Case No. 22-1032

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAN ROBERT, SSG, U.S. ARMY,
HOLLIE MULVIHILL, SSGT, U.S. MARINE CORPS
AND OTHER SIMILARLY SITUATED INDIVIDUALS,

Plaintiffs – Appellants,

v.

LLOYD AUSTIN, in his official capacity as Secretary of Defense, U.S. Department of Defense,
XAVIER BECERRA, in his official capacity as Secretary of the U.S. Department of Health and Human Services, and
JANET WOODCOCK, in her official capacity as Acting Commissioner of the U.S. Food and Drug Administration,

Defendants – Appellees,

On Appeal from a Final Judgment of the United States District Court
for the District of Colorado in Case No. 1:21-cv-02228-RM-STV
The Honorable Raymond P. Moore, U.S. District Judge

BRIEF OF APPELLANTS

Todd S. Callender
600 17th Street
Suite 2800 South
Denver, CO 80202
(303) 228-7065
Todd@dradvocates.com

Andrew L. Schlafly
939 Old Chester Rd.
Far Hills, NJ 07931
(908) 719-8608
(908) 934-9207 (fax)
aschlafly@aol.com

Attorneys for Appellants

Appellants take no position on whether oral argument would be helpful.

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Statement Concerning Prior or Related Appeals:

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

This appeal is brought under 28 U.S.C. § 1291 from a final judgment entered on January 11, 2022 (ADD 7[1], A 187[2]), by the United States District Court for the District of Colorado, and from an Order referenced therein that was entered on that same day (ADD 1, A 181). Appellants Dan Robert, SSG, U.S. Army, and Hollie Mulvihill, SSgt, U.S. Marine Corps ("Sgts. Robert and Mulvihill") filed a timely Notice of Appeal on February 1, 2022. (A 188)

The district court below had jurisdiction under 28 U.S.C. §§ 1331, 1346, and 1361, and under the Administrative Procedures Act, 5 U.S.C. §702, and the Declaratory Judgment Act, 28 U.S.C. §2201. The causes of action are for violations of federal law and the U.S. Constitution, including 10 U.S.C. § 1107, 10 U.S.C. § 1107a, 50 U.S.C. § 1520, and the Fourteenth Amendment. (A 25-30, ¶¶ 45-64).

Accordingly, this Court has jurisdiction over this appeal.

STATEMENT OF THE ISSUES ON APPEAL

The issues presented are:

1. Whether members of the military have a cause of action against an unlawful Covid-19 vaccine mandate against them.

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[1] Citations to the Addendum attached hereto are in the form "ADD _".
[2] Citations to the Appendix are in the form "A _".

2. Whether the district court prematurely closed this case without ever reaching the substantive merits of the alleged violations of law by the Covid-19 vaccine mandate against the Plaintiffs.

3. Whether the district court departed from other precedents that have allowed service members and analogous plaintiffs their day in court in challenging Covid-19 vaccine mandates against them.

4. Whether the District Court erred in failing to consider the allegations of constitutional violations or even mention the constitutional questions raised by Plaintiffs before dismissing this action.

STATEMENT OF THE CASE

Plaintiffs Staff Sergeant Daniel Robert, U.S. Army, and Staff Sergeant Hollie Mulvihill, USMC, are subjected to unlawful mandates to take a Covid-19 vaccine,[3] despite having natural immunity. (A 16, ¶ 15) Specifically, they have been ordered to take an experimental Covid-19 vaccine by the Secretary of Defense (SECDEF), Lloyd Austin, based on a trick of words, an impossible order and a lack of adequate authorization by Defendants Xavier Becerra and Janet Woodcock. (*Id.*; A

[3] In the court below and here, Plaintiffs use the common vernacular "vaccine" to refer to the mRNA products in the Amended Complaint, but do not concede that these products qualify as such because they do not contain any live or attenuated – or even any piece – of the SARS-CoV-2 virus. These drugs are DNA-altering injectables designed to cause the body to mimic the 'spike protein' that is the relevant mechanism of harm of SARS-CoV-2 (Covid-19). (A 12 n.1)

19, ¶¶ 26-28) The Department of Defense (DOD) has publicly notified Plaintiffs, via a Memorandum by Defendant Austin, that they are to be vaccinated immediately despite the experimental nature of the vaccines so ordered taken. (A 12; A 18, ¶¶ 23-25) Each of the military services have promulgated orders and instructions effectuating this requirement (A 12), and courts in other circuits recognize the existence of valid causes of action. SECDEF and DOD are already coercing and forcing military members to be injected with unlicensed drugs in violation of federal law, international convention,[4] and the U.S. Constitution. (A 19, ¶¶ 26-28)

Federal statutes 10 U.S.C. §1107 and 10 U.S.C. §1107a prohibit the use of any unlicensed vaccines whatsoever on service members, without their informed consent and without an express and timely presidential waiver of Plaintiffs' rights. (A 12) Plaintiffs seek declaratory and injunctive relief because the DoD is using an Emergency Use Authorization ("EUA") Covid-19 vaccine in violation of 21 U.S.C. §360bbb-3 (the EUA statute), 10 U.S.C. §1107a, DoD Directive 6200.02, the FDA regulation of biologics at 21 C.F.R. §50 *et seq.*, as well as the law regarding informed consent 50 U.S.C. 1520 ("The Nuremburg Code"). (A 12)

[4] Article 7 of the International Covenant on Civil and Political Rights of 1967; *see also* Article 7 of the International Bill (Convention) on Human Rights of 1948.

Irrespective of the experimental vaccinations ordered, service members are afforded four enumerated exemptions from vaccination, one of which exempts documented survivors of a pathogen (Covid-19) per Army Regulation 40-562 ("AR 40-562"); this provides a *presumptive* exemption from vaccination to anyone who has already had a pathogen or virus, because of the natural immunity acquired as a result of having survived such an infection. (A 12-13) "General examples of medical exemptions include, *inter alia*, the following… Evidence of immunity based on serologic tests, documented infection, or similar circumstances." AR 40-562, ¶2-6a.(1)(b). (A 13)

Defendants have systematically denied all service members and Plaintiffs these exemptions in violation of DOD regulations. (A 13) Further, none of the President, the Secretary of Defense, the Secretary of the Department of Health and Human Services, nor the Secretary of the Food and Drug Administration have complied with any of the requirements of controlling provisions of federal law including any notion of Informed Consent as is required in clinical trials of Emergency Use Authorization ("EUA") or Investigative New Drugs ("IND"); in this case, the purported vaccines are both EUA and IND's. (A 27, ¶ 55)

A. Factual Background

Plaintiff Staff Sergeant Daniel Robert, U.S. Army, is an infantryman currently on active duty. (A 13, ¶ 1) Plaintiff Staff Sergeant Hollie Mulvihill, USMC, is an air traffic controller also currently on active duty. (A 14, ¶ 2)

Defendant U.S. Department of Defense is an agency of the United States Government, as led by Secretary of Defense Lloyd Austin. (*Id.* ¶ 4) Defendant Department of Health and Human Services (HHS) is an agency of the United States Government. (*Id.* ¶ 5) It is led by Secretary Xavier Becerra. Defendant Food and Drug Administration ("FDA") is an agency of the United States Government. It is led by acting Secretary Janet Woodcock. (*Id.* ¶ 6)

On or about August 24, 2021, Defendant Austin ordered the mandatory vaccination of service members, beginning immediately despite the fact that all the offered Covid Vaccines were EUA/IND's; this order was without regard to, and to the exclusion of, other widely available, licensed, well-tested and effective therapeutic drugs. (A 14, ¶ 4; A 18, ¶ 23) This order was related to Defendant FDA's "BLA Approval" notice to the manufacturers Pfizer, Inc. ("Pfizer") and Pfizer's partner, BioNTech Manufacturing Gmbh, in Mainz, Germany, from the prior day. (A 17, ¶ 18) The FDA letter reflects its issuance of an approval to finish their required testing and Institutional Review Board processes, *inter alia*, before manufacturing and marketing a Covid-19 vaccine labeled with the proprietary

name "COMIRNATY." (*Id.*, citing A 33-34, BLA Approval Letter, pp. 1-2, August 23, 2021).

On August 23, 2021, Rear Admiral Denise Hinton, Chief Scientist of Defendant FDA, sent a letter to Pfizer advising it that the EUA previously issued by the FDA for Pfizer-BNT162b2 Covid-19 vaccine ("Pfizer BNT") would remain in place due to the ***unavailability*** of any licensed vaccines, which could not be legally produced as a licensed drug for many months or years later. (A 17, ¶ 19) The letter specifically states that the Pfizer-BNT produced vaccine is "legally distinct" from the COMIRNATY vaccine. (*Id.*, citing A 44-57). Additionally on that same day, August 23, 2021, Pfizer issued a notice to "Health Care Professionals" indicating that while most of the Pfizer-BNT vaccine was only usable under its current EUA, several lots of the vaccine were in compliance with the August 23, 2021 BLA Approval Letter from FDA for COMIRNATY and therefore approved for administration to individuals 16 years of age and older. (A 17, ¶ 20) Seven production lots were identified as being covered by the BLA approval, which is different from licensure, due and subject to satisfaction of pending perquisites. The memo clearly notes that all other lots of the Pfizer-BNT vaccine remained with an EUA status and were not subject to the BLA approval for COMIRNATY issued by the FDA. (A 17-18, ¶ 20, citing A 58-61, Boyce Letter, Notice to Healthcare Professionals, August 23, 2021).

Additionally on August 23, 2021, Pfizer and BioNTech issued a Covid-19 "Vaccine EUA Fact Sheet for Recipients and Caregivers." (A 18, ¶ 21) This fact sheet states in pertinent part: "This EUA for the Pfizer-BioNTech COVID-19 Vaccine and COMIRNATY will end when the Secretary of HHS determines that the circumstances justifying the EUA no longer exist or when there is a change in the approval status of the product such that an EUA is no longer needed." (*Id.,* quoting A 72, Vaccine EUA Fact Sheet, pg. 8, last sentence, August 23, 2021).

The FDA's website and documents also list the Pfizer-BNT vaccine as being under an EUA; the labeling and other requirements remained unsatisfied and continues to show that the Pfizer-BNT vaccine is an EUA product because the approved, but not yet licensed, Comirnaty remains unavailable as of the date of the filing of the Amended Complaint, and regulatory prerequisites to the production of this product remain unsatisfied. (A 18, ¶ 22)

On August 24, 2021, Defendant Austin issued a DOD-wide Memorandum directing "the Secretaries of the Military Departments to immediately begin full vaccination of all members of the Armed Forces under DOD authority on active duty or in the Ready Reserve, including the National Guard who are not fully vaccinated against COVID-19." (A 18, ¶ 23) Given the ineffective nature of the Covid Vaccines, "fully vaccinated" remains a moving target as additional "booster" shots are now mandated seemingly without limitation. "Fully

vaccinated," therefore is a subjective, arbitrary and impossible standard to meet because there is no end date for such a requirement.

Defendant Austin's memo, without explanation or citation to any authority whatsoever, specifically and capriciously states, "Those with previous COVID-19 infection are not considered fully vaccinated." (A 18, ¶ 24)

Defendant Austin's Memorandum further requires that "[m]andatory vaccination against COVID-19 will only use COVID-19 vaccines that receive full Licensure (different from receiving approval) from the Food and Drug Administration…" (A 18, ¶ 25; see also A 125, 155)

Commanders within Defendant DOD moved quickly to begin further experimental vaccination of their units following Defendant Austin's Memorandum, even though it was an impossible order to lawfully carry out given the requirement that "licensed" vaccines were not and are not available. (A 19, ¶ 26) Because there is no COMINARTY vaccine available in the United States, all DOD units, including those in Germany where European-licensed Comirnaty is available, are using the EUA Pfizer-BNT vaccine that remains unlicensed by the FDA. (*Id.*, citing A 85, Office of The Judge Advocate General SJA Update, pg. 2, September 10, 2021)

In fact, various units within DOD received guidance that they could ***involuntarily*** vaccinate service members with unlicensed vaccines. (A 29, ¶ 27)

Without any concern for the law as written, this was ultimately expanded to a service-wide practice. (*Id.*, citing A 88-90, Asst. Secretary of Defense Memorandum "Mandatory Vaccination of Service Members Using the Pfizer-BioNTech COVID-19 and COMIRNATY COVID-19 Vaccines," September 14, 2021; A 91-93, Dept. of the Navy, Bureau of Medicine and Surgery Memorandum, Subject: Interchangeability of the FDA-Approved Pfizer-BioNTech Vaccine COMIRNATY and FDA-Authorized Pfizer-BioNTech Vaccine Under EUA, September 3, 2021).

As of the filing of the Amended Complaint, virtually no required Informed Consent and no COMINARTY vaccine has been used in the thousands of involuntary inoculations administered by Defendant DOD. (A 19, ¶ 28) Because this is a phase three clinical trial without meeting any of the Informed Consent requirements, all such vaccinations must be considered "involuntary." In addition, there has been no attempt by DOD to identify or use only vaccines from the seven lots apparently covered by the FDA approval. (*Id.*) DOD organizations, in violation of federal law and SECDEF Austin's explicit direction, are using an unlicensed vaccine to experiment upon and inoculate service members based on DOD guidance that COMINARTY and Pfizer-BNT are "interchangeable" despite the FDA's website (Purplebook) indicating there are no "interchangeable" vaccines to Comirnaty (*Id.*, citing A 80).

Failure by service members to participate in this phase 3 clinical trial and submit to these unlawful orders by their superiors requiring the Investigational New Drug vaccinations are and continue to result in administrative, judicial, and non-judicial punishment under the Uniform Code of Military Justice and service regulations. (A 19, ¶ 29)

Defendant Austin, in turn, is required by law to adhere strictly within guidelines of the agencies managed by Defendants Becerra and Woodcock, as DoD Instruction 6202.02 ("DoDI") states (in part) that –

> The Heads of DoD Components:
> …Shall, when requesting approval to use a medical product under an EUA or IND application, develop, in coordination with the Secretary of the Army, medical protocols, compliant with this Instruction, for use of the product and, if the request is approved, execute such protocols *in strict compliance* with their requirements[;]
> …Shall, when using medical products under a force health protection program pursuant to an EUA, comply with Enclosure 3, Federal Food Drug and Cosmetic Act section 564 (Reference (d)), section 1107a of Reference (e) and applicable FDA requirements[;]
> …Shall, when using medical products under a force health protection program pursuant to an IND application, comply with Enclosure 4, section 1107 of 10 U.S.C., and applicable provisions of References (e) through (g). Requirements applicable to the use of medical products under an IND application do not apply to the use of medical products under an EUA within the scope of the EUA.

(A 21, ¶ 34)

One of the obligations that Defendant Austin has with respect to use of an investigational new drug ("IND") or drug unapproved for its applied use (under §1107) is to provide detailed, written notice to the service member that

includes information regarding (1) the drug's status as an IND, unapproved for its applied use; (2) "[t]he reasons why the investigational new drug or drug unapproved for its applied use is being administered[;]" and (3) "the possible side effects of the investigational new drug or drug unapproved for its applied use, including any known side effects possible as a result of the interaction of such drug with other drugs or treatments being administered to the members receiving such drug." (A 21, ¶ 35) A published report, "BNT162b2 5.3.6 Cumulative Analysis of Post-authorization Adverse Event Reports" that represents data current to February 28, 2021, lists nearly 1,300 different types of Special Serious Adverse Events experienced and reported by users of the BioNTech EUA/IND being administered to all service members.[5]

This federal law also requires that Defendant Austin's request to President Biden for a waiver of a service member's right to informed consent include the certification that such vaccination is required as to a particular member's participation in a ***specified military operation*** that contains the following additional criteria:

(i) The extent and strength of evidence of the safety and effectiveness of

[5] https://www.scribd.com/document/543857539/CUMULATIVE-ANALYSIS-OF-POST-AUTHORIZATION-ADVERSE-EVENT-REPORTS-OF-PF-07302048-BNT162B2-RECEIVED-THROUGH-28-FEB-2021 (viewed 3/26/22). *See also* https://www.who.int/docs/default-source/covid-19-vaccines-safety-surveillance-manual/covid19vaccines_manual_aesi.pdf?sfvrsn=239020a2_1 (viewed 3/28/22).

> the Investigational New Drug in relation to the medical risk that could be encountered during the military operation, supports the drug's administration under an IND; and
> (ii) The specified military operation presents a substantial risk that military personnel may be subject to a chemical, biological, nuclear, or other exposure likely to produce death or serious or life-threatening injury or illness; and
> (iii) That there is no available satisfactory alternative therapeutic or preventive treatment in relation to the intended use of the investigational new drug; and
> (iv) that conditioning the use of the investigational new drug upon voluntary participation of each member could significantly risk the safety and health of any individual member who would decline its use, the safety of other military personnel, and the accomplishment of the military mission
> […]

(A 22, ¶ 36) At this time, no such military mission has been defined. (*Id.*)

The applicable section of the Federal Food, Drug, and Cosmetic Act (Title 21, Chapter 9) regarding Emergency Use Authorization of biologics on military members is found at 10 U.S.C. §1107a. (A 23, ¶ 37) This statute also requires nothing less than a written Presidential waiver of service members' right to informed consent. (*Id.*)

To this day, there is no waiver of service members' right to informed consent issued by the President of the United States as is required for compulsory use of experimental drugs. (A 21, ¶ 33)

The Defendant Secretaries have not complied with the law and their respective requirements to support the DoD's actions in vitiating, *ab initio*, the informed consent rights of service members regarding these unapproved biologics:

> (a) these drugs are not being used in response to any specific military threat in a theater of operations, but rather are being used to move forward with an unnecessary public health mandate;
> (b) there is near zero risk to healthy, fit, young men and women of the U.S. Armed Services from COVID-19, and
> (c) there are numerous safe, long-standing, proven alternative treatments, such as ivermectin, anti-infective oral and nasal sprays and washes, oral medications, and outpatient monoclonal antibodies, which are 'approved' drugs by the Food and Drug Administration and highly effective in preventing and treating COVID-19, and the existence of such treatments is a legal bar to the use of an EUA or IND under 21 U.S.C. §360bbb-3(c)(3) ("The Secretary may issue an authorization under this section with respect to the emergency use of a product only if…the Secretary concludes… that there is no adequate, approved, and available alternative to the product for diagnosing, preventing, or treating such disease or condition[.]").

(A 23, ¶ 38)

In addition, Army Regulation 40-562 "Immunization and Chemoprophylaxis for the Prevention of Infectious Diseases"[6] presumptively exempts, from any vaccination requirement, a service member that the military knows has had a documented previous infection. (A 23-24, ¶ 39)

It is undisputed that Plaintiffs have individually previously suffered and recovered from Covid-19 infections with the development of natural immunity as demonstrated to or documented by the military. (A 24, ¶ 40) Yet Plaintiffs and all

[6] This document is an all-service publication and has an equivalent name for each of the applicable services. The Army designation is used here for ease, but these arguments apply equally under AFI 48-110, BUMEDINST 6230.15B, COMDETINST M6230.4G. See, AR 40-562, ¶2-6a.(1)(b). (A 24 n.2)

service members are being systematically denied applicable exemptions in violation of DOD regulations. (A 13)

AR 40-562 was signed on Oct. 7, 2013, went into effect on Nov. 7, 2013, and remains in effect today. (A 24, ¶ 41) It applies to all branches of the military. The regulation also applies whether the proposed Covid-19 vaccines Defendant DoD seeks to administer to Plaintiffs and the class are "Investigational New Drugs" as defined in 21 C.F.R. §56.104(c) ("IND"), an IND under Emergency Use Authorization, 21 U.S.C. §360bbb-3 ("EUA"), or a fully approved FDA vaccine for other illnesses such as chicken pox, measles, or mumps, for example. (A 24, ¶ 41)

At the time of Defendant Austin's memorandum, there was more than sufficient evidence to establish that previous infection with Covid-19 provided greater immunity to an individual that the Pfizer-BNT or COMIRNATY vaccine. (A 24, ¶ 42, citing an expert opinion and a published study).

Service members that have natural immunity from surviving the virus should be granted a medical exception from compulsory vaccination because the DoD Instruction reflects the well-established understanding that prior infection provides the immune system's best possible response to the virus, as opposed to simulated infection with something other than the virus itself. (A 25, ¶ 43, citing published studies) "Following the science" as it relates to Covid-19 validates and reaffirms

the wisdom of maintaining long-established virology protocol, as codified by Defendant DOD's own experts in AR 40-562 in 2013. (*Id.*)

B. Relevant Procedural History

Plaintiffs filed suit on August 17, 2021 (A 5), filed an unsuccessful motion for a Temporary Restraining Order on August 30 and for a Preliminary Injunction on September 23 (A 6), and after receiving leave to amend, filed their Amended Complaint on October 6, 2021 (A 7). Plaintiffs asserted five causes of action: violations of (1) the Administrative Procedure Act, (2) violation of 10 U.S.C. §1107, (3) 10 U.S.C. §1107a, (4) 50 U.S.C. §1520, and (5) the Fourteenth Amendment of the U.S. Constitution. (A 25-30) Plaintiffs also moved for a preliminary injunction. (A 6, Dist. Ct. Dkt. 16)

The district court dismissed all of Plaintiffs' claims in their Amended Complaint on January 11, 2022 (ADD 1-6, A 181-86), as explained next. Plaintiffs timely appealed on February 1, 2022. (A 188)

C. Ruling Presented for Review

The district court granted Defendants' motion to dismiss under FED. R. CIV. P. 12(b)(6), and on the same grounds denied Plaintiffs' pending motion for a preliminary injunction. (ADD 4-6, A 184-86)

The district court never reached the merits of Plaintiffs' claims, including the unlawfulness of Defendant Austin's orders, and the ruling below was not based

on any deference to decision-making by the military. The district court dismissed the case without ruling on the alleged violations of law, instead by specifically holding that:

> Plaintiffs' claims involve uncertain and contingent events that may not occur as anticipated. As noted in the Court's previous Order, Plaintiffs' contention that they may be subject to discipline for refusing to take a vaccine appears to be based on nothing more than speculation. Because Plaintiffs have not established that their claims are justiciable, a fortiori, they cannot establish a likelihood of success on the merits or a clear and unequivocal right to injunctive relief. Moreover, in the absence of a justiciable claim, Defendants are entitled to dismissal of this case.

(ADD 6, A 186, citation and quotation omitted).

The district court relied heavily on a district court decision that denied a preliminary injunction in the District of Columbia. *Church v. Biden*, Civil Action No. 21-2815 (CKK), 2021 U.S. Dist. LEXIS 215069, at *3 (D.D.C. Nov. 8, 2021) (cited by ADD 5-6, A 185-86). But that decision did not dismiss the service members' claims. Instead, it merely denied a request for a preliminary injunction, and only because exemption requests were pending:

> At this early stage of the proceedings, the record reflects that *each* Plaintiff has requested an exemption to the very COVID-19 vaccine mandates they challenge. These exemption requests all remain pending, and during their pendency, no Plaintiff faces disciplinary action for refusing the COVID-19 vaccine.

Church v. Biden, 2021 U.S. Dist. LEXIS 215069, at *3.

Without addressing the constitutional questions raised and prior to the scheduling conference to set the hearing (A 9, 10), the court below closed this case

after granting Defendants' Rule 12(b)(6) motion to dismiss (ADD 7, A 187), thereby foreclosing the requested adjudication of the alleged violation of the applicable laws in connection with Defendants' Covid vaccine mandates.

SUMMARY OF THE ARGUMENT

The lower court decision is erroneously in conflict with nearly a half-dozen decisions in other jurisdictions that allow analogous challenges to vaccine mandates. The district court below declined to address the constitutional violations and substantive merits of the claims, thereby foreclosing, *inter alia*, the opportunity for the Plaintiffs to adequately describe their class of similarly situated service members and allowing Plaintiffs their day in court. At least three other jurisdictions have rejected that approach of denying a cause of action, and provided service members their day in court concerning the Covid vaccine mandate; and in a fourth jurisdiction the court merely denied a motion for a preliminary injunction without dismissing the entire case as the lower court did. A fifth recent decision recognized standing by parents to object to a vaccine mandate against schoolchildren despite arguments that enforcement was far from clear. In this instance grievous constitutional violations are alleged and codified Human Rights were violated without any opportunity for redress provided. Given the extraordinary risk of death and injury the court effectively sentenced the service members to involuntary medical experimentation with an exceedingly high

likelihood of injury or death without any constitutional due process, denying them their day in court. Reversal here is warranted.

Plaintiffs have standing to challenge these mandates, as other jurisdictions have held. Violation of federal law by federal officials, to the detriment of members of the armed services, is actionable by the affected soldiers. There are significant, essential legal limitations on DOD's ability to involuntarily inoculate service members with experimental substances that had never been tested in humans previously. Specifically, federal law only allows the forced vaccination of service members with an IND or unlicensed vaccine after the President alone has complied with all the legal requirements of 10 U.S.C. §1107 or §1107a. Those statutory limitations and constitutional protections were violated here. Section 1107a was the result of Congress' reaction to the lack of informed consent during the military mandate for the experimental Anthrax vaccine more than 20 years ago and it remains a mystery why the President has not utilized this clear exemption in the law and instead sought to have the Secretary of Defense attempt to exercise this waiver reserved solely for the President.

Plaintiffs had already acquired the far superior natural immunity to Covid-19 by surviving the infection, and the DOD never investigated the risk factors of inoculating service members who had prior immunity. Plaintiffs pose no danger to their fellow service members, to their mission, to force readiness or to themselves.

Plaintiffs are entitled to seek enforcement of applicable statutory protections against unwarranted and unwanted injection by completely novel biological agents. These include genetic engineering agents, such as Messenger Ribonucleic Acid ("mRNA") that likely results in the loss of vaccinated persons' bodily sovereignty and autonomy by current law making genetically modified genomes, such as the inoculated service members, the chattel property of the patent holders in violation of the 13th Amendment.[7]

ARGUMENT

Like all Americans, the men and women who courageously serve in our military have the right to invoke protection by federal laws that safeguard against unnecessary harm. Wearing a military uniform and risking one's life to defend our Nation do not constitute waiver of protection by federal law applicable to our armed forces. Likewise, voluntary service in the armed forces does not operate to grant ownership rights of the government in their troops. Plaintiffs have the right to demand compliance with statutes protective of their health and their rights. Deference to the military is not an issue here, because the district court found that no cause of action exists without resolving any argument for deference. When the issue is injecting servicemen and servicewomen with novel experimental biological

[7] *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 582-85 (2013).

agents that will forever modify their genomes and remain within them for the rest of their lives, long after they retire from service to our Nation, the Rule of Law must protect them and their right to a hearing before the deprivation of their human rights.

In early January, at the peak of the pandemic, the U.S. Supreme Court emphatically rejected as illegal the Biden Administration's urgent vaccinate-or-test mandate for 84 million employees. That mandate had not yet been enforced against anyone, and the lack of lawful authority for the mandate was sufficient to adjudicate it. Likewise, adjudication of the unlawfulness of the orders at issue here should have been allowed, and a remand should be ordered for this litigation to proceed to its substantive merits.

I. Standard of Review.

The standard of review here is *de novo*. *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1278 (10th Cir. 2021) (citing *Wasatch Equality v. Alta Ski Lifts Co.*, 820 F.3d 381, 386 (10th Cir. 2016)). *See also Cracraft v. Utah Valley Univ.*, No. 21-4031, 2021 U.S. App. LEXIS 34922, at *6 (10th Cir. Nov. 24, 2021) ("We review the district court's Rule 12(b)(6) dismissal de novo.") (citing *Brooks*, 985 F.3d at 1278).

As correctly acknowledged below, "a court must accept as true all well-pleaded factual allegations in the complaint, view those allegations in the light

most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor." (ADD 3, A 183, citing *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1136 (10th Cir. 2014); *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010)).

II. Plaintiffs Have Standing, as Other Jurisdictions Have Held in Analogous Cases.

Plaintiffs are directly and adversely affected by Defendants' orders, and therefore Plaintiffs have standing to challenge their unlawfulness. The district court erred in holding that it was too speculative whether the military would enforce its own Covid mandate. (ADD 4-6, A 184-86; citing argument at ECF No. 46 at 3, ¶ 5) Of course it will and has now done, resulting in thousands of service members being summarily discharged without hearing.[8] Indeed, few things in life are more certain than the military enforcing its own high-profile orders. Once the military machine is mobilized, the inertia therefrom cannot be slowed or stopped short of a court order.

Plaintiffs alleged that they are entitled to medical and other long-established exemptions from the (unlawful) Covid mandates, yet "Defendants are systematically denying Plaintiffs these exemptions in violation of DOD regulations." (A 13) Plaintiffs are thus harmed and have standing.

[8] Service members who have served 6 years or less are being denied a hearing and may be summarily discharged.

The decision below against standing by service members is in sharp conflict with multiple federal district and appellate decisions elsewhere. For example, the Fifth Circuit recently held in favor of Navy SEALS on an analogous military order requiring that they be vaccinated. That decision is illustrative here.[9] The standing of the Navy SEALS to challenge the Covid vaccine mandate against them is comparable to the standing of Plaintiffs here. It was uncovered in that legal proceeding that the Navy has a policy of denying virtually ***all*** applications for a religious exemption:

> In December 2021, the Navy reported receiving 2,844 requests for religious accommodations. A more recent report suggests that more than 4,000 active duty and Navy Reserve sailors have submitted such requests. The Navy has denied them all. Indeed, during the last seven years, the Navy has not granted a single religious exemption from any vaccination.

U.S. Navy Seals 1-26 v. Biden, No. 22-10077, 2022 U.S. App. LEXIS 5262, at *9 (5th Cir. Feb. 28, 2022), *rev'd in part*, *Austin v. United States Navy Seals*, No. 21A477, 2022 U.S. LEXIS 1674 (Mar. 25, 2022). Hence the theoretical existence of such a possible exemption lacks any resemblance to reality.

Justice Kavanaugh concurred with an emergency grant of a partial stay requested by the Biden Administration of the district court ruling in favor of the Navy SEALS, but it is not applicable here and, indeed, no other justice joined his

[9] On March 25, 2022, the Supreme Court granted an emergency request to stay in part the district court decision which the Fifth Circuit declined to stay. *Austin v. United States Navy Seals*, No. 21A477, 2022 U.S. LEXIS 1674 (Mar. 25, 2022).

concurrence. Justice Kavanaugh took a position of essentially absolute deference to the military, which apparently no other justice shares. *See Austin v. United States Navy Seals*, No. 21A477, 2022 U.S. LEXIS 1674, at *1-3 (Mar. 25, 2022). The decision below in this case was not based on deference to the military, and the nearly absolute deference advocated by Justice Kavanaugh is a slippery slope that could easily least to civil rights violations and other atrocities. The authority he cited for support, Justice Robert Jackson's famous concurrence in *Youngstown Sheet*, ruled ***against*** deferring to the Commander-in-Chief when basic rights are at stake, as they are here. *Id.* at *3 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 645 (1952) (Jackson, J., concurring)). In immortal words that ring true here, Justice Jackson wrote the following in his same concurrence that was relied on by Justice Kavanaugh:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. ***But it is the duty of the Court to be last, not first, to give them up***.

Youngstown Sheet, 343 U.S. at 655 (Jackson, J., concurring, emphasis added).

A federal district court in Georgia also held in favor of standing by service members, the same standing that the district court denied below. A member of the Air Force objected there to the vaccine mandate, and the court found standing for his claim by holding that:

> All Americans, especially the Court, want our country to maintain a military force that is powerful enough to thoroughly destroy any enemy who dares to challenge it. However, we also want a military force strong enough to respect and protect its service members' constitutional and statutory religious rights. This ruling ensures our armed services continue to accomplish both.

Air Force Officer v. Austin, No. 5:22-cv-00009-TES, 2022 U.S. Dist. LEXIS 26660, at *35 (M.D. Ga. Feb. 15, 2022). That court then enjoined the Air Force from enforcing the vaccine mandate against the plaintiff. *Id.*

In federal court in Florida, there was a similar claim by sailors against the military vaccine mandate, and a similar result: the sailors have standing to pursue it. *Navy Seal 1 v. Biden*, No. 8:21-cv-2429-SDM-TGW, 2022 U.S. Dist. LEXIS 31640 (M.D. Fla. Feb. 18, 2022). The court found standing by multiple sailors to object to the vaccine mandate, and the court enjoined it:

> The motion (Doc. 60) for preliminary injunctive relief by Navy Commander and Lieutenant Colonel 2 is GRANTED, and the defendants are PRELIMINARILY ENJOINED (1) from enforcing against Navy Commander and Lieutenant Colonel 2 any order or regulation requiring COVID-19 vaccination and (2) from any adverse or retaliatory action against Navy Commander or Lieutenant Colonel 2 as a result of, arising from, or in conjunction with Navy Commander's or Lieutenant Colonel 2's requesting a religious exemption, appealing the denial of a request for a religious exemption, requesting reconsideration of the denial of a religious exemption, or pursuing this action or any other action for relief under RFRA or the First Amendment.

Id. at *66-67. The court addressed the issue of deference to the military and sided with the service members:

> "[C]ourts must — at least initially—indulge the optimistic presumption that the military will afford its members the protections vouchsafed by the

> Constitution, by the statutes, and by its own regulations." *Hodges v. Callaway*, 499 F.2d 417, 424 (5th Cir. 1984). But that deference "does not justify the abdication of the responsibility, conferred by Congress, to apply [a statute's] rigorous standard." *Holt v. Hobbs*, 574 U.S. 352, 364, 135 S. Ct. 853, 190 L. Ed. 2d 747 (2015).

Id. at *44 n.7.

In Ohio, a federal district court considered a similar lawsuit by a member of the Air Force who objected to the Covid vaccine mandate, and the court found full justiciability of the claim. Plaintiff "alleges deprivation of a constitutional right," the court found, and "[h]e also alleges that the Air Force has acted in violation of its own regulations." *Poffenbarger v. Kendall*, No. 3:22-cv-1, 2022 U.S. Dist. LEXIS 34133, at *26 (S.D. Ohio Feb. 28, 2022). The court further observed that the plaintiff had exhausted his administrative remedies, but that is unnecessary here because the policies and practices of Defendants plainly preclude the granting of an exemption to Plaintiffs. (A 13)

In the analogous situation of non-military federal employees challenging a federal vaccine mandate, it was likewise enjoined. On January 21, 2022, the Honorable Jeffery V. Brown, United States District Judge for the Southern District of Texas, blocked implementation or enforcement of Executive Order 14043, which required vaccination for all federal civilian employees. *Feds. for Med. Freedom v. Biden*, 2022 U.S. Dist. LEXIS 11145, 2022 WL 188329, at *8 (S.D. Tex. Jan. 21, 2022). The foregoing *Air Force Officer* decision favorably cited this

similar holding in the federal workers case. *Air Force Officer v. Austin*, 2022 U.S. Dist. LEXIS 26660, at *2 n.2 (citing *Feds. for Med. Freedom v. Biden*).

In an analogous case involving parents of schoolchildren in D.C., rather than service members, the federal district court expressly rejected the defense of "speculation" as to whether a vaccination would be imposed: "The District responds that Booth's alleged injury depends on 'pure speculation' that [a plaintiff's child] L.B. will receive the vaccine. The District claims that L.B. has not said he will try to get vaccinated or that a D.C. official has ever offered vaccines to him." *Booth v. Bowser*, No. 21-cv-01857 (TNM), 2022 U.S. Dist. LEXIS 48877, at *16 (D.D.C. Mar. 18, 2022) (citations to briefing omitted). There was standing because "the requested relief would redress [plaintiff] Booth's injuries." *Id.* *19. Likewise, the requested relief would redress the injuries alleged by Plaintiffs here, and thus they have standing. On March 18 the district court for the District of Columbia held that a vaccine mandate against schoolchildren there, without parental consent, is unconstitutional. *See id.* at *54 (authorities "cannot trample on the Constitution"). While that case did not concern the military, there is no issue of deference to the military in the posture of this appeal either. The district court below held that Plaintiffs lacked a cause of action to challenge the vaccine mandate against them, which was a reversible error of law.

Even the jurisdiction that once pointed in the opposition direction on a

motion for a preliminary injunction, by another federal district judge in D.C., did not dismiss the complaint but rather merely denied a motion for a preliminary injunction. *See Church v. Biden*, Civil Action No. 21-2815 (CKK), 2021 U.S. Dist. LEXIS 215069 (D.D.C. Nov. 8, 2021). But there "[t]he Service Member Plaintiffs do not dispute the availability of future administrative remedies within the military should their appeals for religious accommodations be denied." *Id.* at *35. That is denied here, as Plaintiffs do not have any meaningful administrative remedies available to them and virtually all service members who applied for religious exemptions were denied, including appeals therefrom. Moreover, several of the foregoing decisions, including *Poffenbarger*, distinguished the *Church v. Biden* decision.

Here, Plaintiffs' Amended Complaint expressly alleges that "Defendants are systematically denying Plaintiffs these exemptions [from the Covid vaccine] in violation of DOD regulations." (A 13) At the pleading stage, where allegations are taken as true and inferences are drawn in favor of plaintiffs, that is sufficient to allege standing by Plaintiffs to proceed with this lawsuit. "In conducting de novo review, we accept all well-pleaded factual allegations in the complaint as true and draw all reasonable inferences in favor of" plaintiff. *J.H. v. Bernalillo Cty.*, 806 F.3d 1255, 1259 (10th Cir. 2015). Drawing all inferences in favor of Plaintiffs requires reversal of the dismissal below.

III. This Case is Ripe, as Defendants Have Violated Federal Law to the Detriment of Plaintiffs.

This case is ripe as the government publicly admits they are discharging members of the Armed Services based on the military Covid vaccine mandate challenged here. The lower court erred in holding otherwise. (ADD 4-5, A 184-85; citing argument at ECF No. 46 at 3, ¶ 5) Indeed, many service members are already separated from the military after exhausting all of their appeals.

On March 18, the Army declared that it had involuntarily discharged three soldiers for not receiving the Covid-19 vaccine. A total of 2,692 Army soldiers have declined the controversial vaccine, and the Army has reprimanded 3,251 troops. Other branches of the Armed Services have done likewise. As of March 16, the Navy had discharged 519 sailors. The Marine Corps has terminated 1,038, while the Air Force have let go 212 airmen as of March 15 over this issue.[10]

The Armed Services branches simultaneously deny nearly every request for a religious exemption. The Army has granted merely two of 4,000 such requests, while in the Marine Corps religious exemptions have been granted only to service members who were already leaving the service.[11]

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[10] Konstantin Toropin, "Army Announces First Soldiers Pushed Out of Service over COVID-19 Vaccines" (March 18, 2022) https://www.military.com/daily-news/2022/03/18/army-announces-first-soldiers-pushed-out-of-service-over-covid-19-vaccines.html (viewed Mar. 22, 2022).

[11] *Id.*

It is fully ripe that Defendant Austin violated the significant limitations on DOD's ability to involuntarily inoculate service members. Federal law allows only the forced vaccination of service members with an IND or unlicensed vaccine after the Secretary of Defense has complied with all the legal requirements of 10 U.S.C. §1107 or §1107a, depending upon the status of the vaccine. Defendant Austin failed to so comply.

Specifically, 10 U.S.C. §1107 requires in pertinent part:

> (a) Notice Required.
> (1) Whenever the Secretary of Defense requests or requires a member of the armed forces at the end to receive an investigational new drug or a drug unapproved for its applied use, the Secretary shall provide the member with notice containing the information specified in subsection (d)…
> (f) Limitation and Waiver.—
> (1) In the case of the administration of an investigational new drug or a drug unapproved for its applied use to a member of the armed forces in connection with the member's participation in a particular military operation, the requirement that the member provide prior consent to receive the drug in accordance with the prior consent requirement imposed under section 505(i)(4) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)(4)) may be waived only by the President. The President may grant such a waiver only if the President determines, in writing, that obtaining consent is not in the interests of national security. (emphasis added).

Similarly, 10 U.S.C. 1107a requires that:

> (a) Waiver by the President —
> (1) In the case of the administration of a product authorized for emergency use under section 564 of the Federal Food, Drug, and Cosmetic Act to members of the armed forces, the condition described in section 564(e)(1)(A)(ii)(III) of such Act and required under paragraph (1)(A) or (2)(A) of such section 564(e), designed to ensure that individuals are informed of an option to accept or refuse administration of a product, may be waived only by the President only if the President determines, in writing,

> that complying with such requirement is not in the interests of national security (emphasis added).

There was no such timely waiver, or waiver of any kind, by the President of the United States of service members' right to informed consent to participate in the largest phase 3 clinical study ever undertaken in the history of the military. (A 21, ¶ 33). Likewise, at no point in the history of the military has a service member been required to become, at least in part, the intellectual property of a patent holder in clear violation of the 13th Amendment of the Constitution. Accordingly, Defendant Austin's vaccine mandate is unlawful, and the violations are fully ripe for legal challenge now.

A legal remedy is available immediately. Defendant DOD could and should be ordered to stop its universal vaccination policy of all personnel with an unlicensed product, until it can be established that people who received the mRNA vaccines are not the property of the patent holders contrary to the spirit of the 13th Amendment and until the DOD can assess the immunological condition of Covid-19 survivors within its ranks and decide whether the vaccination is capable of providing any long-term protection or immunity against the Covid infection. Such a question is naturally presented when considering that the DOD is now requiring booster shots in order for service members to be considered "fully vaccinated."

The Biden Administration's employer vaccinate-or-test mandate was ripe for adjudication prior to its implementation, and likewise the military's analogous

vaccine mandate is fully ripe for legal challenge. *See Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661 (2022) (per curiam).

IV. This Case is Justiciable.

This case is fully justiciable, as at least a half-dozen similar cases have been. *See, e.g.*, *U.S. Navy Seals 1-26 v. Biden*, No. 22-10077, 2022 U.S. App. LEXIS 5262, at *9 (5th Cir. Feb. 28, 2022). As discussed above, there are many lawsuits against the Covid vaccine mandate in a variety of contexts, including the military, private employers, and schoolchildren, all or nearly all of which have been adjudicated without any dismissed for non-justiciability.[12] The court below erred on this point. (ADD 5-6, A 185-86; citing argument at ECF No. 46 at 3, ¶ 5)

Objections to governmental actions carrying a risk of permanent injury are fully justiciable. Many tens of millions of Americans have declined to receive the Covid vaccine and its boosters,[13] despite adamant demands for vaccination by a handful of public health officials in the Biden Administration. Government-

[12] The district court expressed surprise that HHS and the FDA were included as defendants, through their top officers (ADD 6 n.1, A 186 n.1), but it is their incomplete, only quasi-authorization of a Covid vaccine that immediately led to the mandate imposed by Secretary Austin. It was necessary to include the HHS and FDA officials as defendants to ensure the availability of complete relief, so that responsibility is not attributed to a non-party.

[13] As of March 14, 2022, the CDC reports that only 65% of Americans have been fully vaccinated, and only 44% of them received the recommended booster shot. https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total (viewed 3/15/22).

managed data in the Vaccine Adverse Event Reporting System ("VAERS"), which threatens imprisonment for any false reporting,[14] is alarming: 1,151,450 reported adverse reactions, 135,783 hospitalizations, and 24,827 deaths,[15] not to mention that there are more than a thousand different types of Serious Adverse Events of Special Interest reported last year in the post-market survey of the BioNTech vaccine.[16] Yet the same agency that urges Covid vaccination, the CDC, both fails to investigate these reports of immense harm and admits that it is withholding from the public additional data that it has concerning effects of the Covid vaccine.[17]

The record in this case confirms the ultra-high risk of harm or death at issue, and thus the justiciability of this dispute, as explained by Lieutenant Colonel Theresa Long, MD, MPH, FS, in her sworn affidavit below:

> 37. I personally observed the most physically fit female Soldier I have seen in over 20 years in the Army, go from Colligate level athlete training for Ranger School, to being physically debilitated with cardiac problems, newly diagnosed pituitary brain tumor, thyroid dysfunction within weeks of getting vaccinated. Several military physicians have shared with me their firsthand

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14 https://vaers.hhs.gov/reportevent.html (viewed 3/12/22).

15 https://vaersanalysis.info/2022/03/05/vaers-summary-for-covid-19-vaccines-through-2-25-2022/ (viewed 3/9/22).

16 https://www.scribd.com/document/543857539/CUMULATIVE-ANALYSIS-OF-POST-AUTHORIZATION-ADVERSE-EVENT-REPORTS-OF-PF-07302048-BNT162B2-RECEIVED-THROUGH-28-FEB-2021 (viewed 3/26/22).

17 Apoorva Mandavilli, "CDC Isn't Publishing Large Portions of the COVID-19 Data It Collects," NEW YORK TIMES (Feb. 20, 2022) https://www.moneycontrol.com/news/trends/health-trends/cdc-isnt-publishing-large-portions-of-the-covid-19-data-it-collects-8143741.html (viewed 3/16/22).

> experience with a significant increase in the number of young soldiers with migraines, menstrual irregularities, cancer, suspected myocarditis and reporting cardiac symptoms after vaccination. Numerous soldiers and DOD civilians have told me of how they were sick, bed-ridden, debilitated, and unable to work for days to weeks after vaccination. I believe the illnesses and injuries observed are the proximate and causal effect of the COVID-19 vaccinations. I have also recently reviewed three flight crew members' medical records, all of which presented with both significant and aggressive systemic health issues. I cannot attribute anything other than the COVID-19 vaccines recently received as the source of these maladies, which has resulted in their grounding. Correlation by itself does not equal causation, however, significant patterns do exist that raise correlation into a probable cause; and the burden, the burden of proof falls on governmental authorities such as the CDC, FDA, and pharmaceutical manufacturers to prove the vaccination did not cause these medical issues.

(A 109-10)

The U.S. Supreme Court has addressed the new biotechnology of making alterations in the molecular structure of human deoxyribonucleic acid (DNA) and ribonucleic acid (RNA), and recognizes how powerful that can be. "Changes in the genetic sequence are called mutations. … Some mutations are harmless, but others can cause disease or increase the risk of disease." *Molecular Pathology*, 569 U.S. at 582. The Supreme Court denied an attempt to own such innovation, and implicit in that is a rejection of mandating, without informed consent, human experimentation with mRNA as Covid-19 vaccines do.[18] The possibility of harm

[18] "It is also possible to create DNA synthetically through processes similarly well known in the field of genetics. One such method begins with an mRNA molecule and uses the natural bonding properties of nucleotides to create a new, synthetic DNA molecule. … Myriad's patents would, if valid, give it the exclusive right to

can hardly be doubted, and is confirmed by Long's affidavit and reports of numerous adverse effects. Amid such potential and actual injury, this controversy is fully justiciable, as virtually all other jurisdictions have held.

CONCLUSION

This Court should reverse the decision below and remand for further proceedings.

Dated: March 28, 2022

Respectfully Submitted,

s/ Andrew L. Schlafly

Andrew L. Schlafly
939 Old Chester Rd.
Far Hills, NJ 07931
aschlafly@aol.com
Voice: 908-719-8608
Fax: 908-934-9207

s/ Todd S. Callender

Todd S. Callender
600 17th Street
Suite 2800 South
Denver, CO 80202
Todd@dradvocates.com
Phone: 303-228-7065

Attorneys for Appellants

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isolate an individual's BRCA1 and BRCA2 genes (or any strand of 15 or more nucleotides within the genes) by breaking the covalent bonds that connect the DNA to the rest of the individual's genome." *Molecular Pathology*, 569 U.S. at 582, 585.

CERTIFICATE OF COMPLIANCE

Andrew L. Schlafly, counsel for Appellants, hereby certifies that:

1. This brief complies with the type/volume limitation contained in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 8,117 words, excluding the items identified in Rule 32(f).

2. This brief complies with the typeface requirements in Fed. R. App. P. 32(a)(5) and the type-style requirements in Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface and, except for emphases, in a plain, roman style using Times New Roman in 14 point.

Dated: March 28, 2022

s/ Andrew L. Schlafly
Attorney for Appellants

Case No. 22-1032

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAN ROBERT, SSG, U.S. ARMY,
HOLLIE MULVIHILL, SSGT, U.S. MARINE CORPS
AND OTHER SIMILARLY SITUATED INDIVIDUALS,

Plaintiffs – Appellants,

v.

LLOYD AUSTIN, in his official capacity as Secretary of Defense, U.S. Department of Defense,
XAVIER BECERRA, in his official capacity as Secretary of the U.S. Department of Health and Human Services, and
JANET WOODCOCK, in her official capacity as Acting Commissioner of the U.S. Food and Drug Administration,

Defendants – Appellees,

On Appeal from a Final Judgment of the United States District Court
for the District of Colorado in Case No. 1:21-cv-02228-RM-STV
The Honorable Raymond P. Moore, U.S. District Judge

ADDENDUM TO BRIEF OF APPELLANTS

Todd S. Callender
600 17th Street
Suite 2800 South
Denver, CO 80202
(303) 228-7065
Todd@dradvocates.com

Andrew L. Schlafly
939 Old Chester Rd.
Far Hills, NJ 07931
(908) 719-8608
(908) 934-9207 (fax)
aschlafly@aol.com

Attorneys for Appellants

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 21-cv-02228-RM-STV

DAN ROBERT, SSG, U.S. Army,
HOLLIE MULVIHILL, SSgt, U.S. Marine Corps, and other similarly situated individuals,

Plaintiffs,

v.

LLOYD AUSTIN, in his official capacity as Secretary of Defense, U.S. Department of Defense,
XAVIER BACERRA, in his official capacity as Secretary of the U.S. Department of Health and Human Services, and
JANET WOODCOCK, in her official capacity as Acting Commissioner of the U.S. Food and Drug Administration,

Defendants.

ORDER

Before the Court are Plaintiffs' Motion for Preliminary Injunction (ECF No. 30) and Defendants' Motion to Dismiss (ECF No. 36), which they have combined with their Opposition to Plaintiffs' Motion with the Court's permission. Plaintiffs filed a Reply in support of their Motion (ECF No. 43) and, belatedly, a separate Response to the Motion to Dismiss (ECF No. 46). Defendants then filed a Reply (ECF No. 47) in support of their Motion. Also pending is a Motion for Leave to File Amicus Curiae (ECF No. 42), filed by Pritish Vora, "an individual concerned U.S. citizen" who is not an attorney. For the reasons below, the Court denies Plaintiffs' Motion, grants Defendants' Motion, and denies the Motion for Leave.

I. LEGAL STANDARDS

A. Preliminary Injunction

To obtain injunctive relief, a plaintiff must establish "(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect the public interest." *Diné Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016) (quotation omitted). The final two requirements merge when the government is the opposing party. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). An injunction is an extraordinary remedy, and therefore the plaintiff must demonstrate a right to relief that is clear and unequivocal. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005). The fundamental purpose of preliminary injunctive relief is to preserve the relative positions of the parties until a trial on the merits can be held. *Id.*

B. Motion to Dismiss

Pursuant to Fed. R. Civ. P. 12(b)(1), a court may dismiss a complaint for "lack of jurisdiction over the subject matter." "The general rule is that subject matter jurisdiction may be challenged by a party or raised *sua sponte* by the court at any point in the proceeding." *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1252 (10th Cir. 1988). Although the burden of establishing subject matter jurisdiction is on the party asserting jurisdiction, "[a] court lacking jurisdiction must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." *Smith v. Krieger*, 643 F. Supp. 2d 1274, 1289 (D. Colo. 2009) (quotation omitted).

In evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court must accept as true all well-pleaded factual allegations in the complaint, view those allegations in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor. *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1136 (10th Cir. 2014); *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010). The complaint must allege a "plausible" right to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007); *see also id.* at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level."). Conclusory allegations are insufficient, *Cory v. Allstate Ins.*, 583 F.3d 1240, 1244 (10th Cir. 2009), and courts "are not bound to accept as true a legal conclusion couched as a factual allegation," *Twombly*, 550 U.S. at 555 (quotation omitted).

C. Leave to File a Brief as Amicus Curiae

Participation as an amicus to brief and argue as a friend of the court is a privilege within the sound discretion of the courts and is contingent on a finding that the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice. *See United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991).

II. BACKGROUND

Plaintiffs are members of the military who were stationed in North Carolina when they brought this action on behalf of themselves as well as all other similarly situated active-duty National Guard and Reserve service members who are subject to Department of Defense regulations and have been ordered by the Secretary of Defense, Defendant Austin, to take a Covid-19 vaccine. (ECF No. 29 at 1-2.) As "documented survivors of Covid-19," they assert that have acquired immunity that is "at least as effective" as that achieved via vaccination, and they seek temporary and permanent injunctive relief preventing their forced vaccination. (*Id.*

at 2-3.) In addition to asserting class action allegations, the Amended Complaint asserts claims for (1) violation of the Administrative Procedure Act, (2) violation of 10 U.S.C. § 1107, (3) violation of 10 U.S.C. § 1107a, (4) violation of 50 U.S.C. § 1520, and (5) violation of the Fourteenth Amendment.

III. ANALYSIS

As a threshold matter, the Court finds there are two—and only two—Plaintiffs in this case. Although the Amended Complaint contains "class action allegations," the Court has not certified any class, and Plaintiffs have not even filed a motion for class certification. *See* Fed. R. Civ. P. 23(c)(1)(A) ("At an early practicable time after a person sues . . . as a class representative, *the court must determine by order* whether to certify the action as a class action." (emphasis added)). Plaintiffs' attempt to incorporate two additional non-parties via a footnote in their Reply (ECF No. 43 at 5 n.7) is wholly inadequate. Thus, for present purposes, the only relevant allegations are those pertaining to Plaintiffs Robert and Mulvihill.

The Court next considers the issues of standing and ripeness, both in terms of whether Plaintiffs have established a likelihood of success on the merits and whether Defendants' Motion should be granted. "The doctrines of standing and ripeness substantially overlap in many cases." *S. Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1157, (10th Cir. 2013). To satisfy Article III's standing requirements, a plaintiff must show: (1) he has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 1153. In evaluating ripeness, often characterized as standing on a timeline, "the central focus

is on whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* at 1158 (quotation omitted).

Defendants assert that Plaintiffs' claims are not yet ripe because Plaintiff Robert has requested an exemption from the vaccination requirement, which remains pending, and Plaintiff Mulvihill has sought and obtained a temporary medical exemption from the vaccination requirement. (ECF No. 36 at 13-14.) Moreover, they argue, were the exemptions to be denied or expire, the military has extensive administrative procedures that offer Plaintiffs multiple opportunities to present their arguments to their respective branches and allow for those branches to respond. In response, Plaintiffs contend that since Defendants control the exemption process, "[i]t cannot be that [they] get to control the federal court's jurisdiction based upon [their] timing of the exercise of [their] discretion." (ECF No. 46 at 3, ¶ 5.) However, on the current record, the Court finds there is no basis to assume that Plaintiffs' exemptions will be denied or revoked.

Under similar circumstances in *Church v. Biden*, 2021 WL 5179215, at *10 (D.D.C. Nov. 8, 2021), the court concluded that two active-duty Marines' claims of harm rested on theories of injury that were speculative and contingent on their pending appeals being denied—an outcome that might never come to pass. In finding the Marines' claims nonjusticiable, the *Church* court also cited the well-established principle that a court should not review internal military affairs in the absence of exhaustion of available interservice corrective measures, concluding that "[g]ranting the urgent injunctive relief sought by the Service Member Plaintiffs would require the Court to adjudicate internal military affairs before the military chain of command has had full opportunity to consider the accommodation requests at issue." *Id.* at *10-11.

The Court agrees with the rationale in *Church* and concludes that Plaintiffs' claims involve uncertain and contingent events that may not occur as anticipated. As noted in the Court's previous Order, Plaintiffs' contention that they may be subject to discipline for refusing to take a vaccine appears to be based on nothing more than speculation. Because Plaintiffs have not established that their claims are justiciable, a fortiori, they cannot establish a likelihood of success on the merits or a clear and unequivocal right to injunctive relief. *See id.* at *8 ("The merits on which plaintiff must show a likelihood of success encompass not only substantive theories but also establishment of jurisdiction." (quotation omitted)). Moreover, in the absence of a justiciable claim, Defendants are entitled to dismissal of this case.[1]

With respect to the Motion for Leave and the proposed amicus brief proffered by Pritish Vora, the Court finds the information therein is not useful or otherwise necessary to the administration of justice, and therefore the Court declines to consider it further.

IV. CONCLUSION

Accordingly, the Court DENIES Plaintiffs' Motion for Preliminary Injunction (ECF No. 30), GRANTS Defendants' Motion to Dismiss (ECF No. 37), and DENIES the Motion for Leave (ECF No. 42). The Clerk is directed to CLOSE this case.

DATED this 11th day of January, 2022.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge

[1] Separate and apart from this basis for dismissal of Plaintiffs' claims, the Court notes the complete lack of allegations pertaining to any conduct by Defendants Bacerra and Woodcock, sued in their official capacities as representatives of the U.S. Department of Health and Human Services and the U.S. Food and Drug Administration, respectively, that could be deemed to state a claim against either entity.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-02228-RM-STV

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HOLLIE MULVIHILL, SSgt, U.S. Marine Corps, and other similarly situated individuals,

Plaintiffs,

v.

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JANET WOODCOCK, in her official capacity as Acting Commissioner of the U.S. Food and Drug Administration,

Defendants.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order (Doc. 48) of Judge Raymond P. Moore entered on January 11, 2022, it is

ORDERED that judgment is hereby entered in favor of Defendants Lloyd Austin, Xavier Bacerra, and Janet Woodcock, and against Plaintiffs Dan Robert, SSG, and Hollie Mulvihill, SSgt. It is

FURTHER ORDERED that this case is closed.

Dated at Denver, Colorado this 11th day of January, 2022.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

s/C. Pearson, Deputy Clerk