No. 23-717

In the
Supreme Court of the United States

ISRAEL ALVARADO, *et al.*,
Petitioners,

v.

LLOYD AUSTIN, III,
in his official capacity as
Secretary of Defense, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* CHAPLAIN ALLIANCE FOR RELIGIOUS LIBERTY, INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS, and ASSOCIATED GOSPEL CHURCHES *in Support of Petitioners*

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STATEMENTS OF INTEREST[1]

Chaplain Alliance for Religious Liberty ("CALL") is an organization of chaplain endorsers, the faith groups that provide chaplains for the U.S. military and other agencies. CALL speaks for more than 2,600 chaplains serving the Armed Forces from many different denominations. Since 2011, we have led the effort to secure the religious liberties of chaplains and those whom they serve. We enable all chaplains to serve to the broadest extent of their constitutional mission and endorsement, and we nurture and support an environment that cherishes the role of chaplains in American culture. CALL exists to ensure that chaplains can defend and provide for the freedom of religion and conscience that the Constitution guarantees all chaplains and those whom they serve. We join together to pursue a nation where all chaplains, and those whom they serve, freely exercise their God-given and constitutionally protected religious liberties without fear of reprisal.

The **International Conference of Evangelical Chaplain Endorsers** ("ICECE") has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice was given to all parties.

endorsements. ICECE safeguards religious liberty for all.

The **Associated Gospel Churches** ("AGC") has been a chaplain endorsing agency for the Armed Forces Chaplaincy for over eighty years, since 1942. AGC currently endorses about one hundred military chaplains serving in all branches of service on active duty and in the Guard and Reserves. AGC is firmly committed to supporting our U.S. Armed Forces chaplains, most importantly their right of conscience and the free exercise of religion. The free exercise of their religious duties is also of critical importance to forming the conscience of our troops, which helps restrain them from committing atrocities of the like that have outraged the world throughout history. AGC believes that, when, as here, the military has violated the constitutional rights of its chaplains, the military should recompense its chaplains to the maximum degree consistent with military preparedness.

SUMMARY OF ARGUMENT

While a summary dismissal for mootness might not normally command this Court's attention, this case does, for two main reasons, besides the fact that the case is not moot because effective relief is still available to the Plaintiff Chaplains. First, chaplains play a unique and critical role in preserving and fostering religious freedom among our military members. Congress has recognized this in § 533 of the FY 2013 National Defense Authorization Act, as

amended.[2] Second, this matter involves the type of restrictions due to the Covid-19 situation that this Court repeatedly addressed because they violated the Free Exercise Clause. The Fourth Circuit's order dismissing the Chaplains' appeal as moot should be vacated and the matter remanded for appropriate consideration.

ARGUMENT

I. The Chaplains' Case Is Not Moot, as the Courts Can and Should Provide Them Effective Relief to Ameliorate the Injuries They Wrongly Suffered to Their Military Careers

The appropriate legal standards are not challenged by DoD in this action. A case is not moot if "any effectual relief whatever" remains available, *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 295 (2023), or, stated obversely, a case is moot "only when it is impossible for court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). Moreover, it is up to the defendant to prove no effective remedy is available, not the plaintiff's burden to disprove it. *See W. Va. v. EPA*, 142 S. Ct. 2587, 2607 (2022).

DoD tries to weave its way between these barriers to a proper finding of mootness by asserting that a court cannot provide any more relief that DoD has already provided by (a) rescinding the order that

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[2] Pub. L. 112–239, div. A, title V, §533, Jan. 2, 2013, 126 Stat. 1727, as amended by Pub. L. 113–66, div. A, title V, §532(a), Dec. 26, 2013, 127 Stat. 759.

all military personnel receive Covid-19 shots and (b) removing any negative material from the records of those who refused to do so for religious reasons. DoD protested that Plaintiff Chaplains were asking the courts to decide what promotions and training and other advantages the Chaplains would have received but for DoD's allegedly improper actions and to order the military branch to implement the court's determinations. That is not what Plaintiff Chaplains seek.

What Plaintiff Chaplains seek, post Congress's action and DoD's rescission of its Covid-19 shot requirement, is for the courts, in recognition that the Chaplains have suffered adverse consequences due to the improper actions of DoD, to require the services to ameliorate the adverse consequences going forward to the maximum possible degree consistent with military preparedness. Such relief does not require a court to promote anyone; it only requires a service to recognize in future promotion opportunities that the particular chaplain's advancement opportunities have been improperly stunted. Such relief does not require a court to designate what training a particular chaplain receives and when he receives it; it only requires a service to recognize that training opportunities were withheld previously and any reasonable actions should be taken to ameliorate that situation.

Among other things, Plaintiff Chaplains requested the court:

> [To e]njoin any adverse or retaliatory action against the Plaintiffs as a result of, arising from, or in conjunction with the Plaintiffs'

> [religious accommodation] requests or denials, or for pursuing this action, or any other action for relief from Defendants' constitutional, statutory, or regulatory violations; [and]
>
> To order Defendants to take necessary actions to repair and restore Plaintiffs' careers and personnel records, and to provide effective guarantees against future retaliation for the exercise of their protected rights through the Services' assignment, promotion, and schooling systems . . . .

(Complaint at 123-24.) This relief is still very much available. It is the type of relief often given to remedy past unlawful discrimination. Under Title VII, courts have discretion to provide back pay and seniority adjustments to remedy discrimination. *See, e.g.*, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 399-400 (1982); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976). Plaintiff Chaplains request, looking forward, that all reasonable efforts consistent with military preparedness be taken to remedy the military's alleged unlawful action. As this Court has repeatedly stated, a "court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 438 (1968) (quoting *La. v. United States,* 380 U.S. 145, 154 (1965)). And under the Religious Freedom Restoration Act of 1993, under which Plaintiff Chaplains also bring suit, a "person whose religious exercise has been burdened in violation of this section may . . . obtain appropriate [judicial] relief . . . ." 42 U.S.C. § 2000bb-1(c). As this Court has held and as

the Chaplains explain in their petition, monetary relief is also available to them for DoD's violations of RFRA. *See Uzuegbunam v. Preczewski,* 141 S. Ct. 792 (2021).

Nor is the type of forward-looking relief Plaintiff Chaplains request foreclosed by the fact that the defendant is the military. Relief can be tailored to assure that military preparedness is not jeopardized and that the military, not the court, makes the appropriate determinations on advancement, assignment, and training. Chaplains, while critically important to the troops, are not front-line fighters, and so the risk to military preparedness is much less than in the normal situation. Obviously, this Court may enjoin any future retaliatory actions against the Plaintiff Chaplains and require all actions consistent with military preparedness to be taken to ameliorate past unlawful action. That has not already been done with the eraser on a pencil by DoD, as it claims.

II. DoD's Recent Treatment of the Religious Rights of Its Chaplains Demonstrates That the Requested Relief Is Not Moot, But Needed

DoD in its motion to dismiss the complaint as moot basically said, "Trust us! We'll make it all right." The Fourth Circuit said, "We do trust you!," but it was wrong to do so in this instance, both in general and for two particular reasons.

First, it is not sufficient to moot a case simply for a defendant to say it will remedy the wrongs about which the plaintiff complains, without more. And when it comes to how DoD will ameliorate the harms

it has already inflicted on the military careers of the Plaintiff Chaplains, DoD promised only the erasure of negative comments in their existing records. DoD neither gave general assurances nor suggested specific, affirmative steps it would take to help the Chaplains "catch up" for the deficiencies in training and advancement the Chaplains have amply alleged. This falls far short of carrying DoD's burden to prove that no judicial relief is available. *See W. Va.*, 142 S. Ct. at 2607; *Chafin*, 568 U.S. at 172 (must be "impossible" for court to provide effective relief).

Second, chaplains fit a special role in the military, with their religious exercise both needed for the war fighters and afforded special protection by Congress. As to their role, it is "'unique,' involving simultaneous service as clergy or a 'professional representative[]' of a particular religious denomination and as a commissioned . . . officer." *In re England*, 375 F.3d. 1169, 1171 (D.C. Cir. 2004) (Roberts, J.) (quoting OPNAVINST 1730.1, *Chaplains Manual* 1-2-1-3 (Dep't of the Navy Oct. 3, 1973)). They assist military personnel to practice their chosen faiths when, otherwise, it might not be possible for them to do so due to military needs and stationing. *Id.*; *Katcoff v. Marsh*, 755 F.2d 233 (2d Cir. 1985); *see generally* P. Thompson, *The United States Army Chaplaincy* (1978).

Despite their special status and obvious need to practice their chosen faith conscientiously and freely, the military services were not always sympathetic to religious concerns when they were inconvenient or inconsistent with normal operations. For that reason, Congress in the FY 2013 National Defense Appropriations Act enacted § 533(b), "Protection of

Chaplain Decisions Relating to Conscience, Moral Principles, or Religious Beliefs," which provides as follows (as amended by the FY 2014 NDAA):

> No member of the Armed Forces may—
>
> (1) require a chaplain to perform any rite, ritual, or ceremony that is contrary to the conscience, moral principles, or religious beliefs of the chaplain; or
>
> (2) discriminate or take any adverse personnel action against a chaplain, including denial of promotion, schooling, training, or assignment, on the basis of the refusal by the chaplain to comply with a requirement prohibited by paragraph (1).

Pub. L. 112–239, div. A, title V, §533(b), Jan. 2, 2013, 126 Stat. 1727, as amended by Pub. L. 113–66, div. A, title V, §532(a), Dec. 26, 2013, 127 Stat. 759. Thus, Congress has shown a special concern for situations such as those involved in this case in which the Plaintiff Chaplains' "promotion, schooling, training, [and] assignment" has been negatively influenced by their exercise of conscience.

Third, the order from which DoD refused to grant the Chaplains an exemption involved Covid-19 treatment that violated the consciences of these Chaplains. The perceived threat of Covid-19 was used repeatedly by governments to violate the free exercise rights of individuals. This Court had to step in time after time. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021); *S. Bay United Pentecostal*

Church v. Newsom, 141 S. Ct. 716 (2021); *Roman Cath. Dio. of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). As Justice Gorsuch stated in *South Bay*, "It has never been enough for the State to insist on deference or demand that individual rights give way to collective interests. . . . Even in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution." 142 S. Ct. at 718 (Gorsuch, J., statement).

DoD damaged Plaintiff Chaplains by its "damn the torpedoes, religious beliefs do not excuse getting a Covid-19 shot" position. That damage cannot be fully remedied just by rescission of the order and taking out negative comments from the Chaplains' personnel files. It requires affirmative actions—actions that can easily be taken without jeopardizing military preparedness—to ameliorate the negative consequences in "promotion, schooling, training, [and] assignment." FY 2013 NDAA § 533(b). Without judicial decrees, that will never happen.

CONCLUSION

The action of Plaintiff Chaplains is not wholly moot, and they present an issue of great importance that requires resolution. This Court should reverse the Fourth Circuit and order full consideration of their appeal.

Respectfully submitted on this
2nd day of February 2024,

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