corps Boards' decision to deny relief to those not seeking reinstatement must be limited to the rationale articulated by the Board in the Board decisions. And that rationale is the bare assertion that the Board may grant relief only to those seeking reinstatement, and must deny relief to those who do not, without citing any governing statute, military regulation, case law, or even Board precedent. Any arguments or assertions that government counsel may make beyond that are necessarily *post hoc* rationalizations by agency counsel to which no deference is due. This Court cannot "accept appellate counsel's *post hoc* rationalizations for agency action," *Power Integrations, Inc. v. Lee*, 797 F.3d 1318, 1326 (Fed. Cir. 2015) (citation omitted). Nor may it "supply a reasoned justification for an agency decision that the agency itself has not given," *Power Integrations*, 797 F.3d at 1326 (citation omitted).

**V. DEFENDANT'S POSITION THAT REINSTATEMENT IS A PRE-CONDITION TO RELIEF IS ARBITRARY AND CAPRICIOUS.**

The Air Force BCMR and the BCNR decisions imposing reinstatement as a pre-condition to relief are arbitrary and capricious for the same reasons that they are contrary to law, namely, because there is no statutory basis for imposing such a pre-condition and the position is contradicted by long-standing and well-established Federal Circuit precedent applying the governing statutes. Moreover, these Board decisions are arbitrary and capricious for the following additional reasons.

**First**, the President has no lawful authority to shrink the Board's mandate or any service members' entitlement to relief under 10 USC § 1552. Even if the President had such authority, neither the Reinstatement EO, nor DoW Guidance prohibit the Boards

from awarding backpay to those not seeking reinstatement. *See* May 7 Guidance at 2 (“This guidance is not intended to interfere with or impede the BCM/NRs’ statutory independence, nor does it limit the Boards from considering additional claims related to harms caused by the Department’s previous COVID-19 vaccine mandate and providing appropriate remedies.”). This conclusion applies *a fortiori* to any claim that the Reinstatement EO limits this Court’s authority to award monetary relief.

**Second**, each of the challenged Air Force and Navy/Marine Corps Board decisions found that the Plaintiff (*i.e.*, Hall, Rodriguez, and Springer) suffered an injustice on multiple grounds, yet each decision denied these Plaintiffs any relief for the error or injustice suffered solely because they did not request reinstatement. *See supra* Facts ¶¶47-49 (Air Force BCMR Decisions) & ¶¶53-54 (BCNR Decision). Denying relief relying solely on “factors which Congress has not intended it to consider” is arbitrary and capricious. *Kelly*, 69 F.4th at 895-96 (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Moreover, the Boards’ refusal to provide any relief after finding an error or injustice “violat[es] its statutory mandate to correct records when ‘necessary to correct an error or injustice.’” *Kelly* at 899 (quoting 10 USC § 1552)).

**Third**, the Army Board awarded monetary relief and records correction to four of the six Army Plaintiffs who did not request reinstatement (*i.e.*, Bassen, Dailey, Merjil, and Wynne). *See supra* Facts ¶¶50-51. In a related case, the Coast Guard awarded plaintiffs monetary relief on remand, without requiring reinstatement as a precondition to relief. *See Harkins v. United States*, No. 1:23-cv-1238, Defendant’s Status Report, ECF 71 (July 18, 2025) (granting relief to plaintiffs Harkins and Powers who did not return to service.) The Army Board and the Coast Guard decisions were governed by the same statutes, EO, and DoW Guidance as the Air Force BCMR and the BCNR, and they all found that the

Petitioner service members suffered an injustice based on the same military-wide mandate and policies. Yet the Air Force BCMR and BCNR reached the opposite conclusion as the Army BCMR and Coast Guard, denying all relief for the same injustice. These Board decisions are arbitrary and capricious not only because they ignore Boards' statutory mandate to provide relief for an injustice, *see Kelly*, 69 F.4th at 899, but also because they interjected, without explanation, a heretofore unknown pre-condition (reinstatement) to relief. *See Stahl v. United States*, 178 Fed. Cl. 500, 516-18 (2025).

**Fourth**, the reinstatement requirement creates discriminatory results. These Board decisions limit relief to one subset of petitioners—those willing and (physically) able to reenlist—who are deemed to have suffered an injustice meriting monetary relief. But they would deny, without any justification, monetary relief to the majority of those harmed who are either disabled by their original service, like Plaintiff Bassen, or either unwilling or unable to return because of the birth of children, necessity to work, etc. like Plaintiff Springer and many others. Denying relief, without justification and based on “factors which Congress has not intended it to consider” is arbitrary and capricious. *Kelly*, 69 F.4th at 895-96.

**VI. THE BCNR'S DENIAL OF RELIEF FOR ENTRY-LEVEL SEPARATIONS IS CONTRARY TO LAW AND ARBITRARY AND CAPRICIOUS.**

On remand from this Court, the BCNR found that Springer's separation constituted an “injustice” because he “was involuntarily separated from the Marine Corps solely for refusing the former COVID-19 vaccination mandate,” ECF No. 75 at 8, and further found “an injustice in all adverse actions that followed from or contributed to that separation.” *Id.* Despite these findings, the Board denied Springer's requests for

constructive service credit and backpay.<sup>36</sup>

**A. There Is No Statutory Minimum Time in Service for Relief.**

The Board’s authority to correct military records derives from 10 USC § 1552(a)(1), which provides that the Secretary of a military department, acting through a board of civilians, “may correct any military record of the Secretary’s department when the Secretary considers it necessary to correct an error or remove an injustice.” This language is unqualified. It does not limit relief based on length of service, discharge characterization, or whether the separation was classified as “entry-level.” Similarly, the Military Pay Act, 37 USC § 204, entitles members of the uniformed services to pay for periods of service. Nothing in § 204 limits this entitlement based on time in service.<sup>37</sup>

Where a service member is wrongfully separated, the constructive service doctrine provides that the member is entitled to backpay for the period of constructive service. *See Dodson* at 1204. This Court does not condition this entitlement on the length of the plaintiff’s service or discharge characterization because the right to backpay flows from the wrongfulness of the separation, not from the duration of service preceding it. Where, as here, the Board determines that a basis for separation was improper, the Board must

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<sup>36</sup> The Board reasoned that: (1) “there is nothing adverse about an uncharacterized separation,” *id.* at 8–9; (2) Springer “did not demonstrate how he was further harmed” because “[h]e was not deprived of any pay or allowance earned,” *id.* at 9; (3) constructive service credit “would provide a significant financial windfall by rewarding him for service not actually performed,” *id.*; and (4) Springer “excluded himself from the applicability of” Executive Order 14184 by not requesting reinstatement. *Id.*

<sup>37</sup> Nor do the applicable military regulations condition relief based on length of service. DoD regulations governing entry-level separations, including DODI 1332.14, define the term for purposes of discharge characterization—not for purposes of limiting the remedial authority of Boards under § 1552. An “uncharacterized” discharge is an administrative classification reflecting that the member did not serve long enough for the quality of service to be assessed. It is not, and has never been construed as, a statutory bar to corrective relief where the separation itself was unlawful.

“reassess the member’s record as if the wrongful conduct or action had never occurred.” *Kelly* at 895. The Board may not simply remove the offending basis and then uphold the separation on other grounds that were not actually relied upon at the time. The Board cannot find that Springer’s separation was an injustice, then rely on his entry-level status—a status that would not exist but for the wrongful separation itself—as a basis for denying relief. If the separation was unjust, then the entry-level classification that flowed from it is equally tainted. Such a result was “arbitrary and capricious” because “[i]f the Board finds an error or injustice, it necessarily follows that some corrective action is warranted.” *Haselwander v. McHugh*, 774 F.3d 990, 996 (D.C. Cir. 2014).

**B. The BCNR Decision Defeats the Remedial Purpose of the Governing Statutes and Allows the Government to Use its Own Illegal Conduct as a Shield from Financial Liability.**

Section 204 and Section 1552 are remedial statutes. Remedial statutes must be “construed broadly to effectuate [their] purposes,” and exceptions to such statutes must be construed narrowly. *See Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987). The Board’s attempt to read into these statutes an entry-level exception finds no support in the statutory language or judicial precedent.<sup>38</sup> It is also contrary to the remedial purposes of the 2023 NDAA, the Reinstatement EO, and DoW Guidance.<sup>39</sup> The DoW Guidance has reduced or eliminated the evidentiary burden for service members

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<sup>38</sup> The principle that entry-level status does not immunize the Government from accountability for unlawful conduct is well established in analogous contexts. *See, e.g., Elgin v. Department of Treasury*, 567 U.S. 1 (2012) (recognizing remedial rights of employees regardless of tenure in context of constitutional challenges to removal).

<sup>39</sup> *See* Reinstatement EO, § 1 (“redress of any wrongful dismissals is overdue.”); December 6 Directive at 1 (“the onus is on us to make this right.”); December 10 Guidance at 1 (“it is time for the Department to take proactive steps to correct these injustices”).

seeking relief from these admittedly unjust and unlawful policies.<sup>40</sup> The Reinstatement EO and DoW Guidance, in effect, require the Boards and this Court to give “liberal consideration” for COVID-19 Mandate-related claims, like that accorded to PTSD claims, by giving service members the benefit of the doubt and resolving any uncertainty in their favor. *See, e.g., Doyon v. United States*, 58 F.4th 1235, 1243-44 (Fed. Cir. 2023).

The rationale applies with particular force here. The COVID-19 Mandate was rescinded by Congress in the 2023 NDAA; declared an “unfair, overbroad, and completely unnecessary burden” in the Reinstatement EO; and it has been found to be an injustice by the DoW Guidance and every Board decision at issue here. Under these circumstances, liberal consideration requires that Boards resolve doubts about the appropriate scope of relief in the service member’s favor, rather than using entry-level status to deny relief and shield the government from all liability.

The Springer Decision acknowledges that the Marine Corps unjustly separated Springer, but then it uses the very brevity of service caused by that unjust separation as a reason to deny him meaningful relief. This is circular reasoning that rewards the Government for acting quickly to discharge a service member before that member accumulates sufficient service time to be classified as anything other than “entry-level.” Thus, under the BCNR’s reasoning, the military could engage in any form of unlawful conduct (*e.g.*, racial, sexual, or religious discrimination) or other abuse of recruits and

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<sup>40</sup> The December 10 Guidance articulates objective criteria that establish an irrebuttable presumption for a service member’s entitlement to relief for those who were involuntarily separated with a general discharge. *See* December 10 Guidance at 1-2. Further, with respect to the evidentiary burden for showing causation, any service member whose separation documents, GOMOR, or LOR references non-compliance with the mandate will be “considered to have been ‘solely’ separated due to refusal to be vaccinated”, *id.* at 2 n.1, with an unlicensed vaccine.

escape all financial accountability simply by separating the service member within 180 days. This perverse incentive structure cannot be reconciled with the remedial purposes of the governing statutes, the 2023 NDAA, the Reinstatement EO, or DoW Guidance.

**C. Defendant’s “Financial Windfall” Argument Is Contrary to Law.**

The BCNR also denied constructive service credit because it would provide a “significant financial windfall by rewarding [Springer] for service not actually performed.” ECF 75 at 9. This characterization fundamentally misunderstands the constructive service doctrine. As the Federal Circuit has repeatedly held, constructive service credit is not a “windfall”—it is the standard remedy for wrongful separation. *See Dodson* at 1204. The purpose of constructive service credit is to place the service member in the position the member would have occupied but for the wrongful separation. *See Barnick* at 1380. Every wrongfully separated service member receives pay for “service not actually performed.” To characterize it as a windfall in the entry-level context but not in other contexts is to apply an impermissible double standard. Indeed, the Board’s own finding of injustice is itself the determination that the service would have been performed, but for the Government’s wrongful conduct. Having made that determination, the Board cannot then turn around and characterize the resulting remedy as undeserved.

**VII. ADDITIONAL RELIEF REQUESTED FROM COURT OR ON REMAND**

Plaintiffs respectfully request that this Court award the following relief in its order granting Plaintiffs’ MJAR. Alternatively, if the Court orders a further round of remands, Plaintiffs request that that Court order the Boards to award such relief on remand.

**A. Army BCMR Decision to Promote Merjil Two Ranks and Deny Any Relief to Wynne Is Arbitrary and Capricious.**

Plaintiffs Merjil and Wynne were both (relatively speaking) junior enlisted soldiers who enlisted exactly 9 months apart, in the exact same MOS as infantryman (11B), with similar times of service. *See, e.g.*, ECF 43-1, Table of Harms (for direct comparison); see also AR 1924 (Wynne DD-214), *cf* AR 1700 (Merjil DD-214). Both received identical discharges (General) within a few weeks of one another leaving roughly 3 years on their respective enlistments. *Id.*

By way of relief, however, the Army BCMR gave SPC Merjil, now Reinstated, a two-grade promotion for the period of his constructive service, from SPC to SSG. ECF 84, Merjil Decision at 6. By contrast, PFC Wynne, who cannot reinstate because of his injuries and disability, remains an E-3 during a period of almost three years of constructive service. *See* ECF 85, Wynne Decision at 6.

The Army BCMR has an obligation to follow its own rules, regulations, and precedents.

It is axiomatic that an agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so. Indeed, a fundamental norm of administrative procedure requires an agency to treat like cases alike, and an agency must provide an adequate explanation to justify treating similarly situated parties differently. This is not to say that the broad discretion afforded to the ABCMR, as discussed above, does not also grant it significant flexibility in judging the respective merits of each application for review. Nonetheless, like a court, normally, an agency must adhere to its precedents in adjudicating cases before it.

*Wilhelmus v. Geren*, 796 F. Supp. 2d 157, 162 (D.D.C. 2011)(internal citations omitted)

The Secretary of the Army has both the discretion and authority to grant Petitioner the rank for the constructive service he served, as was done for Plaintiff Merjil. Wynne's

record sits virtually indistinguishable, and to the extent the Army Board is doing *sub rosa* what the Air Force and Navy Boards have done explicitly: discriminated in favor of those who Reinstated, and against those who do not, for the same reasons as noted above, that decision cannot stand. Wynne should be granted at least the rank of SPC for his constructive service.

**B. Rodriguez Must Receive Involuntary Separation Pay Because His Separation Was Involuntary and Was Not Due to Misconduct.**

In the underlying illegal actions Plaintiffs challenged in the FAC, each of the Services categorically denied involuntary separation pay pursuant to 10 USC § 1174 to otherwise eligible service members by discharging them for misconduct. *See* DODI 1332.29 “Involuntary Separation Pay (Non-Disability)”, ¶3.4(f)(1) (Mar. 3, 2017) (service members separated for misconduct ineligible). In the first round of MJAR briefing, the government argued that Rodriguez was “ineligible for involuntary separation pay for [the] additional reason” that he “voluntarily separated when he withdrew from the protections afforded Air Force members by the *Doster* injunction.” ECF 50 at 24.

In the Rodriguez Decision, the Air Force Board foreclosed both of these arguments. First, the Board removed the misconduct characterization (and associated corrections to his DD-214 to reflect fully honorable service), *see* Rodriguez Decision at 10, Recommendation (c), eliminates the sole basis (under DODI 1332.29 ¶3.4(f)(1)) for denying Rodriguez involuntary separation pay. With a corrected honorable discharge and more than ten years of active service, Rodriguez satisfies the statutory criteria for eligibility. Second, the Air Force Board found that Rodriguez’s involuntary separation was an injustice and ordered that “[a]ll records associated with his involuntary discharge be corrected.” *See id.* at 9, Recommendation (b). This second finding eliminates the

government's alternate ground for denying Rodriguez this relief in its previous MJAR.<sup>41</sup>

In light of the Air Force Board's findings, this Court must find that Rodriguez and any other Plaintiffs or putative plaintiffs who meet the statutory criteria set forth in 10 USC § 1174 are entitled to involuntary separation pay. In its May 2, 2024, MTD Decision, the Court analyzed *Collins v. United States*, 101 Fed. Cl. 435 (2011), which found that 10 USC § 1174 is a money-mandating statute that confers enforceable entitlements on eligible service members.<sup>42</sup> The *Collins* court's analysis is directly applicable here. Like the DADT separations at issue in *Collins*, the COVID-19 vaccine mandate separations involved a policy that has since been rescinded by Congress (2023 NDAA § 525) and declared an injustice by executive action (Reinstatement EO and DoW Guidance). Service members who were separated for refusing an unlawful order and who meet the statutory criteria of § 1174 are entitled to separation pay for the same reasons as the plaintiff in *Collins*.

This conclusion is supported by Judge Bonilla's decision in a related case where he

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<sup>41</sup> The Air Force Board did not address separation pay, but the only other possible basis for denial is that Rodriguez has not sought reinstatement. The imposition of reinstatement as a pre-condition to relief under 10 USC § 1174 is contrary to law and arbitrary and capricious for the same reasons as it is for barring constructive service and backpay under 37 USC § 204 and 10 USC § 1552.

<sup>42</sup> This Court discussed § 1174 at length in evaluating whether § 525 of the 2023 NDAA was money-mandating. The Court's analysis followed that in *Collins*, in which a former Army sergeant who was discharged under the "Don't Ask, Don't Tell" ("DADT") policy for homosexual conduct. After Congress repealed DADT through the 2011 NDAA, Collins sought involuntary separation pay on the theory that his discharge was improper. In *Collins*, the Court found § 1174 to be money-mandating because the statute "stated that qualified personnel were 'entitled' to payment," provided "clear payment standards," "identified three precise payment amounts," and "compelled payment in certain situations despite the Secretary of Defense's discretionary authority to withhold payment." ECF 32 at 5 (citing *Collins*, 101 Fed. Cl. at 449, 458–59). While the Court found § 525 distinguishable from the NDAA at issue in *Collins*, the Court's discussion confirms that § 1174 itself is a money-mandating statute that confers enforceable entitlements on eligible service members.

conditionally granted Coast Guard members' MJAR based, in part, on his finding that the Coast Guard had "abdicated its statutory duty" under § 1174 with respect to the involuntarily separated Coast Guard plaintiffs. *Harkins v. United States*, 174 Fed. Cl. 592, 612 (2025) (citing *Collins*, 101 Fed. Cl. at 444). The *Collins* and *Harkins* holdings establish that the statutory obligation to either award or affirmatively deny separation pay is not discretionary; the Service cannot deny separation pay to otherwise eligible service members by simply failing to act. Since Rodriguez's misconduct characterization has been found to be unlawful—and removed entirely from his corrected DD-214s and other military records—the sole ground for disqualification falls away. Accordingly, 10 USC § 1174 along with the military's own regulations require payment to Rodriguez because he was involuntarily separated with an honorable discharge.

### **CONCLUSION**

The Air Force BCMR and the BCNR decisions are contrary to law and arbitrary and capricious insofar as they categorically deny relief to Plaintiffs Hall, Rodriguez, and Springer solely based on pre-conditions to, and restrictions of, relief under the Military Pay Act, 37 USC § 204, and 10 USC § 1552—reinstatement and minimum time-in-service requirements—that have no basis in the statutory text; are contrary to long-standing and well-established Federal Circuit doctrines applying these statutes; and are not required by the Reinstatement EO, the sole legal basis cited by the Boards. Plaintiffs therefore request that this Court award Plaintiffs Hall, Rodriguez, and Springer the constructive service, backpay, and other monetary relief requested in their respective Board petitions, consistent with the relief awarded by the Army Boards, or order the Boards to do so on remand. In addition, Plaintiffs request that this Court award, or order the respective Boards to award on remand, Plaintiff Rodriguez involuntary separation pay under 10 USC

§ 1174 and grant Plaintiff Wynne promotion at least to E-4 that was granted to other identically situated Army Plaintiff Merjil.

Dated: March 9, 2026

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that on this 9th day of March 2026, the foregoing document was e-filed using the CM/ECF system.

*/s/ Dale Saran*