

No. 23-717

In The
Supreme Court of the United States

ISRAEL ALVARADO, *et al.*,

Petitioners,

v.

LLOYD AUSTIN, III,
in his official capacity as
Secretary of Defense, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* MEMBERS OF
THE UNITED STATES CONGRESS IN
SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST¹

Amici curiae are 25 Members of the U.S. House of Representatives who are committed to defending the constitutional right of military chaplains to freely exercise their religion. *Amici* are disturbed by the Department of Defense's (DoD) discriminatory and retaliatory actions against those chaplains who were denied religious accommodation requests (RAR) for an exemption from the COVID-19 vaccine mandate requirements.

The U.S. Constitution gives Congress the responsibilities *inter alia* to “make rules for the government and regulation of the land and naval forces” and “provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States[.]” U.S. CONST. ART. I, § 8. Congress has also acted numerous times to protect Americans’ First Amendment right to the free exercise of their religion. To that end it has written into statute specific protections for military servicemembers, including chaplains, to freely exercise their religion.

Of critical concern to the undersigned members is the DoD's treatment of military chaplains and religious servicemembers who requested religious accommodation exemptions from receiving the COVID-19 vaccine. *Amici* note with concern the near-

¹ No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice was given to all parties.

universal dismissal of the petitioners' sincere RARs and the retaliatory actions then taken against them. Because the DoD has violated servicemembers' statutory conscience rights, *amici* respectfully urge the Court to vacate the Fourth Circuit's ruling and provide just relief.

SUMMARY OF ARGUMENT

Congress has not hesitated to legislate, and even to correct decisions of this Court, to ensure that U.S. servicemembers and their chaplains are accorded the maximum possible religious freedom consistent with the unique demands of military service. In addition to the Constitution's religious liberty provisions, Congress enacted statutory protections for servicemembers' religious freedom in both the Religious Freedom Restoration Act and the Fiscal Year 2013 National Defense Authorization Act.

Petitioners have raised detailed and serious claims that the DoD violated not only its own regulations, but also the Constitution and these additional statutory protections. Their allegations were neither contradicted nor adjudicated, but instead dismissed as moot by the Fourth Circuit. *Amici* argue the case is not moot, since mootness can only apply when a court cannot provide "any effectual relief whatever." In this case, a court certainly could—and in our view must—instruct the DoD to provide restitution for the career damage and other harms suffered by the chaplain petitioners who, having been summarily denied a RAR, were subsequently wrongfully punished. In the view of *amici*, the DoD appears to have carried out not a legal religious accommodation process, but rather a concerted

targeting of anyone who attempted to exercise their First Amendment or RFRA rights. We urge the Court to right this wrong by granting the Petitioners' writ of *certiorari*.

ARGUMENT

I. CONGRESS HAS RECOGNIZED MILITARY CHAPLAINS' ESSENTIAL ROLE IN THE ARMED FORCES AND HAS ENACTED SPECIFIC PROTECTIONS FOR RELIGIOUS SERVICEMEMBERS' FIRST AMENDMENT RIGHT TO THE FREE EXERCISE OF RELIGION.

A. The military chaplaincy has served a dual purpose of protecting servicemembers' constitutional rights and encouraging morality even from before the Republic's founding.

Religious freedom is no less essential to those serving in the Armed Forces than to civilian Americans. Military chaplains occupy a unique role in this Nation's military by ministering to the spiritual needs of servicemembers. Congress has provided for military chaplains from before the founding of the Republic, and courts, including this one, have recognized chaplains' critical role in enabling servicemembers to worship freely according to the dictates of their conscience. Military chaplains also constitute a collective moral conscience that benefits the force both in service and for the time after, when they doff their uniforms, rejoin civilian life, and return home to be fathers and mothers, brothers and

sisters, and citizens.

One year before the Declaration of Independence was signed, the “Continental Congress put the [military] chaplaincy on a legal federal basis.”² One scholar writes that:

The Continental Congress instituted the Navy Chaplaincy in November, 1775, directing the military commanders “to take care that divine services be performed twice a day on board, and a sermon preached on Sunday, unless bad weather or other extraordinary events occur.” In accordance with another act of the Continental Congress on May 27, 1777, a chaplain was assigned to each Army brigade with colonel’s pay.

The military chaplaincy was an accepted institution under the new Constitution, alongside civilian chaplains who served in the House and Senate beginning with the first Congress in 1789.³

² LCdr Leslie, Reo N., USN, “E Pluribus Unum: Religious Pluralism in the Military.” *Naval War College Review*, vol. 43, no. 3, 1990, pp. 55–61. <http://www.jstor.org/stable/44638438>. (Last accessed Jan. 23, 2024).

³ Hans Zeiger, “Why Does the US Military Have Chaplains?” Pepperdine School of Public Policy, 2024, (internal citations

General Washington made clear his support for a pluralistic religious military force where every soldier might worship according to his individual conscience, even during wartime. In September 1775, Washington wrote to one of his subordinate commanders, Benedict Arnold, “[A]s far as lays in your power, you are to protect and support the free exercise of the Religion of the Country and the undisturbed Enjoyment of the rights of Conscience in religious Matters, with your utmost Influence and Authority.”⁴

The Second Circuit affirmed the chaplaincy’s constitutionality in *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985), in which it denied the challenge of two Harvard Law students who claimed that by furnishing military chaplains, Congress violated the Constitution’s Establishment Clause. That opinion was in many ways anticipated by more than 20 years by Justice Stewart, whose dissent in a different case stated:

omitted), available at <http://tinyurl.com/mrmzv7py> (last accessed Jan. 23, 2024)

⁴ Israel Drazin and Cecil B. Currey, *For God and Country: The History of a Constitutional Challenge to the Army Chaplaincy*. (Hoboken, NJ: KTAV Publishing House, 1995), 10.

Spending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause. Yet a lonely soldier stationed at some far-away outpost could surely complain that a government which did not provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion.⁵

Besides upholding and enabling the exercise of servicemembers' First Amendment rights, the military chaplaincy promotes another crucial good: the moral well-being of the American men and women who are asked to kill enemy combatants on command, and who must later return home to resume their lives as productive, normal functioning citizens. Here again, our Country's first Commanding General, and later Commanding Generals express critical insights into the value of chaplains to the entire American Way of War:

⁵ *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 309 (1963) (Stewart, J. dissenting).

George Washington wrote to Col. George Taylor that chaplains should be men of “character and good conversation ... who will influence the manner of the corps both by precept and influence.” General Pershing wrote of chaplains during World War I, “Their usefulness in the maintenance of morale, through religious counsel and example, has now become a matter of history.” And General MacArthur commended the role of chaplains in the post-World War II occupation of Japan, since “moral leadership devolves, in large measure, upon the corps of chaplains working in close understanding and cooperation with all unit commanders.”

Much as chaplains are defenders of the free exercise clause, especially when their congregants are far from alternative opportunities for worship, they are also the military’s moral guardians in faraway lands and self-contained bases.⁶

⁶ Zeiger, “Why Does the US Military Have Chaplains?” *Ibid.*

B. Congress passed the Religious Freedom Restoration Act and Section 533 of the National Defense Authorization Act for Fiscal Year 2013, both of which strengthen servicemembers' constitutional rights of conscience.

The ratification of the US Constitution and Bill of Rights enshrined the right to religious freedom in three ways: the No Religious Test clause of Article VI and the First Amendment's Free Exercise and Establishment clauses.⁷ Although certain edge cases may exist where specific religious observances collide with the unique demands of military service, Congress has sought to ensure as much protection as possible for the religious liberty of servicemembers and their chaplains.

Following the Circuit Court decision in *Goldman v. Secretary of Defense*, 734 F.2d 1531 (D.C. Cir. 1984) (*aff'd sub nom Goldman v. Weinberger*, 475 U.S. 503 (1986)), but prior to this Court's affirmation, Congress ordered the Secretary of Defense to form a study group "to examine ways to minimize the

⁷ The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; *but no religious test shall ever be required as a qualification to any office or public trust under the United States.*

U.S. CONST. ART. VI (emphasis added).

potential conflict between the interests of members of the armed forces in abiding by their religious tenets and the military interest in maintaining discipline.”⁸ Some seven years later, in 1993, after two decisions by this Court narrowly interpreting the protections of the First Amendment, Congress enacted the Religious Freedom Restoration Act (RFRA) to override those decisions and buttress the Constitution’s triple protection further provide.⁹

RFRA’s explicit purpose was “to provide a claim or defense to persons whose religious exercise is substantially burdened by government.” It codified in law that “Government shall not substantially burden a person’s exercise of religion” unless its action is shown to be the least restrictive means of furthering a compelling government interest. It also specified that “a person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”

In 2012, following concerns regarding chaplains being forced to conduct same-sex marriage ceremonies in violation of their conscience, Congress enacted further protections for chaplains. Section 533(b) of the FY 2013 National Defense Authorization

⁸ JOINT SERVICE STUDY ON RELIGIOUS MATTERS, March 1985.

⁹ See *Ramirez v. Collier*, 595 U.S. 411, 424 (2022) (“Congress enacted RLUIPA, and its sister statute the Religious Freedom Restoration Act of 1993... in the aftermath of our decisions in *Employment Division, Department of Human Resources of Oregon v. Smith*... and *City of Boerne v. Flores*... Both statutes aim to ensure greater protection for religious exercise than is available under the First Amendment.”) (cleaned up).

Act, titled “Protection of Chaplain Decisions Relating to Conscience, Moral Principles, or Religious Beliefs,” reads:

No member of the Armed Forces may—

(1) require a chaplain to perform any rite, ritual, or ceremony that is contrary to the conscience, moral principles, or religious beliefs of the chaplain; or

(2) discriminate or take any adverse personnel action against a chaplain, including denial of promotion, schooling, training, or assignment, on the basis of the refusal by the chaplain to comply with a requirement prohibited by paragraph (1).

The statute is clear. Chaplains are duty bound to follow their religious beliefs, and the DoD may not ask them to violate their conscience as a condition of employment.

C. Congress passed the National Defense Authorization Act for Fiscal Year 2023, which rescinded the Department of Defense’s COVID-19 vaccine mandate.

Congress showed further solicitude for the religious liberty of servicemembers in December 2022 in passing the National Defense Authorization Act for Fiscal Year 2023. Section 525 of the FY23 NDAA

read:

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

Congress’ rescission of the DoD’s COVID-19 vaccine mandate was clearly remedial in nature. In law, “to rescind” means to render void from the beginning. This meaning was clearly grasped by the DoD, as represented by Secretary of Defense Lloyd Austin’s memorandum from January 10, 2023, which reads:

No individuals currently serving in the Armed Forces shall be separated solely on the basis of their refusal to receive the COVID-19 vaccination if they sought an accommodation on religious, administrative, or medical grounds. *The Military Departments will update the records of such individuals to remove any adverse actions solely associated with denials of such requests, including letters of reprimand.*¹⁰

If Congress' rescission were not remedial in nature, adverse actions would not need to be removed from requesters' records. Thus, the DoD itself acknowledges the meaning and intent of Congress' statute requiring it to rescind its vaccine mandate and remedy any resulting punishments.

Servicemembers do not lay aside their religious liberty upon enlisting. Chaplains, whose very job is to minister spiritually to and inform the consciences of servicemembers, must be free to follow their own conscience without fear of official retaliation.

¹⁰ See Secretary of Defense Rescission Memorandum dtd Jan. 10, 2023, available at: <http://tinyurl.com/yymmncu8t> (emphasis added)

II. THE DEPARTMENT OF DEFENSE VIOLATED THE CONSTITUTIONAL RIGHT TO THE FREE EXERCISE OF RELIGION OF CHAPLAINS WHO MADE RELIGIOUS ACCOMMODATION REQUESTS.

For thousands of servicemembers, the DoD's COVID-19 vaccine mandate forced a choice between violating their religious beliefs or losing their jobs. The petitioners here detail unchallenged factual allegations and legal claims that the DoD subverted their constitutional and statutory rights in how it implemented the now-rescinded COVID-19 mandate.

A. Instead of accommodating their sincerely held religious beliefs, the Department of Defense issued blanket denials.

In the DoD's rejection of petitioners' RARs, there was no accusation that the religious beliefs were not "deeply held". The law provides for essentially two reasons why an accommodation might be rejected: beliefs that were not deeply held (a fraudulent claim), or when a rejection is "in the interest of national security". There is room as well for consideration of availability for muster in the case of imminent deployment or mission critical situations. Yet DoD appears not to have given any of the above reasons for its RAR rejections.

After "dozens of complaints" to its hotline, the Inspector General for DoD reviewed the RAR process. The results were damning. In a letter to Secretary Austin on June 2, 2022, DoD IG revealed:

Additionally, the volume and rate at which decisions were made to deny requests is concerning. The appeal authorities of the Services we reviewed indicated that an average of 50 denials per day were processed over a 90-day period. Assuming a 10-hour work day with no breaks or attention to other matters, the average review period was about 12 minutes for each package. Such a review period seems insufficient to process each request in an individualized manner and still perform the duties required of their position.¹¹

From the IG report and the affidavits in this case, RAR rejections typically constituted a terse, single-line statement with no indication of what led to the rejection.

What the Inspector General found to be a “concerning” example of “potential noncompliance” *amici* judge to be an outrageous and illegal violation of religious liberty that demands urgent judicial redress. Petitioners were given blanket rejections without consideration of their case, in clear

¹¹ Dept. of Defense Inspector General Report, “Denials of Religious Accommodation Requests Regarding Coronavirus Disease-2019 Vaccine Exemptions,” June 2, 2022. Available at: https://media.defense.gov/2022/Sep/27/2003085909/-1/-1/1/DENIALS_OF_RELIGIOUS_ACCOMMODATION_20220602_REDACTED.PDF (last accessed Jan. 30, 2024)

contravention of RFRA.

B. DoD took retaliatory actions against servicemembers who requested religious accommodations.

Not only mass denials of RARs but also egregious acts of retaliation occurred against requesters, in violation of Section 533 of the FY13 NDAA. Petitioners testify that military chaplains who sought religious accommodations to the vaccine mandate under the DoD's own instruction, DoDI 1300.17, were—as a matter of course—immediately removed from leadership positions or promotion lists, denied professional schools necessary for continued promotion and service, denied transfer or other orders to continue on with their careers, given letters of reprimand or other negative evaluations, marked lower in certain traits on efficiency reports, subject to travel restrictions, denied normal leave and liberty, and given less than fully Honorable discharge characterizations of service, to mention only some adverse actions. Often these occurred while servicemembers' RARs were still pending. In fact, by service policies that are a matter of record, negative actions followed the moment a member made it known that he or she would seek accommodation from the vaccine mandate.

By definition, this is not a religious accommodation policy. In not accommodating chaplains' religious beliefs, and indeed retaliating against servicemembers of faith, DoD blatantly violated the law. RFRA requires the government to show a “compelling government interest” when substantially burdening one's religious exercise. The

FY13 NDAA clearly spells out the illegality of taking adverse action against a chaplain who refuses to violate his or her conscience. The DoD has not shown a compelling government interest, instead claiming that the case was moot.

III. DOD HAS NOT ADEQUATELY REMOVED ADVERSE ACTIONS, SO THE PLAINTIFF'S REQUESTED RELIEF IS NOT MOOT

Amici strongly disagree with the findings of both the district court and the Fourth Circuit, which denied petitioners relief on the grounds that the repeal of the COVID-19 vaccine mandate renders these cases moot. However, a case is not moot if a court can provide relief. As the petitioners' brief in support of its writ of certiorari ably argues, the mere rescission of the vaccine mandate in no way eliminates all vestiges of DoD's illegal actions. It certainly does not remedy the damage to the petitioners' military careers. The military's statutory "up-or-out" policy, in which one must leave the service if not promoted within a certain timeline, means that being passed over for promotions or being denied permission to travel to trainings required for promotion—solely based on an RAR and the subsequent reputation of not being a "team player"—has resulted in very real career damage to the petitioner chaplains. Petitioners facing reduced levels of discharge could receive significant loss of veteran benefits, including rights to educational and housing benefits. The stain of less than honorable discharges can also affect future employment opportunities. In short, it is not enough to say that the discrimination will end. The chaplains' case is not moot, because the

injuries they suffered for having exercised their faith remain, to the detriment of their careers into the future. The petitioners are legally entitled to relief from their unjust treatment at the hands of the U.S. military.

IV. CONCLUSION

Both Congress and the courts have intervened in law to safeguard Americans' rights of conscience time and again. In recognition of military chaplains' vital role for centuries in preserving servicemembers' freedoms, Congress even expressly outlawed the military from forcing chaplains to forsake their consciences.

Yet in the petitioners' case the DoD did exactly that. What is more, its sham accommodation process in essence created a slow-motion purge of those servicemembers of faith who could not take the COVID-19 vaccine in good conscience. Compared to their peers who did not seek an RAR, these chaplains and religious servicemembers were placed at a clear competitive disadvantage by virtue of having been pulled from promotion lists, denied schooling, or myriad other disciplinary actions.

Amici believe this case, like so many other pandemic-era cases involving a government body overstepping its bounds to restrict Americans' First Amendment rights, requires the Article III branch to step in and provide relief. The undersigned members of Congress respectfully urge this Court to grant the Petitioners' writ of certiorari, vacate the decision of the Fourth Circuit, and either grant relief or return this case to the Court below for a full hearing on the merits of the Petitioners' allegations.

Dated: February 2nd, 2024.

Respectfully submitted,

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