No. 23-211C
(Judge Dietz)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NICK BASSEN, et al.,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD AND CROSS-MOTION TO DISMISS AND FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NICK BASSEN, et al.,	)	
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Plaintiffs,	)	
	)	No. 23-211
v.	)	(Judge Dietz)
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD AND CROSS-MOTION TO DISMISS AND FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

Pursuant to Rules 12(b)(1) and 52.1 of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully requests that the Court deny plaintiffs' motion for judgment on the administrative record, or in the alternative, motion for summary judgment, and grant our cross-motion, instead. In support of this motion, we rely upon the following brief and the administrative record (AR).[1]

INTRODUCTION

Plaintiffs are a group of six former active-duty service members and four Reserve service members from the Army, Air Force, and Marine Corps. The active-duty service members were discharged for their failure to comply with the COVID-19 vaccine mandate issued by the Secretary of Defense, and some of the Reserve members were removed from active-duty mobilization orders after they failed to comply. After the Department of Defense rescinded its vaccination requirement in January 2023 pursuant to Congress's instruction in the Fiscal Year

[1] As we explained when we filed the AR, the AR consists of five sets of documents, each with separate paginations: (1) personnel documents from the Department of the Air Force (AF AR); (2) personnel documents from the Department of the Army (Army AR); (3) operational documents from the Army (Army OP AR); (4) personnel documents from the Department of the Navy (Navy AR); and (5) operational documents from the Department of Defense (DoD AR).

2023 National Defense Authorization Act (NDAA), the Army, Air Force, and Marine Corps likewise rescinded their COVID-19 vaccination requirements. Plaintiffs filed this class-action complaint alleging that their discharges violated the NDAA, 10 U.S.C. § 1107a, and the Religious Freedom Restoration Act (RFRA), and seek backpay and other monetary relief for the alleged adverse actions. After the Court's ruling on our motion to dismiss, only the 10 U.S.C. § 1107a claims, and the RFRA claims for three Air Force plaintiffs – Rodriguez, Chisholm, and Hall – survive. As explained below, the services properly discharged or removed each plaintiff from the service or from active-duty orders, and judgment should be entered in favor of the United States.

QUESTIONS PRESENTED

1. Whether the Court should apply RCFC 52.1 or RCFC 56 in evaluating the plaintiffs' military pay claims alleging that they were improperly discharged.

2. Whether plaintiffs' claims for wrongful discharge under 10 U.S.C. § 1107a (a statute setting forth certain conditions for emergency use products) fails when the Department of Defense and the services provided all protections afforded under the statute and otherwise relied on guidance from the Food and Drug Administration (FDA) in applying its vaccination requirement.

3. Whether plaintiffs' claims for wrongful discharge under RFRA fail when the Air Force properly determined that enforcing the vaccination requirement was the least restrictive means of furthering the compelling Government interest in military readiness.

4. Whether plaintiffs' newly raised claims regarding procedural flaws in their discharges are waived, or if not, are unsupported by the record.

STATEMENT OF THE CASE

I. The Secretary Of Defense's Rescinded COVID-19 Vaccination Requirement

On August 24, 2021, the Secretary of Defense directed the Secretaries of the Military Departments to ensure that all members of the Armed Forces were fully vaccinated against COVID-19. DoD AR 5-6. This instruction came one day after the FDA announced the approval of the Pfizer vaccine. FDA, *News Release—FDA Approves First COVID-19 Vaccine* (Aug. 23, 2021), https://perma.cc/C4DD-PWE5.

Consistent with DoD policy, the Departments of the Army, the Air Force, and the Navy, to include the Marine Corps, required that all servicemembers receive the COVID-19 vaccine unless they were granted an exemption or accommodation. *See* Army OP AR 21; AF AR S1_57; Navy AR 101-14. At the time the services implemented their policies, 36 members of the services and 17 military dependents had already lost their lives to COVID-19. DoD AR 7. Only 57 percent of all servicemembers were vaccinated. DoD AR 7.

Consistent with existing law and policies, the services permitted members to seek medical, religious, and/or administrative exemptions from the vaccination requirement based on their individual circumstances. *See* Army OP AR 24-25; AF AR S1_57; Navy AR 101-14. Further, the military services' vaccination policies reiterated DoD's requirement for fully licensed vaccines, stating that only an FDA-licensed vaccine was mandated. *See* Army OP AR 22; Navy AR 101-15; ECF No. 1-4 at 11 (setting forth Air Force policy). Likewise, the policies did not require service members to receive a COVID-19 vaccine from military medical personnel or treatment facilities only, but rather allowed them to use any medical service provider. *See* Army OP AR 22; Navy AR 101-07; ECF No. 1-4 at 2-20. Indeed, the Department of Defense

policy stated that service members voluntarily immunized with approved vaccines in appropriate doses even prior to the vaccine mandate "are considered fully vaccinated." DoD AR 5.

On December 23, 2022, the President signed into law the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023. Pub. L. No. 117-263, § 525, 136 Stat. 2395, 2571–72 (2022). Section 525 of the NDAA directed the Secretary of Defense to rescind DoD's August 2021 COVID-19 vaccination requirement. *See id*. at § 525. In compliance with Congress's directive, on January 10, 2023, the Secretary of Defense rescinded that requirement. Am. Compl. ¶ 4; ECF No. 1-3. The Secretary's recission memo stated that "former Service members may petition their Military Department's Discharge Review Boards and Boards for Correction of Military or Naval Records to individually request a correction to their personnel records, including records regarding the characterization of their discharge." *See id*. at 3. The services implemented the recission by again issuing their own recission policies in January and February 2023. ECF No. 16-2 at 54 (Army); ECF No. 16-5 at 2 (Air Force); ECF No. 16-3 at 4 (Navy); ECF No. 16-4 at 2 (Marine Corps).

II. Plaintiffs' Claims

Plaintiffs are six former active-duty service members who filed a purported class-action complaint in this case after being discharged from the Army, Air Force, and Marine Corps, and four Reserve service members who allege they were wrongfully removed from active-duty orders or wrongfully put on a no-points, no-pay status.

Between February and September 2022, the active-duty plaintiffs (Mr. Bassen, Mr. Dailey, Mr. Merjil, Mr. Wynne, Mr. Rodriguez, and Mr. Springer) were separated from the service. The Reserve plaintiffs (Mr. Chisholm, Mr. Hall, Mr. Endress, and Mr. Davis) were removed from active-duty orders and/or were temporarily placed on no-points, no-pay status per

Department of Defense policy. Further, relevant to this case, three plaintiffs (Mr. Chisholm, Mr. Hall, and Mr. Rodriguez) submitted religious accommodation requests, which were denied initially and then again following their appeals. AF AR S1_49; AF AR S2_174; AF AR S3_33. Notably, two plaintiffs—Mr. Hall and Mr. Rodriguez—voluntarily accepted separation from the Air Force. AF AR S4_25; AF AR S7_27.

In response to our motion to dismiss, the Court dismissed plaintiffs' claims that the COVID-19 vaccine mandate violated the NDAA and that they were subjected to illegal exactions. *Bassen v. United States*, 171 Fed. Cl. 273, 281-82 (2024). Following the Court's decision on our motion to dismiss, plaintiffs only remaining claims are that the military services violated the Military Pay Act, 37 U.S.C. § 204, by discharging them or removing them from active service in violation of 10 U.S.C. § 1107a (applicable to all plaintiffs) and in violation of RFRA (applicable to only Mr. Chisholm, Mr. Hall, and Mr. Rodriguez).

Following this Court's decision on our motion to dismiss, we filed the administrative record (ECF No. 37) and supplemental administrative record (ECF No. 44), and plaintiffs filed a motion for judgment on the administrative record or, in the alternative, a motion for summary judgment. ECF No. 43 (Pl. MJAR).

ARGUMENT

Plaintiffs have two remaining claims in this Court, and the Court should enter judgment for the United States on both. First, plaintiffs allege their discharges violated 10 U.S.C. § 1107a and that they are thus entitled to pay under the Military Pay Act. But seven plaintiffs lack standing to pursue this claim because the record shows that those plaintiffs refused both emergency use *and* fully licensed vaccines, and thus an alleged violation of 10 U.S.C. § 1107a has no causal relationship to their alleged harm. Moreover, all plaintiffs' claims fail because the

services complied with the requirements of section 1107a and reasonably relied on DoD and FDA guidance in administering their vaccination requirement.

Second, three plaintiffs allege their discharges violated RFRA and that they are thus entitled to pay under the Military Pay Act. However, the record shows that the Air Force properly exercised its military judgment in determining that the vaccination requirement was the least restrictive means of furthering its compelling interest in force health and readiness.

For these reasons, the court should grant judgment to the United States and dismiss all of plaintiffs' remaining claims. To the extent that the court concludes otherwise, however, we note that plaintiffs confuse the standard that this Court applies in deciding military pay matters. Plaintiffs assert that to the extent record evidence does not support the services' decisions in this case, the Court should grant summary judgment under RCFC 56. However, this case, like nearly all military pay cases, is governed by RCFC 52.1. Thus, if any of the challenged decisions are not supported by the record, the proper remedy is remand.

I. Standards Of Review

A. RCFC 12(b)(1) Standard Of Review

Jurisdiction is a threshold matter, and "[w]ithout jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (cleaned up). Under the Constitution, Congress is authorized to define the jurisdiction of the lower Federal courts and, once it has done so, limits on that jurisdiction may not be disregarded. *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993).

Plaintiffs bear the burden of establishing by a preponderance of the evidence that the Court possesses subject-matter jurisdiction over their claims. *Reynolds v. Army and Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); RCFC 12(b)(1); *Visconi v. United States*, 98

Fed. Cl. 589, 590 (2011). "In rendering a decision on a motion to dismiss for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1), this court must presume all undisputed factual allegations to be true and must construe all reasonable inferences in favor of the plaintiff." *Doe v. United States*, 106 Fed. Cl. 118, 122 (2012). "If a motion to dismiss for lack of subject-matter jurisdiction challenges the truth of the jurisdictional facts alleged, the Court may consider relevant evidence outside the complaint when resolving the dispute." *Allen v. United States*, No. 09-33304, 2023 WL 3737120, at *5 (Fed. Cl. May 31, 2023) (citing *Reynolds*, 846 F.2d at 474).

B. RCFC 52.1 Standard Of Review

"In this Court judicial review in military pay cases is normally limited to the administrative record developed before the military board" or "the evidentiary record before the deciding official" if a plaintiff does not proceed before a correction board. *Bateson v. United States*, 48 Fed. Cl. 162, 164 (2000). Plaintiffs suggest that, to the extent the administrative record in this case is insufficient, the Court should grant summary judgment in plaintiffs' favor. Pl. MJAR at 2-3. To that end, plaintiffs rely on evidence beyond the administrative record, including self-serving declarations from plaintiffs. However, "[i]n situations where the evidentiary record is found to be inadequate, it is not this Court's role to fill in the evidentiary gaps." *Bateson*, 48 Fed. Cl. at 165. Instead, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."[2] *Id.* (quoting *Long v.*

[2] The Court may go beyond the existing record and allow plaintiffs to submit new evidence to the court only if "(1) the evidence was unavailable below or (2) if there is a strong showing of bad faith or improper behavior which creates serious doubts about the integrity of the administrative action." *Bateson*, 48 Fed. Cl. at 165. Neither circumstance is present here. The first exception does not apply when plaintiffs do not pursue administrative remedies at the correction board. *Id.* The second exception does not apply because plaintiffs have not offered any evidence of bad faith or improper behavior. *See id.* Accordingly, this Court's review of the case is limited to the administrative record, and plaintiffs' contention that the Court should rely on extra-record declarations and grant summary judgment is wrong.

United States, 12 Cl. Ct. 174, 177 (1987)). Accordingly, contrary to plaintiffs' argument, this case should be decided under RCFC 52.1 rather than the summary judgment standards set forth in RCFC 56.

In considering a motion filed pursuant to RCFC 52.1, this Court's review is limited to determining whether an agency's action is arbitrary, capricious, unsupported by substantial evidence, or contrary to applicable statutes and regulations. *Cronin v. United States*, 765 F.3d 1331, 1334 (Fed. Cir. 2014). The plaintiff bears the burden of providing "cogent and clearly convincing evidence" that the agency's action fails to satisfy the foregoing standard. *Wronke v. Marsh*, 787 F.2d 1569, 1576 (Fed. Cir. 1986) (citation omitted). "Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Jennings v. MSPB*, 59 F.3d 159, 160 (Fed. Cir. 1995). If the plaintiff cannot demonstrate either lack of substantial supporting evidence for the agency's decision or that the administrative determinations were arbitrary, capricious, or contrary to law, this Court should uphold the agency's decision. *Chambers v. United States*, 417 F.3d 1218, 1227 (Fed. Cir. 2005).

II. Plaintiffs' Claims Under Count II Fail Because The Mandate Did Not Violate 10 U.S.C. § 1107a

Under Count II, plaintiffs allege that DoD and the services violated 10 U.S.C. § 1107a by mandating their members to receive a vaccine approved only for emergency use. Am. Compl. ¶¶ 195-223. This violation, they allege, renders their discharges or removal from active duty unlawful and entitles them to pay under the Military Pay Act. *See* Am. Compl. ¶¶ 200-01. Plaintiffs' claims fail for four reasons. First, seven plaintiffs lack standing to pursue their claims because they were not harmed as a result of any alleged violation of section 1107a. Second, the vaccination requirement only applied to fully licensed vaccines, and thus the requirement did not run afoul of section 1107a. Third, DoD provided all of the necessary information under section

1107a for its members to be informed regarding the vaccine. Finally, DoD reasonably relied on FDA's guidance that the Pfizer-BioNTech vaccine is identically formulated and interchangeable with Pfizer's name-branded Comirnaty for the purposes of vaccine administration.

A. Seven Plaintiffs Lack Standing Under Section 1107a Because Any Alleged Violation Of The Statute Did Not Cause The Harm They Allege

Seven plaintiffs lack standing to pursue their claims under 10 U.S.C. § 1107a.[3] To invoke this Court's jurisdiction, a plaintiff must establish standing under Article III of the Constitution. *Media Techs. Licensing, LLC v. Upper Deck Co.*, 334 F.3d 1366, 1370 (Fed. Cir. 2003). To demonstrate standing, a plaintiff must satisfy three elements. *Paradise Creations, Inc. v. UV Sales, Inc.*, 315 F.3d 1304, 1308 (Fed. Cir. 2003). First, "the plaintiff must allege that it has suffered an 'injury in fact—an invasion of a legally protected interest." *Id.* Second, "there must be a causal connection between the injury and the conduct complained of." *Id.* Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.*

Here, seven plaintiffs cannot establish a causal connection between the injury and the conduct complained of. Even assuming that the only vaccine available was an emergency use authorization (EUA) vaccine, as plaintiffs contend, that fact had no causal relation to their injury. Indeed, the record makes clear that seven plaintiffs refused to take *any* Pfizer vaccine, regardless

[3] In ruling on our motion to dismiss, the Court determined that plaintiffs' complaint alleged sufficient facts to satisfy Article III standing requirements. *Bassen*, 171 Fed. Cl. at 284. We respectfully submit that, as for seven plaintiffs, the AR confirms that those plaintiffs objected to receiving *any* vaccine, regardless of its licensure status. Accordingly, based on the evidence in the administrative record, we respectfully resubmit our standing argument for those seven plaintiffs. *Booth v. United States*, 990 F.2d 617, 620 (Fed. Cir. 1993) ("A party, or the court *sua sponte*, may address a challenge to subject matter jurisdiction at any time, even on appeal."). For the remaining three plaintiffs, Mr. Davis, Mr. Wynne, and Mr. Merjil, the AR does not speak to their willingness to receive a fully licensed vaccine, and thus, in accordance with the Court's order, we do not argue they lack standing at this juncture.

of whether it was labeled as fully licensed or only for emergency use.[4] Accordingly, even absent any alleged violation of section 1107a, those plaintiffs would have suffered the same harm that they alleged to have suffered as a result of section 1107a. Because their harm is not traceable to any violation of section 1107a, plaintiffs lack standing and their claims under 10 U.S.C. § 1107a should be dismissed. *See Luca McDermott Catena Gift Trust v. Fructoso-Hobbs SL*, 102 F.4th 1314, 1324 (Fed. Cir. 2024).

B. The Department Of Defense's Vaccination Requirement Complied With 10 U.S.C. § 1107a

In addition to the seven plaintiffs' lack of standing to assert an alleged violation of 10 U.S.C. § 1107a, the claim fails on the merits for several reasons for all plaintiffs. Plaintiffs argue that the Department of Defense "mandated unlicensed, EUA COVID-19" vaccines and that section 1107a prohibits the military from mandating any service member to take an unlicensed EUA vaccine absent an express Presidential authorization. Am. Compl. ¶ 201. While they admit that the vaccine requirement only mandated fully licensed vaccines, *id*. ¶ 203, their theory is that

[4] Mr. Bassen stated that "the vaccine mandate directly contradicts [his] beliefs and [his] reason for enlisting and that "[t]he FDA approval means nothing to [him]." Army AR 267. Mr. Dailey stated "the COVID vaccine is neither safe or effective at preventing [him] or anyone else from catching or spreading COVID-19." Army AR 539. He likewise stated that he objected to the vaccination requirement "whether through the FDA, through OSHA, or through 'a lawful order.'" Army AR 539. Mr. Rodriguez stated he was against all then-available COVID-19 vaccines as he believed they were unethically derived. AF AR S1_8. Further demonstrating that his objection had nothing to do with FDA licensure, Mr. Rodriguez stated he has "always questioned the FDA's intentions." AF AR S1_8. Mr. Chisholm objected to all available vaccines due to their use of "cell lines from aborted fetuses." AF AR S2_21. Like Mr. Chisholm, Mr. Hall stated he was against all available COVID-19 vaccines because "decades-old fetal cell lines were used in the vaccine research." AF AR S3_1. Mr. Springer stated that any COVID-19 vaccine would run afoul of his beliefs because "COVID-19 is the work of 'the evil one'" and receiving "COVID-19 vaccine is a sin." Navy AR 94-95. Mr. Endress stated that he objected to the COVID-19 vaccine because it "demonstrably does not accomplish what it intends to accomplish" and could cause health concerns for him. Army AR 2003-04. Mr. Endress did not distinguish between an EUA vaccine and a fully licensed vaccine, and indeed, there is not one – the two are identical.

"no FDA-licensed vaccines were available at all at the time" the mandate was issued, and thus the only way that they could receive a vaccination is by receiving an unlicensed EUA vaccine. *Id.* ¶ 207. However, the Court need not determine what vaccines had what labels at what locations, because neither the vaccine requirement nor its implementation required use of an unlicensed vaccine or otherwise ran afoul of section 1107a.[5]

The Department of Defense's policy was clear: service members were required to receive only "the Pfizer-BioNTech COVID-19 vaccine" that "was granted license by the Food and Drug Administration." DoD AR 5-6. As another court considering this exact issue noted, "on its face, the mandate does not require anyone to take an EUA vaccine." *Doe #1-#14 v. Austin*, 572 F. Supp. 3d 1224, 1233 (N.D. Fla. 2021). To be sure, the policy afforded members the option to receive an EUA vaccine or a vaccine on the World Health Organization Emergency Use Listing, but the policy did not require that such a vaccine must be obtained by DoD or the Services. DoD AR 5.

Moreover, "[t]he law only requires that [Plaintiffs] have been *informed* [of] a choice whether to get the vaccine or not and to be told of what consequences may follow if [they] decide[] to not get the vaccine." *Miller v. Austin*, No. 4:22-cv-01739, ECF No. 9 at 3 (S.D. Tex. June 1, 2022) (denying preliminary injunction against enforcement of the COVID-19 vaccine mandate based on alleged 10 U.S.C. § 1107a violation); *see also* 10 U.S.C. § 1107a(b). Plaintiffs do not allege and cannot show they were not so informed.

But even setting aside the fact that only FDA-licensed vaccines were mandated and that

[5] To the extent the Court determines it is necessary to know what vials of vaccines were available at various locations, we respectfully submit that the case should be remanded to the respective service military records corrections boards for the issue to be considered in the first instance.

plaintiffs received the protections afforded under section 1107a, plaintiffs' own arguments are undermined by the record. Plaintiffs' entire argument hinges on their contention that DoD did not have any Pfizer vaccines labeled as Comirnaty and thus it was impossible to comply with the mandate. But DoD's guidance regarding vaccine administration was clear:

> Previously, on December 11, 2020, the FDA issued an Emergency Use Authorization (EUA) for the Pfizer-BioNTech COVID-19 vaccine, which has the same formulation as the Comirnaty vaccine. Per FDA guidance, these two vaccines are "interchangeable" and DoD health care providers should "use doses distributed under the EUA to administer the vaccination series as if the doses were the licensed vaccine."

DoD AR 1. The DoD guidance further provides that "[c]onsistent with FDA guidance, DoD health care providers will use both the Pfizer-BioNTech COVID-19 vaccine and the Comirnaty COVID-19 vaccine interchangeably for the purpose of vaccinating Service members in accordance with the" vaccination mandate. *Id*. That FDA guidance, in turn, stated:

> The FDA-approved Comirnaty (COVID-19 Vaccine, mRNA) and the FDA-emergency use authorized Pfizer-BioNTech COVID-19 Vaccine for individuals 12 years of age and older, when prepared according to their respective instructions for use, can be used interchangeably to provide the COVID-19 vaccination series without presenting any safety or effectiveness concerns. Therefore, providers can use doses distributed under EUA to administer the vaccination series as if the doses were the licensed vaccine. For purposes of administration, doses distributed under the EUA are interchangeable with the licensed doses.
>
> . . . .
>
> The FDA-approved Comirnaty (COVID-19 Vaccine, mRNA) and the two EUA-authorized formulations of the Pfizer-BioNTech COVID-19 Vaccine for individuals 12 years of age and older when prepared according to their respective instructions for use, can be used interchangeably.

FDA, Q&A for Comirnaty, "Can Comirnaty and the Pfizer-BioNTech COVID-19 Vaccine be used Interchangeably?" https://perma.cc/XD6V-HH48.

Accordingly, even if there were no Comirnaty-labeled vaccines available, the services, in administering the vaccine requirement, relied on FDA's guidance that the Pfizer-BioNTech vaccine, which plaintiffs acknowledge was available, could be used interchangeably with the Comirnaty vaccine because they were formulaically the same. Congress has given DoD and the Services wide latitude to establish a vaccination program for the welfare and readiness of troops. *See, e.g.*, 10 U.S.C. §§ 113(b), 7013(b)(9), 8013(b)(9), 9013(b)(9). The military services acted well within that latitude and complied with 10 U.S.C. § 1107a in implementing DoD's COVID-19 vaccine requirement by following FDA's determination that the Comirnaty and Pfizer-BioNTech vaccines could be used interchangeably in administering the licensed vaccine.

III. Plaintiffs' Claims Under Count III Fail Because Mr. Chisholm's, Mr. Hall's, And Mr. Rodriguez's' Discharges Did Not Violate RFRA

Under Count III, Mr. Chisholm, Mr. Hall, and Mr. Rodriguez allege that they were wrongfully denied military pay under the Military Pay Act based on a violation of RFRA, 42 U.S.C. § 2000bb. Am. Compl. ¶¶ 224-38. However, plaintiffs fail to establish that any of their discharges actually violated RFRA, and thus the Court should grant judgment in favor of the United States.

Military orders to vaccinate do not violate RFRA if the Government demonstrates that the burden on a person's exercise of religion—"(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Requiring members to be vaccinated in 2021 during the COVID-19 pandemic furthered the compelling interests in military readiness and health and safety of service members and was the least restrictive means of advancing those interests. *See Navy SEAL 1 v. Austin*, 600 F. Supp. 3d 1, 8 (D.D.C. 2022) (noting that "a majority of the Supreme Court has already held . . . that the Government is likely to succeed on

the same claims brought by Navy SEALS."), *vacated as moot*, No. 22-5114, 2023 WL 2482927 (D.C. Cir. Mar. 10, 2023); *see also Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301, 1301-02 (2022).

A. Requiring Vaccinations Furthered The Compelling Interests Of DoD And The Services

At the outset, we note that plaintiffs appear to concede that the military has a "generalized interest in health and readiness." Pl. MJAR at 32. They hasten to argue, however, that the interest in health and readiness is "cabined . . . particularly by 10 USC § 1107(a)." *See id.* We have already demonstrated that the mandate complied with the requirements of section 1107a. Worse yet, plaintiffs continue to assert, despite the Court's prior holding to the contrary, that the recission of the mandate was retroactive and "along with it any legal basis to assert that the mandate furthered a compelling government interest." *See id*. However, every plaintiff was discharged prior to Congress passing the NDAA and the resulting recission in January 2023. And as we have explained, nothing in the NDAA evidences any intent by Congress that the NDAA apply retroactively. The question for the Court is whether, at the time of their discharge, the COVID-19 vaccine mandate furthered a compelling interest.

Requiring plaintiffs to be vaccinated against COVID-19 in 2021 furthered the compelling military interests in force health and readiness, especially when evaluated under the substantial deference that courts afford military operational decision-making. "[N]o court has ever held that the military does not have a compelling interest in the health of its troops" or "that vaccination against harmful diseases does not serve a compelling government interest," *Navy SEAL 1*, 600 F. Supp. 3d at 13-14; *accord Creaghan v. Austin*, 602 F. Supp. 3d 131, 144 (D.D.C. 2022) ("[T]here can be no greater military interest than in keeping each servicemember fit and healthy enough to accomplish their duties."), *vacated as moot*, *Navy Seal I,* 2023 WL 2482927. The

Supreme Court has instead repeatedly emphasized that the Government's interest in the "maximum efficiency" of military operations is paramount, *United States v. O'Brien*, 391 U.S. 367, 381 (1968), and that "[f]ew interests can be more compelling than a nation's need to ensure its own security." *Wayte v. United States*, 470 U.S. 598, 611 (1985). And "[w]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Short v. Berger*, 593 F. Supp. 3d 944, 953 (C.D. Cal. 2022) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)). Congress recognized these long-standing principles of military deference in enacting RFRA. S. Rep. No. 103-111, at 12 (1993) ("The courts have always recognized the compelling nature of the military's interest in [good order, discipline, and security] in the regulations of our armed services," and "have always extended to military authorities significant deference in effectuating these interests. The committee intends and expects that such deference will continue under this bill."); *Navy SEAL 1*, 600 F. Supp. 3d at 12-13 (noting that both the House and Senate Reports explained that military deference would continue under RFRA).

Here, DoD and the Air Force found that COVID-19 vaccination of each service member was necessary to ensure military readiness and the health and safety of service members. DoD AR 5; AF AR S1_57. And "logic alone" dictates that "the military's general compelling interest in ensuring the health of its servicemembers . . . distill[s] to a compelling interest in ensuring that [each individual service member] remains healthy enough to accomplish [his] duties." *Creaghan*, 602 F. Supp. 3d at 143-44; *see also Roth v. Austin*, 603 F. Supp. 3d 741, 767 (D. Neb. 2022). The Court must "give great deference" to the "professional military judgments" of these leaders when it comes to what is needed to ensure military readiness and the welfare of service

members. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (collecting cases). And "when executive officials 'undertake to act in areas fraught with medical and scientific uncertainties' their judgments 'should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health.'" *Short*, 593 F. Supp. 3d at 950 (quoting *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring)); *accord Creaghan*, 602 F. Supp. 3d at 8.

Further, the Air Force's application of the requirement to be vaccinated as a condition of continued military service to each plaintiff satisfies the "to the person" analysis that RFRA requires. 42 U.S.C. § 2000bb-1(b). Especially considering each of the three plaintiffs' particular job duties in 2021, as discussed below, this Court should not disturb the Air Force's conclusion that allowing each of them to remain unvaccinated would have undermined the military's compelling interest in ensuring they could carry out their military duties effectively.

Likewise, plaintiffs' contention that the Air Force failed to make an individualized assessment because the denial letters were similar is meritless. Pl. MJAR at 31-32. The Air Force specifically considered the arguments each plaintiff presented in support of his religious accommodation request. AF AR S1_27-28; AF AR S2_19-20; AF AR S3_14-15. That Mr. Rodriguez, Mr. Chisholm, and Mr. Hall made many of the same arguments or that their assignments subjected them to the same risks does not alter the fact that the requirement to be vaccinated was the least restrictive means of furthering the Air Force's compelling interest of military readiness for each plaintiff. *See Roth*, 603 F. Supp. 3d at 762-65 (holding that even "nearly identical appeal denial letters" still contain an individualized analysis because the letters describe "each service member's circumstances," and that "it is not surprising that numerous requests, even considered individually, could run afoul of the same handful of circumstances

warranting denial of an exemption," especially in the military).

Finally, plaintiffs erroneously contend that the Air Force lacked a compelling interest in denying their religious accommodation requests because it granted certain medical and administrative requests. *See* Pl. MJAR at 31. Medical and administrative exemptions are not comparable to religious accommodations and therefore have no bearing on whether vaccinating plaintiffs furthered the Air Force's compelling interests in military readiness. *Cf. Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) ("Comparability is concerned with the risks various activities pose."). In contrast to religious accommodations, medical exemptions serve the interest in military readiness: vaccinating a service member who has medical contraindications to the vaccine would harm the member's health, *detracting* from the military's interests in ensuring readiness and the health and safety of its members. *Navy Seal 1*, 600 F. Supp. 3d at 17; *Does 1–6 v. Mills*, 16 F.4th 20, 34 (1st Cir. 2021); *see also Short*, 593 F. Supp. 3d at 954. Likewise, administrative exemptions—which are granted to service members with an approved separation or retirement—are appropriate because requiring vaccination of individuals who will no longer be part of the Air Force does not further the military's interest in ensuring readiness. AF AR S1_57. This difference is underscored by the fact that "members with medical, administrative, or religious exemptions to the COVID-19 vaccination mandate [did] not operate within the [military] as if they were vaccinated." *Roth*, 603 F. Supp. 3d at 771. For an administrative or medical exemption, that disruption to normal military operations is temporary, whereas a religious accommodation would, presumably, be permanent.

In short, the military services have a compelling interest in military readiness and the health and safety of service members and are entitled to significant deference to their judgment concerning those interests.

B. Requiring Plaintiffs To Be Vaccinated Was The Least Restrictive Means Of Furthering DoD's Compelling Interest In Military Readiness

As other courts have found in non-military settings, a uniform practice of vaccination is the least restrictive means for accomplishing the Government's interest in preventing the spread of infectious diseases in the workforce.[6] This reasoning has even greater force in the military setting, where the health of service members is paramount to military readiness, and where the acceptable level of risk to the mission must be a military, not judicial, judgment. *See Austin v. U.S. Navy SEALs 1–26*, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J., concurring) (cautioning that a court may not "insert[] itself into the [military's] chain of command, overriding military commanders' professional military judgments"); *Short*, 593 F. Supp. 3d at 953 (emphasizing deference to military judgments and adding that "[t]his deference is layered on top of the deference that courts must give to expert policymakers on matters involving complex medical or scientific uncertainties").

After careful consideration of Mr. Rodriguez's, Mr. Chisholm's, and Mr. Hall's requests for a religious accommodation and their appeals, the final decision authority concluded that no lesser restrictive means sufficiently served the military's compelling interests in readiness and ensuring the health and safety of all service members. AF AR S1_28; AF AR S2_14; AF AR S3_13. The Air Force specifically considered Mr. Rodriguez's assignment as a pararescueman,[7] noting that his "duties include working in close confines of [his building]." AF AR S1_28. Mr. Rodriguez also "conduct[ed] training around other members of the unit to maintain his

[6] *See Does 1–6*, 16 F.4th at 32-33 (health-care workers); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) (recognizing that vaccines "may be supported by" the Government's compelling interest in "the need to combat the spread of infectious diseases").

[7] Air Force pararescuemen (also known as PJs) are elite combat forces equipped to conduct personnel recovery, particularly of downed pilots and air crews, in combat operations.

currencies." AF AR S1_28. Due to these duties, as well as "Moody Air Force Base's particular mission and ops tempo," the Air Force concluded that Mr. Rodriguez's ability to accomplish his duties could not be accomplished through lesser restrictive measures, such as telework, alternate duty locations, or social distancing. AF AR S1_28, S1_30.

The Air Force also considered Mr. Chisholm's military duties within the nuclear career field. AF AR S2_40. His duties required "in-person presence in the duty section accessing SIPR [(Secure Internet Protocol Router)] terminals and in a SCIF [(Sensitive Compartmented Information Facility)] with up to eight members." AF AR S2_40. He also served as a classroom instructor, which placed Mr. Rodriguez "in direct contact with an undetermined number of students in order to execute" his duties. AF AR S2_40. Like Mr. Rodriguez, Mr. Chisholm's job duties precluded him from less restrictive means like telework, mask wear, which has proven ineffective over long periods of time due to elements of human behavior, or social distancing. AF AR S2_40. These less restrictive means are particularly ineffective when considering the close and constant proximity to others.

Likewise, the Air Force specifically considered Mr. Hall's assignment to the A2 (Intelligence) Directorate. AF AR S3_13. Mr. Hall's duties "require[d] [travel] to accomplish inspections, additional training, and/or deploy." AF AR S3_13. Mr. Hall's inability to travel due to his status meant that lesser restrictive means were not available. AF AR S3_13.

Notably, the Air Force is not required to use an alternative that does not serve its compelling interests "equally well" relative to vaccination. *See Burwell*, 573 U.S. at 731 (examining whether alternative served stated interest "equally well"); *Kaemmerling v. Lappin*, 553 F.3d 669, 684-85 (D.C. Cir. 2008) (rejecting RFRA and constitutional challenges against DNA Act, where "[a]ny alternative method of identification would be *less* effective" in

accomplishing the Government's compelling interests (emphasis added)).

As discussed above, the Air Force considered whether telework or remote work could provide a less restrictive alternative but concluded that no plaintiff could complete their duties remotely. AF AR S1_28; AF AR S2_14; AF AR S3_13. Likewise, the Air Force evaluated the feasibility of masking and distancing but concluded that those measures are not as effective as vaccination. AF AR S1_28; AF AR S2_14; AF AR S3_13. And regardless, unlike vaccination, masking and distancing did not provide any protection to an infected individual from severe illness or death. *See Roth*, 603 F. Supp. 3d at 774. Also, unlike vaccination, the effectiveness of masking and distancing fluctuated based on human behavior. *See United States v. Elder*, 592 F. Supp. 3d 48, 62 (E.D.N.Y. Mar. 21, 2022) ("By themselves, face masks, social distancing, and similar measures may be effective for small groups over short periods of time, but fail to ensure the safety of large groups in close contact for sustained periods.").

Tellingly, plaintiffs fail to discuss any alternative means, much less any that are equally as effective as vaccination. Plaintiffs also fail to explain why the Air Force improperly determined that masking, social distancing, remote work, and other alternatives were less effective than vaccination.

In sum, the Air Force's considered judgment is reasonable and supported by the record. RFRA does not compel the Air Force to adopt any measure that is inferior in the military context to the use of vaccines. The Air Force complied with its requirements under RFRA, and plaintiffs' claims that Mr. Chisholm, Mr. Hall, and Mr. Rodriguez were wrongfully discharged due to a RFRA violation should be denied.

IV. Mr. Hall And Mr. Rodriguez Voluntarily Separated And Are Thus Not Entitled To Relief Under The Military Pay Act

In addition to the other flaws in plaintiffs' claims discussed above, Mr. Hall and

Mr. Rodriguez also are not entitled to any relief because they voluntarily separated from the Air Force.

It is well settled that voluntary separation actions are not the basis for viable claims for relief in this Court. *See Metz v. United States*, 466 F.3d 991, 1000 (Fed. Cir. 2006); *Tippett v. United States*, 185 F.3d 1250, 1255 (Fed. Cir. 1999) (applying the rule to a servicemember's request for discharge); *Thomas v. United States*, 42 Fed. Cl. 449, 452 (1998). When assessing the voluntariness of a servicemember's discharge, this Court applies an objective standard based on all the facts and circumstances; the individual's subjective perception is not controlling. As this Court has held,

> [e]xternal events and conditions, rather than subjective impressions or perceptions, must guide the court's focused inquiry. Involuntariness, therefore, is not determined by the fact that an individual subjectively perceived no choice in deciding to retire earlier when, in fact, he truly had an option. Rather, what is determinative as to voluntariness is whether such individual did in fact have a choice, notwithstanding the undesirability of the alternatives available.

Longhofer v. United States, 29 Fed. Cl. 595, 601 (1993). Applying this standard in the context of a claim of duress or coercion, 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. United States*, 298 F.3d 1367, 1372 (Fed. Cir. 2002).

Here, in response to being notified of his proposed discharge, Mr. Rodriguez unconditionally waived his right to a discharge board, meaning he was aware that he would be discharged and could receive a negative service characterization. AF AR S4_25. Mr. Rodriguez indicated that he signed this statement voluntarily. AF AR S4_25. Moreover, Mr. Rodriguez specifically stated that he was "requesting discharge out of the Air Force [no later than] 01 July

2022." AF AR S4_27. Likewise, Mr. Hall also requested a curtailment of his Active Guard Reserve orders, so that he could retire from the military on an earlier date. AF AR S7_27. In these circumstances, Mr. Rodriguez and Mr. Hall cannot show that they involuntarily accepted the terms of the Government. Indeed, they voluntarily accepted discharge by waiving any right to a board hearing and by voluntarily requesting curtailment of their orders to retire earlier and cannot now bring a claim for backpay.

Nor can plaintiffs overcome the second prong. Although Mr. Rodriguez and Mr. Hall may have felt they had limited options, precedent demonstrates that a showing that their choice was between unpleasant alternatives does not rebut the presumption of voluntariness. *See Sammt v. United States*, 780 F.2d 31, 33 (Fed. Cir. 1985); *see also Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975) ("Merely because plaintiff [is] faced with an inherently unpleasant situation in that her choice was arguably limited to two unpleasant alternatives does not obviate the voluntariness of her resignation.").

In their motion, plaintiffs focus on the third prong and argue that Mr. Rodriguez and Mr. Hall were coerced into separating. But their argument twists the measures undertaken by the Air Force to protect its servicemembers during the pandemic into forms of coercion designed to push the plaintiffs out of the Air Force. *See* Pl. MJAR at 38 (referring to protective measures such as masking, testing, and travel limitations as efforts to coerce the plaintiffs). Nothing in the record supports this assertion, and it would be odd indeed to view measures designed to protect the health of others as providing a basis for a member to assert a claim for involuntary separation.

Likewise, plaintiffs argue that the Air Force coerced Mr. Rodriguez through its treatment of him following the injunction issued in *Doster v. Kendall*, 1:22-cv-00084 (S.D. Ohio). Pl.

MJAR at 38-39. Specifically, plaintiffs argue that Mr. Rodriguez would have opted to remain in the Air Force but for the "contempt for the law and the *Doster* court's order" shown by the Air Force. Plaintiffs do not rely on any record evidence, which actually undermines their arguments. As explained above, prior to the *Doster* injunction, Mr. Rodriguez requested to be discharged and indeed received an order to be discharged. AF AR S4_27; AF AR S4_1. Once the *Doster* injunction issued, Mr. Rodriguez voluntarily chose not to avail himself of the protections of the injunction. *See* ECF No. 22 at 52. Rather, he continued to request separation, apparently because he did not wish to return to duty. Pl. MJAR at 39. In short, nothing in the record supports plaintiffs' contention that Mr. Rodriguez (or Mr. Hall) was coerced into separating.

V. Plaintiffs Assert No Claim For Violations Of Any Discharge Procedures Or The Uniform Code Of Military Justice

For the first time in their MJAR, plaintiffs argue that they are entitled to relief because the Army allegedly violated its own regulations or the Uniform Code of Military Justice (UCMJ) with respect to the discharges of Mr. Bassen, Mr. Dailey, and Mr. Wynne and with respect to Mr. Endress's removal from active duty for operational support (ADOS) orders. Pl. MJAR at 40-42. They also argue that the Army and Air Force violated 10 U.S.C. § 1174(b)(1) by failing to provide separation pay for Mr. Bassen and Mr. Rodriguez, respectively, who had six years of service prior to their separations for failing to comply with the vaccine mandate. Pl. MJAR at 17. Simply stated, these claims are not in plaintiffs' amended complaint and should be disregarded by the Court. *Pearl v. United States*, 111 Fed. Cl. 301, 309 (2013) (holding that a plaintiff may not re-write his complaint in a brief); *The Redland Co., Inc. v. United States*, 97 Fed. Cl. 736, 756 (2011) (declining to consider a claim first raised in a motion for summary judgment when the plaintiff did not include the claim in its complaint). This Court has recognized that plaintiffs assert five claims in their amended complaint. *Bassen*, 171 Fed. Cl. at

278. Following the Court's order on our motion to dismiss, only two of those claims remain: a violation of the Military Pay Act due to a violation of 10 U.S.C. § 1107a and a violation of the Military Pay Act due to a violation of RFRA. *Id.* at 288. No other claims remain or should be considered.

Nevertheless, plaintiffs' arguments fail. Beginning with Mr. Bassen's and Mr. Rodriguez's alleged entitlement to involuntary separation pay, such pay is authorized for eligible servicemembers by 10 U.S.C. § 1174(b)(1). The statute contains an important condition: "unless the Secretary concerned determines that the conditions under which the member is discharged do not warrant payment of such pay." *Id.* DoD Instruction (DoDI) 1332.29 implements the statute for the DoD.[8] Paragraph 3.4 of the DoDI sets forth several conditions under which servicemembers are not eligible for ISP, and separation for misconduct is disqualifying. DoDI ¶ 3.4(f)(1). Mr. Bassen and Mr. Rodriguez were both separated for misconduct. Army AR 169; AF AR S4_1. Further, as explained above, Mr. Rodriguez voluntarily separated when he withdrew from the protections afforded Air Force members by the *Doster* injunction that would have prohibited his separation, and thus he is ineligible for involuntary separation pay for that additional reason.

Mr. Endress states he secured a permanent medical exemption from the COVID-19 vaccine in August 2021, one week before the mandate was issued, and that the Army wrongfully revoked that exemption. Pl. MJAR at 41. However, the specific medical exemption policy for the COVID-19 vaccine was not announced by the Army until its implementing guidance was issued on September 14, 2021. Army OP AR 19, 25. Accordingly, the earliest Mr. Endress

[8] The DoDI is publicly available online at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133229p.pdf (last visited October 2, 2024).

could initiate a request for a permanent medical exemption from the COVID-19 vaccine mandate was that day, and thus it is not clear on what basis Mr. Endress asserts he was previously exempted from the vaccine. In any event, when considering whether to grant a medical exemption (after the mandate had issued), his medical provider noted that Mr. Endress was citing a "feared condition with no diagnosis made," which is not a contraindication to the vaccine. Army AR 1994. Accordingly, his medical exemption was properly denied.

Next, Mr. Bassen alleges that he could not be administratively separated because he had started the medical board evaluation process. Pl. MJAR at 40. However, when the Medical Evaluation Board (MEB) found that his medical conditions did not meet retention standards, Mr. Bassen was already subject to a pending administrative separation for vaccine refusal. Army AR 273. When a soldier, such as Mr. Bassen, is undergoing administrative separation under chapter 14, Army AR 236, the administrative separation proceedings continue pending the MEB evaluation. Army Regulation 635-200 ¶ 1-34(d), ECF No. 44-4 at 33. If the MEB determines that the solider does not meet medical retention standards, the soldier's commander must direct whether to proceed with disability processing or administrative separation. *Id.* Here, Mr. Bassen's commander considered whether Mr. Bassen's disability contributed to his conduct leading to the administrative separation or whether any other circumstances warranted continuing disability processing. Army AR 236-37. He determined that Mr. Bassen should be separated without further disability processing. Army AR 236-37. In other words, the Army fully complied with its disability processing regulations.

Mr. Dailey and Mr. Wynne argue they were denied treatment and otherwise mistreated due to their refusal of the vaccine and that such treatment constituted unlawful pretrial punishment under UCMJ Article 13. Pl. MJAR at 41. Plaintiffs cite no authority to suggest that

UCMJ Article 13 applies to administrative separation actions for the Army or any other service. Nor do they cite any *record* evidence to support their claim, and instead rely solely on self-serving declarations outside the record. Simply put, neither plaintiff offers any basis for the Court to conclude that they were denied medical treatment or otherwise subjected to unlawful punishment.

CONCLUSION

For these reasons, we respectfully request that the Court dismiss plaintiffs' section 1107a claims for lack of subject-matter jurisdiction, deny plaintiffs' motion for judgment on the administrative record or for summary judgment, and grant our cross-motion for judgment on the administrative record.

Respectfully submitted,

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