No. 23A264

In the Supreme Court of the United States

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

v.

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

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

APPLICATION TO EXTEND FURTHER THE TIME TO FILE A PETITION FOR A WRIT OF *CERTIORARI* BY ISRAEL ALVARADO *ET AL.*

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TABLE OF CONTENTS

APPENDIX

RULE 29.6 STATEMENT

Applicants are natural persons without parent companies or stock.

APPLICATION TO EXTEND FURTHER THE TIME TO FILE A PETITION FOR A WRIT OF *CERTIORARI*

To the Honorable Chief Justice John G. Roberts, Jr., as Circuit Justice for the United States Court of Appeals for the Fourth Circuit:

Pursuant to Supreme Court Rule 13(5), 40 military chaplains[1] ("Applicants" or "Chaplains") hereby respectfully apply for a further extension of 20 days—to and including Friday, December 29, 2023—of the time within which to petition for a writ of *certiorari*. Unless a further extension is granted, the deadline for filing the petition for *certiorari* will be December 8, 2023. Applicants file this application ten days prior to that current deadline.

In support of this request, Applicants states as follows:

1. In a summary Order dated August 3, 2023 (App. 1a), the United States Court of Appeals for the Fourth Circuit granted the federal respondents' motion to dismiss the appeal as moot. This Court has jurisdiction under 28 U.S.C. § 1254(1).

2. By Order dated November 22, 2022 (App. 3a), the District Court for the Eastern District of Virginia *sua sponte* dismissed the Chaplains' case in conjunction with denying their motion for a preliminary injunction. By Memorandum Opinion

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[1] Israel Alvarado, Brenton C. Asbury, Jordan Ballard, Steven Barfield, Chad Booth, Jeremiah Botello, Walter Brobst, Justin Brown, David Calger, Mark Cox, Clayton Diltz, Jacob Eastman, Thomas Fussell, Nathanael Gentilhomme, Doyle Harris, Michael Hart, Jeremiah Henderson, Andrew Hirko, Krista Ingram, Ryan Jackson, Jacob Lawrence, Joshua Layfield, James Lee, Brad Lewis, Robert Nelson, Rick Pak, Randy Pogue, Gerardo Rodriguez, Parker Schnetz, Lance Schrader, Richard Shaffer, Jonathan Shour, Jeremiah Snyder, David Troyer, Seth Weaver, Thomas Withers, Justin Wine, Matthew Wronski, Jerry Young, and Jonathan Zagdanski.

and Order dated February 17, 2023 (App. 22a), that court denied the Chaplains' motion for reconsideration. App. 22a.

3. By Order dated September 27, 2023, the Circuit Justice granted a 38-day extension of the time for Applicants to petition for a writ of *certiorari*.

4. For purposes of their forthcoming petition for a writ of *certiorari*, the Chaplains' action arises under the First Amendment's Establishment, Free Exercise, Free Speech, and Petition Clauses, U.S. CONST. amend. I, cl. 1-3, 6, the Due Process Clause, U.S. CONST. amend. V, cl. 3, the Religious Test Clause, U.S. CONST. art. VI, cl. 3, the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 ("RFRA"), and Section 533 of the National Defense Authorization Act for Fiscal Year 2013, PUB. L. NO. 112-239, § 533(a)(1), 126 Stat. 1632, 1727 (2013), as amended by National Defense Authorization Act for Fiscal Year 2014, PUB. L. NO. 113-66, § 532(a), 127 Stat. 672, 759 (2013) ("§ 533"), and challenges actions taken by the Department of Defense and the Armed Services (collectively, "DoD") under a vaccine mandate.

5. Specifically, the Chaplains' putative class action challenges not only DoD's authority to mandate that all service members take COVID-19 vaccines, but also DoD's implementation of that mandate to deny religious accommodation requests ("RARs") and to punish those who file RARs with career-destroying negative personnel actions, all in violation of the foregoing statutory and constitutional protections of conscience and prohibitions of retaliation. The Chaplains' complaint alleges that DoD implemented the mandate in a manner designed to purge the Armed Services of those who believe in following their conscience as formed by their faith,

as least with respect to abortion-based objections to vaccines developed using fetal tissue.

6. As this Court is already aware from *Kendall v. Doster*, No. 23-154 (U.S.) (petition for writ of *certiorari* pending), Congress directed DoD to rescind the vaccine mandate, *see* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, PUB. L. NO. 117-263, § 525, 136 Stat. 2395, 2571-72 (2022), and DoD subsequently ceased mandating vaccinations and directed the Armed Forces to "remove any adverse actions *solely* associated with denials of such requests." *See* Memorandum, Secretary of Defense, Rescission of August 24, 2021, and November 30, 2021, Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces (Jan. 10, 2023) (emphasis added) (App. to Pet. Cert., 187a, *Kendall v. Doster*, No. 23-154 (U.S.)).

7. For purposes of RFRA's broad equitable power to issue "appropriate relief," 42 U.S.C. §2000bb-1(c), "it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction" for statutory violations. *School Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985) (discussing Education of the Handicapped Act).

8. Under this Court's precedents of remedies for discrimination, it seems similarly clear that removing only adverse personnel action *solely* resulting from DoD's allegedly unlawful actions neither addresses all injuries *related to or arising from* the mandate nor makes the Chaplains whole by restoring them to their rightful place. *See, e.g.*, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *Franks v.*

Bowman Transp. Co., 424 U.S. 747, 767-68 (1976); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 n.12 (1989) (plurality); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003). For example, chaplains denied promotion for filing RARs could be separated from the military for failing to get promoted.[2] Similarly, chaplains unnecessarily and unlawfully denied training for filing RARs could be denied promotion for failure to obtain training.[3] Congress generally addressed religious accommodation in RFRA and specifically addressed both of the foregoing examples in § 533. PUB. L. NO. 112-239, § 533(a)-(b), 126 Stat. at 1727. In each of these examples, the adverse personnel action may not be caused *solely* by DoD's allegedly unlawful policies, but the vaccine mandate and those policies would be but-for causes of the adverse action.

9. In sum, the Chaplains continue to suffer from adverse personnel actions but-for caused by DoD's allegedly unlawful vaccine mandate and its implementing policies, even if not *solely* caused by the mandate and policies. As such, the Chaplains' suit is not moot under this Court's two-part test for mootness in these circumstances:

> (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and
>
> (2) interim relief or events have *completely and irrevocably eradicated the effects* of the alleged violation.

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[2] Indeed, Chaplains Calger, Diltz, Fussel, Gentilhomme, and Harris failed of selection (*i.e.*, passed over) *twice*, which threatens their separation from the Armed Services. *See* 10 U.S.C. § 632.

[3] Chaplain Calger recently received an order separating him on December 1, 2023, for two failures of selection due to his inability to attend training because of his RAR status.

County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (emphasis added, internal quotation marks, alterations, and citations omitted). The lower courts' summary treatment of the important federal issues that the Chaplains raise not only conflicted with the decisions of this Court, S.Ct. Rule 10(c), but also sufficiently departed from the accepted and usual course of judicial proceedings to warrant this Court's supervisory power. *Id.* 10(a).

10. The Chaplains seek a further extension of the time within which to petition this Court for two reasons: (a) the competing personal and professional obligations of counsel, and (b) the potential impact of this Court's action on the Chaplains' forthcoming application for interim relief.

11. First, the Chaplains' undersigned counsel of record has been engaged not only in competing professional obligations—including a Fourth Circuit appellate reply brief on November 22, 2023—but also in unexpected health problems that have hospitalized his wife with varying life-threatening and changing symptoms over the weeks surrounding Thanksgiving. In addition, the undersigned counsel has sought assistance from new co-counsel, effective November 1, 2023. Prior to taking on assistance in this action, the co-counsel had appellate reply briefs due November 14, 2023, and November 30, 2023, in other matters. These competing demands have worked against the expeditious completion of the Chaplains' filings in this matter.

12. Second, because the military—like law firms—uses an "up or out" approach to retention and promotion, merely "un-dismissing" the Chaplains' action would not preserve this Court's future jurisdiction over a merits appeal after a

remand to the district court. By the time a merits appeal reaches this Court, DoD may have succeeded in driving the Chaplains out of the Armed Services, based on mixed-motive discrimination and adverse action *related to*—but not *solely* caused by—DoD's mandate. Accordingly, the Chaplains intend to apply to this Court for interim relief later this week. Because the Court's favorable action on interim relief would necessarily resolve the Article III basis on which the Fourth Circuit dismissed the appeal, *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983), the Court might construe the Chaplains' application for interim relief as a petition for a writ of *certiorari*, *Nken v. Mukasey*, 555 U.S. 1042 (2008); *Trump v. Mazars USA, LLP*, 140 S.Ct. 660 (2019); *United States v. Texas*, 142 S.Ct. 14 (2021), and summarily reverse. *See*, *e.g.*, *James v. City of Boise*, 577 U.S. 306, 307 (2016). Because the Court's action on the application for interim relief may moot or alter the need to petition this Court for a writ of *certiorari*, the Chaplains respectfully submit that a 20-day extension would clarify the issues presented here.

13. The requested 20-day extension would not prejudice the respondents.

CONCLUSION

WHEREFORE, for the foregoing reasons, Applicants request a further 20-day extension—to and including December 29, 2023—of the time within which Applicants may file a petition for a writ of *certiorari*.

Dated: November 28, 2023

Respectfully submitted,

/s/ Arthur A. Schulcz, Sr.

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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22 and 33, I certify that the foregoing application is proportionately spaced, has a typeface of Century Schoolbook, 12 points, and contain 6 pages (and 1,547 words) respectively, excluding this Certificate as to Form, the Table of Contents, and the Certificate of Service.

Dated: November 28, 2023

Respectfully submitted,

/s/ Arthur A. Schulcz, Sr.

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ISRAEL ALVARADO, *ET. AL.*,
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v.

LLOYD AUSTIN, III, *ET. AL.*,
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To the Honorable John G. Roberts, Jr.,
Chief Justice of the United States and
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APPENDIX TO APPLICATION TO EXTEND FURTHER THE TIME TO FILE A PETITION FOR A WRIT OF *CERTIORARI* BY ISRAEL ALVARADO *ET AL.*

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TABLE OF CONTENTS

FILED: August 3, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1419
(1:22-cv-00876-AJT-JFA)

ISRAEL ALVARADO; STEVEN BARFIELD; WALTER BROBST; JUSTIN BROWN; DAVID CALGER; MARK COX; JACOB EASTMAN; THOMAS FUSSELL; NATHANAEL GENTILHOMME; DOYLE HARRIS; JEREMIAH HENDERSON; ANDREW HIRKO; KRISTA INGRAM; RYAN JACKSON; JOSHUA LAYFIELD; JAMES LEE; BRAD LEWIS; ROBERT NELSON; RICK PAK; RANDY POGUE; GERARDO RODRIGUEZ; PARKER SCHNETZ; RICHARD SHAFFER; JONATHAN SHOUR; JEREMIAH SNYDER; DAVID TROYER; SETH WEAVER; THOMAS WITHERS; JUSTIN WINE; MATTHEW WRONSKI; JERRY YOUNG; BRENTON C. ASBURY; JORDAN BALLARD; CHAD BOOTH; JEREMIAH BOTELLO; CLAYTON DILTZ; MICHAEL HART; JACOB LAWRENCE; LANCE SCHRADER; JONATHAN ZAGDANSKI,

Plaintiffs - Appellants,

v.

LLOYD J. AUSTIN, III, in his official capacity as Secretary of Defense, U.S. Department of Defense; FRANK KENDALL, in his official capacity as Secretary of the Air Force, Department of the Air Force; CARLOS DEL TORO, in his official capacity as Secretary of the Navy, Department of the Navy; CHRISTINE WORMUTH, in her official capacity as Secretary of the Army, Department of the Army; XAVIER BECERRA, in his official capacity as Secretary, U.S. Department of Health and Human Services; ROBERT CALIFF, M.D., in his official capacity as Commissioner of the U.S. Food and Drug Administration; ROCHELLE WALENSKY, in her official capacity as Director, Centers for Disease Control and Prevention,

Defendants - Appellees.

ORDER

Upon review of the submissions relative to the motion to dismiss, the court grants the motion and dismisses this appeal as moot. The court vacates the district court's orders denying the preliminary injunction, dismissing the complaint, and denying reconsideration and remands the case to the district court with directions to dismiss as moot. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–40 (1950); *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 14 F.4th 322, 327–328 (4th Cir. 2021).

The motion for oral argument is denied.

Entered at the direction of the panel: Judge Gregory, Judge Harris, and Judge Rushing.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ISRAEL ALVARADO, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Case No.: 1:22-cv-876 (AJT/JFA)
LLOYD AUSTIN, III, *et al.*,	)	
	)	
Defendants.	)	
	)	

ORDER

Plaintiffs have moved for a Preliminary Injunction (the "Motion")[1] [Doc. No. 59] to enjoin Defendants, executive branch officials, from enforcing the military's vaccine directive or taking any adverse action against Plaintiffs, a proposed class of military chaplains, on the basis of any Plaintiff's refusal to vaccinate against COVID-19. After full briefing, on September 28, 2022 the Court held a hearing on the Motion. After the hearing, Plaintiffs Moved for Leave to File Supplemental Evidence [Doc. No. 74], which the Court granted [Doc. No. 77]. That supplemental evidence was further briefed [Doc. Nos. 80, 81]. After full consideration of the briefings and arguments, for the following reasons, the Motion is **DENIED** and the Complaint **DISMISSED** *sua sponte* for lack of subject-matter jurisdiction based on non-justiciability.

[1] Plaintiffs' Memorandum in Support of the Motion [Doc. No. 60] shall be referred to as "Mem.," Defendants' Opposition in Response to the Motion [Doc. No. 64] shall be referred to as "Opp.," and Plaintiffs' Reply to the Opposition [Doc. No. 66] shall be referred to as "Reply."

I. BACKGROUND

A. Parties

Plaintiffs are forty-two[2] active duty and reserve military chaplains seeking to represent a purported class of more than 100 chaplains in opposition to the COVID-19 vaccine directive (the "Directive") issued by Department of Defense ("DoD") Secretary Lloyd Austin, III. In addition to Secretary Austin, Plaintiffs name the Secretary of the Navy, Secretary of the Army, Secretary of the U.S. Department of Health and Human Services ("HHS"), Acting Commissioner of the U.S. Food and Drug Administration ("FDA"), and Director of the Centers for Disease Control and Prevention ("CDC"), all in their official capacities. Plaintiffs allege the Directive and its subsequent implementation and enforcement, along with a CDC definitional change, have triggered statutory and constitutional violations. Consequently, Plaintiffs seek to preliminarily enjoin the Directive and secure other injunctive remedies for the alleged violations.

B. Impact of COVID-19 on the Armed Forces

Amid a global pandemic that has killed more than a million Americans, the Department of Defense ("DoD") implemented policies that it claims were based on senior military leaders' judgment related to force readiness and aimed at "reducing the risk of infections, hospitalizations, and deaths among service members." Opp. 1-2. More than 400,000 servicemembers have contracted COVID-19 and ninety-six have died. *Id.* at 2. Of those who died, only two were fully vaccinated. *Id.* And while no active duty servicemembers have died from COVID-19 since late last year,[3] Mem. 6, serious illness, outbreaks, and/or long-haul COVID adversely affect military operations, Opp. 2.

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[2] The Complaint originally named thirty-one Plaintiffs. Compl. ¶¶ 28 - 58. Eleven additional chaplains were later joined as Plaintiffs under Fed. R. Civ. P. 20(a). [Doc. No. 68].

[3] It is worth noting that the last death occurred not long after the Directive was issued.

C. The Directive, Implementation, and Objections

After previewing an upcoming COVID-19 vaccine requirement two weeks prior, on August 24, 2021, the day after the FDA granted final approval of the Pfizer vaccine, Secretary Austin issued the Directive to require full vaccination against COVID-19 for all members of the armed forces.[4] Opp. 3. Following the Directive, the Army, Navy, and Air Force issued implementation guidance and set vaccination deadlines. *Id.* The guidance established exemptions for medical,[5] administrative,[6] and religious purposes. *Id.* at 4. A servicemember's application for a religious exemption is called a Religious Accommodation Request ("RAR").

While exact procedures vary, each service branch has a process for RARs that includes (a) an appeals process; (b) input from another chaplain, medical professional, the requesting service member, and the commanding officer; and (c) review by a senior military leader. *Id.* Some RARs have been approved,[7] *id.* at 4, but Plaintiffs assert that the few approved RARs are limited to servicemembers "already programed for retirement or separation," Mem. 10.

When active duty servicemembers refuse vaccination and have not been granted an exemption, administrative discharge proceedings are initiated.[8] Opp. 5. While procedures vary by department, in the Navy, Marine Corp, and Air Force, such proceedings take a minimum of several

[4] DoD presently requires all service members to receive nine vaccines as part of its immunization program, with an additional eight vaccinations possible depending on a servicemember's elevated risk factors. Opp. 3. The immunization program is part of DoD's "Individual Medical Readiness" requirement for service and mobilization efforts. *Id.*

[5] Medical exemptions include, *inter alia*, pregnancy, if a service member has COVID-19, or a medical contraindication for the vaccine. *Id.* at 4. Plaintiffs argue the medical exemption should recognize immunity from a documented prior COVID-19 infection. Mem. 5-6.

[6] Examples of administrative exemptions include those "for members who are missing or who are on terminal leave in anticipation of separation." Opp. 4.

[7] As reflected in the citations in Defendants' brief, as of July 7, 2022, there have been 7,701 RARs for the Active Army, Army National Guard, and Army Reserve, and 19 have been granted. *Id.* For the Navy, as of August 24, 2022, there have been 4,251 RARs for the Active Duty and Reserve members, and 47 have been granted. *Id.* Air Force numbers are not discernible because RARs are considered a subset of administrative exemptions, and only total administrative exemptions are reported. *Id.*

[8] As represented by the parties, such proceedings are presently "largely enjoined" for the Navy, Air Force, and Marine Corps. *Id.* at 5.

months to complete and do not necessarily conclude with termination. *Id.* However, where they do end with termination, an Honorable or General (under honorable conditions) Discharge is issued. *Id.* And even after discharge, additional remedies are available. *Id.* In the Air Force, prior to a possible discharge, servicemembers out of compliance and without an exemption are placed in a no pay/no points status and involuntarily reassigned to the Individual Ready Reserve.[9] *Id.* at 6. In the Army, no guidance regarding a discharge process has yet been issued, though DoD does not provide funding for pay for unvaccinated Army National Guard or Reserve members who do not have an approved or pending exemption request. *Id.* at 5. Additionally, Army National Guard and Reserve troops in this category are not permitted to participate in drills, training, or other duties. *Id.* at 5-6.

With respect to the Directive, Plaintiffs lodge personal objections to the vaccine on a variety of religious and secular grounds, none of which require, given the basis for the Court's ruling discussed below, that the Court assess the military, religious, ethical or scientific basis for those objections.

D. Religious Accommodation Requests and Alleged "No Accommodation Policy"

Plaintiffs allege that DoD established a "No Accommodation Policy," or "Categorial RA Ban." Mem. 9. They largely base their allegations on information and belief and their own declarations, along with a two-page memorandum purportedly from DoD's Acting Inspector General and the declaration of a Navy servicemember who is not a plaintiff in this case. *Id.*; Compl. ¶¶ 97-101; Mem. 9-11 & n.19; Mem. Ex. 9; *see generally* Mot. for Leave to File Supp. Evid. [Doc. No. 74]; Reply to Def. Resp. to Mot. for Leave to File Supp. Evid. [Doc. No. 81]. Plaintiffs further argue that because the language in denial letters is similar and because only senior military officials

[9] The Individual Ready Reserve ("IRR") allows servicemembers to transfer and complete their remaining service obligation rather than be discharged. *Id.* at 6.

serve as the final adjudicatory authority, RAR results are predetermined. Mem. 9-10. Defendants deny the existence of a wholesale RAR rejection policy and assert that RARs are individually considered. Opp. 18.

E. Alleged Harm to Unvaccinated Chaplains for Refusing to Vaccinate

Plaintiffs allege that because they refuse to comply with the Directive, they have been denied promotion, schooling, training, and assignments. Mem. 10. Further, they allege First Amendment violations and other harms on account of their exclusion from the RAR process,[10] compelled speech, hostile work environment, ostracization/isolation/stigmatization, futility of the RAR process, retaliation, and censorship/self-censorship. *Id.* at 10-11, Ex. 11. Plaintiffs also allege they were "coerce[d] and coopt[ed] [] to be complicit in these constitutional violations" by allegedly receiving scripts to recite "government-endorsed positions" when counseling other servicemembers on religious objections to the vaccine. *Id.* at 11. Plaintiffs also assert a variety of adverse employment or disciplinary consequences that either have or could result from their refusal to comply with the Directive. *Id.* at 12. In total, Plaintiffs assert nine causes of action based on alleged violations of statutory and constitutional provisions.[11]

F. Treatment by Other Courts

As compared to similar cases where servicemembers (though not chaplains) have sought preliminary injunctive relief related to the Directive, the vast majority of courts as of the Parties'

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[10] Presumably, Plaintiffs refer to their exclusion from the RAR process to mean their exclusion from being permitted to be the consulting chaplain on *other* servicemembers RARs, not from their exclusion in the process for their own RARs.

[11] Plaintiffs assert the following causes of action:
Counts I and II: National Defense Authorization Act § 533
Count III: Religious Freedom Restoration Act
Count IV: Article VI and Establishment Clause
Count V: Free Exercise Clause
Count VI: Free Speech and Right to Petition Clauses
Count VII: Fifth Amendment Due Process
Count VIII: Administrative Procedure Act
Count IX: Separation of Powers

briefing have denied preliminary relief (or dismissed the claims),[12] while significantly fewer have preliminarily enjoined either the vaccine requirement or the military from taking any adverse actions against those plaintiffs. Opp. 8-9. There have been no such cases within the Fourth Circuit. *Id.* And while no case has reached the Supreme Court for full consideration, the Supreme Court, as discussed below, has stayed one district court's issuance of a preliminary injunction that would have precluded the Navy from considering "vaccination status in making deployment, assignment, and other operational decisions." *Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301, 1301 (2022).

II. LEGAL PRINCIPLES

Plaintiffs seek a preliminary injunction, which the Supreme Court has described as "an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Preliminary injunctions are "very far-reaching power[s] to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola*, 245 F.3d 335, 339 (4th Cir. 2001) (quoting *Direx Israel, Ltd. V. Breakthrough Med. Corp.*, 952 F.2d 802, 816 (4th Cir. 1991)). To obtain relief, a plaintiff must show all four of the following factors: "[1] he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest."

[12] *See, e.g.*, *Miller v. Austin*, No. 22-cv-118, 2022 WL 3584666, at *1-2 (D. Wyo. Aug. 22, 2022) (denying preliminary injunction for lack of standing); *Abbott v. Biden*, No. 6:22-3, 2022 WL 2287547, at *6 (E.D. Tex. June 24, 2022) (denying preliminary injunction because of, *inter alia*, deference afforded to the military); *Knick v. Austin*, No. 22-1267, 2022 WL 2157066, at *1 (D.D.C. June 15, 2022) (denying preliminary injunction and declining "to meddle prematurely in the military's decision-making regarding personnel readiness"); *Creaghan v. Austin*, No. 22-981, 2022 WL 1500544, at *1, 6 (D.D.C. May 12, 2022) (denying preliminary injunction and noting "military and scientific justiciability concerns"); *Navy Seal 1 v. Austin*, No. 22-688, 2022 WL 1294486, at *1, 6 (D.D.C. Apr. 29, 2022) (denying preliminary injunction and expressing concerns that the claims "may be nonjusticiable"); *Short v. Berger*, No. cv-22-444, 2022 WL 1203876, at *16 (D. Ariz. Apr. 22, 2022) (denying preliminary injunction and noting "serious questions as to justiciability"); *Vance v. Wormuth*, No. 3:21-cv-730, 2022 WL 1094665, at *7 (W.D. Ky. Apr. 12, 2022) (granting a motion to dismiss for want of subject-matter jurisdiction); *Roberts v. Roth*, No. 21-1797, 2022 WL 834148, at *1 (D.D.C. Mar. 21, 2022) (dismissing the case for want of subject-matter jurisdiction); *Short v. Berger*, No. cv-22-1151, 2022 WL 1051852, at *6 (C.D. Cal. Mar. 3, 2022) (applying the *Mindes* test and denying preliminary injunction on justiciability grounds); *Robert v. Austin*, No. 21-cv-2228, 2022 WL 103374, at *3 (D. Colo. Jan. 11, 2022) (denying preliminary injunction and dismissing the case for want of subject-matter jurisdiction); *Church v. Biden*, 573 F. Supp. 3d 118, 137-38 (D.D.C. 2021) (finding servicemembers' claims to be non-justiciable).

Winter, 555 U.S. at 20. The first two factors are most important. *Maryland Undercoating Co. v. Payne*, 603 F.2d 477, 482 n.12 (4th Cir. 1979); *see also Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977) (finding that if irreparable injury is only "possible," then the probability of success can be the decisive inquiry). The party moving for the preliminary injunction carries the burden of establishing each factor by a "clear showing." *Hardnett v. M&T Bank*, 204 F. Supp. 3d 851, 862 (E.D. Va. 2016) (quoting in part *Winter*, 555 U.S. at 22).

Traditionally, the Supreme Court has afforded deference to the military over military decisions, free from judicial interference. *See Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("The complex[,] subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional judgments") and *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("[W]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities"); *see also Solorio v. United States*, 483 U.S. 435, 448 (1987) ("[W]e have adhered to [the] principle of deference in a variety of contexts where . . . the constitutional rights of servicemen were implicated); *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975) ("It is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise . . . [and] [t]he responsibility for determining how best our Armed Forces shall attend to that business rests" outside the judiciary) (quoting in part *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)).

III. ANALYSIS

Plaintiffs' likelihood of success on the merits necessarily requires an evaluation into whether the Court can exercise its jurisdiction. Accordingly, the Court must first evaluate the likelihood that Plaintiffs' claims are justiciable. Defendants argue Plaintiffs' claims are non-justiciable because they (1) amount to a review of military assignment and operational decisions, (2) fail to exhaust administrative remedies,[13] and (3) do not satisfy the four-factor test articulated in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971) (the "*Mindes* test").

A. Review of Military Assignment and Operational Decisions

Plaintiffs seek injunctive relief to enjoin (1) the Directive's implementation, (2) Defendants' purported retaliation, (3) any punitive or administrative action from being taken against Plaintiffs, and (4) compliance with various statutory and constitutional provisions. Mot. 1. But such injunctive relief clearly raises the specter of a non-justiciable, improper intrusion into military affairs. *See Winter*, 555 U.S. at 24 (reversing the district court's grant of a preliminary injunction because, *inter alia*, the "complex[,] subtle, and professional decisions as to the composition, training, equipping, and control of a military force [] are essentially professional military judgments") (citation and quotations omitted); *see also Gilligan*, 413 U.S. at 10 ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence [than] . . . professional military judgments."); *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) ("[J]udges are not given the task of running the Army."); *Harkness v. Sec'y of the Navy*, 858 F.3d 437, 443 (6th Cir. 2017) ("[C]ourts are generally reluctant to review claims involving military duty assignments

[13] Exhaustion is considered the second threshold requirement that must be satisfied as an initial matter before reaching the four-factor *Mindes* test, the first being that there exists an allegation of a constitutional, statutory, or military regulation violation. *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971); *see also Williams v. Wilson*, 762 F.2d 357, 360 (4th Cir. 1985) (noting a plaintiff's failure "to satisfy the second *Mindes* threshold requirement of exhaustion of available intraservice remedies"). Here, the first threshold requirement is satisfied.

. . . [due to] lack of expertise, deference to the unique role of the military in our constitutional structure, and the practical difficulties that would arise if every military duty assignment was open to judicial review.") (internal quotations and citations omitted).

Critically, in a recent military vaccine case the Supreme Court has stayed a district court's order "preclud[ing] the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions." *U.S. Navy Seals 1-26*, 142 S. Ct. at 1302. In that case, Justice Kavanaugh's concurrence pointedly noted that "the President of the United States, not any federal judge, is the Commander in Chief of the Armed Forces" and that there was no basis to "employ[] the judicial power in a manner that military commanders believe would impair the military." *Id.* at 1302 (Kavanaugh, J. concurring).

Plaintiffs argue their claims are justiciable by first citing *Winters v. United States*, 89 S. Ct. 57 (1968) (Douglas, J., in chambers), a decision on an application for a stay that noted it was within the province of the judiciary to ensure men and women in the military are treated equally under the law and in ways that "do not turn on the charity of a military commander." *Winters,* 89 S. Ct. at 59-60 (Douglas, J., in chambers). But the ultimate holding in *Winters* is based on facts that are distinguishable from this case. In *Winters*, the Court's rationale was to prevent men and women from being treated differently by different superiors within the military. *Id.* By contrast, Plaintiffs here challenge what they purport to be the practice of the *entire* military (*i.e.*, the alleged No Accommodation Policy). Additionally, *Winters* is distinguishable in that it involves a reservist attempting to *evade* active-duty call-up to Vietnam, *id.* at 57, whereas this case involves servicemembers' attempt to *remain and advance* in the military.

Specifically with respect to the RFRA claim, Plaintiffs also argue those claims are justiciable because the statute permits the assertion of a violation "as a claim or defense in a judicial

proceeding and [to] obtain appropriate relief against the government," thereby making such claims justiciable. Mem. 18 (citing 42 U.S.C. § 2000bb-1(c)). But while RFRA claims may be justiciable in certain military contexts, *see Singh v. McHugh*, 185 F. Supp. 3d 201, 218 (D.D.C. 2016) (finding RFRA applies to the military), the *Mindes* test raises the justiciability bar considerably and for the foregoing reasons, weighs heavily against the likelihood of success of Plaintiffs' claims in this specific case.[14]

Ultimately, given the threat that COVID-19 poses to, *inter alia*, military readiness and operations, the Court finds persuasive and analogous the line of cases affording significant leeway to military leaders for these types of military judgments. Accordingly, *Winter v. NRDC* and its progenitors, along with Justice Kavanaugh's recent concurrence in a similar case, counsel that Plaintiffs' claims, with the possible exception of Count III, are non-justiciable military judgments, even before confronting the *Mindes* test. However, notwithstanding the Court's finding that apart from potentially Count III, Plaintiffs have, at a minimum, failed at the outset to clearly show that all their claims are justiciable, the Court will further consider justiciability issues by next applying the second *Mindes* threshold requirement of exhaustion.

B. Exhaustion of Administrative Remedies

Separately, to succeed on their claims, Plaintiffs must exhaust their available remedies within the armed forces. *See Parisi v. Davidson*, 405 U.S. 34, 37 (1972) (describing the exhaustion doctrine as allowing "an administrative agency to perform functions within its special competence

[14] In specifically addressing 42 U.S.C. § 2000bb-1(b) in a similar case related to the military's COVID-19 vaccine Directive, Justice Kavanaugh specifically foreclosed the possibility that a RFRA claim would survive:

> [E]ven accepting that RFRA applies in this particular military context, RFRA does not justify judicial intrusion into military affairs in this case. That is because the Navy has an extraordinarily compelling interest in maintaining strategic and operational control over the assignment and deployment of all Special Warfare personnel—including control over decisions about military readiness. And no less restrictive means would satisfy that interest in this context.

U.S. Navy Seals 1-26, 142 S. Ct. at 1302 (Kavanaugh, J., concurring). Plaintiffs do point to the *minority* of related military vaccine cases that found similar claims justiciable, which the Court finds unpersuasive.

. . . to moot judicial controversies"); *Williams v. Wilson*, 762 F.2d 357, 359-60 (4th Cir. 1985) (holding that under *Mindes*, courts "should not review internal military affairs" absent "exhaustion of available intraservice corrective measures"). That Plaintiffs allege constitutional and statutory claims against the military do not obviate Plaintiffs' obligation to exhaust the military's intraservice corrective measures prior to filing suit. *See Mindes*, 453 F.2d at 201.

Defendants argue that (1) no Plaintiff has yet faced separation proceedings, and (2) even if they do and receive a final separation order, they can pursue corrections to their military record and/or reinstatement through existing processes. Opp. 16. Plaintiffs argue that such relief is futile because it could be overridden by the Service Secretaries and would not declare Defendants' actions as unlawful and therefore available avenues of relief are imperfect remedies that need not be exhausted. Mem. 21. However, Plaintiffs only assume, but have not demonstrated, futility. Moreover, that Plaintiffs seek relief that may extend outside of the scope of the administrative review process does not vitiate the exhaustion requirement. *See Guerra v. Scruggs*, 942 F. 2d 270, 277 (4th Cir. 1991) ("[T]he inability of the [correction] board to give the plaintiff all the relief he seeks does not automatically excuse the failure to exhaust."). Defendants represent, including through declarations of non-Defendant military leaders, that Plaintiffs' unexhausted administrative remedies are not futile formalities and would be determined on an individualized basis. Opp. 18.

Plaintiffs contend they have exhausted military remedies because they have each submitted an RAR. Reply 9. But it is undisputed that some Plaintiffs are still awaiting an initial decision on their RARs while others await their appeals. The Court rejects the notion that a mere pre-decision submission of an RAR, or even an RAR appeal submission can constitute exhaustion, even if the RAR approval rate is low. And Plaintiffs' position runs contrary to the definition of "exhaustion," which means the "pursuit of options until none remain." Exhaustion, Black's Law Dictionary (11th

ed. 2019). Further, not only are there outstanding intraservice remedies available to all Plaintiffs, but no Plaintiff has actually gone through separation proceedings, a fact which further forecloses a finding of exhaustion. And it is those final separation proceedings that are of particular consequence. Absent a separation proceeding and final decision, the Court cannot find that Plaintiffs have exhausted their intraservice remedies. And while district courts have admittedly reached different conclusions with respect to the exhaustion requirement as applied in similar cases, the Court finds persuasive the reasonings of those courts that have found servicemembers to have failed the exhaustion requirement. *See, e.g.*, *Short*, 2022 WL 1051852, at *4 (finding plaintiff's claims to be non-justiciable, in part because the plaintiff, whose appeal was denied but had not yet undergone separation proceedings, had "not yet exhausted administrative remedies" and that such remedies could not be categorized as futile).

The Court also finds unavailing Plaintiffs' argument that the futility exception to the exhaustion doctrine applies because (1) some RARs have been granted, and (2) no Plaintiff has fully exhausted available remedies, including by pleading their case in an administrative discharge proceeding; thus, it is premature to say that such remedies are futile.[15] *See id.* (rejecting a servicemember's futility argument because the approval rate was "not zero" and the plaintiff's evidence focused on the results of the RAR and RAR appeal process, *not* the results of separation proceedings, which would be the decisive inquiry to determine futility).[16]

[15] The Court has reviewed and considered all of the evidence, including the supplemental evidence that Plaintiffs submitted and the related briefing by the Parties. The Court affords little to no weight to the purported Info Memo from the Acting Inspector General. Not only does the short, two-page document fail to identify with sufficient specificity its evaluation methods, criteria, and sample size, but it is both preliminary in nature (*i.e.*, it only discusses "potential noncompliance") and contradicts the more concrete evidence that Defendants have presented. *See, e.g.*, declarations identified *infra* n. 17-21. Nevertheless, the Court is permitted to evaluate the justiciability of a claim based on the evidence before it, even in the early stages of litigation; *see Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999) ("[T]he absence of jurisdiction may be raised at any time during the case, and may be based on the court's review of the evidence."); and the Court has considered it. *See also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[I]n some instances, if subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own.").

[16] Other courts to address the futility argument are split.

Plaintiffs also argue that RFRA has no exhaustion requirement. Reply 9. But the cases to which Plaintiffs cite are either (a) those minority of federal courts that have granted preliminary injunctions in the military vaccine context; or (b) distinguishable as Plaintiffs' cited case, *Stuart Circle Parish v. Bd. of Zoning Appeals*, 946 F. Supp. 1225, 1234 (E.D. Va. 1996), was a civilian case about whether a church was required under RFRA to seek an accommodation prior to challenging a binding local law. Overall, Plaintiffs fail to address those military vaccine cases that find servicemembers' claims (including under RFRA) to be non-justiciable, in part on exhaustion grounds. *See, e.g.*, *Church*, 573 F. Supp. 3d at 137-38; *Short*, 2022 WL 1051852, at *3-4. In any event, even assuming *arguendo* that no *statutory* exhaustion requirement is *per se* imposed on the RFRA claim, the *jurisprudential* exhaustion requirement imposed under *Mindes*, as adopted by the Fourth Circuit, still controls. *Cf. Williams*, 762 F.2d at 360 (noting "the second *Mindes* threshold requirement of exhaustion of available intraservice remedies").

Based on the First Amendment, Plaintiffs also argue that under *Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013), exhaustion is not required when the government has "manifested its views" that a policy has been violated. Reply 9. But that is simply not the case here. Indeed, the policy at play in this case is that failure to vaccinate violates the Directive *unless* a servicemember has an approved exemption. Defendants have demonstrated through working files and declarations from

[intentionally left blank]

non-Defendant leaders in the Army,[17] Navy,[18] Marines,[19] Coast Guard,[20] and Air Force[21] that no wholesale denial policy exists and that individualized considerations are given to each RAR and appeal. On the evidence before the Court, it cannot be said that a top-down, universal policy exists that holds all servicemembers who seek RARs are in violation of the Directive on the sole basis that they seek a religious exemption. Indeed, Plaintiffs are specifically *not* in violation while pursuing an exemption. [Doc. No. 82] at 35:10-11. In other words, Plaintiffs are not in violation of the policy during the pendency of their RAR and/or RAR appeal, and if an RAR is granted (either in the first instance or after pursuing the intraservice appeal/remedy process) then there would be no violation for failing to vaccinate. This makes *Cooksey* inapposite.[22]

Ultimately, Plaintiffs' failure to clearly show that they exhausted their intraservice remedies alone precludes the Court from granting a preliminary injunction. However, for the sake of completeness and given the split among those courts that have evaluated the validity of Plaintiffs' futility argument, the Court will apply the *Mindes* test.

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[17] Declarations from U.S. Army Colonel Kevin J. Mahoney, Chief, G3 Operations Division, Office of the Army Surgeon General and U.S. Army Medical Command, Opp. Ex. 3; [Doc. No. 80] Ex. E; and U.S. Army Assistant Deputy for Military and Personnel Policy Frances Rivera, [Doc. No. 80] Ex. F.

[18] Declarations from U.S. Navy Vice Admiral William Merz, Deputy Chief of Naval Operations, Operations, Plans and Strategy, Opp. Ex. 4; U.S. Navy Admiral Michael M. Gilday, the highest-ranking uniformed officer in the Navy who serves as Chief of Naval Operations, [Doc. No. 80] at 2; *id.* at Ex. A; and U.S. Navy Captain Mery-Angela Sanabria Katson, Branch Head, Enlisted Plans and Policy, *id.* at Ex. D.

[19] Declarations from U.S. Marine Corps Lieutenant General David J. Furness, Deputy Commandant for Plans, Policies, and Operations, Opp. Ex. 6; U.S. Marine Corps General Eric M. Smith, the second-highest ranking uniformed officer in the Marine Corps who serves as the Assistant Commandant, [Doc. No. 80] at 2; *id.* at Ex. B; U.S. Marine Corps Colonel Adam L. Jeppe, Branch Head, Manpower Military Policy Branch of Manpower and Reserve Affairs, *id.* at Ex. G.

[20] Declaration from U.S. Coast Guard Rear Admiral Eric Jones, Deputy for Personnel Readiness, Opp. Ex. 8.

[21] Declarations from U.S. Air Force Major Matthew J. Streett, Staff Chaplain at the Office of the Chief of Chaplains, Opp. Ex. 12; and U.S. Air Force Major General John J. DeGoes, Deputy Surgeon General, [Doc. No. 80] Ex. C.

[22] Moreover, the cases that Plaintiffs cite in footnote 11 of their Reply are distinguishable as they fail to address the exhaustion doctrine as applied in *Mindes* and relate, respectively in the order they are cited, to a facial challenge to land use regulations, exhaustion under North Carolina law as it applies to civilian challenges on constitutional grounds to state statutes, and exhaustion of state administrative remedies in § 1983 actions.

C. *Mindes* Test

In *Williams v. Wilson*, the Fourth Circuit adopted the test set forth in *Mindes v. Seaman* for determining the reviewability by federal courts of actions by military authorities. *See Williams*, 762 F.2d at 360; *see also Roe v. Dep't of Def.*, 947 F.3d 207, 217-18 (4th Cir. 2010) (noting the *Mindes* test continues to be binding in the Fourth Circuit). The *Mindes* test requires district courts to weigh four considerations "in light of the general policy of nonreview of military matters." *Williams*, 762 F.2d at 359. The four factors are:

> (1) the nature and strength of the plaintiff's challenge to the military determination; (2) the potential injury to the plaintiff if review is refused; (3) the type and degree of anticipated interference with the military function; (4) the extent to which the exercise of military expertise or discretion is involved.

Id.

The parties agree that the *Mindes* test applies, but differ in their views concerning its application. First, as to the nature and strength of their challenge, Plaintiffs cite six cases where preliminary injunctions were granted in military vaccine cases to argue the strength of their case.[23] Mem. 7 & n.8. Second, as to injury, Plaintiffs claim a presumption that they will be irreparably harmed, and further state that loss of careers and career-related responsibilities, benefits, outside employment opportunities, and family disruptions constitute a serious injury. Mem. 22. Defendants counter that because Plaintiffs have not yet been formally disciplined or separated, any injuries are "wholly speculative." Opp. 20. Third, Plaintiffs claim neither (a) requiring DoD to follow existing policies nor (b) Plaintiffs' refusal to vaccinate, particularly given that other servicemembers remain unvaccinated due to medical exemptions, interferes with military functions. Mem. 23. Fourth, Plaintiffs contend adjudication of constitutional issues do not require military expertise, and that review of the military's alleged failure to follow its own policies is not

[23] Notably, Plaintiffs fail to address the majority of cases that have held otherwise. *See* Opp. 8-9 (collecting cases).

discretionary. Mem. 23. Defendants lump the third and fourth *Mindes* factors together, arguing that judicial resolution would improperly "scrutinize military determinations regarding the health and safety of service members and overall force readiness." Opp. 20.

On balance, each of the four *Mindes* factors weigh against judicial intervention. First, upon careful review of each of Plaintiffs' causes of action, the briefing in support thereof and in opposition thereto, and a review similar cases, the Court finds Plaintiffs' claims are not strong and are unlikely to succeed. Second, Plaintiffs' injuries are either not yet realized or redressable. Third, and most importantly, Defendants assert, and the Court places great weight in their expert military judgment, that injunctive relief would significantly interfere with military operations as it pertains to troop health and combat readiness. *See U.S. Navy Seals 1-26*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring) (finding no basis in a military vaccine case "for employing the judicial power in a manner that military commanders believe would impair the military"). Fourth, significant military expertise and discretion was necessary in crafting DoD's response to the pandemic given the unique training, mobilization, and health needs and dynamics associated with America's Armed Forces. *Id.* (citing a Navy Admiral's declaration). Therefore, the *Mindes* factors counsel against justiciability.

For the aforementioned reasons, Plaintiffs' Motion for a Preliminary Injunctions is **DENIED** because Plaintiffs have failed to make a "clear showing" that their claims are likely justiciable; therefore, the claims cannot be likely to succeed. In light of this finding, the Court need not consider the likelihood of success on the merits of each particular cause of action, except to the extent it already has in evaluating the RFRA claim, *supra* n.15, and the strength of Plaintiffs' claims overall under the first *Mindes* factor. *Cf. Flast v. Cohen*, 392 U.S. 83, 96 (1942) ("federal courts will not give advisory opinions") (quoting C. Wright, Federal Courts 34 (1963)).

IV. *Sua Sponte* Dismissal

More than 200 years ago, Chief Justice John Marshall laid the groundwork for the justiciability doctrine, proclaiming that "[q]uestions . . . which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison*, 5 U.S. 137, 170 (1803). One hundred and fifty years later, the Supreme Court applied this principle to hold that "judges are not given the task of running the Army," and that military decision-making "rests upon the Congress and upon the President of the United States and his subordinates." *Orloff*, 345 U.S. at 93-94. Congress has not enacted legislation related to a COVID-19 vaccination requirement in the military.[24] However, the President, through his subordinates, has acted and implemented the Directive.

Accordingly, and for the reasons articulated in Section III, *supra*, not only are Plaintiffs' claims unlikely to succeed for want of justiciability, they are, in fact, non-justiciable. The Court therefore lacks subject-matter jurisdiction and this action must be dismissed. *Cf. Hamilton v. Pallozzi*, 848 F.3d 614, 619 (4th Cir. 2017) ("Justiciability is an issue of subject-matter jurisdiction, and we have an independent obligation to evaluate our ability to hear a case before reaching the merits."). The Court makes this finding after Plaintiffs had ample opportunity to (and did) address justiciability, including (1) having fully briefed this issue in their memorandum accompanying their Motion, *see* Mem. 18-24; (2) having responded to Defendants' arguments in writing, *see* Reply 5-11; and (3) having had the opportunity to argue justiciability at the September 28 hearing, *see* [Doc. No. 82] at 4:7-9 (Plaintiffs' counsel noting "[m]y cocounsel will be handling justiciability, the *Mindes* application"). *See Robertson v. Anderson Mill Elementary Sch.*, 989 F.3d 282, 291 (4th Cir. 2021) (stating district courts may "exercise their authority to *sua sponte* dismiss

[24] Indeed, despite such legislation being introduced more than a year ago and *before* the Directive was announced, Congress has taken no action to advance the bill. *See* H.R. 3860, 117th Cong. (2021).

inadequate complaints if the procedure employed is fair to the parties" and plaintiffs are "afforded notice and an opportunity to amend the complaint or otherwise respond") (citations and quotations omitted).[25]

In light of the Court's finding of non-justiciability, Federal Rule of Civil Procedure 12(h)(3) demands that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." In this Circuit, "a federal court is obligated to dismiss a case whenever it appears the court lacks subject matter jurisdiction." *Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999); *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[C]ourts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party . . . . [W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety."); *Brickwood Contractors, Inc. v. Datanet Eng'g*, 369 F.3d 385, 390 (4th Cir. 2004) ("[Q]uestions of subject matter jurisdiction may be raised at any point during the proceedings and may (or, more precisely, must) be raised *sua sponte* by the court."); *Thompson v. Gillen*, 491 F. Supp. 24, 26 (E.D. Va. 1980) (remanding a case and noting that though no motion was filed, "courts of limited jurisdiction, such as this Court, have the duty, sua sponte, to determine in each case their jurisdiction to proceed").

The Court having found that Plaintiffs' claims are non-justiciable, and Plaintiffs having received notice of the justiciability issue through a fair procedure and then addressing it on three separate occasions, the Complaint is **DISMISSED** *sua sponte*.

[25] The Court recognizes that in some circumstances an evidentiary hearing must be held prior to dismissing a case for want of jurisdiction. *See Lovern*, 190 F.3d at 654. However, here, the Court lacks subject-matter jurisdiction because Plaintiffs' claims are non-justiciable based on the undisputed fact that, *inter alia*, Plaintiffs are servicemembers suing executive branch officials over a military policy based on the military's professional judgment. In other words, unlike in *Lovern*, jurisdictional facts are *not* "intertwined with the merits of the dispute[,]" *Id.* at 654, and dismissal at this stage promotes the efficiency the Fourth Circuit endorsed in *Lovern* when it disposed of the case early in the litigation. *Id.*

V. CONCLUSION

For these reasons, it is hereby

ORDERED Plaintiffs' Motion for Preliminary Injunction [Doc. No. 59] be, and the same hereby is, **DENIED**; and it is further

ORDERED that the above-captioned matter be, and the same hereby is, **DISMISSED** for lack of subject-matter jurisdiction; and it is further

ORDERED that Plaintiffs' Motion for Class Certification [Doc. No. 71] be, and the same hereby is, **DENIED** as moot.

The Clerk is directed to enter judgment in favor of Defendants pursuant to Federal Rule of Civil Procedure 58 and forward copies of this Order to all counsel of record.

Alexandria, Virginia
November 23, 2022

/s/
Anthony J. Trenga
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ISRAEL ALVARADO, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:22-cv-876 (AJT/JFA)
	)	
LLOYD AUSTIN, III, *et al.*,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs have filed a Motion for Reconsideration (the "Motion"), [Doc. No. 88], with respect to the Court's dismissal of this action on November 23, 2022. For the following reasons, the Motion is DENIED.

I. BACKGROUND

This action stems from a Complaint by military chaplains surrounding the military's COVID-19 Vaccine Mandate (the "Mandate"). The Court has previously summarized the Mandate and relevant issues, *see* [Doc. No. 86] at 2-6, and in response to Plaintiffs' Motion for a Preliminary Injunction, [Doc. No. 59], issued an Order on November 23, 2022, denying that motion and *sua sponte* dismissing the case for want of subject-matter jurisdiction, [Doc. No. 86] (the "Order").

After the Court's Order, the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 ("2023 NDAA") was enacted. [Doc. No. 90-1] at 1, 6.[1] Contained within the 2023 NDAA was an express provision, Section 525, requiring the Department of Defense to rescind the Mandate. [Doc. No. 94] at 5. On January 10, 2023, Secretary of Defense Lloyd Austin

[1] Exhibit 1 to [Doc. No. 90] is a corrected memorandum submitted by Plaintiffs to correct factual and other errors contained in the original memorandum in support of their Motion to Reconsider filed with the Court, [Doc. No. 89].

issued a memorandum rescinding the Mandate (the "Rescission Memo"), ordering that the military update records to remove adverse actions based on prior refusals to vaccinate, and outlining recourse for any servicemembers administratively discharged. [Doc. No. 94-1]. The Secretary also directed that further guidance be issued to ensure uniform implementation of the Rescission Memo. *Id.*

On December 17, 2022, Plaintiffs filed the Motion under Federal Rule of Civil Procedure 59(e), seeking reconsideration of the Court's Order on the grounds that (1) the 2023 NDAA amounted to a change in controlling law; (2) the Court made clear errors of law in dismissing this action; and (3) new evidence emerged and is now available to the Court.[2] [Doc. No. 90-1] at 1.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 59(e) permits a party to file a motion to alter or amend a judgment within 28 days after judgment is entered. The Fourth Circuit provides three grounds for reconsideration: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). However, "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly," *Pacific Ins. Co. v. Am. Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (quotation and citation omitted), and is "not intended to allow for reargument of the very issues that the court has previously decided," *DeLong v. Thompson*, 790 F. Supp. 594, 618 (E.D. Va. 1991).

[2] As discussed, *infra* Sec. III(C), the "new evidence" that Plaintiffs rely on is a statement that Government counsel made in a hearing before the Sixth Circuit, which Plaintiffs did not discover until after the Motion for Preliminary Injunction in this action was adjudicated. [Doc. No. 90-1] at 26-27.

III. ANALYSIS

For the reasons stated below, reconsideration is not warranted in this case because (a) the 2023 NDAA is not a change in law that affects the basis for the Court's Order and the 2023 NDAA would have resulted in the same *sua sponte* dismissal of this action, had it been in effect when the Court ruled on the preliminary injunction motion; (b) even if the purported "new evidence" was new, it is not material, and (c) there are neither clear errors of law that need to be corrected nor manifest injustice to be prevented.

A. Enactment of 2023 NDAA

Plaintiffs argue the 2023 NDAA "eliminates entirely the legal basis" for the Mandate and "conclusively demonstrates that Secretary Austin sought and did usurp major policy decisions properly made by Congress." [Doc. No. 90-1] at 7-6 (internal citation and quotation omitted). But Plaintiffs mischaracterize Section 525, which provides:

> Not later than 30 days after the date of the enactment of this Act, the Secretary of Defense shall rescind the mandate that members of the Armed Forces be vaccinated against COVID-19 pursuant to the memorandum dated August 24, 2021, regarding "Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members."

[Doc. No. 94] at 5. The 2023 NDAA does not address the legality of the Mandate or otherwise speak to whether Defendants acted outside of their authority by issuing and implementing the Mandate prior to the enactment of Section 525. Rather, Congress simply exercised its authority to make a post-Mandate policy decision with respect to the military. That Congress acted in such a fashion does not in and of itself suggest the Mandate was unlawful or that the Court erred in its legal analysis based on the then-existing facts and law.

Plaintiffs further contend that Section 525 "eliminates" a central premise to the Court's *sua sponte* dismissal.[3] [Doc. No. 90-1] at 7. But again, the enactment of the 2023 NDAA did not establish or in any way suggest that the Court erred in concluding that decisions such as whether to require that troops be vaccinated rest outside Article III. If anything, the 2023 NDAA endorses the Court's reasoning as it shows that even absent judicial review, the Mandate was at all times subject to civilian review through the political branches.[4]

The 2023 NDAA and the Rescission Memo also confirm that Plaintiffs have still failed to exhaust their intraservice remedies and their claims are non-justiciable because, *inter alia*, they are not ripe claims. No Plaintiff can now be separated on account of their vaccination status. And to the extent any Plaintiff complains of any other alleged harm stemming from their refusal to vaccinate – *e.g.*, exclusion from certain assignments/training, letters of reprimand, etc. – they have not exhausted their intraservice remedies as to those claims. Additional guidance is forthcoming related to the Rescission Memo, [Doc. No. 94-1], and any harm that Plaintiffs claim to have already suffered may be redressed by that guidance and the Rescission Memo's implementation. Thus, any future or ongoing harm that Plaintiffs allege is entirely speculative, and prospective remedies based on alleged past harm is not yet exhausted in light of new and forthcoming policies.

In sum, the Court did not commit clear error by imposing an exhaustion requirement on Plaintiffs' claims, *see* discussion *infra* Sec. III(B), and even if the Court were to now find that Plaintiffs had previously exhausted their intraservice remedies by seeking religious

[3] In that regard, the Court's Order (a) stated that "military decision-making 'rests upon the Congress and upon the President of the United States and his subordinates,'" [Doc. No. 86] at 17 (citing *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953)); (b) noted that Congress had not acted as of the date of the Order, *id.*; and (c) found that, for that reason and others, the military's professional judgment as to the Mandate was non-justiciable, *id.* at 17-18.

[4] Because the 2023 NDAA was signed by President Biden, it was both Article I and Article II actors that ultimately reviewed and rescinded the Mandate.

accommodation requests,[5] such requests and any relief therefrom are now stale given the Rescission Memo. While the 2023 NDAA is a change in law, that change may, and likely will, allow Plaintiffs to obtain review of and relief from Plaintiffs' complained-of injuries through forthcoming, post-Rescission Memo intraservice remedies and policies, thereby potentially eliminating any need for litigation. Accordingly, the 2023 NDAA further confirms that Plaintiffs cannot show that they have exhausted their intraservice remedies and that this litigation is premature.

The ongoing implementation of the Rescission Memo also confirms that the Court lacks subject-matter jurisdiction based on lack of ripeness as to any claim for injuries. In that regard, a claim is not ripe for adjudication if it is not fit for judicial intervention. *In re Naranjo*, 768 F.3d 332, 347 (4th Cir. 2014) (citation omitted). "A case is fit for adjudication when the action in controversy is final and not dependent on future uncertainties; conversely, a claim is not ripe when it rests upon contingent future events that may not occur as anticipated." *Id.* (quoting in part *Scoggins v. Lee's Crossing Homeowner's Ass'n*, 718 F.3d 262, 270 (4th Cir. 2013)) (internal quotations omitted). Here, the case is not fit for judicial intervention. How and if the military will redress and/or accommodate Plaintiffs in the aftermath of Section 525 and the Rescission Memo is entirely speculative and uncertain. *See Beard v. Stahr*, 370 U.S. 41, 41-42 (1962) (finding a servicemember's suit to enjoin his removal from the active duty list was premature because he had not been removed and, if he were, "adequate procedures for seeking redress will be open to him"); *Roberts v. Roth*, 594 F. Supp. 3d 29, 35-36 (D.D.C. 2022) (holding in a military vaccine case that plaintiff's claims were not ripe because the intraservice corrective process was not complete and

[5] To the contrary, the Court explicitly found that Plaintiffs had not exhausted their intraservice remedies. [Doc. No. 86] at 10-14.

finding the action "premature" because the plaintiff was not yet discharged). For these reasons, the case is not ripe for adjudication and must be dismissed for want of subject-matter jurisdiction.

B. Plaintiffs' Assertions of Clear Errors of Law

Plaintiffs first argue that the Court clearly erred when it added an exhaustion requirement to the Religious Freedom Restoration Act ("RFRA") in derogation of its steadfast duty to resolve cases within its jurisdiction. [Doc. No. 90-1] at 9. Plaintiffs claim the Court contradicted itself and had already recognized that RFRA does not require exhaustion when it noted that Plaintiffs' claims are non-justiciable military judgments "with the possible exception of [RFRA]"). [Doc. No. 90-1] at 10 n.5 (citing [Doc. No. 86] at 10). To the contrary, the Court simply noted in that regard that the RFRA claim was arguably not foreclosed at the outset as a non-justiciable military judgment. *See* [Doc. No. 86] at 10 (stating that "even before confronting the *Mindes* [*v. Seaman*, 543 F.2d 197 (5th Cir. 1971)] test," Plaintiffs' claims are non-justiciable military judgments "with the possible exception of [RFRA]"). The Court went on to rule, however, that the RFRA claim was, in fact, non-justiciable once the Court concluded, as it did, that the *Mindes* test and accompanying exhaustion prerequisite applies to RFRA. *See* [Doc. No. 86] at 10. The Court then distinguished the few cases Plaintiffs cited for the contrary proposition.[6] [Doc. No. 86] at 13; *cf. id.* at 11-12 (citing *Williams v. Wilson*, 762 F.2d 357, 359-60 (4th Cir. 1985) (holding that under *Mindes*, courts "should not review internal military affairs" absent "exhaustion of available intraservice corrective measures")). Because the Court found that Plaintiffs' RFRA claims were not exhausted, the *Mindes* exhaustion requirement, imposed by the Fourth Circuit in *Williams*, was not satisfied;

[6] Plaintiffs principally cite *Patsy v. Bd. Of Regents of Fla.*, 457 U.S. 496, 509-12 (1982) for the notion that judicially imposed military exhaustion requirements are inappropriate where a statute already contains an exhaustion requirement. [Doc. No. 90-1] at 10-11. But RFRA has no statutory exhaustion requirement; moreover, *Patsy* was about race and sex discrimination in the civilian (not military) context and decided more than a decade *before* RFRA was enacted.

judicial review of Plaintiffs' claims was, therefore, improper; and the Court was required to dismiss the case for want of jurisdiction.

Plaintiffs similarly challenge the Court's dismissal of their other non-RFRA claims, again arguing that either no exhaustion requirement exists or the requirement was satisfied.[7] But following the Rescission Memo, as detailed above, no claim can now be deemed exhausted. And as to the existence of an exhaustion requirement, Plaintiffs fail to recognize and reconcile the difference between a *statutory* and a *judicial* exhaustion requirement. In that regard, it is undisputed that certain of Plaintiffs' claims do not have a statutory exhaustion requirement. But that a particular claim may lack a statutory exhaustion requirement does not preclude courts from imposing one. *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("[W]here Congress has not clearly required exhaustion, sound judicial discretion governs."). Thus, all of Plaintiffs' claims have a threshold judicial exhaustion requirement imposed by *Williams/Mindes*. And that judicially created exhaustion requirement simply speaks to whether the Court has jurisdiction to hear a particular case *at that time*. *Cf. Nat'l Treasury Emps. Union v. King*, 961 F.2d 240, 243 (D.C. Cir. 1992) ("The doctrine of exhaustion of administrative remedies concerns the *timing*

[7] In particular, Plaintiffs argue the Administrative Procedures Act ("APA") contains no exhaustion requirement, citing *Darby v. Cisneros*, 509 U.S. 137, 145 (1993) for the proposition that the APA is only subject to exhaustion requirements imposed by statute or agency rule. [Doc. No. 90-1] at 24. But *Darby* involved a suit against the Secretary of Housing and Urban Development – a civilian agency. Whether *Darby* applies in the military context is questionable, particularly given the extraordinary deference that the Supreme Court has repeatedly afforded the military. *See* [Doc. No. 86] at 7 (citing Supreme Court authority); *cf. Bowman v. Brownlee*, 333 F. Supp. 2d 554, 558 (W.D. Va. 2004) ("[S]ince *Darby* involved the interpretation of the APA in the context of an administrative ruling by the Department of Housing and Urban Development, courts across the country have reached different conclusions as to whether *Darby* extends to cases involving military decisions."); Cpt. E. Roy Hawkens, *The Exhaustion Component of the* Mindes *Justiciablity Test Is Not Laid to Rest by* Darby v. Cisneros, 166 Mil. L. Rev. 67, 68 (2000) ("Exhaustion of intramilitary remedies should [] continue to be the rule for APA claims brought by service members."). And the Fourth Circuit has specifically declined to answer this question. *Wilt v. Gilmore*, 72 Fed. App'x 484, 488 (4th Cir. 2003) ("We conclude that we need not address *Darby*'s impact (if any) on our rule requiring exhaustion of military remedies."). Moreover, it is unclear whether *Darby*'s holding with respect to exhaustion requirements for "agency action" would even apply in this case. The APA's definition of "agency" specifically excludes "military authority exercised in the field in time of war or in occupied territory." 5 U.S.C. § 701(b)(1)(G). The Mandate was clearly an exercise of military authority that governed, in part, servicemembers stationed, assigned, or subject to future assignment in occupied territory. Therefore, even if *Darby* applied to military cases, it may be wholly inapplicable regardless on the grounds that the type of "agency action" contemplated does not encompass the Mandate.

rather than the jurisdictional authority of federal court decisionmaking.") (emphasis in original). In other words, the Court's finding with respect to Plaintiffs' failure to exhaust was a determination on the timing of their claims rather than the substance, notwithstanding the general deference that Courts afford to the military in these types of matters, and thus Plaintiffs' cited authority about courts' inherent duty to hear cases within their jurisdiction misses the mark. Because Plaintiffs failed to exhaust their claims, the Court did not commit clear error by finding they were non-justiciable *at that time*.[8]

Plaintiffs also contend that the Court improperly found that Plaintiffs had not pursued relief through the Board of Correction of Military Records ("BCMR") prior to exhausting their claims.[9] [Doc. No. 90-1] at 11. The Court need not address this issue because the Rescission Memo requires that Service Secretaries cease review of religious accommodation requests and appeals, orders that records be updated, and directs that future guidance be given. As detailed above, these requirements necessarily mean that any complained-of injuries, past or present, may be remedied or addressed under the new policy, thereby necessarily making premature any consideration of what remedies the BCMR can provide and whether Plaintiffs are required to seek those remedies to satisfy the exhaustion requirements.

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[8] The Court also rejects the claim that, even if an irreparable injury exception to exhaustion applies in this Circuit, one exists here. Plaintiffs' injuries are either not yet realized or redressable. Plaintiffs' principle case for such an assertion, *Elrod v. Burns*, 427 U.S. 347 (1976), is distinguishable as a civilian case related solely to a First Amendment case based on political affiliation. And unlike another one of Plaintiffs' cited cases, *U.S. ex rel. Brooks v. Clifford*, 412 F.2d 1137 (4th Cir. 1969), Plaintiffs here are no longer subject to the objected-to requirement (notably, even when the Mandate was in effect, there were no forcible vaccinations). *Brooks* is further distinguishable because it was a habeas proceeding regarding a conscientious objector to military service generally. And any suggestion that allegations of constitutional violations do not require exhaustion does not square with the first *Mindes* prerequisite, which requires *both* a constitutional (or statutory or regulatory) violation *and* intraservice exhaustion. *Mindes*, 453 F.2d at 201. In other words, imposing the dual requirement of exhaustion and a constitutional violation would make no sense if a constitutional violation excused a failure to exhaust, as Plaintiffs contend. *Cf. Thetford Properties IV Ltd. P'ship v. U.S. Dep't of Hous. & Urb. Dev.*, 907 F.2d 445, 448 (4th Cir. 1990) (rejecting "as a generally rule [that] exhaustion is not necessary where administrative litigants raise constitutional challenges").

[9] Notably, failure to pursue relief through BCMRs was not the sole grounds for the Court's finding that Plaintiffs failed to exhaust intraservice remedies. *See* [Doc. No. 86] at 11-12 (noting, *inter alia*, that "no Plaintiff has actually gone through separation proceedings").

Similarly irrelevant is whether the Court committed clear error, as Plaintiffs contend, in the Court's previous assessment of the *Mindes* doctrine's four factors based on the facts of this case. *See* [Doc. No. 86] at 16. That assessment, summary in nature, was not central, or essential, to the Court' decision, since the Court's necessary inquiry with respect to justiciability needed to go no further than its determination that the Plaintiffs had failed to satisfy the *Mindes* prerequisite of exhaustion, thereby eliminating the need to consider the merits of the *Mindes* factors. Whatever the merits of the four *Mindes* factors, the Court's Order was not anchored in them.

Lastly, Plaintiffs argue the Court erred by giving more weight to certain out-of-circuit decisions than others, and for relying on Justice Kavanaugh's concurrence in a similar and recent military vaccine case.[10] [Doc. No. 90-1] at 24-26. The Court declines to find clear error based on its assessment of the existing legal authority.

C. New Evidence

Plaintiffs assert that a statement by Government counsel in a hearing before the Sixth Circuit constitutes new evidence. [Doc. No. 90-1] at 26-27. That hearing occurred after the hearing in this case on Plaintiffs' Motion for Preliminary Injunction but prior to the Court's November 23, 2022 Order. It appears that Plaintiffs did not become aware of the statement until sometime after November 29, 2022, which is when the Sixth Circuit opinion was released. Given the statement occurred prior to the Court's Order, it arguably is not "new." But in any event, statements by counsel are not evidence. *See, e.g.*, *Crawford v. Newport News Indus. Corp.*, No. 4:14-cr-130, 2018 WL 4524124, at *6 (E.D. Va. Feb. 26, 2018) ("It should go without saying that statements of attorneys are not evidence, and that only admissible evidence can be considered by the Court in resolving [motions]."). More importantly, having reviewed the recording of oral argument in

[10] That case is *Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301 (2022) (Kavanaugh, J., concurring).

Doster v. Kendall, No. 22-3497 (6th Circ. 2022), the Court does not share Plaintiffs' construction of Government counsel's statements, and the statements would not have, in any event, altered the outcome of or analysis in the Court's prior Order in any respect.

D. Manifest Injustice

Plaintiffs argue that Defendants misrepresented the procedural rights and protections afforded to more junior chaplains, and that those chaplains instead may be discharged without those protections.[11] [Doc. No 90-1] at 27-28. But even assuming *arguendo* that the Court materially relied on the alleged misrepresentation, Chaplain Hirko, who Plaintiffs point to, can no longer suffer the allegedly "irreparable harm" of discharge under the Rescission Memo. Accordingly, for the reasons stated earlier, any other allegations of past or future harm is speculative, unexhausted, not ripe for adjudication at this time, and cannot be said to have resulted in, or present the prospect of, manifest injustice.

IV. CONCLUSION

For the above reasons, it is hereby

ORDERED that Plaintiffs' Motion for Reconsideration, [Doc. No. 88], be, and hereby is, DENIED.

The Clerk is directed to forward copies of this Order to all counsel of record.

Alexandria, Virginia
February 17, 2023

Anthony J. Trenga
Senior U.S. District Judge

[11] Defendants dispute any alleged mischaracterization. [Doc. No. 94] at 26-27.

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 28th day of November 2023, in addition to filing the foregoing document—together with its appendix—via the Court's electronic filing system, one true and correct copy of the foregoing document and appendix was served by Federal Express, next-day service, with a PDF courtesy copy served via electronic mail on the following counsel:

Hon. Elizabeth B. Prelogar
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The undersigned further certifies that, on this 28th day of November 2023, an original and two true and correct copies of the foregoing document and its appendix were sent via U.S Priority Mail, postmarked November 28, 2023, to the Court.

Executed November 28, 2023,

/s/ Arthur A. Schulcz, Sr.
Arthur A. Schulcz, Sr.