

No. 23-717

In the Supreme Court of the United States

ISRAEL ALVARADO, *ET AL.*,
Petitioners,

v.

LLOYD AUSTIN, III, *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY IN SUPPORT OF PETITION

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INTRODUCTION

The legal issue before the Court is whether the actions of Secretary of Defense Austin and the Armed Forces Secretaries (“collectively “DoD”) have completely “rescinded” the Secretary’s COVID-19 mandate (the “Mandate”) as directed by Congress making the Petitioners’ (the “Chaplains”) claims moot.

DoD’s argument affirms that the legal term “rescind” makes the challenged policy or action void from the beginning and requires the parties be restored to their status quo ante. The record shows that has not happened. DoD uses lots of words but fails to show it has taken the necessary action to restore these chaplains to the status quo before Austin issued the Mandate. DoD does not deny these chaplains have been injured nor that are they are not at their status quo before the Mandate.

DoD’s Response provides a surplus of evidence showing exactly why this Court should grant the Chaplains’ petition. It could be described as “words, words, and more words” without any action or confirming evidence. The Response clearly shows the Secretary’s actions have not rescinded his Mandate; the Chaplains’ claims and injuries which DoD acknowledges but otherwise ignores remain current, viable, unaddressed and in many cases irreparable.

I. The Secretary’s Mantras are Misleading and Deceitful.

A. The Response at 9, 12, and 15 Wrongly Argues “Petitioners Brought this Case to Seek Prospective Relief from the Military’s Covid-19 Vaccination Requirement.”

DoD essentially and deceptively argues that challenging the vaccination requirement was the sole purpose of this litigation. They make this argument because if it was true, and it is not, the case becomes moot without a COVID-19 mandate. DoD’s argument is misleading and false.

1. The *Alvarado* Complaint shows the Chaplains brought suit to address DoD’s retaliation against them for the exercise of their conscience.

The Chaplains sought a religious accommodation; DoD’s retaliation violated their specific rights and protections for decisions based on their conscience under §533(b) of the 2013 NDAA as modified by the 2014 NDAA. The word retaliation appears 32 times in specific claims. *See, e.g.*, Complaint at 3, ¶2. (“Plaintiffs allege that the Mandate and Military Defendants’ No Accommodation Directive is unconstitutional because these directives violate: (a) the express statutory rights allowing Military Chaplains to follow their conscience as formed by their faith; and (b) statutory protection for chaplains from retaliation.”); 15, Pattern and Practice of Retaliation for Religious Exercise (emphasis in

original as explained in ¶¶ 19 and 20); ¶¶ 26-5 (Relief), 51, 78, 86, 145, 164, 171; “V. DEFENDANTS’ PATTERN AND PRACTICE OF RETALIATION AGAINST AND HOSTILITY TO RELIGIOUS EXERCISE”, *id.* at 47, addressed in ¶¶ 94, 95.

The Chaplains link DoD’s retaliation to their Claim that:

"The Military Defendants’ venom against those who assert religious objections and who have submitted religious accommodation requests (“RARs”) shows the Secretary’s vaccine Mandate’s purpose is to purge those who (a) believe in the Judeo-Christian concept of a conscience formed by faith that guides our lives, and (b) will not participate in what their conscience considers evil." Complaint at 8, ¶ 8. Other Mandate challenges do not allege DoD’s purpose is a purge of those who follow their conscience.

There are five other specific claims relating DoD’s adverse actions against the Chaplains to DoD’s apparent motivation “to **purge** the military of people of faith (emphasis added) (as well as those who would question the lawfulness of facially unconstitutional regulation), rather than to promote military readiness or protect the health and welfare of servicemembers.” Complaint at 103, ¶ 219, *see also*, ¶¶ 10, 106-- Establishment of Secular Religion; 148 (“their attack on chaplains, despite the protections and commands of the [RFRA] and 533 is nothing more than an unconstitutional attempt to purge those that adhere to Judeo-Christian ethics centered on the right to follow one’s conscience as formed by their faith”); 157, and 219.

The “purge and “retaliation” claims do not become moot because the Secretary claims to have rescinded his Mandate. In fact, the Secretary’s refusal to address the injuries done to these chaplains’ careers because they filed RARs suggests and/or clearly demonstrates DoD’s attempt to continue setting the stage for its purge of chaplains and others who believe in following their conscience. DoD has done this by making them uncompetitive which results in failures of selection and then separating them for failing selection. Thus, DoD seeks to do indirectly what it can’t do directly, forcing them out based on adverse actions against them which destroyed their careers.

2. The Chaplains’ Complaint is also very clear they challenge DoD’s blatant violation of §533(b)’s special protection for chaplains who make decisions following their conscience.

Unlike the other lawsuits that challenged the Secretary’s Mandate, these chaplains specifically raise claims that DoD had ruthlessly violated §533(b)’s special protections for chaplains who base their decisions on their conscience as determined by their faith. The Chaplains’ First Cause of Action, states: “Defendants Have Willfully Ignored and/or Violated Section 533's Specific Protections for Chaplains.” Complaint at 86. *See* ¶¶ 164 (“Congress passed §533(b) to specifically address the rights of chaplains to follow their conscience, their faith and protect them from retaliation when they did so”).

§533(b) PROTECTION OF CHAPLAIN
DECISIONS RELATING TO CONSCIENCE,
MORAL PRINCIPLES, OR RELIGIOUS BELIEFS.

—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). Complaint, ¶171.

Everything that §533(b) prohibits, *e.g.*, denying promotions, schools, and assignments, and separation (Chaplain David Calger), DoD has done to these Chaplains. As shown below, although the Secretary repeats the mantra that DoD’s “adverse actions” have been removed from the files of those who had their RARs denied, the reality is DoD is not being truthful. This is bad faith *per se*. Nor does DoD show by individual the action taken to fix the forbidden “adverse personnel actions” still in the records of these chaplains who filed RARs.

**B. DoD and the Armed Services Have Not
Removed “Adverse Personnel Actions”
from These Chaplains Records Nor
Addressed Failures of Selection and
Other Career Destroying Events.**

Another false Secretary mantra as to why the Chaplains’ claims are moot is that the Secretary ended his COVID-19 vaccine requirement “while also taking steps to ensure that servicemembers’

personnel records are corrected to remove adverse actions associated solely with refusing to comply with the COVID-19 vaccination requirement after the denial of a request for a religious, medical, or administrative exemption”, Response at 9. Similar arguments are at Response 6 (“military services then issued its own implementing guidance to ... remove adverse actions from servicemembers’ personnel records); *id.* at 6 (“the government explained that the military had already taken steps to address concerns about future assignments and promotions by ensuring that any adverse actions in servicemembers’ personnel records associated solely with a refusal to comply with the COVID-19 vaccination requirement are removed”); 8 (“military had already taken steps to ensure that the service records that are used for promotions and assignments are up-dated to remove any past adverse actions that were based solely on the denial of requests for religious accommodations.”) That is clearly not the case for these Chaplains. The Chaplains have argued and the record shows the adverse actions began as soon as a chaplain indicated he/she would not take the vaccine and/ or an RAR was filed.

The Chaplains recently filed an application asking for a writ of injunction for interim relief, 23A858. It seeks injunctive relief to stop continuing destruction of these chaplains because of lower and noncompetitive fitness that became part of the record after they filed an RAR. Chaplains Diltz, Fussel, Gentilhomme, and Harris failed of selection *twice*, App:629a-633a, due to filing RARs. Fact 28. This threatens them with imminent separation from the Armed Services. Their fitness reports issued in retaliation for requesting RARs, adverse

personnel actions under §533, still speak retaliatory messages every time they are reviewed. The Secretary does not answer how it is that he and/or the Services have removed “adverse actions” while leaving “adverse personnel actions” in these chaplains’ files. It is clear the injury and the irreparable harm accompanying that act include the constitutional dimensions of the Establishment and Free Exercise Clauses and have not been addressed.

It is obvious that the Secretary has a narrow view of “adverse actions” which excludes adverse personnel actions. This suggests that DoD is treating chaplains differently than other similarly situated personnel.

II. DoD’s Response Deliberately Ignores the Underlying Issue in this Appeal, Who Determines the Authority by Which a Chaplain Exercises His/her Conscience.

The Secretary carefully ignores the underlying issue these Chaplains raise, “who gets to determine the authority that directs a chaplain’s conscience, the God of his faith, or a government bureaucrat or politician.” That remains unaddressed and is being repeated as we write. Not addressing it suggests the Secretary hopes to avoid this Court’s order to the courts below to conduct the searching review the Establishment Clause requires. “The Establishment Clause forbids subtle departures from neutrality, ‘religious gerrymanders,’ as well as obvious abuses.” *Gillette v. United States*, 401 U.S. 437, 452 (1971) [citation omitted].

The Secretary’s continuing permission for uncompetitive fitness reports to remain in these

chaplains files and destroy these chaplains careers for filing RARs is in fact continuing retaliation. This shows his unaddressed hostility to Congress for ordering him to rescind his Mandate. It also shows that fundamental question, who controls a chaplain's conscience, remains. The Secretary's actions clearly shows that he believes he controls these Chaplains' conscience, determining good and evil, right and wrong.

303 Creative LLC v. Elenis, 143 S.Ct. 2298 (2023) addressed a similar issue: "the question we face today [is] [c]an a State force someone who provides her own expressive services to abandon her conscience and speak *its* preferred message instead?" *Id.* at 2318. "In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance." *Id.* at 2321. Substitute DoD for "State" or "Colorado" and Chaplains for "someone/individual" and you have this case. *303 Creative* rejected Colorado's power grab: "the opportunity to think for ourselves and to express those thoughts freely is among our most cherished liberties and part of what keeps our Republic strong." *Id.* The Clause protects not only actual speech but also the expression inherent in some types of "expressive conduct." *Id.* at 2320. It must protect these Chaplains. This shows this case worthy of this Courts's review, it conflicts with this Court's decisions. Response at 15.

III. The Chaplains' Appeal Is Distinct from Other Appeals That Have Been Found to Be Moot.

DoD argues that there is nothing unique about chaplains or their claims. Response at 15. That argument is built on DoD's willful blindness and its contempt for religious liberty. No other group has special protections for its members in the area of conscience and faith clearly set forth in §533(b).

No other distinct group has raised Establishment, Free Exercise, Free Speech, Right to Petition, and Due Process Clause violations, nor Article VI's ban on religious tests for a government office or trust along with The religious Freedom Restoration Act and §533 of the 2013 NDAA. No other case specifically alleges retaliation nor has linked DoD's' hostility to chaplains with its hostility to anyone who believes in following their conscience.

These Chaplains also challenge the Secretary's hostility to Congress over its order to "rescind" his COVID-19 mandate and DoD's failure to adequately and completely "rescind its mandate by returning these Chaplains to their status quo prior to the illegal Mandate by fixing their careers. *See* below.

These Chaplains also seek judicial orders requiring the DoD and the Armed Services to fix these chaplains careers

IV. DoD Mischaracterizes the Chaplains' Request for Relief.

DoD falsely argues that the chaplains are asking for judges to order promotions or be granted benefits that would put them ahead of their peers.

To the extent that petitioners seek an injunction that would require the military to treat them in the future as though they had received promotions or training that they did not in fact receive thus “level[ing]” them up with others service members whom petitioners perceive as now having an unfair “competitive advantage” (Pet. 18)—petitioners do not identify any lawful basis for such an extraordinary order. Any such order would go beyond restoring the status quo ante and would threaten to interfere with quintessentially military judgments about assignments and promotion ” Response at 13.

This is absurd, a red herring. The chaplains have not asked for such relief. The Chaplains have asked that DoD fix the careers it has destroyed. The bad fitness reports the Chaplains cite will remain in their files. To remove them would leave holes in the record, a clear indication of a career problem. The Secretary and his subordinate Secretaries have the ability to make the bad paper good paper. The reason DoD resists and denies its possibility is rooted in the Secretary’s hostility to Congress for telling him he exceeded his authority and was causing grave damage to the Volunteer Military Service.

DoD has obviously forgotten its previous ventures into affirmative action or taking extraordinary means to overcome past prejudice and discrimination to racial minorities and women when male career fields were opened up and sex barriers removed. Services issued instructions to their boards pointing out injustices and issuing orders in terms of how to view certain assignments.

The Chaplains' Application at 39-41 provides a detailed relief plan. It’s highlights are:

years: Stay the operation of 10 U.S.C. §632 for two

- Enjoin Respondents from further retaliation or “adverse action” in response to the exercise of protected right “retaliation” as a better understood term within DoD.

- Issue Public apology and pledge by Secretaries: a significant precedent for this happened in 1991 at the Pentagon. Chief of Naval Operations publicly apologized to the family of GM2 Clayton Hartwig, USN for the mishandling of the investigation into the 1989 explosion aboard USS Iowa. <https://www.cspan.org/video/?22104-1/defense-department-newsbriefing&start=934> Also, plenty of precedent for amending fitness reports.

- Discrimination/retaliation may constitute UCMJ punishment under Article 133 for .

- Expedited access to schools and training.

- Convene special boards for 2x FOS.

10 U.S.C. § 1552(b), “Correction of military records: Claims incident thereto”, states: “The Secretary concerned may file a request for correction of a military record only if the request is made on behalf of a group of members or former members of the armed forces who were similarly harmed by the same error or injustice.” That’s this case.

A scenario to repair Lieutenant Nathaniel Gentilhomme’s career. Chaplain Gentilhomme was assigned to Marine-One, as part of the aviation unit at HMX 1 at Quantico, that supplies the President’s helicopters. That duty comes after careful selection and a quality review. When COVID vaccines came out as a experimental but available, there was a great deal of pressure for the Marines to sign up for the vaccine, although using coercion is forbidden by statute. Prior to the mandate LT Gentilhomme visited the commanding officer and, as part of his

duty to provide "advisement" about moral, ethical, and morale issues, suggested to the commanding officer that telling Marines that vaccination was voluntary and then punish them for not volunteering was hypocritical. The CO essentially threw LT Gentilhomme out of his office, forbade him to visit with his Marines and attempted to fire the chaplain and terminate his career.

The Chaplain Corps Deputy, the Chaplain for the Marine Corps, became involved because the CO did not have authority to fire his chaplain or destroy his career.

Gentilhomme remained at Quantico but received a career killing report. The issues continued after the Mandate when the leadership pushed vaccination for everyone while attempting to accommodate those who had religious objections. LT Gentilhomme did his duty and his career injury is directly related to the Vaccine but not directly related to requesting a RAR. When the mandate was issued, he requested a RAR which was denied. "Vaccine injury reports" and other troubling data shows multiple mistakes were made in the vaccine process. Gentilhomme knew the risks of confronting the CO, had a duty to do so and paid the price.

His career can be restored with the following actions.

The Secretary of Defense writes a memorandum or letter to the DoD recognizing that many people worked to immunize the DoD but also that in excess of zeal, mistakes were made. Those who exercised their rights to request an exemption were unfairly and illegally retaliated against. Congress ordered the mandate rescinded and the courts have now required those injured be restored to the status

quo before the mandate or before an adverse action related to the vaccine was awarded for doing his job.

The Secretary then (1) acknowledges and commends those who had the courage and personal integrity to swim upstream when the leadership was forcefully pushing vaccination, (2) apologize to those injured for doing their duty, and (3) direct the respective Armed Forces Secretaries to do the same and ensure that promotion boards were directed to view fitness reports during the Covid era in a positive light, recognizing that those who requested such RARs were unjustly punished and it was the Services responsibility to recognize the courage and personal integrity of those who sought RARs and encouraged others to do so.

Each Service would keep a record of those who had sought RARs to make sure that there was no further retaliation and that their careers were remediated.

CONCLUSION

This Reply shows DoD has NOT met its burden to show the judiciary can not provide any relief. This Court should grant the petition to protect these Chaplains' conscience and religious liberty.

Respectfully submitted,

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