

No. 23-717

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IN THE  
**Supreme Court of the United States**

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ISRAEL ALVARADO, ET AL.,  
*Petitioners,*

v.

LLOYD J. AUSTIN, III, SECRETARY OF DEFENSE, ET AL.,  
*Respondents.*

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**On Petition for Writ of Certiorari to the United  
States Court of Appeals for the Fourth Circuit**

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**BRIEF OF *AMICI CURIAE* FOUNDATION FOR  
MORAL LAW, MINISTRY TO THE ARMED  
FORCES OF THE CHURCH OF THE LUTHERAN  
BRETHREN, AUSBERG LUTHERN CHURCHES,  
AND BIBLE CHURCHES CHAPLAINCY IN  
SUPPORT OF PETITIONERS**

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

*Amicus* Foundation for Moral Law ("Foundation") is a 501(c)(3) non-profit, non-partisan organization dedicated to religious liberty and to the strict interpretation of the Constitution as intended by its Framers. The Foundation is especially concerned about religious freedom for military personnel. The founder of the Foundation, Judge Roy Moore, is a graduate of the U.S. Military Academy and a Vietnam veteran. The Foundation's Senior Counsel and primary author of this brief, John Eidsmoe, served twenty-three years (five years active duty, eighteen years active reserves) as a U.S. Air Force Judge Advocate retiring at the rank of Lt. Colonel, and subsequently served as a Chaplain with the Mississippi State Guard, retiring at the rank of Colonel (MS). He is also Professor of Constitutional Law with the Oak Brook College of Law and Government Policy and serves as Director of Military Chaplaincy for the Association of Free Lutheran Congregations.

The Foundation has received more requests for assistance on the issue of religious exemptions from COVID vaccination requirements than on any other

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<sup>1</sup> Counsel of record for all parties received notice at least ten days prior to the due date of *amicus curiae*'s intention to file this brief. Pursuant to Rule 37.6, *amicus curiae* certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

issue since we were founded in 2003. Most of these requests have come from military personnel and/or civilian employees of the military. These fine patriotic personnel desire nothing but to serve their country honorably, but they and their families have faced and in some instances are still facing career disruption, loss of salary and benefits, disciplinary action, disparagement of their reputations, and untold emotional distress. Chaplains stand in the forefront of the defense of religious liberty in the military.

*Amicus* Ministry to the Armed Forces of the Church of the Lutheran Brethren serves as the endorsing agency for chaplains of the Church of the Lutheran Brethren and for chaplains of the Association of Free Lutheran Congregations.

*Amicus* Ausberg Lutheran Churches is the endorsing agency for the fellowship of Ausberg Lutheran Churches.

*Amicus* Bible Churches Chaplaincy serves as the endorsing agency for chaplains of the Independent Fundamental Churches of America International.

The above-named *Amici* endorsers do not take a doctrinal stand on the issue of vaccination, but they fully support the right of their chaplains to oppose vaccination and are highly concerned that their chaplains may face adverse consequences for exercising their religious convictions.

The Foundation believes these military chaplains and countless other military personnel should not have to sacrifice their careers because of a religious conviction that in no way prevents them from being

good chaplains, soldiers, and sailors. The Foundation further believes the United States military and the people of the United States should not lose the services of such outstanding military personnel for standing upon their sincere religious beliefs.

### SUMMARY OF THE ARGUMENT

President Joseph Biden stated flatly on September 19, 2022, "The pandemic is over."<sup>2</sup> But few doubt that there will be future pandemics, whether of Covid or something else. The constitutional issues of free exercise of religion, freedom of speech, and the right to privacy will not go away, at least not for long.

Crucial constitutional issues are better addressed in calm than in crisis. *See, e.g., Chiafalo v. Washington*, 140 S. Ct. 2316 (2020) (resolving the issue of the "faithless elector" during a period of calm, without waiting for a rushed political crisis that might depend on the judicial outcome). During the recent COVID pandemic, military commanders, doctors, health officials, lawyers, judges, and others acted in haste. They were uncertain how long the pandemic would last or how severe it would be. If they acted too harshly, they might endanger civil liberties; if they did not act harshly, they wrongly feared they might endanger the lives of many, and

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<sup>2</sup> President Joseph Biden, "Biden Says COVID-19 Pandemic Is 'Over' in U.S.," September 19, 2022, <https://www.cbsnews.com/news/biden-covid-pandemic-over/>

in the case of military commanders, endanger military preparedness.<sup>3</sup>

Now is the time to take the lessons we have learned from the past pandemic and develop them into sound legal principles that ensure national safety while protecting constitutional liberties. Otherwise, we will face the next pandemic just as unprepared as we were for the last one.

### ARGUMENT

*Amici* fully support the arguments of Petitioners in their Complaint and will not duplicate those arguments. We fully agree that the Fourth Circuit ruling that the case is moot is wrong and conflicts with precedents of other Circuits and of this Court. *Amici* raise the following additional points for the Court's consideration:

**I. The Constitution, including the First Amendment, clearly applies to military personnel.**

The courts have given no credence to the notion that soldiers and sailors give up their constitutional rights when they join the military. Rather, the courts have recognized that military personnel who swear an oath to support and defend the Constitution of the United States are entitled to the protection the Constitution provides to all. A marble

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<sup>3</sup> Dr. Colleen Huber's book, *Neither Safe Nor Effective: The Evidence Against the COVID Vaccines in 700+ Medical Studies*, 2d (Huber: 2023), provides convincing evidence that many of the earlier concerns about allowing people to be unvaccinated were unfounded.

monument at the amphitheater of Arlington National Cemetery displays the engraved words of George Washington, Commander of the Continental Army and President when the Bill of Rights was adopted: “When we assumed the Soldier, we did not lay aside the Citizen.” (Order, p. 1).

Servicemen and women are entitled to protection of free speech and free exercise of religion under the First Amendment, which states,

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

These rights are not stripped away when one enters the military; servicemen and women are entitled to exercise these rights. “The military enclave is kept free of partisan influence, but individual servicemen are not isolated from participation as citizens in our democratic process.” *Greer v. Spock*, 424 U.S. 828, (1976). As the Supreme Court unanimously stated, “Our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.” *Chappell v. Wallace*, 462 U.S. 296, 304, (1983) (quoting Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L.Rev. 181, 188 (1962); *see also*, *Adkins v. Rumsfeld*, 389 F. Supp. 2d 579 (2005); *Carlson v. Schlesinger*, 511 F. 2d 1327 (D.C. Cir. 1975). The First Amendment applies to all servicemen and servicewomen without exception. The District Court below cited *Elrod v. Burns*, 427 U.S. 347, 373 (1976), “The loss of First Amendment

freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”

Furthermore, on May 4, 2017, the President of the United States issued Executive Order 13798, “Promoting Free Speech and Religious Liberty,” which states in part:

*Section 1. Policy.* It shall be the policy of the executive branch to vigorously enforce Federal law's robust protections for religious freedom. The Founders envisioned a Nation in which religious voices and views were integral to a vibrant public square, and in which religious people and institutions were free to practice their faith without fear of discrimination or retaliation by the Federal Government. For that reason, the United States Constitution enshrines and protects the fundamental right to religious liberty as Americans' first freedom. Federal law protects the freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government. The executive branch will honor and enforce those protections.

*Sec. 2. Respecting Religious and Political Speech.* All executive departments and agencies (agencies) shall, to the greatest extent practicable and to the extent permitted by law, respect and protect the freedom of persons and organizations to engage in religious and political speech.

“All executive departments and agencies” clearly includes the Department of Defense.

In keeping with the President's Executive Order, on September 1st, 2020 the Department of Defense issued DODD 1300.17, “Religious Liberty in the Military Services.” This Directive provides in part in 1.2:

a. Pursuant to the Free Exercise Clause of the First Amendment to the United States Constitution, Service members have the right to observe the tenets of their religion or to observe no religion at all, as provided in this issuance.

b. In accordance with Section 533(a)(1) of Public Law 112-239, as amended, the DoD Components will accommodate individual expressions of sincerely held beliefs (conscience, moral principles, or religious beliefs) which do not have an adverse impact on military readiness, unit cohesion, good order and discipline, or health and safety. A Service member's expression of such beliefs may not, in so far as practicable, be used as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment.

The various branches of the armed forces issued similar directives.

Also, the Religious Freedom Restoration Act of 1993, Public Law No. 103-141, 107 Stat. 1488, 42 U.S.C. § 2000bb, applies to the Department of Defense (see Department of Defense Instruction

1300.17 and Department of the Air Force Instruction 152-201.1.2.3 23 June 2021) and provides that government may not substantially burden one's free exercise of religion without a compelling interest that cannot be achieved by less restrictive means.

Asserting that the courts should defer to the military on matters like vaccination, the DoD relies heavily upon *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). However, *Mindes* was never intended to deprive military personnel of their constitutional rights, and at least three of the four *Mindes* factors (nature and strength of the challenge, impact on servicemen, and the involvement of military expertise) would weigh in favor of Petitioners.

## **II. Religious exemption requests should be liberally construed in favor of the persons making the requests.**

A government official may consider whether an individual's religious beliefs are sincere, but beyond that he may not refuse to honor a person's religious beliefs and practices simply because he disagrees with them, finds them unpersuasive, or even finds them inconsistent and therefore indefensible.

But that is precisely what the Air Force did with Petitioner Schrader's request for religious exemption from vaccination. In a letter to the RAR (Religious Accommodation Request) decision authority, Chaplain Schrader's senior rater, the Commandant and President of the Air University, chose not to recommend that Chaplain Schrader's RAR be approved because:



While I accept the sincerity of Maj Schrader's beliefs, his position that getting the vaccine constitutes an act of worship to a false God (i.e., the State) arguably appears to be in conflict with his service as a [sic] an officer—service he entered voluntary [sic] and in doing so bore allegiance to the State, which at times requires him to do it's [sic] bidding. His assertion on this point, through sincere, seems inconsistent and falls flat.<sup>4</sup>

In so saying, the Commander exceeded his authority under the mandate and under the United States Constitution. As the Supreme Court said in *United States v. Ballard*, 322 U.S. 78 at 86 (1944), a case involving a man convicted of mail fraud because he claimed to be in communication with angels,

Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mere mortals does not mean they can be made suspect before the law.

Nor must one's religious beliefs be part of the official doctrine of a church or shared by all members of a denomination. As the Court said in *Thomas v.*

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<sup>4</sup> Lt Gen James B. Hecker, 1st Ind, AU/CC, 13 Oct 2021, Religious Accommodation Request for Maj Darrel L. Schrader, MEMORANDUM FOR AETC/CC, para 3.

*Review Bd. Of Ind. Employment Sec. Div.*, 450 U.S. 707 at 715-16 (1981),

In reaching its conclusion, the Indiana court seems to have placed considerable reliance on the facts that Thomas was "struggling" with his beliefs and that he was not able to "articulate" his belief precisely. It noted, for example, that Thomas admitted before the referee that he would not object to "working for United States Steel or Inland Steel . . . produc[ing] the raw product necessary for the production of any kind of tank . . . [because I] would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience. . . ." Ind., 391 N.E.2d, at 1131.

The court found this position inconsistent with Thomas' stated opposition to participation in the production of armaments. But Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.

...

Courts are not arbiters of scriptural interpretation.

The Thomas Court further stated, citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), that forcing a person into a "Hobson's choice" dilemma of having to either (1) compromise a sincerely held religious belief or (2) give up a substantial government benefit, is a Free Exercise violation. *See also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014), recognizing religious liberty exemption rights rooted in sincerely held religious beliefs, as well as First Amendment-anchored analysis within *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), recognizing the propriety of, if not also the need for, a religious exemption to federal healthcare-regulating statutes.

Religious beliefs raised by Petitioners and by other persons who have sought assistance from Amicus Foundation include the following:

(1) That the body is the temple of the Holy Spirit and therefore should not be defiled with an experimental drug that could be dangerous. Some Roman Catholic theologians have articulated an ethical position called "therapeutic proportionality" which means that because the human body is God's creation (Genesis 2:7) and the temple of the Holy Spirit (1st Corinthians 6:19-20), a person has a duty to God to weigh the possible benefits of medicine against possible risks and adverse consequences, and to refuse medical treatment if risks and adverse consequences outweigh the benefits. *See* <https://catholic-factchecking.com/2021/07/vaccine->

exemption-resource-for-individuals/; *see also* <https://academic.oup.com/jlb/article/7/1/lsaa058/5878809>.

(2) That some COVID vaccines are made from, or were developed from, cells or cell lines from aborted human fetuses, and taking the vaccine makes the recipient an accessory to abortion, which many believe to be against God's laws. *See Whole Woman's Health v. Paxton*, 10 F.4th 430 (5th Cir. 2021), illustrating tragic aspects of abortion. Thus, those servicemen and servicewomen who sincerely hold pro-life Bible-based beliefs that abortion is wrong and sinful (see Genesis 9:1-7; Exodus 21:22-25; Acts 15:20,29 & 21:25; etc. – see also, accord, Romans 14:23; Matthew 27:1-10; Exodus 20:13; Leviticus 24:17; Deuteronomy 23:18; Jeremiah 32:35; etc.), should be exempted from being required or coerced to accept any such COVID-19 vaccines.

Some DOD officials may disagree with Petitioners' views on abortion, or they may disagree that the fact that the vaccine is made from cell lines of aborted babies is a sufficient reason to oppose it. But they may not reject an RAR just because they disagree with it.

(3) That when the COVID-19 vaccine is imposed so strongly that a vaccination passport or the equivalent becomes necessary for being allowed to fly, enter stores, obtain food or other necessities, or participate in public events, it becomes what some believe is the "mark of the beast" of Revelation 13 (or that it serves as a prototype thereof, such that accepting it is aiding and abetting the anticipated Revelation 13's "mark of the beast").

(4) That God has established civil government and has given civil government certain limited authority (Romans 13:1-7), but that when government exceeds its God-given (i.e., legitimate) authority, it becomes tyrannical, and the individual has a duty before God to resist the unlawful mandates of a tyrannical government.

The DOD and the courts need not agree with these religious objections, but they must recognize that they are protected by the First Amendment.

Although the military has utilized vaccinations in the past, none has involved the complex and controversial medical, scientific, religious, sociological, and religious issues triggered by the COVID-19 vaccine. None has involved such serious and divisive questions as to the vaccine's origin, its effectiveness, or its likelihood to produce adverse reactions, and none has engendered the serious religious and other objections that have arisen from the COVID vaccines. Many who had previously not thought about the religious implications of vaccines, did so when the COVID vaccine was released. The fact that a soldier or sailor had received other vaccines is not a reason to question the sincerity of an objection to the COVID vaccine.

Petitioners' religious exemption requests should be construed liberally in their favor. The First Amendment protects not just belief, but "free exercise" of religion. Whether one agrees with them or not, Plaintiffs/Appellants' beliefs are religious, and they sincerely hold them. The very fact that Plaintiffs/Appellants are willing to jeopardize their livelihoods, their reputations, and career that they

dearly love because of their beliefs, is of itself proof of her sincerity. *Res ipsa loquitur*; the thing speaks for itself. As the Supreme Court recognized in *United States v. Macintosh*, 283 U.S. 605, 633-634 (1931):

. . . in the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens.

. . .

The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law, and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience.

In many legal contexts, religious liberty is respected by adjusting standard operating procedures to accommodations—including legal concepts such as “reasonable accommodation” and “least restrictive burden” criteria. In federal jurisprudence this is not new. If a Congress-authorized law (e.g., statute, agency rule, or military regulation) fails to fairly accommodate sincerely held religious beliefs as it restricts religious freedoms, that law is illegitimate – because the First

Amendment does not just favor the “exercise” of religious freedom, it bans interferences with the “free exercise” of religion. *See, accord, Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). In fact, according to *Holy Trinity Church* (and the Free Exercise Clause), religious freedom, *ab initio*, has not just an equal-priority status, but a superior place in our constitutional system. Although the Foundation does not believe that a sincerely-held religious belief should be infringed for any reason, the DOD’s actions do not even follow their supposed argument that there is a compelling reason to mandate all vaccinations or that less restrictive means do not exist.

### **III. Offering exemptions but categorically denying them is bad faith.**

The Air Force and other branches of the armed forces have established forms and policies for the granting of religious exemptions from the vaccination requirement. However, as of January 24, 2022, the Air Force had granted a total of 1,570 medical exemptions, 2,211 administrative exemptions, and zero (0) religious exemptions (2,683 religious accommodation requests have been disapproved and 2,119 are pending; 282 appeals have been disapproved, and 222 are pending; none have been granted).<sup>5</sup> Subsequently, the Air Force granted nine religious exemptions, and these were granted on February 8, 2022, right after the hearing

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<sup>5</sup> DAF (Department of the Air Force) COVID-19 Statistics -- Jan. 24, 2022, published January 25, 2022 by Secretary of the Air Force Public Affairs, <https://www.af.mil/News/Article-Display/Article/2831845/daf-covid-19-statistics-jan-25-2022/>

in the *Air Force Officer v. Austin* case, U.S. Dist. Ct. Middle District of Georgia, Macon Division, Case No. 5-22-cv-0009-TES. Furthermore, in a May 9, 2022 hearing Air Force officials admitted that the nine exemptions were granted to airmen who were already leaving the Air Force.<sup>6</sup>

As of June 27, 2022, the Air Force had disapproved 9,547 religious exemption requests and approved 118, with 3,829 pending.<sup>7</sup> Of those 118 approved requests, it is unknown how many were already leaving the Air Force. As of the same date, the Air Force had approved 709 medical exemptions and 979 administrative exemptions.<sup>8</sup> Despite the discrepancies noted in footnote 7 below, it is clear that the Air Force has disapproved nearly 99% of all religious exemptions but has liberally granted medical and administrative exemptions.

It is wrong to deny exemptions to those who have sincere religious objections to vaccination. But to offer religious exemptions and create forms and

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<sup>6</sup> "Report: Air Force Only Granted Religious Vax Exemptions to Exiting Airmen," Luca Cacciatore, May 10, 2022, <https://www.newsmax.com/newsfront/military-covid-19-religious-liberty/2022/05/10/id/1069318/>

<sup>7</sup> "DAF COVID-19 Statistics - June 2022," Secretary of the Air Force Public Affairs June 28, 2022, <https://www.af.mil/News/Article-Display/Article/3055214/daf-covid-19-statistics-june-2022/>

<sup>8</sup> *Id. Amici* note that these official Air Force statistics seem inconsistent with those quoted from the same source in its January 11, 2022 report, which as noted in on p. 15 fin 4 included 1,612 medical exemptions and 2,127 administrative exemptions. The difference may be that the January report included the Guard and Reserve.



procedures to apply for and process exemption requests, and then routinely deny all exemption requests, is more than wrong; it is duplicitous and evidence of bad faith.

The District Court below confirmed this: “The Navy provides a religious accommodation process, but by all accounts, it is theater. The Navy has not granted a religious exemption to any vaccine in recent memory. It merely rubber stamps each denial.” (Order, p. 1).<sup>9</sup> The Court further stated, “There is no COVID-19 exception to the First Amendment. There is no military exclusion from our Constitution,” citing George Washington's words carved into the marble of the memorial Amphitheater of Arlington National Cemetery, “When we assumed the Soldier, we did not lay aside the Citizen.” (Order, p. 1).

The DOD may argue that that they cannot grant exemptions because of military necessity. However, they have freely granted medical exemptions from the vaccination. DOD has presented no compelling reason, as required by *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 593 U.S. \_\_\_ (2020), that they must deny religious exemptions but may grant medical exemptions. They have presented no compelling reason, in fact, no reason whatsoever, that granting religious exemptions would pose a danger to the overall health and fitness of military personnel but granting medical and administrative exemptions

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<sup>9</sup> The Court added on p. 7, “...the record indicates the denial of each request is predetermined. As a result, Plaintiffs need not wait for the Navy to engage in an empty formality,” meaning Plaintiffs need not exhaust administrative remedies.

would pose no such danger. After all, those with medical exemptions and those with religious exemptions have this in common – they’re both unvaccinated.

By granting medical and administrative exemptions, the military has in effect forfeited any argument that they must deny all exemptions for the health and safety of military personnel.

#### **IV. The military’s efforts to remedy the damage to the chaplains’ lives and careers are inadequate.**

When the vaccination mandate was finally rescinded, the military made token efforts to remedy the damage to the chaplains’ careers. But these efforts are woefully inadequate.

Each of the Petitioners has a story to tell, but we will focus upon that of Petitioner Chaplain Schrader. Chaplain Schrader received a Letter of Reprimand (LOR) for his refusal to take the Covid vaccine. In today’s highly competitive military, an LOR is harmful to an enlisted person’s career and likely fatal to an officer’s career. After serving in a certain rank for a specified number of years, an officer faces a selection board of officers who review his records and decide whether he should be promoted to the next higher rank. Under the “up or out” policy, if he is not promoted after several considerations, he is discharged from military service.

Selection boards commonly operate under the “best qualified” criteria, meaning that if 100 lieutenant colonel slots are available and 200 majors are being considered, only the 100 “best qualified” will be selected. A major with an LOR in his records,

competing against majors who do not have LORs, is extremely unlikely to be selected. An LOR, therefore, is considered a “career killer.”

On 24 February 2023, the Secretary of the Air Force issued a memo entitled “Department of the Air Force (DAF) Guidance on Removal of Adverse Actions and Handling of Religious Accommodations Requests,” which stated

Adverse actions removed under the provisions of this guidance memorandum contained in Inspector General files pursuant to AFI 90-301 will be removed from those files.<sup>10</sup>

However, the LOR was not removed from Chaplain Schrader’s selection folder. Rather, the selection board is advised that the LOR was rescinded by command and therefore should not be considered in determining promotion. This is like instructing a jury not to consider the bloody knife they saw on the prosecutor’s table. It is unlikely to eliminate the inflammatory and prejudicial effect.

Furthermore, like other chaplains in this case, Chaplain Schrader was given a referral (unfavorable) Officer Performance Report (OPR) for the period of service in which he received the LOR, stating that he did not “meet standards” of “professional qualities” because of his stand against the vaccination mandate, even though during this period he had received the 2020 Wing Staff Agencies

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<sup>10</sup> Secretary of the Air Force Memorandum, Department of the Air Force (DAF) Guidance on Removal of Adverse Actions and Handling of Religious Accommodations Requests, 24 Feb 2023.

Field Grade Officer of the Year Award, and even though during this period he had served as the Wing Chaplain for an Air Expeditionary Wing during a seven-month deployment to an undisclosed location in SW Asia. Again, a referral OPR usually sounds the death-knell for an officer's promotion (especially if it is issued shortly before the selection board meets) and therefore ends an officer's career.

After the vaccine mandate was rescinded, as a half-hearted remedy for this injustice, the military directed that the referral OPR for Chaplain Schrader (and for others similarly situated) was to be deleted from his record and replaced with a blank Letter of Evaluation stating simply "Not rated for the above period. Evaluation removed by order of the SECAF."

This does not come close to remedying the damage to Chaplain Schrader's career. First, selection boards are composed of experienced officers who know how the system works. They know that when an OPR is removed, there has been a problem with the officer's career. They do not know what the problem was, and they may assume it was some kind of egregious misconduct or malfeasance that was overturned by some technicality. Second, when a blank OPR is substituted, the selection board has no way of knowing of Chaplain Schrader's outstanding duty performance, including his Officer of the Year Award and his service in a challenging assignment. This obviously adversely affected his chances for promotion. Third, the selection board is comparing the officer against other officers who do not have similar gaps in their records.

Selection boards do not give reasons for their promotion decisions, but it is highly likely that these illegal actions by the Department of Defense, and their failure to adequately remedy them, contributed to the selection board's decision. If we may apply the framework of analysis of *Price Waterhouse v. Hopkins*, 490 U.S.228 (1989), the burden is upon the employer, the Department of Defense, to prove by preponderance of evidence that these actions did not affect the selection board's decisions.

And when Chaplain Schrader finally was selected for promotion, he was given a line number of 9, meaning he was not promoted until months later than he would otherwise have been promoted. For each of these months, he was paid at the grade of O-4 (Major) rather than O-5 (Lt. Colonel). Depending upon his years of service, this could be a differential of \$800 - \$1600 per month,<sup>11</sup> thus satisfying the money damages requirement. *See, Uzuegbunam v. Preczewski*, 592 U.S. \_\_\_\_ (2021).

**V. The law provides for money damages, but money damages cannot fully compensate the tarnishing of a military career.**

Those who join the armed forces, especially those who hope for military careers, do not join the military for financial reward alone. This is especially true of chaplains. They choose the military chaplaincy with high hopes of serving God

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<sup>11</sup> Military Pay Chart 2023, <https://militarypay.com/Charts/2023%20Military%20Pay%20Chart.pdf>.

and country, tackling difficult and challenging assignments, performing heroic and self-sacrificing deeds, and serving in positions of high responsibility and often in interesting and sometimes dangerous places. The law provides remedies for the ruination of a military career, but those remedies cannot even begin to compensate for the dashing of one's hopes and dreams.

In retaliation against Chaplain Schrader for his stand on religious conviction against the vaccination mandate, he was denied many challenging assignments that could have prepared him for a more fulfilling career. He was removed from his position as Instructor, Course Director, and Student Mentor as Staff Chaplain and Instructor at the Air Force Chaplain Corp College. He was denied the opportunity to represent the Chaplain Corp College in other capacities; his selection as an alternate for in-residence Intermediate Development Education for the Air Command and Staff College was rescinded, and in many other ways his career opportunities and chances for further promotion were damaged.

**VI. The military compelled the chaplains to speak contrary to their convictions in violation of their First Amendment rights.**

Throughout the military, soldiers and sailors who submit Religious Accommodation Requests (RARs) have been required to go through an interview with a military chaplain. Many of the Petitioners were required to conduct these interviews (Complaint, paragraphs. 36, 49, 82, 97, 103).

One would expect that these chaplains would conduct these interviews fairly and impartially, questioning the applicant to ascertain his religious objections and assess the sincerity thereof.

Instead, many were ordered to “parrot the Army position on vaccines” and were instructed that their “responsibility as a chaplain was to assuage any religious concerns soldiers may have regarding the vaccine,” and at least one Petitioner “had his religious objections and those of soldiers he counsels ridiculed by his commander.” (Complaint, paragraph 49).

This Court has repeatedly made clear that, just as the First Amendment Free Speech Clause guarantees every person’s right to say what he wants to say, it also guarantees his right not to say what he doesn’t want to say: *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (compelling unwilling students to say Pledge of Allegiance); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (forcing newspaper to publish reply of political candidate); *Wooley v. Maynard*, 430 U.S. 705 (1977) (forcing Jehovah’s Witness to display “Live Free or Die” motto on license plate); *National Institute of Family and Life Advocates, dba NIFLA v. Becerra*, 138 S. Ct. 1275 (2018) (forcing crisis pregnancy center to notify women that California provides free or low-cost services, and provide phone numbers to call, and also to notify if clinic is unlicensed).

Forcing a chaplain who believes the vaccine is dangerous to tell people it is not dangerous, constitutes compelled speech. Forcing a chaplain

who objects to the vaccine because it is made from stem cell lines from aborted babies, to tell people that is not a valid objection, constitutes compelled speech. Forcing a chaplain to argue with a person to persuade his religious objection is invalid, when in fact the chaplain believes the objection is valid, constitutes compelled speech.

When considered alongside the above Supreme Court precedents, coupled with U.S.C. Sec. 533(b) which provides “Protection of chaplain decisions relating to conscience, moral principles, or religious beliefs” and which specifically protects chaplains from being required to perform any “rite, ritual, or ceremony ... that is contrary to the conscience, moral principles, or religious beliefs of the chaplains,” the DOD has clearly overstepped its bounds and trampled upon the chaplains’ legal and constitutional rights.

**VII. The military’s repression of the chaplains infringes not only the chaplains’ constitutional rights but also those of their denominations and endorsing agencies.**

To serve as a military chaplain, one must meet certain requirements: completion of a certain level of theological education (often a Master of Divinity Degree), two years of post-seminary professional experience (active duty only), ordination by a denomination, and endorsement for the chaplaincy by that denomination. These requirements may vary somewhat for reserve and guard chaplains.

Each denomination has an endorsing agency or works through the endorsing agency of another



(usually similar) denomination, that endorses chaplains. The endorsement process varies with denominations, but many are very rigorous, require their chaplains to through periodic training, counsel their chaplains, uphold their chaplains in prayer, visit their chaplains on-site, and take a strong interest in their chaplains' performance of their missions.

A military chaplain therefore serves and represents in many different capacities. He is a commissioned officer of the United States Armed Forces. He is also a spokesman for his church denomination, and what he says and does reflects upon the denomination and upon other chaplains endorsed by that denomination. And sometimes he is required to speak with a prophetic voice, speaking to the higher command what he perceives to be the voice of God. If a chaplain is having difficulty in the military, the endorsing agency will be highly concerned. If they conclude the chaplain is right, they will stand behind him and back him in every way they can. If they conclude the chaplain is wrong, or that the chaplain even if right is unsuitable for military service, they will sometimes rescind his endorsement, meaning he may no longer serve as a military chaplain.

Endorsing agencies become genuinely concerned when chaplains are forced to violate their religious convictions. In some cases, these may also be the convictions of the denomination. In others, such as vaccination, the denomination may not take a stand on the issue but may fully support their chaplain's right to hold that conviction and act accordingly.

## CONCLUSION

The Court should grant this Petition for Writ of Certiorari. As Petitioners have established, the Fourth Circuit's decision that this case is moot conflicts with decisions of other Circuit and District Court decisions and with decisions of this Court, as Petitioners have established in their Petition. Furthermore, this is an especially important case because it raises key issues of compelled speech, free exercise of religion, the application of the Religious Freedom Restoration Act, and the role of chaplains in the U.S. Military.

People recover from Covid, but their health is often damaged for the rest of their lives. Likewise, the pandemic may be over (at least for now), but these chaplains continue to feel the damage the DOD policies have caused to their lives and careers.

New pandemics will arise, and these issues will reassert themselves. Now is the time to establish landmark decisions that will guide the military and others, so that in the future we will be prepared to address these issues in a way that ensures military readiness but also preserves the rights protected by the Constitution these chaplains have sworn to support and defend.

Respectfully submitted,

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