No. 23-211C
(Judge T. Dietz)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NICK BASSEN, et. al,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

DEFENDANT'S CROSS MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD AND RESPONSE TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR JUDGMENT UPON THE ADMINISTRATIVE RECORD AND CROSS-MOTION TO DISMISS IN PART AND FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

Pursuant to Rules 12(b)(1) and 52.1(c) of the Rules of the United States Court of Federal Claims (RCFC), Defendant, the United States, respectfully requests that the Court (1) deny Plaintiffs' motion for judgment on the administrative record, or in the alternative, motion for summary judgment (ECF 117), and (2) grant Defendant's cross-motion.

INTRODUCTION

The plaintiffs at issue in this motion are a group of six former active-duty service members and four Reserve service members from the Army, Air Force, and Marine Corps.[1] Each of the Services discharged the active-duty service members for failure to comply with the COVID-19 vaccine mandate issued by the Secretary of Defense. As to the Reserve service members, the Services removed some of them from active-duty mobilization orders after they failed to comply with the mandate. After the Department of Defense rescinded its

[1] The plaintiffs are Nicholas Bassen, Isaac Dailey, Kyle Davis, Billie Endress, Adam Merjil, Derrick Wynne, Allen Hall, Paul Rodriguez, Brent Chisholm, and Hunter Springer. *Bassen v. United States*, 177 Fed. Cl. 69, 70 (2025) n. 1; ECF 68.

vaccination requirement in January 2023 following the 2023 National Defense Authorization Act (NDAA), the Army, Air Force, and Marine Corps followed suit.

These ten plaintiffs filed this action, originally seeking class action, alleging that their discharges violated the NDAA, 10 U.S.C. § 1107a, and the Religious Freedom Restoration Act (RFRA), and seeking backpay and other monetary relief. The Court previously ruled on the Government's motion to dismiss these original 10 plaintiffs, after which only the 10 U.S.C. § 1107a claims, and the RFRA claims for three Air Force plaintiffs—Rodriguez, Chisholm, and Hall—survive.

Central to this case at the present time is Executive Order 14184, titled Reinstating Service Members Discharged Under the Military's COVID-19 Vaccination Mandate (EO). 90 Fed. Reg. 8761 (Jan. 27, 2025). Following the President's issuance of that executive order, the Court granted the United States' request for voluntary remand to the Boards for Correction of Military and Naval Records (Service Boards) for consideration of that EO. The remands for the original 10 plaintiffs have all been completed, and plaintiffs, (A) Bassen, (B) Dailey, (C) Davis, (D) Endress, and (E) Merjil, have stated that they were satisfied with the Board's remand results. ECF 108. Plaintiffs (F) Wynne, (G) Hall, (H) Rodriguez, (I) Chisholm, and (J) Springer assert that there remain issues for the Court to resolve after remand.

QUESTIONS PRESENTED

I. The Service Boards granted constructive service and backpay to plaintiffs (A) Bassen, (B) Dailey, (C) Davis, (D) Endress, (E) Merjil, (F) Wynne, and (I) Chisholm. Should the Court dismiss those plaintiffs' claims as moot?

II. The Service Boards denied plaintiffs (G) Hall, (H) Rodriguez, and (J) Springer, constructive service and backpay because they declined reinstatement into service. Have plantiffs failed to show that the Boards' determinations were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law?

III. DoD and the Services provided all protections afforded under 10 U.S.C. § 1107a and otherwise relied on guidance from the U.S. Food and Drug Administration. Do plaintiffs fail to show that the COVID-19 vaccine mandate violated that statute?

IV. The Air Force Board determined that enforcing the vaccine mandate was the least restrictive means of furthering the compelling government interest in military readiness. Should the Court find that plaintiffs' claims for wrongful discharge fail?

STATEMENT OF THE CASE

I. The COVID-19 Pandemic

The President declared the COVID-19 outbreak in the United States a national emergency on March 13, 2020. *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,377 (Mar. 2020). COVID-19 is a respiratory disease that killed over one million Americans and infected 88 million more by July 2022. Centers for Disease Control, *COVID Data Tracker*, (July 11, 2022), https://perma.cc/S6MP-SX46?view-mode=server-side&type=image. The pandemic "wreaked havoc on every facet of society [from 2020 to 2022] and the United States military is no exception." *Short v. Berger*, 593 F.Supp. 3d 944, 946 (C.D. Cal. 2022). From data available in August 2021, thirty service members had died from COVID-19, over 1,900 had been hospitalized, and over 213,000 had contracted the disease. Department of Defense (DoD) Administrative Record (AR) at 141.

II. The U.S. Food and Drug Administration Approves the Pfizer COVID-19 Vaccine

In response to the COVID-19 pandemic, the U.S. Food and Drug Administration (FDA) issued an Emergency Use Authorization (EUA) for the Pfizer-BioNTech COVID-19 vaccine in January 2021. *Authorizations of Emergency Use of Two Biological Products During the COVID-19 Pandemic; Availability*, 86 Fed. Reg. 5200 (Jan. 19, 2021). Later that year, in August 2021, the FDA approved Pfizer's COVID-19 vaccine, marketed as COMIRNATY. DoD AR at 8–20; *see also* FDA, News Release—FDA Approves First COVID-19 Vaccine (Aug. 23, 2021), https://perma.cc/C4DD-PWE5. The FDA determined that "[t]he licensed vaccine has the same formulation as the EUA-authorized vaccine and the products can be used interchangeably to

provide the vaccination series without presenting any safety or effectiveness concerns." DoD AR at 9; *see* Cong. Rsch. Serv., FDA Approval of the Pfizer-BioNTech COVID-19 Vaccine: Frequently Asked Questions, at 1 (Sept. 29, 2021), https://www.congress.gov/crs-product/R46913 ("Comirnaty has the same ingredients and formulation as the Pfizer-BioNTech vaccine that is authorized under the EUA."). Though the "two products differ in branding and labeling," they "can be used interchangeably without any impact on safety or effectiveness." *Id.*; *see* DoD AR at 9. Both vaccines contain "'a nucleoside-modified messenger RNA (mRNA) encoding the viral spike glycoprotein (S) of SARSCoV-2' formulated in the same lipids (i.e., organic compounds that are insoluble in water such as fats)." *Id.* at 4

III. The Secretary of Defense Mandates COVID-19 Vaccines for Active Duty, Reserve, and National Guard Service Members

Vaccines have played a longstanding and important role in America's military readiness. DoD's immunization program requires nine vaccines for all service members, and eight other vaccines when certain elevated risk factors are present. *See, e.g.,* Air Force Instruction 48-110_IP, Table D-1, available at https://perma.cc/82YE-EA3U; DoD Instruction 6205.02, available at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/620502p.PDF?ver=9HjCT_kTBaEAyGNBnhISdA%3d%3d (June 28, 2025). These vaccination requirements are part of the Individual Medical Readiness requirement, under which each service member must be medically ready for service and mobilization. DoD Instruction 6025.19, available at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/602519p.PDF?ver=HEZCBo13wjpswYuR2ePBQQ%3d%3d (January 21, 2026).

One day after the FDA announced the approval of the Pfizer vaccine, 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 at 5–6. In issuing this

directive, the Secretary of Defense noted that "[m]andatory vaccination will only use COVID-19 vaccines that receive full licensure from [FDA] in accordance with FDA-approved labeling and guidance." *Id.* at 5. The Secretary further noted that "[s]ervice members voluntarily immunized with a COVID-19 vaccine under FDA [EUA] or World Health Organization Emergency Use Listing" would also be considered fully vaccinated. *Id.* Shortly thereafter, each of the Services issued initial implementing guidance, setting deadlines for full vaccination. *See* Department of the Army Operations AR (Army OP AR) at 24–25; Department of the Air Force AR (AF AR) at S1_57; Department of the Navy AR (Navy AR) at 101–14.

In a September 2021 memorandum, the Acting Assistant Secretary of Defense for Health Affairs determined 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 Secretary of Defense's vaccination mandate. DoD AR at 16.

IV. Services' Implementation of the COVID-19 Vaccination and Religious Exemptions

As with other vaccine requirements, the Services established medical, administrative, and religious exemptions to the COVID-19 vaccine requirements. *See* Army OP AR 24–25; AF AR S1_57–58; Navy AR 101-14. Each Service has a process available to members making religious accommodation requests (RARs), including an appeal process from an unfavorable initial decision. *See* Army OP AR at 542–44; AF AR at S1_63–75; Navy AR at 86–100. Although the procedures and ultimate decisionmaker varies, each Service's process involves the input of at least one chaplain, medical professionals, the requesting service member, and the commanding officer. *See, e.g.,* Army Op AR at 542–44; AF AR S1_1–49; Navy AR at 86–100. In each process, a senior military leader individually reviews each request and appeal in light of all

available information. Army AR at 543; Navy AR at 20; AF AR at S3_20. As of July 2022, the Army had approved 19 permanent religious exemptions, and the Marine Corps had approved 7 exemptions. *See* Army updates Total Army COVID-19 vaccination statistics. Available at https://perma.cc/9SF5-PYC9 (July 8, 2022); United States Marine Corps Monthly COVID-19 Update. Available at https://perma.cc/2S5D-V5NS (July 6, 2022).

V. The Five Remaining Dissatisfied Plaintiffs Refuse to Comply with the Vaccine Mandate

Three of the five Plaintiffs (Messrs. (H) Rodriguez, (I) Chisholm, and (J) Springer) refused to take any COVID-19 vaccine, regardless of the vaccine's label or FDA-licensing status.[2] Four Plaintiffs, (Messrs. (G) Hall, (H) Rodriguez, (I) Chisholm, and (J) Springer) sought religious exemptions from the vaccine mandate and submitted RARs. AF AR at S1_1–2, S2_1–2, S3_1–2; Navy AR at 90–91 (86–100). Two of those Plaintiffs, Messrs. (G) Hall and (H) Rodriguez, voluntarily accepted separation from the Air Force. AF AR at S4_25, S7_27.

Following the Air Force's RAR process, the Surgeon General of the Air Force denied (H) Mr. Rodriguez's RAR appeal, finding that there was a compelling government interest in requiring him to comply with the vaccine mandate because preventing the disease was vital to mission accomplishment and that there were "no less restrictive means available in [his] circumstances as effective as receiving the above immunization in furthering those compelling government interests." AF AR at S1_3–49. In doing so, the Surgeon General discussed Mr.

[2] Mr. Rodriguez (H) stated he was against all then-available COVID-19 vaccines as he believed they were unethically derived. AF AR at S1_8. He further stated that he has "always questioned the FDA's intentions." AF AR at S1_8. Mr. Chisholm (I) objected to all available vaccines due to their use of "cell lines from aborted fetuses." AF AR at S2_21. Similarly, Mr. Hall (G) stated he was opposed to available COVID-19 vaccines because "decades-old fetal cell lines were used in the vaccine research." AF AR at S3_1. Mr. Springer (J) stated that any COVID-19 vaccine would run afoul of his beliefs because "COVID-19 is the work of 'the evil one'" and that receiving "COVID-19 vaccine is a sin." Navy AR at 94–95.

Rodriguez's specific duties and explained why those duties warranted vaccination. *Id.* Specifically, the Surgeon General stated that Mr. Rodriguez's "present duty assignment requires intermittent to frequent contact and is not fully achievable via telework or with adequate distancing," and that his "instructor role also requires frequent contact and immersion with multiple individuals, which would significantly impact training accomplishment if you, your trainees, or your fellow instructors were exposed or actively infected." *Id.*

Following the same RAR process, the Surgeon General denied (G) Mr. Hall's RAR appeal. AF AR. at S3_33 (S3_3–33). Again, he stated that Mr. Hall's duty "requires intermittent to frequent contact with others and is not fully achievable via telework or with adequate distancing." *Id.* He stated further that his "inspector status requires frequent contact and immersion with individuals, which would significantly impact mission accomplishment if [he] was exposed or actively infected." *Id.* Mr. Hall voluntarily retired from the Air Force in April 2022. AF AR at S7_47–64.

The Surgeon General also denied (I) Mr. Chisolm's RAR. AF AR at S2_174. Again, the Surgeon General recognized Plaintiff's specific duties and explained why those duties warranted vaccination. *Id.* at S2_3–174. Specifically, the Surgeon General stated that his "present duty assignment requires intermittent to frequent contact with others and access to classified information," which were not "fully achievable without mission degradation when fulling teleworking or in complete isolation from other personnel." *Id.* Mr. Chisholm, unlike the other plaintiffs, remained in the Air Force Reserve.

In (J) Mr. Springer's case, the Director of Health Services, Headquarters, U.S. Marine Corps, recommended against his RAR "due to the negative impact on the health safety, and readiness of Pvt Springer and the Marines and Sailors that serve with them." Navy AR at 99.

Following his refusal, Mr. Springer received an uncharacterized entry level separation after serving less than seven months.[3] Navy AR at 17–23, 29.

The remaining Plaintiff, (F) Mr. Wynne, did not seek a religious or medical exemption request. Army AR at 1954. Instead, he stated as one of the reasons for refusal was that only the EUA vaccine was available rather than Comirnaty. Army AR at 1931. Following Mr. Wynne's refusal, he was separated from the Army and received a general discharge under honorable conditions. Army AR at 1927, 1961–79.

VI. Congress Rescinds the COVID-19 Vaccination Requirement

In December 2022, Congress enacted the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (NDAA), which, among other things, required the Secretary of Defense to rescind the COVID-19 vaccine requirements for military service members. Pub. L. No. 117-263 § 525, 136 Stat. 2395, 2571-72 (2022). Consistent with the NDAA, the Secretary of Defense rescinded the vaccine mandates and ordered that "[n]o individuals currently serving in the Armed Forces shall be separated solely on the basis of their refusal to receive the COVID-19 vaccination if they sought an accommodation on religious, administrative, or medical grounds." Am. Compl. ¶4; ECF No. 1–3. In that memorandum, the Secretary of Defense 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 in

[3] Mr. Springer's original DD-214 shows that he was separated for entry level performance and conduct. Navy AR at 29. In April 2024, the Naval Discharge Review Board (NDRB) directed that Mr. Springer's narrative reason for separation be changed to "Secretarial Authority" and his reentry code changed to RE-1A. ECF 75 (Springer Decision at 5).

January and February 2023. *See* ECF 16-2 at 54 (Army); ECF No. 16-5 at 2 (Air Force); ECF No. 16-3 at 4 (Navy); ECF 16-4 (Marine Corps).

VII. The President Issues the Reinstatement Executive Order and DoD Issues Guidelines

In January 2025, the President issued Executive Order 14184, Reinstating Service Members Discharged Under the Military's COVID-19 Vaccination Mandate (EO). 90 Fed. Reg. 8761 (Jan. 27, 2025). The President determined that the "vaccine mandate was an unfair, overbroad, and completely unnecessary burden on our service members," and that the military "unjustly discharged those who refused the vaccine, regardless of the years of service given to our Nation, after failing to grant many of them an exemption that they should have received." *Id.* The President instructed the Secretary of Defense to:

> (a) make reinstatement available to all members of the military (active and reserve) who were discharged solely for refusal to receive the COVID-19 vaccine and who request to be reinstated;
>
> (b) enable those service members reinstated under this section to revert to their former rank and receive full back pay, benefits, bonus payments, or compensation; and
>
> (c) allow any service members who provide a written and sworn attestation that they voluntarily left the service or allowed their service to lapse according to appropriate procedures, rather than be vaccinated under the vaccine mandate, to return to service with no impact on their service status, rank, or pay.

Id. DoD issued implementing guidelines the following month. ECF 61-1 at 1–11. In an accompanying memorandum, a DoD official instructed that the guidance "does not apply to those former Service members who are unwilling or unable to return to active service for at least 2 years," or to those "who remained in service, voluntarily left the service, or allowed their service to lapse according to appropriate procedures, rather than be vaccinated under the COVID-19 mandate." *Id.* at 11. The DoD official instructed that "[t]hose service members are still encouraged to apply to the BCM/NRs for alternative and appropriate relief, e.g., removal of

negative documentation or revision of their discharge terms, such as characterization of service." *Id.*

DoD provided updated guidance in April 2025. ECF 63 at 1–24. In the accompanying memorandum DoD instructed that, as to those involuntarily separated solely for COVID-19 vaccine refusal, the Service Boards "will assess each case to determine if an error or injustice exists within the former Service member's record and order all appropriate records corrections, which may include but is not limited to reinstatement with no break in service, restoration of the member's previous grade or rank, and credit for lost service time due to separation." *Id.* at 5.

VIII. The Court's May 2025 Remand and Service Board Proceedings

In May 2025, the Court remanded plaintiffs' claims to their respective Service Boards, holding that the EO was an intervening event, as there was "no question that the EO may affect the validity of the Army, Air Force, and Marine Corps actions at issue in this case because the EO invalidates the very same DoD policy that the plaintiffs challenge in their amended complaint." *Bassen v. United States*, 177 Fed. Cl. 69, 73 (2025).

IX. On Remand, the Army Board Grants Backpay and Other Relief to Messrs. Bassen, Dailey, Davis, Endress, Merjil and Wynne

On remand, the Army Board granted constructive service credit, backpay and other individual relief to Messrs. (A) Bassen, (B) Dailey, (C) Davis, (D) Endress, (E) Merjil, and (F) Wynne. *See* ECF 80–85 (Army Board decisions). In Mr. Bassen's case, the "Board found by a preponderance of the evidence that [his] separation from service solely on the basis of his refusal to take the COVID-19 vaccine [was] an[] injustice." ECF 80 at 5. The Board recommended "constructive service credit and backpay through [Mr. Bassen's expiration term of service

(ETS)] date of 14 Oct 2024."[4] *Id.* Following those decisions, Messrs. (A) Bassen, (B) Dailey, (C) Davis, (D) Endress, and (E) Merjil stated that they were satisfied with the Board's actions. ECF 108 at 2.

In (F) Mr. Wynne's case, the Army Board similarly found "by a preponderance of the evidence that [his] separation from service solely on the basis of his refusal to take the COVID-19 vaccine was an injustice." ECF 85 at 5. As with the other Army plaintiffs, the Board recommended constructive service and all associated backpay from his discharge to the end of his service obligation: in his case, from June 28, 2022, through February 9, 2025. *Id.* The Board awarded him backpay based on his last duty location of Fort Hood, Texas, and rank of E-3. *Id.* at 6. The Board also removed disciplinary documents from his record. *Id.* Mr. Wynne, unlike the other Army Plaintiffs, is not satisfied with the Board's actions. Instead, he "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." ECF 117, Pl. Mot. at 3.

X. The Air Force Board Denies Backpay and Constructive Service Credit to Messrs. Hall and Rodriguez, and Grants Mr. Chisholm Backpay and Constructive Service from June 17, 2022, to September 30, 2022

In January 2026, the Air Force denied backpay and constructive service credit to Messrs. (G) Hall and (H) Rodriguez. ECF 113, 114. In both cases, the Board recognized, "[i]n light of EO 14184 and subsequent [DoD] and Department of the Air Force guidance . . . that the mandate, and the limited due process afforded to those seeking religious accommodation,

[4] The Army Board decisions for Messrs. (B) Dailey, (C) Davis, (D) Endress, and (E) Merjil largely contain the same rationale as Mr. Bassen's decisions. Because they are satisfied with those decisions, the Government will not restate the contents of those decisions. *See* ECF 80–84.

constituted an injustice," and that the "COVID-19 vaccination is now considered an unlawful order and has recommended correcting the record where appropriate." ECF 114, Hall Decision at 9–10; ECF 113, Rodriguez Decision at 9–10.

As to (G) Mr. Hall, the Air Force Board concluded that he "not demonstrated the existence of an error or injustice warranting correction of his military records." ECF 114, Hall Decision at 9. First, the Board found that Mr. Hall's record did not reflect vaccination status or any noncompliance with the vaccine mandate. *Id.* And second, the Board explained that Mr. Hall "has not requested reinstatement, which is a prerequisite for constructive service credit under current reinstatement policy," and thus found "no basis to grant [his] request for constructive active duty service credit or lost retirement pay for that period of service." *Id.* at 8. The Board explained that, under the relevant guidance backpay and service credit "require a commitment to the associated military service obligation." *Id.* at 10.

As to (H) Mr. Rodriguez, the Board found that he was "the victim of an error or an injustice" and recommended (2) that his record reflect that he was not involuntarily discharged; (2) he receive a favorable reentry code; and (3) that his discharge package be expunged from the record. ECF 113, Rodriguez Decision at 10. But as with Mr. Hall, the Board explained that reinstatement was a prerequisite for constructive service credit and backpay. *Id.* at 9. And because Mr. Rodriguez had not requested reinstatement, it could not grant his request for constructive service credit or backpay. *Id.*

Mr. Chisholm (I), who remained in the Air Force, received a different result. ECF 115. As to Mr. Chisholm, the Board found that he was "the victim of an error or injustice." *Id.* at 11. In Mr. Chisholm's case, however, the Board found that he "was never discharged from the service," but was "requesting corrections to his record based on other harms from the COVID-19

vaccine mandate." *Id.* The Board found Mr. Chisholm's arguments reasonable that his active duty orders were curtailed due to his unvaccinated status and recommended correction to show that instead remained on active duty orders through the original September 30, 2022, instead of through June 16, 2022. *Id.* Accordingly, the Board recommended that he be "credited with all points, backpay, benefits, and entitlements, minus any required offsets," based on his active duty service. *Id.* at 12. The Board, however, found there was "no evidence to show that [Mr. Chisholm] would have remained on full-time active duty orders through August of 2023." *Id.*

XI. The Navy Board Denies Mr. Springer Backpay

The Navy Board found an injustice in that (J) Mr. Springer was involuntarily separated from the Marine Corps solely for refusing the former COVID-19 vaccination mandate. ECF 75, Springer Decision at 6. Based on that finding, the Navy Board recommended that that the Marine Corps "carefully scrub [Mr. Springer's] naval record to identify and remove any and all adverse information pertaining to his refusal to comply with the former COVID-19 vaccination mandate." ECF 75, Springer Decision at 8. The Navy Board also found that "the injustices arising from the discharge itself has been fully addressed by the NDRB and that "[b]y changing [his] narrative reason to separation and reentry code to 'Secretarial Authority' and 'RE-1A] respectively." *Id.* at 6. By doing so, "the NDRB removed all adverse inferences that could be drawn about his discharge and/or naval service from [Mr. Springer's] DD Form 214 and restored [his] ability to reenlist in the future should he choose to do so." *Id.*

The Board, however, found that constructive service credit was "neither necessary nor appropriate" in this case. *Id.* at 7. The Board explained that "the President directly tied the receipt of full back pay, benefits, bonus payments, or compensation for those discharged solely for refusing the former COVID-19 vaccination mandate to a request for reinstatement." *Id.* at 7.

And without a request for reinstatement, Mr. Springer has not shown "how he was further harmed by the Marine Corps' decision to prematurely end his enlistment." *Id.* The Board further reasoned that the granting of constructive service credit in these circumstances was not necessary to make Mr. Springer whole and would instead provide "a significant financial windfall by rewarding him for service not actually performed." ECF 75 at 7.

XII. Plaintiffs' Renewed Motion for Judgment on the Administrative Record

Pursuant to the Court's February 23, 2026, and February 27, 2026, orders (ECF 109, 111), plaintiffs filed their renewed motion for judgment on the administrative record (MJAR) on March 9, 2026 (ECF 117). In their motion, plaintiffs assert that the Court should grant judgment on counts I and II of their First Amended Complaint as to violations of 10 U.S.C. § 1107a and RFRA. ECF 117; *see* ECF 17, First Am. Compl. Plaintiffs assert that the Reinstatement EO, Department of War guidance, and the Service Board decisions determined that the Services' RAR processes violated RFRA and was unjust and unlawful. Pl. MJAR at 22. Plaintiffs then filed a Second Amended Complaint on April 10, 2026. ECF 123.

SUMMARY OF ARGUMENT

First, the Court should dismiss the claims of plaintiffs (A) Bassen, (B) Dailey, (C) Davis, (D) Endress, (E) Merjil, (F) Wynne, and (I) Chisholm because there is no further relief that the Court may provide. Importantly, the first five plaintiffs listed above have represented in this litigation following remand that they were satisfied with the results of the Army Board's remand, which means there is no issue remaining for this Court to consider in their individual cases. Though Plaintiffs Wynne and Chisholm represented that they remain unsatisfied, their Service Boards granted them relief including constructive service credit and backpay. Regarding Mr. Wynne's desire for retroactive promotion, he has failed to articulate a basis upon which this

Court could grant this promotion. And Mr. Chisholm has failed to plainly state what further relief he seeks from the Court.

Second, plaintiffs have failed to show that the Service Boards' denial of constructive Service credit and backpay for Messrs. (G) Hall, (H) Rodriguez, and (J) Springer was arbitrary, capricious, an abuse of discretion or was otherwise not in accordance with law. Although the Reinstatement EO and Service Boards found injustice as to the Services' handling of the COVID-19 vaccine mandate, a finding of injustice is not a finding of illegality. Exercising their *equitable* discretion, the Air Force and Navy Boards granted relief in the form of record correction but determined that reinstatement, or a desire to reinstate, was necessary before the Boards would exercise their discretion to grant constructive service credit and backpay.

Third, the vaccine mandate did not violate 10 U.S.C. § 1107a. Importantly, plaintiffs (G) Hall, (H) Rodriguez, (I) Chisholm, and (J) Springer all stated that they would have declined any COVID-19 vaccine regardless of its licensure status. But there is no issue of them being required to take an unlicensed vaccine in this case. Indeed, the vaccination requirement applied only to fully licensed vaccines, which means the requirement did not run afoul of section 1107a. Moreover, DoD provided the necessary information under section 1107a for its members to be informed regarding the vaccine. In sum, 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, which means plaintiffs cannot prove their statutory violation claim.

Fourth, the Services did not violate the RFRA as to plaintiffs (G) Hall, (H) Rodriguez, and (I) Chisholm. 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.

ARGUMENT

I. The Court Should Dismiss the Claims of Plaintiffs Bassen, Dailey, Davis, Endress, Merjil, Wynne, and Chisholm Because There is No Further Relief the Court May Provide

Seven plaintiffs, (A) Bassen, (B) Dailey, (C) Davis, (D) Endress, (E) Merjil, (F) Wynne, and (I) Chisholm all received constructive service credit, backpay, and other individual relief from their respective board. The Court should therefore dismiss their claims because there is no other relief the Court can provide.

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, 593 (2011). 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). "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). The Court will grant a motion to dismiss pursuant to RCFC 12(b)(6) if the facts asserted in the complaint do not entitle the plaintiff to a legal remedy. *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002).

A. Messrs. Bassen, Dailey, Davis, Endress, and Merjil's Claims are Moot

In their motion for judgment, the five plaintiffs who were satisfied with their remand decisions appear not to take issue with any aspect of the Boards' decisions. Pl. MJAR at 19–38.

Indeed, the Army Board granted constructive service credit, backpay, and other

individual relief to Messrs. (A) Bassen, (B) Dailey, (C) Davis, (D) Endress, and (E) Merjil. See ECF 80–84 (Army Board decisions). In the February 2026 Joint Status Report, those plaintiffs stated that they were satisfied with the results of their respective Service Board decisions following the Court's remand. ECF 108 at 2.[5] Yet, those Plaintiffs still appear to seek relief in the Second Amended Complaint filed in April 2026.[6] Second Am. Compl. at 1–2. But because the Army Board granted the relief sought by those Plaintiffs, the Court should dismiss their claims. *See Rothe Dev. Corp. v. DOD*, 413 F.3d 1327, 1331 (Fed. Cir. 2005); *see also Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 939 (Fed. Cir. 2007) ("When, during the course of litigation, it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should generally be dismissed."). Where, as is the case here, "a defendant's actions have eliminated the possibility of meaningful relief, the case ordinarily should be dismissed as moot." *McTech Corp. v. United States*, 105 Fed. Cl. 726, 731 (2012). Plaintiffs have stated that they are satisfied and there is no further relief the Court could provide. Thus, the Court should dismiss Plaintiff's claims. *See* RCFR 12(b)(1), (6).

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[5] By letter dated April 30, 2026, the Army Review Boards Agency (ARBA) notified (E) Mr. Merjil and his counsel of a typographical error in his original remand decision. Specifically, page 6 incorrectly stated that the Service Board voted to "[r]estore all entitlements…as an E-6 at Fort Irwin, California," whereas the corrected version instead read "…as an E-4 at Fort Irwin, California." This correction made the decision consistent as a whole given that, on page 4, the Service Board had granted "[r]estoration of] all entitlements…at the appropriate time in service and time in grade, for *the rank of specialist (SPC)/E-4*." (Emphasis added.) Notwithstanding such notification, (E) Mr. Merjil has not changed his position as state in the February 2026 Joint Status Report, ECF 108 at 2.

[6] Plaintiffs acknowledges that five plaintiffs "have been satisfied and/or left the action" but it's unclear from the Second Amended Complaint whether this refers to Messrs. Bassen, Dailey, Davis, Endress, and Merjil. Second Am. Compl. at 1, n. 3. Those five plaintiffs are still named as parties in that complaint. Second Am. Compl. ¶15–24.

B. Mr. Wynne Cannot Establish Entitlement to the Retroactive Promotion

Despite being granted relief, Mr. Wynne (F) argues that the Army Board improperly denied him additional relief by failing to award him a similar promotion that he claims it awarded (E) Mr. Merjil.[7] ECF 117, Pl. MJAR at 35. But Mr. Wynne fails to show that the Court has jurisdiction to grant any relief. *Reynolds*, 846 F.2d at 748; *Visconi*, 98 Fed. Cl. at 593.

In the military promotion context, the Court has noted that "the Military Pay Act ordinarily does not give rise to a right to the pay of the higher rank for which the plaintiff was not selected." *Conti v. United States*, 168 Fed. Cl. 547, 557 (2023) (quoting *Smith v. Sec'y of the Army*, 384 F.3d 1288, 1294 (Fed. Cir. 2004)). This is so because "a service member is entitled only to the salary of the rank to which he is appointed and in which he serve[d]." *Id*. The Court has recognized an exception where the plaintiff "has satisfied all the legal requirements for promotion, but the military has refused to recognize his status." *Id.* (citing *Smith*, 384 F.3d at 1294); *see also Skinner v. United States*, 594 F.2d 824, 830 (Ct. Cl. 1979).

Thus, for Mr. Wynne's claim to be justiciable, he must identify an instruction the Army violated by failing to promote him or that he satisfied all the legal requirements for promotion but that the military has refused to recognize his status. *Conti*, 168 Fed. Cl. at 557 (citing *Hale v. United States*, 497 F. App'x 43, 46 (Fed. Cir. 2012)). But Mr. Wynne did not present any such instruction to the Army Board. *See* ECF 85. Nor does he present any such evidence now. *See* Pl. Mot. at 35–36. The mere fact that an Army Board found that a different service member in different circumstances may have satisfied those requirements does not mean that Mr. Wynne

[7] As discussed in n. 5, ARBA notified (E) Mr. Merjil that his decision reflected a typographical error. As explained above, though the Service Board voted to grant (E) Mr. Merjil's restoration as "the rank of specialist (SPC)/E-4," the decision later incorrectly stated "E-6" as the grade. The correction clarified that no promotion had been granted.

has a justiciable claim in this Court. Because the Court may not review a promotion claim in the absence of a justiciable standard by which it may assess whether the Army erred by not promoting him, the Court should find Mr. Wynne's claim moot. *See Antonellis v. United States*, 723 F.3d 1328, 1334 (Fed. Cir. 2013) ("[A] remedy is available only if the statute, regulation, or instruction provides justiciable standards.").

Indeed, plaintiffs fail to identify a standard. Plaintiffs claim the Army possessed the "discretion and authority" to promote Mr. Wynne but fail to identify any procedure violated when the Army exercised that discretion to not promote Mr. Wynne. *See, e..g,* Pl. MJAR at 35–36. At best, citing a district court decision, plaintiffs argue that the Army was obligated to promote Mr. Wynne because the Army reactively promoted Mr. Merjil. ECF 117 at 35 (citing *Wilhelmus v. Geren*, 796 F. Supp. 2d 157, 162 (D.D.C. 2011)). But this out-of-circuit decision does not speak to automatic promotions, and we are unaware of any requirement to promote all servicemembers who are, at best, in similar situations.

C. Mr. Chisholm Fails to State What Further Relief He is Seeking from the Court Following the Air Force Board's Decision on Remand

It is unclear what relief Mr. Chisholm seeks following remand because he has failed to articulate any alleged harm. Pl. MJAR at 19–38. The United States is also hard pressed to discern any potential harm he might be seeking to remedy because the Air Force Board credited (I) Mr. Chisholm "with all points, backpay, benefits, and entitlements, minus any required offsets," based on his active-duty service orders from October 31, 2021, through September 30, 2022. ECF 115 (Chisholm Decision at 12). Though Mr. Chisholm requested that the Board grant constructive service through August 2023, the Board found there was "no evidence to show that [Mr. Chisholm] would have remained on full-time active duty orders through August of 2023." *Id.* at 1, 12. Mr. Chisholm fails to allege in either his Second Amended Complaint or in

his Motion that the Air Force Board's decision was arbitrary, capricious, unsupported by substantial evidence, or contrary to law. *See* Second Am. Compl. ¶16; *Cronin v. United States*, 765 F.3d 1331, 1334 (Fed. Cir. 2014). Moreover, Mr. Chisholm fails to identify any evidence to establish that he would have remained on active-duty orders through August 2023 but for his refusal to take the COVID-19 vaccine. Because Appellant does not allege any error in the Air Force Board's decision, the Court should dismiss his claim. *See Rothe Dev. Corp.*, 413 F.3d at 1331; *see also Chapman Law Firm Co.*, 490 F.3d at 939. Under the facts presented, there is simply no further relief the Court could provide Mr. Chisholm, and the Court should dismiss his claims. *See* RCFC 12(b)(6).

II. Plaintiffs Fail to Show that the Service Boards' Denial of Constructive Service Credit and Backpay for Hall, Rodriguez, and Springer was Arbitrary, Capricious, an Abuse of Discretion or was Otherwise Not in Accordance with Law

The Air Force and Navy Boards denied Messrs. (G) Hall, (H) Rodriguez, and (J) Springer constructive service credit and backpay. ECF 75 (Springer decision); ECF 114 (Hall decision); ECF 113 (Rodriguez Decision). Each Board determined, consistent with the Reinstatement EO, that while the discharge for refusal to comply with COVID-19 vaccine mandate constituted an "injustice," without reinstatement—or a request for reinstatement—it would not exercise its discretion to provide backpay and constructive service credit absent a request for reinstatement. ECF 75 at 7; ECF 113 at 9; ECF 114 at 9. These three plaintiffs challenge the Boards' exercise of its discretion in this manner. Pl. MJAR at 28–30.

The Court reviews a Service Board's decision to determine whether it was arbitrary, capricious, unsupported by substantial evidence, or contrary to law. *Cronin*, 765 F.3d at 1334. "An agency's decision is arbitrary and capricious when the agency decision-maker 'entirely fail[s] to consider an important aspect of the problem, offer[s] an explanation for its decision that

runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Kelly v. United States*, 69 F.4th 887, 894–95 (Fed. Cir. 2003) (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farms Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Plaintiffs must show "cogent and clearly convincing evidence" that the agency's action fails to meet this standard. *Wronke v. Marsh*, 787 F.2d 1569, 1576 (Fed. Cir. 1986) (quoting *Dorl v. United States*, 200 Ct. Cl. 626, 633 (1973)). The correction board must also provide sufficient detail so that the Court may ascertain the reasoning behind the denial of benefits to the applicant. *See Buchanan v. United States*, 621 F.2d 373, 383, (Ct. Cl. 1980). If the plaintiff cannot show either a 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).

Contrary to plaintiffs' assertion otherwise, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 392–93 (2025), did not displace that deferential standard for discretionary judgments. Pl. MJAR at 19. It is true that a Court exercises independent judgment when it decides if an agency acted within its statutory authority, a question of law. *Loper Bright*, 603 U.S. at 392–93. But in cases involving review of an agency's exercise of discretion or its findings of fact, the Court still owes the agency determination deference. *See Seven Cnty. Infrastructure Coal. v. Eage Cnty.*, 605 U.S. 168, 181 (2025) (declining to apply *Loper Bright* to an agency's determination of what details were relevant in an environmental impact statement).

A. A Finding of Injustice is Not a Finding of Illegality and 10 U.S.C. § 1552 Commits the Discretion of Equitable Remedies to Each Military Secretary

Messrs. (G) Hall, (H) Rodriguez, and (J) Springer incorrectly contend that the Air Force and Navy boards violated the law by finding an injustice but then denying them all possible relief available. Pl. MJAR at 22.

Section 1552 authorizes the military Secretaries, acting through corrections boards, to "correct an error or remove an injustice" as to any military record. 10 U.S.C. § 1552(a)(1) ("The Secretary of a military department may correct any military record when the Secretary considers it necessary to correct an error or remove an injustice."). Multiple circuits recognize that section 1552's discretionary language affords Service Boards significant deference. As the D.C. Circuit emphasized, "[i]t is simply more difficult to say that the Secretary has acted arbitrarily if he is authorized to act '*when he considers it necessary* to correct or remove an injustice' . . . than it is if he is required to act whenever a court determines that certain objective conditions are met." *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989); *see also Taylor v. Hung Cao*, No. 25-1880, 2026 U.S. App. LEXIS 19777, at *17–18 (1st Cir. July 7, 2026); *Dorado-Ocasio v. Averill*, 128 F.4th 513, 520–21 (4th Cir. 2025) (noting that Service Boards are afforded "an unusually deferential application of the 'arbitrary and capricious standard.'").

Under that authority, the Navy Board found an injustice in that (J) Mr. Springer was involuntarily separated from the Marine Corps solely for refusing the former COVID-19 vaccination mandate. ECF 75, Springer Decision at 6. The Air Force similarly acknowledged that "the COVID-19 mandate, and the limited due process afforded to those seeking religious

accommodation, constituted an injustice."[8] ECF 114 (Hall Decision at 9); ECF 113 (Rodriguez Decision at 10).

But an injustice is an equitable concept. It describes treatment that, viewed in hindsight, offends the sense of fairness. *See Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (noting that an injustice is treatment that "shocks the sense of justice" but "is not technically illegal."). An error, on the other hand, means a legal or factual error. *Id.* The Reinstatement EO reflects that distinction: it calls the vaccine mandate unfair, overbroad, and unnecessary, and it describes the resulting discharges as unjust. Reinstatement EO, 90 Fed. Reg. at 8761.[9] The Reinstatement EO neither declares the vaccine mandate illegal nor does it not find a violation of 10 U.S.C. § 1107a or RFRA. DoD's guidance and the Service Boards' decisions mirror this equitable language. ECF 63 at 12 (noting that "the 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.").

Contrary to plaintiffs' assertion, the Reinstatement EO, DoD guidance, Air Force Board, and Navy Board have never held that the vaccine mandate "violated RFRA" or was otherwise

[8] The Air Force decisions differ in finding whether (H) Mr. Rodriguez and (G) Mr. Hall experienced an injustice or an error. The Board found that Mr. Rodriguez was "the victim of an error or injustice" and, based on DoD guidance, upgraded his discharge to reflect that he was not involuntarily discharged for misconduct. ECF 113 (Rodriguez decision at 9). In Mr. Hall's case, the Air Force found that he had not shown the existence of an error or an injustice because his official record did not reflect vaccination status or noncompliance with the vaccine mandate. ECF 114 (Hall Decision at 9).

[9] The Reinstatement EO disclaims the creation of a private right of action. Fed. Reg. at 8762 ("This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."). Instead, it orders the Secretary of Defense to take specific actions to allow servicemembers discharged because they refused the COVID-19 vaccine to return to service.

illegal.[10] Pl. MJAR at 23. Instead, the Boards' conclusion that the COVID-19 mandate and the religious accommodation process was unjust is an equitable determination about fairness. That equitable determination is left to the discretion of each military Secretary under 10 U.S.C. § 1552(a). *See Reale*, 208 Ct. Cl. at 1011–12 (recognizing that the Boards "exercise high discretionary functions in the management of the military establishment"); *see also Anderson v. United States*, 59 Fed. Cl. 451, 456 (2004) (noting that the Court "possess[es] limited authority to award equitable relief only when such an award would be ancillary to an affirmative obligation of the federal government to pay money damages" and that military correction boards are "not limited by the same constraint" and are "free to make decisions based on equitable grounds.").

Illustrating this principle, the Navy Board did not consider the EO's guidance "to be a bar to exercising its independent authority to grant constructive service credit when appropriate," but it "did not find such relief to be appropriate under the circumstances of [Mr. Springer's] case because doing so would provide [him] a benefit not afforded to other similarly situated individuals." ECF 75 at 8. Thus, the Navy Board, acting on its equitable discretion, determined that constructive service was not warranted in Mr. Springer's case. That the Army Board may have granted equitable relief to some of the plaintiffs in the form of backpay and constructive service credit reflects only that different branches can and do exercise their independent discretion differently, which corresponds with Congress affording such discretion to each

[10] The Government acknowledges that the Air Force Board stated that it "recognizes that the COVID-19 vaccination is now considered an unlawful order." ECF 114 (Hall Decision at 10), ECF 113 (Rodriguez Decision at 10). Despite this language, the Board did not find that the COVID-19 vaccination violated any statutes. At most, the Board's use of the passive voice suggests that there may have been some uncertainty within the Air Force as to the EO's meaning. *See, e.g., Chattler v. United States*, 632 F.3d 1324, 1331 (Fed. Cir. 2011) (noting that use of the passive voice "makes it less likely that the government intended to be bound").

Secretary individually. 10 U.S.C. § 1552(a)(1). Variation among independent decision makers is a feature of that statutory design, rather than a flaw.

Plaintiffs' citations to *Dodson v. United States*, 988 F.2d 1199, 1208 (Fed. Cir. 1993) and *Kelly*, 69 F.4th at 899 are unpersuasive. Pl. MJAR at 23–26. To be sure, the Board may not find an injustice or error and then refuse all corrective action. But that is not what happened here as the Boards refused nothing. The fact that the Board has a "statutory mandate to correct records when necessary to correct an error or remove an injustice" does not require a Service Board to grant the maximum possible remedy or entitle an application to the particular remedy of his choice. *See Kelly*, 69 F.4th at 899; 10 U.S.C. § 1552(a)(1). The Service Boards satisfied 10 U.S.C. § 1552 and extended further relief where it was warranted. Consistent with the EO and DoD guidance, the Boards remedied the unfairness they found through record correction, such as a discharge upgrade in Mr. Rodriguez's case and the removal of adverse information in Mr. Springer's case.[11] ECF 113 at 10–11; ECF 75 at 8–9. In sum, the Boards' discretionary choices of remedies in these individual cases are reasonable and consistent with 10 U.S.C. § 1552. Absent a finding that there was a violation of law, such as RFRA or 10 U.S.C. § 1107a, the Boards' decisions are in accordance with law and do not represent an abuse of that equitable discretion. *See Cronin*, 765 F.3d at 1334.

B. The Boards' Determination that Reinstatement was a Necessary Prerequisite to Backpay and Constructive Service Credit is Reasonable

There is no merit to these three plaintiffs' assertion that the that the Air Force and Navy Boards violated the law by determining that they would only exercise their equitable discretion

[11] In (G) Mr. Hall's case, the Board found no error or injustice because his record did not reflect his vaccination status or noncompliance with the vaccine mandate. ECF 114 (Hall Decision at 9).

for backpay in situations where reinstatement was sought. *See* Pl. MJAR at 28–30. Indeed, a plain reading of the EO and DoD Guidance establishes that that the Boards possessed such discretion only when a former servicemember sought reinstatement. And that reading is consistent with the constructive service doctrine.

The Navy Board found an injustice in that (J) Mr. Springer was involuntarily separated from the Marine Corps solely for refusing the former COVID-19 vaccination mandate. ECF 75, Springer Decision at 6. Based on that finding, the Navy Board recommended that that the Marine Corps "carefully scrub [Mr. Springer's] naval record to identify and remove any and all adverse information pertaining to his refusal to comply with the former COVID-19 vaccination mandate." ECF 75, Springer Decision at 8. The Navy Board also found that "the injustices arising from the discharge itself has been fully addressed by the NDRB and were remedied "[b]y changing [his] narrative reason to separation and reentry code to 'Secretarial Authority' and 'RE-1A]' respectively." *Id.* at 6. By doing so, "the NDRB removed all adverse inferences that could be drawn about his discharge and/or naval service from [Mr. Springer's] DD Form 214 and restored [his] ability to reenlist in the future should he choose to do so." *Id.*

The Navy Board, however, found that an additional remedy of constructive service credit was "neither necessary nor appropriate" in this case. *Id.* at 7. The Board explained that "the President directly tied the receipt of full back pay, benefits, bonus payments, or compensation for those discharged solely for refusing the former COVID-19 vaccination mandate to a request for reinstatement." *Id.* at 7. And without a request for reinstatement, Mr. Springer had not shown "how he was further harmed by the Marine Corps' decision to prematurely end his enlistment." *Id.* The Board further reasoned that the granting of constructive service credit in these circumstances was not necessary to make Mr. Springer whole and would instead provide "a

significant financial windfall by rewarding him for service not actually performed." ECF 75 at 7.

Similarly, the Air Force Board explained that reinstatement "is a prerequisite for constructive service credit under current reinstatement policy," and that, "absent a request for reinstatement, [it] is unable to provide the requested relief" of backpay and constructive service credit. ECF 114 at 10 (Hall decision at 10); ECF 113 at 10 (Rodriguez Decision) ("[W]ith regards to [Mr. Rodriguez's] request for constructive service credit, back pays, and entitlement, absent a request for reinstatement, the Board is unable to provide the full relief requested.").

The Navy and Air Force Secretaries, consistent with the EO, reserved the most substantial monetary remedy for members who resumed, or sought to resume, their service relationships. The line the Boards drew was reasonable. Constructive service credit and backpay compensate a member for a service relationship that would have continued but for an illegal action. *See Barnick v. United States*, 591 F.3d 1372, 1379 (Fed. Cir. 2010) ("The basic premise of the constructive service doctrine is to 'return successful plaintiffs to the position that they would have occupied 'but for' their illegal release from duty'") (quoting *Dilley v. Alexander*, 627 F.2d 407, 413 (D.C. Cir. 1980)). As we explain below, the discharges carried out under the vaccine mandate were not illegal, despite these original plaintiffs' contrary contention. Pl. MJAR at 20–22. This reality defeats any claim that constructive service credit and backpay are required for any service member who was discharged for refusing to take the COVID-19 vaccine in accordance with the now-rescinded mandate.

Because constructive service and backpay are not mandated remedies in this situation, the Boards appropriately considered other aspects of the servicemembers' cases in determining the relief to be afforded. Importantly, a member who was unjustly removed from a military career

that he desires to continue is in a different position from who does not wish to return to service. The first was and continues to be prevented from continuing a unique career path, whereas the second lost employment and declines to return to it. Illustrating this principle, the Air Force Board granted equitable relief to Mr. Chisholm in part because he never left service. ECF 115 at 11 (Chisholm Decision) ("[T]he Board's rationale for correcting the applicant's record to reflect credit of constructive service and backpay in this particular case is due to the fact that he has continued to serve in the Air Force and therefore meets the intent of fulfilling a service obligation normally associated with the benefits of reinstatement."). And the Air Force Board explained that, as to Mr. Rodriguez, "[s]hould he seek reinstatement, and upon meeting the medical and physical retention standards be willing to fulfill a minimum four-year service obligation, [it] would be willing to reconsider [that] portion of his request." ECF 113 at 10 (Rodriguez decision).

Moreover, the Board's reinstatement requirement is consistent with the requirements of the constructive-service doctrine. *Contra* Pl. MJAR at 23–24. To benefit from the constructive-service doctrine, a plaintiff must show that he or she is "ready, willing, and able" to resume his or her military duties. *Anderson*, 59 Fed. Cl. at 458 (citing *Groves v. United States*, 47 F.3d 1140, 1147 (Fed.Cir.1995)); *see also Graves v. United States*, 176 Ct. Cl. 68, 76 (1966) ("It has long been the rule in this court that back pay for improper dismissal will be denied where the employee is not ready, willing and able to resume his position during the period for which relief is sought."); *Lyon v. United States*, 161 Fed. Cl. 88, 97 (2022); *Grooms v. United States*, 113 Fed. Cl. 651, 662 (2014). In *Anderson*, the Court held that Major Anderson's refusal to return to active duty waived a required element for relief under the constructive service doctrine, warranting dismissal:

> Because Major Anderson voluntarily and knowingly foreswore the option of returning to active duty when he requested constructive service pay from the ABCMR, he is not entitled to relief under the constructive-service doctrine. Due to this refusal to be reinstated and the fact that he did not serve on active duty during the time for which he requests payment, Major Anderson is not entitled to relief under the Military Pay Act. Accordingly, he has failed to state a claim for which this Court can provide relief. The Court therefore grants the government's motion to dismiss pursuant to RCFC 12(b)(6).

Anderson, 59 Fed. Cl. at 459.

A plaintiff must prove that he or she was ready, willing, and able to serve during the *entire* period for which he or she seeks back pay. *Piccone v. United States*, 186 Ct. Cl. 752, 769, 407 F.2d 866, 876 (1969) ("At a trial on this issue, the plaintiff must ultimately sustain the burden of proving, as part of his claim, that he was ready, willing and able to perform *at all times since* April 11, 1962, for which back pay is sought." (emphasis added)). By declining to request to reenlist, those plaintiffs have similarly declined to show that they were ready, willing, and able to serve during those time periods they seek backpay. *Anderson*, 59 Fed. Cl. at 459; *see also Groves*, 47 F.3d at 1146; *Graves*, 176 Ct. Cl. at 76. Messrs. (G) Hall, (H) Rodriguez, and (J) Springer did not assert before the Boards that they were willing, able, and ready to serve. Nor do plaintiffs assert so in the Second Amended Complaint or in their MJAR.

In fact, Messrs. Hall and Rodriguez voluntarily separated from the Air Force, and voluntary separation actions do not provide viable claims for relief in this Court. *See* AF AR at S4_25, S7_27; *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). In response to being notified of his proposed discharge, (H) Mr. Rodriguez unconditionally waived his right to a discharge board, meaning he was aware that he would be discharged. AF AR at S4_25. Mr. Rodriguez indicated that he signed this

statement voluntarily. AF AR at 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 at S4_27.

Likewise, (G) 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 at S7_27. In these circumstances, Mr. Rodriguez and Mr. Hall cannot show that they involuntarily accepted the terms of the Government. *Carmichael v. United States*, 298 F.3d 1367, 1372 (Fed. Cir. 2002) (holding that to establish coercion or duress a plaintiff must show, among other factors, 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."); *see also Longhofer v. United States*, 29 Fed. Cl. 595, 601 (1993). Indeed, they voluntarily accepted discharge by waiving any right to a board hearing and by voluntarily requesting curtailment of their orders to retire earlier. Thus, they cannot now bring a claim for backpay.

Moreover, though Mr. Rodriguez and Mr. Hall may have felt they had limited options, the mere fact that they had to choose 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*, 207 Ct. Cl. 333, 338, 518 F.2d 584, 587 (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.").

As well as being consistent with the constructive service doctrine, the plain language of 10 U.S.C. § 1552 does not preclude requiring reinstatement before a Service member may

receive backpay and constructive service credit. *Contra* Pl. MJAR at 22–23. The Boards's use of a reinstatement requirement refers to a readiness, willingness, and ability to serve. *See Anderson*, 59 Fed. Cl. 451, 458 (2004).

True, neither 37 U.S.C. § 204 nor 10 U.S.C. § 1552 list reinstatement as a precondition to receiving backpay following departure from service. Pl. MJAR at 23. But section 1552 does not provide any preconditions to relief. Instead, Congress authorized each military Secretary to make record corrections "when the Secretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). The Air Force and Navy Boards acted within their equitable discretion in weighing whether reinstatement, or a request or reinstatement, was a necessary prerequisite to backpay and constructive service credit. *See Reale*, 208 Ct. Cl. at 1011–12.

Because the reinstatement requirement proffered by the Service Boards is consistent with this caselaw concerning the constructive service doctrine and the plain language of 10 U.S.C. § 1552, Appellant cannot show that the Boards' decisions were arbitrary, capricious, and abuse of discretion, or were otherwise not in accordance with law. *See Cronin*, 765 F.3d at 1334.

III. Plaintiffs' Claims Under Count I Fail to the Extent They are Premised on the Allegation that the Vaccine Mandate Violated 10 U.S.C. § 1107a

Plaintiffs' claims for back pay under the Military Pay act, as alleged in Count I of the Second Amended Complaint, are all ultimately premised on an incorrect allegation that DoD and the Services violated 10 U.S.C. § 1107a by requiring that service members receive a vaccine approved only for emergency use. *See* Second Am. Compl. ¶¶ 152–72. Plaintiffs believe that this alleged violation renders their discharges or removal from active duty

unlawful and entitles them to pay under the Military Pay Act.[12] *See id*. ¶¶ 166–72.

These claims fail for four reasons. First, four 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 applied only 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. Messrs. Hall, Rodriguez, Chisholm, and Springer Lack Standing Under 10 U.S.C. § 1107a Because They Would Have Declined Any COVID-19 Vaccine Regardless of Licensure

These four original plaintiffs in this action lack standing under 10 U.S.C. § 1107a. To invoke this Court's jurisdiction, a plaintiff must establish standing under Article III of the Constitution. *See Media Techs. Licensing, LLC v. Upper Deck Co.*, 334 F.3d 1366, 1370 (Fed. Cir. 2003). A plaintiff must satisfy three elements to show standing. *Paradise Creations, Inc. v. UV Sales, Inc.*, 315 F.3d 1304, 1308 (Fed. Cir. 2003). First, "the plaintiff must allege that he 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.*

[12] As discussed above, although the Reinstatement EO, DoD guidance, and Service Boards found the mandate was an "injustice" warranting equitable relief, they did not find the vaccine mandate violated 10 U.S.C. § 1107a.

Messrs. (G) Hall, (H) Rodriguez, (I) Chisholm, and (J) Springer cannot establish a causal connection between the injury and the conduct complained of because the record shows that they refused to take *any* Pfizer vaccine, regardless of its labeling—as FDA-licensed Comirnaty—or as the Pfizer-BioNtech COVID-19 vaccine authorized under the EUA. For example, Mr. Rodriguez stated he was against all then-available COVID-19 vaccines as he believed they were unethically derived. AF AR at S1_8. He further stated that he has "always questioned the FDA's intentions." AF AR at S1_8. Mr. Chisholm objected to all available vaccines due to their use of "cell lines from aborted fetuses." AF AR at S2_21. Similarly, Mr. Hall stated he was opposed to available COVID-19 vaccines because "decades-old fetal cell lines were used in the vaccine research." AF AR at S3_1. And 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 that receiving "COVID-19 vaccine is a sin." Navy AR at 94–95.

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, these plaintiffs lack standing and their claims under 10 U.S.C. § 1107a should be dismissed. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (holding that the plaintiff must show "a fairly traceable injury and the complained-of-conduct of the defendant.").

B. DoD's Vaccination Requirement Complied With 10 U.S.C. § 1107a

Even if not dismissed, these four plaintiffs' claims fail on the merits for three reasons. First, they argue that DoD "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. Second Am. Compl.

¶ 159, 163. While plaintiffs admit that the mandate required fully licensed vaccines, *id.* ¶ 160, their theory is that "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.* at ¶164. This argument is a red herring because neither the vaccine requirement nor its implementation required use of an unlicensed vaccine or otherwise ran afoul of section 1107a.

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 at 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 at 5.

Second, "[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 a temporary restraining order against enforcement of the COVID-19 vaccine mandate based on alleged 10 U.S.C. § 1107a violation); *see also* 10 U.S.C. § 1107a(a)(1)-(2). Plaintiffs do not allege and cannot show they were not so informed.

Third, plaintiffs' argument that DoD did not have any Pfizer vaccines labeled as Comirnaty ignores the realities of the interchangeability of the vaccines being used, which

defeats their claim that it was impossible to comply with the mandate.

This argument ignores that DoD's guidance regarding vaccine administration made clear that the distinction plaintiffs rely on in support of their contention does not support a claim that no vaccines were available. That guidance stated:

> 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 at 1. The DoD guidance further provided 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 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? (Feb 8, 2022), https://perma.cc/XD6V-HH48.

The Government acknowledges that the Court rejected its interchangeability argument in *Harkins v. United States*, 174 Fed. Cl. 592, 604–05 (2025). Relying on *Doe #1-14 v. Austin*, 572 F.Supp. 3d 1224, 1232 (N.D. Fla. 2021), the Court held that the Government's position in that case failed "to appreciate the import of the FDA's distinction between medical and legal interchangeability." *Harkins*, 174 Fed. Cl. at 604. Multiple federal courts, however, "have held that the Comirnaty vaccine, which was fully approved by the FDA, is the functional equivalent of the Pfizer-BioNTech EUA vaccine." *Boyd v. Shriners Hosps. for Children*, No. 25-1183, 2026 U.S. App. LEXIS 10558, at *2, n. 1 (3d Cir. Apr. 14, 2026) (collecting cases). For example, in *Brock v. City of Bellingham*, the U.S. District Court for the Western District of Washington held that the plaintiffs "failed to demonstrate that any purported distinction [between Comirnaty and the Pfizer-BioNTech vaccine] bears a factual or legal significance," noting multiple courts' holdings and FDA's repeated statements that the formulations are the same. No. 2:24-cv-850, 2025 LX 163162 at *12 (W.D. Wash. Jan. 21, 2025). In *Johnson v. Brown*, the United States District Court for the District of Oregon found that FDA's approval for the Comirnaty vaccine "was for the *physically, chemically, and biologically identical vaccine.*" 567 F. Supp. 3d 1230, 1247 (D. Or. 2021). In *Navy Seal 1 v. Biden*, the U.S. District Court for the Middle District of Florida held that the plaintiffs identified "no factual distinction between Pfizer's vaccine bearing the emergency label but produced in compliance with eh FDA license and Pfizer's 'interchangeable vaccine bearing the Comirnaty label." 574 F. Supp. 3d 1124, 1131 (M.D.

Fla. 2021). Because multiple federal courts have concurred that the vaccines are interchangeable, the Government disagrees with the Court's reasoning in *Harkins* and urges this Court to do the same.

This interchangeability defeats plaintiffs' argument, which hinges on the two vaccines being "legally distinct." Pl. MJAR. at 6. But in the EUA, FDA explained that the differences did "not impact safety or effectiveness." Cong. Rsch. Srv., FDA Approval at 12 (citing FDA, EUA letter to Pfizer, Sept. 22, 2021). As the Congressional Research Service recognized in discussing the FDA's guidance, though the "two products differ in branding and labeling," they "can be used interchangeably without any impact on safety or effectiveness." *Id*. So even if there were no Comirnaty-labeled vaccines available, the Services relied on FDA's guidance that the Pfizer-BioNTech vaccine 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.

IV. Plaintiffs Claims Under Count II Fail Because the Services Did Not Violate RFRA as to Messrs. Hall, Rodriguez, and Chisholm

Under Count II, Messrs. (G) Hall[13] (H) Rodriguez, and (I) Chisholm allege that they were wrongfully denied military pay under the Military Pay Act based on a violation of

[13] As discussed above, the Air Force Board granted backpay to Mr. Chisholm for his period of active service, so the Board should dismiss his claim as moot.

RFRA, 42 U.S.C. § 2000bb. Second Am. Compl. ¶¶ 173-87; Pl. MJAR. at 22. Plaintiffs, however, fail to show that the Services' actions violated the RFRA. 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).

Here, as we demonstrate below, 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

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. *See Navy SEAL 1*, 600 F. Supp. 3d at 13–14 ("[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,"); *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 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). "When 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*, 593 F. Supp. 3d at 953 (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 at 5; AF AR at S1_57. "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; *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). "[W]hen 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)); *Republican Nat'l Comm. v. Pelosi*, 602 F. Supp. 3d 1, 8 (D.D.C. 2022), vacated as moot by No. 22-5123, 2022 WL 4349778 (D.C. Cir. Sep. 16, 2022).

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. Second Am. Compl. ¶180. The Air Force specifically considered the arguments each plaintiff presented in support of his

religious accommodation request. AF AR at S1_27-28; AF AR at S2_19–20; AF AR at S3_14–15. That Messrs. Chisholm, Hall, and Rodriguez 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. *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)..

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.[14] 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,

[14] *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").

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 Messrs. (G) Hall, (H) Rodriguez, and (I) Chisholm's requests for religious accommodations 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 at S1_28; AF AR at S2_14; AF AR at S3_13. The Air Force specifically considered Mr. Rodriguez's assignment as a pararescueman,[15] noting that his "duties include working in close confines of [his building]." AF AR at S1_28. Mr. Rodriguez also "conduct[ed] training around other members of the unit to maintain his currencies." AF AR at 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 at S1_28, S1_30.

The Air Force also considered Mr. Chisholm's military duties within the nuclear

[15] 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.

career field. AF AR at 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 at S2_40. He also served as a classroom instructor, which placed him "in direct contact with an undetermined number of students in order to execute" his duties. AF AR at 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 at 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 at S3_13. Mr. Hall's inability to travel due to his status meant that lesser restrictive means were not available. AF AR at 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. *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 at S1_28; AF AR at S2_14; AF AR at S3_13. Likewise, the Air Force evaluated the feasibility of masking and distancing but concluded that those measures were not as effective as vaccination. AF AR S1_28; AF AR at S2_14; AF AR at S3_13. And unlike vaccination, masking and distancing did not provide any protection to an infected individual from severe illness or death. *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 Messrs. Chisholm, Hall, and Rodriguez were wrongfully discharged due to a RFRA violation should be denied.

CONCLUSION

For the above reasons, the Court should deny plaintiffs' Motions and grant Defendant's Motion to Dismiss and for Judgment on the Administrative Record.

Respectfully submitted,

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