No. 25-448

In the Supreme Court of the United States

MICHAEL POFFENBARGER, PETITIONER

v.

TROY E. MEINK, SECRETARY OF THE AIR FORCE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

D. JOHN SAUER
Solicitor General
Counsel of Record
BRETT A. SHUMATE
Assistant Attorney General
CHARLES W. SCARBOROUGH
SARAH C. GRIFFIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Petitioner, a service member in the Air Force Reserves, challenged the Air Force's COVID-19 vaccination requirement on the grounds that the Air Force's denial of his request for an exemption from that requirement violated the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, and the Free Exercise Clause of the First Amendment, U.S. Const. Amend. I. After the military rescinded the vaccination requirement at Congress's direction, this Court vacated a class-wide preliminary injunction prohibiting enforcement of that requirement on mootness grounds, where petitioner was a member of the certified class. See *Kendall* v. *Doster*, 144 S. Ct. 481 (2023). The district court here subsequently dismissed the case as moot. The Sixth Circuit held that petitioner's claims for back pay and retirement points were not moot but were barred by sovereign immunity. The question presented is whether the court of appeals properly concluded that petitioner's claims for back pay and retirement points were barred by sovereign immunity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 137 F.4th 563. The opinion of the district court (Pet. App. 14a-23a) is available at 2024 WL 1155965.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a-13a) was entered on May 12, 2025. On July 23, 2025, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including October 9, 2025, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 2021, the Secretary of Defense[1] directed the military departments to ensure that all service members were fully vaccinated against COVID-19. Pet. App. 2a. Service members could seek an exemption from this requirement for medical, administrative, or religious reasons. *Id.* at 2a-3a. If an exemption request was eventually denied, the service member could receive the vaccine, wait for the military to initiate separation proceedings, or retire (if eligible). See D. Ct. Doc. 22-14, at 3-7 (Jan. 31, 2022); D. Ct. Doc. 22-15, at 6-7 (Jan. 31, 2022). As relevant here, members of the Air Force Reserve who did not comply with the vaccination requirement were reassigned to the Individual Ready Reserve in a "no pay/no points status," meaning that they would remain Air Force service members but would not drill with their units or earn pay or credit toward retirement. Pet. App. 3a, 15a (capitalization omitted); see D. Ct. Doc. 22-20, at 2-4 (Jan. 31, 2022).

In December 2022, Congress passed, and the President signed into law, the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (2023 NDAA), Pub. L. No. 117-263, 136 Stat. 2395. Section 525 of the 2023 NDAA required the Secretary of Defense to rescind the COVID-19 vaccination requirement. See 136 Stat. 2571-2572; see also Pet. App. 4a, 16a. The 2023 NDAA did not require the Department of Defense to award back pay, restore retirement points, or provide any other type of retrospective relief for reservists.

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[1] By executive order, the Department of Defense is now called the Department of War. See Exec. Order No. 14,347, 90 Fed. Reg. 43,893 (Sept. 10, 2025). This brief refers to the Department and its officers by their names in effect during the litigation below.

On January 10, 2023, the Secretary of Defense rescinded the military's COVID-19 vaccination requirement. Pet. App. 4a. The Secretary's Rescission Memorandum provided that service members in the Armed Forces shall not be "separated solely on the basis of their refusal to receive the COVID-19 vaccination" if they sought an exemption on medical, administrative, or religious grounds. D. Ct. Doc. 58, at 2 (Feb. 7, 2024) (citation omitted). In addition, the memorandum directed the military departments to "update the records of such individuals to remove any adverse actions solely associated with denials of such requests." *Ibid.* (citation omitted); see Pet. App. 16a.

The Secretary of the Air Force and the Chief of the Air Force Reserve subsequently issued additional memoranda rescinding prior guidance implementing the COVID-19 vaccination requirement for the Air Force and Space Force and the Reserve's prior policies limiting participation by unvaccinated service members in drills and training. The Secretary of the Air Force's memorandum explained, among other things, that "[n]o individuals currently serving in the Department of the Air Force shall be separated solely on the basis of their refusal to receive the COVID-19 vaccination if they sought an accommodation on religious" or other grounds and that "[t]he Department of the Air Force will update the records of such individuals to remove any adverse actions solely associated with denials of such requests." Memorandum from Frank Kendall, Sec'y of the Air Force, U.S. Dep't of Def., to Dep't of the Air Force Commanders, *Re: Rescission of 3 September 2021 Mandatory Coronavirus Disease 2019 Vaccination of Department of the Air Force Military Members and 7 December 2021 Supplemental Coronavirus Disease*

2019 Vaccination Policy Memoranda (Jan. 23, 2023), https:// perma.cc/7L66-FMXN (*Air Force Rescission Memorandum*). And the Reserve Chief's memorandum explained that "COVID-19 vaccination status is not a barrier to service in the Air Force Reserve." Air Force Reserve Command, *Reserve Commander Rescinds COVID-19 Participation Limits* (Feb. 10, 2023), https://perma.cc/VH8A-TDKQ (capitalization altered).

2. Petitioner Michael Poffenbarger is an active-reservist member of the Air Force. Pet. App. 2a. He filed this putative class action in the United States District Court for the Southern District of Ohio in January 2022, after he was placed in the Individual Ready Reserve for failure to comply with the COVID-19 vaccination requirement. *Id.* at 3a, 15a; see Compl. 3, 6.[2] Petitioner asserted that the Air Force's failure to grant his request for a religious exemption from the vaccination requirement violated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, and the Free Exercise Clause of the First Amendment, U.S. Const. Amend. I. Pet. App. 2a. He sought declaratory and injunctive relief to prohibit enforcement of that requirement, as well as damages. Compl. 11-12; see Pet. App. 3a, 15a. Petitioner's complaint named as defendants the Secretary of the Air Force and other Air Force officials in their official capacities. See Compl. 1-2.

Petitioner sought a preliminary injunction that would require the Air Force to grant his religious-accommodation request and prohibit the Air Force from taking punitive action against him. D. Ct. Doc. 2, at 17

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[2] Petitioner sought class-based relief on behalf of himself and other similarly situated persons, see Pet. 8, but because no class was ever certified, only petitioner's claims on his own behalf are properly presented here.

(Jan. 2, 2022). The district court granted in part petitioner's motion. The court found that petitioner "ha[d] shown a strong likelihood of success on the merits of his claims," 588 F. Supp. 3d 770, 784, and that petitioner met the requisite showing of irreparable harm because he "suffered the loss of First Amendment freedoms," *id.* at 797. The preliminary injunction prohibited the Air Force from taking any adverse action against petitioner "because of his refusal to get vaccinated for COVID-19 due to his religious beliefs" and prohibited the Air Force from "involuntarily transferring/reassigning [him] to the Individual Ready Reserve." *Id.* at 799; see Pet. App. 3a, 15a. The court did not require the Air Force to remove petitioner "from 'No Pay/No Points' status." 588 F. Supp. 3d at 799.

Petitioner then filed an amended complaint, which (as relevant here) requested that the Air Force be required to "restore any lost credit for points or pay he is due and was 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. 12; see Pet. App. 3a, 15a.

The district court subsequently stayed this case after another district court certified a class of Air Force service members (including petitioner) who had sought religious exemptions from the vaccination requirement and entered a preliminary injunction prohibiting the Air Force from enforcing the requirement against class members. See D. Ct. Doc. 53 (Sept. 2, 2022); Pet. App. 16a; *Doster* v. *Kendall*, No. 22-cv-84, 2022 WL 2974733 (S.D. Ohio July 27, 2022). The class-wide injunction in *Doster* prohibited the Air Force from placing "reservists on no points, no pay status for their refusal to get vaccinated for COVID-19 due to their sincerely held re-

ligious beliefs." *Doster*, 2022 WL 2974733, at *1. So petitioner was only precluded from participating in drills or trainings (and thus earning pay or accruing credit toward military retirement) from January to July 2022, when the *Doster* class-wide injunction issued. The court of appeals affirmed the *Doster* injunction. See *Doster* v. *Kendall*, 54 F.4th 398 (6th Cir. 2022).

After the Air Force rescinded the vaccination requirement, this Court vacated the court of appeals' decision in *Doster* and remanded to the court of appeals with instructions to direct the *Doster* district court to vacate its preliminary injunctions "as moot." *Kendall* v. *Doster*, 144 S. Ct. 481, 481 (2023) (citing *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)). The district court in *Doster* subsequently dismissed the plaintiffs' claims as moot, see *Doster* v. *Kendall*, No. 22-cv-84, 2024 WL 5402281 (S.D. Ohio Jan. 18, 2024), and the court of appeals affirmed, see *Doster* v. *Kendall*, No. 24-3404, 2025 WL 1369378 (6th Cir. May 12, 2025). The *Doster* plaintiffs filed a petition for a writ of certiorari on the same day as petitioner did in this case. See *Doster* v. *Meink*, petition for cert. pending, No. 25-446 (filed Oct. 9, 2025).

3. After this Court vacated as moot the Sixth Circuit's *Doster* decision, the district court in this case "directed the parties to brief whether the case was moot" in light of those developments. Pet. App. 16a; see *id.* at 4a.

Petitioner agreed that the Air Force's rescission of the vaccination requirement and this Court's vacatur in *Doster*, 144 S. Ct. 481, rendered "much of his case * * * moot." Pet. App. 17a. But petitioner argued that the case was not entirely moot because he was still entitled to "backpay and retirement points for the drill week-

ends from January to June, 2022" from which he was "excluded." *Ibid.* In response, the government argued that those claims were barred by sovereign immunity, see *id.* at 17a-18a, and that petitioner had already received enough retirement points for the relevant time periods for military retirement purposes and thus did not establish that he would have attended additional drills and earned extra pay absent the challenged vaccine requirement, see D. Ct. Doc. 58, at 14; D. Ct. Doc. 58-1, at 3 (Feb. 7, 2024).

The district court dismissed petitioner's claims, concluding that "the matter is moot." Pet. App. 14a-15a; see *id.* at 14a-23a. The court recognized petitioner's "conce[ssion] that much of his case is moot," *id.* at 17a, and it rejected petitioner's argument that his claims for back pay and retirement points could proceed. The court determined that reservists like petitioner "cannot recover back pay for drills or training they did not attend," "even if * * * [they] were wrongfully prevented from attending the training or drill." *Id.* at 18a (citing *Palmer* v. *United States*, 168 F.3d 1310, 1314 (Fed. Cir. 1999)).

The district court further determined that it could not "award retirement points" for the same reason—*i.e.*, because "reservists only accrue retirement points for drills they attend." Pet. App. 20a. And in the alternative, the court held that "sovereign immunity bars the recovery of retirement points" because it is "a claim for damages, not an injunctive claim for equitable relief," and RFRA does not waive sovereign immunity for damages against federal officials sued "in their official capacities." *Id.* at 20a-22a. The court also rejected petitioner's argument that the government had "waived [sovereign] immunity * * * by not raising it before," as

"[g]overnment counsel cannot waive sovereign immunity" and the court could address "sovereign immunity at any stage of the litigation." *Id.* at 21a.

4. The court of appeals affirmed, "though on different grounds." Pet. App. 2a; see *id.* at 1a-11a. The court held that petitioner's "case is not moot" because, "subject to the government's defense of sovereign immunity," the court could "enter an order granting him" back pay and retirement points. *Id.* at 5a. But the court held that petitioner's claims for that relief were barred by sovereign immunity. See *id.* at 6a-11a.

The court of appeals explained that, while RFRA waives the United States' sovereign immunity "to some extent" by providing for "'appropriate relief against a government,'" Pet. App. 6a (quoting 42 U.S.C. 2000bb-1(c)), RFRA does not waive sovereign immunity "for money damages," *id.* at 7a. The court relied on this Court's decision in *Sossamon* v. *Texas*, 563 U.S. 277 (2011), which held that the same phrase in the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) did not waive the States' "sovereign immunity to suits for damages," Pet. App. 7a (quoting *Sossamon*, 563 U.S. at 288). The court held that *Sossamon*'s holding with respect to RLUIPA applies equally to RFRA, joining the consensus view of "every circuit court to have reached the issue." *Ibid.* (citing *Morgan* v. *Federal Bureau of Prisons*, 129 F.4th 1043, 1050-1051 (7th Cir. 2025)).

The court of appeals then determined that the back pay and retirement points that petitioner sought were "retrospective compensation for a previous legal wrong," *i.e.*, "money damages," barred by sovereign immunity. Pet. App. 10a. Examining *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), the court reasoned that "a claim seek[ing]

an award of money" that "a statute obligated" the government "to pay" could amount to "equitable relief," not money damages. Pet. App. 8a-9a. But the court explained that petitioner sought "to enforce RFRA," which does not mandate "the payment of money" and instead requires "the government's forbearance from interference with 'a person's exercise of religion.'" *Id.* at 10a (quoting 42 U.S.C. 2000bb-1(a)). The court also explained that, under the military pay statutes, reservists like petitioner have "no entitlement to any compensation for drills that he did not 'actually attend.'" *Ibid.* (quoting *Palmer*, 168 F.3d at 1313-1314). The court determined that the "alleged legal wrong in this case was that the Department of the Air Force substantially burdened [petitioner's] religious practice"; because petitioner sought back pay and retirement points "not to prevent or undo that wrong, but as compensation for what he 'lost due to Defendants' illegal actions,'" the relief sought was "retrospective compensatory relief." *Ibid.* (citation omitted).

The court of appeals further rejected petitioner's argument that the government waived the defense of sovereign immunity, as "a government official or attorney cannot waive the sovereign immunity of the federal government." Pet. App. 11a (quoting *Gaetano* v. *United States*, 994 F.3d 501, 508 (6th Cir. 2021)). And the court concluded that the government was not judicially estopped from arguing that petitioner is not entitled to back pay and retirement points, reasoning that "the district court rejected the government's prior argument that [petitioner] says conflicts with its argument now." *Ibid.*

ARGUMENT

Petitioner's claims seeking injunctive and declaratory relief are moot because a court cannot award prospective relief as to a policy that no longer exists—as petitioner tacitly concedes. But petitioner renews his argument (Pet. 11-20) that his case can proceed because he is entitled to back pay and retirement points. The court of appeals correctly rejected that contention, holding that such relief is barred by the United States' sovereign immunity. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Petitioner's claims for prospective injunctive and declaratory relief are undeniably moot. Based on petitioner's concessions that much of his case was moot, both lower courts focused only on petitioner's claims for back pay and retirement points. See Pet. App. 5a, 17a. Before this Court too, the petition focuses only on back pay and retirement points. See, *e.g.*, Pet. i, 14. To the extent petitioner contests that his prospective claims for injunctive and declaratory relief are moot, see, *e.g.*, *id.* at 11-13 (reciting legal standard and arguments based on mootness), such a challenge would be forfeited (if not waived), see *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 37 (2015), and in any event would be without merit.

Under Article III, the jurisdiction of the federal courts is limited to the resolution of actual "Cases" or "Controversies." U.S. Const. Art. III, § 2, Cl. 1. "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (citation omitted). Among other reasons, a case may become moot when a controversy is

overtaken by new legislation that "significantly alters the posture of th[e] case." *United States Dep't of the Treasury* v. *Galioto*, 477 U.S. 556, 559 (1986); see, *e.g.*, *United States* v. *Microsoft Corp.*, 584 U.S. 236, 240 (2018) (per curiam) (explaining that a case "ha[d] become moot" due to legislation that eliminated any "live dispute * * * between the parties").

Petitioner sought prospective relief barring enforcement of the Air Force's COVID-19 vaccination requirement on behalf of himself and similarly situated service members. See p. 4, *supra*. The 2023 NDAA and the Air Force's subsequent rescission of the vaccination requirement mooted petitioner's claims for injunctive and declaratory relief. The Secretary of Defense and the Secretary of the Air Force specifically prohibited enforcement and punitive actions against service members in petitioner's position. See pp. 3-4, *supra*. Military policy prevents the Air Force from "using vaccination status to deny deployment eligibility, training opportunities, and assignments," and the military has "definitively restored [petitioner] to equal footing with [his] vaccinated counterparts through repeated formal policy changes." *U.S. Navy SEALs 1-26* v. *Biden*, 72 F.4th 666, 673 (5th Cir. 2023); see *Air Force Rescission Memorandum*, *supra*. Therefore, a court cannot grant any "effectual" injunctive or declaratory relief as to the vaccination requirement. *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992). This Court has already recognized as much by vacating as moot the court of appeals' prior decision affirming the class-wide preliminary injunction in *Doster* and directing the vacatur of

the district court's preliminary injunction in that case. See *Kendall* v. *Doster*, 144 S. Ct. 481 (2023).[3]

2. The court of appeals also correctly held that petitioner's claims for back pay and retirement points are "retrospective compensatory relief" and thus barred by sovereign immunity. Pet. App. 10a.

a. "[T]he United States, as sovereign, is generally immune from suits seeking money damages." *Department of Agric. Rural Dev. Rural Hous. Serv.* v. *Kirtz*, 601 U.S. 42, 48 (2024). Congress may waive that immunity, but "Congress must unequivocally express any waiver of sovereign immunity for that waiver to be effective." *Return Mail, Inc.* v. *United States Postal Serv.*, 587 U.S. 618, 627 (2019).

Petitioner suggests (Pet. 17) that because "RFRA affords 'appropriate relief,'" the statute waives the United States' sovereign immunity with respect to claims for back pay and retirement points. But as the court of appeals recognized, every circuit to have addressed the issue has held that "RFRA does not authorize damages suits against the United States." Pet. App. 7a (citation omitted); see *Morgan* v. *Federal Bureau of Prisons*, 129 F.4th 1043, 1050-1051 (7th Cir. 2025) (collecting authorities). Likewise, this Court held that the "appropriate relief" provision in RLUIPA does not "clearly and unambiguously waive sovereign immunity

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[3] Petitioner's passing reliance (Pet. 12) on the "collateral consequences" mootness exception is mistaken. Under that exception, a case is not moot if a court may remedy a plaintiff's "collateral" injury, even if the plaintiff's principal injury has been resolved. See, *e.g.*, *Sibron* v. *New York*, 392 U.S. 40, 53-59 (1968). As explained further below, petitioner's assertedly collateral claims for back pay and retirement points were correctly dismissed on sovereign-immunity grounds.

to private suits for damages." *Sossamon* v. *Texas*, 563 U.S. 277, 285 (2011) (citation omitted); see Pet. App. 7a; *Lane* v. *Pena*, 518 U.S. 187, 197 (1996) (explaining that "available remedies" against the United States are "only those for which sovereign immunity has been expressly waived") (citation omitted). RFRA is RLUIPA's "sister" statute and should be interpreted the same way. *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730 (2014). Indeed, *Sossamon* approvingly cited lower-court cases holding that "appropriate relief" under RFRA likewise did not include money damages in suits against sovereigns. 563 U.S. at 289 n.6.

This Court's decision in *Tanzin* v. *Tanvir*, 592 U.S. 43 (2020), supports, rather than undermines, that conclusion. Contra Pet. 14. *Tanzin* held that "injured parties can sue Government officials in their *personal* capacities" for damages under RFRA. 592 U.S. at 47 (emphasis added). But that holding did not extend to suing federal officials in their official capacities, as petitioner has done here. Indeed, *Tanzin* distinguished *Sossamon* on the basis that individuals sued in their personal capacities "do not enjoy sovereign immunity." *Id.* at 52. The courts of appeals to have addressed the issue post-*Tanzin* have likewise distinguished *Tanzin* on that basis. See *Morgan*, 129 F.4th at 1051; *Lancaster* v. *Secretary of Navy*, 109 F.4th 283, 294 (4th Cir. 2024).[4]

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[4] In support of his argument that RFRA waives the government's sovereign immunity to claims for back pay, petitioner cites (Pet. 14-16) various authorities construing Title VII of the Civil Rights Act of 1964. See Pet. 14-16 (citing, *e.g.*, *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999), *West* v. *Gibson*, 527 U.S. 212 (1999), and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975)). Those decisions are not relevant here because Title VII, unlike RFRA, specifically waives sovereign immunity for "appropriate remedies, includ-

Petitioner asserts in passing (Pet. 18) that the government "waiv[ed] the defense" of sovereign immunity by not raising sovereign immunity as a defense in its answer. Both lower courts properly rejected that argument. See Pet. App. 11a, 21a. "Sovereign immunity is jurisdictional in nature," *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994), and can be raised at any time, see, *e.g.*, *Edelman* v. *Jordan*, 415 U.S. 651, 678 (1974); see also Pet. App. 11a (explaining that government counsel cannot waive the defense of sovereign immunity in litigation).

Petitioner's reliance (Pet. 18) on the Little Tucker Act, 28 U.S.C. 1346(a)(2), is equally flawed. The Little Tucker Act is simply "a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States* v. *Testan*, 424 U.S. 392, 398 (1976). Petitioner must instead identify a substantive right on which to base his damages claims that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States* v. *Mitchell*, 463 U.S. 206, 217 (1983) (quoting *Testan*, 424 U.S. at 400). Petitioner invokes (Pet. 18) the Reservists Pay Mandating Statute, 37 U.S.C. 206, but petitioner has no right to compensation as a reservist for drills he did not attend, see pp. 15-16, *infra*.

b. Petitioner implicitly recognizes that RFRA does not waive the government's immunity from damages claims by attempting (Pet. 14-17, 19) to cast his requested relief of back pay and retirement points as "restitutionary" "equitable relief." As the court of appeals

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ing reinstatement * * * with or without back pay." 42 U.S.C. 2000e-16(b). *CIGNA Corp.* v. *Amara*, 563 U.S. 421, 438 (2011) (cited at Pet. 17), is even further afield because it does not concern sovereign immunity at all.

explained, however, the back pay and retirement points that petitioner seeks are a classic form of "retroactive compensation for a previous legal wrong—which is to say * * * money damages." Pet. App. 10a.

In *Bowen* v. *Massachusetts*, this Court held, over a dissent by Justice Scalia, that "an equitable action for specific relief" may "include an order * * * for 'the recovery of specific property *or monies*.'" 487 U.S. 879, 893 (1988) (quoting *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)). But that is only so, the Court recognized, when a plaintiff sues to enforce a statutory mandate that provides for the payment of money. In those circumstances, the suit is not one "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.

As the court of appeals correctly held, petitioner "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.'" Pet. App. 10a (quoting 42 U.S.C. 2000bb-1(a)). Petitioner alleged that the Air Force "substantially burdened his religious practice," and he sought retirement points and back pay "not to prevent or undo that wrong, but as compensation for what he 'lost due to [the Air Force's] illegal actions.'" *Ibid.* (quoting Am. Compl. 12). That remedy is standard compensatory damages. See, *e.g.*, *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306 (1986) (describing compensatory damages).

Nor do "the 'military pay statutes'" provide petitioner with an "entitlement to any compensation" for drills he did not attend. Pet. App. 10a (quoting *Palmer*

v. *United States*, 168 F.3d 1310, 1313-1314 (Fed. Cir. 1999)). Reservists like petitioner are required to participate in military drills and training throughout the year, see 10 U.S.C. 10147(a)(1), and they accrue points toward retirement for drills attended or active-duty training performed, see 10 U.S.C. 12732(a)(2)(B) and 10 U.S.C. 12733. But reservists are paid "only for drills actually attended and for active duty for training actually performed." *Palmer*, 168 F.3d at 1314 (citing 37 U.S.C. 204(a)(2) (1994) and 206(a)(1) (1994)). Thus, as a reservist, petitioner "has no lawful pay claim against the United States" for back pay or retirement points "for unattended drills or for unperformed training duty," even if his claim is based on "wrongful[ ] remov[al]" from "part-time reserve duty." *Ibid.*; see *Martinez* v. *United States*, 333 F.3d 1295, 1310 n.3 (Fed. Cir. 2003) (en banc) (same for a claim of "improper discharge from the Reserves"), cert. denied, 540 U.S. 1177 (2004). Moreover, the 2023 NDAA also did not require any such retrospective relief. See p. 2, *supra*. Accordingly, when petitioner was transferred to the Individual Ready Reserve from January to July 2022 based on his failure to comply with the vaccination requirement, he did not participate in drills or training, and he was not entitled to back pay or retirement points for those missed activities. See D. Ct. Doc. 22-15, at 4; D. Ct. Doc. 22-20, at 2-4.

Petitioner identifies no decision by any other court of appeals that conflicts with the unanimous decision of the panel below (which was authored by Judge Kethledge and joined by Judges Bush and Murphy). See Pet. App. 2a. In particular, petitioner identifies no court of appeals decision that has treated back pay or retirement points as "appropriate relief" available against the federal government under RFRA, either in the context of

military reserves or any other. Nor has petitioner identified any court of appeals decision that has treated back pay or retirement points as "appropriate relief" under RLUIPA.

Instead, petitioner merely invokes a *dissenting* opinion from a *1992* D.C. Circuit decision to support his view that back pay is equitable relief. See Pet. 19 (citing *Hubbard* v. *Administrator, EPA*, 982 F.2d 531, 547-548 (D.C. Cir. 1992) (en banc) (Edwards, J., dissenting)). Although the *Hubbard* dissent opined that "[a]n award of instatement and back pay * * * constitutes specific restitution" that could fall within the Administrative Procedure Act's waiver of sovereign immunity for equitable relief, 982 F.2d at 547-548 (Edwards, J., dissenting), the majority opinion held that back pay can constitute "restitution" only if "it gives the plaintiff the specific thing to which he was originally entitled." *Id.* at 538. Otherwise, back pay amounts to "compensatory damages" that "would return to [the plaintiff] the 'value' of the job from which he was wrongfully excluded." *Id.* at 539 n.12; cf. *Crocker* v. *Piedmont Aviation, Inc.*, 49 F.3d 735, 747 (D.C. Cir.) (finding a "claim for back pay * * * not restitutionary" for Seventh Amendment purposes), cert. denied, 516 U.S. 865 (1995). That is exactly the distinction applied by the court of appeals here. See Pet. App. 7a-11a. In the words of *Hubbard*, petitioner did not meet "the pre-existing legal obligations to receive a cash entitlement from the government." 982 F.2d at 538.

Petitioner also erroneously invokes (Pet. 13, 19) an unpublished district court decision to support the proposition that his claims for back pay and retirement points are equitable. See *Schelske* v. *Austin*, 2023 WL 5986462 (N.D. Tex. Sept. 14, 2023). That district court

explained that an *active-duty* service member who was separated from the military and who sought reinstatement and back pay could "seek[ ] relief related to * * * discharge" in part because "backpay is 'an integral part of the equitable remedy of injunctive reinstatement.'" *Id.* at *32-*33 (citation omitted). In other words, the court found that active-duty service members, unlike reservists, have a statutory right to compensation even if they are improperly prohibited from serving. On the other hand, though, the court recognized that sovereign immunity barred recovery of back pay for service members who had merely been denied promotions because that relief "d[id] not qualify as restitutionary." *Id.* at *31-*32. The court of appeals here rightly noted that petitioner's case is "distinguishable" from *Schelske* because, unlike active-duty service members, reservists have no statutory right to compensation when they are improperly prohibited from serving. Pet. App. 11a.

The absence of a claim for reinstatement in this case underscores that the relief petitioner seeks cannot properly be characterized as equitable. Petitioner does not seek reinstatement because he was never separated from the Air Force; instead, he was temporarily assigned to the Individual Ready Reserve. Petitioner is thus mistaken to rely (Pet. 14, 16, 19-20) on cases mentioning that back pay accompanying reinstatement is equitable relief. See, *e.g.*, *Bowen*, 487 U.S. at 893; *Rankin* v. *McPherson*, 483 U.S. 378, 382-383 (1987).[5]

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[5] Petitioner briefly references the "constructive service doctrine" to suggest that he should be returned "'to the position that [he] would have occupied but for [his] illegal release from duty.'" Pet. 17 (citation omitted). Under that doctrine, "military personnel who have been illegally or improperly separated from service are deemed

c. Petitioner errs in independently asserting (Pet. 20-24) that the government should be estopped from arguing that petitioner is not entitled to back pay and retirement points. 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." *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001) (citation omitted).

Judicial estoppel does not apply here. In opposing petitioner's motion for a preliminary injunction, the government contended that "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." D. Ct. Doc. 22, at 40 (Jan. 31, 2022) (emphasis omitted). The district court, however, concluded that, even *assuming* that premise, petitioner still suffered irreparable injury due to the violation of the First Amendment and RFRA. 588 F. Supp. 3d 770, 796-797. Thus, the court of appeals correctly recognized that "the district court rejected the government's prior argument" about irreparable harm that petitioner "says conflicts with its argument now"—so judicial estoppel does not apply. Pet. App. 11a (citing *New Hampshire*, 532 U.S. at 750). Petitioner identifies no legal error in the court of appeals' analysis, and that factbound deter-

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to have continued in active service until their legal separation." *Barnick* v. *United States*, 591 F.3d 1372, 1379 (Fed. Cir. 2010) (citation omitted). But that doctrine has no application because petitioner was never separated from the Air Force. In any event, the doctrine does not extend to reservists like petitioner who were "on inactive status"—*i.e.*, who were not active-duty service members—"at the time of the improper action." *Ibid.*; see *Reilly* v. *United States*, 93 Fed. Cl. 643, 649 (2010) (rejecting reservist's claim for "pay for constructive service").

mination does not warrant this Court's review regardless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
BRETT A. SHUMATE
Assistant Attorney General
CHARLES W. SCARBOROUGH
SARAH C. GRIFFIN
Attorneys

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