No. _____

In The
Supreme Court of the United States

DAN ROBERT AND HOLLIE MULVIHILL,

Petitioners,

v.

LLOYD J. 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 ROBERT CALIFF, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE U.S. FOOD AND DRUG ADMINISTRATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the unlawful implementation of the harmful Covid vaccine mandate in the Armed Services properly evades judicial review based on repeal of the mandate and separation of a service member who is subject to recall to duty.

2. Whether it is proper and authorized for a court of appeals to engage in factfinding, while going outside of the record, to dismiss service members' appeal without reaching its merits.

3. Whether the government may properly force citizens to receive an experimental gene-modifying injection, recognized in the medical literature as causing severe adverse effects.

PARTIES TO THE PROCEEDINGS

Petitioners, plaintiffs-appellants below, are Dan Robert and Hollie Mulvihill.

Respondents, defendants-appellees below, are Lloyd J. 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 Robert Califf, in his official capacity as Commissioner of the U.S. Food and Drug Administration.

RELATED PROCEEDINGS

Robert and Mulvihill v. Austin, et al., No. 22-1032, U.S. Court of Appeals for the Tenth Circuit. Judgments entered on July 6, 2023 and Aug. 30, 2023.

Robert and Mulvihill v. Austin, et al., No. 21-cv-02228-RM-STV, U.S. District Court for the District of Colorado. Judgment entered on Jan. 11, 2022.

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The published opinion of the court of appeals from which this appeal is taken is reported at *Robert v. Austin*, 72 F.4th 1160 (10th Cir. 2023), and reproduced in the appendix hereto ("App.") at 1-10. The underlying opinion of the U.S. District Court is included in the appendix at 11-18. The order by the court of appeals to deny the petition for rehearing *en banc* was issued on August 30, 2023 (App. 21-22).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Tenth Circuit was entered on July 6, 2023. (App. 1-10) A timely petition for rehearing *en banc* was filed, and then denied on August 30, 2023. (App. 21-22) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

10 U.S.C. §1107 requires:

> (a) Notice required.
>
> (1) Whenever the Secretary of Defense requests or requires a member of the armed forces 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). …
>
> (d) Content of notice. The notice required under subsection (a)(1) shall include the following:

> (1) Clear notice that the drug being administered is an investigational new drug or a drug unapproved for its applied use.
> (2) The reasons why the investigational new drug or drug unapproved for its applied use is being administered.
> (3) Information regarding 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. …

10 U.S.C. §1107a requires:

> (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 [21 USCS § 360bbb-3] to members of the armed forces, the condition described in section 564(e)(1)(A)(ii)(III) of such Act [21 USCS § 360bbb-3(e)(1)(A)(ii)(III)] 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.

STATEMENT OF THE CASE

Petitioners Dan Robert and Hollie Mulvihill were staff sergeants in the U.S. Army and Marine Corps,

respectively, but were driven out by the unlawful implementation of a mandate by the Biden Administration to receive the mRNA biological injection known as the Covid vaccine. This mandate by the Biden Administration was invalidated by the Supreme Court with respect to private employers, and by the Fifth Circuit with respect to government workers. But Petitioners were denied their day in court to challenge the illegal implementation of this mandate against them. Federal law prohibits using any unlicensed vaccine on service members without their informed consent and without an express and timely presidential waiver of service members' rights, which were both lacking.

The district court never reached the merits of Petitioners' claims, by ruling they were nonjusticiable, and then the court of appeals dismissed their appeal based on mootness by going outside of the record to engage in factfinding. This was procedurally improper and substantively erroneous on an issue of exceptional importance: unlawful experimentation on members of the Armed Services with a novel biological agent having untested long-term side effects and indisputable short-term, sometimes fatal harm to some recipients.

A. Factual Background.

On August 24, 2021, as part of a sweeping program of mandates by the Biden Administration to impose vaccination by the mRNA product on as many people as possible, Defendant Lloyd Austin signed an order requiring "full vaccination of all members of the Armed Forces under DOD authority on active duty or

in the Ready Reserve."[1] This was a command, and was not optional. Penalties for non-compliance were not specified but the violation of any higher order by an enlisted man or woman is subject to harsh punishment.

Staff sergeants in the U.S. Army and U.S. Marine Corps, Petitioners Dan Robert and Hollie Mulvihill, objected, lost opportunities, and ultimately separated from the military due in large part to this unlawful order, and at least Robert has remained subject to recall as most service members are. Both were harmed by the preclusion of likely advancement in the military due to this command to take the mRNA injection.

This vaccine mandate took effect immediately despite the unavailability of any fully licensed Covid vaccines; all the available Covid Vaccines were offered under only the Emergency Use Authorizations in Investigatory New Drugs (EUA/IND's). 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 as required by applicable statutes.

The FDA's website and documents listed the Pfizer-BNT vaccine as being offered under an EUA

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[1]Lloyd Austin, Memorandum for Senior Pentagon Leadership Commanders of the Combatant Commands Defense Agency and DOD Field Activity Directors (Aug. 24, 2021) https://tinyurl.com/2ucrj74j (viewed Nov. 17, 2023).

rather than fully licensed. The labeling and other requirements remained unsatisfied and the Pfizer-BNT vaccine remained an EUA product because the approved, but not yet licensed, Comirnaty was unavailable at the relevant time.

Even though it was impossible lawfully to satisfy the requirement that only fully licensed vaccines be used – they were unavailable – commanders within the Department of Defense ("DOD") swiftly imposed the mandate using the EUA Pfizer-BNT vaccine that remained unlicensed by the FDA. Various units within DOD received guidance that they could ***involuntarily*** vaccinate service members with unlicensed vaccines, which expanded to a service-wide practice. (*See* Asst. Secretary of Defense Memorandum, "Mandatory Vaccination of Service Members Using the Pfizer-BioNTech COVID-19 and COMIRNATY COVID-19 Vaccines" (Sept. 14, 2021); Dept. of the Navy, Bureau of Medicine and Surgery Memorandum, "Interchangeability of the FDA-Approved Pfizer-BioNTech Vaccine COMIRNATY and FDA-Authorized Pfizer-BioNTech Vaccine Under EUA" (Sept. 3, 2021).) DOD then administered many thousands of involuntary inoculations, without the required informed consent and without using a fully licensed vaccine as required.

One of the obligations that Defendant Austin has, under 10 U.S.C. §1107 with respect to use of an investigational new drug ("IND") or drug unapproved for its applied use, is to provide detailed, written notice to the service member, as quoted *supra*. Neither Defendant Austin nor anyone else in the Biden Administration provided this. Another applicable statute, 10 U.S.C. §1107a (also quoted

supra), requires nothing less than a written Presidential waiver of service members' right to informed consent, and no such waiver ever occurred.

Petitioners had personally contracted and recovered from Covid-19 infections, thereby developing natural immunity as demonstrated to or documented by the military. Army Regulation 40-562, "Immunization and Chemoprophylaxis for the Prevention of Infectious Diseases,"[2] presumptively exempts from any vaccination requirement a service member that the military knows has had a documented previous infection.

B. Proceedings Below.

Petitioners Robert and Mulvihill filed their lawsuit in the U.S. District Court for the District of Colorado on August 17, 2021, where jurisdiction existed under 28 U.S.C. §§ 1331, 1346, and 1361. Six days after Defendant Austin issued his order for the compulsory Covid vaccination, Petitioners filed on August 30 their unsuccessful motion for a TRO and subsequently sought a Preliminary Injunction. After obtaining leave to amend, they filed their Amended Complaint on October 6, asserting five causes of action: violations of (1) the Administrative Procedure Act, (2) 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. Plaintiffs further moved for a preliminary injunction. (Dist. Ct. Dkt. 16)

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[2] This document is an all-service publication and has an equivalent name for each of the applicable services. https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r40_562.pdf (viewed Nov. 20, 2023).

The district court dismissed the Amended Complaint in its entirety on January 11, 2022, by finding the allegations to be non-justiciable, and likewise denied Plaintiffs' pending motion for a preliminary injunction. The district court never reached the unlawfulness of the implementation of Defendant Austin's order, and the ruling below was not based on any deference to decision-making by the military. Instead, the district court relied heavily on a District of Columbia district court decision that had denied a request for a preliminary injunction, in *Church v. Biden*, Civ. No. 21-2815 (CKK), 2021 U.S. Dist. LEXIS 215069, at *3 (D.D.C. Nov. 8, 2021). But that other decision did not dismiss service members' claims, and instead merely denied a request for a preliminary injunction only because exemption requests were still pending.

On appeal, the Tenth Circuit never reached the merits of this case either. In a published, precedential decision, a panel of the Tenth Circuit granted a motion by the government to dismiss the appeal based on mootness. Rather than remand for additional factfinding, the appellate court went outside of the record to incorrectly conclude that because Petitioners were separated from the Armed Services, they no longer had a valid claim. This was false, as separated service members (including Robert) are subject to recall, and both Petitioners lost opportunities due to the unlawful implementation of the vaccine mandate. *See, e.g.*, *McCarty v. McCarty*, 453 U.S. 210, 222 (1981) (a "retired officer remains subject to recall to active duty by the Secretary of the Army at any time") (inner quotations omitted). The court of appeals also cited the repeal of

the mandate by Congress, but that repeal did not provide a full remedy for those who, like Petitioners, had declined to be subjected to the unlawful vaccine mandate.

REASONS FOR GRANTING THE PETITION

This Court should grant the Petition to address a matter of exceptional importance: whether a President may violate federal law to coercively inject novel biological agents into members of the Armed Services, and then evade review of it in federal court. Military enlistment is to defend our country, not to become guinea pigs for politically motivated biological mandates that were properly enjoined when applied against employees of private companies and against government workers. *See Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 595 U.S. 109 (2022) (blocking vaccine mandate against private employers); *Feds for Med. Freedom v. Biden*, 63 F.4th 366 (5th Cir. 2023) (blocking vaccine mandate against government workers). If our national defense is a matter of exceptional importance – and it certainly is – then respecting due process by our enlisted men and women to protect themselves against invasion of their bodily integrity to alter their genes is also highly important.

"Vaccine manufacturers are aware of the adverse effects of mRNA vaccines,"[3] is a candid admission published recently in a peer reviewed medical journal

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[3] David A. Bluemke, M.D., Ph.D., COVID-19 Vaccines and Myocardial Injury," 308 *Radiology* No. 3, at p. 2 (Sept. 2023) https://pubs.rsna.org/doi/10.1148/radiol.232244 (viewed Nov. 16, 2023).

about the Covid vaccines at issue here. Yet despite their known adverse effects, these mRNA vaccines were imposed on our service members in violation of federal law. These mRNA products were rushed to implementation and illegally injected without legal accountability during or after. This was a medical experiment on a scale larger than anything ever allowed before in our country, and never authorized by Congress. Due process requires meaningful judicial review for the objecting service members, including those subject to recall to duty as presented here.

Yet to deny substantive review of Petitioners' claims below, the Tenth Circuit went beyond the record and engaged in appellate factfinding without any of the procedural protections required in district court. The Tenth Circuit did so in a published decision that creates a circuit split concerning procedure, which is an additional reason for review by this court. Litigants, and particularly current and former members of our Armed Services, should be afforded full due process in district court on a remand by an appellate court whenever it seeks more factfinding.

For the foregoing reasons as explained further below, this Petition should be granted.

I. There Is Exceptional Importance to Judicial Review of Unlawful Biological Injections into Members of the Armed Services.

The Biden Administration imposed on members of the Armed Services injections by a novel mRNA biological agent. This mandate was enjoined by federal appellate courts when imposed by President

Biden on employees of private companies and on government workers. The enlistment men and women of our military did not waive their relevant rights under federal law by agreeing to serve, and are not to be made guinea pigs for what became the equivalent of a large-scale medical experiment.

A. The Illegality of the Mandate.

The illegality of the implementation of this mandate against the Armed Services is clear. Federal law allows compelled vaccination of service members with an Investigational New Drug or unlicensed vaccine only when the Secretary of Defense has complied with all the legal requirements of 10 U.S.C. §1107 or §1107a. Defendants failed to thereby comply and 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. To this day Defendants refuse to restore unvaccinated service members without penalty for their personal decisions to decline the Covid vaccine. "[O]ver 8,300 military service members have been discharged due to non-compliance," and "another 19,000 troops remain unvaccinated."[4]

It is exceptionally important that there be redress and accountability in the courts for the unlawful mandate that injected a biological agent having life-

[4] Mike Gooding, "Measuring the costs of U.S. military's COVID-19 vaccine mandate; critics say policy harmed force," 13NewsNow (July 28, 2023). https://tinyurl.com/2bpph2yw (viewed Nov. 18, 2023).

changing characteristics into our service members. Federal law protects the enlisted, and yet the courts below avoided addressing the plain violations of federal law as properly alleged by Petitioners. The district court prematurely dismissed this case by finding it to be nonjusticiable, and then the court of appeals dismissed it by declaring it moot. Both bases for failing to reach the merits of this case were in error on a matter of enormous significance: the personal autonomy of our service members. Due process should not be denied to them.

None of the traditional deference to military decision-making applies here. This was a mandate that was likewise imposed against civilians and everyone who was allegedly under some authority of the President. Federal appellate courts properly enjoined the same mandate against civilians, and for the same reason should have enjoined this abuse of power against service members in the Armed Forces. The order at issue here even implicitly authorized the use of force against young service members if they objected to this genetic modification of their bodies by this biological agent, the novel mRNA technology. Moreover, the injections imposed had typically not been fully approved as required.

The decision below denying judicial review is precedential, and unless reversed will be used to preclude future review of similar abuses of power. No one expects the Covid pandemic to have been the last of its kind. Those who risk their lives in defense of our country are entitled to redress in the courts under federal law, with full due process. Upon revelation that this technology causes fatal heart conditions and otherwise modifies the recipients'

genes, judicial review is essential when any segment of our population, military or civilian, is subjected to this. Nothing is more repugnant to our inalienable rights and God-given liberties than being compelled to receive a biological agent that transforms our natural composition. The context of the mandate shows that this was not a military decision for national security, and legitimate deference to the military was never an issue here.

B. Harm Caused by the Mandate.

While the Biden Administration went full tilt into coercing injection by the mRNA Covid vaccine into everyone it could possibly coerce, the CDC belatedly admitted to the severe harm it was causing. By September 2022, long before the precedential decision was rendered by the court of appeals below, the CDC admitted to widely reported, sometimes fatal adverse effects of the mRNA vaccine mandated against Petitioners and other service members: myocarditis, which is a sometimes deadly inflammation of the heart muscle, and pericarditis, which is an inflammation of the outer lining of the heart.[5]

These side effects particularly harmed healthy young adults – the same demographic subjected to the Covid vaccine against the military. Of course the CDC tried to downplay this side effect for a government-mandated vaccine, but Florida Surgeon General Joseph Lapado, M.D., Ph.D., has been more

[5] CDC, "Myocarditis and Pericarditis" (Nov. 3, 2023) https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/myocarditis.html (viewed Nov. 17, 2023).

candid. Among his many public statements warning against this mRNA vaccine was the following:

> Two USC basketball players experience cardiac arrest in the past year and both almost certainly were forced or misled into taking a vaccine never proven to meaningfully benefit young, healthy people, but definitely proven to cause cardiac injury.

Meghan Bowman, "Florida surgeon general Ladapo suggests link between cardiac arrest and COVID vaccine" (Aug. 4, 2023).[6]

Now numerous reports confirm this deadly side effects of this mRNA vaccine on young people who are in the prime of their life, as our Armed Services enlisted men and women are. Harvard-trained for both his M.D. and Ph.D. degrees, Florida Surgeon General Ladapo has been proven right, and has been able to speak out because he has independence from the Biden Administration, in contrast with most researchers who are beholden for funding on the National Institutes for Health and other federal agencies. Lapado cited data compiled by the State of Florida and a peer-reviewed, published Switzerland study that indeed confirms that "vaccine-associated myocardial injury was more common than previously thought."[7]

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[6] https://www.wlrn.org/health/2023-08-04/florida-surgeon-general-ladapo-suggests-link-between-cardiac-arrest-and-covid-vaccine (viewed Nov. 17, 2023).

[7] Natacha Buergin, et al., "Sex-specific differences in myocardial injury incidence after COVID-19 mRNA-1273 booster vaccination," European Journal of Heart Failure 1871, 1879 (2023)

Similar evidence was presented below, yet never addressed. For example, the compelling sworn affidavit by Lieutenant Colonel Theresa Long, MD, MPH, FS, is part of the record in this case:

> 37. I personally observed the most physically fit female Soldier I have seen in over 20 years in the Army, go from Collegiate 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 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 ….

(Appellate Appendix below, 109-10)

This mRNA vaccine has been linked to fertility and pregnancy problems in young women, and

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https://onlinelibrary.wiley.com/doi/epdf/10.1002/ejhf.2978 (viewed Nov. 18, 2023).

Petitioner Mulvihill was pregnant at the time of this mandate. "When normalized by time-available, doses-given, or number of persons vaccinated, all COVID-19 vaccine [adverse events] ***AEs far exceed the safety signal on all recognized thresholds***. These results necessitate a worldwide moratorium on the use of COVID-19 vaccines in pregnancy." James A. Thorp, M.D., *et al.*, "COVID-19 Vaccines: The Impact on Pregnancy Outcomes and Menstrual Function," 28 *Journal of American Physicians and Surgeons* (No. 1) 28 (Spring 2023).[8] These experts pointed out that, other than the politically motivated Biden Administration, "Governments and public health agencies worldwide are stepping back from COVID-19 vaccine mandates and are beginning to recommend against or even prohibiting COVID-19 mandates and vaccinations for vulnerable groups such as children, pregnant women, and lactating women." *Id.* at 33.

Studies released this year confirm how improper this vaccine mandate was from a medical perspective. As foreign researchers wrote about the Covid vaccine:

> Furthermore, despite the assumption that there is no possibility of genomic integration of therapeutic synthetic mRNA, only one recent study has examined interactions between vaccine mRNA and the genome of transfected cells, and reported that an endogenous retrotransposon, LINE-1 is unsilenced following mRNA entry to the cell, leading to reverse transcription of full length vaccine mRNA sequences, and nuclear entry. This finding should be a major safety concern, given

[8] https://jpands.org/vol28no1/thorp.pdf (viewed Nov. 18, 2023).

> the possibility of synthetic mRNA-driven epigenetic and genomic modifications arising.

K. Acevedo-Whitehouse and R. Brunob, "Potential health risks of mRNA-based vaccine therapy: A hypothesis," Med Hypotheses. 2023 Feb; 171: 111015.[9]

C. Judicial Review of the Life-Changing mRNA Technology – Never Authorized by Congress – Was Improperly Denied.

Defendants alone have control of their own extensive Covid vaccine data in the military which continues to be withheld from the public. Defendants have access to the data about service members harmed by the Covid vaccine; there is an Army Center for Synthetic Biology relating to synthetic biological products, which the mRNA (vaccine) product at issue here is.[10] This mRNA product makes alterations in the molecular structure of human deoxyribonucleic acid (DNA) and ribonucleic acid (RNA), and the Supreme Court has expressly recognized how harmful 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***." *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 582 (2013) (emphasis added).

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[9] https://tinyurl.com/y3tn7t79 (viewed Nov. 20, 2023).

[10] Army Center for Synthetic Biology https://www.arl.army.mil/collaborate-with-us/opportunity/army-center-for-synthetic-biology/ (viewed Nov. 18, 2023).

Indeed, this Court's ruling in *Molecular Pathology* foreshadowed the mRNA product here, underscoring the exceptional importance of this case:

> One [product development] 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 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. There this Court rejected ownership of that genetic engineering, implying the illegality of forcing anyone to submit their own bodies to such ownership as at issue here.

The exceptional importance of this issue is reinforced by how more biological experimentation on our service members is in the pipeline. In "development [are] implantable neural interfaces able to transfer data between the human brain and the digital world … to monitor a soldier's cognitive workload …." Anika Binnendijk, *et al.*, "U.S. Military Applications and Implications, An Initial Assessment," RAND Corporation (2020) (also describing a "Silent Talk" neurological program that has been funded since 2009).[11] The U.S. Patent and Trademark Office has ruled that the Thirteenth Amendment to the U.S. Constitution prohibits the issuance of any patent on a human being, and

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[11] https://www.rand.org/pubs/research_reports/RR2996.html (viewed Nov. 17, 2023).

likewise novel biological agents should not be imposed by government against anyone. *See* Thomas A. Magnani, "V. BIOTECHNOLOGY AND MEDICAL DEVICES: 1. Patenting Lifeforms: a) Chimeras: The Patentability of Human-Animal Chimeras," 14 Berkeley Tech. L.J. 443, 444 (1999) (citing Commissioner of Patents and Trademarks, Policy Statement on Patentability of Animals, 1077 Off. Gaz. Pat. Office 24 (April 7, 1987), *reprinted in* Donald S. Chisum, Chisum on Patents app. 24-2 (1998).

This mRNA vaccine was never authorized by Congress, and this mandate was enjoined by federal appellate courts with respect to private and government workers. It is a matter of exceptional importance whether this mandate was properly imposed on the Armed Services, and judicial review of this issue was improperly denied below.

II. The Decision Below Creates a Circuit Split as to the Appropriateness of Appellate Factfinding Reaching Beyond the Record.

The published court of appeals decision was based on erroneous appellate factfinding found nowhere in the record of this case, and contravened precedent. This Court, the Tenth Circuit itself, and other circuits have emphasized that a remand is necessary for further development of the facts, which was denied to these service members as Plaintiffs. For example, prior Tenth Circuit cases held that:

> the function of appellate review is to decide whether the correct rule of law was applied to the facts found. When there has been an insufficient development of the facts by the

> parties, so as to amount to the failure of proof of either position advanced, ***then … [a] remand for further development of the facts must follow***.

Heinold Hog Mkt., Inc. v. Superior Feeders, Inc., 623 F.2d 636, 637 (10th Cir. 1979) (emphasis added). *See also Brutsche v. Commissioner*, 585 F.2d 436, 443 (10th Cir. 1978) ("Because we are without power to consider the doctrine of estoppel as an initial trier of fact, the case is remanded to the Tax Court for findings of fact from the record ….").

This Court and other circuits have held likewise. *See, e.g.*, *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969) ("appellate courts must constantly have in mind that ***their function is not to decide factual issues de novo***") (emphasis added); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2121 (2020) (same); *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (same); *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 54 (2d Cir. 2010) (same); *United States v. Soto*, 48 F.3d 1415, 1421 (7th Cir. 1995) (same).

Finally, the congressional repeal in December 2022 of the mandate does not moot this case, as service members are long subject to recall and thus continue to be at risk of retaliation and lost opportunities due to their objection to the unlawful vaccine mandate. Factual issues were necessary to resolve first, which should have happened on a remand to the district court, rather than close the courthouse doors entirely to those who served our country honorable for the benefit of all.

The foregoing circuit split, the lack of congressional authorization for the mandate, and the incompleteness of its repeal support this Petition.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: November 22, 2023

APPENDIX TABLE OF CONTENTS

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAN ROBERT; HOLLIE MULVIHILL; and other similarly situated individuals, Plaintiffs - Appellants, v. LLOYD J. 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; ROBERT CALIFF, in his official capacity as Commissioner of the U.S. Food and Drug Administration, Defendants - Appellees.[1]	No. 22-1032 (D.C. No. 1:21-CV-02228-RM-STV) (D. Colo.)

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[1] During the pendency of this appeal, Appellants left active service in the United States Armed Forces. The original case caption reflected their previous respective ranks while actively serving in the military. The updated caption mirrors Robert and Mulvihill's new status.

ORDER

(Filed Jul. 6, 2023)

Before **HOLMES**, Chief Judge, **McHUGH**, and **EID**, Circuit Judges.

EID, Circuit Judge.

Plaintiff-Appellants Dan Robert and Hollie Mulvihill are former members of the United States Armed Forces who object to the military's past COVID-19 vaccination requirement. They sued the Department of Defense ("DoD"), the Food and Drug Administration, and the Department of Health and Human Services, claiming to bring the action on behalf of themselves and all other similarly situated service members and alleging that DoD lacked authority to require they receive a COVID-19 vaccine. The district court found that the allegations were not justiciable, declined to certify a class, denied a request for costs and attorneys' fees, and dismissed the complaint. Robert and Mulvihill appealed. Exercising jurisdiction under 28 U.S.C. § 1291, we grant the government's motion to dismiss this case as moot.[2]

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[2] Another jurisdictional hurdle Appellants must clear is Article III standing. But "a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits."

I.

Appellants object to the military's previous COVID-19 vaccination requirement. When this suit was filed, Robert was actively serving in the United States Army and Mulvihill was actively serving in the United States Marine Corps; both were subjected to the prior vaccination requirement the time. Following litigation, the district court dismissed their complaint as non-justiciable. Appellants timely appealed. But after the district court made its decision, Robert and Mulvihill both separated from the Armed Forces. Before oral argument, the government filed a motion contending that Appellants' departure from the military moots this case. The government also believes that legislative and executive branch action offers another reason this appeal is moot. On January 10, 2023, in accord with the National Defense Authorization Act for Fiscal Year 2023, Secretary of Defense Lloyd J. Austin rescinded the military's COVID-19 vaccination requirement. Dep't of Def., *Rescission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces* (Jan. 10, 2023), *available at* https://perma.cc/L9L2-PF6F.[3]

Valenzuela v. Silversmith, 699 F.3d 1199, 1205 (10th Cir. 2012) (cleaned up). We decline to address standing and resolve this case on mootness concerns alone. *See Dunn v. Austin*, No. 22-15286, 2023 WL 2319316, at *1 (9th Cir. Feb. 27, 2023) (holding that DoD's rescission of the vaccination requirement mooted an appeal of the denial of a preliminary injunction); *Short v. Berger*, No. 22-15755, 2023 WL 2258384, at *1 (9th Cir. Feb. 24, 2023) (same).

[3] On January 12, 2023, this Court directed the parties to file simultaneous briefs addressing whether this appeal is moot due

II.

"The Constitution gives federal courts the power to adjudicate only genuine Cases and Controversies." *Kerr v. Polis*, 20 F.4th 686, 692 (10th Cir. 2021) (en banc) (cleaned up). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings . . . [and] requires a party seeking relief to have suffered, or be threatened with, an actual injury traceable to the appellee and likely to be redressed by a favorable judicial decision by the appeals court." *Prison Legal News v. Fed. Bureau of Prisons*, 944 F.3d 868, 879 (10th Cir. 2019) (cleaned up). "Thus, even where litigation poses a live controversy when filed, the doctrine requires a federal court to refrain from deciding it if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Schell v. OXY USA Inc.*, 814 F.3d 1107, 1114 (10th Cir. 2016) (cleaned up).

"Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction." *Id.* at 1113 (cleaned up). "As Article III requires an actual controversy, we lack subject-matter jurisdiction over a case that is moot. We review mootness determinations de novo. A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Smith v. Becerra*, 44 F.4th

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to the fact that Secretary Austin rescinded the COVID-19 vaccination requirement for military service members.

1238, 1247 (10th Cir. 2022) (cleaned up). "The crucial question is whether granting a *present* determination of the issues offered . . . will have some effect in the real world." *Id.* (emphasis added) (cleaned up). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Id.* (cleaned up).

III.

Robert and Mulvihill sought declaratory and injunctive relief, as well as costs and attorneys' fees. Their supplemental briefing before this Court does not ask for back pay as a form of relief, but refers to Appellants losing opportunities and back wages due to DoD's rescinded COVID-19 vaccination requirement.

"We take a claim-by-claim approach to mootness and must decide whether a case is moot as to each form of relief sought." *Id.* (cleaned up). "The defendant bears the burden of establishing that a once-live case has become moot." *Id.* (cleaned up). "An injunctive relief claim becomes moot when the plaintiff's continued susceptibility to injury is no longer reasonably certain or is based on speculation and conjecture." *Id.* (cleaned up). "Similarly, a declaratory relief claim is moot if the relief would not affect the behavior of the defendant toward the plaintiff." *Id.* (cleaned up).

a.

We start with Appellants' claim for declaratory relief. Their complaint asked the district court to "declare that any order issued by DoD requiring the Plaintiffs to receive inoculation with COVID-19 vaccines are per se unlawful." App'x Vol. I at 30. This claim is moot for two reasons. First, the claim is moot because Appellants left military service. *Schell*, 814 F.3d at 1113 (cleaned up) ("[T]he existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction."). Mulvihill departed military service before oral argument, and Robert's retirement was completed shortly thereafter. Appellants cannot be subjected to any vaccine requirement associated with service in the military because they no longer serve in the military. *Smith*, 44 F.4th at 1247 (cleaned up) ("A case becomes moot when . . . the parties lack a legally cognizable interest in the outcome."). Thus, we lack jurisdiction over Appellants' moot claim.

Second, Appellants' claim is also moot because Congress passed legislation requiring DoD to rescind the COVID-19 vaccine mandate, and the Secretary of Defense has since done so. *See Dunn v. Austin*, No. 22-15286, 2023 WL 2319316, at *1 (9th Cir. Feb. 27, 2023); *Short v. Berger*, No. 22-15755, 2023 WL 2258384, at *1 (9th Cir. Feb. 24, 2023). Appellants cannot be subject to a vaccine requirement that no longer exists. *Smith*, 44 F.4th at 1247 (cleaned up) ("[T]he case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights."); *see also Schell*, 814 F.3d at 1114 (cleaned up) ("Thus, even

where litigation poses a live controversy when filed . . . a federal court [must] refrain from deciding it if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.").

It is true that federal courts recognize two exceptions to the mootness doctrine. "[U]nder the voluntary cessation exception to mootness, a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Prison Legal News*, 944 F.3d at 880 (cleaned up). We "view voluntary cessation with a critical eye, lest defendants manipulate jurisdiction to insulate their conduct from judicial review." *Brown v. Buhman*, 822 F.3d 1151, 1166 (10th Cir. 2016) (cleaned up). However, "[t]he voluntary cessation exception does not apply, and a case is moot, if the defendant carries the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Prison Legal News*, 944 F.3d at 881 (cleaned up). "Even when a legislative body has the power to reenact an ordinance or statute, ordinarily an amendment or repeal of it moots a case challenging the ordinance or statute." *Smith*, 44 F.4th at 1250 (cleaned up).

The second exception is conduct capable of repetition yet evading review. *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015). "Under this exception, which courts reserve for exceptional situations, issues under review are not moot if they (1) evade review because the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration, and

(2) are capable of repetition, such that there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Id.* (cleaned up).

Neither mootness exception saves this claim. The voluntary cessation exception offers Appellants no relief because the government has met its arduous burden of showing the allegedly wrongful behavior could not reasonably be expected to recur. *Prison Legal News*, 944 F.3d at 881. Neither does the capable of repetition but evading review exception benefit Appellants. The duration of the challenged action—here DoD's past vaccine mandate as applied to Robert and Mulvihill—was not too short to be fully litigated before its expiration. *Fleming*, 785 F.3d at 445. Furthermore, nothing in the record leads to a reasonable expectation they will be subjected to the same action again. *Id.* Appellants are no longer actively serving in the military and the Secretary of Defense has rescinded the challenged policy. This is not the exceptional situation the exception is designed for. *Id.*

b.

We turn to Robert and Mulvihill's injunctive relief claim. They asked the district court to "[e]njoin [ ] DoD from vaccinating any service members. . . ." App'x Vol. I at 31. This claim fares no better than the declaratory relief claim. Congress's revocation of DoD's vaccine mandate, and DoD's implementation of Congress's

instruction, means there is no more vaccine mandate to enjoin. The claim is therefore moot.

c.

Next, we address Appellants' request for "costs and attorneys' fees." App'x Vol. I at 31. Robert and Mulvihill raised the matter below, but failed to discuss it in their briefing before this Court. "We routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief. . . ." *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 773 (10th Cir. 2013) (cleaned up). "Stated differently, the omission of an issue in an opening brief generally forfeits appellate consideration of that issue." *Id.* (cleaned up). We decline to consider Robert and Mulvihill's request for costs and attorneys' fees.

d.

We finish our review with Appellants' cursory mention of lost opportunities and back pay. Robert and Mulvihill's supplemental briefing superficially alleges they "continue to lose opportunities and back[]pay" because of the now-rescinded vaccine mandate. Aplt. Supp. Br. at 1. But they failed to allege lost opportunities or back pay in the district court. "[A]bsent extraordinary circumstances, arguments raised for the first time on appeal are waived." *Little v. Budd Co., Inc.*, 955 F.3d 816, 821 (10th Cir. 2020), *as corrected* (Apr. 6, 2020). "This is true whether the newly raised

argument is a bald-faced new issue or a new theory on appeal that falls under the same general category as an argument presented at trial." *Id.* (cleaned up). Robert and Mulvihill have waived any argument involving lost opportunities or back pay.

IV.

We GRANT the government's motion to dismiss and DISMISS this appeal as moot.

Entered for the Court

Allison H. Eid
Circuit Judge

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

(Filed Jan. 11, 2022)

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]

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[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.

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:

/s/ Raymond P. Moore
RAYMOND P. MOORE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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.

FINAL JUDGMENT

(Filed Jan. 11, 2022)

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAN ROBERT, SSG, U.S. Army, et al., Plaintiffs - Appellants, v. LLOYD J. AUSTIN, in his official capacity as Secretary of Defense, U.S. Department of Defense, et al., Defendants - Appellees.	No. 22-1032 (D.C. No. 1:21-CV-02228-RM-STV) (D. Colo.)

ORDER

(Filed Aug. 30, 2023)

Before **HOLMES**, Chief Judge, **McHUGH**, and **EID**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge

in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk