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
Secretary of Defense,

XAVIER BECERRA, in his official capacity as Secretary of the U.S. Department of
Health and Human Services, and

ROBERT CALIFF, U.S. Commissioner of the Food & Drugs

Defendants – Appellees

APPELLANTS' RESPONSE BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEAL AS MOOT

Introduction

Defendants-Appellees' ("Appellees") Motion to Dismiss as Moot the pending appeal by Plaintiffs-Appellants ("Appellants") must be denied. This Appeal is far from Moot despite contrived circumstances that would make it appear as such.

Plaintiff SSG Dan Robert ("SSG Robert"), who is in the process of retiring, remains in the Army and will be in the Army at the time this Court holds its scheduled oral arguments on November 18, 2022. SSG Robert brought this action because his intent was to remain in the Army until retirement irrespective of the mandatory and illegal Covid 'vaccine' mandate, which has now amplified the many discriminatory hoops, hurdles and obstacles blocking his continued service or advancement. SSG Robert describes his situation as having the proverbial gun to his head since he filed this case. Similarly, Plaintiff SSGT Hollie Mulvihill ("SSGT Mulvihill") has now left the Marine Corps, like thousands of other marines who, for all practical purposes, involuntarily separated She too would not have separated from her beloved Marine Corps, but for the discrimination and terminal career path the Corps engineered to assure her departure from service and especially as a plaintiff in this case.

As further explained below, if Appellants' case were to be considered technically moot, it would nonetheless fall into the exception to the mootness doctrine for, *inter alia*, the class of cases that are "capable of repetition yet evading review."

The Appellants have not wavered in their allegations and effectively no change has occurred with respect to the Appellees' tortious acts since the original Complaint was filed. The mandated shots are now and always have been experimental, Investigational New Drugs ("IND's"), despite the word-manipulation and bait-and-switch tactics that convinced more than a million servicemembers into foregoing their Informed Consent rights, among others. For instance, on August 23, 2021 the same day the FDA granted the Biologic License Application of Comirnaty, the FDA terminated the marketing of the drug which is an essential element of the full approval, such that the application itself was

approved yet the manufacture of it was not.[1] This Court should not condone the military's continued manipulation of the IND laws and troops, nor provide further cover to the Appellees to avoid any findings of fact in the official record. To find in Appellees' favor on this motion will only allow this unbridled behavior to go on without consequence ad infinitum. Appellants have continuously and appropriately alleged justiciable facts and allegations that are urgent, disastrous, imminently provable and corroborated through judicial notice. That is to say, at a minimum, Defendant DOD is without legal or practical authority to mandate an experimental Emergency Use Authorization ("EUA") IND injectable without the presidential invocation of the requirements set forth in 10 USC § 1107a.

Our country was in this very situation two decades ago in relation to the DOD's mandated use of an EUA anthrax vaccine, which caused Congress to pass Section 1107a, and failure of the DOD to abide its prerequisites makes the current mandate of EUA, IND's, patently and facially illegal. The Secretary of Defense's department-wide order specifically requires that only FDA-approved Covid 19 vaccines may be mandated, yet he offers in the same document that use of an EUA alternative is authorized; which the subordinate commanders immediately used to require all servicemembers to take the alternative without any Informed Consent or regulatory exemptions. To be clear, there is no FDA-approved Covid 19 vaccine available to the DOD or anyone else in the US. All of the DOD's assurances that the EUA version of Pfizer's Covid 19 shot is the same are irrelevant because it is illegal to violate servicemembers' (everyone's) Informed Consent rights and that is exactly the conduct Appellants are seeking to stop by use of an injunction. Indeed,

[1] See: https://lc.org/newsroom/details/061022-pfizers-fda-approved-covid-shot-will-never-be-available-1, citing https://www.cdc.gov/vaccines/programs/iis/COVID-19-related-codes.html "These NDC's will not be manufactured. Only NDC's for the subsequently GLA approved tris-sucrose formulation will be produced."

the court, in a nearly duplicate EUA anthrax vaccine mandate case (*Doe v. Rumsfeld*, 297 F. Supp. 2d 119 (D.D.C. 2003) issued an injunction because the same circumstances were so egregious and it found that standing for injunctive relief was demonstrated for the first two standing requirements only by showing that the defendant is likely to injure the plaintiff. See: *Cone Corp. v. Florida Dep't of Transportation*, 921 F.2d 1190, 1205 (11th Cir. 1991). The mortality and morbidity from the illegal EUA mandate in *Doe* was significantly less deadly and injurious compared to the instant EUA/IND injections at issue. To this moment, Defendant DOD remains unable to produce any FDA-approved Covid-19 vaccine, including Pfizer's Comirnaty, because it does not now, nor will it ever exist according to the CDC and Pfizer,[2]

Appellants' allegations set forth a well-pleaded cause of action, then as now which, taken as true, requires the appropriate judicial forum for the investigation and merits arguments of these allegations. There is no other legitimate or meaningful way for Appellants to parse the facts other than presenting evidence in court. Bodily integrity, sovereignty, the ownership of one's own genetic composition, along with the very definition of "humanity" is at issue here. Certainly these weighty issues demand a hearing at the minimum; Appellants have enjoyed no such opportunity and Appellees unjustifiably demand this Court perpetuate Appellants' silence.

Argument

Intentional Mooting

1. The doctrine of dismissal is based on Article III of the Constitution which

[2] https://lc.org/newsroom/details/061022-pfizers-fda-approved-covid-shot-will-never-be-available-1, citing https://www.cdc.gov/vaccines/programs/iis/COVID-19-related-codes.html (both viewed Nov. 3, 2022).

limits federal courts to hearing only "cases and controversies." The doctrine puts the onus on the plaintiff to prove, among other things, that they suffered an actual harm and that failure to do so allows the Court to conclude it has no jurisdiction over the case.

2. Even in times of national emergency, such as now, Article III and peoples' Constitutional rights in this regard may not be abridged.[3] Appellants are similar to detainees seeking Habeas Corpus review insomuch that their right to court access, to rectify violation of their guaranteed rights, survives the imposition of emergency powers and proclamations.[4]
3. In so deciding, the court must view facts and harms alleged in the light most favorable to the plaintiff, irrespective of a national emergency, which is exactly why Congress created 10 USC Section 1107a to bridle our government's experimentation on our troops.
4. After Appellants filed a Temporary Restraining Order a Preliminary Injunction motion with expert testimony supporting the facts, which should have been viewed as true, the lower court instead decided that it need not hear the allegations at all to determine if they were true and thereby deprived Appellants their right to a hearing and potential redress.
5. In response, Appellees, rather than answering the amended Complaint, simply moved to dismiss the lower case thereby evading any Answer while convincing the court that no such allegations or evidence could possibly exist, in over-deference to the FDA, DOD and HHS.
6. Appellees have consistently contravened the rules of procedure for the purpose of prohibiting Appellants from providing evidence to the contrary, including actual answers from Appellees themselves rather than affiant

[3] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
[4] *Boumediene v. Bush*, 553 U.S. 723 (2008).

proxies.

7. In furtherance thereof, Appellees have now moved to dismiss this appeal in which might be termed "intentional mooting."[5]
8. Prior to the dismissal of the lower action, both Appellants were active duty servicemembers; and as of this date SSG Robert remains an active duty Drill Sergeant, as he has been for years.
9. It is true that SSGT Mulvihill is now retired from the Marine Corps, yet this is solely due to the illegal EUA vaccine mandate.
10. It is true that SSG Robert is on Terminal Leave, meaning he's in the process of separating from the Army, yet he too is only leaving because the DOD rushed his disability package through after SSG Robert had served as a Drill Sergeant for nearly two years with no change in his physical disabilities. In fact, each of the Appellants filed this lawsuit for the very purpose of staying in the military without the vaccine requirement as have numerous other military plaintiffs.
11. The Appellees have also failed to mention that servicemembers often have continuing service obligations to the DOD. Even after separation, they may be called back into service, particularly in the case of armed conflict or war.[6] The 101st Airborne Army division is now staged on the border of Ukraine and our Nation sits on the cusp of a global military conflict with Russia which would certainly give people cause for concern as to whether they would be recalled into service. Indeed, there are types of servicemembers who remain at risk for recall and redeployment for the remainder of their

[5] 534 F.3d 213 4th Cir. (2008).
[6] See also Executive Order 13603 Part IV, Section 601 et seq. https://www.govinfo.gov/content/pkg/FR-2012-03-22/pdf/2012-7019.pdf (viewed Nov. 3, 2022).

lives, such training specialists and general officers.[7]

12. These are military rules, not statutory ones, which means their application can be made or adjusted administratively and with a minimum of delay, if any.

13. That being said, the entire potential class of plaintiffs, on the order of 24% of the uniformed personnel in the military, are being processed out of the Service, because they are being forced to make the "impossible choice" of taking a deadly, experimental genetic modification injection ("Covid 19 vaccine") or prematurely ending their careers and abandoning their time and effort investment heretofore.[8] Many, if not most, of those service members affected have lost hope of completing required terms for the allocation of the very benefits they were promised and earned at enormous personal risk and sacrifice. SSG Robert is now 100% disabled, as Appellees correctly allege, because of his self-sacrifice that left him horribly and permanently injured; yet he's served valiantly for many years having been so disabled. Only after this suit was commenced did the DOD rush his impairment rating to expedite this intentional mooting.

14. In short, servicemembers are choosing to leave rather than risk the lie that these experimental gene modification agents are either safe or effective, much less "safe and effective."

15. Even so, significant questions remain as to the permanency of Robert's Terminal Leave. At this moment and until November 21, 2022, SSG Robert is still in active duty service and subject to recall until the very last moment of his departure for various reasons including potential prosecution for

[7] Executive Order 13603 Section 501 et seq.
[8] *Together Employees et al v. Mass General Brigham, Inc.*, 21 CV 1909, 1st Cir (Nov. 19, 2021), pg. 16.

failure to follow these illegal orders. Many other servicemembers have suffered such prosecution for failure to follow this illegal order and if SSG Robert were to be convicted, then his service would continue until his full sentence would be served if convicted, irrespective of his disabilities.

16. This kind of retaliation has already occurred for many similarly situated servicemembers. In fact, SSG Robert was warned as such when his commander mentioned that the Pentagon called to ask why SSG Robert was not yet kicked out, court-martialed or flagged. At this time, SSG Robert continues to be subject to the orders of his chain of command, the Army or DoD, which clearly provides him standing now and after the hearing.
17. There is no depth to which the DOD will sink in order to make this case moot. During the pending action in the lower Court, Defendant DOD offered an unsolicited temporary medical exemption for the mandatory shots to SSGT Mulvihill. Effectively no other servicemember in the entirety of the Marine Corps was offered any such accommodation. In fact, SSGT Mulvihill didn't need such an exemption because she already enjoyed an administrative exemption as a named plaintiff in this lawsuit. Nonetheless Defendant DOD provided her with a temporary medical accommodation with great haste for the purpose of intentionally mooting this case.
18. Thereafter the Defendant DOD relied upon SSGT Mulvihill's temporary medical exemption as the basis to dismiss this case from the trial court action. See Paragraph 2, page 7 of Defendants' second Motion to Dismiss.
19. The creation of facts and circumstances for the purpose of seeking or supporting a motion to dismiss cannot be found as moot simply because it was convenient for the Defendants who had the power to create those circumstances. See *Ghailani v. Sessions* 859 F.3d 1295, 10th Cir. (2017)
20. This case and hearing are neither technically moot nor factually moot as

Appellees contend.

21. If this honorable Court were to suspend, stay or enjoin the mandate, it is likely that both Appellants would not be leaving the military.

22. Mootness has the same effect as dismissal and it was intended to have that effect, which is to silence the Appellants and prevent them from introducing their evidence; and Appellees continue to violate Appellant's Constitutional rights to be heard.

23. Appellees claim the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. This circumstance was fabricated so that the court would have to arrive at this conclusion.

24. In so deciding regular dismissal or dismissal for mootness, this Court must consider the exceptions to mootness, including whether a party's voluntary cessation of an unlawful practice operates to moot the challenge of that practice.[9]

Continuing harm

25. One can characterize intentional mooting as a continuing injury to Appellants, yet the Court must also consider an exception because Appellees have not ceased their unlawful activities and if this case is dismissed then nothing will stop Appellees continuing their unlawful behavior and they will "be free to return to [its] old ways."[10]

26. Courts generally declined to deem cases moot where issues or disputes are "capable of repetition, yet evading review."[11] This exception to the mootness

[9] *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018).
[10] *Allee v. Medrano*, 416 U.S. 802, 810 (1974).
[11] *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016).

doctrine applies in cases where (1) "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration;" and (2) "there is a reasonable expectation that the same complaining party will be subject to the same action again."[12] If this exception to mootness did not exist, then certain types of time-sensitive controversies would become effectively unreviewable by the courts.[13] Such is the case here.

27. Effectively, the Appellees have created the same circumstances where termination of pregnancy is at issue because it has a finite time during which the facts remain at issue.

28. This continuing harm is not merely causing Appellants problems, it is putting the entire country in jeopardy.

29. In July of this year Senator Wicks, chairman of the Armed Services Committee stated: "The Department is simultaneously bleeding its best and brightest while desperately trying to recruit new talent," Wicker wrote. "This is not a blueprint for success."[14]

30. In fact, recruitment for the Army has dwindled remarkably and is 25% short of meeting this year's required goal.[15]

Conclusion

31. We do not know what the future holds and for purposes of this case or otherwise, yet we do know that this Court's decision on whether Appellants move forward will have an everlasting effect on Appellants, all

[12] *United States v. Juvenile Male*, 564 U.S. 932, 938 (2011).
[13] *Sosna v. Iowa*, 419 U.S. 393, 400 (1975).
[14] https://www.wicker.senate.gov/2022/7/wicker-blasts-defense-department-for-vaccine-requirement-recruitment-challenges
[15] https://www.foxnews.com/us/us-army-falls-25-percent-short-recruiting-goal

servicemembers, and all of society no matter the ruling.

32. We also know that SSG Robert will remain an active duty service member until such time as he is finally released, which Appellees admit is after the scheduled hearing date of November 18, 2022.

33. We also know that both Appellants are subject to emergency recall by the military in future times of war.

34. Accordingly, this Court should assert its right to hear the case before it and for the compelling reasons stated herein, Appellants further move this honorable Court to estop, enjoin and invalidate the DOD's illegal and continuing harmful behavior.

35. For these compelling reasons, which are far from moot, Appellants pray this honorable Court will deny Defendants' Motion to Dismiss, grant an immediate injunction and hold the hearing as scheduled on November 8 at 8:30 am Mountain Time in Courtroom II.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response to a motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,703 words. This motion also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Todd S. Callender
Todd S. Callender

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2022, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Todd S. Callender
Todd S. Callender