No. 25-448

In the Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONER

Aaron Siri
Elizabeth A. Brehm
Wendy Cox
SIRI & GLIMSTAD LLP
745 Fifth Ave.
Suite 500
New York, NY 10151
aaron@sirillp.com
ebrehm@sirillp.com
wcox@sirillp.com

Thomas B. Bruns
Counsel of Record
BRUNS CONNELL VOLLMAR & ARMSTRONG
4555 Lake Forrest Drive,
Suite 330
Cincinnati, Ohio 45202
Tel: 513/312-9890
tbruns@bcvalaw.com

Counsel for Petitioner

(additional counsel listed on inside cover)

Christopher D. Wiest
CHRIS WIEST ATTORNEY AT LAW, PLLC
50 East Rivercenter Blvd.
Suite 1280
Covington, KY 41011
chris@cwiestlaw.com

Zachery Gottesman
9200 Montgomery Road,
Bldg. E, Ste. 18B
Cincinnati, OH 45242

Counsel for Petitioner

TABLE OF CONTENTS

Table of Authorities ii
Introduction 1
Reasons Review Is Necessary 2
I. The case is not moot because effectual relief remains available 2
II. Equitable estoppel prohibits Respondents from claiming mootness based on the unavailability of relief they previously identified as adequate 4
III. Restorative relief is authorized by RFRA and within the Court's equitable powers 6
Conclusion 14

TABLE OF AUTHORITIES

Page(s)

Cases

Bell v. Hood,
327 U.S. 678 (1946) 13

Bowen v. Massachusetts,
487 U.S. 879 (1988) 6, 11, 12

Chafin v. Chafin,
568 U.S. 165 (2013) 2

CIGNA Corp. v. Amara,
563 U.S. 421 (2011) 8

Davis v. Wakelee,
156 U.S. 680 (1895) 5

Downie v. Independent Drivers Ass'n Pension Plan,
934 F.2d 1168 (10th Cir. 1991) 8

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 2

Hubbard v. *Administrator, EPA*,
982 F.2d 531 (D.C. Cir. 1992) 9, 11

Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014) 10

Oppenheim v. Campbell,
571 F.2d 660 (D.C. Cir. 1978) 8

Poffenbarger v. Kendall,
588 F. Supp. 3d 770 (2022) 5

Rankin v. McPherson,
483 U.S. 378 (1987) 8

Schelske v. Austin,
2023 U.S. Dist. LEXIS 163101
(N.D. Tex. 2023) 9, 10

Sibron v. New York,
392 U.S. 40 (1968) 3, 4

Tanzin v. Tanvir,
592 U.S. 43 (2020) 7, 8, 12

U.S. Navy Seals 1-26 v. Biden,
27 F.4th 336 (5th Cir. 2021) 9

United States v. Concentrated Phosphate Export Assn., 393 U.S. 199 (1968) 2

Statutes and Regulations

28 U.S.C. 1346(a)(2) ("Little Tucker Act") 11

Religious Freedom Restoration Act of 1993,
42 U.S.C. 2000bb et seq. 1, 2, 3, 6, 7, 8, 11, 12, 13

Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274,
114 Stat. 803 (42 U.S.C. 2000cc et seq.) 7

Other Authorities

18 Moore's Federal Practice § 134.30 (3d ed. 2000) 5

INTRODUCTION

Respondents' brief in opposition rests on a fundamental misunderstanding of RFRA's remedial framework and basic mootness doctrine. This case does not seek retrospective damages for past service, but equitable relief correcting ongoing collateral consequences of Respondents' RFRA violations—relief that remains available and is necessary to make Petitioner whole.

Most notably, Petitioner seeks restoration of retirement points wrongfully denied as a result of the challenged mandate. That relief is independent of any dispute over back pay, which he also seeks, and constitutes classic equitable status-restoring relief. Because such relief will have real legal consequences for Petitioner's military record and future benefits, it defeats Respondents' mootness argument as a threshold matter.

Respondents' focus on pleading formalities and retrospective compensation elevates form over substance and obscures the nature of the relief at issue. RFRA authorizes "appropriate relief" for violations, and this Court has long recognized that equitable remedies designed to restore a plaintiff to his rightful position remain available even after the challenged conduct has ceased. The decision below improperly narrows that remedial framework and leaves service members without any meaningful remedy for RFRA violations.

Of equal significance is that Respondents' current position also sits in opposition to their prior representations regarding the availability of relief, underscoring the remedial gap created by the Sixth Circuit's approach. Under Respondents' theory, the government may engage in a RFRA violation, avoid interim relief by citing the availability of future remedies, and then avoid review altogether by denying that any remedy exists. That result is inconsistent with RFRA's text, as well as this Court's precedents and basic principles of equity.

This case therefore presents a clean and recurring question of exceptional importance: whether RFRA permits meaningful post-violation relief for people whose religious exercise has been unlawfully burdened. This Court should grant the petition.

REASONS REVIEW IS NECESSARY

I. The case is not moot because effectual relief remains available

Respondents have not carried their "heavy burden" of demonstrating mootness. *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)). A case is moot only if it is impossible for a court to grant any effectual relief whatsoever. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). Under the collateral consequences doctrine, as long as a

prevailing party retains a concrete interest—however small—in the outcome of the litigation, the case remains justiciable. *See Sibron v. New York*, 392 U.S. 40, 53-59 (1968).

Here, Petitioner seeks concrete restorative relief for completed violations of RFRA, including restoration of lost reservist pay, retirement points, and service credit. That relief has not been provided, and it remains fully capable of being ordered by a court. The recission of the vaccination mandate does not itself moot claims for relief designed to remedy the continuing consequences of past unlawful action.

Respondents' contrary argument rests on an artificially narrow concept of equitable relief. They treat the repeal of the mandate as dispositive while ignoring concrete collateral consequences from the denial of religious accommodation—consequences embedded in his military records and retirement calculations. Unless corrected by order of the Court, Petitioner 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. The availability of relief addressing those ongoing effects defeats a mootness finding.

Respondents' position also fails to comport with the collateral consequences doctrine. Even where the primary conduct has ceased, a case is not moot if additional harm remains that a court can remedy. *See*

Sibron v. New York, 392 U.S. 40, 53-59 (1968). Petitioner's loss of pay and retirement points constitute precisely the type of continuing injury for which effective relief remains available.

Because Respondents cannot show that Petitioner has received complete relief—or that no court possesses the authority to grant the relief sought—the case is not moot.

II. Equitable estoppel prohibits Respondents from claiming mootness based on the unavailability of relief they previously identified as adequate

Respondents' argument concerning judicial estoppel also fails because they now rest on a position directly contrary to the one they advanced and prevailed on earlier in this litigation. In opposing preliminary injunctive relief, Respondents expressly argued that the loss of reservist pay and retirement points did not constitute irreparable harm because those losses could be remedied later through reinstatement and backpay if Petitioner prevailed on the merits. Respondents persuaded the district court to deny that aspect of preliminary relief on precisely that basis.

Respondents assert that judicial estoppel does not apply because, in their view, the district court "rejected" the government's prior argument regarding irreparable harm. (Opp. Br. at 19.) That

characterization is incorrect. The district court denied that specific relief after accepting Respondents' representation that restoration of pay and retirement points would be available later and thus was not irreparable harm. *See Poffenbarger v. Kendall,* 588 F. Supp. 3d 770, 796-797 (2022).

"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).

Accordingly, having prevailed on the argument that restoration of pay and retirement points was available as a final remedy, Respondents cannot now assert that no court possesses authority to grant that same relief. This Court has repeatedly rejected such litigation tactics, which would allow a party to have it both ways by prevailing on one theory at an earlier stage and then reversing course to defeat jurisdiction altogether. *See Pegram v. Herdrich*, 530 U.S. 211, 227 n. 8 (2000); *see* 18 Moore's Federal Practice § 134.30 (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").

At minimum, Respondents' prior representations confirm that this case does not fall within the narrow category of disputes in which it is impossible for a court to grant any effectual relief whatsoever. Because Respondents themselves identified restoration of pay and retirement points as an available remedy, the case remains justiciable.

III. Restorative relief is authorized by RFRA and within the Court's equitable powers

Respondents' mootness theory also depends on the erroneous premise that courts lack authority to grant the restorative relief Petitioner seeks. That premise is wrong as a matter of law. Respondents repeatedly characterize Petitioner's requested relief as "retrospective compensatory relief" barred by sovereign immunity. (Opp. Br. at 9.) However, Petitioner does not seek damages measured by the value of lost employment or compensation for independent injury. He seeks equitable, status-restoring relief that corrects official military records to eliminate the continuing effects of an unlawful RFRA violation. Relief that restores a plaintiff to the position he would have occupied absence illegal government action is restitutionary and equitable in nature, even if compliance requires the payment of money. *See Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988).

RFRA expressly authorizes "appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). This

Court has explained that the term "appropriate relief" is open-ended and encompasses the full range of traditionally available equitable remedies. *Tanzin v. Tanvir*, 592 U.S. 43, 47 (2020). When Congress authorizes equitable relief against the government, sovereign immunity does not bar remedies that restore plaintiff to the *status quo ante*. Respondents' insistence on an additional explicit statement misreads both RFRA's text and this Court's precedent. Nothing in RFRA narrows that authority, and nothing in this Court's precedent supports Respondents' attempt to carve out restorative relief for violations.

Respondents' reliance on RLUIPA is misplaced (Opp. Br. at 8, 17.) RFRA and RLUIPA differ materially in scope, structure, and remedial context. RFRA applies broadly to federal government action and expressly authorizes "appropriate relief against a government," while RLUIPA's remedial provisions operate in a far narrower institutional setting. Nothing in RLUIPA jurisprudence narrows RFRA's remedial reach.

Respondents' claim that no court has treated restoration of pay or service credit as available relief under RFRA ignores both precedent and principle. (Opp. Br. at 16.) Courts routinely award reinstatement, back pay, and restoration of benefits as equitable relief in constitutional and statutory religious liberty cases. *See Downie v. Independent Drivers Ass'n Pension Plan*, 934 F.2d 1168 (10th Cir. 1991); *Oppenheim v. Campbell*, 571 F.2d 660, 661-63

(D.C. Cir. 1978) (retirement credit is equitable relief); *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011) (explaining wide-ranging equitable relief available for similar "appropriate" remedy statute). RFRA's "appropriate relief" provision incorporates these well-established principles.

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

Respondents further misread *Tanzin v. Tanvir*. *Tanzin* addressed whether RFRA permits damages actions against federal officials in their *personal capacities*. It did not restrict—let alone eliminate—long recognized official-capacity suits seeking equitable relief. To the contrary, *Tanzin* reaffirmed that RFRA's remedies are coextensive with those historically available under § 1983, which include injunctions, reinstatement, and other status-restoring relief against government officials acting in their official capacities. *Tanzin v. Tanvir*, 592 U.S. 43 (2020).

Respondents' reliance on cases distinguishing restitution from compensatory damages mischaracterizes the relief sought here. (Opp. Br. at 17-19.) Petitioner does not seek damages measured by the "value" of a lost job. *Hubbard v. Administrator, EPA*, 982 F.2d 531, at 539 n.12 (D.C. Cir. 1992) (en banc). He seeks restoration of his military service status and records (points) to what he would have reflected absent the unlawful denial of religious accommodation.

For reservists, pay, retirement points, and service credit flow automatically from that status by operation of law. Restoring those records therefore provides the "specific thing" to which Petitioner is entitled, not compensatory damages untethered to a legal entitlement. *Hubbard* v. *Administrator, EPA*, 982 F.2d 531, 538 (D.C. Cir. 1992) (en banc) (Edwards, J., dissenting)).

Accordingly, lower courts addressing materially identical claims to those underlying this petition have recognized this authority. In *Schelske v. Austin*, for example, the court held that restoration of pay and retirement credit following an unlawful denial of a religious accommodation to the COVID-19 vaccination mandate constituted equitable relief and remained justiciable even after the mandate was rescinded. *See Schelske v. Austin*, 2023 U.S. Dist. LEXIS 163101 (N.D. Tex. 2023). *See also 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). That same reasoning applies with equal force here.

Respondents' attempt to distinguish *Schelske v. Austin* by labeling it an "active duty" case misunderstands both the holding of that decision and the nature of the relief sought here. (Opp. Br. at 18.) *Schelske* turned on the nature of the relief—not on plaintiff's duty classification. *Schelske v. Austin,* U.S. Dist., LEXIS 163101, *109 (2023). The relevant inquiry is not Petitioner's duty classification, but whether the relief sought restores Petitioner to the legal position he would have occupied but for the Government's unlawful action. *Id* at 105-106. *Schelske* held that the relief granted was proper because it returned that plaintiff to the "status quo." *Id* at 105.

Petitioner seeks precisely that form of relief here. He does not seek compensatory damages untethered from legal entitlement; he seeks correction of his military records to reflect uninterrupted reserve service during the period in which he was unlawfully placed in no-pay, no-points status. Once those records are corrected, drill pay and retirement points follow as a matter of law[1].

---

[1] Further, Respondents' focus on whether Petitioner "attended" particular drills misses the point. (Opp. Br. at 7.) Petitioner was unlawfully placed in a no-pay, no-points status that barred him from participating in drills in the first place. The relief sought corrects the official records that prevented participation and restores Petitioner to the status he would have held but for the

Respondents also suggest that 28 U.S.C. 1346(a)(2) ("**Little Tucker Act**") forecloses district court authority to order restoration of lost pay and retirement points. (Opp. Br. at 14.) That argument misunderstands both the nature of Petitioner's claims and the scope of the Little Tucker Act. Petitioner does not seek money damages; he seeks equitable, restitutionary relief restoring him to the status quo ante by correcting military records to reflect the service, pay, and retirement credit wrongfully withheld. Such relief has long been recognized as equitable and within the authority of district courts. *See Hubbard v. Adm'r, EPA*, 982 F.2d 531, 547–48 (D.C. Cir. 1992); *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988). The Little Tucker Act does not divest district courts of jurisdiction over equitable claims merely because compliance requires the payment of money, particularly where Congress has authorized "appropriate relief" under RFRA. 42 U.S.C. § 2000bb-1(c).

Accordingly, Respondents err in suggesting that the Little Tucker Act forecloses the relief sought here. (Opp Br. at 14.) Petitioner does not rely on the Little Tucker Act as a source of substantive rights. Rather, he seeks equitable relief authorized by RFRA. The fact that compliance with an equitable decree may require the payment of money does not transform that

---

RFRA violation. Again, once those records are corrected, pay and retirement points follow automatically by operation of law.

relief into damages or divest courts of jurisdiction. *Bowen,* 487 U.S. at 893.

In fact, Respondents' contrary position would impermissibly narrow RFRA by allowing the government to moot claims for violations simply by ceasing the challenged policy while retaining the consequences it imposed. RFRA does not permit that result. Where, as here, Petitioner continues to suffer concrete consequences from past unlawful action, courts retain authority to grant restorative relief to eliminate those effects.

Because RFRA authorizes the relief Petitioner seeks, and because that relief remains capable of being ordered, the decisions below erred in concluding that this case is moot. The petition should be granted to resolve this conflict and to reaffirm that RFRA provides meaningful remedies for completed violations of federally protected religious liberty.

Respondents also suggest that sovereign immunity forecloses the restorative relief Petitioner seeks. That contention is likewise incorrect. RFRA expressly authorizes "appropriate relief against a government," and this Court (along with many others) has held that such language encompasses traditional equitable remedies. *Tanzin v. Tanvir,* 592 U.S. at 48. (2020*). Tanzin* addressed a narrow question: whether RFRA's authorization of "appropriate relief" permits claims for money damages against federal officials in their personal capacities. *Id.* The decision left

untouched the settled understanding that RFRA permits official-capacity suits seeking equitable relief, including relief necessary to restore plaintiff to the position he would have occupied absent the unlawful burden on religious exercise. Nothing in *Tanzin* suggested that Congress intended to curtail traditional equitable relief against the government itself. Given that various courts at all levels have recognized that remedies like reinstatement, restoration of service credit, and back pay constitute equitable, restitutionary relief rather than damages, it cannot simultaneously stand that he is categorically barred by sovereign immunity.

RFRA is not limited to forbearance as Respondents suggest. (Opp. Br. at 15.) Where a violation has occurred, courts retain authority to grant relief necessary to eliminate its continuing effects. This Court has long recognized that equitable remedies may require affirmative action by the government to undo past unlawful conduct. *Bell v. Hood*, 327 U.S. 678, 684 (1946).

The decisions below have the effect of stripping RFRA of an incredibly important equitable relief—restitutionary relief—such as reinstatement, back pay, or other remedial relief. It runs contrary to both the text, and the historical tradition in place when RFRA was passed. And this Court should grant *certiorari* to review the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Aaron Siri
Elizabeth A. Brehm
Wendy Cox
SIRI & GLIMSTAD LLP
745 Fifth Ave.
Suite 500
New York, NY 10151
aaron@sirillp.com
ebrehm@sirillp.com
wcox@sirillp.com

Thomas B. Bruns
Counsel of Record
BRUNS CONNELL VOLLMAR & ARMSTRONG
4555 Lake Forrest Drive,
Suite 330
Cincinnati, Ohio 45202
Tel: 513/312-9890
tbruns@bcvalaw.com

Christopher D. Wiest
CHRIS WIEST ATTORNEY AT LAW, PLLC
50 East Rivercenter Blvd.
Suite 1280
Covington, KY 41011
chris@cwiestlaw.com

Zachery Gottesman
9200 Montgomery Road,
Bldg. E, Ste. 18B
Cincinnati, OH 45242

January 29, 2026