No. 23A858

In the Supreme Court of the United States

ISRAEL ALVARADO, *ET. AL.*,
Applicants,

v.

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

On Application for a Writ of Injunction Pending Petition for a Writ of Certiorari

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF ALVARADO, ET AL, APPLICATION FOR WRIT OF INJUNCTION PENDING PETITION FOR A WRIT OF *CERTIORARI*

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To the Honorable John G. Roberts, Jr., Chief Justice of the United states and Circuit Justice for the Fourth Circuit:

INTRODUCTION

The A*lvarado v. Austin* petitioners in Case No. 23-717 filed an Application for a Writ of Injunction for Interim Relief, No. 23A858, on March 19, 2024.

Parties to the Proceeding, Application ("Applic.") at I; Rule 29.6 Disclosure Statement, *id*.; Statement of Related Cases, *id*. at ii- iii; and Jurisdiction, id. at iii, as presented in the Application remain unchanged.

Pursuant to S.CT. R. 15.8, Applicants respectfully file this supplemental brief addressing two distinct but related topics that impact and support both this Application and the Applicant's pending petition for certiorari, No. 23-717.

First, *FBI v. Fikre*, 601 U.S. ___, 144 S.Ct. 771 (2024) addresses the criteria for a defendant to prove mootness, *id*. at 777-78. The Application at 15-16, § II.A, argued: "The Court is likely to grant a writ of *certiorari* on the issue of mootness." Sections I and II below shows Applicants' facts 12-31, Applic. at 8-12, which *Fikre* requires courts accept as true, 144 S.Ct. at 778, preclude mootness as Respondents have failed to meet *Fikre*'s standard. *Fikre*'s emphasizes the courts' "virtually unflagging obligation" to hear and resolve questions over which they have jurisdiction, *id*. at 777.

Fikre expressly abrogated the Fourth Circuit's decision in *Long v. Pekoske*, 38 F.4th 717 (4th Cir. 2022) and the mootness standard therein that Respondents successfully advocated to affirm dismissal of the Applicants' complaint, *see* App.747a-749a. *Fikre* was issued after the

filing of Petitioner's petition and Application. It clarifies the application of the mootness doctrine and the voluntary cessation exception thereto for similar claims of religious liberty violations justified by the government on broad, yet undisclosed national security grounds.

The second topic or factor that Applicants bring to the Court's attention is the Navy Chaplain Corps' April 5, 2024, "Quarterly Newsletter", Supplemental Appendix 738a-39a (attached) presenting the Navy Chaplain Recruiting Numbers for FY ("fiscal year ") 24, "20 added with a goal of 82 (24%)" halfway through the FY. Section IV addresses the Application's reference to the reported shortage of military chaplains as reflective of Secretary's and DOD's hostility to people of faith as shown in their attempt to purge the military of those who believe in following their conscience and their "malicious implementation of Congress's 2023 Order to rescind the mandate", Applic. at 10.

REASONS TO GRANT THE APPLICATION

I. *FIKRE* CLARIFIED THE APPLICATION OF MOOTNESS DOCTRINE TO EVALUATING A DEFENDANT'S PROOF OF MOOTNESS.

Fikre covers known ground on the law of mootness in many respects, but in addition to expressly abrogating the Fourth Circuit's decision in *Long*, it clarifies the standard defendants must meet to carry their burden of establishing mootness generally and specifically the showing required to demonstrate that it cannot reasonably be expected to resume the challenged conduct or policy.

● *Fikre* restates mootness doctrine, making clear the respondents here cannot show mootness:

● To find a lack of jurisdiction, the defendant accepts the complaint's allegations unless denied or controverted. *Fikre*, 144 S.Ct. at 777.

● "A court with jurisdiction has a 'virtually unflagging obligation' to hear and resolve questions properly before it." *Id.* (citation and quotation marks omitted).

● To show mootness, the defendant—not the plaintiff—bears the "formidable burden" to show that "no reasonable expectation remains that it will return to its old ways." *Id.* (interior quotation marks and alterations omitted).

● A case's procedural posture informs the mootness showing a defendant must make, which can be more difficult when a "case comes to [a court] in a preliminary posture, framed only by uncontested factual allegations and a terse declaration." *Id.* at 779.

● The foregoing "holds for governmental defendants no less than for private ones." *Id.* at 777.

All these known issues that *Fikre* restates support Applicants' arguments that the complaint was not mooted when the Mandate was allegedly rescinded or by subsequent factual developments.

What is new in *Fikre* is the rigor and focus applied to parsing the defendants' mootness evidence versus the foregoing mootness standards. In *Fikre*, the district court had dismissed Mr. Fikre's complaint based on the government's declaration that Mr. Fikre had been removed from the No Fly List. The Court affirmed the Ninth Circuit's reversal.

> The government's declaration might mean that Mr. Fikre will not be placed on the No Fly List now based on what he did in the past. But, the Ninth Circuit reasoned, the declaration does not disclose what conduct landed Mr. Fikre on the No Fly List, and it does not ensure that he will "not be placed on the List if ... he ... engag[es] in the same or similar conduct" in the future. As a result, the [Ninth Circuit] concluded, the government had still failed to meet its burden of establishing that its allegedly unlawful conduct cannot reasonably be expected to recur.

Id. at 777-78 (citations omitted). The government's removal of Mr. Fikre without any explanation of the factors or facts that the government actually relied on in deciding to place him on the No Fly List did not moot the case.

Nor could the government carry its burden of showing that this action could not reasonably be expected to occur by submitting a declaration baldly asserting Mr. Fikre would not be placed on the list again based on "currently available information" because the declaration did not disclose what previously available information was used to place him on the list in the first place or whether this decision was based on constitutionally impermissible reasons.

> Viewed in that light, this case is not moot. To appreciate why, it is enough to consider one aspect of Mr. Fikre's complaint. He contends that the government placed him on the No Fly List for constitutionally impermissible reasons, including his religious beliefs.

Id. at 778 (citation omitted). To carry its burden of demonstrating mootness, and for the voluntary cessation exception to mootness, the government must disclose to the court—relying only "non-classified information" and discovery materials, but not "classified information", *id.* at 780 (Alito, J., concurring)—the specific facts or factors were considered in making the challenged decision or taking the challenged action. This information is required for the reviewing court to determine what the government is committing not to do or not to consider and whether the challenged actions are likely to recur.

II. UNDER *FIKRE*, APPLICANTS' RELIGIOUS LIBERTY AND RETALIATION CLAIMS WERE AND ARE NOT MOOT.

This Court must reject the Fourth Circuit's dismissal of Applicants' complaint

and their appeal as moot, because it directly conflicts with this Court's decision in *Fikre*, which expressly abrogated the Fourth Circuit's decision in *Long* and the mootness standard therein on which the government expressly relied in successfully moving to dismiss. App. 747a-749a.

Unlike in *Fikre*, the government's May 16, 2023, motion to dismiss consists solely of a brief and does not include any declarations attesting to factual developments after the mandate" alleged rescission January 10, 2023. Instead, the only declarations supporting the motion are from U.S. Army Colonel Kevin Mahoney (dated July 11, 2022), U.S. Navy Admiral William Merz (dated Aug. 9, 2022), U.S. Air Force Major Matthew Streett (dated July 7, 2022), and U.S. Air Force Colonel Elizabeth Hernandez (dated Apr. 7, 2022). These declarations did not provide any factual information whatsoever regarding the rescission of the mandate, nor could they have provided the Fourth Circuit with any factual basis for finding that the government carried its burden of showing that the challenged conduct could not reasonably be expected to recur or career injuries cured. Respondents **never** disputed Applicants' identified injuries caused by filing a religious accommodation request ("RAR"), *e.g.*, promotion failures, separation. Under these facts, neither Respondents nor the lower courts can show mootness under *Fikre*.

The Court's decision in *Fikre* supports granting the petition and ordering a full merits briefing—or alternatively to summarily grant, vacate the lower courts' decisions, and remand to be decided in accordance with *Fikre*. This resolution and relief is consistent with *Fikre*, and the Court's express abrogation of the Fourth

Circuit's decision in *Long*, which underpinned the government's successful motion to dismiss, *see* App.747a-749a, because the petition presents largely similar facts and legal issues.

Applicants here, like Mr. Fikre, allege substantial violations of their religious liberties, which the government has sought to justify on national security grounds. While the government has strenuously denied what Applicants allege—that the military adopted a uniform "No Religious Accommodation Policy"—it has refused to disclose whatever the actual facts or factors considered may be that could have resulted in denying 99 percent or more of RARs. Nor has it explained how or whether these purported actual facts or factors included constitutionally impermissible actions or criteria alleged by Applicants. Identification and disclosure of these facts and factors are required preconditions for courts to determine what the government has done in the past and what it commits not to do in the future. Here, the government's declarations regarding post-rescission policies is not just sparse, it is non-existent; as such it necessarily "falls far short of demonstrating that it cannot reasonably be expected to do again what it is alleged to have done in the past." *Id.* at 778 (citation omitted).

The government has never claimed that its decisions are based on classified information that need not be disclosed. *Id.* at 780 (Alito, J., concurring). Accordingly, to carry its burden under *Fikre*, it must disclose the basis for the challenged actions, and this showing must include post-rescission declarations or evidence that could support a finding that the challenged actions cannot reasonably be expected to recur.

Here, Respondents failed to provide any declarations or other factual support that could have carried their burden under *Fikre*, and the Fourth Circuit's dismissal must therefore be reversed, especially since it was on notice of DOD's continuing retaliation and irreparable injuries that are unaddressed.

Finally, under the rigor and focus that *Fikre* applies to analyzing mootness, the case was not moot because the complaint stated claims on which relief could have been granted.

III. SECRETARY AUSTIN'S HOSTILITY TO CONGRESS'S ORDER TO RESCIND HIS VACCINE MANDATE BARS HIS CLAIM OF MOOTNESS

Fikre addressed the question whether the defendant had to repudiate its previous activities or admit its actions were wrong to establish that it would not continue the challenged action at a later time, after the case's dismissal. The Court stated, "What matters is not whether a defendant repudiates its past actions, but what repudiation can prove about its future conduct. It is on that consideration alone—the potential for a defendant's future conduct—that we rest our judgment." 144 S.Ct. at 779. Here, the Secretary has made it abundantly clear he does not intend to fully rescind his mandate.

The Chaplains' opposition to DOD's 4th Cir. mootness motion, 23-1419, ECF No. 14 at 7-8, Fact 13, highlighted the Secretary and DOD's hostility to Congress' order to rescind the mandate. Rather than acknowledge that Congress has the authority to make choices about vaccines that did not protect, DOD made clear it did not accept the meaning of "rescind."

> 13. The Assistant Secretaries of DoD and each Armed Forces testified to the House Armed Services Committee ("HASC") on 2/28/2023 concerning the impact of COVID and DoD's compliance with the NDAA's order to rescind the Mandate. CA70-80 (Excerpts from Transcript of HASC hearing (hereafter "HASC TR")).
>
> A. DoD showed no remorse for issuing the Mandate, identified no

harms, and agreed DoD opposed and disagreed with the NDAA.[1]

B. DoD stated it was still considering whether to punish those who had refused the COVID vaccine; DoD's mantra in response to questions about fixing records and/or restoring service members and their careers who had refused the vaccine was they "violated a lawful order." CA71-72, 75 (HASC TR at timestamps 27:52, 28:34, 29:30, 29:46, 30:38:31:00, 44:58).

C. DoD showed no repentance or acknowledgment that issuing the Mandate or changing the definitions of vaccine and vaccination were beyond DoD's authority and no concern for the damage done to the careers and lives of military personnel or exacerbating existing shortages of skilled personnel, including Chaplains who are below their authorized strength, or overseeing and participating in the destruction of the volunteer military service.

DOD's belief that the vaccine refusers violated a "lawful order" shows it has not accepted the reality that "rescind" means the mandate became void *ab initio*, and therefore could not be considered a lawful order once Congress spoke.

The Chaplains' Petition Reply at 4 points out that DOD's failure to restore the chaplains to their status before the mandate, a necessary condition for rescission, was an attempt to do what it could not do directly, separate chaplains who believe in following their conscience. Instead, DOD purges them indirectly through chaplains' failures of selection due to the bad reports given in retaliation for filing RARs. Only this Court can correct that behavior. Failure to do so creates the appearance of approving religious retaliation, rewarding lawlessness.

IV. GRANTING THE APPLICATION IS IN THE PUBLIC INTEREST BECAUSE IT WOULD FORCE THE SECRETARY TO REMOVE A MAJOR STUMBLING BLOCK TO RECRUITING CHAPLAINS, A NATIONAL SECURITY INTEREST GIVEN THE CURRENT WORLD SITUATION

The Application on page 2 states "DOD's open hostility to religion likely corresponds to the Armed Services' recent and repeated failure to meet their recruiting goals."

The Chaplains' Fact 30 (page 12) specifically drew attention to the shortage of military chaplains and quoted RADM Todd's 11/23/23 public broadcast.

[1] https://www.cnn.com/2022/12/07/politics/biden-military-covid-mandate-ndaa /(last accessed 4/22/2024). WH publicly calls Congress' mandate rescission direction a "mistake."

> 30. The military is short chaplains, and the number of military chaplains is plummeting. Ivonne Spinoza, *The Complex Role and Diverse Array of Chaplains in the Military*, Public Broadcasting Service (Nov. 23, 2023) (App:683a-693a); RADM Gregory N. Todd [Navy Chief of Chaplains], *The Navy needs more chaplains: All three sea services want and need more chaplain—but the recruiting deficit is extreme*, Religion News Service (May 15, 2023) (App:673a-675a).

The Chaplains Application again mentions recruiting on Page 38:

> Given the Armed Services' shortage of chaplains and their recent and repeated failure to meet their recruiting goals, this Court should not only defer to the support that Congress—with the President's assent—showed for people of faith in the 2023 NDAA but also resoundingly reject DoD bureaucrats' indifference and antipathy.

The April 5, 2024, Navy Chaplain Corps "Endorsers Quarterly Newsletter" is in fact an update of a critical and continuing problem that impacts our National Security. Supplement Application App. 738a-39a. The other services have not shared their recruiting results.

The "Endorsers Quarterly Newsletter", dated April 5, 2024, is a message from the Navy Chief of Chaplains providing an update on the Navy's recruiting efforts. The FY 24 "Recruiting Numbers" show "As of March 31, 2024":

> Active Duty: 20 added with the goal of 82 (24%)
>
> Reserve Duty: six sided with the goal of 15 (40%)
>
> Chaplain Candidates: 15 added with the goal of 40 (38%)

The message is that halfway through FY 24 the Navy has met only 24% of its Active Duty Chaplain recruiting goal. Applicants ask the Court to take judicial notice of the hostilities involving the Navy now taking place in the Middle East and threats thereof in other locations worldwide. The facts the Navy is over 100 chaplain short as explained by RADM Todd on page 2, his plea, "We desperately need chaplains", *id*., and the Navy's involvement in significant active combat in the Middle East, with other major power threats in Europe and the Far East

suggest the chaplain shortage is a serious problem.

A 7/16/2003 Epic Times article by JM Phelps, "In-Depth: Military Families No Longer Want Their Children to Enlist", https://www.theepochtimes.com/audio/us/in-depth-military-families-no-longer-want-their-children-to-enlist-5402430 (last checked 4/19/24), is not alone reporting serious moral problems due to DOD policies.

RADM Todd at 2 wants names of potential chaplains "to inform them of this amazing ministry." It would help if he were able to respond to questions about chaplains punished for following their conscience that this Court has enjoined DOD from further retaliation and is fixing the destroyed careers. The Petitioners Reply at 9-13 shows that is an easy thing for the Secretary to do, the problem is he will not fix anything absent a Court order.

Theses 38 Applicants were the named plaintiffs in a putative class action. Other chaplains were asking to join or seeking information when the case was dismissed. A military area defense counsel based on her interviews reported to the undersigned the class would be more than several hundred. DOD has not reported how many chaplains requested RARs. The point is this is not small problem.

CONCLUSION

The record shows that the Secretary cannot meet *FBI v. Fikre*'s criteria for mootness. He has not and will not return chaplains who filed RARs to their pre-mandate status nor addressed the continuing retaliation resulting from his policies and violation of the law. The record is also clear the Secretary does not intend to repair the destroyed careers of chaplains who requested a religious accommodation concerning the Covid alleged vaccine. This is contrary to Congress's specific order to rescind the mandate. An injunction should issue as requested to protect these chaplains from further destruction while the petition process unfolds and thereafter.

Respectfully submitted,

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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 21.2(c) and 33.2, I certify that the foregoing Supplement is proportionately spaced, has a typeface of Times New Roman, 12 points, and contain 2,874 words, less that the 3,000 word limit excluding this Certificate as to Form, the Table of Authorities, and the Table of Contents

Dated: April, 22, 2024

Respectfully submitted,

/s/

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APPENDIX FOR SUPPLEMENTAL BRIEF IN SUPPORT OF ALVARADO, ET AL, APPLICATION FOR WRIT OF INJUNCTION PENDING PETITION FOR A WRIT OF *CERTIORARI*

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ENDORSERS

Quarterly Newsletter

April 5, 2024

Recruiting Numbers FY24

As of March 31, 2024
Active Duty: 20 added with a goal of 82 (24%)
Reserve Duty: 6 added with a goal of 15 (40%)
Chaplain Candidates: 15 added with a goal of 40 (38%)

ACCESSIONS BOARD NOTES

On 3 April 2024, we held a Chaplain Appointment and Retention Eligibility Advisory Group (CARE-AG) to review applications and provide recommendations of the best and fully qualified to the Chief of Chaplains. The applicants selected as Active and Reserve component Chaplains or Chaplain Candidate Program Officers must meet the Professional Naval Chaplaincy requirements, have proven pastoral leadership with the highest potential, facilitate religious ministry in a pluralistic environment, care for all Service members, and provide relevant advice to commanders. The next CARE-AG will be held 15 May 2024 and will ensure applicants are the best qualified to serve in Naval Chaplaincy.

Application 738a

DESIGNATOR REQUIREMENTS

Direct Accession (4100) & Direct Commission (4105)

RO ENDORSEMENT: DD2088
Email Chief of Chaplain's office: chiefofchaplains1@us.navy.mil
EDUCATION: Bachelors degree ≥ 120 semester hours
3.0+ GPA on a 4.0 scale (recommended)
Must have a qualifying graduate degree ≥ 72 semester hours
3.4+ GPA on a 4.0 scale (recommended)
EXPERIENCE: 2 years of full-time ministry experience, post grad. degree
AGE: Commissioned prior to the age of 42
U.S. Citizenship
Requirements are the same for Active Duty and the Reserve Component

Chaplain Candidate Program Officer, CCPO (1945)

RO ENDORSEMENT: DD2088
Email Chief of Chaplain's office: chiefofchaplains1@us.navy.mil
EDUCATION: Bachelors Degree > 120 semester hours
3.0+ GPA on a 4.0 scale (recommended)
Enrolled full-time in a qualifying graduate school (at least 72 hours)
Maintain GPA of 3.0+ while in the program
AGE: Commissioned prior to the age of 38
U.S. Citizenship
EXPERIENCE: No ministry experience required to become a CCPO
WHILE IN THE PROGRAM:
Complete ODS, PNC-BLC Phase I, and OJT
Develop Pastoral identity while in the program

MESSAGE FROM THE CHIEF OF CHAPLAINS

Dear Partners in ministry to Sea Service personnel and their families,

I pray this finds you strengthened by a connection to the Divine, participating in a community of faith, sacrificing for a greater good, or living a life directed by meaning, purpose, and values. These four avenues are proven means leading to Spiritual Readiness and are championed by the Navy Chaplain Corps.

Let me share an opportunity with which I believe you can help.

The Department of the Navy has asked the Navy Chaplain Corps to grow from 932 authorized billets to 958 by FY28. Several factors have influenced this need for growth. Navy Chaplains are proving themselves to be a valuable resource in strengthening our service members. Current combat operations in the Red Sea have accentuated this truth, and potential future conflicts only serve to underscore it. Additionally, rising rates of suicide have signaled a greater need for mental health resources. Chaplains are well-suited to address sub-clinical concerns, freeing up mental health providers to address more acute clinical needs. Finally, studies have identified new areas of ministry that need to be addressed. Simply put, we need more chaplains.

The challenge is that we currently have 869 chaplains on active duty. This deficit is compounded by the fact that we have been unable to recruit enough chaplains to fill the growing need. As of March 31, 2024, we have only recruited 20 chaplains to serve on active duty with a goal of 82 by the end of the fiscal year. Additionally, we have only recruited six chaplains out 15 needed in the reserve community, and only 15 Chaplain Candidates toward our goal of 40. These shortfalls will continue to compound from year to year unless we turn it around now. This is where I need your help.

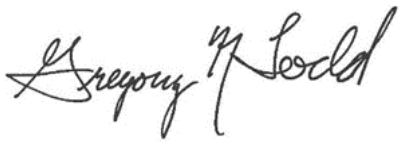
First, please pray for more chaplains. As people of faith, we cry out to God in our time of need. We desperately need chaplains, so please pray daily that God would send them.

Secondly, please share with everyone that the Navy wants the ministry of Navy Chaplains. In talking with Navy, Marine Corps, and Coast Guard leaders, the consistent message has been we need more chaplains. I believe there has never been a time in my career when the Chaplain Corps was more appreciated than right now. I am asking you to share this message with every interested person in your faith group. Please help me tell the story about the fulfilling ministry of being a Navy Chaplain.

Finally, I am asking you to send us names of possible candidates. We would relish the opportunity to talk with those whom you think have what it takes to be Navy Chaplains, even if they have never considered it. We would simply like the opportunity to inform them of this amazing ministry. If you have a candidate, please send the names and contact information to N312_Chaplain_Program_Accessions@us.navy.mil.

Again, the success of Professional Naval Chaplaincy rests on a partnership between you, our religious organizational partners, and the Department of the Navy. Thank you for your faithfulness to that covenant.

Sincerely Yours,



Application 739a