No. 22-1

IN THE
In the Supreme Court of the United States

LYNN BROWN, as appointed successor and representative of now-deceased Howard M. Berry,
Petitioner,

v.

CHRISTINE E. WORMUTH, Secretary of the Army and LLOYD J. AUSTIN, III, Secretary of Defense,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* AMERICA FIRST POLICY INSTITUTE, LT. GEN. (RET.) KEITH KELLOGG, AND HON. ROBERT WILKIE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to subparagraph 2(b) of Rule 37, U.S. Supreme Court Rules, America First Policy Institute, Lt. Gen. (Ret.) Keith Kellogg, and Hon. Robert Wilkie hereby move the Court for leave to file an *amicus curiae* brief in support of the petition for *certiorari*.

This brief is being filed timely, "within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later." Rule 37(2). The petition was docketed on June 30, 2022. This *amicus* brief is being filed on August 1, 2022, which is within 30 days after docketing. In support of their motion, these *amici* state:

Identity and Experience of *Amici Curiae*

The America First Policy Institute ("AFPI") is a 501(c)(3) non-profit, non-partisan research institute. AFPI exists to conduct research and develop policies that put the American people first. AFPI's "guiding principles are liberty, free enterprise, national greatness, American military superiority, foreign-policy engagement in the American interest, and the primacy of American workers, families, and communities in all we do." AFPI, *About*, https://americafirstpolicy.com/about/ (last visited July 13, 2022). AFPI consists of many former senior leaders of the United States government.

Lieutenant General Keith Kellogg, United States Army (Retired), serves as AFPI's Co-Chairman of the Center for American Security and previously served as National Security Advisor to former Vice President Mike Pence and Chief of Staff and Executive Secretary of the National Security Council.

The Honorable Robert Wilkie, Colonel in the United States Air Force Reserve, serves as AFPI's Distinguished Fellow for the Center for American Security and previously served as Secretary of Veterans Affairs in the Trump Administration.

Relevance of *Amicus* Brief to Petition for *Certiorari*

According to Rule 37, "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court." *Amici* believe that this brief will assist the Court in resolving whether the military should receive "unusual deference" in judicial decisions regarding statutory

and constitutional rights. *Amici* offer their extensive expertise on national security issues to assist the Court with these difficult issues.

In this case, the brief submitted by *amici* provides authorities and arguments on important issues presented which are not addressed fully by Petitioner. These include the negative effects of the "unusual deference" standard on service members' constitutional rights.

The Positions of the Parties

These *amici* obtained the consent of counsel for Petitioner. Counsel for Respondents did not respond to multiple requests for consent by *amici.*

Conclusion

For the foregoing reasons, these *amici* respectfully request the Court to grant them leave to file their brief *amicus curiae*, which is appended hereto.

Respectfully submitted,

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August 1, 2022

QUESTION PRESENTED

Whether the Administrative Procedure Act ("APA") incorporates a presumption of "unusual deference" in all cases involving the military.

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INTEREST OF *AMICI CURIAE*[1]

The America First Policy Institute ("AFPI") is a 501(c)(3) non-profit, non-partisan research institute. AFPI exists to conduct research and develop policies that put the American people first. AFPI's "guiding principles are liberty, free enterprise, national greatness, American military superiority, foreign-policy engagement in the American interest, and the primacy of American workers, families, and communities in all we do." AFPI, *About*, https://americafirstpolicy.com/about/ (last visited July 13, 2022). AFPI consists of many former senior leaders of the United States government.

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[1] All parties received timely notice of this filing. Counsel for Petitioners consented, but counsel for Respondents did not respond. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Amici offer their extensive expertise on national security issues to assist the Court in resolving whether the military should receive "unusual deference" in judicial decisions regarding statutory and constitutional rights. In particular, *amici* will illuminate the negative effects of the "unusual deference" standard on service members' constitutional rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the infamous *Korematsu* decision, Justice Robert Jackson's dissent cautioned that unquestioning judicial deference is even worse than military overreach: "A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting), overruled by *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'") (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)).

Justice Jackson's prophetic observation captures the legal issue at the heart of this case: whether courts tasked with judicial review owe "unusual deference" to military decisionmakers. *Amici* argue that they do not, particularly when service members' constitutional or statutory rights are at stake. Courts addressing these challenging issues should engage in a threshold inquiry that determines whether the issue involves

"military judgment requiring military expertise." *Kreis v. Sec'y of Air Force*, 406 F.3d 684, 686 (D.C. Cir. 2005) ("*Kreis III*"). If so, then deference may be due. But if not, where procedural or legal issues are involved, courts are well-equipped to conduct judicial review. *See* Pet. 15.

This Court recently faced another question about deference regarding the military's COVID-19 vaccine mandate. While the Navy sought deference toward its policy of no religious accommodations, it failed to provide evidence that unvaccinated SEALs pose an actual threat to its fighting force. *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 351-52 (5th Cir. 2022). In fact, the SEAL plaintiffs completed missions successfully by using mitigation techniques, both before and after vaccines were available. *Id.* at 341, 351-52. Both the district court and the Fifth Circuit rightly refused to defer to the Navy's "rubber stamp[]" decisionmaking process which results in automatic denials. *U.S. Navy Seals 1-26 v. Biden*, No. 4:21-cv-01236-O, 2022 WL 34443, at *1 (N.D. Tex. Jan. 3, 2022). The district court granted a preliminary injunction protecting the SEALs, finding that judicial review "would not 'seriously impede the military in the performance of vital duties.'" *Id.* at *8 (citations omitted). The Fifth Circuit agreed that the Navy failed to "conscientiously adher[e] to RFRA" because its medical exemptions undermined its compelling interest claim, and its policy of denying all religious accommodations and punishing anyone who requested them was not the least restrictive means of achieving its interest. *U.S. Navy Seals 1-26*, 27 F.4th at 350-52.

Launching an emergency appeal to this Court, the Navy again grasped for unusual deference to military

judgments, this time with partial success. *Austin v. U.S. Navy Seals 1-26,* 146 S. Ct. 1301 (2022) (granting partial stay of district court's order precluding Navy from considering plaintiffs' vaccination status in making operational decisions). Justice Kavanaugh's concurrence found that the district court "inserted itself into the Navy's chain of command" and that "RFRA does not justify judicial intrusion into military affairs in this case." *Id.* at 1302 (Kavanaugh, J., concurring). Justices Alito, Gorsuch, and Thomas would have denied the Navy's application for a partial stay, calling the Court's action "rubberstamping" that "brushes . . . aside" the Navy's unlawful treatment of the SEALs. *Id.* at 1302 (Alito, J., dissenting).

The Court's disagreement demonstrates that judicial deference toward military decisionmakers is not a zero-sum game. Rather, when constitutional or statutory rights are at stake, courts must not automatically defer to military decisions but should enforce those rights our brave service members promise to protect.

ARGUMENT

I. The D.C. Circuit's "unusual deference" standard invades service members' constitutional rights.

Amici support Petitioner in contesting the Army's denial of a Purple Heart to SSG Berry. Yet *amici* are even more concerned that the district court and D.C. Circuit rubber-stamped the Army's decision and reinforced an "unusual deference" standard which treats service members as second-class citizens. If courts continue to give undue deference to military

decisions, *amici* fear negative repercussions for the constitutional and statutory rights of service members.

A. Courts should not apply "unusual deference" when the agency is violating a clear statutory or constitutional provision.

SSG Berry's APA claim alleges that the Army's rejection of his Purple Heart recommendation was "arbitrary, capricious, an abuse of discretion, not in accordance with law, and unsupported by substantial evidence." Pet. 5. Both lower courts relied on "unusual deference" to reject Berry's claim. App. to Pet. Cert. 2a, 14a.

Under the "unusual deference standard," courts cannot evaluate whether the military's decision was "substantively correct," but only whether the decision "minimally contains a rational connection between the facts found and the choice made." App. to Pet. Cert. 19a (quoting *Coe v. McHugh*, 968 F. Supp. 2d 237, 240 (D.D.C. 2013), and *Frizelle v. Slater*, 111 F.3d 172, 176 (D.C. Cir. 1997)). This weakens the arbitrary and capricious standard and precludes any meaningful judicial review of military decisions.

Yet when Congress has spoken directly on an issue, courts must follow its clear intent rather than judicially created doctrines. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). When Congress passed the APA just after World War II, public demand for a strong

military was high. Yet Congress purposefully rejected requests to exempt the military from APA accountability. *See* Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 697-700 (2010). When Congress speaks, as in the APA, then judicial deference must give way to the statute.

Many statutes, including the APA and the Religious Freedom Restoration Act ("RFRA"), explicitly create judicial standards to hold government accountable. The APA requires courts to set aside agency findings that are "contrary to constitutional right, power, privilege, or immunity" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(B)-(C). When service members request religious accommodations, they may invoke both the Constitution and RFRA. *See, e.g., Singh v. Carter*, 168 F. Supp. 3d 216, 226-27 (D.D.C. 2016) (Sikh Army officer brought RFRA and Free Exercise claims seeking religious beard and turban accommodation); *Roth v. Austin*, No. 8:22-CV-03038, 2022 WL 1568830, *1 (D. Neb. May 18, 2022) (Air Force members brought RFRA and Free Exercise claims seeking religious exemptions from COVID-19 vaccine requirement). Multiple circuits have recognized that "[r]esolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board," especially when the claims are "founded on infringement of specific constitutional rights." *U.S. Navy Seals 1-26*, 27 F.4th at 348 (quoting *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973) and *NeSmith v. Fulton*, 615 F.2d 196, 201-02 (5th Cir. 1980)); *see also Nieto v.*

Flatau, 715 F. Supp. 2d 650, 655 (E.D.N.C. 2010) (upholding free speech claim because "[n]otwithstanding the great deference owed to the military, regulations restricting speech on military installations may not discriminate against speech based upon its viewpoint"). Thus, courts should be especially careful not to apply "unusual deference" when Congress has clearly spoken or when constitutional rights are at stake.

B. Some deference is due given the military's unique responsibilities, but this deference must not be unfettered.

As Justice Jackson's dissent in *Korematsu* acknowledged, "[i]t would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality." 323 U.S. at 244 (Jackson, J., dissenting). Some deference is due to the military, especially because their primary object is to protect not only the Constitution but society as a whole—a daunting task that does at times require extreme and unprecedented measures. Yet the effective way for courts to address this reality is to engage in a threshold inquiry that determines whether the issue involves "military judgment requiring military expertise." *Kreis III*, 406 F.3d at 686. If so, then deference may be due. But if not, where the issues are more procedural or legal in nature, courts are well-equipped to engage in judicial review under the APA. *See* Pet. 15. For courts to skip this threshold inquiry and blindly defer to the military goes against the text of the APA.

The D.C. Circuit has shown that this threshold inquiry is workable in practice. In *Dickson v. Secretary of Defense*, the court followed "the strong presumption that Congress intends judicial review of administrative action" and found that no statute precludes judicial review of Army Board decisions under the APA. 68 F.3d 1396, 1401 (D.C. Cir. 1995) (citation omitted) (finding Army Board's decisions arbitrary and capricious because it failed to provide any reasoned explanation for its decisions). In *Wilhelmus v. Geren*, the court applied the arbitrary and capricious standard instead of "unusual deference" because the issues involved procedural fairness rather than "military expertise." 796 F. Supp. 2d 157, 162 (D.D.C. 2011) (finding for plaintiff who was disenrolled from U.S. military academy). In *Coburn v. Murphy,* 827 F.3d 1122, 1124-25 & n.1 (D.C. Cir. 2016), the court expressly declined to decide whether the Army was owed "special deference" and applied the arbitrary and capricious standard to the Army's disability evaluation. Declining to apply unusual deference does not guarantee victory for service members; they still face the difficult "arbitrary and capricious" standard and will often lose in court, like the plaintiff in *Coburn.* But at least the court considered the underlying military decision on the merits instead of deferring altogether. *Id.* at 1124-25.

Similar to the APA, RFRA also requires a threshold inquiry of whether the policy at issue poses a "substantial burden" on a claimant's religious exercise. This triggers strict scrutiny: whether the government has a compelling interest and has used the least restrictive means to achieve that interest. 42 U.S.C. § 2000bb-1(b); *Holt v. Hobbs*, 574 U.S. 352, 357

(2015). If courts skip both the threshold inquiry and the strict scrutiny test, granting the military "unusual deference" without putting it to its proof, religious claimants will always lose—even when their requests could be accommodated without compromising the military's interests. This tendency becomes clear when service members bring other types of constitutional claims. *See, e.g., Roberts v. United States*, 883 F. Supp. 2d 56, 69-70 (D.C. Cir. 2012) (applying unusual deference standard and rejecting Navy officer's due process and APA challenges based on lack of promotion due to gender discrimination); *Maneely v. Donley*, 967 F. Supp. 2d 393, 401-02 (D.C. Cir. 2013) (rejecting Air Force officer's due process claim as untimely and applying unusual deference to reject his APA claim based on faulty disability rating). Yet constitutional claims merit review even when an agency decision is not subject to other APA requirements. *Webster v. Doe*, 486 U.S. 592, 603 (1988) ("where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear").

The D.C. Circuit's tendency to ignore constitutional and statutory claims because of the unusual deference standard creates a circuit split with the Fifth, Sixth, and Ninth Circuits. When deciding whether military claims are justiciable, the Fifth Circuit requires courts to examine first "whether the plaintiff has alleged a deprivation of constitutional rights." *U.S. Navy Seals 1-26*, 27 F.4th at 346 (citation omitted). The Sixth Circuit has declined to show "traditional deference granted to the military by the courts" where constitutional rights were at stake and there was no direct connection with military discipline. *Hartmann*

v. Stone, 68 F.3d 973, 984 (6th Cir. 1995) (preventing Army from excluding religion from on-base childcare services). In applying judicial review to constitutional claims, the Ninth Circuit has held that "[r]esolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board." *Downen*, 481 F.2d at 643. This Court should grant certiorari to clarify when military decisionmakers should receive deference, making clear that constitutional claims merit judicial review.

C. RFRA and the First Amendment provide robust protection for the religious freedom of service members.

Courts have made clear that RFRA "undoubtedly 'applies in the military context.'" *U.S. Navy Seals 1-26*, 27 F.4th at 346 (citing *United States v. Sterling*, 75 M.J. 407, 410 (C.A.A.F. 2016)); *Katcoff v. Marsh*, 755 F.2d 223, 227 (2d Cir. 1985).

Yet for twenty years after a bipartisan Congress passed RFRA in 1993, the military largely ignored it. Michael Berry & Antony Barone Kolenc, *Born-Again RFRA: Will the Military Backslide on its Religious Conversion?* 87 MO. L. REV. 463, 466 (2022). Until 2014, most military regulations were only required to meet the rational basis test to justify curtailments of service members' religious liberty. *Id.* at 464-65 (discussing 2009 regulations that kept 1988 language leaving religious accommodation decisions completely up to commanders, "when accommodation will not have an adverse impact on mission accomplishment, military readiness, unit cohesion, standards, or

discipline" (quoting DOD INSTRUCTION 1300.17, *Accommodation of Religious Practices Within the Military Services* (Feb. 10, 2009) (now superseded))). This reluctance to follow statutory protections for religious liberty should caution courts from granting unusual deference to the military where Congress has spoken.

Only in 2014, after a clear Congressional mandate, did the Department of Defense ("DoD") finally follow the law and incorporate RFRA, its "substantial burden" requirement, and its strict scrutiny test into military regulations. DOD INSTRUCTION 1300.17, *Accommodation of Religious Practices Within the Military Services* (Feb. 10, 2009) (Incorporating Change 1, Effective Jan. 22, 2014), at ¶ 4(e)(1).

Despite the military's unwillingness to abide by congressional mandates, courts have applied RFRA to protect the religious liberty of service members in multiple contexts. *See, e.g., Carter*, 168 F. Supp. 3d at 229 (Army violated RFRA by subjecting Sikh soldier to discriminatory testing); *Singh v. McHugh*, 185 F. Supp. 3d 201, 222 (D.D.C. 2016) (Army violated RFRA by refusing to provide religious beard and turban accommodation for Sikh recruit seeking to enroll in ROTC); *Rigdon v. Perry*, 962 F. Supp. 150, 160-62 (D.D.C. 1997) (military violated RFRA when it prohibited chaplains from encouraging congregants to contact Congress in favor of antiabortion legislation).

This interplay between Congress, the DoD, and the courts illustrates how separate powers keep each other in check. When the Supreme Court's decision in *Employment Div., Dep't of Hum. Res. v. Smith*, 484 U.S. 782 (1990), weakened free exercise protections,

Congress passed RFRA to reinstate the compelling interest test and protect religious liberty across all federal agencies, including the military. *Holt*, 574 U.S. at 356-57. Twenty years later, after the military consistently ignored this requirement, Congress included religious accommodation standards in the National Defense Authorization Act, prompting the DoD to formally adopt RFRA's protections.[2] Thus, Congress used RFRA to limit both judicial and executive overreach. Yet these checks and balances are only effective if they are mutual. If the judicial branch refuses to check the executive branch by holding it to congressional standards, our uniquely balanced system becomes lopsided. Indeed, the Founders recognized that to maintain the separation of powers "essential to a free government," the different branches must "be so far connected and blended as to give to each a constitutional control over the others." James Madison, *The Federalist Papers*, No. 48 (Feb. 1, 1788). To that end, "[c]ommand power . . . is subject to limitations consistent with a constitutional Republic whose law and policymaking branch is a representative Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645-46 (1952) (Jackson, J., concurring). By enforcing congressional statutes such as the APA and RFRA that place limits on executive agencies, courts preserve liberty and provide a meaningful check on executive power.

Following congressional guidance, the DoD fully embraced RFRA in 2020 with five significant updates

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[2] *See* National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 533; National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 532.

for religious accommodations: 1) shifting the burden of proof from the individual to the DoD; 2) placing 30-60 day deadlines on decisions; 3) requiring decisionmakers to consider alternate means of accommodating religious exercise; 4) requiring granted accommodations to remain for the duration of one's career unless rescinded; and 5) defining "substantial burden." *See* DOD INSTRUCTION 1300.17, *Religious Liberty in the Military Services* (Sept. 1, 2020); Berry & Kolenc at 467. With these updates, service members must enjoy all the protections that RFRA extends to civilians.

The First Amendment also protects service members. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) ("our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes") (citation omitted); *Hartmann*, 68 F.3d at 984 ("First Amendment protection still exists" for service members); *Nieto,* 715 F. Supp. 2d at 656 ("While military officials are entitled to great deference in restricting speech to further the military's needs, they may not do so in a manner that discriminates against a particular point of view.").

Despite these robust statutory and constitutional protections, service members' religious exercise is often curtailed without meaningful access to judicial review. Military commands are hierarchal by nature, units often encounter exigent circumstances, and courts routinely refuse to provide meaningful review of military decisions because they extend "unusual deference" instead of applying constitutional or statutory requirements. Thus, service members often face a bleak landscape where RFRA's protections are just a mirage. *See, e.g., Creaghan v. Austin*, No. 22-

0981, 2022 WL 1500544, at *8 (D.D.C. May 12, 2022) (denying preliminary injunction to Space Force captain seeking religious vaccine exemption based on RFRA, because of deference to "the military's technical, *scientific* findings supporting the wisdom of a particularly, generally applicable military order"); *Sterling*, 75 M.J. at 419 (affirming bad-conduct discharge and rejecting RFRA defense of Marine who posted Bible verse because "the military must foster instinctive obedience" to superiors); *United States v. Webster*, 65 M.J. 936, 945-46 (A. Ct. Crim. App. 2008) (rejecting Muslim Sergeant's RFRA claim and applying "judicial deference when strictly scrutinizing the military's burden on the free exercise of religion").

Decisions like these ignore the clear intent of Congress in passing RFRA, because "there is simply no language in RFRA that requires a different level of deference to military decision-making than courts must apply to decision-making by any other governmental entity that falls within the scope of RFRA." *Roth*, 2022 WL 1568830, at *12. RFRA rightly permits courts to recognize "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline," which set the military apart from civilian life. *Parker v. Levy*, 417 U.S. 733, 758 (1974). Yet this discretion cannot nor should not be unfettered, because not every asserted government interest is compelling. And there are often ways to accommodate a service member's religious exercise that do not inhibit the military's compelling interest.

RFRA is a unique statutory exception to judicial deference that requires no less.[3]

For example, when Sikh and Muslim service members sought religious garb accommodations, both the Army and the Air Force modified their grooming policies.[4] The Army's regulations strike the proper balance that RFRA requires, allowing commanders to disapprove religious accommodation requests only if 1) "the request is not based on a sincerely held belief", or 2) if the commander "identifies a specific, concrete hazard . . . that cannot be mitigated by reasonable measures."[5] Similarly, updated Air Force guidance requires the military to satisfy RFRA's compelling interest test even "when accommodation would

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[3] RFRA's proper application here is entirely consistent with the Constitution's requirement that "[t]he Congress shall . . . make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. This limited exception to judicial deference to miliary judgment does not encroach upon the deference principle in any other context. It merely effectuates Congress's overwhelming desire to specifically protect religious liberty across the federal government, including in the military. *Cf.* Wendy S. Whitbeck, *Restoring Rites and Rejecting Wrongs: The Religious Freedom Restoration Act*, 18 SETON HALL LEGIS. J. 821, 863 (1994) ("The Senate passed the amended RFRA by the large margin of 97-3. The House of Representatives considered and accepted the Senate [version]. . . . President Clinton enthusiastically signed the RFRA of 1993 into law on November 16, 1993.").

[4] Dave Philipps, *The Marines Reluctantly Let a Sikh Officer Wear a Turban. He Says It's Not Enough,* N.Y. TIMES (Sept. 26, 2021), https://perma.cc/LV3V-7UZV.

[5] Army Directive 2017-03, ¶ 3(c) (Jan. 3, 2017), https://perma.cc/RV43-Q94U.

adversely affect mission accomplishment."[6] Another Air Force regulation makes clear that "[c]ommanders may only impose limits on [religious] expressions when there is a real (not theoretical) adverse impact on military readiness, unit cohesion, good order and discipline, health or safety of the member or the unit," and "[a]ny imposed limitations will employ the least restrictive means possible on expressions of sincerely held religious beliefs."[7] These updates have made it possible for at least 100 Sikhs to serve in the Army and Air Force with courage and distinction.[8]

These regulations demonstrate that application of RFRA's strict scrutiny test may allow for some deference to military commanders and decisions, especially when those decisions involve the dynamic nature of modern warfare. What RFRA prohibits is "unusual deference" to military decisionmakers that courts often apply blindly, without considering whether the military's interest in that context *regarding that service member* is compelling, or whether there is a less restrictive way to pursue that interest. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014) (RFRA requires government to satisfy compelling interest test "through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.") (quoting *Gonzales v. O*

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[6] Secretary of the Air Force, Air Force Instruction 36-2903, *Dress and Personal Appearance of Air Force Personnel,* ¶ A8.1 (Feb. 7, 2020), https://perma.cc/G72G-ZQ2T.

[7] Secretary of the Air Force, Department of the Air Force Instruction 52-201, *Religious Freedom in the Department of the Air Force*, ¶ 2.1 (June 23, 2021), https://perma.cc/E3HQ-MNZS.

[8] Dave Philipps, *The Marines Reluctantly Let a Sikh Officer Wear a Turban. He Says It's Not Enough, supra* note 4.

Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430-31 (2006)).

Under the "unusual deference" standard, service members alleging violations of religious freedom or other constitutional rights would *always* lose, regardless of how unobstructive their requests may be. That is not what Congress intended, nor what the Constitution requires. When Congress passed RFRA, it clearly applied to the military. H.R. Rep. No. 103-88, at 8 (1993) ("[p]ursuant to the Religious Freedom Restoration Act, courts must review the claims of . . . military personnel under the compelling governmental interest test"); S. Rep. No. 103-111, at 12 (1993) (same). Thus, Congress "placed a thumb on the scale in favor of protection religious exercise" even in the military context. *McHugh*, 185 F. Supp. 3d at 222. Indeed, "RFRA operates as a kind of super statute, displacing the normal operation of other federal laws." *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1754 (2020).

Thus, RFRA's test strikes the right balance: requiring courts to consider the military's compelling interests in security and mission accomplishment, yet also requiring them to weigh the effects on individual service members with sincerely held religious beliefs.

II. National security suffers when service members' constitutional rights are violated.

When U.S. service members are forced to choose whether to serve their God or their country, the consequences for our nation are devastating. Violating service members' rights causes a significant loss of

American military strength through long-term damage to retention, recruitment, and morale.

First, the financial costs of religious discrimination illustrate its negative effects on retention. For example, it costs an estimated $1 million to train a single Navy SEAL. *U.S. Navy SEALs 1-26*, 27 F.4th at 342. Discharging the plaintiffs in that case, as the Navy has continually threatened, would cost $35 million—besides the 4,095 other certified class members who also face discharge without judicial protection. *U.S. Navy Seals 1-26*, No. 4:21-cv-01236-O, 2022 WL 1025144, at *1 (N.D. Tex. Mar. 28, 2022). More than 260,000 troops—about 13% of the total force—are not yet fully vaccinated, plus thousands more who have not received any doses to date.[9] As the director of the National Guard explained, its 40,000 unvaccinated members represent "a significant chunk" of the force, and "there's readiness implications . . . and concerns associated with that."[10] Discharging seasoned service members when the strength and military readiness of several branches is declining has serious implications for national security. According to the Center for a New American Security, "dismissals could jolt the Air Force personnel system and cause significant challenges within units that must be ready to respond to crises at a moment's notice, especially if some vital jobs—like pilots or

[9] Department of Defense, *Coronavirus: DOD Response*, updated July 13, 2022, https://perma.cc/3TSN-KFEX.

[10] Lolita C. Baldor, *Army Guard Troops Risk Dismissal as Vaccine Deadline Looms*, DEFENSENEWS (June 26, 2022), https://bit.ly/3OcZFWV.

aircraft maintainers—are overrepresented among those who could face expulsion."[11]

Second, as our nation grows increasingly diverse, military leaders have emphasized the importance of diversity in recruiting.[12] The Marines and Navy even relaxed their grooming standards to reduce barriers to entry, allowing full-sleeve tattoos, alternative hairstyles for women, and exemptions for medical beards. Yet at the same time, both branches have enforced a near-total ban on religious beards and turbans, which excludes all Sikhs and many Muslims and Jews from even completing recruit training without permanently compromising their sincerely held religious beliefs. *See, e.g., Di Liscia v. Austin*, No. 1:21-cv-01047 (D.D.C. Apr. 15, 2021), ECF No. 7 (granting administrative stay to protect Jewish and Muslim sailors from no-shave orders while case is pending); *Toor v. Berger*, No. 1:22-cv-01004-RJL (D.D.C. Apr. 13, 2022), ECF No. 16-1 (awaiting ruling

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[11] Alex Horton, *Air Force is First to Face Troops' Rejection of Vaccine Mandate as Thousands Avoid Shots*, WASHINGTON POST (Oct. 28, 2021), https://perma.cc/X7B6-F9PD.

[12] General David Berger: "The Marine Corps draws its collective strength and identity from all its Marines, so it is critical that we prioritize policies that maximize the individual strengths of every Marine, regardless of race, gender, sexual orientation, creed, or any other marker." Philip Athey, *Here's Where Ponytails Stand for Women in the Marine Corps*, MARINE CORPS TIMES (Nov. 4, 2021), https://perma.cc/DR75-BAP3; Secretary of the Navy Carlos Del Toro: "[We] can only overcome the complex challenges we face every day by cultivating the talent and unique insights of individuals from diverse personal, cultural, and professional backgrounds." Carlos Del Toro, *One Navy-Marine Corps Team: Strategic Guidance From The Secretary of the Navy,* at 5 (Oct. 2021), https://perma.cc/MDT2-7TQM.

on preliminary injunction motion by Sikh captain and recruits). Shutting out entire categories of willing and able recruits, particularly those with helpful linguistic and cultural skills, is not merely unconstitutional but also defies logic. *Carter*, 168 F. Supp. 3d at 235 (finding that "the public has a significant interest in having a diverse military," and that religious discrimination "is likely to discourage Sikhs and other minorities from military service"). This is especially problematic when every branch is struggling to meet its 2022 recruiting goals, with only 23% of Americans ages 17-24 eligible to join without a waiver.[13]

Third, because religious faith plays such a significant role for service members, religious discrimination has devastating effects on morale. Religious exercise is critical for service members "uprooted from their home environments, transported often thousands of miles to territories entirely strange to them, and confronted there with new stresses." *U.S. v. Navy Seals 1-26*, 27 F.4th at 346 (quoting *Katcoff*, 755 F.2d at 227-28). These stresses include "loneliness when on duty . . . fear of facing combat or new assignments, financial hardships, personality conflicts, and drug, alcohol or family problems." *Katcoff*, 755 F.2d at 227-28. Because faith provides a lifeline for so many service members, granting religious accommodations is a significant way to bolster morale and improve retention. Service members who can freely express their religious identity are less likely to struggle with mental health issues and more likely to remain in the military long-

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[13] Courtney Kube & Molly Boigon, *Every Branch of the Military is Struggling to Make its 2022 Recruiting Goals, Officials Say,* NBC NEWS (June 27, 2022), https://perma.cc/AE4F-LGKT.

term.[14] Conversely, according to the Department of Veterans Affairs, exposure to "morally injurious events," that is, "exposure to acts that violate one's moral code," leads to increased risk for suicidal behavior and other mental health conditions.[15]

Thus, forcing service members to choose between violating their sincere religious convictions or suffering the lifelong consequences of discharge or court-martial not only violates their rights, but also harms them in lasting ways. This Court need look no further than the recent COVID-19 vaccine mandates and the resulting chaos from terminations, forced retirements, and nonjudicial punishments as thousands of service members face involuntary discharge or retirement. For example, in *U.S. Navy SEALs 1-26*, Navy SEAL 3 was receiving treatment for traumatic brain injury and post-traumatic stress disorder from previous deployments when he heard that his religious accommodation request was denied and that his role was being replaced. *U.S. Navy SEALs 1-26*, No. 4:21-cv-01236-O (Dec. 20, 2021), Mot. Hr'g Tr. at 23, 24, 32 ("Part of the treatment was to step away from the stress . . . I was surprised . . . that they continued to add the stress onto my life while I was seeking treatment"). Navy SEAL 2 testified about the damage to morale resulting from denied religious accommodations: "Multiple personnel from different commands have been relieved of their milestone positions that . . . essentially railroad their careers.

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[14] Shareda Hosein, *Muslims in the U.S. Military: Moral Injury and Eroding Rights*, PASTORAL PSYCHOLOGY, 68: 77-92 at 86, 89 (Nov. 12, 2018), https://perma.cc/LC9H-SFZP.

[15] Department of Veterans Affairs, *Address Moral Injury to Reduce Veteran Suicide Risk* (2021), https://bit.ly/3uTsqBf.

And some members . . . have been made to do menial labor tasks, cleaners, sweeping clean grounds" apart from their commands. *Id.* at 63:2-12. Another Navy plaintiff testified: "I believe I was being coerced into receiving the vaccine . . . basically being in fear of not having a job once leaving the command." *Id.* at 86:1-16.

Given the damaging effects of religious discrimination on morale, recruitment, and retention, courts that apply unusual deference only exacerbate these problems. Instead, courts can support national security efforts and bolster military strength by ensuring that service members' religious freedoms are protected. While the military has a duty to protect national security, the courts have a duty to protect constitutional rights. Courts must fulfill their constitutional role to ensure that the rights of service members are not jeopardized as the military pursues its mission of protecting national security.

III. This Court has recently cautioned against undue deference and should apply that analysis here to protect the rights of service members.

The military is not the only context where government agencies expect deference. In prisoner cases, the Court has struck the proper balance by recognizing prisons' compelling interest in security, but also requiring them to prove that they are using the least restrictive means to pursue that interest. In *Holt v. Hobbs*, a Muslim prisoner seeking to grow a religious beard lost in lower courts because they deferred to prison officials on security matters. 574 U.S. at 260. This Court reversed, unanimously holding

that the prison violated Mr. Holt's rights under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and the Free Exercise Clause because it failed to show that shaving his beard was the least restrictive means of pursuing its compelling interest in security. The Court required the government to satisfy the compelling interest test regarding "the particular claimant": a "broadly formulated interest" in prison security was not enough. *Id.* at 362-63. RLUIPA "does not permit such unquestioning deference," but like its sister statute RFRA, "makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress." *Id.* at 364 (citation omitted).

Given that RFRA and RLUIPA use "the same standard," *id.* at 358, *Holt* begs the question: why do military officials deserve unusual deference when prison officials must comply with federal civil rights statutes? And why do prisoners receive greater religious liberty protections than military service members?

The day before granting the Navy a partial stay in *U.S. Navy SEALs 1-26*, the Court upheld religious liberty in *Ramirez v. Collier*, 142 S. Ct. 1264 (2022), where a death row inmate asked for his long-time pastor to lay hands on him and pray audibly during his execution. Writing for an eight-member majority, Chief Justice Roberts recognized that prisons "have a compelling interest in monitoring an execution and responding effectively during any potential emergency," but refused the prison's request "that we simply defer to their determination" that they could not allow Ramirez' pastor to speak. *Id.* at 1279. The Court held the government to its proof.

Although RFRA uses the same compelling interest test, the Court extended deference to the military in *U.S. Navy Seals 1-26*. Like the prison in *Ramirez*, which asked for deference without providing any evidence supporting its conclusion, the Navy provided no evidence that unvaccinated SEALs had compromised any missions or even posed a risk to their units. *U.S. Navy Seals 1-26*, 27 F.4th at 351-52. Justice Alito's dissent pointed out that at trial, "mere 'conjecture' or 'speculation' would not be enough" to prove that the Navy's concerns justified infringing the SEALs' religious exercise. *Id.* at 1305 (citing *Ramirez*, 142 S. Ct. at 1280)). Justice Alito highlighted the "striking" contrast between *Ramirez* and *U.S. Navy SEALs 1-26*: "We properly went to some lengths to protect Ramirez's rights because that is what the law demands. We should do no less for [the SEALs]." *U.S. Navy SEALs 1-26*, 142 S. Ct. at 1307-08.

If convicted murderers on death row have robust religious liberty rights protected by federal statutes and the Constitution—and they should—our nation's service members should receive at least the same protections in court. By properly putting the government to its proof instead of granting unusual deference, this Court can respect military decisionmakers while also honoring the rights of service members who make daily sacrifices to protect our own liberties.

CONCLUSION

The Court should grant the petition and reverse.

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