No. 25-446

In the Supreme Court of the United States

HUNTER DOSTER ET AL., *ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED*,

Petitioners,

v.

HON. TROY MEINK, *IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE AIR FORCE* ET AL.,

Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITIONER FOR WRIT OF CERTIORARI

Petitioners presented two questions for this Court to consider. The first concerns whether RFRA permits the equitable relief of reinstatement, to include back pay and retirement points. The second asked whether Respondents are judicially estopped from arguing that back pay and retirement points may not be awarded under RFRA when, a year earlier, they successfully argued the opposite position to prevent preliminary injunctive relief extending to reinstatement of reservists.

In their brief in opposition, Respondents all but ignored these arguments and instead expended most of their brief arguing that the Sixth Circuit properly concluded that Petitioners' complaint did not seek back pay and retirement points. We respond.

ARGUMENT

I. From the outset of this case, the record reflects Petitioners' request for restoration of back pay and points for reservists

Respondents argue that "[P]etitioners did not raise the possibility of any form of retrospective, compensatory relief until years later, when the parties briefed the question of mootness." (Brief in Opposition ("Opp. Br.") at 10.) The Record before the Court does not support this conclusion.

Petitioners' complaint sought relief to "remedy the violations at issue" and to "halt the ongoing violations of law." (Petition at 25.) In line with that, Petitioners sought preliminary injunctive relief on February 22, 2022. (Plaintiffs' Motion for an Emergency TRO & Prelim. Inj., Dkt. 13, *Doster v. Kendall*, No. 1:22-cv-00084 (S.D. Ohio, Feb. 22, 2022).) The motion for injunctive relief included proposed orders relating to the loss of pay and points specifically for reservists SRA Dills and SMSgt Schuldes:

The proposed order requested the following relief:

> To the extent [Respondents] have taken punitive action against any airman from September 1, 2021 to the present, including but not limited to the named

> [Petitioners], including discharges, both punitive or administrative, against any airmen who submitted a religious accommodation request from [Respondents'] vaccination requirements, and to whom the [Respondents] confirmed (or did not dispute) the sincerity of the belief at issue, *to provide full and complete relief to such persons, including* restoration to active duty (or active reserve duty, as the case may be), record expungement, and *restoration of pay and allowances.*

(Proposed Order Pl.'s Mot. for TRO & PI at Dkt, 13-6 (emphasis added).)

In March of 2022, a preliminary injunction issued in favor of the named Plaintiffs to include SRA Dills and SMSgt Schuldes, but the relief did not extend to the requested restoration of reservist pay and points. *Doster v. Kendall*, 596 F. Supp. 3d 995 (S.D. Ohio 2022).

However, in July 2022, a class was certified, and the injunctive relief was further extended to restore reservist class members to a pay and points status in July 2022, thus providing equitable relief to Petitioners. *See Doster v. Kendall*, No. 1:22-cv-84, 2022 U.S. Dist. LEXIS 137068, at *5 (S.D. Ohio 2022), ("Defendants shall not place or continue *active reservists on no points, no pay status* for their refusal

to get vaccinated for COVID-19 due to their sincerely held religious beliefs….” (emphasis added)); *see Doster v. Kendall*, 48 F.4th 608 (6th Cir. 2022). In their Opposition Brief, Respondents failed to address any of this evidence when arguing that Petitioners did not raise the pay and points relief until “years later.” (Opp. Br. at 10.) Respondents’ revisionist history is simply not accurate.

Second, Respondents substantively addressed the relief in their Opposition to Petitioners’ emergency motion for a temporary restraining order and preliminary injunction. Without question, Respondents explicitly argued and acknowledged that such relief was available. (*See* Defs.’ Opp’n to Pl.’s Emergency Mot. For TRO & Prelim. Inj., Dkt. 25 at PageID#1025, *Doster v. Kendall*, No. 1:22-cv-00084 (S.D. Ohio, Mar. 8, 2022) (“Second, Plaintiffs appear to allege that involuntary reassignment to the Individual Ready Reserve and loss of retirement constitutes irreparable harm…. the service member *could later be reinstated and provided back pay if he prevailed on his claim*.”(emphasis added).) To now claim that Petitioners did not seek back pay or retirement points until “years later” is disingenuous and contrary to the record.

In sum, the record demonstrates Petitioners were requesting restoration of backpay and points for reservist Petitioners.

II. The request for "pay and points" is implicit in the original complaint and is supported by the FRCP and relevant case law

Federal Rule Civil Procedure 54(c) states that, except in default judgment cases, every "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c); *see also* 10 C. Wright, A. Miller, & M. Kane, Federal Practice & Procedure §§ 2662, 2664 (4th ed. 2014) [hereinafter Wright & Miller]. Further, "[R]ule 54(c) … is, instead, a clarification of the fundamental point … that the relief to which a claimant is entitled is not limited to the relief it requested in its original demand for judgment." *Gilbane Bldg. Co. v. FRB*, 80 F.3d 895, 901 (4th Cir. 1996). *See also New Amsterdam Casualty Co. v. Waller*, 323 F.2d 20, 24-25 (4th Cir. 1963) ("Under the Federal Rules of Civil Procedure, … a plaintiff in his complaint … need not set forth any theory or demand any particular relief for the court will award appropriate relief if the plaintiff is entitled to it upon any theory." (quoting Federal Rule of Civil Procedure 8(a)(2)). Petitioners' entitlement to back pay and points did not depend on an explicit request in the original complaint; it arose as a matter of law.

Respondents do not contest the purpose of Fed. R. Civ. P. 54(c) and in fact concede that the "rule might in some circumstances permit a court to award relief outside the pleadings." (Opp. Br. at 10.) They then

attempt to engraft an exception to the rule, arguing that the rule does not support Petitioners' position because "the gravamen of petitioner's case was to prevent future harms, not remedy past ones." (Opp. Br. at 10.) Yet the plain text of Rule 54(c) does not support this invented "gravamen" of relief theory that must be explicitly plead.

Instead, Courts have refused to award relief outside the pleadings only when doing so would prejudice the defendant, such as in instances where the defendant did not have an opportunity to contest the basis for that relief. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975); *United States v. Marin*, 651 F.2d 24, 30 (1st Cir. 1981); Wright & Miller § 2664. Without a showing of prejudice to the despondent, "a party should experience little difficulty in securing a remedy other than that demanded in the pleadings as long as the party shows a right to it." Wright & Miller § 2662; *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 584 (2016). Here, the record makes clear that Respondents actively contested the basis for Petitioners' requested relief and again denied that relief after Congress terminated the COVID-19 Vaccine Mandate. (Opp'n to TRO & PI at PageID#1025.) Respondents' systemic religious discrimination spanning from late 2021 to late 2022 entitles Petitioners to relief regardless of whether that relief fell outside the original pleadings, which it did not.

Additionally, "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. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946). Petitioners sued alleging that Respondents' COVID-19 mandate unlawfully burdened their religious exercise in violation of RFRA and the First Amendment. The district court certified a class and issued preliminary injunctions, which the Sixth Circuit affirmed. *Doster v. Kendall*, 2022 U.S. Dist. LEXIS 137068; *Doster v. Kendall*, 54 F.4th 398 (6th Cir. 2022). Because Petitioners' legal rights were "invaded" and RFRA provided a "general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* at 684. Respondents illegally discriminated against reserve Petitioners because of their religious beliefs, and the restoration of "pay and points" is necessary relief to restore their federally protected rights regardless of whether such relief was explicitly enumerated in the complaint because Respondents have not been prejudiced—given they were on notice that Petitioners were seeking such relief from the outset where Respondents contested the granting of such relief—and because "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c).

III. Respondents do not have sovereign immunity for equitable relief and awarding back pay and retirement points is available as equitable relief

Respondents argue that granting backpay and points is barred by sovereign immunity, absent a waiver, and that back pay and points are "'retroactive compensation for a previous legal wrong'; that is, 'money damages'" and not equitable relief. (Opp. Br. at 12, Petition at 15.) They are mistaken. *Id*.

RFRA expressly authorizes "appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). This Court has explained that the term "appropriate relief" is open-ended and encompasses the full range of traditionally available equitable remedies. *Tanzin v. Tanvir*, 592 U.S. 43, 48 (2020). When Congress authorizes equitable relief against the government, sovereign immunity does not bar remedies that restore plaintiff to the *status quo ante*. Respondents' insistence on an additional explicit statement misreads both RFRA's text and this Court's precedent. Nothing in RFRA narrows that authority, and nothing in this Court's precedent supports Respondents' attempt to carve out restorative relief for violations.

Petitioners' request for backpay and points is not barred by sovereign immunity because the requested relief constitutes equitable relief.

Respondents assigned reservist Petitioners to the Individual Ready Reserve after violating their rights afforded by RFRA. As the court in Schelske explained, Congress waived sovereign immunity for equitable claims, which extends to back pay. *See Schelske v. Austin*, 2023 U.S. Dist. LEXIS 163101 at *105-106 (N.D. Tex. 2023) (citing *Borst v. Chevron Corp.*, 36 F.3d 1308, 1324 (5th Cir. 1994), *Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry*, 494 U.S. 558, 570 (1990), and *Tull v. United States*, 481 U.S. 412, 424 (1987)). Other federal courts are in accord that sovereign immunity does not apply to claims for back pay, whether under RFRA or any other applicable statutory scheme, because the nature of back pay claims is equitable relief. *See Hubbard v. Administrator, EPA*, 982 F.2d 531, 547-48 (D.C. Cir. 1992). The *Hubbard* Court explained that where a plaintiff is illegally denied a job or its emoluments, restitutionary relief applies and thus an "award of instatement and back pay gives [plaintiff] the precise thing to which he was entitled and therefore constitutes specific restitution." *Id.* "Although such an award involves money, that alone does not take it outside equity." *Id.* As in *Hubbard*, Reservist Petitioners were illegally prevented from performing the very activities which would have resulted in them receiving pay and points. Not because they chose to, but because Respondents ordered them into that status for the purpose of coercing them into getting a vaccine that violated their religious beliefs.

Courts routinely award reinstatement, back pay, and restoration of benefits as equitable relief in constitutional and statutory religious liberty cases. *See Downie v. Independent Drivers Ass'n Pension Plan*, 934 F.2d 1168 (10th Cir. 1991); *Oppenheim v. Campbell*, 571 F.2d 660, 661-63 (D.C. Cir. 1978) (retirement credit is equitable relief); *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011) (explaining wide-ranging equitable relief available for similar "appropriate" remedy statute). RFRA's "appropriate relief" provision incorporates these well-established principles.

In fact, even this Court has treated back pay and related relief as equitable remedies under § 1983 matters for quite some time. *See Rankin v. McPherson*, 483 U.S. 378, 382 (1987) (explaining back pay and related relief is equitable under § 1983). Such relief is restitutionary in nature, directed at undoing the effects of illegal conduct rather than compensating for independent injury. Restoration of reservist pay and retirement points fits squarely within that framework.

For reservists, pay, retirement points, and service credit flow automatically from that status by operation of law. Restoring those records therefore provides the "specific thing" to which Petitioner is entitled, not compensatory damages untethered to a legal entitlement. *Hubbard*, 982 F.2d at 538.

IV. Respondents are judicially estopped from their arguments against back pay and restitutionary damages

Respondents would have this Court believe that because the district court did not address, or as they say "rejected" their irreparable harm argument, in the preliminary injunction order, that they are now free to argue the exact opposite when it benefits them years later. (Opp. Br. at 13.) Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000); *see* 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory"); *see also New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" (quoting *Pegram*, 530 U.S. at 227 n.8)).

Respondents fail to support their novel argument that judicial estoppel does not apply here where, according to them, the district court has "rejected the government's prior argument about irreparable harm" (Opp. Br. at 13) and, thus, they are now free to argue the exact opposite years later. Notwithstanding their attempts to reclassify the proceedings below, the opposite is true as Respondents argument was in fact successful. Respondents previously argued—in opposing more wide-ranging early preliminary injunctive relief—that back pay and restitutionary relief would be a remedy that could be awarded in final injunctive relief. The district court withheld such relief on that very basis and declined to grant back pay retirement points, and restitutionary relief. Thus, Respondents did in fact benefit from their prior inconsistent argument before the district court to Petitioners' detriment. Because all three elements of judicial estopped are met here, judicial estoppel applies.

CONCLUSION

Because this case involves important questions of religious liberty and a lower court decision that fundamentally limits available equitable relief in a way not intended by Congress, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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