No. 23-717

In the Supreme Court of the United States

ISRAEL ALVARADO, *ET. AL.*,
Petitioners,

v.

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

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

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PETITIONERS' APPLICATION FOR A WRIT OF INJUNCTION FOR INTERIM RELIEF

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PARTIES TO THE PROCEEDING

Applicants are military chaplains: 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, 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 DISCLOSURE STATEMENT

Applicants are natural persons without parent companies or 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:

- *Alvarado v. Austin*, No. 8:22-cv-1149-WFJ-CPT (M.D. Fla. July 29, 2022) (transferred to E.D. Va.).
- *Alvarado v. Austin, et al*., No. 1:22-cv-876 (E.D.VA., Nov. 23, 2022) [cite] Order Dismissing Case and Denying PI; Order denying Motion for Reconsideration Petitioners sought a preliminary injunction ("PI) in the district court under the First Amendment's Establishment, Free Exercise, Free Speech, and Petition Clauses, U.S. CONST. amend. I, cl. 1-3, 6; the Due Process Clause, U.S. CONST. amend. V, cl. 3; the Religious Test Clause, U.S. CONST. art. VI, cl. 3; the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb-2000bb-4 ("RFRA"); and the National Defense Authorization Act for Fiscal Year 2013 (the "2013 NDAA"), PUB. L. NO. 112-239, §533, 126 Stat. 1632, 1727 (2013), as amended by 2014 NDAA, PUB. L. NO. 113-66, §532(a), 127 Stat. 672, 759 (2013) ("§533"), against DoD's Mandate, its failure to accommodate religious objections to the Mandate, and its discriminatory policies and retaliation related thereto. This application renews the Chaplains' request for injunctive relief.
- *Alvarado v. Austin*, No. 23-1419 (4th Cir. Aug. 3, 2023) (Circuit dismissed as moot Applicants' appeal of their PI denial and dismissal of all their claims).
- *In re Alvarado*, Application No. 23A264 (U.S. Sept. 27, 2023) (deadline to petition for a writ of certiorari extended to Dec. 8, 2023).
- *In re Alvarado*, Application No. 23A264 (U.S. Dec. 1, 2023) (deadline to petition for a writ of certiorari extended to Dec. 29, 2023).
- *Alvarado v. Austin*, Petition No. 23-717 (U.S. Dec. 29, 2023), petition for a writ of certiorari filed December 29, 2023.

- *Alvarado v. Austin*, Petition No. 23-717 (U.S. Jan. 24, 2024), Distributed for Conference of 2/16/2024.
- *Alvarado v. Austin*, Petition No. 23-717 (U.S. Jan. 26, 2024), Respondents' "Response Requested." (Due February 26, 2024)
- *Alvarado v. Austin*, Petition No. 23-717 (U.S. Jan 26, 2024) Respondents move for Response extension to March 27, 2024.
- *Alvarado v. Austin*, Petition No. 23-717 (U.S. Jan 29, 2023) Respondents extension to March 27, 2024, granted.
- *U.S. NAVY SEALs 1–26, et al., v. LLOYD J. AUSTIN, III, et al.,* No. 4:21-cv-1236-O, slip op. (N.D. Tex. Feb. 14, 2024) (Order denying Defendants' Assertion of Mootness).

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).

JURISDICTION

Applicant filed a petition for certiorari, pursuant to 28 U.S.C. § 1254((1). This Court has jurisdiction pursuant to 28 U.S.C. § 1651.

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PETITIONERS' APPLICATION FOR A WRIT OF INJUNCTION

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

Pursuant to this Court's Rule 22 and the All Writs Act, 28 U.S.C. 1651(a), the Applicants—38 military chaplains (the "Chaplains"), *see* Parties *supra*—respectfully request this Court grant them interim injunctive relief against DoD's continuing retaliation that's destroyed their careers for filing religious accommodation requests ("RARs") pursuant to Armed Services' regulations. Their RARs requested excusal for religious reasons from Secretary Austin's mandate that all service-members receive a COVID-19 vaccine (the "Mandate").These chaplains filed suit when it became obvious DoD was denying all RARs, using that process to purge those who believed in following their faith formed conscience by requesting RARs. Applicants challenge (1) the Secretary's authority to issue the Mandate under the Major Policy Doctrine, his failure to obey DoD's own regulations concerning what is/isn't a vaccine and "natural immunity"; (2) the Mandate's implementation contrary to constitutional and statutory protections; and here, (3) DoD's refusal to obey Congress's order to **rescind** DoD's retaliatory actions for filing RARs. DoD's continuing retaliation indicates its commitment to purge from its Services those who believe in following their conscience as formed by their faith.

Such relief is necessary to protect both the Court's jurisdiction and Applicants from continuing irreparable harm, career destruction and/or discharge while the Court addresses the Chaplains' petition for certiorari (the "Petition") filed Dec. 29, 2023, No. 23-717, challenging the Fourth Circuit's dismissal of their appeal for mootness, any remand, and a final merits decision.

This Application's length. Supreme Court Rule 33.2(b)'s 40-page limit for specific 8½X11 submissions does not include applications. This Application's 41 pages include (1) eight pages of facts showing Applicants merit interim injunctive relief because DoD is conducting a bureaucratic

insurgency against Congress's command to restore Applicants to their pre-Mandate status by rescinding the Mandate; and (2) three pages detailing relief addressing DoD's continuing retaliation, the Chaplains' constitutional and statuary claims, and relief appropriate to DoD's unique rating/promotion context. These issues cannot be addressed adequately in less space.

STATEMENT OF THE CASE

Applicants sought a preliminary injunction ("PI) in the district court under the First Amendment's Establishment, Free Exercise, Free Speech, and Petition Clauses, U.S. CONST. amend. I, cl. 1-3, 6; the Due Process Clause, U.S. CONST. amend. V, cl. 3; the Religious Test Clause, U.S. CONST. art. VI, cl. 3; the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb-2000bb-4 ("RFRA"); and §533 of the 2013 NDAA, as amended by the 2014 NDAA, §532(a). Applicants challenged the Mandate, DoD's failure to accommodate religious objections to the Mandate, and DoD's discriminatory policies and retaliation related thereto. This application renews the Chaplains' request for interim relief.

Embedded within the Chaplains' claims are foundational questions of religious freedom, free-speech, and petition rights—uniquely applied to military chaplains: "Who gets to decide what authority controls a chaplain's conscience, the God of his or her faith, or a government bureaucrat?" RFRA and §533's statutory backdrop limit DoD's power to impose a given administration's views on religious issues on the Armed Services. DoD's open hostility to religion likely corresponds to the Armed Services' recent and repeated failure to meet their recruiting goals. DoD's violations RFRA, §533, and First Amendment violations warrant judicial resolution here.

Understanding this case's importance is very simple in the context of the Constitution's preamble's last phrase stating its purpose, defining this Court's duty: to "secure the Blessings of Liberty to ourselves and our Posterity."

The fundamental question these Chaplains raise is "who is the authority that directs a chaplain's conscience in determining what is good and evil, the God of his/her faith, or a government bureaucrat." The facts show DoD claims the authority to tell chaplains what is good and evil, right and wrong to propagate DoD's gospel.

The Chaplains' argument is very simple: freedom of conscience is an essential element of the Constitution's "no religious test" clause, the common requirement for each First Amendment guarantee, and an absolute necessity to enjoy the "blessings of liberty" purchased by the blood of our patriot forefathers. Well-established precedent agrees:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943).

Recently, *303 Creative LLC v. Elenis,* 143 S.Ct. 2298, 2317-19 (2023), readdressed this issue. "In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance." *Id*. at 2318. Substitute DoD for "State" and/or "Colorado", and Chaplains for "individual" and you have this case.

Despite the issue's simplicity and precedent's authority, the Chaplains are here because the courts below forgot important "legal principles to be applied by the courts." *Barnette*, 319 U.S. at 638 ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy … and to establish them as legal principles to be applied by the courts").

Chaplains also challenge DoD's open rebellion against Congress's order to fully "rescind" the mandate hidden by DoD's malicious compliance. DoD removed disciplinary related documents while making false official assertions all "adverse actions" were removed from RAR

requesters' files. It has not removed the "adverse personnel actions" such as bad fitness reports causing failures of promotion, missed schooling, or the consequences thereof as shown in David Calger's separation for failure to complete required instruction, *see* Fact 28 *infra*. These Chaplains' careers are dead men walking, direct consequences of filing RARs but hidden by DoD's emphasis on "solely" as the adverse action's cause. *See* §533 *infra*. The Secretary's actions show his awareness that "rescind" means the rescinded Mandate was void *ab initio* and the Chaplains must be returned to their status quo before the Mandate's issuance; the record shows his failure to fully "rescind" his Mandate. The courts below ignored this continuing retaliation and injury. .

The record documents the lower courts' failures to address DoD's continuing retaliation against these Chaplains and the irreparable harm flowing from DoD's violations of constitutional guarantees, RFRA's statutory protections, and §533(b)'s chaplains' conscience protections. DoD and the courts below *negatively* rewarded these Chaplains for their integrity in following their conscience and relying on well-established religious accommodation procedures and protections. DoD's continuing and unaddressed illegal efforts to purge Chaplains for following their conscience destroyed their careers and placed immeasurable stress on them and their families.

The Chaplains ask the Court to order DoD stop its continuing retaliation and to complete compliance with Congress's directive by restoring their careers, even while this Court addresses the merits of their claims that this case is not moot, and the courts have jurisdiction.

The Chaplains' petition and this Application's well-established facts show DoD's leaders' diminished respect for the rule of law. DoD's lawbreaking will continue unless restrained by this Court. Time has not diminished the truth of Justice Brandeis' oft quoted dissent in *Olmstead v. U.S*, 277 U.S. 438, 485 (1928), addressing the danger of rewarding government criminality:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent

> teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

This Application asks the Court to order DoD to stop breaking the law while the Chaplains' petition concerning mootness is reviewed and considered. It is especially appropriate given DoD's extension until March for a response and the upcoming DoD promotion cycle.

FACTUAL BACKGROUND

The facts and context relevant to interim relief are as follows:

1. Servicemembers apply for religious exemptions from military policies through a Religious Accommodation Request ("RAR"). DoD issued the primary governing regulation, DOD INSTRUCTION 1300.17: RELIGIOUS LIBERTY IN THE MILITARY SERVICES ("DoDI 1300.17") (App:384a-402a), in 2020.

DoD mandated COVID vaccination.

2. The Secretary of Defense August 24, 2021, memorandum mandated DoD-wide vaccination against COVID-19. *See* Sec. Lloyd J. Austin III, Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members (Aug. 24, 2021) (App:586a-587a).

3. The Army, Navy, and Air Force each issued guidance implementing the Mandate, including guidance for medical, administrative, and religious exemptions. Mahoney Decl. ¶¶11-14, 15-22 (App:407a-412a); Merz Decl. ¶¶5–10, 11, 12 (App:423a-426a); Air Force Implementation Guidance, ¶¶4.1-4.8 (Medical), ¶¶5.1-5.3 (Admin and religious) (Mar. 14, 2022) & Attachment 1 (App:651a-657a & 662a-664a). Although the procedures vary, each Service's process includes (a) an appeals process; (b) input from another chaplain, medical professional, the requesting servicemember, and the commanding officer; and (c) review by a senior military leader.

4. Although DoDI 1300.17 ¶3.2.a directs that RARs be decided at "the lowest appropriate level of command or supervision," the Armed Services adopted new, centralized RAR

procedures that designated senior military officials—three-star or four-star flag officers—as the RAR approval and final appeal authorities. Mahoney Decl. ¶18 (App:410a); Merz Decl. ¶12.b (App:427a); Furness Decl. ¶15 (App:459a-460a); Streett Decl. ¶¶13, 16 (App:480a-482a).

5. On June 2, 2022, DoD's Acting Inspector General ("OIG") wrote a memorandum to Secretary Austin suggesting that DoD's RAR denials generally did not reflect the individualized assessments that RFRA requires, and that data indicated that RARs were decided in an average of merely 12 minutes. App:670a-671a.

6. On September 2, 2022, Secretary Austin circulated the OIG memorandum within DoD under a cover memorandum reiterating that "[m]andatory vaccination against [COVID-19] is necessary to protect the Force." App:672a.

7. The Chaplains' declarations consistently indicate that the Chaplains' commands told them no RARs or appeals would be granted. *See* Brown Decl. ¶15 (App:158a); Young Decl. ¶18.v (informed that his RAR "would certainly result in failure, *i.e.*, expulsion from the military," and that the RAR process was "intended to achieve 100% compliance," *i.e.*, no religious exemptions) (App:374a).

8. According to a DoD letter to Congress, servicemembers filed 37,000 RARs, with 400 approved (1%), 19,100 denied (52%), and 17,500 still pending (47%) at the enactment of the 2023 NDAA. App:701a. The rates for non-religious medical and administrative requests for accommodation are unavailable because the reporting was less uniform across Service Branches and the denominators—the number of requests submitted—apparently were kept on a rolling basis (*i.e.*, DoD ceased tracking requests after their resolution), making it impossible to determine approval *rates* without discovery. *Navy Seal 1 v. Austin*, 586 F. Supp. 3d 1180, 1185 (M.D. Fla. 2022). As of August 15, 2022, the Chaplains submitted evidence of 19,821 non-religious

accommodations approved. App:569a. Significantly, the 400 RARs that DoD reports as approved likely overstate DoD's religious accommodations because those 400 approved RARs represent dual approvals as both an RAR and a medical or administrative request. *Doster v. Kendall*, 54 F.4th 398, 435 (6th Cir. 2022), *vacated sub nom. Kendall v. Doster*, No. 23-154 (U.S. Dec. 11, 2023). On information and belief following reasonable inquiry and likely provable through discovery, DoD approved virtually zero standalone RARs and routinely granted medical and administrative accommodation requests.

9. DoD's near-zero rate for RAR approval and whistle blowers' testimony suggest that each service branch implemented an actual or *de facto* DoD-directed "No Accommodation Policy." Courts that reviewed the issue described the RAR process as "theater" that "merely rubber stamps each denial." *U.S. Navy Seals 1-26 v. Biden*, 578 F. Supp. 3d 822, 826 (N.D. Tex. 2022), *appeal dismissed as moot*, 72 F.4th 666, 676 (5th Cir. 2023).

DoD denied the Chaplains' RARs.

10. Most Chaplains' RARs objected to the use of stem cell lines developed from an aborted fetus in testing or developing DoD's offered vaccines. *See* App:56a-57a; Brown Decl. ¶9 (App:155a); Gentilhomme Decl. ¶9 (App:206a); Meredith Wadman, *Abortion opponents protest COVID-19 vaccines' use of fetal cells*, Science Insider (June 5, 2020) (App:676a-679a). Others objected to the use of vaccines that introduced unnatural materials contaminating the body, "God's temple of the Holy Spirit." *See* Hirko Decl. ¶9 (App:231a-232a).

11. The Chaplains' RARs were not granted. At least seven Chaplains had their RAR appeals denied, and a majority (at least 17 of the original 31) had had their initial RAR denied, all by form letters nearly identical to those received by every other service member in question. *See Alvarado* Decl. Ex. 6 (App:136a); Barfield Decl. Ex. (App:146a), Brobst Decl. Ex. (App:153a) (Air Force); Eastman Decl. Ex. (App:194a-195a) (Navy). The Army slow-walked its RAR review

and appeal process.

The Chaplains suffered injury from the RAR filings, denials and retaliation.

12. District court exhibits 10-11 (App:629a-633a) from the Chaplains' preliminary-injunction motion summarize each Chaplains' injuries and irreparable harms (*e.g.*, religious discrimination, speech restrictions, denial of promotion, schooling, training) following a RAR filing. These injuries remain unaddressed

13. DoD attempted to coerce and coopt chaplains to be complicit in implementing the Mandate—"weaponiz[ing] the Chaplain Corps against its own core function," Schrader Decl. ¶17 (App:515a-516a)—by giving them "script[s]" for interviews to dismiss servicemembers' religious objections, *see* Young Decl. ¶18 (App:373a); Schnetz Decl. ¶18 ("From the high level of the branch, chaplains were coached and resourced from a pro-vaccine viewpoint on how to combat potential vaccine 'refusers'" and describing the "scripted" interview process they were ordered to conduct), to "parrot" the government-endorsed position) (App:298a), and to convince them their sincerely held religious objections are instead political (*i.e.*, not religious) in nature, insincere, or invalid. *See* Brown Decl. ¶16 (App:156a); Schnetz Decl. ¶18 (App:298a); Schrader Decl. ¶17 (App:515a-516a).

14. Several Chaplains were expressly and intentionally excluded from the RAR process for other servicemembers, removed from religious review teams ("RRTs"), and prohibited from counseling servicemembers seeking religious accommodation, and/or otherwise punished for submitting RARs, expressing religious objections, or supporting servicemembers with religious objections. *See* Fussell Decl. ¶12 (App:197a-198a); Gentilhomme Decl. ¶14 (App:207a-208a); Nelson Decl. ¶11 (App:275a); Schnetz Decl. ¶18 (App:298a).

15. Nearly all Chaplains describe a pervasive DoD created hostile environment intended to isolate, ostracize, stigmatize, and humiliate Chaplains and others with religious

objections to the Mandate. *See* Hirko Decl. ¶12 (removing all unvaccinated soldiers from training "at the last minute for maximum embarrassment and coercion," and leaving his unit without a chaplain) (App:233a-234a); Shour Decl. ¶17 ("senior members of the chaplain corps revel in … the harsh and abusive measures to be taken against 'refusers'" while their RAR was pending, and happy because these draconian punitive measures would deter servicemembers from submitting RARs "so the chaplain corps would have less work to process the requests.") (App:313a).

16. The Chaplain Corps' leadership were openly hostile to RARs, as publicly demonstrated by the Army's then-Chief of Chaplains:

> The environment at the Chaplains Schoolhouse became hostile conforming to the directives, prejudice and hostility of the Chief of Chaplains, CH (MG) Solhjem, He made it very clear any chaplain requesting an RAR should leave the Army in a speech he made to a Chaplain Basic course, reinforced by his actions and comments. The Chaplain Corps position was 100% COVID-19 vaccination.

Young Supp. Decl. ¶5 (App:730a).

17. Chaplains requesting RARs were punished for the free exercise of their religion—and prohibited from—performing their duties to minister to service-members in accordance with their faith, conscience, and vocation, by DoD's directions to discourage or dissuade servicemembers from submitting RARs; their removal from RRTs; and prohibiting their RAR reviews. *See* Brown Decl. ¶15 (App:157a).

18. During the Mandate's pendency, the Chaplains were non-deployable; removed from leadership positions; received one or more letters of reprimand and degraded performance reports producing promotion failures; and prohibited from travel, schooling, permanent change of station, and new assignments. Although DoD prospectively lifted these restrictions, the damage to the Chaplains' careers remains in their performance reports unless judicially remediated.

19. These injuries are reflected in Chaplains' reduced officer efficiency reports (Army),

fitness reports (Navy), and performance reports (Air Force), which are the basis for promotion in a competitive, subjective, up-or-out system.

DoD maliciously implemented Congress' 2023 Order to rescind the Mandate.

20. The 2023 NDAA directed DoD to "rescind" the Mandate within 30 days. James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, PUB. L. NO. 117-263, §525, 136 Stat. 2395, 2571-72 (2022) ("2023 NDAA") (Petition Appendix ("Pet.App"):51a).

21. After Congress enacted the 2023 NDAA, Secretary Austin issued a memorandum rescinding his prior two Mandate-related memoranda, directing the Armed Services to stop separating servicemembers who had sought an exemption, and to "remove any adverse actions *solely* associated with denials of such requests." Secretary of Defense, Rescission of August 24, 2021, and November 30, 2021, Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces (Jan. 10, 2023) (emphasis added) (Pet.App:53a).

22. On information and belief, following reasonable inquiry, and likely provable through discovery, DoD's directive to "remove any adverse actions solely associated with [RAR] denials" does not imply or direct the Armed Services tol remove all adverse actions that *relate to* or *arise from* RAR applications or denials. For example, Sec. Austin's memorandum would allow separating servicemembers under 10 U.S.C. §632 for twice having failed of selection for promotion, even if the servicemembers were denied promotions solely because they filed an RAR.

DoD's Mandate has continuing adverse effects after the 2023 NDAA ordered recission.

23. The Armed Services hold promotion boards every fiscal year to review applicants' records to determine who is best qualified for promotion. These boards—whose proceedings are secret—evaluate subjective fitness reports in competitive "up or out" environments with fewer opportunities for qualified candidates at each higher rank. *See Schlesinger v. Ballard,* 419 U.S. 498, 502-03 (1975) (describing "a basic 'up or out' philosophy ... to maintain effective leadership

by heightening competition for the higher ranks").

24. Two failures of selection below the rank Commander (Navy) or Lieutenant Colonel (Army and Air Force) can result in separation. 10 U.S.C. §632. "'[F]ailed of selection for promotion' is a statutory term of art" identifying candidates considered but not selected. *Schlesinger,* 419 U.S. at 503 (citing 10 U.S.C. §632).

25. Past retaliatory fitness reports based on a then-contemporaneous policy that was subsequently rescinded survive Austin's rescission because—once entered into a servicemember's record—fitness reports are reviewed in subsequent promotion reviews. For example, all Air Force members who filed RARs received "adverse administrative action" of a record of individual counseling under Air Force Form 174 simply for submitting an RAR. Even if DoD removed the derogatory forms from the Chaplains' records, the negative performance reports (based in part on the derogatory forms) from past cycles continue "speaking" in the Chaplains' records.

26. A rater's failure to use certain keywords indicating top performance results in non-selection. *See* Young Supp. Decl., ¶¶10-15 (describing his Senior Chaplain's withholding a promised "Most Qualified" rating) (App:733a-736a). For example, Chaplains Young and Schrader had "impeccable records" in the top of their respective year groups before the Mandate and describe the impact of Mandate-related adverse actions that lowered their standing and/or made them uncompetitive. *Id.*; Schrader Supp. Decl. ¶¶19-25 (App:722a-726a). Negative Mandate-related fitness reports and DoD's hostility to RAR filers thus have effectively destroyed these chaplains' careers and limited future promotions.

27. Similarly, CDR Eastman reports despite "an impeccable record at the time, I was not selected for a milestone billet [a key to promotion], which ultimately resulted in a non-selection to CAPTAIN." Eastman Decl. ¶5 (App:713a).

28. Chaplains Diltz, Fussel, Gentilhomme, and Harris failed of selection *twice*, App:629a-633a, due to filing RARs. This threatens them with imminent separation from the Armed Services. *See* Fact 24.

29. Chaplain Calger was separated December 1, 2023, following his second non-selection to Major because the denial of his RAR and his vaccination status precluded his attending mandatory schooling before consideration for promotion. Calger Decl. ¶3 (App:706a).

30. The military is short chaplains, and the number of military chaplains is plummeting. Ivonne Spinoza, *The Complex Role and Diverse Array of Chaplains in the Military*, Public Broadcasting Service (Nov. 23, 2023) (App:683a-693a); RADM Gregory N. Todd [Navy Chief of Chaplains], *The Navy needs more chaplains: All three sea services want and need more chaplain—but the recruiting deficit is extreme*, Religion News Service (May 15, 2023) (App:673a-675a).

31. DoD's Motion to Dismiss for Mootness ("MTD") admitted the Chaplains claimed DoD's retaliatory "adverse personnel actions" after filing RARs requests destroyed their careers and "asked the court to order the military to 'repair and restore Plaintiffs' careers and personnel records." App:744a-745a on.DoD's argued the judiciary could provide no relief. App:750a.

LEGAL BACKGROUND

The Chaplains' action arises under the Establishment, Free Exercise, Free Speech, Petition, Article VI's Religious Test, and Due Process Clause; RFRA; and §533. The Appendix contains these provisions' pertinent text and the relevant statutory provisions rescinding DoD's Mandate and DoD's related administrative actions. Key provisions on which the Chaplains base this application follow.

Religious Freedom Restoration Act

RFRA's three-part test determines whether government action violates religious freedoms:

- Whether the challenged governmental actions "substantially burden" the "exercise of religion," regardless of whether "the burden results from a rule of general applicability." 42 U.S.C. §2000bb-1(a).
- Whether the governmental actions further "a compelling governmental interest." *Id.* §2000bb-1(b)(1).
- Whether "application of the burden to the person … is the least restrictive means of furthering" the interest. *Id.* §2000bb-1(b)(2).

RFRA restored strict-scrutiny requirements for Free-Exercise claims under *Sherbert v. Verner*, 374 U.S. 398 (1963), in response to *Employment Division v. Smith*, 494 U.S. 872, 890 (1990). *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

Section 533

Section 533 protects the religious freedoms of all servicemembers in two distinct ways—an affirmative obligation to attempt to accommodate beliefs, *see* §533(a)(1) (Pet.App:50a), and a limitation on disciplinary or administrative actions outside the Uniform Code of Military Justice, 10 U.S.C. §§801-946a. *See* §533(a)(2) (Pet.App:51a). With respect to chaplains, §533 further prohibits compelling chaplains to participate in certain activities contrary to a chaplain's conscience, moral principles, or religious beliefs, *see* §533(b)(1) (Pet.App:51a), and protects chaplains from discrimination and adverse personnel action for refusing to so participate. *See* §533(b)(2) (Pet.App:51a).

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 implementation thereof.

After 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. Pet.App:24a-26a. Subsequently, Congress' 2023 NDAA directed DoD to rescind the Mandate (Pet.App:51a), and the District Court denied Applicants' reconsideration motion. App:28a-40a.

The Chaplains appealed to the Fourth Circuit. The Fourth Circuit stayed the appeal briefing the same day DoD moved to dismiss the appeal as moot. App:706a-707a. The Fourth Circuit then dismissed the appeal as moot. Pet.App:1a-2a. The Chaplains petitioned this Court for a writ of *certiorari* regarding the dismissal of their case on jurisdictional grounds, 23A-717, but move here for interim relief in support of the Court's future jurisdiction to review the ultimate merits.

STANDARD OF REVIEW

Interim relief pending the timely filing and ultimate resolution of a petition for a writ of *certiorari* is appropriate when there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant *certiorari*; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). For "close cases," the Court "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190.

REASONS FOR GRANTING INJUNCTIVE RELIEF

I. THE CIRCUIT JUSTICE OR THE FULL COURT CAN AND SHOULD CONSIDER INJUNCTIVE RELIEF HERE.

Only the Circuit Justice—or the full Court, if referred thereto—can grant the interim relief

that Chaplains seek because the District Court denied the Chaplains' preliminary injunction motion and dismissed their case, and the Fourth Circuit dismissed the Chaplains' appeal as moot. Although this Court generally will not entertain requests for relief not sought below, *c.f.* S.Ct. R. 23.3, the Chaplains sought interim relief in the District Court and would have done so pending appeal in the Fourth Circuit had that court not stayed briefing and then quickly dismissed the Chaplains' appeal. Accordingly, the Chaplains respectfully submit that extraordinary circumstances warrant consideration of their request for interim relief as a continuation of their efforts to obtain a preliminary injunction in the District Court, because they did not have time to seek that relief in the Fourth Circuit.

Requests for interim relief are requests under the All Writs Act. *See* 28 U.S.C. §1651(a); *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers); Stern & Gressman, SUPREME COURT PRACTICE §17.11 (11th ed. 2013). Moving for interim relief in the Fourth Circuit was impractical, if not impossible. Because the question of interim relief merges into a final judgment, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 314 (1999), the Fourth Circuit has already affirmed the District Court's denial of interim relief. Finally, the issue of interim relief is fairly presented in the Chaplains' petition and—in any event—necessary under the All Writs Act to preserve this Court's future jurisdiction to review the ultimate, post-remand merits and stop continuing irreparable harm.

II. THE GRANT OF A WRIT OF *CERTIORARI* IS LIKELY.

This Court is likely to grant the petition for *certiorari* now before this Court. The Court can consider that petition in conjunction with this application.

A. The Court is likely to grant a writ of *certiorari* on the issue of mootness.

As explained in more detail in the Chaplains' petition, the Fourth Circuit's finding of mootness is an "understandable" yet recurring instance of confusing mootness with standing.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) ("the Court of Appeals confused mootness with standing," and the "confusion is understandable"). This confusion requires the Court's supervision to clarify the important issue of federal courts' Article III jurisdiction. *See* S.Ct. R. 10(a). Similarly, the resolution of the issue of interim relief will resolve additional threshold issues (*e.g.*, whether statutory claims generally or RFRA claims particularly are subject to prudential requirements for exhaustion, whether doctrines deferring to or exempting the military under other statutes apply to RFRA), which this Court also should resolve. *Id.*

The Court is likely to grant a writ of *certiorari* for an additional procedural reason. In deciding whether to grant the Chaplains interim relief, the Court will need to address the basis for the Fourth Circuit's mootness holding. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) (Article III jurisdiction required for interim relief); *cf. Rosado v. Wyman*, 397 U.S. 397, 403 n.3 (1970) (court has jurisdiction to determine its jurisdiction). As such, the resolution of this application for interim relief will make the Court likely to "GVR" the Fourth Circuit's decision (*i.e.*, simultaneously to grant the petition, vacate the dismissal, and remand for further proceedings). Authority for a GVR derives in part from the Court's authority to resolve issues brought before the Court. *Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (citing 28 U.S.C. §2106). If the Court finds the case sufficiently non-moot to enter interim relief, the Fourth Circuit decision finding mootness would obviously warrant a GVR. *See id.* (including "our own decisions" as a basis to GVR a case). If the Court issues interim relief, full review of the jurisdictional issues on writ of *certiorari* would serve little to no purpose.

B. The Court is likely to grant a writ of *certiorari* on the ultimate merits.

Whereas a grant of interim relief would provide the basis for a GVR on the threshold issues that the lower courts resolved against the Chaplains, the ultimate merits of the Chaplains' case are also important. The All Writs Act provides this Court jurisdiction to issue interim relief to preserve

the Court's future jurisdiction over the ultimate merits, after this case is remanded to the lower courts for further proceedings. The Chaplains' case raises several "cert-worthy" merits issues:

First, the Chaplains raise unique challenges to DoD's policies implementing the Mandate, including a violation of the Establishment Clause and Article VI ban on religious tests for public office. The almost universal rejection of RARs based on the vaccine's lineage with stem cell lines from aborted babies establishes a religious test for continued service: "You must agree that abortion is not a sin and therefore has no influence on your conscience or we will prejudicially discharge you." The whole RAR process demonstrates hostility to the religious belief that directs chaplains' conscience. *See* Sections III.B.1.a, III.B.2.a, *infra*.

Second, chaplains occupy a unique role in our military serving simultaneously as commissioned officers and as denominational representatives who provide the means by which military members may exercise their free exercise of religion in the unique and constrained military environment. They have rank without command, 10 U.S.C. §§7231, 9231, and receive special protection and privilege under the Geneva Convention. Unlike the rest of the military, their role is to provide religious ministry, not to act as tools for imposing the Sovereign's will on our enemies. Significantly, the 2023 NDAA's rescission of the Mandate does nothing to prevent the recurrence of DoD challenging §533's conscience protections.

Third, whether by design or not, in violation of RFRA and §533, DoD's rejection of Mandate-related RARs has accomplished—and continues to accomplish—a purge from DoD those who honor their conscience in obedience to their religion. The fact that every military branch is short chaplains speaks volumes about the importance of these issues.

This Court has well-established precedent addressing the judiciary's responsibility to carefully examine religious liberty claims to avoid subtle as well as overt erosions of First

Amendment values, *e.g.*, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542-43 (1993); *Gillette v. United States*, 401 U.S. 437, 452 (1971). When this case is remanded for proceedings on the merits, the lower courts will need to resolve these merits issues, which the lower courts have—to date—ignored, based on their erroneous analysis of threshold issues.

This case provides an opportunity to affirm the importance of our First Amendment protections, the interrelationship of all those protections, and the judiciary's rule in enforcing them. If the lower courts prove unequal to that task, the Court is likely to grant a writ of *certiorari* on the merits. For purposes of interim relief under the All Writs Act, the Court has jurisdiction now to issue interim relief to preserve the Court's future jurisdiction over the merits. Without interim relief to prevent continuing retaliation and prejudice, the Chaplains might be purged before a merits appeal.

III. THE CHAPLAINS ARE LIKELY TO PREVAIL ON THE MERITS

The likelihood of prevailing is the most important factor for determining an entitlement to interim relief. *Hollingsworth*, 558 U.S. at 190; *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Chaplains' likelihood of prevailing has two components: jurisdiction to reach the merits and the merits themselves. The Chaplains readily satisfy both components.

A. The courts below have jurisdiction.

In order to grant the Chaplains relief, this Court must satisfy itself not only of its own jurisdiction, but also of the lower courts' jurisdiction. *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 95 (1998). The District Court found the Chaplains' suit non-justiciable, Pet.App:24a-25a, and the Fourth Circuit found the suit moot. Pet.App:3a. Both rulings were error. The Chaplains' petition for a writ of *certiorari* addresses all the potential threshold barriers to this Court's granting interim relief. Because "a plaintiff must demonstrate standing for each claim he seeks to press," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *Lyons*, 461 U.S. at 103 (Article III

jurisdiction required for interim relief), this Section demonstrates that the Chaplains' action satisfied Article III's requirements for a live case or controversy at all times.

Article III 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). These Chaplains have suffered and continue to suffer numerous Article III injuries from DoD's unlawful vaccine policies:

- *First*, DoD's Mandate presented the Chaplains with a Hobson's choice, violate their religious beliefs or face separation, loosing careers and ministries. The Mandate thus concretely injured the Chaplains' religious freedoms, 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). That injury continues.
- *Second*, the Chaplains suffer reputational injury from having been branded as "not team players" and having their personnel records degraded by adverse personnel actions (*e.g.*, lessened evaluations, denied promotions and training) that result directly from DoD's unlawful actions and inaction. 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, §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 interest in the ultimate end (*e.g.*, winning a contract, promotion, or admission), *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (injury "is the *denial of equal treatment* resulting from the imposition of the barrier, not the ultimate *inability to obtain the benefit*") (emphasis added)). 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 statutorily required protections. *Compare Clinton v. New York*, 524 U.S. 417, 433 & n.22 (1998) *with id.* at 456-57 (Scalia, J., dissenting).

Even without the Mandate's continuation, these Chaplains injuries from DoD's retaliation for filing RARs and the Chaplains' protected exercises of religion, speech, and petition (*e.g.*, missed training, discriminatory performance reports, and denied promotions) will cause separation from the military unless the Chaplains' personnel records are remedied.

The other two prongs of the standing inquiry—causation and redressability—pose "little question" when—as here—the government directly regulates a plaintiff. *Lujan*, 504 U.S. at 561-62. In sum, the Chaplains plainly *had* standing when they filed their suit.

"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.* As demonstrated in Section IV, *infra*, the Chaplains continue to suffer irreparable harm from DoD's policies, although DoD has ceased enforcing the Mandate. Showing irreparable harm exceeds Article III's requirement for injury in fact, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-50, 162 (2010), and the Chaplains' showing on irreparable harm demonstrates that DoD has not "completely and irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631. This action is not moot.

Sovereign immunity poses no barrier to interim relief because the APA waives sovereign immunity, 5 U.S.C. §702, and DoD does not hold separations from service inoperative pending appeal within the DoD. *See* 5 U.S.C. §702; *Darby v. Cisneros*, 509 U.S. 137, 152 (1993).

Significantly, courts analyze Article III and sovereign immunity on *the plaintiff's* merits views. *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal"); *Verizon Md. Inc. v. PSC*, 535 U.S. 635, 646 (2002) ("the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim"). Thus, for jurisdictional purposes, it is immaterial whether DoD claims that its actions always were or now are lawful.

Wholly apart from appellate jurisdiction to review the lower courts' 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 pending the final resolution of this action, DoD likely will separate many of the Chaplains under 10 U.S.C. §632 based on issues *arising from* or *related to*—but not caused *solely* by—DoD's unlawful imposition and implementation of the Mandate, the Chaplains' lawful RAR petitions, and DoD's failure to rescind the Chaplains' damaging fitness reports for filing a RAR.

B. The Chaplains are likely to prevail on the merits.

With jurisdiction and other threshold bases for dismissal put aside, *see* Section III.A, *supra*, this Section demonstrates that the Chaplains are likely to prevail.

1. DoD's actions violate the Chaplains' constitutional religious-freedom, free-speech, and petition rights.

The First Amendment's Establishment and Free-Exercise Clauses prohibit the making of "law respecting an establishment of religion, or prohibiting the free exercise thereof," respectively. U.S. CONST. amend. I, cl. 1-2. Further, under the Religious Test Clause, "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, cl. 3. The First Amendment also protects speech and the right of petition. "Congress shall make no law … abridging the freedom of speech" or "the right of the people … to petition the Government for a redress of grievances." U.S. CONST. amend. I, cl. 3, 6.

As this Court has explained, "[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." *Lukumi*, 508 U.S. at 523. Abortion politics can inspire a vehemence not typically seen in politics, much less in government. DoD's unusual—and unusually vehement—attempt to suppress religious opposition to the COVID vaccines appears based on DoD leadership's dispute with the Chaplains' pro-life rationale for rejecting the COVID vaccines. *See* Facts ¶10. Whatever DoD's reason for suppressing religious freedoms, the Chaplains assert basic First Amendment and religious liberties protected not only by the Constitution itself, but also by the laws that Congress has enacted to implement the Constitution, including not only RFRA for government generally but also §533 and the 2023 NDAA for the Armed Services specifically.

Given the Chaplains' *statutory* bases for prevailing, *see* Sections III.B.2-III.B.3, *supra*, this Court need not reach the merits of the Chaplain's *constitutional* claims. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). The Chaplains nonetheless summarize their constitutional injuries in this Section to demonstrate the unlawfulness of DoD's actions and the seriousness of the Chaplains' challenge.

"A [military] chaplain's role within the service is 'unique,' involving simultaneous service as clergy or a '*professional representative[]' of a particular religious denomination* and as a commissioned [military] officer." *In re England*, 375 F.3d 1169, 1171 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1152 (2005) (emphasis added). Chaplains have "rank without command," 10 U.S.C. §§7231, 9231, to avoid unconstitutionally granting the Sovereign's power to a person defined by their religious identity, fusing civic and religious power. See *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 698-99, 702 (1994).

DoD can neither suppress nor direct a chaplain's religious speech to soldiers within that chaplain's ministry. *See Rigdon v. Perry*, 962 F.Supp. 150, 152 (D.D.C. 1997) (DoD could not prohibit military chaplains from encouraging their congregants to contact Congress in support of

the partial birth abortion ban). *Katcoff v. Marsh*, 755 F.2d 223, 234 (2d Cir. 1985) held a Chaplain Corps was Congress's solution to balancing the Establishment and Free Exercise Clauses competing commands in the military's unique, restricted environment. The current DoD administrators may dislike Congress's choice but discriminating against religious, speech, or petition rights is not a constitutional option.

a. DoD violated the Chaplains' religious liberty.

The Chaplains' RARs all emphasized the Mandate burdened their conscience. *See* Facts ¶12 (table summarizing Chaplains' religious objections). They could not, consistent with their faith, accept the vaccine for the valid reasons they provided. As explained in this Section, DoD violated the Chaplains' religious freedom under three independent clauses of the Constitution: the Establishment Clause, the Free Exercise Clause, and the Religious Test Clause. U.S. CONST. amend. I, cl. 1-2; *id.* art. VI, cl. 3. In this Nation founded on principles of religious freedom, *Trump v. Hawaii*, 138 S.Ct. 2392, 2417-18 (2018); *Van Orden v. Perry*, 545 U.S. 677, 687 n.7 (2005) (plurality opinion) (Rehnquist, C.J.), these three clauses share a common thread on the limits of government power: "[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. The DoD policies implementing the Mandate attempt to violate that central tenet of our Constitution by seeking to regulate permissible conscience, religious belief and conduct. Specifically, in preferring one religious position (*i.e.,* abortion is not "sin") and rejecting another (*i.e.*, abortion is "sin"), DoD engages in the very interference that *Barnette* and its progeny prohibit.

For chaplains, the religious-freedom violations are even more severe because DoD sought to coerce chaplains to parrot and be complicit in DoD's wrongdoing by counseling servicemembers to ignore the demands of their conscience and forego their rights to seek religious

accommodation. When chaplains declined, DoD removed them from RRTs and excluded them from RAR reviews for performing their duties consistent with their conscience and faith.

i. DoD violated the Establishment Clause.

Almost all the Chaplains' RARs cite the use of abortion-related stem cell lines and object to the use of abortion byproducts. *See* Facts ¶10. Contrary to *Barnette* and its progeny, DoD's RAR process discriminated against the Chaplains based on their abortion beliefs, while granting preferential accommodation to others.

That discrimination violates the "clearest command of the Establishment Clause." *Larson*, 456 U.S. at 244. This Court struck down the statute at issue there because its requirement that churches derive at least half their income from members did "not operate evenhandedly" and was intended to impose "selective … burdens and advantages upon particular denominations." *Id*. at 254. DoD was not subtle here, "the Establishment Clause forbids [government] to hide behind an application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995). DoD's RAR process was not an attempt to accommodate religion. The RAR process was openly hostile to any religion—particularly regarding religious questions (*i.e.*, abortion)—which the Establishment Clause forbids. *Katcoff*, 755 F.2d at 234; *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947). A plaintiff showing *prima facie* Establishment Clause violations triggers strict scrutiny shifting the burden of proof to the government. *See Cty of Allegheny v. ACLU*, 492 U.S. 573, 608-09 (1989).

ii. DoD violated the Free Exercise Clause.

DoD's Mandate and the policies implementing that Mandate interfered with the Chaplains' free exercise of their religion not only by sending a coercive message that the military was hostile to the Chaplains' core religious beliefs on the sanctity of life and refusal to benefit from abortion

but also by attempting to compel government-endorsed speech promoting vaccination and dismissing religious objections. Under *Barnette* and its progeny, it is not "open to public authorities to compel [a plaintiff] to utter what is not in his mind." *Barnette*, 319 U.S. at 634; *accord 303 Creative, LLC v. Elenis*, 143 S.Ct. 2298, 2310-12 (2023). Once a plaintiff shows *prima facie* violations of the Free Exercise clause, strict scrutiny is triggered and the burden of proof shifts to the government. *See O Centro*, 546 U.S. at 429. Moreover, with respect to government compulsion in strict-scrutiny settings, any distinction between "compelled speech" and "compelled silence" is "without constitutional significance." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). DoD's Mandate thus violated the Free Exercise Clause.

iii. DoD violated the Religious Test Clause.

The Religious Test Clause prohibits not only oaths, but also government action that "establishes a religious classification" that imposes "a test for office based on religious conviction as one based on denominational preference." *McDaniel v. Paty*, 435 U.S. 618, 632 (1978) (Brennan, J., concurring). Religious tests are "absolutely prohibited." *Id*. Neither Congress nor DoD can condition service in the Armed Forces on believing that abortion is religiously tolerable. Any such religious test is *per se* void. *Id.*; *accord Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961).

b. DoD violated the Chaplains' freedom of speech.

This Court reviews content-based restrictions on speech under strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-164 (2015). The Clause protects not only actual speech but also the expression inherent in some types of "expressive conduct." *303 Creative*, 143 S.Ct. at 2320.

In addition to seeking to suppress the Chaplains' freedom of religion and to impose its own versions of acceptable religious belief, DoD also acted to suppress the Chaplains' freedom of speech on religious matters, *e.g.*, providing scripts of what to tell servicemembers with religious concerns about the COVID vaccines, removing the Chaplains from RRTs, and excluding them

from RAR reviews. *See* App:550a (citing App:158a-159a; 298a; 370a; 515a-516a).

DoD's actions also violate the Free Speech Clause. "These Clauses work in tandem" because "the Free Speech Clause provides overlapping protection for expressive religious activities." *Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2421 (2022). As such, the First Amendment "doubly protects religious speech." *Id.* Significantly, the Chaplains do not seek to speak *publicly* (*i.e.*, outside DoD), so the issue of balancing DoD's interests versus the Chaplains' interests does not arise. *See City of San Diego v. Roe*, 543 U.S. 77, 82-83 (2004) (discussing "*Pickering* balancing" for public employees' *public speech* on matters of public concern). Instead, the Chaplains simply seek to do their jobs as denominational representatives *within DoD*, without improper DoD pressure in this unique religious context. Chaplains' speech on matters of faith is not government speech under *Kennedy* and the *Pickering* test.

c. DoD violated the Chaplains' freedom to petition.

This Court has been careful to avoid chilling the First Amendment right of petition. *See Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014) (explaining effort "to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances"). This Court evaluates public employees' claims under the Petition Clause using the same *Pickering* "public concern test" that the Court uses to evaluate public employees' claims under the Free Speech Clause. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 393 (2011). DoD violated the Chaplains' First Amendment right of petition in two distinct ways.

First, DoD retaliated against these Chaplains for exercising their right of petition by filing RARs. The Chaplains' petition claims are actionable for the same reasons that that their speech claims are actionable. *See* Section III.B.1.b, *supra*. While petitioning government does not guarantee a *response* from government, *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984), government cannot constitutionally *retaliate* against a petitioner for petitioning.

Second, as with the Chaplains' Free Speech injuries, DoD's violations of the Petition Clause merge with DoD's violations of the Chaplains' religious-freedom rights. Thus, their Petition Clause claims "work in tandem" with their claims under the religious-freedom clauses and "provide[] overlapping protection" that "doubly protect[]" religious petitions. *Kennedy*, 142 S.Ct. at 2421. To the extent that any of the Chaplains' petition claims fall outside the *Pickering* "public concern test," those claims remain squarely within the religious-freedom clauses' protections.

d. DoD violated the Chaplains' due process rights.

"No person shall … be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V, cl. 3. The Due Process Clause has substantive and procedural protections, and an equal-protection component equivalent to the Fourteenth Amendment's Equal Protection Clause. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

DoD's RAR process violated the Chaplains' rights to due process, which this Court's precedents "generally require[] consideration of three distinct factors," *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), summarized as "the private interest that will be affected by the official action"; "the risk of an erroneous deprivation of such interest through the procedures used"; and the Government's interest". *Id.* at 335. Under the first factor, the Chaplains' interests are weighty. *See* Sections III.B.1.a-III.B.1.c. The 2023 NDAA terminated DoD's authority for the Mandate, eliminating any governmental interest on which DoD might have sought to rely.

Under the second factor, DoD denied due process in two overlapping ways. *First*, DoD had already decided to deny RARs *en masse* before evaluating any given RAR. *See* Facts ¶¶7-9. "Procedure of this style has been questioned even in systems … less concerned than ours with the right to due process." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 468 & n.2 (2000) (citing Lewis Carroll, ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS 108 (Messner, 1982)). *Second*, while DoD's administrative procedures were not—and did not need to be—a trial *per se*,

this Court has rejected "kangaroo court proceedings" that come after a decision already made. *Skilling v. United States*, 561 U.S. 358, 379 (2010) (quoting *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963)). The Court should reject DoD's Kabuki process here.

2. RFRA bars DoD's actions.

"RFRA was designed to provide very broad protection for religious liberty … far beyond what this Court has held is constitutionally required." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014).[1] As indicated, RFRA follows a three-part test of whether government actions "substantially burden a person's exercise of religion," 42 U.S.C. §2000bb-1(a), whether the action furthers a "compelling governmental interest," *id.* §2000bb-1(b)(1), and whether the "application of the burden to the person … is the least restrictive means of furthering" the interest. *Id.* §2000bb-1(b)(2). The Court has held this text to adopt a burden-shifting approach under which plaintiffs must show a religious burden under the first test, which shifts the burden of proof to the government to show the second and third tests. *See O Centro*, 546 U.S. at 429. Significantly, this burden-shifting approach applies not only to the merits, but also to preliminary injunctions. *O Centro*, 546 U.S. at 429. The Chaplains easily meet their burden under the first test, and DoD cannot meet its burden under the second or third tests.

a. DoD's Mandate and policies implementing the Mandate burden the Chaplains' religious freedoms.

As this Court has recognized, conscience rights are defined by the rights holder, not by government. *Hobby Lobby*, 573 U.S. at 724. Nor does religious freedom "turn upon a judicial

[1] Given this *statutory* basis for review beyond what the Constitution requires, this Court need not reach the constitutional merits, *see Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944), nor apply prudential limits that this Court has devised for constitutional adjudication. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014).

perception of the particular belief or practice in question." *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981). If courts cannot question the merits of the Chaplains' religious views in religious-freedom cases, DoD *a fortiori* cannot impose its views by administrative fiat or otherwise: "[The Chaplains] drew a line, and it is not for us to say that the line [they] drew was an unreasonable one." *Id.* at 714; *accord Hobby Lobby*, 573 U.S. at 725.

Because DoD has not questioned—and cannot credibly question—the sincerity of the Chaplains' beliefs, *see Hobby Lobby*, 573 U.S. at 717 n.28 ("asserted belief must be 'sincere' [and not] … pretextual"), the Chaplains must show only that DoD's Mandate—and the implementing policies—substantially burdened their exercise of religion, which the Chaplains can show in several, independent ways:

- With respect to requests for accommodation of objections to the COVID vaccine, DoD disparately accommodated religious and non-religious requests, with the threat of separation from the Armed Services for religious objections. *See* Section III.B.2.b, *infra*; *See* Facts ¶¶7-9.
- DoD burdened the Chaplains' rights under the Constitution's religious-freedom clauses by forcing the Chaplains to choose between (a) following their faith to reject a vaccine developed with fetal tissue from abortion, or (b) being eligible for training, assignments, and promotions in the Armed Services. *See* Section III.B.1.a, *supra*.
- DoD retaliated against chaplains who filed RARs by degrading their performance reports, and denying some access to schooling and promotions that they otherwise would have received, without which their military careers will end for failure of selection in the military's "up-or-out" promotion system. *See* 10 U.S.C. §632; *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("[w]hen the government targets …

particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant"); Section III.B.1.a, *supra*.

- DoD coerced chaplains to parrot the DoD script on the COVID vaccine and removed chaplains who refused that script—as inconsistent not only with their personal faith but also with their role as ministers of that faith—from RRTs and RAR reviews. *See 303 Creative*, 143 S.Ct. at, 2318.
- DoD imposed a religious test for service in the Armed Services by essentially banning pro-life Chaplains. *See* Section III.B.1.a.iii, *supra*.

Each of these burdens satisfies RFRA's first prong. *Cf. Hobby Lobby*, 573 U.S. at 720-23 (penalties for noncompliance); *Holt v. Hobbs*, 574 U.S. 352, 361 (2015) (punishing religiously motivated conduct). The Chaplains are likely to prevail on each burden, showing the Chaplains are likely to prevail on the RFRA merits.

b. DoD has not shown a compelling governmental interest for its Mandate policies as applied to the Chaplains.

RFRA's second prong requires DoD to prove that "application of the burden *to the person* … is in furtherance of a compelling governmental interest." 42 U.S.C. §2000bb-1(b)(1) (emphasis added); *Hobby Lobby*, 573 U.S. at 694-95. Thus, while "[s]temming the spread of COVID-19 is unquestionably a compelling interest," *Roman Catholic Diocese v. Cuomo*, 141 S.Ct. 63, 67 (2020), that is not all that RFRA's second prong requires. Because DoD's required showing is *individualized to each affected Chaplain*, "invocation of … general interests, standing alone, is not enough." *O Centro*, 546 U.S. at 438; accord App:670a-672a (OIG report). DoD must show a compelling interest in forcing someone with each Chaplains' duties to take the vaccine or face a sanction. *Hobby Lobby*, 573 U.S. at 726. DoD cannot make the required showing for *any* Chaplain, especially given DoD's relative generosity with non-religious exemptions.

First, DoD must make an individualized finding, *Hobby Lobby*, 573 U.S. at 727 ("in other words, to look to the *marginal interest* in enforcing the … mandate in these cases") (emphasis added, citing *O Centro*, 546 U.S. at 431), which is something that DoD's cookie-cutter denials did not even attempt. *See* Facts ¶¶7-9, 11. Significantly, both before and after the APA's enactment, agency action "must … stand or fall on the propriety of [the] finding[s]" on which the agency based its action, *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *accord SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based"), not on after-the-fact arguments made in litigation. DoD's record cannot support DoD's burden here.

Second, DoD's relative generosity with medical and administrative exemptions to its Mandate belies any claimed compelling interest. *See* Facts ¶8. "Where government restricts only conduct protected by the First Amendment," but exempts other conduct and "alleged harm of the same sort" on non-religious grounds, "the interest given in justification of the restriction is not compelling." *Lukumi*, 508 U.S. at 546-47. DoD cannot meet RFRA's second prong.

c. DoD has not applied the least restrictive means of furthering a governmental interest.

RFRA's third prong requires DoD to prove that "application of the *burden to the person* … is the least restrictive means of furthering" the government's interest. 42 U.S.C. §2000bb-1(b)(2) (emphasis added). As signaled in the prior section, DoD's relative generosity with *non-religious* exemptions demonstrates that alternate methods of accommodating unvaccinated personnel exist. Moreover, while it likely would be impossible for DoD to show otherwise here, *Hobby Lobby*, 573 U.S. at 728 ("least-restrictive-means standard is exceptionally demanding"), DoD is limited to the record, *Camp*, 411 U.S. at 142; *Chenery Corp.*, 318 U.S. at 87, and the record does not show that DoD's policies are the least restrictive means of furthering DoD's interests.

Significantly, it is not a court's burden "to predict the extent to which an [alternate accommodation] would improve [the program]" but rather DoD's burden when "presented with a plausible, less-restrictive alternative, to prove the alternative to be ineffective." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 823 (2000). "Conjecture alone fails to satisfy the sort of case-by-case analysis that RLUIPA [and thus RFRA] requires." *Ramirez v. Collier*, 595 U.S. 411(2022) (citing *Holt*, 574 U.S., at 363). RFRA thus requires DoD to explain why less restrictive means (*e.g.*, teleworking, masking, social distancing, natural immunity) would not work.

To make the required showing, DoD must engage in a "'more focused' inquiry" into whether alternative means exist for *each* Chaplain. *Hobby Lobby*, 573 U.S. at 726 (quoting *O Centro*, 546 U.S. at 430). Several Chaplains proposed alternative, less restrictive means and provided evidence that these alternatives had been employed successfully over the past two years achieving mission objectives and limiting the spread of COVID-19. *See* Hirko Decl., ¶10 (App: 232a-233a); Jackson Decl., ¶12 (App:245a-246a). DoD's denials failed altogether to mention proposed alternatives.[2] Narrow tailoring requires government defendants to "demonstrate that alternative measures that burden substantially less speech [or conduct] would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). DoD simply *cannot* meet that burden, and it certainly *has not* met that burden.

In any event, by accommodating non-religious exemptions, DoD creates the added burden on itself of explaining why identical accommodation for the Chaplains would not work. *See Hobby Lobby*, 573 U.S. at 730-31; *Lukumi*, 508 U.S. at 546-547. Similarly, DoD's refusal to

[2] Defendants also dismissed or failed altogether to consider natural immunity (possessed by approximately half the Chaplains) as required by DoD's own rules. *See* Army Regulation 40-562, "Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases" (Oct. 7, 2013) (App:599a at §2-6).

accommodate the Chaplains is inconsistent with its past approaches of using affirmative-action programs to ameliorate the effects of racial and sexual prejudice and discrimination. As with RFRA's compelling-interest prong, DoD cannot make the required showing here because DoD itself has demonstrated that less restrictive means exist, which means that DoD "must use" those means. *Playboy Ent. Grp.*, 529 U.S. at 816. DoD cannot meet RFRA's third prong.

d. DoD's RFRA violations extend to injuries beyond those for which DoD's Mandate was the *sole* cause.

Although DoD has ceased mandating the vaccine and ordered the Armed Services to stop separating servicemembers who had sought an exemption and to "remove any adverse actions *solely* associated with denials of such requests," App:698a (emphasis added), those limited actions do not fully resolve, remedy, or moot DoD's RFRA violations. Chaplains who missed required training or were denied needed assignments or denied promotion because of either DoD's failure to accommodate their RARs or because of retaliation for having filed the RARs now can be separated for having failed of selection twice *See* 10 U.S.C. §632. While the "adverse actions" (*e.g.*, missed training, non-promotion) that form the basis for missed promotion or assignments are not "*solely* associated with denials of [RARs]," the denials and DoD's continuing retaliation are but-for causes of the adverse actions. RFRA authorizes a court not only to stop the beatings, but also to heal the wounds.

Specifically, RFRA authorizes "appropriate relief." 42 U.S.C. §2000bb-1(c). Shortly before RFRA's enactment in 1993, this Court held "appropriate relief" to include injunctive relief: "it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction" for statutory violations. *School Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985) (discussing Education of the Handicapped Act); *cf. Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 128 (1985) (Congress presumed aware of prior interpretations

of this Court). Equitable relief gives courts broad flexibility in choosing how to proceed:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to [mold] each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.

Winter, 555 U.S. at 51 (internal quotation marks omitted). Indeed, under this Court's precedents on remedies for discrimination, it seems similarly clear that removing only adverse personnel action *solely* resulting from the defendants' unlawful actions neither addresses all injuries *related to or arising from* those unlawful actions nor makes the plaintiffs whole by restoring them to their rightful place. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (noting statutory purpose "to make persons whole for injuries suffered on account of unlawful employment discrimination"); *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"); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 n.12 (1989) (plurality); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003). RFRA allows equitable relief—including the interim relief requested here—to remedy violations.

The Chaplains respectfully submit that RFRA authorizes a court to remove the taint of the but-for causes, even in mixed-motive contexts. W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1244 (2022). DoD's implicit attempt to limit relief to issues "solely" caused by RARs is inadequate: "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*, 422 U.S. at 418 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946), alterations omitted). For example, Chaplains denied promotion for filing RARs could be separated from the military for failing to get promoted. *See* Fact 28. Similarly, Chaplain Calger recently received an order separating him on December 1, 2023, for two failures of selection due to his

inability to attend mandatory schooling after filing his RAR because of his vaccination status. App:708a-711a. Other non-Applicant chaplains may have similar injuries. Congress generally addressed religious accommodation in RFRA and specifically addressed both of the foregoing examples in §533. App:4a. In each of these examples, the adverse personnel action may not be caused *solely* by DoD's allegedly unlawful policies, but the Mandate and those policies would be *but-for* causes of the adverse action. Without DoD's unlawful RAR denials and retaliation for filing RARs, these adverse personnel events would not have arisen.

3. Section 533 bars DoD's adverse actions.

For the same reasons that DoD's actions violate RFRA, *see* Section III.B.2, *supra*, DoD's actions also violate §533(a)(1)'s requirement to "accommodate individual expressions of belief of a member of the armed forces reflecting the sincerely held conscience, moral principles, or religious beliefs of the member and, in so far as practicable" and its prohibition against "us[ing] such expression of belief as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment." §533(a)(1) (App:4a). DoD's non-accommodation of the Chaplains and punitive retaliatory actions against them for exercising their right to follow their conscience involve the very actions that §533(b) covers (*e.g.*, denying promotions, assignments, travel, and training). These violations support interim relief to provide the Chaplains' preferential treatment in the allocation of "schooling, training, or assignment," *id.*, that the Chaplains were unlawfully denied while DoD's unlawful Mandate was in effect.

IV. THE CHAPLAINS WILL SUFFER IRREPARABLE HARM WITHOUT INTERIM RELIEF.

In seeking their preliminary injunction, the Chaplains identified numerous "adverse personnel actions" (*e.g.*, lowered fitness reports, missed schools necessary for promotion) that violated RFRA and §533 and that directly impaired their careers. *See* Facts ¶¶7, 14-19. Those

adverse actions inflicted real and continuing harm and constitute retaliation on the basis of religious belief, irreparable harm. *Chaplaincy of Full Gospel Churches v. England* ("*CFGC*"), 454 F.3d 290, 302 (D.C. Cir. 2006) (Establishment Clause).

With exceptions irrelevant here, officers below the rank of Commander or Lieutenant Colonel must leave the Armed Services if not promoted to the next rank after two tries. 10 U.S.C. §632. As such, if allowed to continue during the pendency of this litigation, the negative effect of DoD's prior unlawful actions will continue to destroy the Chaplains' military careers. Accordingly, until a final judgment on DoD's obligation to remediate the injuries to the Chaplains' careers, operation of 10 U.S.C. §632 will automatically inflict irreparable harm—as a result of DoD's *past* unlawful actions and inaction—notwithstanding that DoD claims to have ceased any *ongoing* violations of the federal law and the Constitution.

Moreover, DoD's unlawful implementation of the Mandate has chilled—and will continue to chill—the First Amendment religious rights and the right of petition, which itself qualifies as irreparable injury: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *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.

V. THE EQUITIES BALANCE IN FAVOR OF INTERIM RELIEF.

In close cases—and this is not a close case—the Court should balance the equities. *Hollingsworth*, 558 U.S. at 190. But If this Court accepts that DoD's actions violate the First Amendment and RFRA, *see* Section III.B, *supra*, the case is neither close nor one where the equities can tip to DoD.

A. DoD will not suffer cognizable injury from interim relief.

Although governmental parties have Article III standing to defend their actions, *Diamond*

v. Charles, 476 U.S. 54, 62-63 (1986), the concept of irreparable harm requires a greater injury than Article III requires. *Monsanto*, 561 U.S. at 149-50, 162. Here, Congress—with the President's assent by signing the NDAA—has rescinded DoD's authority to issue DoD's Mandate. DoD cannot credibly argue that it has a cognizable interest in having the Mandate's lingering effects continue, as they will do unless the prior effects of DoD's unlawful "adverse personnel actions" are remedied. Regardless of whether DoD violated RFRA and §533 negligently out of indifference and incompetence or intentionally out of antipathy to the Chaplains' religious views, DoD has no cognizable interest in continuing the delayed-effect purge of pro-life Chaplains from the military under 10 U.S.C. §632.

Significantly, as applied to federal agencies, RFRA is based on the enumerated power that supports the particular agency's work, *Hobby Lobby*, 573 U.S. at 695, so the 2023 NDAA's command arises under the power of Congress to raise armies. U.S. CONST. art. I, §8, cl. 12. Given the Armed Services' shortage of chaplains and their recent and repeated failure to meet their recruiting goals, this Court should not only defer to the support that Congress—with the President's assent—showed for people of faith in the 2023 NDAA but also resoundingly reject DoD bureaucrats' indifference and antipathy.

B. <u>The equities balance in favor of the Chaplains.</u>

Against DoD's meager injuries, the Chaplains raise foundational First Amendment rights, *see* Section III.B.1, *supra*. Quite simply, the DoD does not warrant deference here. In order to defer *to Congress and the President* in military matters, the 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 respondent secretaries bring a wet noodle. Whatever else RFRA includes as "appropriate relief," 42 U.S.C. §2000bb-1(c), "it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction" for statutory violations. *School Comm.*

of Burlington, 471 U.S. at 370. These legal and equitable issues are ones for judicial interpretation under *Marbury v. Madison*, 5 U.S 137 (1803) and *City of Boerne v. P.F. Flores*, 521 U.S. 507 (1997). For all these reasons, the equities balance sharply in the Chaplains' favor. Without interim relief to protect their chaplaincies, many Chaplains will have been forced out of the Armed Services before the merits of this case returns to this Court after remand. *See* Section III.A, *supra*. To preserve this Court's future jurisdiction over the permanent resolution of the Chaplains' challenge, the Court should issue interim relief now to ensure that DoD cannot play out the clock as a means to evade review of its unlawful Mandate.

VI. THE PUBLIC INTEREST FAVORS INTERIM RELIEF.

To grant interim relief, courts consider the public interest. *Winter*, 555 U.S. at 20. Where the parties dispute government actions' lawfulness, the public interest collapses into the merits. *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) ("the public interest [is] not served by the enforcement of an unconstitutional law") (interior quotation omitted); *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("no public interest in the perpetuation of unlawful [government] action"). The public interest clearly favors granting interim relief given religious freedom's importance and DoD's clear violation of those rights, *see* Section III.B, *supra*,.

RELIEF REQUESTED

Pursuant to this Court's Rule 22 and the All Writs Act, 28 U.S.C. §1651(a), the Chaplains respectfully request that this Court enter the following interim relief:

a. Stay the operation of 10 U.S.C. §632 to any chaplain who objected to pre-Mandate DoD vaccine bullying and/or filed an RAR responding to DoD's Mandate between August 24, 2021, and January 10, 2023 (a "Covered Chaplain" and "Covered Actions") for two full review years after entry of a final judgment here, including the resolution of any timely filed appeals and order respondent Army to rescind Chaplain Calger's separation, *see* Fact 28.

b. Enjoin Respondents from further retaliation against Covered Chaplains.

c. Pending final resolution of the merits, Order the respective Secretaries to (1) officially recognize that Covered Chaplains have been the victims of retaliation, unlawful prejudice and discrimination for exercising their protected rights while displaying personal courage, commitment, integrity and faithfulness to the Constitution and their religious organizations; (2) require Covered Period fitness reports be looked at positively; and (2) acknowledge the respective Services have the responsibility to restore Covered Chaplains' careers to their pre-Mandate status.

This includes providing specific instructions to commanders, promotion-selection board members, and assignment officers that fitness reports for Covered Chaplains during the covered period are presumed to be tainted with unlawful prejudice. Accordingly, it is the responsibility of board members to recognize the courage and integrity the covered chaplains displayed knowing that requesting an RAR was the kiss of death for their career, take steps to remediate that damage, and end the continuing retaliation and injury such covered reports have caused. As a minimum, require that the fitness reports rating applicable to a Covered Chaplain be the highest rating for the Covered Chaplain for the two years prior to the first Covered Fitness Report.

Furthermore, order the Services to monitor such Covered Chaplains careers to ensure the Services restore the Covered Chaplains to their standing prior to the Mandate's issuance and take such steps as is necessary to fully remediate the damage done for following their conscience

d. Order respondents to issue guidance advising all officers in the Chaplains Corps and all general and flag officers of each Service Branch that discriminating or retaliating against a Covered Chaplain in any manner related to the Covered Chaplain's having filed an RAR with respect to the

e. Mandate retaliation constitutes conduct unbecoming an officer within the meaning of Article 133 of the Uniform Code of Military Justice, 10 U.S.C. §933.

f. With respect to any opportunities such as training or schooling (including advanced civil or military schooling, *e.g.*, Command and General Staff or War College) that Covered Chaplains missed during the period between the date a Covered Chaplain filed an RAR with respect to the Mandate and the date of this Court's Order, order respondents to ensure consideration of the Covered Chaplain for expedited access to such opportunities as an interim affirmative-action or equal-opportunity remedy for past discrimination against the Covered Chaplain.

g. For Covered Chaplains who failed of selection or were separated from the Armed Services for two failures of selection, notwithstanding the foregoing relief, order respondents expeditiously to convene special boards under 10 U.S.C. §1558 or §14502(a)-(b) to review the Covered Chaplain's non-selection and/or separation or the terms of the Covered Chaplain's separation, at the Covered Chaplain's election and if selected promote the Covered Chaplain retroactively as of the date he or she was eligible for promotion.

h. Enjoin respondents from excluding Covered Chaplains from any proceedings, favorable opportunity, or assignment on the basis—in whole or in part—of the Covered Chaplains performing Covered Actions.

The Chaplains require merits-based relief *now* to end their irreparable injury, ongoing retaliation, and preserve an Article III controversy for the Court's review of the ultimate merits, after remand to the District Court to resolve the merits. Any interim relief should remain in place pending the lower courts' entry of judgment and exhaustion of any appeals of that judgment.

CONCLUSION

DoD's numerous retaliatory "adverse actions" against these Chaplains violate the law, breeding "contempt for law and inviting every man to become a law unto himself." *Olmstead*, 277 U.S. at 485. That invitation has no place in DoD. This Court should grant injunctive relief restoring the rule of law and protecting Chaplains' right of conscience.

Dated: March 18, 2024

Respectfully submitted,

/s/Arthur A. Schulcz, Sr.__

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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 21.2(c) and 33.2, I certify that the foregoing Application is proportionately spaced, has a typeface of Times New Roman, 12 points, and contain 41 pages (and 12,593 words) respectively, excluding this Certificate as to Form, the Table of Authorities, the Table of Contents, and the Certificate of Service.

Dated: March 18, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 18th day of March 2024, in addition to filing the foregoing document via the Court's electronic filing system, one true and correct copy of the foregoing document was served by U.S Priority Mail, postage pre-paid, with a PDF courtesy copy served via electronic mail on the following counsel:

Hon. Elizabeth B. Prelogar
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
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Email: SupremeCtBriefs@usdoj.gov

The undersigned further certifies that, on this 18th day of March 2024, the delivery of an original and two true and correct copies of the foregoing document were sent to the Court via Federal Express, next-day delivery.

Executed March 18, 2024,

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