IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Governor GREG ABBOTT, in his official capacity as Governor of the State of Texas; *et al.*, *Plaintiffs*, v. JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*, *Defendants*.	No. 6:22-cv-3-JCB

MOTION TO DISMISS AND
FOR JUDGMENT ON THE PLEADINGS

In warfare, disease has historically accounted for more Service Member deaths than battlefield injuries, and a healthy fighting force has long been a key part of America's military readiness. For that reason, since decades before the COVID-19 pandemic, the Department of Defense ("DoD") has required that all Service Members obtain at least nine immunizations, including the flu vaccine, and up to an additional eight depending on the circumstances. For a brief period, during the peak of the deadly COVID-19 pandemic that killed more than one million Americans—and seeking to protect the readiness of the Armed Forces by reducing the risk of hospitalizations and deaths among Service Members—DoD had added the COVID-19 vaccine to the long list of required immunizations.

Rather than working cooperatively with their federal counterparts to minimize the threat to military readiness posed by COVID-19 during the peak of the pandemic, Plaintiffs—Governors Abbott and Dunleavy—initiated this lawsuit and sought to invoke the judicial machinery of injunction to undermine the very purpose of a National Guard—to be ready.

But this case presents no basis to consider Plaintiffs' claims because the Court lacks jurisdiction. Plaintiffs seek to enjoin Defendants from convening courts-martial and from

withdrawing federal recognition from Texas and Alaska Guardsmen. But Plaintiffs cannot show that any of these purported enforcement measures were ongoing or imminent at the outset of the litigation. And because no Plaintiff alleged an impending enforcement action against them personally, Plaintiffs would have to show even more to demonstrate personal injury, which they cannot. Accordingly, Plaintiffs lack standing.

Even if Plaintiffs could demonstrate standing to seek an injunction, this case is moot. In January 2023, at Congress's command, the Secretary of Defense rescinded the COVID-19 vaccination requirement. The Secretary of Defense announced that Service Members who had sought religious, medical, and other accommodations from the requirement to vaccinate should not face any future consequence for failing to comply. But he did not immediately rule out the possibility that Service Members who refused vaccination without seeking an exemption should face some consequence for refusing to comply with the now-rescinded requirement. As the enforcement record since rescission demonstrates, however, Defendants ultimately decided not to initiate any enforcement proceedings against Guardsmen solely for refusing the now-defunct vaccination requirement and have no intention of doing so in the future. Because there is no risk that Texas and Alaska Guardsmen will be subject to any enforcement measures, Plaintiffs lack a concrete and ongoing stake in their challenge.

Even if an Article III case or controversy existed both at the outset of the litigation and now, the claims pled in the operative complaint face other fatal threshold flaws. First, the Administrative Procedure Act ("APA") counts each fail to identify the circumscribed agency action that Plaintiffs seek to review. Second, Plaintiffs fail to show that these arbitrary-and-capricious claims can survive *Mindes* scrutiny. And third, decisions under the relevant statutes involve a balancing of the nation's defense needs that are committed to military discretion.

Moreover, Plaintiffs fail to establish the critical factors that must be present for the nonstatutory equitable *ultra vires* review demanded under Counts I, II, and III. In particular, given the availability of an APA cause of action, they fail to satisfy the traditional requirement at equity that they lack an adequate means of vindicating their rights without invoking equitable jurisdiction.

For all of these reasons, the Amended Complaint should be dismissed.

BACKGROUND

I. Military COVID-19 Vaccination Program

Since the dawn of our Nation, the military has required inoculations as a part of military medical readiness because vaccines reduce infectious disease morbidity and mortality. *See* Cong. Rsch. Serv., Defense Health Primer: Military Vaccinations (updated Aug. 6, 2021), https://perma.cc/BMW3-HGJW. And for decades before COVID-19, the military has required at least nine immunizations, including an annual flu shot. *See* Army Regulation ("AR") 40–562 (Oct. 7, 2013), https://perma.cc/MB96-5JK3. On August 24, 2021, the day after the Food and Drug Administration provided full approval of a COVID-19 vaccine, and in the peak of the pandemic, the Secretary of Defense announced that he was adding the COVID-19 vaccine to the list of required vaccines. *See* Aug. 24, 2021 Secretary of Defense Memo, https://perma.cc/YZ9F-NNU2.

With respect to enforcement, the August 2021 memo provided that mandatory vaccination must be "implemented consistent with DOD Instruction 6505.02, 'DoD Immunization Program,' July 23, 2019." *Id*. It provided that "[t]he Military Departments should use existing policies and procedures to manage mandatory vaccination of Service Members to the extent practicable" consistent with enforcement of other mandatory vaccinations. *Id*. The memorandum otherwise does not reflect any decisions on enforcement. *Id.*

On November 30, 2021, the Secretary of Defense issued a memorandum regarding vaccination requirements for the National Guard. *See* Nov. 30, 2021 Secretary of Defense Memo, https://perma.cc/XA83-FNRM. The memo explained that after the compliance deadline, National Guard members "must subsequently become vaccinated, in order to participate in drills, training and other duty conducted under title 32, U.S. Code." *Id.* The Secretary explained that "[n]o [DoD] funding may be allocated for payment of duties performed under title 32 for members of the National Guard who do not comply with [DoD] COVID-19 vaccination requirements." *Id.* And that "[n]o credit or excused absence shall be afforded to members who do not participate in drills, training, or other duty due to failure to be fully vaccinated against COVID-19." *Id.* The November

Memo did not direct any other enforcement measures for ensuring compliance with the COVID-19 vaccination requirement.

On December 7, 2021, the Secretary of the Air Force issued a memorandum addressing COVID-19 vaccination policy. *See* Secretary of the Air Force Memo, Supplemental Coronavirus Disease 2019 Vaccination Policy (Dec. 7, 2021), https://perma.cc/72K5-SN8E. Attachment 2 included guidance addressing the Air National Guard. Members of the Air National Guard had until December 31, 2021, to initiate a vaccination regimen or have a pending exemption request, and those who failed to comply "may not participate in drills, training, or other duty conducted under Title 10 or Title 32." *Id.* Specifically, the Secretary withdrew consent for Active Guard Service "for members not fully vaccinated" by December 31, 2021, pursuant to 32 U.S.C. § 328. *Id.* The memorandum dated December 7, 2021, does not direct any other enforcement measures. It does not direct, for example, courts-martialing.

The Department of the Army often provides guidance and directives to subordinate commands using Execute Orders ("EXORDs") and Fragmentary Orders ("FRAGOs"),[1] and the Army issued a number of them during the pandemic to manage its impact on Army operations. For example, FRAGO 11 to EXORD 22-21 required commanders to "report [the] number of soldiers who have refused COVID-19 vaccination and have not requested or received an approved exemption" beginning in December 2021. ECF No. 33-1 at 13. On January 27, 2022, Army National Guard issued FRAGO 17 to Army National Guard EXORD 197-21, which included a vaccination completion "goal" and described available medical, administrative, and religious exemptions. *Id.* at 20-21. On January 31, 2022, the Secretary of the Army issued Army Directive 2022-02 ("A.D. 2022-02"). Ex. 2 ¶ 19(a). The directive established Army's policy of initiating separation proceedings for certain Soldiers who refused the lawful order to be vaccinated against COIVD-19. *Id.* However, Soldiers of the Army National Guard, like the Texas and Alaska

[1] A fragmentary order is "an abbreviated form of an operation order issued as needed after an operation order to change or modify that order or to execute a branch or sequel to that order." U.S. Dep't of Army, Field Manual, Commander and Staff Organization and Operations, Glossary-6 FM 6-0 C1 (May 11, 2015).

Guardsmen at issue in this case, were excluded from the list of Soldiers subject to initiation of involuntary separation proceedings. *Id.* ¶ 19(b). Under A.D. 2022-02, the Secretary of the Army "with[held] authority" from lower-level commanders "to impose non-judicial and judicial actions based solely on vaccine refusal." *Id.* ¶ 19(d).[2]

II. The Rescission

On December 23, 2022, the President signed into law the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 ("NDAA"). A provision of that Act directs the Secretary of Defense to rescind the August 2021 COVID-19 vaccination requirement. Pub. L. No. 117-263, § 525, 136 Stat. 2395, 2571-72 (2022). In compliance with Congress's directive, on January 10, 2023, the Secretary of Defense rescinded his earlier memoranda dated August 24, 2021, and November 30, 2021, addressing COVID-19 vaccination for Service Members and Members of the National Guard and Ready Reserve. Ex. 2 ¶ 7(a).

On January 18, 2023, the National Guard Bureau issued a memorandum addressing the return of Non-Federalized Title 32 National Guard Service Members to Non-Federalized Title 32 Duty. Ex. 2 ¶ 7(b). The memorandum directs that "all currently-serving non-federalized Army National Guard and Air National Guard members who are not fully vaccinated for COVID-19, but are otherwise qualified and eligible are no longer prohibited from, and may be directed to resume participation in drills, training and/or other duty conducted under Title 32, U.S. Code[.]" *Id.* The guidance was effective as of January 10, 2023. Ex. A to Ex. 2.

On February 24, 2023, the Deputy Secretary of Defense issued guidance making clear that the January 10, 2023, rescission memorandum "rendered all DoD Component policies, directives, and guidance implementing [the] vaccination mandates as no longer in effect as of January 10, 2023." Ex. 3 at 1. That includes, but is not limited to, "any COVID-19 vaccination requirements or related theater entry requirements and any limitations on deployability of Service members who

[2] This is consistent with the traditional coordination between the federal and state governments when jointly managing the National Guard. Ex. 2 ¶¶ 16, 18(a), 20.

are not vaccinated against COVID-19." *Id.* The Deputy Secretary directed commanders to comply with foreign nation entry requirements, but has otherwise prohibited individual commanders from requiring vaccination or considering vaccination status when "making deployment, assignment, and other operational decisions, absent establishment of a new immunization requirement" to be approved at the level of the Assistant Secretary of Defense for Health Affairs, which will occur "only when justified by compelling operational needs and . . . as narrowly tailored as possible." *Id*. at 2.

Also on February 24, 2023, the Secretaries of the Army and the Air Force issued additional memoranda. The Secretary of the Army broadly "rescind[ed] all Department of the Army policies specifically associated with the implementation of the COVID-19 vaccination mandate." Ex. C to Ex. 2 at ¶ 2. Among other things, the Secretary of the Army "with[held] the authority to impose any non-judicial and judicial [adverse] actions based solely on a Soldier's refusal to receive the COVID-19 vaccine while the mandate was in effect." *Id.* ¶ 4.

Similarly, the Secretary of the Air Force clarified that "all policies" that were "associated with implementation of the [COVID-19] vaccination mandate for Service members were also rescinded[.]" Ex. B to Ex. 2 at 1. The Secretary of the Air Force directed that all "[c]urrent involuntary discharge proceedings will be terminated [under applicable regulations] if the basis was solely for refusal to receive the" vaccine. *Id.* ¶ (a)6.

Defendants do not intend to convene courts-martial based solely on a Guardsman's refusal to comply with the now-rescinded COVID-19 vaccination requirement. Ex. 1 ¶ 3. Neither DoD, nor the Secretaries of the Army and the Air Force, intend to initiate withdrawal of federal recognition proceedings for members of the Army and Air National Guard based solely on refusal to comply with the now-rescinded COVID-19 vaccination requirement, over the objection of the relevant State Adjutant General. *Id*. Neither DoD, nor the Secretaries of the Army and the Air Force, intend to withdraw consent for any future drilling, training, and other duties, under 32 U.S.C. § 328 or under any other provision solely because a Guardsman is not vaccinated against COVID-19. *Id*. Neither DoD, nor the Secretaries of the Army and the Air Force, intend to withhold

pay from any individual Guardsmen or any State solely because a Guardsmen is not vaccinated against COVID-19. *Id.*

III. Procedural Background

On January 4, 2022, Governor Abbott filed this lawsuit. ECF No. 1. On January 25, 2022, Plaintiffs filed an amended complaint which added Alaska Governor Dunleavy as a plaintiff. The Amended Complaint includes seven counts. Am. Compl. ¶¶ 81-108. Counts I, II, and III raise *ultra vires* claims under nonstatutory equitable causes of action. *Id*. ¶¶ 81-94. Counts IV, V, and VI claim that the medical readiness requirement for National Guard members to be vaccinated for COVID-19 violates the APA. *Id*. ¶¶ 95-106. Count VII claims that Plaintiffs are entitled to a declaratory judgment. *Id*. ¶¶ 107-08. Plaintiffs seek declaratory and injunctive relief as well as an order setting aside "the DoD Vaccine Mandate as applied to non-federalized Texas and Alaska National Guardsmen[.]" *Id*., Prayer for Relief.

On June 26, 2022, the Court denied Governor Abbott's motion for a preliminary injunction. ECF No. 48. Governor Abbott had sought to block the COVID-19 vaccine readiness requirement for all Texas National Guard members and to force the Federal Government to pay for Title 32 training and service for members of the Texas National Guard who have not met COVID-19 readiness requirements. *See* Abbott Br.; ECF No. 24-1 (Proposed Order). Governor Abbott appealed, ECF No. 49, and the Court stayed proceedings until after the Fifth Circuit issued its mandate, Court Order (July 21, 2022). On June 12, 2023, the Fifth Circuit issued a decision holding that Governor Abbott is likely to succeed on the merits of his Constitutional claim and vacating this Court's order denying Governor Abbott's motion for a preliminary injunction and remanding for further proceedings. *Abbott v. Biden*, 70 F.4th 817, 846 (5th Cir. 2023).

LEGAL STANDARD

A. Motion to Dismiss.

Defendants move to dismiss this action for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(h)(3). A motion to dismiss for lack of subject-matter jurisdiction may either be "facial" or "factual." *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). An

attack is "factual" if the defendant "submits affidavits, testimony, or other evidentiary materials" contesting jurisdiction. *Id*. Where, as here, a defendant makes a factual attack, the plaintiff "has the burden of proving by a preponderance of the evidence that the trial court does have subject matter jurisdiction." *Id*.

B. Motion for Judgment on the Pleadings.

"The standard for Rule 12(c) motions for judgment on the pleadings is identical to the standard for Rule 12(b)(6) motions to dismiss for failure to state a claim" upon which relief can be granted. *Waller v. Hanlon*, 922 F.3d 590, 599 (5th Cir. 2019). "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

ARGUMENT

I. Plaintiffs Lack Standing to Enjoin the Purported Enforcement Mechanisms Described by the Fifth Circuit.

"[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek[.]" *TransUnion v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) (citation omitted). "Plaintiffs must maintain their personal interest in the dispute at all stages of litigation." *Id*.

Here, Plaintiffs seek to enjoin Defendants "from enforcing the DoD Vaccine Mandate as to non-federalized Texas and Alaska National Guardsmen." Am. Compl., Prayer for Relief. The Fifth Circuit identified five statutory enforcement measures under Title 32 of the United States Code that Plaintiffs seek to enjoin. *Abbott*, 70 F.4th at 823.[3] But Plaintiffs lack standing to seek an order enjoining Defendants from enforcing any of these five statutory provisions against non-federalized Texas and Alaska National Guardsmen who refused to comply with the now-defunct requirement to be vaccinated against COVID-19 because they have not met the first of Article III's

[3] Specifically, the Fifth Circuit identified (1) "Courts-martial," under 32 U.S.C. § 326-27; (2) "[d]ischarge from the National Guard" under 32 U.S.C. § 322-24; (3) "[p]rohibiting Guardsmen from participating in drills, training, and other duties" under 32 U.S.C. § 501-02; (4) "[w]ithholding pay from individual Guardsmen" under 32 U.S.C. § 108; and (5) "[w]itholding funds from individual states" under 32 U.S.C. § 108. *Abbott*, 70 F.4th at 823.

core requirements—an "injury in fact" that was "actual or imminent," *Whitmore v. Arkansas*, 495 U.S. 149, 155, 158 (1990), "at the time [they] filed suit," *Carney v. Adams*, 592 U.S. ---, 141 S. Ct. 493, 499 (2020), due to their threatened enforcement.

Plaintiffs must show that, at the outset of the litigation, there was an "immediacy and reality" with respect to the injuries that they claim to seek to redress with their requested injunction. *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) (citation omitted). "[N]onparanoid fear" of that future injury—even fear that is "not fanciful, irrational, or clearly unreasonable"—is insufficient. *Clapper v. Amnesty Int'l*, 568 U.S. 398, 416 (2013) (citation omitted). Increased-risk claims "generally cannot satisfy the actual or imminent requirement, which necessitates evidence of a certainly impending harm or substantial risk of harm," *E.T. v. Paxton*, 41 F.4th 709, 715 (5th Cir. 2022) (citation omitted), that existed "when plaintiffs filed the complaint," *A & R Engineering and Testing, Inc. v. Scott*, 72 F.4th 685, 690 (5th Cir. 2023). "The purpose of the imminence requirement is 'to reduce the possibility of deciding a case in which no injury would have occurred at all.'" *Air Products and Chemicals, Inc. v. General Servs. Admin.*, --- F. Supp. ---, 2023 WL 7272115, at *2 (N.D. Tex. Nov. 2, 2023) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 n.2 (1992)). Plaintiffs do not show personal injury and cannot advance the interest of third parties. And even if they could, any "risk" that Defendants would utilize any of the enforcement mechanisms against Texas or Alaska Guardsmen was not so substantial at the outset of the litigation that any future injury was "certainly impending." *Clapper*, 586 U.S. at 401.[4]

A. Plaintiffs Have Not Shown Personal, Imminent, and Concrete Injury.

Plaintiffs identify no actual or imminent injury that was *personal* to them "near to the date of the complaint." *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1142 (D.C. Cir. 2011). They gesture nonspecifically towards "State sovereignty[,]" Am. Compl. ¶ 63, and to their States' fiscs, *id*. ¶ 76.[5] But no state is a party to this suit. They assert in a conclusory manner that

[4] Even an "objectively reasonable likelihood" of future injury—which Plaintiffs do not show—would be "inconsistent with [the Supreme Court's] requirement[s]" in this area. *Clapper*, 586 U.S. at 410 (citation omitted).

[5] Plaintiffs provide no evidence of any funding that has been lost. *See* Ex. 2 ¶¶ 8-12.

Defendants have somehow "override[n]" their authority "to make regulations[,]" *id*. ¶ 63, without pointing to any regulations that Defendants have somehow precluded them from issuing. They say that Defendants have infringed on their authority and "commandeered" personnel. Am. Compl. ¶¶ 77-78. But relevant implementing guidance left their commands with discretion to determine what administrative and disciplinary actions, if any, were appropriate for noncompliance with applicable federal requirements. Ex. 2 ¶ 18(a).

Plaintiffs advance an interest in the well-being and safety of Texas and Alaska citizens, Am. Compl. ¶¶ 68, 72. But "'[a] State does not have standing as *parens patriae* to bring an action against the Federal Government[.]'" *Haaland v. Brackeen*, 59 U.S. 255, 295 (2023) (citation omitted). Surely a Governor does not as well. *See id*.

In addressing mootness, the Fifth Circuit concluded that "many Texas militiamen [had] face[d] the same enforcement measures that Governor Abbott seeks to enjoin." *Abbott*, 70 F.4th at 825. But any injury to Texas or Alaska Guardsmen are not inherently personal to Plaintiffs, no Guardsmen are parties to this case, and Plaintiffs do not explain why those Guardsmen are incapable of representing their own interests, as many other Service Members have in other cases.

B. The Enforcement Record Demonstrates That No Enforcement Was Imminent at the Outset of the Litigation.

Whatever theory of personal injury Plaintiffs purport to advance, it must somehow be tied to Defendants' implementation of the statutory enforcement measures that they seek to enjoin "as to non-federalized Texas and Alaska National Guardsmen." Am. Compl., Prayer for Relief. But the enforcement record demonstrates that there was no certainly impending or substantial risk of enforcement—especially of court-martialing or discharging Guardsmen—at the outset of the litigation. "[W]hen a plaintiff alleges a future injury, common sense dictates that a court can and should consider the activities of the plaintiff during and after the time that the complaint is filed in order to assess the likelihood of such a future injury." *Nat. Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 262 (D.D.C. 2012). "[I]f an individual is exposed to a risk of future harm, time will eventually reveal whether the risk materializes in the form of actual harm. . . . If the risk of future

harm does *not* materialize, then the individual cannot establish [that] the concrete harm [was sufficiently imminent] for standing" at the outset of the litigation. *See TransUnion LLC*, 141 S. Ct. at 2211. A notice initiating an enforcement action "that is not sent" to a Guardsman "does not harm anyone[.]" *See id.* at 2210. "An uninjured plaintiff who sues in those circumstances is, by definition, not seeking to remedy any harm to herself[.]'" *Id.* at 2206 (citation omitted).

Here, the COVID-19 vaccine mandate enforcement record makes clear that no enforcement was actual or imminent in January 2022. Ex 2. The requirement for non-federalized National Guardsmen to be vaccinated against COVID-19 was issued two years ago today. Am. Compl. ¶ 52. In that time, not one single non-federalized Guardsman has been court-martialized or been subject to the initiation of withdrawal of federal recognition proceedings over the objection of a State Adjutant General under applicable statutory provisions for refusing to receive the COVID-19 vaccine. Ex. 2 ¶¶ 22-23, 29-30. Nor have Plaintiffs shown even one example of a specific Texas or Alaska Guardsmen who did not drill due to vaccination status and therefore had his pay withheld. *Id.* ¶¶ 8-10. And Guardsmen are no longer subject to any federally-imposed consequences for past noncompliance with the now-rescinded requirement to be vaccinated against COVID-19. Ex. 1 ¶ 4. Any injury that was arguably at risk at the outset of this case was not imminent, and its failure to materialize would "would ordinarily be cause for celebration, not a lawsuit." *TransUnion LLC*, 141 S. Ct. at 2211.

C. The *SBA List* Factors Independently Demonstrate that Plaintiffs Have Not Shown an Injury in Fact that was Imminent at the Outset of the Litigation.

Insofar as Plaintiffs' supposed injuries flow directly from the purported "loss of [certain] Guardsmen from the States' militias," Am. Compl. ¶ 68, the traditional imminence requirement in the military context is not satisfied until after the Service Secretary makes the discretionary decision to separate a Service Member—a decision that is not made until after the conclusion of administrative separation proceedings. *See Beard v. Stahr*, 370 U.S. 41, 41-42 (1962); *see also Roberts v. Roth*, 594 F. Supp. 3d 29, 34-36 (D.D.C. 2022) (applying the reasoning of *Beard* to Guardsman facing withdrawal of federal recognition proceedings). But even if the factors

identified by the Supreme Court in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) ("*SBA List*") applied, they independently demonstrate that Plaintiffs lack standing. In pre-enforcement challenges to a statute in certain civilian contexts (predominantly when a civilian is faced with criminal prosecution), a plaintiff satisfies the imminence requirement by showing "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *SBA List*, 573 U.S. at 158 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). In considering whether a credible threat of prosecution exists, the Supreme Court has considered the following factors: (1) the "history of past enforcement," (2) whether the enforcement mechanism allows "any person" to initiate enforcement or whether initiation authority is "limited to a prosecutor or an agency" and (3) whether the enforcement "proceedings are not a rare occurrence." *Id.* at 164.

A plaintiff may show a credible threat by demonstrating that the statute was enforced in the past or that he has received a specific and targeted threat of future enforcement. *See, e.g., Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *SBA List*, 573 U.S. at 164 ("threat of future enforcement of the [challenged] statute is substantial" as "there is a history of past enforcement here"); *cf. Clapper*, 568 U.S. at 411 (plaintiff's theory of standing was "substantially undermine[d]" by their "fail[ure] to offer any evidence that their communications h[ad] been monitored" under the challenged statute).

A plaintiff cannot, however, satisfy Article III standing by alleging that it engages in conduct that it fears may violate federal law. *See, e.g., Clapper*, 568 U.S. at 410; *Younger v. Harris*, 401 U.S. 37, 42 (1971). Likewise, "general threat[s] by officials to enforce those laws which they are charged to administer" do not create the necessary injury in fact. *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 88 (1947); *see also Poe v. Ullman*, 367 U.S. 497, 501 (1961). Plaintiffs cannot show that the *SBA List* factors demonstrate imminent enforcement against Texas or Alaska Guardsmen of any of the statutes cited by the Fifth Circuit.

1. Courts-Martial Under 32 U.S.C. §§ 326-27 and Withdrawal of Federal Recognition Under 32 U.S.C. §§ 322-24.

Plaintiffs cannot establish that any court-martial convening authority under 32 U.S.C. §§ 326-27 or that any initiation of withdrawal of federal recognition proceedings under 32 U.S.C. §§322-24 for any Texas or Alaska Guardsmen was imminent at the outset of the litigation. All *SBA List* factors weigh against such a finding. No Defendant in this case ever issued a memorandum, directive, or order directing any commander to convene courts-martial or to initiate withdrawal of federal recognition proceedings over the objection of the relevant State Adjutant General. Ex. 2 ¶ 27. There is *no* history of the military taking these actions for any reason, let alone for not satisfying an immunization requirement. *Id*. ¶ 27. The court-martialing provisions under §§ 326-27 were enacted in 1956, but neither the Services nor DoD have ever issued implementing regulations that would provide indicia of how they might be utilized by the Federal Government over objection of a State. *Id*. ¶ 26. Similarly, Defendants have no record of federal officials, as opposed to state officials, "*ever*" initiating withdrawal of federal recognition proceedings. Ex. ¶ 16. Federal Government-initiated courts-martial or withdrawing federal recognition over the objection of the relevant State Adjutant General under these sections are less than a "rare occurrence," *SBA List*, 573 U.S. at 164, and have been used less frequently than enforcement of the statute at issue in *Poe*, 367 U.S. at 501-02, where only one criminal prosecution had ever been brought as a test case. There has been no test case under 32 U.S.C. §§ 326-27.[6]

Moreover, the "credibility of [any] threat" is undermined "by the fact that [federal] authority" to convene courts-martial under 32 U.S.C. §§ 326-27 is extremely limited. That authority is not available to "any person" or even to a military "prosecutor or an agency." *See SBA*

[6] This past enforcement is relevant because the August 2021 memorandum directed that "[m]andatory vaccination requirements will be implemented consistent with DoD Instruction 6505.02, 'DoD Immunization Program,'" which governs many vaccination requirements, such as the requirement to be annually immunized against influenza. https://perma.cc/XA83-FNRM. Accordingly, if Plaintiffs cannot show a history of enforcement for noncompliance with similar vaccination requirements, such as the influenza vaccine, they cannot show that this requirement would have been enforced by court-martialing noncompliant Guardsmen or withdrawing federal recognition.

List, 573 U.S. at 164. Rather, the President is the only federal actor that the statute authorizes to convene general courts-martial for the National Guard not in Federal Service. 32 U.S.C. § 327(b)(1). Similarly, withdrawal of federal recognition of officers of the National Guard must be "approved by the President[.]" 32 U.S.C. § 323(b).

Accordingly, Plaintiffs lack standing to seek an injunction or declaratory judgment precluding Defendants from convening courts-martial or initiating withdrawal of federal recognition proceedings under Title 32 for Texas or Alaska Guardsmen.

2. Prohibiting Guardsmen from Participating in Drills, Training, or Other Duties Under 32 U.S.C. §§ 328, 501-02 and the Potential Consequence of Withholding Pay from Individual Guardsmen.

Unlike court-martialing and initiation of withdrawal of federal recognition proceedings, which were not mentioned in COVID-19 memoranda or orders, some early memoranda and orders required COVID-19 vaccination to be fit for drills, training or other duties under 32 U.S.C. §§ 110, 328, 501-02. Defendants had indicated that, to enforce this rule, they would not allocate funding to training Guardsmen that did not satisfy this readiness requirement. ECF No. 4-5 at 2. But Plaintiffs have not come forward with even one example of a specific Texas or Alaska Guardsmen who was barred from drilling and therefore had his pay withheld. *See* Ex. 2 ¶¶ 8-10; *see also Clapper*, 568 U.S. at 411 (plaintiff's theory of standing was "substantially undermine[d]" by their "fail[ure] to offer any evidence that their communications h[ad] been monitored" under the challenged statute); *Mitchell*, 330 U.S. at 88 ("general threat" insufficient).

II. Plaintiffs' Claims Are Moot.

The military no longer has a COVID-19 vaccination requirement in place and Defendants have no intention of enforcing the now-defunct requirement against any Guardsmen who refused to take the vaccine. Consequently, Plaintiffs' claims are moot. "[A] live controversy must maintain through each stage of the litigation." *Freedom From Religion Found., Inc. v. Abbott*, 58 F.4th 824, 831 (5th Cir. 2023). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Fontenot v. McCraw*, 777 F.3d 741, 747 (5th Cir.

2015) (citation omitted). Accordingly, "any set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot." *Id*. (citation omitted).

On December 23, 2022, while Governor Abbott's appeal of this Court's denial of his request for a preliminary injunction was before the Fifth Circuit, the President signed into law the 2023 NDAA, which required the Secretary of Defense to rescind the requirement that Service Members be vaccinated against COVID-19. The Secretary of Defense rescinded the requirement on January 10, 2023. ECF No. 55-1. The following day, the Fifth Circuit ordered the parties to file letter briefs on the import of the rescission. The parties submitted their letters on January 18, 2023, less than a month after the NDAA and barely a week into the rescission's implementation. In the immediate aftermath of the 2023 NDAA, the Secretary of Defense determined that Service Members that had sought an accommodation on religious, administrative, or medical grounds should not be subject to any consequences for not receiving the COVID-19 vaccine. ECF No. 55-1. But recognizing that Service Members who refused to vaccinate without first seeking an exemption through the military's administrative process presented a more difficult issue, that early memorandum did not resolve whether such Service Members should receive an adverse consequence for noncompliance. Ultimately, the Fifth Circuit found that those limited facts—in light of the then-uncertainty with respect to enforcement against Guardsmen who refused vaccination without seeking an exemption—did not render Governor Abbott's appeal moot. *Abbott*, 70 F.4th at 825. Given the timing of party presentment, the Fifth Circuit "did not consider any factual developments after the January 10, 2023 rescission memo and the January 17, 2023 statistics given in Major General Suelzer's declaration."[7] ECF No. 78 at 4.

"The mootness inquiry always considers any new factual developments." *Id*. And as the enforcement record of almost an entire year since January 10, 2023, demonstrates, Defendants have decided that they do not intend to enforce the challenged COVID-19 vaccination directive

[7] The Fifth Circuit's conclusion has no bearing on the mootness of Governor Dunleavy's claims, as Governor Dunleavy has never submitted any similar evidence showing that there are any currently serving Guardsmen under his command that serve in Title 32 status and had refused to take the COVID-19 vaccine but had never sought any exception of any kind.

against any Guardsmen in Plaintiffs' commands in the wake of the rescission directed by the 2023 NDAA. Ex. 1 ¶¶ 3-4; Ex. 2 ¶¶ 11-12, 22-23, 29-30. Non-federalized Texas and Alaska Guardsmen are no longer subject to consequences for past noncompliance with the mandate. Ex. 1 ¶ 4. Accordingly, the NDAA and Defendants' current policies have now redressed anything complained of in the Amended Complaint. The Fifth Circuit "recognized that, if the entire non-federalized Texas National Guard were no longer subject to consequences for past noncompliance with the mandate, that change 'would very likely moot' Governor Abbott's claims." ECF No. 78 at 4 (quoting *Abbott*, 70 F.4th at 824-25). Because that is true for the entire non-federalized Texas and Alaska National Guards, the Governors' clams are moot. *Golden v. Zwickler*, 394 U.S. 103, 110 (1969).[8]

III. The Court Lacks Jurisdiction to Enter Relief Against the President.

Whatever claims Plaintiffs may pursue against the other government officials in this action, neither declaratory nor injunctive relief is proper against the President in his official capacity. "With regard to the President, courts do not have jurisdiction to enjoin him, and have never submitted the President to declaratory relief." *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (citations omitted); *see Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) ("[I]n general this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties." (citation omitted)). Accordingly, the Court should dismiss Plaintiffs' claims for

[8] Consistent with every court to decide the issue in similar military COVID-19 vaccine contexts after the 2023 NDAA, Plaintiffs cannot show that any exception to mootness applies. *Robert v. Austin*, 72 F.4th 1164-65 (10th Cir. 2023); *U.S. Navy SEALs 1-26 v. Biden*, 72 F.4th 666, 673-75 (5th Cir. 2023); *Roth v. Austin*, 62 F.4th 1114, 1119 (8th Cir. 2023); *Creaghan v. Austin*, No. 23-5101, 2023 WL 8115975, at *1 (D.C. Cir. Nov. 21, 2023); *Wilson v. Austin*, No. 4:22-CV-438, 2023 WL 5674114, at *6-8 (E.D. Tex. Sept. 1, 2023); *Coker v. Austin*, --- F. Supp. 3d ---, 2023 WL 5625486, at *5 (N.D. Fla. Aug. 25, 2023); *Jackson v. Mayorkas*, No. 4:22-cv-0825-P, 2023 WL 5311482, at *3-5 (N.D. Tex. Aug. 17, 2023); *Bongiovanni v. Austin*, No. 3:22-cv-580-MMH-MCR, 2023 WL 4352445, at *9-10 (M.D. Fla. July 5, 2023); *Crocker v. Austin*, C.A. No. 22-0757, 2023 WL 4143224, at *6-8 (W.D. La. June 22, 2023); *Bazzrea v. Mayorkas*, --- F. Supp. 3d ---, 2023 WL 3958912, at *6-7 (S.D. Tex. June 12, 2023); *Clements v. Austin*, C.A. No. 2:22-2069-RMG, 2023 WL 3479466, at *3-4 (D.S.C. May 16, 2023); *Colonel Financial Mgmt. Officer v. Austin*, No. 8:22-cv-1275-SDM-TGW, 2023 WL 2764767, at *2 (M.D. Fla. Apr. 3, 2023).

declaratory or injunctive relief against the President and enter an order dropping the President from this action. *U.S. Navy SEALs 1-26 v. Biden*, 578 F. Supp. 3d 822, 829 (N.D. Tex. 2022); *Navy Seal 1 v. Biden*, 574 F. Supp. 3d 1124, 1130 (M.D. Fla. 2021); *Foley v. Biden*, No. 4:21-cv-01089-O, 2021 WL 7708477, at *2 (N.D. Tex. Oct. 6, 2021).

IV. Counts IV, V, and VI Fail to State an APA Claim and Are Otherwise Unreviewable.

A. Counts IV, V, and VI Fail to State an APA Claim Because They Fail to Identify the Discrete Agency Action that Plaintiffs Seek to Review.

The Court should dismiss for lack of jurisdiction or enter judgment for Defendants on Counts IV, V, and VI because the Amended Complaint fails to identify the "circumscribed, discrete agency action[]" or actions at issue, and, thus, fails to state an APA claim for judicial review of agency action. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004) ("*SUWA*").[9] "Under the terms of the APA, [Plaintiffs] must direct [their] attack against some particular 'agency action' that causes [them] harm." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990).[10] "Because 'an on-going program or policy is not, in itself, a final agency action under the APA,' [a court's] jurisdiction does not extend to reviewing generalized complaints about agency behavior." *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006) (citation omitted).

As relevant here, in August 2021, Secretary Austin issued a memorandum directing Service Secretaries to begin implementing a COVID-19 vaccination program. ECF No. 4-2 at 2-3.

[9] Many of the remaining issues raised in this motion are, in this circuit, jurisdictional in nature. *See Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 488-93 (5th Cir. 2014); *Sierra Club v. Peterson*, 228 F.3d 559, 569-70 (5th Cir. 2000); *Bullard v. Webster*, 679 F.2d 92, 93 (5th Cir. 1982). Insofar as the remaining issues are instead construed as non-jurisdictional claim processing rules, Defendants seek their resolution under Federal Rule of Civil Procedure 12(c).

[10] The APA authorizes review of "final agency action," 5 U.S.C. § 704, and defines "agency action" to mean a "rule, order, license, sanction, relief, or equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). An "agency action" is "final" only when it (1) "mark[s] the consummation of the agency's decision-making process" and (2) is an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 177-78 (1997) (citations omitted).

Defendants concede that this memorandum amounts to an "agency action" under the APA.[11] But none of the Counts in the Amended Complaint purporting to state APA claims challenges this particular action. Rather, Count IV, for example, seeks wholesale judicial review of "Defendants' memoranda and directives." Am. Compl. ¶ 97. Specifically, it seeks judicial review of Defendants' general "implementation of the DoD vaccine mandate as applied to non-federalized Texas and Alaska Guardsmen in Title 32 status[.]" *Id*. ¶ 98. But this "implementation," *id*., is "not action that was circumscribed and discrete." *Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 194 (4th Cir. 2013). "[I]mplementation . . . does not constitute 'agency action' within the meaning of the APA." *Id*.

The factual background section of the Amended Complaint references three memoranda and one order. Am. Compl. ¶¶ 48-60. But no count seeks judicial review of any one of them. In *Lujan*, the Supreme Court dispelled any notion that a complaint's reference to a few identified agency actions permits such a claim to proceed:

> [I]t is at least entirely certain that the flaws in the entire "program"—consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects [a plaintiff].

497 U.S. at 82-94.

In this case as well, each APA count seeks to bring a collective, programmatic, challenge to all the memoranda and orders involved in implementing the entire now-defunct COVID-19 vaccination program, including actions yet to be taken at the time the Amended Complaint was filed. Beyond the plain language in those counts (which is enough to show that none challenges a discrete agency action), this conclusion finds support in several of Plaintiffs' representations in

[11] Defendants do not concede that the memorandum is "final agency action." But as described *infra*, this memorandum is not the circumscribed action challenged in any of the Amended Complaint's APA Counts. Just as analyzing whether each of the myriad memoranda and orders issued while Defendants were implementing the COVID-19 vaccination program were arbitrary and capricious would require a separate analysis, determining whether each was a final agency action would also require a separate analysis.

this matter.[12]

First, Plaintiffs admit that their APA claims seek review of enforcement "powers" like court-martialing and withdrawal of federal recognition for Guardsmen, which are not agency action as defined by the APA. *Supra* note 10. And decisions on these issues are not reflected in any of the memoranda or orders referenced in the factual background section of the Amended Complaint. For example, the August 2021 Memorandum merely sets forth Secretary Austin's prior decision to include the COVID-19 vaccine among the long list of those already required of all Service Members, including Guardsmen. ECF No. 4-2 at 2-3. In prior briefing, however, Governor Abbott argued that this action is "irrelevant" to the APA claims and not what Plaintiffs asked the Court to review. Reply Br. for App., *Abbott v. Biden*, No. 22-40399, 2022 WL 12620737, at *22 (5th Cir. Oct. 12, 2022). He explained that the APA claims are instead "about Defendants' *enforcement* powers" as they implement the vaccination requirement established by the August 2021 memorandum, such as decisions about whether to convene courts-martial for noncompliant Guardsmen. *Id.* While an agency enforcement policy may be subject to review under the APA, the purported enforcement policy Plaintiffs challenge cannot be "an abstract decision apart from the specific agency actions contained in" a discrete memorandum or order, *Biden v. Texas*, 142 S. Ct. 2528, 2533 (2022). It is clear that Counts IV, V, and VI challenge "some" purportedly "potential consequences[,]" ECF No. 78 at 1, of violating the prior vaccination mandate—like "discharg[ing of] unvaccinated Guardsmen," 2022 WL 12620737, at *3—that are not decisions reflected in any specific agency actions, let alone reflected in any of the memoranda identified in the factual background of the Amended Complaint.

Additional aspects of the briefing in this case confirm that the APA claims purport to seek

[12] Although Plaintiffs have since abandoned any request for an order setting aside or vacating any particular agency action, the Prayer for Relief's request that the Court "[s]et aside the DoD Vaccine Mandate as applied to non-federalized Texas and Alaska National Guardsmen" Am. Compl., Prayer for Relief, provides additional indication that Plaintiffs do not challenge an identifiable agency action. The "DoD Vaccine Mandate as applied to non-federalized Texas and Alaska National Guardsmen" is not an identifiable agency action within the meaning of the APA that can be held unlawful or set aside under 5 U.S.C. § 706.

judicial review of programmatic decision-making, including "actions yet to be taken" when the Amended Complaint was filed. *See Lujan*, 497 U.S. at 893. For example, Governor Abbott has argued that the sweeping "set of orders" at issue in the APA counts encompass two documents dated January 27, 2022. Br. for App., *Abbott v. Texas*, No. 22-40399, 2022 WL 3910505, at *10 (5th Cir. Aug. 22, 2022). But these documents post-date the Amended Complaint, which was filed on January 25, 2022, and thus cannot form any basis for relief in this case. It is implausible that the Amended Complaint petitioned for review of those actions.

Consistent with the vagueness in Plaintiffs' pleading, this Court's orders understandably reflect the confusion with respect to the circumscribed agency action at issue in the APA claims. The Court identifies the action being challenged as "[t]he mandate and some potential consequences of its violation[.]" ECF No. 78 at 1. But, respectfully, the Court errs insofar as it "understands itself to be reviewing [one or several] abstract decision[s] apart from [a] specific agency action, as defined by the APA[.]" *Biden*, 142 S. Ct. at 2545. Although specific identifiable "[m]emoranda [are sometimes] themselves the operative agency actions," *id*. at 2545, the "mandate" is not a circumscribed agency action. Neither is a "potential" consequence of that "mandate." Further, Counts IV, V, and VI do not even identify which circumscribed memorandum or order Plaintiffs seek to have this Court hold as unlawful under 5 U.S.C. § 706.

In sum, "when a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001); *see also Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 288 (5th Cir. 1999) (analogizing to appellate court reviewing a final judgment of a trial court). A 5 U.S.C. § 706(2)(A) claim requires "[t]he reviewing court" to "hold unlawful and set aside [a particular] agency action" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). "In making [that] determination[], the court shall review the whole record" for the final agency action, which includes material the decisionmaker considered in the process of generating the circumscribed final agency action under review. *Id.* §706. Because Counts IV, V, and IV do not identify which final agency action Plaintiffs seek to review under that standard, each

Count fails to state a claim under the APA, and the Court should dismiss these Counts for lack of subject-matter jurisdiction or enter judgment on them in Defendants' favor.

B. Counts IV, V, and VI Fail to Survive *Mindes* Scrutiny.

Plaintiffs' arbitrary and capricious claims fail to survive *Mindes* scrutiny. Because arbitrary and capricious claims are at the core of those claims that this doctrine precludes, the Court should dismiss or enter judgment in Defendants' favor on Counts IV, V, and VI.

Under the APA, the Court has a "duty" to "dismiss any action or deny relief on any . . . appropriate legal or equitable ground." 5 U.S.C. § 702(1). Under this provision, courts "refuse 'to decide issues about foreign affairs, military policy and other subjects inappropriate for judicial action,'" consistent with the type of claims that were traditionally refused review by courts of equity. *See Saavedra Bruno v. Albright*, 197 F.3d 1153, 1158 (D.C. Cir. 1999). *See also Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207-08 (D.C. Cir. 1985) (similar). In the landmark decision *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), the Fifth Circuit "distilled" the equitable doctrine of military nonreviewability from a "broad ranging . . . view of the case law" at equity into a multi-prong test. *Id*. at 201.

Under this test, an internal military decision is unreviewable "in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures." *Id*. If these initial prerequisites are satisfied, the Court must then "weigh the nature and strength of the challenge to the military determination, the potential injury to the plaintiff if review is refused, the type and degree of anticipated interference with the military function, and the extent to which military discretion or expertise is involved in the challenged decision." *NeSmith v. Fulton*, 615 F.2d 196, 201 (5th Cir. 1980).

Counts IV, V, and VI cite several cases, Am. Compl. ¶¶ 95-106, but they "point to no prior case in which an APA-based challenge to an internal military policy survived *Mindes* scrutiny." *See Kuang v. U.S. Dep't of Def.*, 778 F. App'x 418, 420 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 2565 (2021). Pleadings raising "arbitrary and capricious" claims against the military are routinely

"denied review" under the doctrine. *NeSmith*, 615 F.2d at 202; *see also Woodard v. Marsh*, 658 F.2d 989, 994-95 (5th Cir. 1981); *West v. Brown*, 558 F.2d 757, 760 (5th Cir. 1977).

Because an arbitrary and capricious claim does not allege a deprivation of any constitutional right or violation of any concrete statutory or regulatory provision, these claims do not survive the initial *Mindes* prerequisites. *Mindes*, 453 F.2d at 201. Even if the Court were to consider courts' reluctance to review claims challenging internal military policies as arbitrary and capricious as part of the *Mindes* four-factor balancing test, the Court should still deny review. Plaintiffs identify no grave injury that will result if the Court refuses review of the APA claims. *See supra* at 8-16. Defendants have not enforced the now-defunct vaccination directive against any members of the National Guard in Texas or Alaska. *Id*. Accordingly, it is far from clear what Plaintiffs' remaining concrete injury is at all. Even before rescission, Plaintiffs claimed that their harms do "not require evidence of the vaccine requirement's impact on the Guard," ECF No. 36 at 4, indicating that there was never much of an impact on their commands.

The final *Mindes* factors weigh against review when "review would entail a sizeable leap into an area in which the only compass is accumulated military experience." *West*, 558 F.2d at 761. For the same reasons identified *infra* at 25-27, these final *Mindes* factors weigh against review here. For example, whether a Service Secretary should withhold consent under 32 U.S.C. § 328(a) for a class of Guardsmen to be placed on or to continue on previously issued Title 32 Active Guard and Reserve orders,[13] is among those "'orders directly related to specific military functions' that *Mindes* expressly found were improper subjects for judicial review." *NeSmith*, 615 F.2d at 203 (quoting *Mindes*, 453 F.2d at 201-202).

While it would surely be easy for Defendants to show that any aspect of the prior COVID-19 vaccination program was reasonable, "the central question posed by *Mindes* is whether the [military] should be required to satisfy a federal court on this score." *Woodard*, 658 F.2d at 994. "The possibility that a federal court may later require officers to explain the 'rational basis'" for

[13] This was the decision made in the Air Force memorandum that is referenced in the factual background of the Amended Complaint. ECF No. 4-6 at 6.

programmatic military policies taken in response to national emergencies such as which classes of Guardsmen are fit for consent under 32 U.S.C. § 328(a) during a global pandemic "may deter military officers from relying on inherently subjective, though proper, criteria in favor of solely 'objective' criteria that make it easier to demonstrate a 'rational basis' when they get to court." *Id*. At best, that deterrence would encumber the military's ability to swiftly react to major threats to military readiness, such as the prior COVID-19 pandemic. At worst, that deterrence could result in decision paralysis in the face of similar future threats. Counts IV, V, and VI fail to survive *Mindes* scrutiny.

C. The Rescinded Agency Actions Referenced in the Factual Background of the Amended Complaint Were Committed to Agency Discretion by Law.

The memoranda and orders identified in the factual background section of the Amended Complaint reflect decisions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Those memoranda and orders involve implementation of 32 U.S.C. §§ 108, 110, and 328(a). ECF No. 4-6 at 6 (invoking § 328(a)); ECF No. 4-5 at 2 (prescribing regulations under § 110 and addressing how DoD funding should be allocated under § 108 to ensure compliance). Insofar as Counts IV, V, and VI challenge these actions, they fall squarely under § 701(a)(2).

"[U]nder § 701(a)(2), even when Congress has not affirmatively precluded judicial oversight, 'review is not to be had if the [relevant] statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Webster v. Doe*, 486 U.S. 592, 599-600 (1988) (citation omitted). "In such a case, the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (citation omitted). In these matters, "the inappropriateness or even mischief involved in appraising a claim of error or of abuse of discretion, . . . leads to the conclusion that there has been withdrawn from the judicial ambit any consideration of whether the official action is 'arbitrary' or constitutes an abuse of discretion." *Curran v. Laird*, 420 F.2d 122, 131 (D.C. Cir. 1969). Courts "consider both the nature of the administrative action at issue and the language and structure of the statute[s] that suppl[y] the applicable legal standards for reviewing

th[e] action." *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002). Here, each factor shows that Defendants' decisionmaking under §§ 108, 110, and 328(a) is committed to the military's discretion (so long as it falls within statutory and constitutional bounds).[14]

1. Sections 108, 110, and 328 Involve Categories of Decisions that are Presumptively Outside the Bounds of Judicial Review.

The memoranda and orders implementing §§ 108, 110, and 328 are doubly among those "certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion.'" *Lincoln*, 508 U.S. at 191. Those categories include the "allocation of funds from a lump-sum appropriation," *id*. as well as decisions concerning military policy, *Nat'l Fed. of Fed. Emps. v. United States*, 905 F.2d 400, 406 (D.C. Cir. 1990); *Curran*, 420 F.2d at 130; *U.S. ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 374-75 (2d Cir. 1968) (Friendly, J.).

First, the Secretary of Defense's memorandum dated November 30, 2021, addresses allocation of funds from a lump sum appropriation. The memorandum provided that "[n]o [DoD] funding may be allocated for payment of duties performed under title 32 for members of the National Guard who do not comply with [DoD] COVID-19 vaccination requirements" under 32 U.S.C. § 108. ECF No. 4-5 at 1; Am. Compl. ¶ 60. The allocation of DoD resources only to Guardsmen and trainings that are least likely to pose a risk to mission execution due to illness falls within the military's capacity to allocate resources for meeting the nation's defense needs during a global pandemic in what it sees is the most effective or desirable way.

Second, the actions identified in the factual background section of the Amended Complaint reflect military policy about readiness requirements for reservists. The November 2021 memorandum, as well as the August 2021 memorandum (insofar as it applies to Guardsmen),

[14] "[E]ven if agency action is committed to its discretion by law, judicial review of constitutional claims is still available [under 5 U.S.C. § 706(2)(B)] unless congressional intent to preclude review is clear." *Ellison v. Connor*, 153 F.3d 247, 254 (5th Cir. 1998); *see also* 5 U.S.C. § 701(a) (providing that the APA applies "except *to the extent that* . . . agency action is committed to agency discretion by law") (emphasis added); *Lincoln*, 508 U.S. at 195 ("[T]he APA contemplates, in the absence of a clear expression of contrary congressional intent, that judicial review will be available for colorable constitutional claims.").

established prior readiness requirements under 32 U.S.C. § 110. As the Fifth Circuit confirmed, the Federal Government has long used its authorities to require Guardsmen to meet stringent medical and physical fitness standards so they may remain ready to defend the nation. "These standards include . . . a range of immunizations." *Abbott*, 70 F.4th at n.18. The November 2021 memorandum's decision to allocate funding under § 108 only to training Guardsmen meeting those standards is inexorably intertwined with DoD's readiness requirements, including immunizations. ECF No. 4-5 at 1; Am. Compl. ¶ 60. The same is true of the Air Force's memorandum dated December 7, 2021, which, in the provisions applicable to Guardsmen, withdraws consent for Guardsmen not fully vaccinated to be placed on or continue on previously issued Title 32 Active Guard and Reserve (AGR) orders under 32 U.S.C. § 328. ECF No. 4-6 at 6.

As Judge Friendly explained, "[t]he very purpose of a 'ready reserve' is that the reserve shall be ready." *Schonbrun*, 403 F.2d at 374. He therefore held that decisions regarding the administration of hardship exemptions in the reserves are "committed to agency discretion," because they "involve[] a balancing of the nation's needs, and the balance may differ from time to time and from place to place in a manner beyond the competence of a court to decide." *Schonbrun*, 403 F.2d at 375 & 375 n.2 (citation omitted). The same logic applies to the National Guard, which is an "essential reserve component of the Armed Forces," *Holdiness v. Stroud*, 808 F.2d 417, 421 (5th Cir. 1987), and which "the President of the United States can call on . . . at a moment's notice" to defend the United States, https://nationalguard.com/guard-faqs/. In setting immunization standards under § 110, allocating funding under § 108, and determining whether to consent under § 328(a), Defendants must carefully balance the nation's needs in a manner beyond the competence of a court to decide.[15]

[15] The Fifth Circuit's decision reversing the denial of Governor Abbott's motion for a preliminary injunction includes language indicating that the Government's power to set military readiness standards is irrelevant to Governor Abbott's appeal. *Abbott*, 70 F.4th at 821. That paragraph is best understood in light of the Fifth Circuit's findings that the appeal was not moot with respect to the Constitutional claims given the possibility that Guardsmen could face punishment, predominantly in the form of court-martialing, for past failure not to receive the

While it may seem harmless to review the COVID-19 vaccination program now that it has been rescinded and the threat of COVID-19 has receded, the Court must consider "the inappropriateness or even mischief involved," *Curran*, 420 F.2d at 131, from "the flood of unmeritorious applications that might be loosened by such interference with the military's exercise of discretion and the effect of the delays caused by these in the efficient administration of" the Armed Forced during future national emergencies, *see Schonbrun*, 403 F.2d at 375. When they initiated this lawsuit, Plaintiffs sought to extend to the military context the type of robust arbitrary-and-capricious review for reliance interests that, in other areas, permit courts "without holding that [the challenged action is substantively invalid]" to prevent the action from taking effect "during an entire Presidential term," if not longer. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1932 (2020) (Alito, J., concurring in the judgment in part and dissenting in part). "Our constitutional system is not supposed to work that way" in any area. *Id.* But surely tying up our military's ability ensure a ready and effective fighting force during a national emergency by subjecting military orders to this style of arbitrary-and-capricious review would have devastating

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COVID-19 vaccine. *Id*. at 845-46. Because there is no agency action reflecting a decision to court-martial any Guardsmen for not complying with the requirement to be vaccinated against COVID-19, insofar as the APA claims are challenging those possible decisions as part of Defendants' implementation, they have not stated an APA claim at all. *See supra* at 17-20; *see also* 5 U.S.C. § 701(b)(F). Inasmuch as Plaintiffs' APA claims are challenging memoranda and orders in the factual background of the Amended Complaint (which is inconsistent with the language in Counts IV, V, and VI), then the APA clams are challenging the "impos[ition of] vaccine requirements as part of the national effort to ensure military readiness[.]" *See Abbott*, 70 F.4th at 821. After all, that is all that is at issue in, for example, the August 2021 memorandum. This reasoning finds further support in Judge Oldham's statement that "the Secretary of Defense conceded that COVID shots are no longer necessary to military readiness when he repealed the mandate." *Id*. The Secretary's rescission of the mandate in 2023 as required by Congress has no bearing on the justification of any agency action plausibly challenged when the Amended Complaint was filed at the peak of the pandemic. "It is a widely accepted principle of administrative law that the courts base their review of an agency's actions on the materials that were before the agency at the time its decision was made," *Tindal v. McHugh*, 945 F. Supp. 2d 111, 123 (D.D.C. 2013) (quoting *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997)), not on events occurring thereafter. That "sort of Monday morning quarterbacking" is improper under the APA. *Vt. Yankee Nuclear Power Corp. v. Nat Res. Def. Council*, 435 U.S. 519, 547 (1978). Accordingly, Judge Oldham's discussion must not have been referring to the APA counts insofar as those counts challenge discrete action (which they do not).

effects on military discretion and flexibility. Congress closed the courthouse doors to that type of judicial supervision of military policy even after the vaccine mandate's rescission. 5 U.S.C. § 701(a)(2).

2. The Language and Structure of the Relevant Statutes Confirm that There is No Law to Apply.

The text of §§ 108, 110, and 328(a) plainly leave the decisions at issue, within statutory and constitutional bounds, to Defendants' independent judgment. Under 32 U.S.C. § 110, the statutory standard for setting federal standards for the National Guard is whether they are "necessary." Under 32 U.S.C. §108, the statutory standard is "as the President may prescribe." 32 U.S.C. § 108. Finally, under 32 U.S.C. § 328(a), Congress required "the consent of the [Service] Secretary concerned," for Plaintiffs to "order a member of the National Guard to perform Active Duty and Reserve duty" as defined under Title 10, "pursuant to section 502(f) of this title." The statutory requirement for Service Secretary consent includes no standard at all for withholding consent. *Antonellis v. United States*, 723 F.3d 1328, 1334-35 (Fed. Cir. 2013). The language in each of these statutes "fairly exudes deference" to Defendants, and "foreclose[s] the application of any meaningful judicial standard of review." *Webster*, 486 U.S. at 600. Insofar as Counts IV, V, and VI challenge agency actions referenced in the factual background of the Amended Complaint, they are committed to agency discretion by law.

V. Plaintiffs Do Not Establish the Critical Factors that Must be Present for Nonstatutory Equitable Review of the Claims in Counts I, II, and III.

Plaintiffs lack an extraordinary nonstatutory equitable cause of action to address their *ultra vires* claims pleaded in Counts I, II, and III because an adequate alternative means of vindicating their purported rights without nonstatutory review is available: the APA. "In the context of agency action, parties occasionally invoke the principles of 'nonstatutory review.'" *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 59 (1st Cir. 2007). This review involves the "residuum of power [that] remains with the district court to review agency action that is *ultra vires*," *R.I. Dep't of Envt'l Mgmt. v. United States*, 304 F.3d 31, 42 (1st Cir. 2002), stemming from "courts' use of their equitable jurisdiction to enjoin illegal agency action," Charles A. Wright & Arthur R.

Miller, 33 Fed. Prac. & Proc. Judicial Review § 8307 (2d ed). A court's power to enforce the Constitution in absence of a statutory cause of action does not rest upon an implied right of action contained in the Constitution. *Armstrong v. Exceptional Child Ctr. Inc.*, 575 U.S. 320, 324-27 (2015). Rather, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity[.]" *Id*. at 327.

Given the equitable basis of a nonstatutory cause of action, Plaintiffs may not invoke it unless they satisfy "the traditional requirement for equitable relief that a plaintiff lack an adequate remedy at law." Charles A. Wright & Arthur R. Miller, 33 Fed. Prac. & Proc. Judicial Review § 8307 (2d ed).[16] "Thus, if the APA or a special statutory review proceeding can provide adequate relief, an equitable remedy via nonstatutory review ought not be available." *Id*.; *see also Puerto Rico*, 490 F.3d at 59 ("[S]uch review may occur only if its absence would 'wholly deprive the party of a meaningful and adequate means of vindicating its . . . rights.'") (quoting *Bd. of Gov'rs of Fed. Reserve Sys. v. MCorp. Fin.*, 502 U.S. 32, 43 (1991)). In this way, "[t]he power of federal courts of equity to enjoin unlawful executive action is subject to . . . implied statutory limitations." *Armstrong*, 575 U.S. at 327.

Plaintiffs do "have a means of vindicating [their] rights without nonstatutory review: the APA." *Puerto Rico*, 490 F.3d at 59-60. "Within that judicial review framework, [Governors Abbott and Dunleavy] may assert [their] sovereign interests" as a consideration "in [this Court's] review" of a particular agency decision. *Id*. at 60. Indeed, the APA explicitly provides for judicial review of final agency action that is "contrary to constitutional right[.]" 5 U.S.C. § 706(2)(B).[17]

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[16] The equity jurisdiction of the federal courts is strictly limited to the "authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery" in 1789. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quoting *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)).

[17] In *Trump v. Sierra Club*, 140 S. Ct. 1 (Mem) (2019), the Supreme Court stayed a decision by the Ninth Circuit, which had concluded that Plaintiffs had an equitable cause of action notwithstanding the availability of a cause of action pursuant to the APA, *Sierra Club v. Trump*, 929 F.3d 699-700 (9th Cir. 2019). The Supreme Court's stay order explained that "the Government ha[d] made a sufficient showing at this stage that the plaintiffs have no cause of action[.]" *Trump*, 140 S. Ct. at 1.

The APA's framers legislated against background principles from courts of equity and understood that, by creating an adequate statutory cause of action for judicial review, they were limiting the circumstances in which extraordinary equitable jurisdiction—available when there is no adequate alternative—could be invoked. To override that understanding and permit a plaintiff to bypass the APA's procedural requirements for judicial review would render those procedural limits surplusage. The APA's "consideration and hearing, especially of agency interests, was painstaking." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950). It "represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacted a formula upon which opposing social and political forces have come to rest[,]" and "contains many compromises[.]" *Id.* For example, those compromises require Plaintiffs to "direct [their] attack against some particular 'agency action' that causes [them] harm." *Lujan*, 497 U.S. at 891. Plaintiffs may not superintend a military vaccination policy, such as the unidentified "orders implementing the DoD vaccine mandate and dictating specific punishments for non-federalized troops," Am. Compl. ¶ 85, or other "potential future consequences" of the vaccine mandate, ECF No. 78 at 1, without first generating and challenging a final agency action. The APA's compromises "reflect[] the legal principle of permitting agencies to deal thoroughly in the first instance with issues" such as Plaintiffs' objections to possible methods of enforcement of the military's now-defunct COVID-19 vaccination directive. *See Cousins v. Secretary of the U.S. Dep't of Transp.*, 880 F.2d 603, 610 (1st Cir. 1989). Plaintiffs may not resurrect equitable doctrines to bypass the strictures of the APA. "[T]he existence of the APA as a means for reviewing [Defendants'] actions at least implies that nonstatutory review is inappropriate." *Puerto Rico*, 490 F.3d at 60; *see also Coalition for Competitive Electricity, Dynegy, Inc. v. Zibelman*, 272 F. Supp. 3d 554, 566 (S.D.N.Y. 2017) ("The limited private right of action provided by [a statute] is by itself sufficient to establish that Congress intended to foreclose [an] equitable" cause of action).

Nor does the fact that there may be no final agency action reflecting a decision to, for example, withdraw federal recognition for non-Federalized Guardsmen indicate that Plaintiffs have no adequate means of vindicating their rights under the APA. Again, the APA "reflects the

legal principle of permitting agencies to deal thoroughly in the first instance with issues like the present one." *Cousins*, 880 F.2d at 610. Insofar as there was any confusion, the APA envisions that Plaintiffs could generate a final agency action by petitioning the military not to enforce the now-defunct vaccination directive against Guardsmen in their commands by means of court martialing or by means of withdrawal of federal recognition proceedings. *See id*. In any such petition, they could raise their constitutional objections for consideration. *Cf. Dep't of Educ. v. Brown*, 600 U.S. 551, 565 (2023) (invoking 5 U.S.C. § 553(e)). "The denial of such a petition 'must be justified by a statement of reasons,' which in turn 'can be appealed to the courts' if the litigant has standing to maintain such a suit." *Id*. (citation omitted). That procedure—correct under the APA—provides Plaintiffs with an adequate alternative remedy for vindicating their constitutional claims. It also permits the military to utilize its normal administrative channels, those channels envisioned by the APA's framers, for considering and agreeing to the request without the need for a lawsuit and an entirely unnecessary injunction or declaratory judgment.

Given the available APA cause of action, equitable *ultra vires* claims are only considered when there is some implicit "statutory preclusion of [judicial] review" that makes the APA claim unavailable. *See Changji Esquel Textile Co. Ltd. v. Raimondo*, 40 F.4th 716, 722 (D.C. Cir. 2022) (citation omitted). Accordingly, "courts have stressed that [equitable] *ultra vires* review has 'extremely limited scope.'" *Id*. at 722-23 (citation omitted). Counts I, II, and III fall far outside that scope. They should be dismissed, or judgment on them should be entered in Defendants' favor, because the APA provides for an adequate means of vindicating Plaintiffs' purported rights.

VI. The Declaratory Judgment Act Creates No Cause of Action.

"[T]he Declaratory Judgment Act alone does not create a federal cause of action." *Harris Cty., Tex. v. MERSCORP Inc.*, 791 F.3d 545, 552 (5th Cir. 2015). Because it fails to identify any available cause of action, the Court should enter judgment for Defendants on Count VII.

CONCLUSION

The Court should dismiss the Amended Complaint or enter judgment for Defendants.

Dated: November 30, 2023

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

JOSHUA E. GARDNER
Special Counsel

/s/ *Liam C. Holland*
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Counsel for Defendants

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GOVERNOR GREG ABBOTT, in his official capacity as Governor of the State of Texas,

and

GOVERNOR MIKE DUNLEAVY, in his official capacity as Governor of the State of Alaska,
Plaintiffs,

v.

JOSEPH R. BIDEN, in his official capacity as President of the United States, *et al.*,
Defendants.

No. 6:22-cv-3-JCB

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Upon consideration of Defendants' motion to dismiss and for judgment on the pleadings, it is hereby ORDERED that the motion is GRANTED; and it is further

ORDERED that the Amended Complaint is DISMISSED.

SO ORDERED.

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GOVERNOR GREG ABBOTT, in his official capacity as Governor of the State of Texas, and

GOVERNOR MIKE DUNLEAVY, in his official capacity as Governor of the State of Alaska,

Plaintiffs,

v.

JOSEPH R. BIDEN, *et al.*,

Defendants.

No. 6:22-cv-00003

DECLARATION OF DAVID GRIER MARTIN III

I, David Grier Martin III, hereby state and declare as follows:

1. I currently am performing the duties of the Assistant Secretary of Defense for Manpower and Reserve Affairs. I have been in this position since April 1, 2023. In this role, I am the principal advisor to the Secretary of Defense and the Under Secretary of Defense for Personnel and Readiness on all matters related to civilian and military personnel policies, reserve integration, military community and family policy, and total force manpower and resources. I am a retired Army Reserve soldier with service as a judge advocate and a field artillery officer.

2. I make the following statements based upon my personal knowledge gained through my official duties and information received in the ordinary course of my duties.

3. Neither the Department of Defense, nor the Departments of the Army and the Air Force, nor the National Guard Bureau, intend to:

a. Withdraw consent for any future drilling, training, and other duties, under 32 U.S.C. § 328 or otherwise solely because a Guardsman is not vaccinated against COVID-19;

b. Withhold pay or other funding from any individual Guardsman or any State solely because a Guardsman is not vaccinated against COVID-19;

c. Initiate or authorize initiation of withdrawal of federal recognition proceedings for a Guardsman based solely on refusal to comply with the now-rescinded COVID-19 vaccination mandate, over the objection of the relevant State Adjutant General;

d. Convene courts-martial under 32 U.S.C. §§ 326 or 327 based solely on a Guardsman's refusal to comply with the now-rescinded COVID-19 vaccination mandate.

4. The entire non-federalized Texas National Guard and Alaska National Guard are no longer subject to any federally-imposed consequences for past noncompliance with the now-rescinded requirement to be vaccinated against COVID-19.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of November 2023.

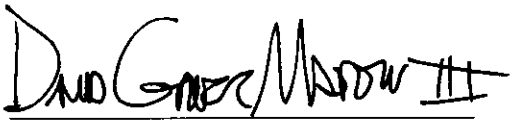

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GOVERNOR GREG ABBOTT, in his official capacity as Governor of the State of Texas, and GOVERNOR MIKE DUNLEAVY, in his official capacity as Governor of the State of Alaska, *Plaintiffs*, v. JOSEPH R. BIDEN, *et al.*, *Defendants*.	No. 6:22-cv-00003

DECLARATION OF CHARLES W. NICHOLS, Jr.

I, CHARLES WESLEY NICHOLS, Jr, hereby state and declare as follows:

1. Presently, I am a Department of Air Force (DAF) Civilian and serve as Deputy Director for Manpower and Personnel (NGB-S1) for National Guard Bureau Space Operations. I have served in NGB-S1 from 8 October 2023 to present. Before NGB-S1, I served, also as a DAF Civilian, as Chief, Technician and Civilian Personnel Policy Division (NGB-J1-P), National Guard Bureau Joint Directorate of Manpower and Personnel (NGB-J1). I served in NGB-J1-P from 2022 May 2023 to 7 October 2023. Pertinent to this declaration, and before my service in NGB-J1-P, I served as an Air Force Colonel on a Title 10 Active Guard and Reserve Statutory Tour with the National Guard Bureau. I was the Deputy Director, National Guard Bureau Directorate of Manpower,

Personnel, Recruiting and Services (NGB/A1) from 27 October 2019 to 1 August 2022. As Deputy Director, I served as a principal deputy and advisor to Director, Manpower, Personnel Recruiting and Services (NGB/A1) on policy and program associated with those functional areas within NGB/A1 affecting 90 Air National Guard Wings, comprised of approximately 885 units with 108,300 authorized personnel. I provided management oversight of approximately $6.5B in manpower resources and assisted the Director (NGB/A1) in leading a team of 300 military and civilians located at 51 world-wide locations supporting the deployments, warfighting, domestic operations capabilities, and the overall mission of the National Guard which is to organize, administer, recruit, train, and equip National Guard units.

2. I make the following statements based on my personal knowledge gained through my official duties and information received in the ordinary course of my duties.

The Rescinded Military COVID-19 Vaccination Program and Policy Requiring Vaccination for Participation in Drills, Training, and Other Duties

3. Title 32 training is conducted by states, but subject to regulation by Congress and the federal military. *See* 32 U.S.C. § 501 ("The training of the National Guard of the several states . . . shall be conducted in conformity with this title."). Drilling, training, and other duties under Title 32 are conducted under regulations prescribed by the Secretaries of the Army and Air Force. 32 U.S.C. § 502(a), (f). A member of the National Guard may only perform Active Guard and Reserve duty with the consent of the Secretary of the Military Department concerned. 32 U.S.C. § 328.

4. **Secretary of Defense Initial Guidance:**

   a. On August 24, 2021, the Secretary of Defense directed the Secretaries of the Military Departments to begin full vaccination of all members of the Armed Forces against COVID-19, including members of the Army National Guard and Air National Guard. ECF No. 4-2.

b. On November 30, 2021, the Secretary issued a second memorandum specifically addressing COVID-19 vaccination for National Guard members. ECF No. 4-5 at 2. The memorandum directed the Secretaries of the Army and the Air Force, and other federal military authorities, to establish policies and implementation guidance to ensure that Guardsmen are vaccinated against COVID-19 "in order to participate in drills, training and other duty conducted under title 32, U.S. Code." *Id*. Specifically, this memorandum directed that no DoD "funding may be allocated for payment of duties[, including drilling and training,] performed under title 32 for members of the National Guard who do not comply with [DoD] COVID-19 vaccination requirements." *Id*.

5. **Air Force Initial Guidance:** Consistent with the Secretary of Defense's November 2021 memorandum, the Secretary of the Air Force on December 7, 2021, issued a memorandum ("Supplemental Coronavirus Disease 2019 Vaccination Policy") which at Attachment 2 included the specific policy and guidance applicable to Air National Guard members. ECF No. 4-6 at 6-7. That directive provided that in accordance with "32 U.S.C. 328, the Secretary of the Air Force hereby withdraws consent for members not fully vaccinated to be placed on or to continue on previously issued Title 32 Active Guard and Reserve (AGR) orders." *Id*. at 6 ¶ 2. It also provided that unvaccinated Guardsmen without pending or approved exemption requests "may not participate in drills, training, or other duty conducted under Title 10 or Title 32, U.S.C.[.]". *Id*. at 6 ¶ 5.

6. **Army Initial Guidance:** On November 30, 2021, the Department of the Army issued Army Fragmentary Order 11 to HQDA Execute Order 225-21 Covid-19 Steady State Operations. ECF No. 33-1 at 11-18 ("FRAGO 11"). FRAGO 11 ordered commands throughout the Army to "read

and comply with Secretary of Defense Memorandum, 'Coronavirus Disease 2019 Vaccination for Members of the National Guard and the Ready Reserve,' dated 30 November 2021." *Id*. at 13 ¶ 3.D.21. Thereafter, the Department of the Army set the deadline of July 1, 2022, by which all Army Reserve and National Guard members had to be vaccinated (unless otherwise exempt) to participate in drills, training, and other duties funded by the Department of Defense. *See* FRAGO 13 at 9 ¶¶ 3.D.21.F. The potential consequence of a Guardsman not complying after the deadline was that no DoD "funding [would] be allocated for payment of duties performed by members of the Army National Guard . . . who do not comply[.]" *Id*. ¶ 3D.21.G.

7. **Subsequent Guidance.**

a. On January 10, 2023, the Secretary of Defense, as directed by Congress, rescinded his August 24 and November 30, 2021 memoranda. ECF 55-1.

b. In response, on January 18, 2023, the Chief of the National Guard Bureau issued a Memorandum for the Adjutants General and Commanding General, District of Columbia. The Memorandum provided that "all currently serving non-federalized Army National Guard and Air National Guard members who are not fully vaccinated for COVID-19, but are otherwise qualified and eligible are no longer prohibited from, and may be directed to resume participation in drills, training and/or duty conducted under Title 32, U.S. Code[.]" A true and correct copy of the January 18, 2023 Memorandum is attached as Exhibit A.

c. The Air Force's December 7, 2021 guidance relating to the Air National Guard had expired by its own terms as of December 7, 2022. ECF No. 4-6 at 3. The Secretary of the Air Force subsequently issued a memorandum ("Department of the Air Force (DAF) Guidance on Removal of Adverse Actions and Handling of Religious

Accommodation Requests") on February 24, 2023, reinforcing that all prior policies, including those related to the National Guard, associated with the implementation of the prior COVID-19 vaccination mandate had been rescinded and are no longer in effect. A true and correct copy of this memorandum is attached as Exhibit B.

d. The Secretary of the Army on February 24, 2023 issued a memorandum reinforcing that all prior policies, including those related to the National Guard, associated with the implementation of the prior COVID-19 vaccination mandate had been rescinded and are no longer in effect. A true and correct copy of this memorandum is attached as Exhibit C.

8. Between August 24, 2021 (when Secretary Austin issued his initial vaccination memorandum) and February 24, 2023 (when the Secretaries of the Air Force and Army Secretaries memoranda regarding the implementation of the rescission of the August 2021 memorandum), no federal officer or official withheld funding for payment to Texas or Alaska Guardsmen performing duties under title 32 who did not comply with the now-rescinded DoD Covid-19 vaccination requirement. The National Guard Bureau, the Department of the Army, and the Department of the Air Force do not have any record of any Texas and Alaska Guardsmen who were prevented from performing duties under title 32 due to a failure to comply with the now-rescinded DoD COVID-19 vaccination requirement.

9. Under standard practice, commanders within the state National Guards make the determination of whether individual Guardsmen are in compliance with federal readiness standards before being credited for service for purposes of federal pay. While the prior COVID-19 vaccination policy was in effect, DoD and the National Guard Bureau obtained no evidence from the Texas and

Alaska National Guards as to whether they ensured individual Guardsmen were in compliance with the prior DoD COVID-19 vaccine policy before crediting their Guardsmen with service and military pay.

10. The National Guard Bureau, the Department of the Army, and the Department of the Air Force, do not have any record of any Texas and Alaska Guardsmen who were unable to perform Active Guard or Reserve duty under 32 U.S.C. § 328(a) due to the Secretary of the Air Force's withdrawal of consent for Guardsmen not fully vaccinated to be placed on or to continue on previously issued Title 32 Active Guard and Reserve orders or due to the Army's issuance of FRAGO 11.

11. Similarly, since February 24, 2023, no federal officer or official withheld funding for payment to Texas and Alaska National Guardsmen performing duties under title 32 who did not comply with the now-rescinded DoD COVID-19 vaccination requirement. The National Guard Bureau, the Department of the Army, and the Department of the Air Force, do not have any record of any Texas and Alaska Guardsmen who were unable to perform duties under title 32 at February 24, 2023 due to their failure to comply with the now-rescinded DoD COVID-19 vaccination requirement.

12. Accordingly, no federal military policy precludes non-federalized Guardsmen from participating in drills, training, and other duties based solely on refusal to comply with the now-rescinded COVID-19 vaccination mandate.

Withdrawal of Federal Recognition or Discharge Under 32 U.S.C. §§ 322-24

13. 32 U.S.C. §323(a) provides that "[w]henever a member of the National Guard ceases to have the qualifications prescribed under section 301 of this title or ceases to be a member of the federally recognized unit or organization of the National Guard, his Federal recognition shall be withdrawn."

14. For officer members of the National Guard, federal recognition is not withdrawn until after an investigation by a board, findings by the board that are unfavorable to the officer, and finally, approval by the President, per 32 U.S.C. § 323(b).

15. 32 U.S.C. §§ 322-24 govern withdrawal of federal recognition and discharge of Guardsmen.

a. 32 U.S.C. § 322 provides, in relevant part, that an "enlisted member of the National Guard shall be discharged when . . . his Federal recognition is withdrawn."

b. 32 U.S.C. § 324, provides, in relevant part, that "[a]n officer of the National Guard shall be discharged when . . . his Federal recognition is withdrawn."

16. Under applicable Air Force and Army regulations, the relevant commander, which for the Army National Guard and Air National Guard is the Adjutant General of the state, not any federal official, is responsible for initiating withdrawal of federal recognition proceedings for non-federalized Guardsmen. *E.g.* AFI 36-3211 para. 18.13. To do so for Air National Guard officers, the Adjutant General submits a written request to conduct a withdrawal of federal recognition board to the National Guard Bureau. *Id*. For Army National Guard officers, the Adjutant General refers a case to the appropriate "Area Commander" (First Army or U.S. Army Pacific), a federal official who can authorize the convening of the board. While the Army National Guard and Air National Guard regulations also authorize certain federal officials to initiate this process, neither the military services nor the National Guard Bureau have a record of such officials ever doing so.

17. No memorandum, order, or directive issued in connection with the now-rescinded requirement that Guardsmen be vaccinated against COVID-19 specifically authorized or directed any federal official to initiate any withdrawal of federal recognition proceedings under 32 U.S.C. §§ 322-24. As described below, although certain Air Force and Army policies implementing the now-rescinded COVID-19 vaccination program required commands to initiate administrative

separation proceedings for certain Service Members, those policies were not applicable to non-federalized Guardsmen.

18. **Air Force:**

a. The Secretary of the Air Force Memorandum issued on December 7, 2021, encouraged "[c]ommanders" to "take appropriate administrative and disciplinary actions." ECF No. 4-6 at 2. At this time and always, non-federalized Guardsmen are under the command and control of the Plaintiffs. Accordingly, Plaintiffs' commands determine which administrative and disciplinary actions, if any, are "appropriate" for non-federalized guardsmen who do not comply with the requirement to be vaccinated against COVID-19.

b. Although the memorandum directed that "[r]efusal to comply with the vaccination mandate without an exemption will result in the member being subject to initiation of administrative discharge proceedings[,]" ECF No. 4-6 at 2, that directive applied only to regular service members, not to non-federalized Air National Guard members. As clarified later in the directive, "[r]egular service members[,]" not non-federalized Guardsmen, "who continue to refuse to obey a lawful order to receive the COVID-19 . . . will be subject to initiation of administrative discharge [proceedings]." ECF No. 4-6 at 3. The potential consequences for Air National Guardsmen, were described in "[u]nique guidance associated with the Air National Guard [that was] provided at Attachment 2." *Id*. Attachment 2, in turn, provided "specific policy and provides guidance applicable to Air National Guard (ANG) members pursuant to Secretary of Defense and Secretary of the Air Force guidance." *Id*. at 6 ¶ 1.

c. For Air National Guardsmen, the consequence of refusing to comply with the requirement to be vaccinated against COVID-19 was clear: "[In accordance with] 32 U.S.C. § 328, the Secretary of the Air Force hereby withdraws consent for members not fully vaccinated to be placed on or continue to be previously issued Title 32 Active Guard and Reserve (AGR) orders." *Id*. ¶ 2. "ANG members that have not initiated a vaccination regimen by 31 December 2021 [were not permitted to] participate in drills, training, or other duty continued under Title 10 or Title 32 U.S.C.[.]" and were to be involuntarily reassigned to the Individual Ready Reserve. *Id*. ¶ 5.

d. The Air Force's December 7, 2021 guidance relating to the Air National Guard had expired by its own terms as of December 7, 2022. ECF No. 4-6 at 3. The Secretary of the Air Force subsequently-issued guidance on February 24, 2023, reinforced that all prior policies, including those related to the National Guard, associated with the implementation of the prior COVID-19 vaccination mandate had been rescinded and are no longer in effect. (Exhibit B).

19. **Army:**

a. On January 31, 2022, the Secretary of the Army issued Army Directive ("A.D.") 2022-02 ("Personnel Actions for Active Duty Soldiers Who Refuse the COVID-19 Vaccination Order and Accession Requirements for Unvaccinated Individuals). A true and correct copy of A.D. 2022-02 is attached as Exhibit D. The Directive established the Department of the Army's policy of initiating separation proceedings for certain Service Members refusing the lawful order to be vaccinated against COVID-19, excluding non-federalized Guardsmen. In particular, A.D.

2022-02 required the initiation of separation proceedings for Soldiers who serve in the Regular Army; Soldiers in a Reserve component while serving on active duty for more than 30 days pursuant to Title 10, U.S.C.; cadets in the United States Military Academy; cadet candidates at the United States Military Academy Preparatory School, and Senior Reserve Officers' Training Corps (SROTC). A.D. 2022-02 ¶¶ 4(a)(2), (c).

b. Expressly excluded from the list of those soldiers subject to initiation of involuntary separation proceedings were Soldiers of the Army National Guard not on Title 10 status, like the Texas and Alaska Guardsmen at issue in this case. *Id*. ¶ 4(a)(2).

c. Other aspects of A.D. 2022-02 applied to all Guardsmen, however. For example, A.D. 2022-02 described an exemptions system which permitted all Soldiers, including Guardsmen, to submit requests for medical or administrative exemption from mandatory immunization. *Id*. ¶ 4(b).

d. In A.D. 2022-02, the Secretary of the Army "continue[d] to withhold authority to impose non-judicial and judicial actions based solely on vaccine refusal." A.D. 2022-02 ¶ k.

e. In her February 24, 2023 memorandum, the Secretary of the Army expressly rescinded A.D. 2022-02. (Exhibit C).

20. Consistent with State Adjutant General and State Commander discretion to take appropriate administrative and disciplinary actions to enforce the prior requirement to be vaccinated against COVID-19, while the vaccination directive was in effect, commanders of Air National Guard personnel in many States sought withdrawal of federal recognition of and to discharge noncompliant Guardsmen.

21. The Department of Defense, the Departments of the Army or Air Force, and the National Guard Bureau have no record of any federal officer or official initiating withdrawal of federal recognition proceedings under 32 U.S.C. §§ 322-24.

22. Between August 24, 2021 (when Secretary Austin issued his initial vaccination memorandum) and February 24, 2023 (when the Air Force and Army Secretaries issued memoranda regarding the implementation of the rescission of the August 2021 memorandum), no federal officer or official initiated any withdrawal of federal recognition proceedings under 32 U.S.C. §§ 322-24 for any Guardsmen who refused to be vaccinated against COVID-19P.

23. Similarly, since February 24, 2023, no federal officer or official initiated withdrawal of federal recognition proceedings under 32 U.S.C. §§ 322-24 for any Guardsmen who refused to be vaccinated against COVID-19.

Courts-Martial Under 32 U.S.C. §§ 326-27

24. 32 U.S.C. § 326 provides that:

> In the National Guard not in Federal service, there are general, special, and summary courts-martial constituted like similar courts of the Army and the Air Force. They have the jurisdiction and powers, except as to punishments, and shall follow the forms and procedures, provided for those courts. Punishments shall be provided by the laws of the respective States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands.

25. 32 U.S.C. § 327(b) provides that "[i]n the National Guard not in Federal service—(1) general courts-martial may be convened by the President" of the United States. Special courts-martial and summary courts-martial may be convened by commanding officers in the respective State chain of command. *Id*.

26. Sections 326 and 327 were first enacted in 1956. 70A Stat. 608. They were amended in 1988, 2002, and 2006. 102 Stat. 2059; 116 Stat. 2537; 119 Stat. 3442. The Department of Defense, the Departments of the Army or Air Force, and the National Guard Bureau, have never issued

regulations to implement, interpret, or prescribe policy to address court-martialing under 32 U.S.C. §§ 326-27.

27. The Department of Defense, the Departments of the Army or Air Force, and the National Guard Bureau, have no record of courts-martial being convened under Sections 326 or 327 by any federal authorities or officials for Guardsmen not in federal service in the nearly 70 years since these statutory authorities were first enacted in 1956.

28. No memorandum, order, or directive issued in connection with the former requirement that Guardsmen be vaccinated against COVID-19 specifically authorized or directed any federal official to convene courts-martial under 32 U.S.C. §§ 326-27 as a means to address a Guardsmen's refusal to comply with the requirement to be vaccinated against COVID-19.

29. Between August 24, 2021 (when Secretary of Defense Lloyd Austin issued a memorandum determining that mandatory vaccination against COVID-19 is necessary to protect the Force and defend the American people) and February 24, 2023 (when the Air Force and Army Secretaries issued memoranda regarding the implementation of the rescission of the August 2021 memorandum), no federal officer or official enforced any requirement that Guardsmen be vaccinated against COVID-19 by convening a court-martial under Sections 326 or 327.

30. Since February 24, 2023, no federal officer or official enforced the now-rescinded requirement that Guardsmen be vaccinated against COVID-19 by convening courts-martial under Sections 326 or 327.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of November 2023.

NICHOLS.CHARLES.WESLEY.JR.1117083558 Digitally signed by NICHOLS.CHARLES.WESLEY.JR.1117083558 Date: 2023.11.30 16:42:00 -05'00'

CHARLES W. NICHOLS, Jr., GS-15, DAF
Deputy Director, NGB-S1
National Guard Bureau

Exhibit A

NATIONAL GUARD BUREAU
1636 DEFENSE PENTAGON
WASHINGTON DC 20301-1636

JAN 18 2023

MEMORANDUM FOR THE ADJUTANTS GENERAL AND COMMANDING GENERAL, DISTRICT OF COLUMBIA

SUBJECT: Return of Non-Federalized T32 National Guard Service Members to Non-Federalized Title 32 Duty

On January 10, 2023, the Secretary of Defense rescinded both the August 24, 2021 memorandum, "Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members" and the November 30, 2021 memorandum, "Coronavirus Disease 2019 Vaccination of Members of the National Guard and the Ready Reserve."

In coordination with the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) and the Secretaries of the Army and Air Force, all currently serving non-federalized Army National Guard and Air National Guard members who are not fully vaccinated for COVID-19, but are otherwise qualified and eligible are no longer prohibited from, and may be directed to resume participation in drills, training and/or other duty conducted under Title 32, U.S. Code, to include AGR and FTNGD-OS duties.

This implementation guidance is effective for non-federalized duty originally scheduled to be conducted on or after January 10, 2023. Additional guidance to ensure uniform implementation of the rescission memorandum will be developed in collaboration with USD(P&R) and the Military Departments, as appropriate.

Please address any questions regarding this guidance to Major General Wendy Wenke, 703-604-9540 or wendy.b.wenke.mil@army.mil.

Daniel R. Hokanson
General, USA
Chief, National Guard Bureau

Exhibit B

SECRETARY OF THE AIR FORCE
WASHINGTON

February 24, 2023

MEMORANDUM FOR ALMAJCOM-FOA-DRU/CC
DISTRIBUTION C

SUBJECT: Department of the Air Force (DAF) Guidance on Removal of Adverse Actions and Handling of Religious Accommodation Requests

In accordance with my 23 January 2023 memorandum "Rescission of 3 September 2021 Mandatory Coronavirus Disease 2019 Vaccination of Department of the Air Force Military Members and 7 December 2021 Supplemental Coronavirus Disease 2019 Vaccination Policy Memoranda," I want to reinforce that all policies within the Department of the Air Force associated with the implementation of the Coronavirus Disease 2019 (COVID-19) vaccination mandate for Service members were also rescinded. Commanders at all levels must ensure that associated guidance derived from the mandate is rescinded. Refer to USD(P&R) Re: Consolidated Department of Defense Coronavirus Disease 2019 Force Health Protection Guidance - Revision 4, 30 January 2023 for current force health protection guidance.

I am issuing the following additional guidance with respect to the removal of adverse actions, and the handling of religious accommodation requests for those Service members who refused vaccination. At the time the actions were taken, they were appropriate, equitable and in accordance with valid lawful policy in effect at the time; however, removal of those actions is now appropriate in some circumstances.

a. Removal of Adverse Information: Currently serving Regular Air Force (RegAF), Space Force, Air National Guard, and Air Force Reserve members [including those involuntarily reassigned to the Inactive Ready Reserve] who sought an exemption on religious, administrative, or medical grounds, and who received adverse actions solely due to their refusal to receive a Coronavirus Disease 2019 (COVID-19) vaccine shall have these items removed as detailed below. The Service member must have formally sought an accommodation on religious, administrative, or medical grounds prior to or concurrent with the official initiation of the adverse action in order to receive relief under this memorandum. Commanders will ensure the removal of such adverse actions from currently serving Service members' records in accordance with the below guidance. Members will be notified by their command or record holder (e.g. Air Force Personnel Center, Air Reserve Personnel Center) when the adverse actions have been removed from their records. This policy does not apply to members who refused the COVID-19 vaccination and did not request an exemption. Members who did not seek an exemption may petition their chain of command under existing DAF policy or the Air Force Board for Correction of Military Records (AFBCMR) for removal of adverse information if they believe an injustice or error has occurred. The process to petition the AFBCMR may be found at: https://Afrba-portal.cce.af.mil.

1) Letters of Admonishment, Counseling, or Reprimand, and Records of Individual Counseling issued solely for vaccine refusal after requesting an exemption as described above will be rescinded. Removal of actions for enlisted members will follow the procedures in DAFI 36-2907. Removal of officer adverse actions will follow DAFI 36-2907, except that the removal of Letters of Counseling related to a substantiated finding from an officially documented investigation, Letters of Admonishment and Letters of Reprimand from a Personnel Information File (PIF) or Unfavorable Information File (UIF) is delegated to commanders in the member's current chain of command who are equal or senior in grade to the initial imposing authority. Where the administrative action addresses additional misconduct, the administrative action will be redacted to remove all language associated with the member's refusal to receive the COVID-19 vaccine. Commanders will make new determinations as to whether to uphold, downgrade, or withdraw the administrative action and entry into a PIF or UIF without consideration of the refusal to receive the COVID-19 vaccine. Any requirement for AFBCMR direction for removal of actions from Military Human Resource Records or other files will be accomplished by AFPC/ARPC as appropriate if removal is required under this memorandum. The member's command will inform AFPC/ARPC which adverse actions will be removed, redacted, or replaced.

2) Nonjudicial punishments issued solely for vaccine refusal after requesting an exemption as described above will be set aside in their entirety. Nonjudicial punishments issued partially for such vaccine refusal will have the vaccine refusal portion set aside and the remainder of the nonjudicial punishment reassessed for appropriateness. When the set aside is more than four months after the execution of the punishment, commanders should reference the SecDef Memo dated 10 January 2023 on an attachment to the AF Form 3212.

3) Referral Performance Reports issued solely for vaccine refusal after requesting an exemption as described above will have the referral report removed from the member's personnel record and replaced with a statement of non-rated time. Where the referral report addresses additional misconduct, the report will be redacted to remove all language associated with the member's refusal to receive the COVID-19 vaccine and the rater and/or additional rater will reassess if the remaining report should remain a referral.

4) Promotion Records will be corrected by the record holder (e.g., AFPC, ARPC, SAF/IG) to remove or redact, as appropriate, all adverse actions related to the member's refusal to receive the COVID-19 vaccine.

5) Promotion Propriety Actions will continue processing in accordance with DAFIs 36-2501 and 36-2504 and may only be closed by Secretarial action.

6) Current involuntary discharge proceedings will be terminated IAW the procedures in DAFI 36-3211 if the basis was solely for refusal to receive the COVID-19 vaccine. If there are additional circumstances supporting discharge, commanders should make a determination as to whether to continue discharge proceedings, including re-notification of discharge.

7) Adverse actions removed under the provisions of this guidance memorandum contained in Inspector General files pursuant to AFI 90-301 will be removed from those files.

b. Processing of religious accommodation requests (RARs) requesting an exemption to the COVID-19 vaccination requirement.

1) Due to the recission of the COVID-19 vaccine mandate, all outstanding RARs for COVID-19 vaccination have been cancelled and will be returned without action.

2) Individuals, whose COVID-19 RAR also requested accommodation for other mandated vaccinations, may resubmit their RAR to their unit commander for non-COVID-19 vaccinations in accordance with DAFI 52-201. Previous requests should be updated to provide any additional information the member deems relevant to the specific vaccine(s) the member is requesting an accommodation for. In order to expedite processing, members who desire to submit a new accommodation are requested to do so within 30 days.

3) Commanders will expeditiously review and adjudicate RARs in accordance with DAFI 52-201 with the following exceptions. Upon resubmission by the member, unit commanders will review the revised package and provide a command recommendation. Following unit commander recommendation on the resubmitted package, if the RAR was previously reviewed by a Religious Resolution Team (RRT), it will be forwarded to the initial decision authority. Resubmitted RARs that were not previously reviewed by an RRT will be processed expeditiously through the DAFI 52-201 RRT process. Resubmitted RARs that were at the appellate authority will be forwarded by the unit commander to the initial decision authority. If the initial decision authority disapproves the requested accommodation, it will be forwarded directly to the appellate authority. Personnel at all levels will consider additional information provided by the applicant and the commander's recommendation.

Let me close by expressing my admiration to the men and women of this Department for the tremendous effort and accomplishments in response to the COVID-19 pandemic while also ensuring the readiness of the force and defense of the Nation. We will continue to encourage COVID-19 vaccination for all personnel to ensure readiness, facilitate mission accomplishment, and protect our people.

Frank Kendall
Secretary of the Air Force

cc:
AF/CC
SF/CSO

Exhibit C

SECRETARY OF THE ARMY
WASHINGTON

24 FEB 2023

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Army Policy Implementing the Secretary of Defense Coronavirus Disease 2019 (COVID-19) Vaccination Mandate Rescission

1. References. See enclosure 1.

2. On 10 Jan 23, the Secretary of Defense rescinded the COVID-19 vaccination mandate across the Department of Defense (DoD). Accordingly, I hereby rescind all Department of the Army policies specifically associated with the implementation of the COVID-19 vaccination mandate. This includes rescinding references d, e, f, g, h, and i.

3. No currently serving Soldier[1] shall be separated based solely on their refusal to receive the COVID-19 vaccine if they sought an exemption on religious, administrative, or medical grounds. I want to reinforce that the Department of the Army will:

a. Cease any ongoing reviews of current Soldiers' religious, administrative, or medical exemption requests if those requests are solely for the COVID-19 vaccine. These specific pending requests are deemed resolved through the elimination of the COVID-19 vaccination mandate.

b. Update the records of Soldiers who requested an exemption for the COVID-19 vaccine to remove or correct any adverse actions associated with denials of such requests, as well as favorably remove any flags associated with those adverse actions.

c. No longer require the COVID-19 vaccine for accessions. Those currently in, or seeking admission to pre-commissioning programs, are no longer required to receive the COVID-19 vaccine.

d. In addition to the elimination of travel restrictions directed in reference c, remove any remaining travel restrictions based solely on COVID-19 vaccination status. Other standing Department of the Army policies, procedures, and processes regarding immunization and travel remain in effect, including combatant command, country clearance, and theater entry specific requirements.

[1] For the purposes of this policy, the term Soldier refers to Soldiers currently serving in the Regular Army (RA), Army National Guard (ARNG) / Army National Guard of the United States (ARNGUS), and U.S. Army Reserve (USAR); cadets at the United States Military Academy (USMA); cadet candidates at the United States Military Academy Preparatory School (USAMPS); and cadets in the Senior Reserve Officers' Training Corps (SROTC).

SUBJECT: Army Policy Implementing the Secretary of Defense Coronavirus Disease 2019 (COVID-19) Vaccination Mandate Rescission

4. To prevent any inconsistent disciplinary action based on past actions during the pandemic, I continue to withhold the authority to impose any non-judicial and judicial actions based solely on a Soldier's refusal to receive the COVID-19 vaccine while the mandate was in effect.

5. Furthermore, I am issuing the following guidance for updating the records and adjudicating pending exemption requests for Soldiers who sought an exemption.

a. Completed / Denied Exemption Requests. Personnel records for Soldiers who sought, but were denied, an exemption on religious, administrative, or medical grounds to the COVID-19 vaccination requirement will be updated as follows:

(1) Pending Separations. Effective immediately, Commanders will rescind all pending involuntary separation actions pursuant to reference d. The Soldier's flag (Flag Code B) will be closed as *favorable*.

(2) Suspension of Favorable Actions (Flags). Effective immediately, U.S. Army Human Resource Command (HRC), in coordination with the Deputy Chief of Staff G-1 (DCS G-1) will *favorably* close the flag for Soldiers who sought an exemption and are flagged (Flag Code A) for failure to comply with the lawful order to receive the COVID-19 vaccination.

(3) General Officer Memoranda of *Reprimand* (GOMOR). Effective immediately, HRC, in coordination with DCS G-1, will remove GOMORs from a Soldier's Army Military Human Resource Record (AMHRR) if the GOMOR was issued for the failure to comply with the lawful order to receive the COVID-19 vaccine and the Soldier previously sought an exemption.

(a) Filing authorities will immediately withdraw and destroy locally filed GOMORs issued for the failure to comply with the lawful order to receive the COVID-19 vaccine for Soldiers who previously sought an exemption.

(b) GOMORs that have been issued for the failure to comply with the lawful order to receive the COVID-19 vaccine where the Soldier previously sought an exemption, but are not yet filed, will be rescinded.

(4) Bars to Continued Service. Effective immediately, HRC, in coordination with DCS G-1, will remove all bars to continued service if the bar was based on the Soldier's failure to comply with the lawful order to receive the COVID-19 vaccination and the Soldier previously sought an exemption.

(5) Evaluation Reports. Within 30 days of the publication of this policy, HRC, in coordination with DCS G-1, will contact the Soldier and their rating chain if a negative

evaluation report was based on the Soldier's failure to comply with the lawful order to receive the COVID-19 vaccine and the Soldier previously sought an exemption.

(a) Soldiers, working with their rating chain, will determine if the evaluation should be maintained, modified, or removed from Soldier's AMHRR to achieve the most advantageous outcome for the Soldier.

(b) For evaluations that are pending but not yet filed, rating officials will remove annotations documenting vaccine refusal that were included in the evaluation pursuant to reference d.

(6) Adverse Actions Referencing Additional Misconduct. As stated above, HRC, in coordination with DCS G-1, will update personnel records to remove all adverse actions for Soldiers who sought, but were denied, an exemption on religious, administrative, or medical grounds to the COVID-19 vaccination requirement. If the adverse action was taken due to other instances of misconduct, Commanders may initiate adverse actions based on the other misconduct not associated with the failure to comply with the lawful order to receive the COVID-19 vaccine.

(7) Reporting. Within 45 days of the publication of this policy, HRC will report the actions taken to update Soldiers' personnel records. The General Court Martial Convening Authority (GCMCA) or equivalent authority will validate the report within 15 days of receipt from HRC. Soldiers who were inadvertently excluded in the report will notify their GCMCA.

b. Pending Exemption Requests. Rescission of the DoD COVID-19 vaccination mandate eliminates the need for the Army to adjudicate pending exemption requests based on religious, administrative, or medical grounds.

(1) Notification. Within 30 days of the publication of this policy, the Office of the Surgeon General (OTSG), in coordination with the Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA(M&RA)), will notify Soldiers who sought an exemption (or appealed a denied exemption) solely for the COVID-19 vaccination mandate that no further action will be taken. The Soldier will be notified through the GCMCA or equivalent authority that submitted the request. Commanders will notify each Soldier in writing within seven days of receipt of notification.

(2) Multiple Vaccine Exemption Requests. Within 30 days of the effective date of this policy, Soldiers who sought exemption to other mandatory vaccines along with their request for exemption from the COVID-19 vaccine must resubmit their request if they continue to seek an exemption from the other vaccines.

(a) Soldiers who submitted multiple vaccine exemption requests did not consistently provide information related to non-COVID vaccine requests. To ensure fair

and expeditious processing of these requests, request for exemption should be specific to the vaccine and must address how receipt of each vaccine substantially burdens the Soldier's exercise of religion.

(b) To expedite the process, Soldiers are not required to receive additional counseling or training/education by a Chaplain or Medical Provider if the request is re-submitted within 30 days of notification. The new request must otherwise comply with the existing processes contained in Army Regulation (AR) 600-20, *Army Command Policy*, Appendix P-2.

(c) Commanders will ensure resubmissions are processed within 30 days. Commanders have the authority to determine if a new command recommendation is warranted based on the information in the request.

(3) Reporting. On a monthly basis, GCMCAs or equivalent authorities will report the number of Soldiers notified and the projected number of resubmissions. OTSG will validate and report the number of exemption requests and appeals adjudicated to include the number of approvals and denials in each category.

6. Former Soldiers may petition the Army Discharge Review Board and the Army Board for Correction of Military Records to request corrections to their personnel records, including records regarding the characterization of their discharge.

7. Additional Army policy and guidance to effect this rescission and implement DoD policy will be issued by the Assistant Secretary of the Army (Manpower and Reserve Affairs) as necessary and appropriate.

8. I am proud of the efforts the Department of the Army has taken to respond to the COVID-19 pandemic. We will continue to promote and encourage COVID-19 vaccination for all personnel to ensure readiness, facilitate mission accomplishment, and protect our force.

Christine E. Wormuth

Encls

DISTRIBUTION:
Principal Officials of Headquarters, Department of the Army
Commander
U.S. Army Forces Command
U.S. Army Training and Doctrine Command
(CONT)

SUBJECT: Army Policy Implementing the Secretary of Defense Coronavirus Disease 2019 (COVID-19) Vaccination Mandate Rescission

DISTRIBUTION: (CONT)
- U.S. Army Materiel Command
- U.S. Army Futures Command
- U.S. Army Pacific
- U.S. Army Europe and Africa
- U.S. Army Central
- U.S. Army North
- U.S. Army South
- U.S. Army Special Operations Command
- Military Surface Deployment and Distribution Command
- U.S. Army Space and Missile Defense Command/Army Strategic Command
- U.S. Army Cyber Command
- U.S. Army Medical Command
- U.S. Army Intelligence and Security Command
- U.S. Army Corps of Engineers
- U.S. Army Military District of Washington
- U.S. Army Test and Evaluation Command
- U.S. Army Human Resources Command

Superintendent, U.S. Military Academy
Commandant, U.S. Army War College
Director, U.S. Army Civilian Human Resources Agency
Executive Director, Military Postal Service Agency
Superintendent, Arlington National Cemetery
Director, U.S. Army Acquisition Support Center

CF:
Principal Cyber Advisor
Director of Business Transformation
Commander, Eighth Army

REFERENCES

a. Section 525 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023.

b. Secretary of Defense memorandum (Rescission of August 24, 2021, and November 30, 2021, Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces), 10 January 2023.

c. Consolidated Department of Defense Coronavirus Disease 2019 Force Health Protection Guidance, Revision 4, 30 January 2023.

d. Army Directive 2022-02 (Personnel Actions for Active-Duty Soldiers Who Refuse the COVID-19 Vaccination Order and Accession Requirements for Unvaccinated Individuals), 31 January 2022.

e. Secretary of the Army Memorandum (Flagging and Bars to Continued Service of Soldiers Who Refuse the COVID-19 Vaccination Order), 16 November 2021.

f. Secretary of the Army Memorandum (Unvaccinated Cadets at the United States Military Academy and United States Army Senior Reserve Officers' Training Corps), 14 December 2021.

g. Secretary of the Army Memorandum (Delegation of Authority for Consolidated Department of Defense Coronavirus Disease 2019 Force Health Protection Guidance), 25 May 2022.

h. Under Secretary of the Army Memorandum (Updated Guidance on Official Travel), 17 October 2022.

i. All Army Activities (ALARACT) Message 009/2022 (Execution Guidance for Accessions and Active-Duty Soldiers Who Refuse the COVID-19 Vaccination Order), 2 February 2022.

j. Army Regulation 600-8-2 (Suspension of Favorable Personnel Actions (FLAG)).

k. Army Regulation 600-20 (Army Command Policy).

l. Army Regulation 600-37 (Unfavorable Information).

m. Army Regulation 601-280 (Army Retention Program).

n. Army Regulation 623-3 (Evaluation Reporting System).

Exhibit D

SECRETARY OF THE ARMY
WASHINGTON

31 JAN 2022

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Army Directive 2022-02 (Personnel Actions for Active Duty Soldiers Who Refuse the COVID-19 Vaccination Order and Accession Requirements for Unvaccinated Individuals)

1. References. See references enclosed.

2. Purpose. This directive establishes personnel policies and procedures for unvaccinated individuals seeking accession into the Army and Soldiers who refuse the novel Coronavirus 2019 (COVID-19) vaccination order.

3. Applicability. This Directive applies to all Soldiers of the Regular Army and Soldiers of the Army National Guard/Army National Guard of the United States and the U.S. Army Reserve when serving on active duty for more than 30 days, pursuant to Title 10, U.S. Code, and Cadets at the United States Military Academy (USMA) and Senior Reserve Officers' Training Corps (SROTC).

4. Policy. Individuals seeking accession into the Army and those Soldiers currently serving must be fully vaccinated against COVID-19.

a. The following definitions apply for the purposes of this policy.

(1) "fully vaccinated"—defined by the Department of Defense (DoD) in reference 1b

(2) "Soldier refusing the vaccine order"—a Soldier in the Regular Army; Soldier in a Reserve component when serving on active duty for more than 30 days pursuant to Title 10, U.S. Code; a cadet at the United States Military Academy (USMA); a cadet candidate at the United States Military Academy Preparatory School (USMAPS); or a Senior Reserve Officers' Training Corps (SROTC) cadet who meets all of the following:

(a) has received a lawful order to be fully vaccinated against COVID-19

(b) has been provided a reasonable opportunity to receive the COVID-19 vaccination

(c) has made a final declination of immunization as instructed in reference 1l

(d) does not have a pending or approved medical or administrative exemption (to include religious accommodation)

SUBJECT: Army Directive 2022-02 (Personnel Actions for Active Duty Soldiers Who Refuse the COVID-19 Vaccination Order and Accession Requirements for Unvaccinated Individuals)

b. COVID-19 Vaccine Exemptions. Soldiers may submit requests for medical or administrative exemption from mandatory immunization as enumerated in reference 1c. If a Soldier has a pending exemption request, and final action is taken to deny the exemption, to include any request for appeal, the Soldier will be ordered to receive the COVID-19 vaccination and counseled regarding this directive. If the Soldier refuses the COVID-19 vaccination order, the Soldier will be subject to action as listed in this directive.

c. Involuntary Separation Policy.

(1) Effective immediately, commanders will initiate involuntary administrative separation proceedings for Soldiers who have refused the lawful order to be vaccinated against COVID-19 and who do not have a pending or approved exemption request. Commands will process these separation actions, from initiation to a Soldier's potential discharge, as expeditiously as possible.

(2) Exception. Soldiers who will final out-process for separation/retirement on or before 1 July 2022 or who will separate/retire after 1 July 2022, but will begin transition leave on or before 1 July 2022, will be permitted to execute their separation or retirement without the additional separation processing described elsewhere in this paragraph.

d. Involuntary Separation Procedures. Consistent with reference 1a, all Soldiers, including those in an entry-level status, who are separated for refusing to become vaccinated will be issued either an Honorable or General (under honorable conditions) characterization of service unless additional misconduct warrants separation with an Other than Honorable characterization of service. Unless otherwise noted in this directive, these requests will be processed in accordance with current policy and regulations.

(1) Enlisted Personnel.

(a) Commanders will follow current policy for initiating administrative separation proceedings pursuant to reference 1k. The basis for separation will be for "Commission of a Serious Offense," under paragraph 14–12c of reference 1k. This applies to all enlisted Soldiers, regardless of whether the Soldier is in an entry-level status.

(b) If an enlisted Soldier is subject to an administrative separation action on the basis of refusing the COVID-19 vaccination order, is recommended for retention by an administrative separation board or approved for retention by the separation authority, and remains unvaccinated, the separation authority will reinitiate an action for the exercise of Secretarial Plenary Authority under paragraph 15–2 of reference 1k.

(c) Qualitative Management Program (QMP). If a Regular Army enlisted Soldier is identified for potential denial of continued active duty service under the QMP based solely on adverse information from refusing the COVID-19 vaccination order, the Soldier will not be processed through the QMP. The Soldier's command will initiate involuntary separation for misconduct pursuant to this directive.

(d) Expiration Term of Service (ETS). Commanders are not required to initiate involuntary administrative separation for enlisted personnel who have an ETS date on or before 1 July 2022 when the sole basis for involuntary separation is refusing the COVID-19 vaccination order. Soldiers with an ETS date on or before 1 July 2022 will be allowed to separate in accordance with chapter 4, reference 1k, unless separation on other grounds is warranted.

(2) Commissioned and Warrant Officers.

(a) Commanders will initiate an elimination action under reference 1g. The basis for separation will be for "Misconduct, Moral or Professional Dereliction," under paragraph 4–2b of reference 1g.

(b) Probationary Officers. Involuntary separation for probationary officers will be processed under notification procedures, and the separation authority will be the Deputy Assistant Secretary of the Army (Review Boards) (DASA (RB)). Although the show cause authority (SCA) may provide recommendations on retention or separation, all actions will be processed to the DASA (RB) for final decision.

(c) Non-Probationary Officers. The SCA will close the case, and no further separation-related action is required, if a non-probationary officer has been subject to an elimination action for refusing the COVID-19 vaccination order and a board of inquiry (BOI) determines that the officer should be retained on active duty. If the BOI determines that the officer should be separated, the SCA may provide recommendations on retention or separation, but the case will be processed to the DASA (RB) for final decision.

(d) Unqualified Resignation (UQR). Officers refusing the COVID-19 vaccination order may submit a request for UQR. If submitted within 30 days of the date of this directive, and the request includes a final separation date on or before 1 July 2022, commanders will not initiate involuntary separation on the sole basis of refusing the COVID-19 vaccination order unless the UQR is denied. Qualifying UQRs submitted under this directive may be approved by the Commanding General, U.S. Army Human Resources Command, or other designee, despite the officer being flagged solely for refusing the COVID-19 vaccination order. If an officer has an exemption request that is

subsequently denied, the officer will have the later of 14 days from final action or 30 days from the date of this directive to submit a UQR. If the UQR is not submitted within 14 days, involuntary separation will be initiated. Once a UQR is submitted, it may not be withdrawn absent a showing of good cause.

e. Retirement.

(1) All officer and enlisted personnel eligible to retire on or before 1 July 2022 will be permitted to retire as soon as practicable through expedited processes in lieu of involuntary separation. Requests for retirement must be submitted no later than 30 days from the date of this directive and include a final separation date no later than 1 July 2022.

(2) Soldiers eligible to retire on or before 1 July 2022, who have a pending exemption request as of the date of this directive, and that exemption request is subsequently denied, will have the later of 14 days from final action or 30 days from the date of this directive to submit a request for retirement. The retirement request must include a final separation date that is on or before the later of either 1 July 2022 or 120 days from final action date on the exemption request.

f. Disability Evaluation System (DES). Officers and enlisted personnel currently being processed through the Medical Evaluation Board/Physical Evaluation Board system pursuant to AR 635–40 will be processed in accordance with current policy and regulations.

g. Compensation, Entitlements and Recoupment.

(1) Soldiers separated will not be eligible for involuntary separation pay and may be subject to termination and recoupment of any unearned special or incentive pays. The effective date of the termination will be the date the commander initiates an involuntary administrative separation for any Soldier who has refused the COVID-19 vaccination order. The Soldier may be required to repay the unearned portion of the pay or benefit in accordance with current policy and regulations.

(2) Unless otherwise prohibited by law or DoD policy, the Secretary of the Army may render a case-by-case determination that the Soldier’s repayment of, or the Army’s full payment of an unpaid portion of, a pay or benefit is appropriate.

(3) Recoupment against Soldiers and cadets who are disenrolled or separated prior to the completion of their term of service will be processed in accordance with existing policy and regulations.

h. Evaluation Reports. When a Soldier refuses the order to be vaccinated against COVID-19 during a rating period, without a pending or approved medical or administrative exemption (to include religious accommodation), rating officials will document the refusal in the Soldier's evaluation report consistent with implementing instructions published by the Deputy Chief of Staff, G-1.

i. Permanent Change of Station (PCS). Unvaccinated Soldiers who are pending a medical or administrative exemption (to include religious accommodation) will not PCS. Exceptions may only be approved by the Under Secretary of the Army. These requests will be submitted to the Under Secretary of the Army through the Vice Director of the Army Staff. Further, unvaccinated Soldiers who do not have a pending medical or administrative exemption (to include religious accommodation) remain flagged, and are therefore ineligible to PCS under current Army policies and in accordance with reference 1m.

j. Accessions.

(1) Enlistment into the Army. An enlisted applicant must have an approved pre-accession medical or administrative exemption (to include religious accommodation) or must agree to receive the COVID-19 vaccination on entrance to active duty or active duty for training.

(2) Applicants for a Commissioning Program. Individuals seeking to enter into a cadet contract through the Reserve Officers' Training Corps (ROTC), gain admission as a cadet to USMA, or commission as an officer in the Army must be fully vaccinated against COVID-19 prior to entering into a cadet contract, signing the USMA Form 5–50, or being tendered an appointment as a commissioned officer unless they have an approved pre-accession medical or administrative exemption (to include religious accommodation).

(3) Pre-Commissioning Cadets. Current cadets who refuse the COVID-19 vaccination order, and who do not have a pending or approved medical or administrative exemption (to include religious accommodation), will be processed for disenrollment and separation.

(a) USMA Cadets/USMAPS Cadet Candidates. USMA will follow current policy for initiating administrative separation and disenrollment proceedings for cadets and cadet candidates pursuant to reference 1e, as appropriate. The basis for separation will be "Misconduct."

(b) Army SROTC Cadets. The U.S. Army Cadet Command (USACC) will follow current policy for initiating disenrollment proceedings pursuant to reference 1d, as

appropriate. The basis for disenrollment will be “Inaptitude for Military Service” under paragraph 3–43(a)(13) of reference 1d.

(4) Direct appointment. Prior to accession, applicants must have an approved pre-accession medical or administrative exemption (to include religious accommodation) or must agree to receive the COVID-19 vaccination on entrance to active duty or active duty for training.

(5) In-Service Officer Candidates. In-Service Candidates selected to attend the U.S. Army Officer Candidate School (OCS) must be fully vaccinated against COVID-19 prior to beginning OCS unless issued an approved medical or administrative exemption (to include religious accommodation). OCS candidates who refuse the COVID-19 vaccination order will be removed from OCS under the provisions of reference 1f.

k. The Secretary of the Army continues to withhold the authority to impose non-judicial and judicial actions based solely on vaccine refusal.

5. Proponent. The ASA (M&RA) has oversight of this policy and is authorized to grant exceptions to this directive and to amend the definitions contained in paragraph 4a of this directive. This authority may not be delegated. The Deputy Chief of Staff, G-1, in coordination with the ASA (M&RA), will publish implementing instructions as soon as possible.

6. Duration. This directive is effective unless superseded or otherwise rescinded.

Christine E. Wormuth

Encl

DISTRIBUTION: (see next page)

SUBJECT: Army Directive 2022-02 (Personnel Actions for Active Duty Soldiers Who Refuse the COVID-19 Vaccination Order and Accession Requirements for Unvaccinated Individuals)

DISTRIBUTION:
Principal Officials of Headquarters, Department of the Army
Commander
- U.S. Army Forces Command
- U.S. Army Training and Doctrine Command
- U.S. Army Materiel Command
- U.S. Army Futures Command
- U.S. Army Pacific
- U.S. Army Europe and Africa
- U.S. Army Central
- U.S. Army North
- U.S. Army South
- U.S. Army Special Operations Command
- Military Surface Deployment and Distribution Command
- U.S. Army Space and Missile Defense Command/Army Strategic Command
- U.S. Army Cyber Command
- U.S. Army Medical Command
- U.S. Army Intelligence and Security Command
- U.S. Army Criminal Investigation Command
- U.S. Army Corps of Engineers
- U.S. Army Military District of Washington
- U.S. Army Test and Evaluation Command
- U.S. Army Human Resources Command

Superintendent, U.S. Military Academy
Director, U.S. Army Acquisition Support Center
Superintendent, Arlington National Cemetery
Commandant, U.S. Army War College
Director, U.S. Army Civilian Human Resources Agency

CF:
Director of Business Transformation
Commander, Eighth Army

REFERENCES

a. National Defense Authorization Act for Fiscal Year 2022, 27 December 2022

b. Secretary of Defense memorandum (Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members), 24 August 2021

c. Army Directive 2021-33 (Approval and Appeal Authorities for Military Medical and Administrative Immunization Exemptions), 24 September 2021

d. Army Regulation (AR) 145–1 (Senior Reserve Officers' Training Corps Program: Organization, Administration, and Training), 22 July 1996, with rapid action revision, 6 September 2011

e. AR 150–1 (United States Military Academy Organization, Administration, and Operation), 12 January 2021

f. AR 350–51 (United States Army Officer Candidate School), 11 June 2001

g. AR 600–8–24 (Officer Transfers and Discharges), 8 February 2020

h. AR 600–20 (Army Command Policy), 24 July 2020

i. AR 623–3 (Evaluation Reporting System), 14 June 2019

j. AR 635–40 (Disability Evaluation for Retention, Retirement, or Separation), 19 January 2017

k. AR 635–200 (Active Duty Enlisted Administrative Separations), 28 June 2021

l. Fragmentary Order 5 to Headquarters, Department of the Army Execution Order (EXORD) 225-21 (COVID-19 Steady State Operations), 14 September 2021, paragraph 3.D.8.B.5.A

m. Secretary of the Army memorandum (Flagging and Bars to Continued Service of Soldiers Who Refuse the COVID-19 Vaccination Order), 16 November 2021

Exhibit 3

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

FEB 2 4 2023

MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP
COMMANDERS OF THE COMBATANT COMMANDS
DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS

SUBJECT: Guidance for Implementing Rescission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces

In today's rapidly changing global security environment, vaccines continue to play a critical role in assuring a ready and capable force that is able to rapidly deploy anywhere in the world on short notice. Department leadership is committed to ensuring the safety of our Service members and will continue to promote and encourage vaccinations for all Service members along with continued use of other effective mitigation measures. This includes monitoring changing public health conditions, relevant data, and geographic risks; and updating policies and processes as required to maintain the strategic readiness of our forces and our ability to defend national security interests around the globe.

This memorandum provides additional guidance to ensure uniform implementation of Secretary of Defense Memorandum, "Rescission of the August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces," January 10, 2023 (January 10, 2023 memorandum).

As required by section 525 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, the January 10, 2023 memorandum rescinded the August 24, 2021 and November 30, 2021 Secretary of Defense mandates that members of the Armed Forces be vaccinated against the coronavirus disease 2019 (COVID-19) and thereby also rendered all DoD Component policies, directives, and guidance implementing those vaccination mandates as no longer in effect as of January 10, 2023. These include, but are not limited to, any COVID-19 vaccination requirements or related theater entry requirements and any limitations on deployability of Service members who are not vaccinated against COVID-19.

DoD Component policies, directives, and guidance have not been operative since the January 10, 2023 memorandum was issued, regardless of the status of the DoD Component conforming guidance. DoD Component heads shall formally rescind any such policies, directives, and guidance as soon as possible, if they have not done so already. DoD Component heads shall certify to the Under Secretary of Defense for Personnel and Readiness in writing that these actions have been completed no later than March 17, 2023.

The January 10, 2023 memorandum recognizes that other standing Departmental policies, procedures, and processes regarding immunizations remain in effect, including the ability of commanders to consider, as appropriate, the individual immunization status of personnel in making deployment, assignment, and other operational decisions, such as when vaccination is

required for travel to, or entry into, a foreign nation. This continues to be the case, in accordance with the guidance below.

The Department's Foreign Clearance Guide will be updated to reflect that DoD personnel must continue to respect any applicable foreign nation vaccination entry requirements, including those for COVID-19. Other than to comply with DoD Foreign Clearance Guidance, DoD Component heads and commanders will not require a Service member or group of Service members to be vaccinated against COVID-19, nor consider a Service member's COVID-19 immunization status in making deployment, assignment, and other operational decisions, absent establishment of a new immunization requirement in accordance with the process described below. It is my expectation that any requests to the Assistant Secretary of Defense for Health Affairs (ASD(HA)) for approval to initiate mandatory immunizations of personnel against COVID-19 will be made judiciously and only when justified by compelling operational needs and will be as narrowly tailored as possible.

Department of Defense Instruction (DoDI) 6205.02, "DoD Immunization Program," July 23, 2019, will be updated as follows to establish a process requiring the Secretary of a Military Department, the Director of a Defense Agency or DoD Field Activity that operates medical clinics, or the Commandant of the Coast Guard, to submit a request for approval to initiate, modify, or terminate mandatory immunizations of personnel. Effective immediately, I direct the following action:

Paragraph 2.11. of DoDI 6205.02 is revised by adding a new subsection g., which will read:

> "Submit requests to the ASD(HA) for approval to initiate, modify, or terminate mandatory immunizations of personnel and voluntary immunizations of other eligible beneficiaries determined to be at risk from the effects of deliberately released biological agents or naturally occurring infectious diseases of military or national importance."

The Commander of a Combatant Command must submit a request for approval to initiate, modify, or terminate mandatory immunizations of personnel through the Joint Staff, consistent with existing processes specified in DoDI 6205.02.

The Director of Administration and Management will make the revision directed above as a conforming change to the version of DoDI 6205.02 published on the DoD Issuances website.