No. _____

In the Supreme Court of the United States

MICHAEL POFFENBARGER, ET AL., *ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED*,

PETITIONERS,

V.

TROY MEINK, ET AL.,

RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Religious Freedom Restoration Act ("RFRA") permits courts to award "appropriate relief" against the government. 42 U.S.C. § 2000bb-1. This includes the equitable relief of reinstatement of back pay and retirement benefits.

Here, the Air Force instituted a mandate for the COVID-19 vaccine ("Vaccine Mandate"), but then systemically denied religious exemption requests. Petitioners sued, a class was certified, and preliminary injunctive relief was ordered. In opposing more encompassing preliminary injunctive relief, Respondents argued that RFRA permitted reinstatement of back pay and retirement points in final judgment, which the district court accepted.

The Vaccine Mandate was rescinded by an act of Congress. Respondents then took an about face and claimed that restoration of back pay and retirement points could not be awarded under RFRA and, as such, the case was moot. The district court accepted this argument and dismissed for mootness and the Sixth Circuit affirmed. This petition follows.

The questions presented are:

1. Whether RFRA permits the equitable relief of reinstatement, to include back pay and retirement points.

2. 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.

PARTIES TO THE PROCEEDING

The following individual was a Plaintiff before the trial court and an Appellant in the Sixth Circuit: Michael Poffenbarger on behalf of himself and others similarly situated.

The following individuals are Defendants before the trial court and Appellees in the Sixth Circuit: Hon. Frank Kendall III, in his official capacity of Secretary of the Air Force, Lt. General Robert I. Miller, in his official capacity as Surgeon General of the Air Force, Lt. General Richard W. Scobee, in his official capacity as Commander of the Air Force Reserve Command, Major General Jeffrey T. Pennington, in his official capacity as Commander of the 4th Air Force, Lt. Colonel Christopher Kojak, in his official capacity as Commander of the 445th Operations Support Squadron, Colonel Raymond A. Smith, Jr., in his official capacity as the 445th Airlift Wing, and the United States of America. Secretary Kendall has been replaced by Secretary Troy Meink. General Miller has been replaced by Lt. General John J. DeGoes. General Scobee has been replaced by Lt. General John P. Healy. General Pennington has been replaced by Major General Paul R. Fast. Colonel Smith has been replaced by Colonel Douglas A. Perry, Jr.

RELATED PROCEEDINGS

The proceedings directly related to this case are:

Doster v. Kendall, 48 F.4th 608 (6th Cir. 2022).

Doster v. Kendall, 54 F.4th 398 (6th Cir. 2022).

Kendall v. Doster, 144 S. Ct. 481 (2023).

Doster v. Kendall, 2024 WL 1156426 (S.D. Ohio, Mar. 18, 2024).

Doster v. Kendall, 2025 WL 1369378 (6th Cir. 2025).

Poffenbarger v. Kendall, 588 F. Supp. 3d 770 (S.D. Ohio 2022).

Poffenbarger v. Kendall, 2024 WL 1155965 (S.D. Ohio, Mar. 18, 2024).

Poffenbarger v. Kendall, 137 F.4th 563 (6th Cir. 2025).

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INTRODUCTION

Defendants/Appellees ("Defendants" and/or "Respondents"), all Air Force Officials sued in their official capacities, implemented a mandatory COVID-19 vaccine requirement for the branch ("Vaccination Mandate"). Plaintiff is a regular reserve member of the Air Force stationed at Wright Patterson Air Force Base in Ohio. Defendants illegally denied the vast majority of religious accommodation requests to their Vaccination Mandate to include improperly denying Plaintiff's requested accommodation. Plaintiff, who refused to compromise his well-founded religious beliefs and receive the COVID-19 vaccine, was disciplined by Defendants with a reprimand in his file and was placed on a "no points, no pay" status effective January 10, 2022. That meant Plaintiff could not attend drills, could not receive pay for attending those drills, and did not receive points towards his military retirement.

In February of 2022, a preliminary injunction issued in favor of Plaintiff preventing further promised adverse actions by Defendants (including blocking an impending involuntary transfer to the Individual Ready Reserve and discontinuation of Plaintiff's health benefits), but the preliminary relief did not extend to the restoration of lost pay or lost points or a return to the active reserve, and those harms continued. *See Poffenbarger v. Kendall*, 588 F. Supp. 3d 770 (OHSD 2022). In fact, Defendants argued, and the district court accepted, that Plaintiff could receive restitution of back pay and back retirement points in a final judgment and, thus, that

sort of harm, although recoverable, was not irreparable. *Id.* at 796-797.

In July of 2022, in a separate (but related) matter, class-wide relief was entered that required the restoration of Plaintiff to a "pay, points, and drill status." *See, Doster v. Kendall*, 48 F.4th 608 (6th Cir. 2022).

In December 2022, Congress enacted legislation directing the Department of Defense[1] and its component branches to repeal the Vaccination Mandate. In January and February of 2023, Respondents took steps to remedy *most* adverse actions relating to the Vaccination Mandate, such as removing reprimands from service records, but they declined to fully remedy the consequences of their illegal discrimination, including refusing to restore reservist Plaintiff's records to reflect continued reserve service from January to July of 2022, refusing to restore Plaintiff's lost retirement points for that same period, and refusing to restore lost back pay for that same period.

Respondents then moved to dismiss on the basis of mootness by executing an about face, and arguing, contrary to their argument at the preliminary injunction stage, that the district court was "without authority" to correct the back pay and back points

[1] Pursuant to Executive Order signed by President Donald J. Trump on September 5, 2025, the Department of Defense is now titled the Department of War; however, this Petition refers to the Department by its former name which was in place during the actions underlying this Petition.

issue. The district court erroneously concluded that RFRA's "appropriate relief" did not extend to equitable remedies such as reinstatement and restoration of back pay and retirement points, and thus the district court could not order relief for the remaining harm. The Sixth Circuit affirmed, erroneously limiting the forms of equitable relief available under RFRA. *Poffenbarger v. Kendall*, 137 F.4th 563 (6th Cir. 2025). This petition follows.

The petition for a writ of certiorari should be granted, and the Sixth Circuit's holding should be reversed.

OPINIONS BELOW

The Sixth Circuit's opinion (App.1a-11a) is reported at 137 F.4th 563. The district court's opinion (App.14a-23a) is reported at 2024 U.S. Dist. LEXIS 47189.

JURISDICTION

The Sixth Circuit entered judgment on May 12, 2025. (App.12a). Circuit Justice Kavanaugh granted an extension of time to file this petition to October 9, 2025. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. U.S. Const. Amend. I.

B. 37 U.S.C. § 206

C. 42 U.S.C. § 2000bb-42 U.S.C. § 2000bb-4, Religious Freedom Restoration Act of 1993 ("RFRA")

D. 28 U.S.C. § 1346(a)(2), Tucker Act

STATEMENT

A. Factual Background

The case below was instituted by Plaintiff, Air Force Lieutenant Michael Poffenbarger ("Petitioner" and/or "Plaintiff"), a reservist stationed at Wright Patterson Air Force Base, in Dayton, Ohio, after Defendants illegally denied him a religious accommodation to the Vaccination Mandate. [Ver. Compl., Doc. 1, at PageID#1-43.] The claims raised were under the Religious Freedom Restoration Act (42 U.S.C. § 2000bb) ("**RFRA**") and the First Amendment's Free Exercise Clause. *Id.*

In September of 2021, Plaintiff, then on active reserve duty for training and in Officer Training School, received an order by Defendant Kendall, Secretary of the Air Force, to get the COVID-19 vaccine. *Id.* ¶ 7; Declaration Poffenbarger, Doc. 2-1, PageID#62, *see also*, Doc. 1-1, PageID#15-16. As a consequence, Plaintiff began the administrative process to seek a religious accommodation under RFRA, and its implementing regulations, including,

without limitation, Department of Defense Instruction ("DoDI") 1300.17. *Id.* ¶ 8.

With his request for religious accommodation still pending, Plaintiff was permitted to graduate Officer Training School and was commissioned in September of 2021. *Id.* ¶ 9. He was then returned to active reserve duty and was assigned to the 455th Operational Support Squadron, located at Wright-Patterson, Air Force Base. *Id.*

On October 2, 2021, Plaintiff received a direct order to be vaccinated from his then-commander, Lt. Colonel Sopko (who has since been replaced by Lt. Colonel Kojak). *Id.* ¶ 10; Compl. Exhibit 2, Doc. 1-2, PageID#17-19. Again, in response to this order, Plaintiff pursued administrative remedies under RFRA, DoDI, and applicable Air Force Instructions, and his religious accommodation request was sent to the Commander of Air Force Reserve Command, Defendant, Lt. General Richard W. Scobee ("Lt. Gen. Scobee"). *Id.* ¶ 11.

On or about October 22, 2021, Lt. Gen. Scobee improperly denied Plaintiff's accommodation request. *Id.* ¶ 12; Doc. 1-3, PageID#20. Although the denial acknowledged the sincerity of Plaintiff's religious beliefs, it asserted that mission readiness required that Plaintiff still be vaccinated against COVID-19. *Id.* ¶ 13 At the same time, however, Lt. Gen. Scobee had approved numerous accommodations for administrative and/or medical reasons, allowing those members to remain unvaccinated against COVID-19. *Id.* Thus, Lt. Gen. Scobee's denial of a religious

accommodation to Plaintiff could only be explained as a hostility to Plaintiff's religious beliefs, and not as a good faith application of RFRA. *Id.*

On October 30, 2021, Plaintiff undertook an administrative appeal of Lt. Gen. Scobee's denial to the Surgeon General of the Air Force, Lt. General Robert I. Miller ("Lt. Gen. Miller"). *Id.* ¶ 14; Doc. 1-4, PageID#21-23. On December 8, 2021, Lt. Gen. Miller also improperly denied Plaintiff's appeal. *Id.* ¶ 15.

Days later, on December 12, 2021, Plaintiff received an order to vaccinate from his commander, Lt. Colonel Christopher Kojak, forwarding an order from the 4th Air Force Commander, Major General Jeffrey Pennington, to vaccinate. *Id.* ¶ 18; Doc. 1-6, PageID#25-28.

B. Procedural Background

Plaintiff filed suit on January 2, 2022, raising a claim under RFRA and the First Amendment. *Id.;* PageID#1-43. Plaintiff then sought a preliminary injunction at a hearing held on February 22, 2022. [Tr., Doc. 33, PageID#1226-1303.] At the hearing, Plaintiff testified that he joined the Air Force and was on active duty starting in November 2005. *Id.* at PageID#1231. He accrued 905.8 combat hours in overseas deployments. *Id.* at PageID#1232. In 2014, after getting married and as a result of family demands, Plaintiff left active duty but continued serving in the reserves. *Id.* at PageID#1232-1233.

Plaintiff testified that he was being denied reserve pay and retirement points as a result of his refusal to vaccinate. *Id.*, at PageID#1241-1242, 1257,

Hearing Exhibit 7. He also testified about how retirement points should accrue, and he testified about the impact of the denial of such points on his eventual retirement. *Id.*

Defendants, in opposing preliminary injunctive relief, argued as follows:

> It is unclear whether Plaintiff alleges that involuntary reassignment to the Individual Ready Reserve and loss of eligibility for health care constitutes irreparable harm. *See* Pl.'s Notice 2, Doc. No. 11, PageID 284. Any such contention is meritless, as military administrative and disciplinary actions, including separation, are not irreparable injuries because **the service member could later be reinstated and provided back pay if he prevailed on his claim**. *See, e.g., Hartikka v. United States*, 754 F.2d 1516, 1518 (9th Cir. 1985); *Chilcott v. Orr*, 747 F.2d 29, 34 (1st Cir. 1984); *Guitard v. Sec'y of Navy*, 967 F.2d 737, 742 (2d Cir. 1992); *Church*, 2021 WL 5179215, at *17.

[*See* Govt. Opposition to Preliminary Injunction, at Doc. 22, PageID#369) (emphasis added).]

Following the hearing, a preliminary injunction issued in favor of Plaintiff and prevented further adverse actions by Defendants (including blocking an impending transfer to the Individual Ready Reserve and blocking the discontinuation of his health benefits), but that relief did not extend to the restoration of lost pay and lost points (or even an order to be put back in that status going forward from the

hearing, such that he continued to lose pay and points). *See Poffenbarger v. Kendall*, 588 F. Supp. 3d 770 (OHSD 2022). That was because Defendants argued, and the district court accepted, Plaintiff could receive restitution in the form of back pay and back retirement points in a final judgment. *Id.* at 796-797; Govt. Opposition to Preliminary Injunction, at Doc. 22, PageID#369.

On March 23, 2022, Plaintiff filed a Verified Amended Complaint seeking relief for himself and on behalf of a class of similarly situated persons. [Am. Ver. Compl., Doc. 38, PageID#1315-1329.] That complaint incorporated and included documentation evidencing that Defendants illegally placed Plaintiff on a no-points and no-pay status. *Id.*, at Doc. 38-7, PageID#1351-1363. The prayer for relief explicitly included a request to the Court "to restore to him and correct his military records **to restore any lost credit for points or pay he is due and were lost** due to Defendants' illegal actions." *Id.* at Doc. 38, PageID#1326 (emphasis added).

In July of 2022, in a separate (but related) matter, class-wide relief was entered that required the restoration of Plaintiff to active reserve duty, and thus the accrual of such pay and points going forward. *See Doster v. Kendall*, 48 F.4th 608 (6th Cir. 2022). Then, Plaintiff's case below was stayed to await the outcome of appellate proceedings in *Doster*. [Order Staying, Doc. 53, PageID#1473-1478.]

In December of 2022, Congress enacted legislation directing the Department of Defense, and

its component branches, to repeal the Vaccination Mandate.[2] In January[3] and February of 2023,[4] Defendants took steps to remove *most* adverse actions from service member's files, such as Plaintiff's reprimand, but Defendants declined to fully remedy their discrimination in total and to remove its effects root and branch, including refusing to restore Plaintiff's records to reflect continued reserve service from January to July 2022, refusing to restore his lost retirement points, and refusing to restore his lost back pay.

On January 23, 2024, the district court ordered, via a notation order, simultaneous briefing by the parties "to provide this Court with briefing on the question of mootness in light of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395 (2022), and the Supreme Court's order in *Kendall, Secretary of the Air Force v. Doster*, No. 23-154, 601 U.S.___ (2023). All

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[2] *See* 117th Congress, HR 1776 at Sec. 525; 136 Stat. 2395 at Sec. 525; available at https://www.congress.gov/117/plaws/publ263/PLAW-117publ263.pdf (last accessed 6/19/2024).

[3] DOD Rescission available at https://media.defense.gov/2023/Jan/10/2003143118/-1/-1/1/SECRETARY-OF-DEFENSE-MEMO-ON-RESCISSION-OF-CORONAVIRUS-DISEASE-2019-VACCINATION-REQUIREMENTS-FOR-MEMBERS-OF-THE-ARMED-FORCES.PDF (DoD rescission; last accessed 6/19/2024); https://media.defense.gov/2023/Jan/24/2003148810/-1/-1/1/DAF%20COVID-19%20%E2%80%8CVACCIN%E2%80%8CATION%20MAN%E2%80%8CDATE%20RESCISSION.PDF (DAF rescission; last accessed 6/19/2024).

[4] *See* DAF Guidance, available at https://www.af.mil/Portals/1/documents/2023SAF/PolicyUpdates/L6JT_SecAF_Signed_DAF_guide_Adverse_Actions_Religious_Requests_24Feb23.pdf (last accessed 6/19/2024).

briefing shall be submitted by February 7, 2024." Notably, the district court did not permit Plaintiff to respond to Defendants' filing.

In arguing that the case was moot, Defendants executed an about face and took a contrary position from their position in the preliminary injunction proceeding, now arguing that the district court was without authority to restore Plaintiff's lost pay and lost points. [Memo, Doc. 58, PageID#1557-1579.]

Plaintiff demonstrated that he was not made whole because the relief he sought, consisting of lost pay and lost points, was not yet restored, substantiating his lost pay and lost points through a declaration. [Memo and Declaration in Support, Doc. 59, PageID#1580-1627.] Defendants denied Plaintiff $4,346.16 in lost drill pay (i.e., back pay) for the drill weekends he missed from January to June 2022. [Dec. Poffenbarger ¶ 11, Doc. 59-1, PageID#1593-1595.] This consisted of 4 drill periods per weekend, at O-1E pay, with 16 years of prior service, at a rate of $189.09 per drill period, or $4,346.16 in lost drill pay. *Id.* Plaintiff has never had that lost drill pay restored to him and, without an order of this Court, will never have that lost drill pay restored to him. *Id.*

Defendants also denied restoring Plaintiff's lost reserve retirement points from the period of January through June 2022, to include 4 reserve retirement points for each drill weekend during this six-month period, for a total of 24 reserve retirement points. *Id.* ¶12. These lost reserve retirement points constitute harm because all of a member's reserve retirement

points (to include prior active-duty periods) are calculated in retirement pay calculations. *Id.* ¶13. As a result, and unless corrected by order of the Court, Plaintiff ultimately will draw less retirement pay when he retires, and all because of the illegal discipline taken against him for not compromising his sincere religious beliefs against taking the COVID-19 vaccine. *Id.*

On March 18, 2024, the district court held that Defendants' failure to remedy this admitted harm did not matter, that the court was without authority to afford the requested relief, and that the case was moot. [Order, Doc. 60, PageID#1628-1635.] The Sixth Circuit Affirmed on May 12, 2025. 137 F.4th 563. This petition follows.

REASONS FOR GRANTING THE PETITION

I. This Court should grant *certiorari* because the decisions below undermine RFRA and conflict with binding precedent from this Court

The "heavy burden of persua[ding]" the Court that this matter is moot lies with the Government, not with Plaintiff. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968)). And "a case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (emphasis added) (citation modified). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.*

(emphasis added). Thus, if there is any additional relief that can be awarded, however small, a case is not moot. *See Knox v. SEIU, Local 1000*, 567 U.S. 298, 307-308 (2012); *Chafin*, 568 U.S. 165, 172. (emphasis added).

It is well-settled that new legislation does not *ipso facto* eliminate the discriminatory intent behind older legislation, nor does it moot a dispute regarding the violation of law. *See Hunter v. Underwood*, 471 U.S. 222, 232-33 (1985) (holding that actions taken in the succeeding 80 years to change the terms of a law did not eliminate its original discriminatory intent); *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 408-09 (5th Cir. 1991); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 240 (4th Cir. 2016).

Under the "collateral consequences" exception to mootness, even when the plaintiff's primary injury has ceased, the case is not moot if there remains other harm the court is capable of remedying. *See Sibron v. New York*, 392 U.S. 40, 53-59 (1968). And a continuing collateral consequence is one that provides the plaintiff with a "concrete interest" in the case and for which "effective relief" is available. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 571 (1984).

Only the act of fully remedying harm can moot a case, and it is undisputed that full relief has not occurred here. *See Wooten v. Housing Authority of Dallas*, 723 F.2d 390, 392 (5th Cir. 1983) (explaining that only receipt of "all of the relief sought" will moot the case); *see also Chen v. Allstate Ins. Co.*, 819 F.3d

1136, 1138 (9th Cir. 2016) (noting that a claim becomes moot when a plaintiff actually receives complete relief).

In *Schelske v. Austin*, a separated soldier who applied for and was denied a religious accommodation to the Vaccination Mandate sued and sought equitable relief to include reinstatement and back pay. 2023 U.S. Dist. LEXIS 163101 (N.D. Tex. 2023). After the policy was repealed, and despite corrective actions taken by the Secretaries of the Army and Defense (now War) materially similar to those taken by the Secretary of the Air Force here, the soldier did not receive all of the equitable relief he sought.

In addressing the mootness issue in that case, the *Schelske* Court determined that claims for back pay and retirement points were merely to restore that plaintiff to the position he held prior to the Army defendants' illegal actions, thus those claims were equitable and justiciable. *Id.* at *105-*111. The Plaintiff in *Schelske* was not in any duty status after involuntary separation, and he did not perform any military duties. *Schelske* is on all fours with this case.

Here in contrast, and relying on *Palmer*, the Sixth Circuit held, in part, that Petitioner is not entitled to backpay due to his status as a reservist. *See Poffenbarger*, 137 F.4th, at 569 (6th Cir. 2025) (citing *Palmer v. United States*, 168 F.3d 1310 (Fed. Cir. 1999). But even *Palmer* made clear that back pay and retroactive relief "would be available in instances where Congress "provide[d] a separate basis for relief … independent of a money-mandated claim." *Id.* Here,

RFRA is just that sort of "separate basis for relief … independent of a money-mandated claim." Again, RFRA includes the statutory entitlement to "appropriate relief against a government." 42 U.S.C. 2000bb-1(c). And this Court has explained that "appropriate relief" is "open-ended" on its face, and "inherently context dependent." *Tanzin v. Tanvir*, 592 U.S. 43, 49 (2020). And the context here for appropriate relief is to permit equitable restitution of back pay and retirement points. Completely ignoring this argument regarding "appropriate relief" allowed under RFRA, the Sixth Circuit instead relied on *Palmer* to mischaracterize RFRA as a statutory enactment that only required "the government's forbearance from interference with 'a person's exercise of religion,'" nothing else. *Poffenbarger*, 137 F.4th at 568. That is reversible error.

Simply put, the district court and Sixth Circuit chose not to follow precedent that classifies restorative relief—like restoration of back pay or retirement points—as equitable, not legal, relief. *See Kolstad v. ADA*, 527 U.S. 526 (1999); *West v. Gibson*, 527 U.S. 212 (1999). And again, this Court held, in *Tanzin v. Tanvir*, 592 U.S. 43, 48 (2020), that the "appropriate relief" under RFRA was "open ended." This Court also held that "parties suing under RFRA must have at least the same avenues for relief against officials that they would have had before *Smith*" under § 1983. Of course, this Court previously held that such relief is equitable relief and is available in § 1983 matters. *See Rankin v. McPherson*, 483 U.S. 378, 382 (1987) (explaining back pay and related relief is equitable under 1983).

As noted, it is undisputed that this matter involves claims for back pay and retirement points. Those claims are justiciable as a matter of equitable relief and are within the authority of federal courts to award. *See U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336 (5th Cir. 2021); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014); *Schelske v. Austin*, 2023 U.S. Dist. LEXIS 163101 (N.D. Tex. 2023).

Once again, courts, including this Court, hold that relief, such as the restoration of lost drill pay and lost retirement points withheld here in 2022, is purely restitutionary in nature. *Id.* (citing *Borst v. Chevron Corp.*, 36 F.3d 1308, 1324 (5th Cir. 1994) and *Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry*, 494 U.S. 558, 570 (1990)). In other words, the "equitable" remedy is limited to "restoring the *status quo* and ordering the return of that which rightfully belongs" to a plaintiff. *Id.* (citing *Tull v. United States*, 481 U.S. 412, 424 (1987)); *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946). *See also Harkless v. Sweeny Independent School Dist.*, 427 F.2d 319 (5th Cir. 1979).

Because back pay is equitable rather than legal relief, federal courts can order such relief. *See Kolstad v. ADA*, 527 U.S. 526 (1999); *West v. Gibson*, 527 U.S. 212, 119 S. Ct. 1906 (1999); *Schelske*, 2023 U.S. Dist. LEXIS 163101.

And the equitable remedy of restoration of back pay and retirement points runs to the official capacity

of Respondents who improperly placed this reservist Plaintiff in a no pay and no points status, and it is entirely within the authority of courts to grant. *See Crugher v. Prelesnik*, 761 F.3d 610 (6th Cir. 2014); *Cimerman v. Cook*, 561 Fed. App'x 447 (6th Cir. 2014); *Turker v. Ohio Dep't of Rehabilitation & Corrections*, 157 F.3d 453, 459 (6th Cir. 1998) ("reinstatement [is] … prospective equitable relief").

"[W]here 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." *Bell v. Hood*, 327 U.S. 678, 684 (1946). And back pay is an equitable remedy distinct from damages. *See Albemarle Co. v. Moody*, 422 U.S. 405 (1975); *Howe v. City of Akron*, 801 F.3d 718, 744 (6th Cir. 2015) (explaining that back pay is an equitable remedy, part and parcel with eradicating the effects of discrimination); *CONRAIL v. Darrone*, 465 U.S. 624 (1984) (back pay is appropriately awarded as an equitable remedy under Title VI); Tull, 481 U.S. 412, 424 (1987) (restitution "traditionally considered an equitable remedy"); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (restitution is a "remedy traditionally viewed as 'equitable'"); *Teamsters v. Terry*, 494 U.S. 558, 570 (1990) ("We have characterized [money] damages as equitable where they are restitutionary."); *United States v. Burke*, 504 U.S. 229 (1992) (back pay is equitable relief, not money damages).

Regardless, even *if* back pay cannot be awarded (as noted above, it can), retirement credit and points plainly can be awarded as a matter of equity because

RFRA affords "appropriate relief," and retirement credit has long been determined by courts to be equitable relief. *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).

And this equitable relief, under the constructive service doctrine, should "return successful plaintiffs to the position that they would have occupied 'but for' their illegal release from duty." *Barnick v. United States*, 591 F.3d 1372, 1379 (Fed. Cir. 2010) (quoting *Dilley v. Alexander*, 627 F.2d 407, 413, 200 U.S. App. D.C. 354 (D.C. Cir. 1980)).

Here, equitable relief for Plaintiff's unremedied harm is the very relief Plaintiff sought in his amended complaint: to "restore to [Plaintiff] and correct his military records to restore any lost credit for points or pay he is due and were lost due to Defendants' illegal actions, to provide such other equitable relief as may be appropriate at the time, and award him damages." [Am. Compl., Doc. 38 at page 12, ¶ D, PageID#1326.] Plaintiff's declaration reveals that he lost retirement points and drill pay, from January 2022 through June 2022, which have not been restored to him and,

without a court order, will never be restored to him. [Dec. Poffenbarger, Doc. 59-1, PageID#1593-1595.][5]

Moreover, "the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

In response to the district court's request for briefing on mootness, and despite not raising it in their Answer and thus waiving the defense, Respondents argued that the requested equitable relief was foreclosed due to sovereign immunity. Respondents are wrong as a matter of law. The Tucker Act, 28 U.S.C. § 1346(a)(2), applies here because Plaintiff's back pay claims are, individually, all under the $10,000 threshold, thus conferring jurisdiction on the district court. In a like manner, the Reservists Pay Mandating Statute, 37 U.S.C. § 206, also applies and conferred jurisdiction on the district court.

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[5] Defendants submitted an unsigned (and therefore invalid) declaration, Doc. 58-1, PageID#1577-1579. That invalid declaration then was used by Defendants to argue that Plaintiff did not lose out on pay and points simply because he had more points from June 2021 through June 2022 (the calendar year in which the deprivation of points and pay occurred) than he did in other years. In making this disingenuous argument, Defendants omitted the highly relevant fact that Plaintiff obtained higher points because of his six months of active-duty service that year, which he earned prior to the discriminatory actions at issue in this case, all while ignoring no pay or points were awarded for the remaining six months of that year, from January 2022 through June 2022.

As the court in *Schelske* explained, Congress waived sovereign immunity for equitable claims, which extend to back pay. *See Schelske*, 2023 U.S. Dist. LEXIS 163101 at *105-*106 (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)). The *Schelske* Court also explained that, because of the nature of a RFRA claim, with "appropriate relief," equitable relief could be had that included back pay. 2023 U.S. Dist. LEXIS 163101. So too, here.

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.*

Hubbard, in turn, cited *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1998), for the proposition that, in certain circumstances, sovereign immunity does not bar claims that involve money. In *Bowen,* this Court explained that it was "an equitable action for specific relief" when a government employee sought "an order

providing for the reinstatement of an employee with backpay, or for 'the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer's actions.'" *Id; see also Ulmet v. United States*, 888 F.2d 1028, 1030-31 (4th Cir. 1989) (finding jurisdiction in the district court to award back pay, although sanctioning its decision to defer to the Claims Court); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1381 (10th Cir. 1990) (dicta), *cert. denied*, 111 S. Ct. 799 (1991); *Gleason v. Malcom*, 718 F.2d 1044, 1048 (11th Cir. 1983) (in rejecting a First Amendment damages claim, the court wrote: "As a federal employee, she could have sought equitable relief, i.e., reinstatement and back pay, pursuant to the Administrative Procedure Act"); *Nixon v. United States*, 290 U.S. App. D.C. 420, 938 F.2d 239, 251 n.4 (D.C. Cir. 1991). Other Courts are in agreement. *See Wenrich v. Empowered Mgmt. Sols. LLC*, 2019 U.S. Dist. LEXIS 130041 (D. Colo. 2019) (explaining back pay claims were equitable in claim against Army, and not barred by sovereign immunity).

II. Judicial estoppel forecloses Respondents' arguments against back pay and restitutionary relief

This case was dismissed, and dismissal was affirmed, based on Respondent's claim that equitable back pay and restitutionary relief was unavailable to Plaintiff. However, Respondents previously argued—in opposing more wide-ranging preliminary injunctive relief—that back pay and restitutionary relief would be a remedy that could be awarded in a final

judgment. And the district court withheld such relief on that very basis, holding that Plaintiff could receive restitution in the form of back pay and back retirement points in a final judgment. *Poffenbarger*, 588 F. Supp. 3d 770, 796-797.

"Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U.S. 680, 689 (1895). 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." *Pegram v. Herdrich*, 530 U.S. 211, 227 n. 8 (2000); *see also* 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"); *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 v. Herdrich*, 530 U.S. 211, 227 n.8 (2000))).

The factors this Court applies to assertions of judicial estoppel are: (i) whether a party's later position is "clearly inconsistent" with its earlier position; (ii) whether a "party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled'"; and (iii) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Maine*, 532 U.S. 742, 750-51.

Every one of those elements is met here.

Respondents, in opposing preliminary injunctive relief, argued below as follows:

> It is unclear whether Plaintiff alleges that involuntary reassignment to the Individual Ready Reserve and loss of eligibility for health care constitutes irreparable harm. *See* Pl.'s Notice 2, Doc. No. 11, PageID 284. Any such contention is meritless, as military administrative and disciplinary actions, including separation, are not irreparable injuries because **the service member could later be reinstated and provided back pay if he prevailed on his claim**. *See, e.g., Hartikka v. United States*, 754 F.2d 1516, 1518 (9th Cir. 1985); *Chilcott v. Orr*, 747 F.2d 29, 34 (1st Cir. 1984); *Guitard v. Sec'y of*

> *Navy*, 967 F.2d 737, 742 (2d Cir. 1992); *Church*, 2021 WL 5179215, at *17.

[*See* Govt. Opposition to Preliminary Injunction, at Doc. 22, PageID#369] (emphasis added).

If true, that would have been grounds for a finding of irreparable harm in February, 2022, at a time that would have prevented the unremedied harm at issue from continuing until July, 2022. *See Ky. v. Biden*, 23 F.4th 585, 611, fn.19 (6th Cir. 2022) (explaining that where immunity likely barred money damages, the losses would be irreparable); *Kentucky v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023) ("immunity typically makes monetary losses like these irreparable").

As noted, a preliminary injunction issued in favor of Plaintiff in February of 2022 that prevented any further adverse actions by Defendants, but did not restore Plaintiff to pay and points status. *See Poffenbarger*, 588 F. Supp. 3d 770, 796-797. However, *because* Defendants argued, and the district court accepted, that Plaintiff was able to receive restitution in the form of back pay and back retirement points in a final judgment, and thus that sort of harm was not irreparable, the preliminary injunction relief did not include restoration of lost pay and lost points. *Id.* at 796-797; Govt. Opposition to Preliminary Injunction, at Doc. 22, PageID#369.

And as *Maine* makes clear, estoppel is not foreclosed just because the Government is one of the parties. *Id.* at 755. When dealing with estoppel against the Government, courts must ask whether the law

itself is being enjoined, as there are public policy reasons not to enjoin enforcement of the law. *Id.* Here, of course, we have a case involving Government violations of the law, and ultimately the Government engaging in Janus-faced arguments that suited it at the time but resulted in depriving service-members of important statutory relief and protections enacted by Congress in RFRA.

III. This case is important and is an ideal vehicle

Declining to grant review here results in traditional restorative equitable relief being rendered unavailable to claimants under RFRA—at least in the Sixth Circuit. *See Poffenbarger v. Kendall*, 137 F.4th 563 (6th Cir. 2025). This Court should not wait for other circuits to follow that erroneous path.

Correctly interpreting matters pertaining to religious liberty "is a question of great importance." *Fulton v. City of Philadelphia*, 593 U.S. 522, 553 (2021) (Alito, J., concurring); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730 (2014) ("HHS's view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law."). Granting review here is thus critical to maintaining the full protections afforded under RFRA.

The ongoing deprivation of back pay and retirement points to thousands of conscience-bound military reservists, after a pattern of illegal religious discrimination, still needs to be remedied. This Court

is Petitioner's last hope. And here, the Government comes to this Court with unclean hands, having succeeded in executing an about face maneuver with respect to preliminary injunctive relief. Review is thus warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 9, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED MAY 12, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-3417

MICHAEL POFFENBARGER, ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

FRANK KENDALL, III, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE AIR FORCE; JOHN D. DEGOES, IN HIS OFFICIAL CAPACITY AS ACTING SURGEON GENERAL OF THE AIR FORCE; JOHN P. HEALY, IN HIS OFFICIAL CAPACITY AS COMMANDER, AIR FORCE RESERVE COMMAND; MAJOR GENERAL D. SCOTT DURHAM, IN HIS OFFICIAL CAPACITY AS COMMANDER, 4TH AIR FORCE; LIEUTENANT COLONEL MICHAEL R. RUBELING, IN HIS OFFICIAL CAPACITY AS COMMANDER, 445TH OPERATIONS SUPPORT SQUADRON; COLONEL DOUGLAS A. PERRY, IN HIS OFFICIAL CAPACITY AS COMMANDER, 445TH AIRLIFT WING; UNITED STATES OF AMERICA,

Defendants-Appellees.

Appendix A

Appeal from the United States District Court for the Southern District of Ohio at Dayton.
No. 3:22-cv-00001—Matthew W. McFarland, District Judge.

Decided and Filed: May 12, 2025

Before: KETHLEDGE, BUSH, and MURPHY, Circuit Judges.

OPINION

KETHLEDGE, Circuit Judge. Michael Poffenbarger, a First Lieutenant in the Air Force Reserve, brought this suit alleging that the Air Force's COVID-19 mandate, as applied to him, violated the Religious Freedom Restoration Act (RFRA) and the First Amendment. The Air Force later rescinded that mandate, and the district court dismissed the case as moot. We affirm the dismissal, though on different grounds.

I.

In August 2021, at the direction of President Biden, Secretary of Defense Lloyd Austin mandated that all members of the armed forces be vaccinated against COVID-19. The Secretary of the Air Force (then Frank Kendall, the lead defendant when this suit was filed) accordingly mandated that all the Air Force's active-duty service members and reservists (including members of the Air Guard) be vaccinated. Under the Department of the Air Force's guidelines, service members could seek exemptions from the mandate on medical, administrative,

or religious grounds. In the months that followed, the Department granted medical and administrative exemptions "relatively freely"; but as of September 2022, on the record before us then, the number of exemptions the Department had granted on religious grounds stood "at zero." *Doster v. Kendall*, 48 F.4th 608, 610 (6th Cir. 2022). Meanwhile, service members who refused the vaccination without an exemption were subject to various punitive measures—including separation from the Air Force (*i.e.*, termination).

Poffenbarger sought a religious exemption, which the Air Force denied. But he refused the vaccination nonetheless. In response, the Air Force gave him a letter of reprimand and placed him on "No Pay/No Points status"—an inactive status on which he could not attend drills and thus could not earn pay and retirement points. Poffenbarger soon brought this suit, claiming that the vaccine mandate as applied to him violated RFRA and the First Amendment. As relief, he sought a declaration to that effect, an injunction barring the defendants from enforcing the mandate against him, and "damages." More to the point here, Poffenbarger also sought "injunctive relief" that would require the defendants to "restore any lost credit for points or pay" that he had "lost due to Defendants' illegal actions." Am. Compl., R. 38. The district court thereafter entered a preliminary injunction barring the Air Force from taking further punitive action against Poffenbarger during the pendency of his case.

Meanwhile, in the same district court, the same attorneys filed a companion case challenging the mandate on the same grounds. *See Doster v. Kendall*, 596 F. Supp.

3d 995 (S.D. Ohio 2022). In that case, the district court certified a class of affected Air Force service members and enjoined the Department from taking further punitive action against them during the pendency of that case. *See Doster v. Kendall*, No. 1:22-CV-84, 2022 U.S. Dist. LEXIS 137068, 2022 WL 2974733 (S.D. Ohio July 27, 2022). In September 2022, we denied the Department's motion for an emergency stay of the district court's preliminary injunctions in *Doster*. *See Doster*, 48 F.4th at 610. Two months later, we affirmed those injunctions on the merits. *Doster v. Kendall*, 54 F.4th 398 (6th Cir. 2022).

The following month, however, Congress enacted legislation that directed the Secretary of Defense to rescind the military's COVID-19 vaccine mandate. Pub. L. No. 117-263, § 525. The Secretary complied with that directive on January 10, 2023, and the Air Force followed suit. As a result, the Supreme Court vacated our decision in *Doster* on mootness grounds. *See Kendall v. Doster*, 144 S. Ct. 481, 217 L. Ed. 2d 248 (2023) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S. Ct. 104, 95 L. Ed. 36 (1950)). We remanded the case to the district court with instructions to vacate its preliminary injunctions on those same grounds.

Thereafter, the district court ordered briefing as to whether this case as a whole was moot. *See generally Resurrection Sch. v. Hertel*, 35 F.4th 524, 528 (6th Cir. 2022) (en banc). The court held it was and dismissed it. This appeal followed.

Appendix A

II.

A.

We review the district court's dismissal de novo. *Hanrahan v. Mohr*, 905 F.3d 947, 960 (6th Cir. 2018).

1.

Under Article III, the "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *DeFunis v. Odegaard*, 416 U.S. 312, 316, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974) (per curiam) (citation omitted). "Thus, when a case at first presents a question concretely affecting the rights of the parties, but—as a result of events during the pendency of the litigation—the court's decision would lack any practical effect, the case is moot." *Ohio v. EPA*, 969 F.3d 306, 308 (6th Cir. 2020).

Poffenbarger argues his case is not moot because he has not received the pay and retirement points for the drill weekends—specifically, $4,346.16 in drill pay and 24 retirement points—that he missed when the Air Force assigned him to inactive status (after his refusal to take the vaccine). And here—subject to the government's defense of sovereign immunity—we have power to enter an order granting him that relief. Hence his case is not moot. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 394, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981).

2.

The government argues that Poffenbarger's claim for drill pay and retirement points is barred by federal sovereign immunity. That claim was asserted against these defendants—the Secretary of the Air Force and several Air Force officers—solely in their official capacities. *See* Am. Compl., R.38 ¶¶ 4, 28. Federal officials in their official capacity fall within the government's sovereign immunity. *See Dugan v. Rank*, 372 U.S. 609, 621-22, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963); *see also Tanzin v. Tanvir*, 592 U.S. 43, 51-52, 141 S. Ct. 486, 208 L. Ed. 2d 295 (2020). The question, then, is whether the United States has waived its immunity as to this claim. *See Collin v. Comm'r of Soc. Sec.*, 881 F.3d 427, 429 (6th Cir. 2018).

A "waiver of sovereign immunity must be unequivocally expressed in statutory text." *F.A.A. v. Cooper*, 566 U.S. 284, 290, 132 S. Ct. 1441, 182 L. Ed. 2d 497 (2012) (internal quotation marks omitted). The Religious Freedom Restoration Act has waived the federal government's immunity to some extent; in this appeal, as in *Cooper*, "the question at issue concerns the *scope* of that waiver." *Id.* at 291. RFRA's waiver provides in relevant part that a "person whose religious exercise has been burdened in violation of" the Act may "obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). Here, these defendants, in their official capacities, fall within the Act's definition of a "government." *See Tanzin*, 592 U.S. at 47. Whether the United States has waived its immunity as to Poffenbarger's claim for lost drill pay and retirement points, therefore, depends on whether that relief, against

these officials, is "appropriate relief" as the Act uses that term.

We begin (and later end) with what that term does *not* include—namely, claims against the federal government for money damages. In *Sossamon v. Texas*, the Supreme Court held that the phrase "appropriate relief" as used in a related statute (the Religious Land Use and Institutionalized Persons Act) did not "unequivocally express[]" an intent to waive the States' "sovereign immunity to suits for damages." 563 U.S. 277, 288, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011). Meanwhile, every circuit court to have reached the issue (six of them, at last count) has held that the same phrase in "RFRA does not authorize damages suits against the United States[.]" *Morgan v. Fed. Bureau of Prisons*, 129 F.4th 1043, 1050-51 (7th Cir. 2025) (collecting cases). We agree: "appropriate relief" as used in RFRA is too vague a phrase to waive unequivocally the federal government's immunity from damages suits.

Poffenbarger's claim for lost drill pay and retirement points is therefore barred if that relief would amount to money damages. By contrast, if that relief would arise in equity, it could be "appropriate relief." *See Sossamon*, 563 U.S. at 285. The aims of the two kinds of relief are different. As Joseph Story observed: "Courts of Equity will interfere by way of injunction to prevent wrongs; whereas Courts of Common Law can grant redress only, when the wrong is done." Story, 1 *Commentaries on Equity Jurisprudence* § 30 (1836). Thus, equity seeks to prevent a legal wrong, or to change the status quo

so that what was wrong becomes right; whereas legal damages leave the wrong in place but afford the plaintiff compensation for it. *See Bowen v. Massachusetts*, 487 U.S. 879, 910, 108 S. Ct. 2722, 101 L. Ed. 2d 749 (1988).

That a claim seeks an award of money does not necessarily mean it is a claim for money damages. To the contrary, the "Supreme Court has 'long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order for the recovery of specific property or monies.'" *Collin*, 881 F.3d at 429 (quoting *Bowen*, 487 U.S. at 893 (cleaned up)). In *Bowen*—over a strong dissent from Justice Scalia—the Supreme Court cited Judge Bork for the proposition that "[d]amages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" 487 U.S. at 895 (quoting *Md. Dep't of Hum. Res. v. Dep't of Health & Hum. Servs.*, 763 F.2d 1441, 1446, 246 U.S. App. D.C. 180 (D.C. Cir. 1985) (quoting in turn D. Dobbs, *Handbook on the Law of Remedies* 135 (1973))).

As we noted in *Collin*, however, "[t]his distinction is harder to make when, as here, the very thing to which the plaintiff says [he] is entitled is the payment of money." 881 F.3d at 429. Money is usually fungible, just as commodities are, and thus is hard to characterize as a distinct thing—a *res*—to which a plaintiff is entitled. *See Bowen*, 487 U.S.

at 919 n.3 (Scalia, J., dissenting). Moreover, an award of money damages is usually adequate compensation for a defendant's failure to pay money, which usually forecloses equitable relief. *See id.* at 917. But the Supreme Court has held that—when the defendant has withheld a specific sum that a statute obligated the defendant to pay all along—then an order directing the defendant to pay that sum can be equitable relief rather than legal. In *Bowen*, for example, the Court explained:

> The State's suit to enforce § 1396b(a) of the Medicaid Act, which provides that the Secretary [of Health and Human Services] 'shall pay' certain amounts for appropriate Medicaid services, is not a suit seeking money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce *the statutory mandate itself*, which happens to be one for the payment of money.

Id. at 900 (second emphasis added).

Likewise, in Judge Bork's case, Maryland was "seeking funds to which a statute allegedly entitle[d] it, rather than money in compensation for the losses" that Maryland would have suffered "by virtue of the withholding of those funds." *Id.* at 901 (quoting *Md. Dep't of Hum. Res.*, 763 F.2d at 1446). In both cases, therefore, the failure to pay the withheld sum was *itself* the legal wrong.

Here, by contrast, "the statutory mandate is different in kind." *Collin*, 881 F.3d at 429. Poffenbarger seeks to enforce RFRA, which mandates not the payment of money but the government's forbearance from interference with "a person's exercise of religion[.]" 42 U.S.C. § 2000bb-1(a). Nor were the drill pay or retirement points anything—much less "the very thing"—to which Poffenbarger "was entitled" under RFRA. *Bowen*, 487 U.S. at 895 (citation omitted). Indeed, as a reservist, under the "military pay statutes," he had no entitlement to any compensation for drills that he did not "actually attend[.]" *Palmer v. United States*, 168 F.3d 1310, 1313-14 (Fed. Cir. 1999). That was true even if (as Poffenbarger alleges here) he was "wrongfully removed" from "part-time reserve duty in a pay billet." *Id.* at 1314. Hence the relief he seeks would not enforce a statutory mandate that "happens to be one for the payment of money." *Bowen*, 487 U.S. at 900.

Instead, Poffenbarger's statutory entitlement (subject to a narrow exception) was to practice his religious faith without substantial interference from the government. *See* 42 U.S.C. § 2000bb-1(a). The alleged legal wrong in this case was that the Department of the Air Force substantially burdened his religious practice nonetheless. He seeks drill pay and retirement points not to prevent or undo that wrong, but as compensation for what he "lost due to Defendants' illegal actions." Am. Compl., R. 38. The relief he seeks now, therefore, is retrospective compensation for a previous legal wrong—which is to say it is money damages. *See Collin*, 881 F.3d at 429. That is true for the retirement points too: those would be retrospective compensatory relief, without any concomitant injunction

that the government pay Poffenbarger some additional specified amount during his retirement. (Instead the points would impose their own obligation on the government under a different statutory regime.)

Poffenbarger's arguments to the contrary are without merit. For reasons that *Palmer* itself makes clear, Poffenbarger's lack of entitlement under the military pay statutes (as a reservist) makes his case distinguishable from cases (like *Schelske v. Austin*, 2023 U.S. Dist. LEXIS 163101, 2023 WL 5986462 (N.D. Tex. Sept. 14, 2023)) involving active-duty service members. 168 F.3d at 1313-14. Moreover, contrary to his contention here, "a government official or attorney cannot waive the sovereign immunity of the federal government[.]" *Gaetano v. United States*, 994 F.3d 501, 508 (6th Cir. 2021). Nor does judicial estoppel apply, since the district court rejected the government's prior argument that Poffenbarger says conflicts with its argument now. *See New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001). The relief that Poffenbarger now seeks is therefore relief to which the government remains immune.

The district court's judgment is affirmed.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED MAY 12, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-3417

MICHAEL POFFENBARGER, ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

FRANK KENDALL, III, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE AIR FORCE; JOHN D. DEGOES, IN HIS OFFICIAL CAPACITY AS ACTING SURGEON GENERAL OF THE AIR FORCE; JOHN P. HEALY, IN HIS OFFICIAL CAPACITY AS COMMANDER, AIR FORCE RESERVE COMMAND; MAJOR GENERAL D. SCOTT DURHAM, IN HIS OFFICIAL CAPACITY AS COMMANDER, 4TH AIR FORCE; LIEUTENANT COLONEL MICHAEL R. RUBELING, IN HIS OFFICIAL CAPACITY AS COMMANDER, 445TH OPERATIONS SUPPORT SQUADRON; COLONEL DOUGLAS A. PERRY, IN HIS OFFICIAL CAPACITY AS COMMANDER, 445TH AIRLIFT WING; UNITED STATES OF AMERICA,

Defendants-Appellees.

Appendix B

Before: KETHLEDGE, BUSH, and MURPHY,
Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Southern District of Ohio at Dayton.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the dismissal of the case is AFFIRMED on different grounds than was reasoned by the district court.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION – CINCINNATI, FILED MARCH 18, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION – CINCINNATI

Case No. 3:22-cv-1
Judge Matthew W. McFarland

MICHAEL POFFENBARGER,

Plaintiff,

v.

HON. FRANK KENDALL, *et al.*,

Defendants.

ORDER SUA SPONTE DISMISSING CASE AS MOOT

This matter is before the Court sua sponte to consider whether the case is moot following the enactment of the James M. Inhofe National Defense Authorization Act ("NDAA") for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395 (2022), and the Supreme Court's order in *Kendall, Sec'y of the Air Force v. Doster*, 601 U.S. ___, 144 S. Ct. 481, 217 L. Ed. 2d 248, 2023 U.S. LEXIS 4827 (2023). The parties have briefed the matter. (*See* Docs. 58, 59.) For the reasons discussed below, the Court concludes that

the matter is moot and **DISMISSES the case WITHOUT PREJUDICE**.

FACTS & PROCEDURAL HISTORY

Plaintiff Michael Poffenbarger is a First Lieutenant in the Air Force Reserve who sought, and was refused, a religious exemption to the Department of Defense's requirement that its armed servicemembers be vaccinated against COVID-19. (Am. Compl., Doc. 38, ¶¶ 8-15.) Though Plaintiff did not receive an exemption to the policy, he refused to get the vaccine. (*Id.*) Because of his noncompliance with the policy, Plaintiff was placed on "No Pay/No Points" status, which excused him from participating in reserve training and drills. (Smith Decl., Doc. 15, Pg. ID 310.)

Plaintiff brought this Complaint against several Defendants in the Air Force chain of command, arguing that the vaccine requirement and subsequent disciplinary action violated his rights under the Religious Freedom Restoration Act ("RFRA") and the First Amendment's Free Exercise Clause. (*See* Am. Compl., Doc. 38, Pg. ID 1324-25.) He sought declaratory judgment and injunctive relief to prevent further disciplinary action, remove prior disciplinary measures, and restore his service record to account for lost pay and retirement points. (*Id.* at Pg. ID 1326.) On February 28, 2022, this Court entered a preliminary injunction preventing Defendants from taking further disciplinary action. (Preliminary Injunction, Doc. 32.) The Order did not rescind Defendants' prior action. (*See id.*)

Appendix C

On July 27, 2022, this Court entered a nationwide preliminary injunction in *Doster v. Kendall* that restored reservists in the class, including Plaintiff, to pay and points status. *See Doster v. Kendall*, No. 1:22-CV-84, 2022 U.S. Dist. LEXIS 137068, 2022 WL 2974733, at *1-2 (S.D. Ohio, July 27, 2022). This Court then stayed this case pending resolution of the appeal in *Doster*. (Stay Order, Doc. 53.) The Court of Appeals for the Sixth Circuit affirmed this Court's preliminary injunction in *Doster*. *Doster v. Kendall*, 54 F.4th 398, 442 (6th Cir. 2022), *vacated as moot, Kendall, Sec'y of the Air Force v. Doster*, 601 U.S. ___, 144 S. Ct. 481, 217 L. Ed 2d 248, 2023 U.S. LEXIS 4827 (2023).

In December 2022, Congress enacted the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023. Pub. L. No. 117-263, § 525. Under this legislation, on January 10, 2023, the Secretary of Defense rescinded the vaccine mandate and adverse actions for those servicemembers who sought exemptions on religious grounds. *See id.* Following, the Supreme Court vacated the Sixth Circuit's judgment in *Doster* and ordered the Sixth Circuit to instruct this Court to vacate the *Doster* preliminary injunctions as moot. *Doster*, 601 U.S. ___, 2023 U.S. LEXIS 4827, at *1. In the meantime, this Court lifted the stay in this case and directed the parties to brief whether this case was moot after the Supreme Court's order and the enactment of the NDAA. (01/23/2024 Notation Order.)

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LAW & ANALYSIS

The question before the Court is whether the case is moot. Mootness implicates a federal court's subject-matter jurisdiction, *Mokdad v. Sessions*, 876 F.3d 167, 169-170 (6th Cir. 2017), and the Court may consider whether it has subject-matter jurisdiction at any time, Fed. R. Civ. P. 12(h)(3). Federal courts may only adjudicate "actual" controversies, so a case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S. Ct. 721, 184 L. Ed. 2d 553 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982)). "The test for mootness is 'whether the relief sought would, if granted, make a difference to the legal interests of the parties.'" *Hanrahan v. Mohr*, 905 F.3d 947, 960 (6th Cir. 2018) (cleaned up). In other words, a court must be able to grant "effectual" relief. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S. Ct. 132, 40 L. Ed. 293 (1985)).

Plaintiff concedes that much of his case is moot following the Supreme Court's order. (*See* Plaintiff's Brief, Doc. 59, Pg. ID 1583-84.) But, he contends that he is still entitled to backpay and retirement points for the drill weekends from January to June, 2022 that Defendants excluded him from. (*Id.*) Defendants argue that the case is nevertheless moot because Plaintiff cannot recover backpay and retirement credit and sovereign immunity

bars relief. (Def. Brief, Doc. 58, Pg. ID 1568-69.) Upon review, the Court finds that Defendants' arguments have merit.

I. This Court Cannot Award Backpay

Plaintiff argues that Defendants' actions cost him $4,346.16 in lost drill pay. (Plaintiff's Brief, Doc. 59, Pg. ID 1583.) Plaintiff contends that this injury keeps the case alive because he is entitled to backpay. (*Id.*) That said, the Court cannot grant backpay as relief, so this argument fails to show that there is a live case or controversy.

The United States pays its military servicemembers in one of two ways: members serving in full-time active duty are paid because of their professional status, and members serving part-time in the reserves are paid for drills and training they attended. *See Kuntz v. United States*, 141 Fed. Cl. 713, 716 (2019); 37 U.S.C. §§ 204(a)(1), (2), and 206 (a)(1). Under this scheme, reservists cannot recover back pay for drills or training they did not attend. *Palmer v. United States*, 168 F.3d 1310, 1314 (Fed. Cir. 1999). This is true even if a reservist were wrongfully prevented from attending the training or drill. *Id.* Therefore, Plaintiff cannot recover backpay for those drills that he missed, even if his exclusion was unlawful.

In response, Plaintiff points to *Schelske v. Austin*, 2023 U.S. Dist. LEXIS 163101, 2023 WL 5986462 (N.D. Tex. Sept. 14, 2023). There, the district court held that RFRA permitted claims for backpay in connection with claims for reinstatement to active duty because backpay was "integral" to restoring prospective class members

to their former status before separation. 2023 U.S. Dist. LEXIS 163101, [WL] at *31-32. That holding does **not** apply here. The issue in *Schelske* involved separated active-duty servicemembers who sought reinstatement to active duty and as well as backpay that they would have earned but for their unlawful separation. *Id.* Here, Plaintiff did not attend drills while serving as a reservist. Reservists can only receive pay for drills they attended. 37 U.S.C. § 206(a)(1). As a result, "military reservists can find themselves 'without recourse' for wrongful treatment, 'when a service member on regular active duty would have such recourse if similarly treated.'" *Radziewicz v. United States*, 167 Fed. Cl. 62, 67 (2023) (quoting *Palmer*, 168 F.3d at 1314-15 (Fed. Cir. 1999)).

Plaintiff further contends that the Court can grant this relief because it is equitable. (Plaintiff's Brief, Doc. 59, Pg. ID 1585, 1588). Despite this argument, Plaintiff still cannot receive backpay for the drills between January and June 2022 because he did not participate in them. *See Palmer*, 168 F.3d at 1314. The Court cannot grant backpay as relief, so it cannot be used to avoid mootness. *See Church of Scientology of Cal.*, 506 U.S. at 12.

II. This Court Cannot Award Retirement Points

Plaintiff also seeks 24 retirement points that he did not receive because Defendants placed him on "No points/ No pay" status, which he maintains is a live issue because he will draw less retirement pay. (Plaintiff's Brief, Doc. 5, Pg. ID 1583.) But, as detailed below, this similarly fails to demonstrate a live controversy in this case.

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a. Plaintiff Cannot Receive Retirement Points for Unattended Drills

First, the Court concludes that it cannot award retirement points for similar reasons as to why it cannot award backpay, namely that it is not permitted by statute. Reservists receive retirement pay based on the points they accrue throughout their service. *See* 10 U.S.C. § 12733. They can accrue points, in part, by attending drill sessions. *See* 10 U.S.C. § 12732(a)(2)(B). That said, like pay, reservists only accrue retirement points for drills they attend. *Id.* There is no statute or other authority allowing reservists to receive credit for drills they did not attend, so the Court concludes that the structure of 10 U.S.C. § 12732 and the Federal Circuit's reasoning in *Palmer* forecloses Plaintiff's desired relief.

b. Sovereign Immunity Bars Relief

Alternatively, sovereign immunity bars the recovery of retirement points in this case. Sovereign immunity shields the federal government from suit, absent an explicit statutory waiver. *Gaetano v. United States*, 994 F.3d 501, 506 (6th Cir. 2021). This immunity extends to federal officials sued in their official capacities. *Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668, 671 (6th Cir. 2013). Congress may only waive sovereign immunity through clear statutory language. *Dept. of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 144 S. Ct. 457, 465-66, 217 L. Ed. 2d 361 (2024),

As a threshold matter, and despite Plaintiff's argument to the contrary, the Court concludes that his

request for retirement points is a claim for damages, not an injunctive claim for equitable relief. (*See* Plaintiff's Brief, Doc. 59, Pg. ID 1585). Awarding these points has the effect of increasing Plaintiff's retirement pay, which is similar to what this Court has previously concluded "amount[s] to an award of monetary damages." *DeGroat v. Townsend*, 495 F. Supp. 2d 845, 852 (S.D. Ohio 2007) (Air Force officer's request for injunction to credit for service time was ultimately one for monetary damages.); *see also Sosa v. Sec'y, Dep't of Def.*, 47 F.App'x 350, 351-52 (6th Cir. 2002) (Army veteran's request for a correction of his records to reflect a medical discharge was ultimately one for money damages.). Plaintiff seeks the retirement points in order to increase his benefits from the government, so the Court cannot remedy this harm by injunction. *DeGroat*, 495 F. Supp. 2d at 853.

The Court next turns to whether sovereign immunity bars relief. Plaintiff contends that Defendants waived the immunity argument by not raising it before and that he can recover damages against Defendants under RFRA. (Plaintiff's Brief, Doc. 59, Pg. ID 1586, 1588-89). Neither argument sways the Court.

Government counsel cannot waive sovereign immunity as a defense, and the Court can address the applicability of sovereign immunity at any stage of the litigation. *Gaetano*, 994 F.3d at 508.

Also, Plaintiff cannot recover damages from Defendants because he only sued them in their official capacities. Plaintiff argues that the Supreme Court's recent decision in *Tanzin v. Tanvir*, 592 U.S. 43, 49, 141

S. Ct. 486, 208 L. Ed. 2d 295 (2020) provides that RFRA waives sovereign immunity in this instance. (Plaintiff's Brief, Doc. 59, Pg. ID 1586). RFRA enables a person whose religious exercise has been unlawfully burdened by a government to "obtain appropriate relief." 42 U.S.C. § 2000bb-1(c). The Supreme Court held in *Tanzin* that, based on the "appropriate relief" language, plaintiffs could bring damages claims under RFRA against government officials in their individual capacities. *Tanzin*, 592 U.S. at 50-51. But, the Court did not extend this holding to RFRA claims against government officials in their official capacities. *See id.* In fact, the Court explicitly differentiated *Tanzin* from *Sossaman v. Texas*, wherein the Court held that the identical "appropriate relief" language in the Religious Land Use and Institutionalized Persons Act did not waive sovereign immunity for damages claims against government actors in their official capacities. *See id.* at 51-52 (citing *Sossamon v. Texas*, 563 U.S. 277, 284-86, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011)). In sum, *Tanzin* did not hold that RFRA waives sovereign immunity to suits for damages against government officials in their official capacities, and Plaintiff has not provided any other authority to the contrary. Accordingly, Plaintiff cannot recover damages from Defendants.

Plaintiff's claim for retirement points does not maintain a live case that can be remedied. The structure of 10 U.S.C. § 12732 and the reasoning in *Palmer* foreclose relief, and in the alternative, sovereign immunity bars his claim.

* * *

This Court cannot award backpay and retirement points to Plaintiff. In turn, the Court cannot "effectuate relief" that would "make a difference to the legal interests of the parties." *Hanrahan*, 905 F.3d at 960; *Church of Scientology of Cal.*, 506 U.S. at 12. Thus, this case is now moot.

CONCLUSION

Accordingly, the Court sua sponte **DISMISSES** the case **WITHOUT PREJUDICE**. The matter is **TERMINATED** from this Court's docket.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

By: /s/ Matthew W. McFarland
JUDGE MATTHEW W. McFARLAND

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION – CINCINNATI, FILED MARCH 18, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION – CINCINNATI

Case No. 3:22-cv-1
Judge Matthew W. McFarland

MICHAEL POFFENBARGER,

Plaintiff,

v.

HON. FRANK KENDALL, *et al.*,

Defendants.

JUDGMENT IN A CIVIL CASE

	Jury Verdict.	This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
X	**Decision by Court.**	This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

Appendix D

IT IS ORDERED AND ADJUDGED that the Court sua sponte DISMISSES the case WITHOUT PREJUDICE this matter is TERMINATED from this Court's docket.

Dated: March 18, 2024.

Richard W. Nagel, Clerk of Court

By: */s/ Kellie A. Fields*
Deputy Clerk