No. __-_____

In the Supreme Court of the United States

ISRAEL ALVARADO, *ET AL.*,
Petitioners,

v.

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

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

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

Military chaplains sue the Defense Department ("DoD") under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 ("RFRA"), and related statutory protections of military personnel's religious freedoms for failing to accommodate their religious objections to DoD's mandating a COVID-19 vaccine and coercing chaplains—denominational representatives—to speak *DoD's message* on the vaccine. On the former, DoD denied religious accommodation, but granted secular exemptions. DoD retaliated against some chaplains (*e.g.*, denied promotions or schooling), with other promotions denied for lack of the required schooling or for negative mandate-related reviews.

Congress directed DoD to rescind the mandate, and DoD ceased mandating the vaccine prospectively and directed DoD to "remove any adverse actions *solely* associated with denials of such requests," which does not protect against either the coerced speech or mixed-motive discrimination (*e.g.*, promotions denied for missed schooling or negative reviews resulting from the mandate). Continuing effects of the RFRA violations will cause a slow-motion purge of chaplains who filed religious accommodation requests, based on failing of selection for promotion under DoD's up-or-out promotion requirements under 10 U.S.C. § 632.

The questions presented are:

1. Whether this action was and remains justiciable because the RFRA violations' effects continue.
2. Whether the challenge to coerced speech survives as capable of repetition yet evading review.

To preserve a live controversy, petitioners will renew their request for interim relief by contemporaneous motion or application to avoid separation under § 632.

PARTIES TO THE PROCEEDING

Petitioners are 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, 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, who were plaintiffs in District Court and appellants in the Court of Appeals.

Respondents are Lloyd 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, Secretary Xavier Becerra in his official capacity as Secretary, U.S. Department of Health and Human Services, Janet Woodcock in her official capacity as Acting Commissioner of the U.S. Food and Drug Administration, and Rochelle Walensky in her official capacity as Director, Centers for Disease Control and Prevention, who were defendants in District Court and appellees in the Court of Appeals.

RULE 29.6 STATEMENT

Petitioners are natural persons with no parent companies and no outstanding stock.

STATEMENT OF RELATED CASES

For purposes of this Court's Rule 14.1(b)(iii), this case arises from and is related to the following proceedings in the U.S. District Court for the Eastern District of Virginia, the U.S. Court of Appeals for the Fourth Circuit, and this Court:

- *Israel v. Austin*, No. 8:22-cv-1149-WFJ-CPT (M.D. Fla. July 29, 2022) (transferred to E.D. Va.).
- *Israel v. Austin*, No. 1:22-cv-0876-AJT-JFA (E.D. Va. Feb. 17, 2023) (dismissed (and preliminary injunction denied).
- *Israel v. Austin*, No. 23-1419 (4th Cir. Aug. 3, 2023) (dismissed as moot).
- *In re Alvarado*, No. 23A264 (U.S.) (deadline to petition for a writ of *certiorari* extended to December 29, 2023).

Although several unrelated suits challenged the respondents' actions, no other case directly relates to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR WRIT OF *CERTIORARI*

Thirty-nine military chaplains[1] ("Chaplains") respectfully petition this Court for a writ of *certiorari* to the U.S. Court of Appeals for the Fourth Circuit to review the dismissal of their appeal as moot. Respondents are the Secretaries of Defense, Army, Air Force, and Navy (collectively, "DoD"), and the Secretary of Health and Human Services, the Food and Drug Commissioner, and the Director of the Centers for Disease Control and Prevention in their official capacities.

OPINIONS BELOW

The Fourth Circuit's unreported Order dismissing the appeal is reprinted in the Appendix ("App") at 1a. The district court's unreported Order dismissing the case *sua sponte* and denying the motion for a preliminary injunction is reprinted at App:1a. The district court's unreported Memorandum Opinion and Order denying the plaintiffs' motion for reconsideration is reprinted at App:3a.

JURISDICTION

On August 3, 2023, the Fourth Circuit issued its Order dismissing the Chaplains' appeal of the district court's dismissal of the action. The Circuit Justice

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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, 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.

extended the time to petition for a writ of certiorari to December 29, 2023. *In re Alvarado*, No. 23A264 (U.S.). The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343, 1346, 1361, and the Fourth Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix sets out the relevant constitutional, statutory, and regulatory provisions. App:44a-55a. As explained in more detail below, the Chaplains seek to enforce primarily the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 ("RFRA"), and 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"), but also assert constitutional violations of 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, and the Religious Test Clause, U.S. CONST. art. VI, cl. 3. The Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), provides review of some DoD actions..

STATEMENT OF THE CASE

Although this action shares aspects of other RFRA challenges to DoD's failing to accommodate religious objections to DoD's vaccine mandates, *Austin v. U.S. Navy Seals*, 142 S.Ct. 1301, 1302 (2022), the Chaplains raise overlapping speech, petition, and religious-freedom rights, *Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2421 (2022), because DoD not

only seeks to limit how the Chaplains personally exercise their faith but also to impose government-approved doctrine on what the Chaplains may preach. If allowed to stand, DoD's actions will have weaponized Colorado's attempted coercion struck down in *303 Creative LLC v. Elenis*, 143 S.Ct. 2298 (2023), to purge the Chaplains Corps of chaplains who refuse to act as political commissars.

Although "[t]he principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in [the Court's] opinions." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 523 (1993), DoD's zealous combination of COVID-19 maximalism and pro-abortion politics have made DoD unrecognizably hostile to religious freedom, requiring this Court's intervention to protect the independence of the Chaplains Corps' members and to guard against similar violations in the future.

In *Kendall v. Doster*, No. 23-154 (U.S.), this Court directed the lower courts to vacate a mandate-related preliminary injunction as moot, but the *Doster* plaintiffs-respondents did not claim a need to protect themselves from residual harms, which—because of the preliminary injunction—they may not have suffered to the same extent as the Chaplains. In any event, the *Doster* mootness is not controlling here because decisions "cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994); *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 170 (2004) (unraised, unexamined issues are not precedential), and *stare decisis* is at its weakest for decisions that result from the non-prevailing parties' waiver. *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 626-27 (2016). The

Chaplains suffer continuing injury and seek judicial redress, even if the *Doster* plaintiffs did not.

Legal Background

The Chaplains' contemporaneous request for interim relief will detail the constitutional and statutory bases for the Chaplains' claims. As relevant to jurisdiction, the Chaplains emphasize three central legal issues.

First, RFRA provides a claim against government action that substantially burdens religious exercise, with the government bearing the burden to show how applying the burden to plaintiffs furthers compelling government interests with the least restrictive means. 42 U.S.C. § 2000bb-1(a)-(b). Government cannot bear that burden when it exempts similarly situated non-religious third parties.

Second, § 533 provides additional protections against DoD's using "sincerely held conscience, moral principles, or religious beliefs … as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment." PUB. L. NO. 112-239, § 533(a)(1), (b), 126 Stat. at 1727, as amended by PUB. L. NO. 113-66, § 532(a), 127 Stat. at 759.

Third, under 10 U.S.C. § 632, the military—like law firms—uses an "up-or-out" approach to retention and promotion. Chaplains reprimanded for filing a religious accommodation request ("RAR") will not benefit from DoD's removing the reprimand if they also missed required training—and thus promotion—because DoD would not accommodate them to the same extent as non-religious objectors. Separation under § 632 follows soon enough, purportedly without DoD's fingerprints.

Factual Background

The facts at issue are the complaint's factual allegations and all reasonable inferences drawn from those allegations, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). For jurisdiction, the plaintiff may supplement those facts with declarations, affidavits, and other extrinsic evidence, *Mowery v. Nat'l Geospatial-Intelligence Agency*, 42 F.4th 428, 433-34 (4th Cir. 2022), even on appeal. 28 U.S.C. § 1653. In summary, the salient facts are as follows:

- The Chaplains filed RARs to avoid the COVID-19 vaccine, primarily based on their development using abortion-related stem cell lines.
- Although DoD accommodated those with medical or administrative objections, DoD did not grant religious-only exemptions from the Mandate.
- Due to both vaccination status and retaliation for not being team players, DoD denied the Chaplains travel, schooling, competitive performance reports, and promotions for filing RARs, with the Chaplains here dropping in their relative Chaplains Corps standing.
- Chaplains who lack schooling and competitive performance reports end up failing of selection (*i.e.*, being passed over), which leads to their separation from the Armed Services under § 632. For example, after Chaplain David Calger filed his RAR, the Army flagged his record precluding his travel to the two-week Chaplain School Reserve Component training necessary for Calger to complete the Chaplain Captain Career Course ("C4"). As a result, he failed of selection for promotion to major twice and was separated on December 1, 2023.

This petition cites specific facts *infra*, as they arise.

Procedural Background

The Chaplains filed their complaint and moved for a preliminary injunction in the Middle District of Florida, but the case was transferred to the Eastern District of Virginia. As relevant here, the Chaplains challenged the lawfulness of DoD's Mandate and polices related to DoD's implementing the Mandate.

In denying a preliminary injunction, the District Court also dismissed the entire case *sua sponte* on the basis of justiciability, deference to the military, and failure to exhaust administrative remedies. App:3a. Subsequently, Congress directed DoD to rescind the Mandate, James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, PUB. L. NO. 117-263, § 525, 136 Stat. 2395, 2571-72 (2022), and the District Court denied a motion to reconsider. App:28a.

The Chaplains appealed to the Fourth Circuit, which dismissed the appeal as moot. App:1a. The Chaplains petition this Court to reverse the dismissal and will contemporaneously seek interim relief to preserve the Court's future Article III jurisdiction to review the ultimate merits.

REASONS TO GRANT THE WRIT

The District Court found the Chaplains' suit non-justiciable, App:11a-26a, and the Fourth Circuit found the suit moot. App:2a. Both rulings were in error, reflecting important and recurring issues calling for this Court's exercise of its supervisory power. Moreover, because appellate courts can affirm judgments on any basis supported in the record, *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *King v. Rubenstein*, 825 F.3d 206, 222 n.3 (4th Cir. 2016), the

petition also provides an opportunity for this Court to address additional recurring issues of justiciability, both under RFRA generally and against the military particularly. The case presents an ideal vehicle for the Court to resolve several issues that only this Court can resolve:

1. Lower courts continue to confuse defendants' burdens for mootness versus plaintiffs' burden for continued redressability. *See* Sections I.A.1, I.B.4, *infra*.
2. Whether statutory claims generally or RFRA claims particularly are subject to prudential requirements for exhaustion or other justiciability issues. *See* Sections II.B-II.C, *infra*.
3. Whether doctrines deferring to or exempting the military under other statutes apply to RFRA. *See* Sections I.A.4, II.B, *infra*.

The Chaplains respectfully submit that each of these issues warrants granting a writ of *certiorari*.

I. AN ARTICILE III CONTROVERSY EXISTS BETWEEN THE CHAPLAINS AND DOD.

Federal courts must have—and maintain throughout a case—Article III jurisdiction over the controversy between the parties. U.S. CONST. art. III, § 2. Although Article III puts limits on the judiciary's power, *Allen v. Wright*, 468 U.S. 737, 750 (1984), an Article III controversy existed when the Chaplains filed their suit and continues to exist.

A. This action is not moot.

"A case becomes moot … only when it is impossible for a court to grant any effectual relief whatever." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) (internal quotations omitted). This Court has identified a two-part test for mootness:

> (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.

County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (emphasis added, internal quotation marks, alterations, and citations omitted). "When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law." *Id.* Even with federal defendants, "voluntary cessation does not moot a case unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *West Virginia v. EPA*, 142 S.Ct. 2587, 2607 (2022) (internal quotation marks omitted). As demonstrated in this Section, this action is not moot because the Chaplains' injuries are ongoing—and can be redressed—notwithstanding that DoD has ceased prospectively enforcing the Mandate.[2]

While the Chaplains do not concede that their challenge to the Mandate is moot, *see* Section I.A.4, *infra*, the Chaplains' suit would not be moot even if their challenge to the Mandate has become moot. Under the *Davis* test above, DoD has not "completely and irrevocably eradicated the *effects* of the [Mandate]," *Davis*, 440 U.S. at 631 (emphasis added); *see* Section I.A.1 (Mandate has ongoing effects), *infra*, even if the Mandate is unlikely to recur.

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[2] The parties dispute whether DoD has fully "rescinded" the Mandate, but this Court need not resolve that issue.

Significantly, although plaintiffs bear the burden of proving standing, defendants bear the burden of proving mootness. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). This distinction—and the Court's prior description of mootness as "the doctrine of standing set in a time frame"—have caused "understandable" confusion. *Id.* at 189-90. It is entirely possible that "the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Id.* at 190. This Section demonstrates that the Chaplains' action is not moot, both because they continue to suffer unlawful consequences from unlawful policies and because DoD's prospectively ceasing to enforce those policies would not moot the Chaplains' challenge.

1. The Chaplains continue to suffer injury redressable by injunctive relief.

While federal courts perhaps cannot void policies no longer in effect, *but see* Section I.A.4, *infra*, challenges to discriminatory and retaliatory actions *resulting from* a policy would not be moot, even assuming that challenges to the policy itself were moot. Because the Chaplains continue to suffer injury resulting from DoD's Mandate, *see* Section I.B.1-I.B.3, *infra* (continuing Article III injuries), and because a Court still can redress these injuries, *see* Section I.B.4 (Mandate's continuing Article III injuries remain redressable by a court), *infra*, the Chaplains' ongoing discrimination and retaliation claims are not moot, even assuming *arguendo* that the Chaplains' challenge to the Mandate that initially caused the discrimination and retaliation has become moot.

The basis for non-mootness depends in part on what "rescind" means in the 2023 NDAA. When new legislation or another development moots an issue or a complaint, a reviewing court should—and certainly *can*—remand to allow amending the complaint to address lingering harms under the prior rule or new harms from the new rule:

> Because it is possible that appellants may wish to amend their complaint so as to demonstrate that the *repealed statute retains some continuing force* or to *attack the newly enacted legislation*, rather than remanding the case to the District Court for dismissal as is our usual practice when a case has become moot [on appeal], we vacate the judgment of the District Court and remand the case to the District Court with leave to the appellants to amend their pleadings.

Diffenderfer v. Cent. Baptist Church, Inc., 404 U.S. 412, 415 (1972) (citations omitted, emphasis added); *accord Spomer v. Littleton*, 414 U.S. 514, 522-23 (1974); *Ramsek v. Beshear*, 989 F.3d 494, 500 (6th Cir. 2021); *Wood v. Several Unknown Metro. Police Officers*, 835 F.2d 340, 341-42 (D.C. Cir. 1987) (R.B. Ginsburg, J.). Mootness requires the *impossibility* of relief, which can never be shown when amending the complaint is possible. That is especially true here, where the District Court dismissed this action *sua sponte* on the Chaplains' motion for a preliminary injunction and then declined to reconsider based on the adoption of the 2023 NDAA. *Compare* App:21a-24a (balancing under *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971)) *with* App:30a-34a (refusal of reconsideration).

Significantly, this case is not moot regardless of what the 2023 NDAA meant by directing DoD to "rescind" its Mandate. The parties have a live controversy under either the broad or narrow reading of "rescind." Accordingly, this Court need not decide what "rescind" meant in the 2023 NDAA. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("we are a court of review, not of first view").[3] With respect to mootness, the Chaplains ask this Court to review whether their case is moot. Under *either interpretation* of "rescind" in the 2023 NDAA, this case is not moot.

Assuming *arguendo* that Congress intended the broad meaning of "rescind" in the 2023 NDAA (*i.e.*, restore the *status quo* as though the Mandate never existed), the Chaplains should be allowed the opportunity to amend their complaint to allege that DoD's implementation of the 2023 NDAA is inadequate. As explained in Section I.B.4, *infra*, DoD's limitation of its forgiveness of past adverse action to actions "solely" related to the RARs is insufficient to rescind the Mandate as though the Mandate had never existed.

Alternatively, assuming *arguendo* that Congress intended the narrow meaning of "rescind" in the 2023 NDAA (*i.e.*, "stop mandating" prospectively), the Chaplains' case is not moot for two reasons. First, given the Chaplains' ongoing injuries from the

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[3] The District Court balanced the *Mindes* factors while the Mandate was in effect, then assumed the narrow definition of "rescind" in denying reconsideration. *See* App:1a-24a (initial *Mindes* balancing); 30a-31a (refusal of reconsideration). As indicated in Section II.B, *infra*, however, the 2023 NDAA's rescission dramatically alters the *Mindes* balance, even under a narrow reading of the 2023 NDAA's rescission.

Mandate, DoD has not "completely and irrevocably eradicated the effects of the [Mandate]" under *Davis*, 440 U.S. at 631. Second, under this reading of "rescind," DoD's implementing policy decision to forgive actions "solely" resulting from RARs—*while welcome*[4]—is voluntary on DoD's part and thus DoD cannot argue that Congress compelled the result to avoid DoD's heavy burden of persuasion under the voluntary-cessation line of cases. *See* Section I.A.4, *infra*.

In short, under either reading of the 2023 NDAA, the Chaplains' controversy with DoD is not moot. The lower courts can interpret the 2023 NDAA in the first instance, but only this Court can reverse the lower courts' dismissal of the case as moot or otherwise outside federal courts' jurisdiction.

2. Even if prospective injunctive relief were unavailable, a court could order DoD to revisit past personnel actions with the Mandate's effects removed.

Even if all injunctive relief against DoD's *future* actions were moot—and it is not—a court could order DoD to revisit *past* personnel actions regarding the Chaplains that were based, in part, on the unlawful Mandate. Specifically, some Chaplains argue that their Service Branch passed them over for promotion as a direct result of DoD's unlawful Mandate. The

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[4] To the extent not required by the 2023 NDAA, the DoD policy decision is welcome in that it would eliminate *some* of DoD's unlawful discrimination and retaliation. But sole causation is not but-for or mixed-motive causation, so DoD's sole-causation relief does not eliminate *all* of DoD's unlawful discrimination and retaliation. *See* Section I.B.4, *infra*.

District Court could order DoD to revisit the Chaplains' prior evaluations for promotion with anything but-for caused by the Mandate taken out of the evaluation process:

> [W]hen the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.

Heckler v. Mathews, 465 U.S. 728, 740 (1984) (emphasis in original). The competition for promotions improperly burdened the Chaplains, and that type of "unequal footing" injury involves not the actual benefit (*e.g.*, promotion), but rather the ability to compete for it on an equal footing, free of unlawful discrimination. *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 211 (1995). In other words, the injury "is the *denial of equal treatment* resulting from the imposition of the barrier, not the ultimate *inability to obtain the benefit*." *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (emphasis added). Whatever else remains an Article III controversy with DoD, the Chaplains have an Article III controversy over whether their merits should be re-evaluated on lawful grounds, even if the Chaplains might fair no better. *FEC v. Akins*, 524 U.S. 11, 25 (1998).

3. Money damages are available under RFRA.

Wholly apart from injunctive or declaratory relief, "RFRA's express remedies provision permits litigants, when appropriate, to obtain money damages against

federal officials in their individual capacities." *Tanzin v. Tanvir*, 141 S.Ct. 486, 493 (2020). Although the Chaplains' complaint did not seek money damages, that is no bar to relief: ""final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." FED. R. CIV. P. 54(c); *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 65 (1978).

Feres v. United States, 340 U.S. 135 (1950), held that the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 ("FTCA") does not apply to "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 145-46. The Court relied on policy rationales and—under FTCA's language tying the United States' liability to "like circumstances" for private torts—the lack of any private analog to military service. *Id.* 141-42; 28 U.S.C. § 2674. Similarly, the Court later applied the "incident to service" rationale as a "special factor" to exclude military services from an implied damages remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)). *See Chappell v. Wallace*, 462 U.S. 296, 305 (1983). None of these FTCA or *Bivens* rationales apply to RFRA which "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act[.]"42 U.S.C. § 2000bb-3(a).

As relevant here, "the mooting of the complaint's request for injunctive relief does not require dismissal of the suit if monetary relief would be available on the claim, even if the monetary relief was not requested." 10 J. MOORE, MOORE'S FEDERAL PRACTICE § 54.70; *accord* 10 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2664. In short, this action

is not moot. *Cf.* 28 U.S.C. § 1653 ("[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts"). The District Court's *sua sponte* dismissal denied the Chaplains an opportunity to amend the complaint to seek damages under RFRA as a means of vindicating their rights in the event that injunctive relief is not available.

4. DoD's actions are capable of repetition that evades review.

Even federal defendants cannot simply cease their challenged conduct and thereby evade review:

> [T]his Court's precedents recognize an exception to the mootness doctrine for a controversy that is "capable of repetition, yet evading review." That exception applies only in exceptional situations, where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.

Kingdomware Techs., Inc. v. United States, 579 U.S. 162, 170 (2016) (interior quotation marks, citations, and alterations omitted). Defendants claiming mootness must meet the "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190.; *West Virginia*, 142 S.Ct. at 2607 (voluntary cessation does not moot a case without absolute clarity that the defendant could not resume the wrongful conduct). DoD cannot meet that test for two different reasons.

First, given the recurring COVID strains and mutations as well as future pandemics, It seems likely

that new boosters or vaccines will present themselves in the future. When that happens, DoD could resume mandating the Chaplains to act against their consciences and beliefs.

Second, and more fundamentally, repetition is inevitable for a facet of the Mandate-related cases that is unique to chaplains and wholly absent from *Doster*: What authority controls a chaplain's conscience, the chaplain's faith or a government bureaucrat? Here, DoD used pandemic-generated fear and its own zeal about both COVID and abortion to attempt to convert chaplains from denominational representatives of their faiths to government mouthpieces. The Establishment Clause injury occurs "as soon as the government engages in impermissible action" and "occurs merely by virtue of the government's purportedly unconstitutional policy or practice." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006) ("*CFGC*"). "Those who would renegotiate the boundaries between church and state must [] answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?" *McCreary County v. ACLU*, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring). Whether that question next recurs in the context of new vaccine or a completely different non-medical context, the 2023 NDAA does nothing to prevent its recurrence.

B. The Chaplains have Article III standing.

Standing poses a tripartite test: (a) judicially cognizable injury to the plaintiff, (b) causation by the challenged conduct, and (c) redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Causation and redressability pose "little question" when the government directly regulates a

plaintiff, although the standing inquiry requires a heightened showing when the government regulates third parties, who then cause injury. *Id.* Moreover, to establish subject-matter jurisdiction, a complaint's "general allegations embrace those specific facts that are necessary to support the claim." *Bennett v. Spear*, 520 U.S. 154, 168 (1997). The following subsections demonstrate the various cognizable injuries that the Chaplains suffer, as well as the rationale for finding causation and redressability.

1. The Chaplains suffer cognizable and concrete injury from DoD's unlawful vaccine policies.

The Chaplains have suffered and continue to suffer numerous concrete injuries from DoD's unlawful vaccine policies.

- *First*, the Mandate presented the Chaplains with a Hobson's choice violating their religious beliefs or threatening their continued employment and ministries. The Mandate thus concretely injured the Chaplains' religious freedoms, which presented an Article III injury. *See Larson v. Valente*, 456 U.S. 228, 238-41 (1982) (Establishment Clause); *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 & n.9 (1963) (Free Exercise Clause).
- *Second*, the Chaplains suffer reputational injury from having been branded as "not team players" and having their personnel records marred by adverse actions (*e.g.*, pass-overs, non-competitive performance reviews) that result from DoD's unlawful actions. Reputational harm—including harm from pejorative federal action—can qualify as an Article III injury when it concretely affects

a plaintiff. *Meese v. Keene*, 481 U.S. 465, 475-76 (1987); *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2198 (2021) ("intangible harms—like reputational harms—can also be concrete").

- *Third,* the Chaplains suffer an "unequal footing" injury from DoD's failing to follow the APA, RFRA, Section 533, and the Constitution because—unless enjoined by a court—the Chaplains' colleagues who did not seek RARs from the Mandate are now at an unlawful competitive advantage vis-à-vis the Chaplains who did seek RARs. This interest in a level playing field exists apart from the end (*e.g.*, winning a contract, promotion, or admission), *Northeastern Fla. Chapter of Associated Gen. Contractors of Am.*, 508 U.S. at 666 (injury "is the *denial of equal treatment* resulting from the imposition of the barrier, not the ultimate *inability to obtain the benefit*") (emphasis added); *accord Adarand Constructors*, 515 U.S. at 211; *Gratz v. Bollinger*, 539 U.S. 244, 261-62 (2003). The ultimate benefit (*e.g.*, the "question of [petitioner's] admission *vel non*") "is merely one of relief," not injury or standing. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 280 n.14 (1978). The injury-in-fact is the unequal treatment in the process. *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003). Significantly, although unequal-footing injuries often arise in the context of Equal Protection actions, the concept applies equally to instances where the government improperly denies plaintiffs statutory protections. *Compare Clinton v. New York*, 524 U.S. 417, 433 & n.22 (1998) *with id.* at 456-57 (Scalia, J., dissenting).

- *Fourth*, although this injury may be remedied after separation from the Armed Services or through a damages remedy, the Chaplains also suffer diminished pay to the extent that their filing RARs prevented a promotion. Such economic injuries obviously qualify as cognizable under Article III. *Ramirez*, 141 S.Ct. at 2200.

Because the Chaplains suffer these concrete injuries from the Mandate, the Chaplains alco can assert *procedural* injuries from DoD's procedural violations of the APA, RFRA, Section 533, and the Petition Clause. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *see* Section I.B.3, *infra*.

Significantly, these injuries persist because—in addition to being branded as not "team players"—the Chaplains suffer from career-destroying adverse actions (*e.g.*, denied schooling and promotions) as a result of DoD's unlawful policies. For example, Chaplain Calger missed required C4 training because DoD improperly denied his RAR and was denied promotion for lacking C4, resulting in his separation under § 632. Notwithstanding DoD's elimination of adverse reports "solely" related to the Mandate, DoD's actions remain as marks against the Chaplains caused by DoD's unlawful actions.

2. The Chaplains' economic injury satisfied Article III.

In addition to their far more serious reputational injuries, the Chaplains also have been passed over for promotions based on unlawful discrimination and retaliation for seeking religious exemptions from the Mandate. *See*, *e.g.*, Compl. 71-72, (¶ 143). Because promotion includes increased compensation, the ongoing economic effects of DoD's illegal conduct

easily satisfied Article III, for which any measurable "trifle" of injury suffices:

> We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $ 5 fine and costs, and a $1.50 poll tax.

United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 689 n.14 (1973) (citations omitted). The Chaplains' ongoing diminution in salary is "controversy" enough between the parties for Article III.

3. The Chaplains' procedural injury lowers the Article III threshold for immediacy and redressability.

Because the Chaplains' complaint asserts that the federal respondents amended the definition of "vaccine" in violation of the APA and that DoD failed to follow its own regulations, this action is based partly on procedural injury. Compl. 114-19 (¶¶ 253-265). Because the Chaplains have concrete injuries, *see* Sections I.B.1-I.B.2, *supra*, this type of procedural injury lowers the Article III threshold for immediacy and redressability. *Lujan*, 504 U.S. at 571-72 & n.7 (a proper procedural-injury plaintiff "can assert that right without meeting all the normal standards for redressability and immediacy"); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) (procedural claims are fully formed at the procedural violation and "can never get riper"); *cf. Summers*, 555 U.S. at 496. Moreover, procedural-rights plaintiffs have standing for a "do-over" under the proper procedures and standards, even if the agency might make the same choice. *See Akins*, 524 U.S. at 25. The Chaplains have

procedural standing to challenge the negative reviews and promotion actions based on DoD's illegal criteria.

4. The Chaplains' injuries are traceable to DoD's actions and redressable in court.

When the Chaplains filed this action, there was "little question" of causation or redressability because DoD and its constituent service branches directly injured the Chaplains and a court could have stopped those injuries with injunctive relief. *See Lujan*, 504 U.S. at 561-62. The only question about causation and redressability now is whether the Chaplains' injuries are impossible to redress (*e.g.*, when patients die or convicts are executed, their challenges to treatment or punishment may become impossible for a court to redress). Even after the Chaplains separate from the armed forces, their injuries would remain partially redressable by damages. *See* Section I.A.3, *supra*.[5]

While the Chaplains remain in the armed services, their prospects for promotion and retention will improve by removing—even temporarily—the adverse actions from their records that are *related to* their having sought RARs. Significantly, this relief differs from DoD's implementation of the 2023 NDAA. While DoD would remove only adverse actions solely resulting from an RAR, the Chaplains seek not only sole-cause relief but also relief for anything for which DoD's unlawful Mandate and implementing policies

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[5] For each form of requested relief, however, only one Chaplain needs to show an Article III controversy. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) ("[o]nly one of the petitioners needs to have standing to permit us to consider the petition for review"); *Horne v. Flores*, 557 U.S. 433, 446-47 (2009).

were the but-for or mixed-motive cause in dislodging them from where they would have been:

> "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946), alterations omitted); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 767-68 (1976) (noting need for "concomitant award of the seniority credit" for plaintiff to "obtain his rightful place in the hierarchy of seniority"). Further, the Chaplains seek review of DoD's prior denial of their promotions, *See Akins*, 524 U.S. at 25 (review of prior action on new record provides redress, even if review would or might not change the result). Finally, the Chaplains request preferential treatment *vis-à-vis* schooling and assignment opportunities to redress DoD's unlawful denial of equal treatment for such opportunities. All of these forms of relief would provide redress.

C. This action is ripe.

In addition to having standing, the Chaplains must also have a ripe claim. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted). Because the Chaplains are *already suffering* concrete injury, *see* Sections I.B.1-I.B.2, *supra*, their claims are also constitutionally ripe. Indeed, their procedural "claim[s] can never get riper." *Ohio Forestry Ass'n*, 523 U.S. at 737. But even if elements of the Chaplains'

case must await further ripening based on future DoD actions to implement the 2023 NDAA, federal courts have jurisdiction for interim relief under the All Writs Act. *See* Section II.E, *infra*.

Although courts often consider a case's fitness for review and the hardship of denying review to determine whether a case is *prudentially* ripe, that doctrine is in tension with the need—at least for statutory causes of action like RFRA—for courts to hear cases within their jurisdiction, without judicially crafted overlays. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167-68 (2014) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014). That tension is heightened for statutes like RFRA that limit standing to Article III (*i.e.*, with no prudential overlays). *See* 42 U.S.C. § 2000bb-1(c) (limiting standing to assert RFRA claims to "general rules of standing under article III of the Constitution"). Assuming *arguendo* that prudential limits on ripeness apply, the Chaplains' claims easily meet those limits.

- Purely legal issues that "will not be clarified by further factual development" are fit for review, *Driehaus*, 573 U.S. at 167 (internal quotation marks omitted). Although the parties may dispute certain facts, those disputes do not go to the questions that a court must decide the RFRA issue because DoD has conceded or waived the relevant issues (*e.g.*, DoD's RAR denials did not attempt to make DoD's required showings). *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *accord SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). As such, no "further factual development" is required for a court to decide the RFRA issues. For the relevant steps in the Chaplains' careers (*e.g.*, denial of promotions,

training, and assignments), DoD has made its "final decision, *Pakdel v. City & Cnty. of San Francisco*, 141 S.Ct. 2226, 2228 (2021), which is all that the "relatively modest" fitness test requires. *Id.* at 2230.

- The Chaplains meet the hardship test because—without equitable relief—they will suffer irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (rights of association and political belief); *accord Agudath Isr. v. Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020) (free exercise); *CFGC*, 454 F.3d at 302 (Establishment Clause). That suffices here. *See Driehaus*, 573 U.S. at 167-68 (finding "substantial hardship" in being "forc[ed] … to choose between refraining from core political speech on the one hand or engaging in that speech and risking costly Commission proceedings and criminal prosecution on the other").

While prudential limits on statutory claims should not apply, the Chaplains submit that the prudential-ripeness tests are easily met.

II. NO OTHER JURISDICTIONAL OR THRESHOLD ISSUES BAR THIS ACTION.

The prior section addressed the ongoing existence of an Article III controversy between the parties, which was the basis on which the Fourth Circuit dismissed the appeal. Because "there is no unyielding jurisdictional hierarchy" to threshold bases for dismissal, *Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999), this Court can and should consider and reject all other threshold bases for dismissing the action. Especially with putative class actions, additional threshold issues can be "logically antecedent" to jurisdictional issues. *Ortiz v.*

Fibreboard Corp., 527 U.S. 815, 830-31 (1999) (quoting and citing *Amchem Prods. v. Windsor*, 521 U.S. 591, 612-13 (1997)).

A. The complaint presents substantial federal questions of religious freedom.

The Chaplains' complaint premised jurisdiction *inter alia* on 28 U.S.C. §§ 1331, 1343, 1346, 1361. Given the federal issues that the Chaplains raise under the First Amendment, Religious Test Clause, Due Process Clause, RFRA, and Section 533, the case clearly falls within the district courts' federal-question and civil-rights jurisdiction unless some other principle or provision withdraws that jurisdiction.

Even a case that concerns a federal statute or the Constitution—and thus literally presents a "federal question"—can present a question too "insubstantial" for federal-question jurisdiction to apply. *See*, *e.g.*, *Hagans v. Lavine*, 415 U.S. 528, 537 (1974); *Goosby v. Osser*, 409 U.S. 512, 518 (1973); *Bell*, 327 U.S. at 683-84 (federal-question jurisdiction can be denied if federal basis for suit is "insubstantial or frivolous"); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8-9 (1978). Although DoD argued that this case is now moot, DoD has not and cannot argue that the case presents only "frivolous" or "insubstantial" federal questions.

B. Deference and *Mindes*-style abstention do not limit review.

The District Court treated deference to the military under this Court's precedents and abstention under *Mindes* and its lower-court progeny as two discrete issues, *compare* App:12a-15a *with* App:21a-24a, and found both issues to weigh against the

justiciability of the Chaplain's case. While the Chaplains respectfully submit that these two issues—namely, deference and *Mindes*—are essentially the same, the Court need not decide that issue because deference and *Mindes* are essentially moot, now that Congress—with the President's assent, 136 Stat. at 4166—has removed the Mandate from DoD's authority.

Provided that plaintiffs request traditional relief for the injuries that military actors inflict and not amorphous judicial supervision of military functions, a suit against military defendants can be justiciable. *Compare Gilligan v. Morgan*, 413 U.S. 1, 11-12 (1973) *with Scheuer v. Rhodes*, 416 U.S. 232, 249-50 (1974). The Court explained its deference in the context of alleged sex discrimination in the military as follows:

> Judges are not given the task of running the Army. The responsibility for setting up channels through which grievances can be considered and fairly settled rests upon the *Congress and upon the President of the United States and his subordinates*. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Rostker v. Goldberg, 453 U.S. 57, 71 (1981) (alterations omitted, emphasis added). Notably, Congress and the President are the ones with *express* constitutional power for the military, U.S. CONST. art. I, § 1; *id.* art. I, § 8, cl. 12; *id.* art. II, § 2, cl. 1. This Court's power over the military lies in its *general*

power of judicial review: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) ("power to interpret the Constitution … remains in the Judiciary"), *abrogated in part on other grounds*, PUB. L. NO. 106-274, § 3, 114 Stat. 803, 804 (2000). But the respondents here—the President's "subordinates" as *Rostker* put it—have "literally … no power to act ... unless and until Congress confers power upon [them]." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Now that Congress—with the President's assent, 136 Stat. at 4166—has stripped any power DoD had for the Mandate, it would be a dereliction of duty for the Court to defer to the respondents.

On deference, "[t]his Court has never held … that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." *Chappell*, 462 U.S. at 304, Moreover, this Court's deferential "'review of military regulations challenged on First Amendment grounds' … does not render 'entirely nugatory in the military context the guarantees of the First Amendment.'" *Austin*, 142 S.Ct. at 1307 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)) (Alito, J., dissenting). Deference has its limits:

> [T]he phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. Even the war power does not remove constitutional limitations safeguarding essential liberties.

United States v. Robel, 389 U.S. 258, 263-64 (1967) (internal quotation marks omitted). While the

Chaplains do not concede that deference would or should have carried the day for DoD when DoD was aligned with Congress and the President, the 2023 NDAA mooted that question.

Similarly, under *Mindes*—to the extent it applies—the balancing test favors the Chaplains.[6] As their contemporaneous request for interim relief will explain, the Chaplains assert weighty issues and irreparable harm under the Constitution, RFRA, and § 533. By contrast, Congress—with the President's assent, 136 Stat. at 4166—has decided DoD lacks authority for the Mandate, thus negating any competing interests DoD might have asserted. On these constitutional and statutory issues, moreover, the judiciary—not the Executive Branch, much less the military—has the relevant expertise and final word. *Marbury*, 5 U.S. (1 Cranch) at 177; *City of Boerne*, 521 U.S. at 524. Indeed, in order to defer to Congress and the President in military matters, this Court must reject DoD's position, which the 2023 NDAA disavows. To the rock-paper-scissors game of checks and balances that is separation of powers doctrine, the secretaries bring a wet noodle.

Finally, even if judicial doctrines of exhaustion or abstention apply the Chaplains' constitutional claims, RFRA does not include an exhaustion requirement:

> We do not ask whether in our judgment Congress *should* have authorized [the

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[6] *Mindes* includes a threshold two-part test—whether plaintiffs allege violations of law and whether plaintiffs exhausted administrative remedies, *Mindes*, 453 F.2d at 201. The Chaplains allege violations of constitutional violations (*i.e.*, religious freedom, speech, petition, and due process), as well as statutory violations (*i.e.*, RFRA, § 533). Exhaustion is addressed in Section II.C, *infra*.

> plaintiff's] suit, but whether Congress in fact did so. Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because "prudence" dictates.

Lexmark, 572 U.S. at 128 (emphasis in original). To the contrary, RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA's enactment" in 1993. 42 U.S.C. § 2000bb-3(a). RFRA thus "operates as a kind of super statute, displacing the normal operation of other federal laws[,]" *Bostock v. Clayton County*, 140 S.Ct. 1731, 1754 (2020), that does not leave room for judicial doctrines such as prudential exhaustion. *See*, *e.g.*, *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 346 (5th Cir. 2022) (citing *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981)). In any event, RFRA's plain language prohibits "substantially burden[ing] a person's exercise of religion" unless "application of the burden to the person" "is the *least restrictive means* of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2) (emphasis added). Requiring exhaustion is not the "least restrictive means" to further governmental interests. Allowing resort of judicial review is less restrictive.

C. The Chaplains need not further exhaust administrative remedies.

The District Court accepted DoD's argument that administrative exhaustion doctrines required the Chaplains to defer suit until after they sought reinstatement or other corrections from *post-separation* review boards. App:15a-21a; *see also id.*

16a (noting that some—but not all—Chaplains had not even received the results of their intra-agency appeal of the denial of their RARs). Exhaustion doctrine poses no barrier to suit for several independently dispositive reasons.

First, the APA does not require seeking intra-agency review from a higher authority unless agency regulations require those appeals and the denial remains inoperative during the pendency of the intra-agency review. *See* 5 U.S.C. § 704; *Darby v. Cisneros*, 509 U.S. 137, 152 (1993). While an RAR denial may well have been inoperative pending appeal to a higher agency authority, most RAR appeals were complete, and any that were not would be justiciable for agency inaction. *See* 5 U.S.C. §§ 551(13) (agency action defined to include inaction), 706(1) (judicial review of agency inaction, including unreasonable delay); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004). The suggestion that the Chaplains defer action until after arguing their case to *a post-separation review board* is absurd, given that separations by definition do not remain "inoperative" pending review. In short, the APA allowed judicial review of DoD's denial of relief under 5 U.S.C. § 555(b) and (e), either on the merits or for unreasonable delay.

Second, RFRA does not require exhaustion. *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012). Indeed, this Court analogized claims under RFRA to claims under 42 U.S.C. § 1983, *Tanzin*, 141 S.Ct. at 490-92, and § 1983 claims do not require exhaustion. *Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982), *abrogated in part on other grounds*, PUB. L. NO. 104-134, § 803(d), 110 Stat. 1321-71 (1996). Accordingly, the Chaplains need

not exhaust administrative remedies before seeking judicial review under RFRA.

Third, even if there were further administrative remedies within DoD, the Chaplains credibly alleged that exhaustion would be futile and challenged a *de facto* policy of denial. Even if judge-made exhaustion applied here—and it does not—futility is an exception to exhaustion: "an administrative remedy may be inadequate where the [agency] is shown to be biased or has otherwise predetermined the issue." *McCarthy v Madigan*, 503 U.S. 140, 148 (1992). Exhaustion provided no basis on which to dismiss the Chaplains' action for judicial review.[7]

D. Sovereign immunity presents no barrier to review.

The federal government's sovereign immunity poses no jurisdictional bar to the Chaplains' action for three reasons: (1) the APA's waiver of sovereign immunity; (2) the officer-suit exception to immunity

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[7] The exhaustion requirements applicable to non-military employees do not apply to actions by members of the armed services. First, with respect to Title VII, some courts have held that RFRA's lack of an exhaustion requirement does not displace Title VII's exhaustion requirement in religious-accommodation cases. *See*, *e.g.*, *Francis v. Mineta*, 505 F.3d 266, 272 (3d Cir. 2007). That is irrelevant here because Title VII does not apply to federal employers. *See* 42 U.S.C. § 2000e(b)(1). Second, although the Civil Service Reform Act ("CSRA") provides a "system for reviewing personnel action taken against federal employees," *United States v. Fausto*, 484 U.S. 439, 455 (1988), the term "civil service" excludes the "uniformed services." *See* 5 U.S.C. § 2101(1). As such, CSRA does not apply in pertinent part to members of the Armed Services like the Chaplains. *See* 5 U.S.C. § 2101(2)-(3) (definitions of "uniformed services" and "armed services").

for prospective injunctive relief; and (3) RFRA's authorizing a RFRA action against federal parties.

First, the APA provides "generous review provisions" that require "hospitable interpretation." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967). While that review does not extend to "military authority exercised in the field in time of war or in occupied territory" or "courts martial and military commissions," 5 U.S.C. §§ 551(1)(G), 701(b)(1)(F)-(G), that very narrow exception proves the general rule of the APA's applicability to respondents' actions here. Moreover, the 1976 APA amendments to 5 U.S.C. § 702 went even further and "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (internal quotations omitted) (emphasis added) (R.B. Ginsburg, J.). With that generous provisions for judicial review, the Chaplains have ample basis for relief. *See also* 5 U.S.C. § 705 (interim relief).

Second, even if the APA does not apply,[8] the Chaplains have named the *officers* in charge of the various federal agencies involved here. App:4a. Under the officer-suit exception of *Ex parte Young*, 209 U.S. 123, 159-61 (1908), sovereign immunity does not protect the unlawful actions of government officers from review. While not all of the Chaplains are Christians, it bears emphasis that the divided federal sovereign under the Constitution's separation of

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[8] The Chaplains suffer "direct injury" (*i.e.*, "a wrong which directly results in the violation of a legal right") under the pre-APA cases for judicial review of administrative action. *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938).

powers, *Bowsher v. Synar*, 478 U.S. 714 (1986), makes it difficult to "[r]ender to Caesar the things that are Caesar's." Matthew 22:21. When the chain of command appears to act unconstitutionally or unlawfully, it might not be easy to know what exactly is Caesar's.[9] For purposes of justiciability, however, "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon Md. Inc. v. PSC*, 535 U.S. 635, 646 (2002). As a threshold matter, sovereign immunity poses no barrier to the Chaplains' suit for injunctive relief.

Third, the premise of the *Young* officer-suit doctrine is that "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *Dugan v. Rank*, 372 U.S. 609, 621-23 (1963); *cf. Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374 (recognizing that "an agency literally has no power to act… unless and until Congress confers power upon it"). By defining the covered entities to

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[9] The President is commander in chief, U.S. CONST. art. II, § 2, cl. 1, Congress makes the laws and raises armies, U.S. CONST. art. I, § 1; *id.* art. I, § 8, cl. 12, and this Court referees legal disputes between the other two branches and has the final say on legal issues. *Marbury*, 5 U.S. (1 Cranch) at 177; *City of Boerne*, 521 U.S. at 524. Moreover, "[t]here is nothing in the power of Congress to make rules for the government and regulation of the land and naval forces, nor in the powers of the President as commander in chief, that ousts the power of courts to protect the constitutional rights of individuals against improper military actions." *U.S. Navy Seals 1-26*, 27 F.4th at 346 n.8 (quoting 13C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2942 n.80 (3d ed. Apr. 2021 update)) (alteration in original).

include federal parties, *see* 42 U.S.C. § 2000bb-2(1), RFRA authorizes suit against federal parties. Along the same lines, this Court has recognized that RFRA allows "money damages against federal officials in their individual capacities." *Tanzin*, 141 S.Ct. at 493. With respect to RFRA damage remedies, federal officials cannot assert the defense of sovereign immunity to shield their unlawful conduct.

E. The All Writs Act authorizes interim relief to preserve the *status quo* pending the final resolution.

Wholly apart from appellate jurisdiction to review the lower court's dismissal and their resulting denial of interim relief, the All Writs Act, 28 U.S.C. § 1651(a), gives this Court jurisdiction to issue interim relief to preserve the controversy for a later appeal of the lower courts' decision on a permanent injunction. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966) (recognizing federal courts' "traditional power to issue injunctions to preserve the status quo while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction"). "[I]f a court may eventually have jurisdiction of the substantive claim, the court's incidental equitable jurisdiction, despite the agency's primary jurisdiction, gives the court authority to impose a temporary restraint in order to preserve the status quo pending ripening of the claim for judicial review." *Wagner v. Taylor*, 836 F.2d 566, 571 (D.C. Cir. 1987). Without interim relief to preserve the Chaplains' blamelessness pending the final resolution of this action, interim relief is required to prevent DoD from separating the Chaplains from military based on issues related to—but perhaps not caused "solely"

by—DoD's unlawful Mandate and its discrimination and retaliation for lawfully petitioning DoD for RARs.

Although some of the Article III injuries that the Chaplains suffer (*e.g.*, lower salary) can be resolved in a final judgment or by subsequent DoD action after the Chaplains prevail, some injuries demand interim relief to preserve the controversy for a merits judgment. *See*, *e.g.*, *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 423 (D.C. Cir. 1992) (unequal-footing injuries amenable to preliminary injunctions).

F. No other threshold issues bar Chaplains' pursuit of this litigation as a class action in district court.

The Chaplains seek to certify themselves as class representatives. *See Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (class-action injunctive relief available against federal government). Although the District Court dismissed without resolving class certification, App:26a-27a, nothing precludes certifying the Chaplains as class representatives on remand. Indeed, nothing would preclude their pursuing their individual claims on remand. Thus, there are no threshold issue "logically antecedent" to jurisdiction and would warrant dismissal. *Cf. Ortiz*, 527 U.S. at 830-31; *Amchem*, 521 U.S. at 612-13.

CONCLUSION

The petition for a writ of *certiorari* should be granted. If the Court grants interim relief under the Chaplains' contemporaneous request, the Court will necessarily have found jurisdiction to exist, *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983), and should "GVR" the case. *Lawrence v. Chater*, 516 U.S. 163, 166 (1996).

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Respectfully submitted,

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