IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ISRAEL ALVARADO, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Case No.: 1:22-cv-00876-AJT-JFA**
LLOYD AUSTIN, III, *et al.*,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs, 31 Military Chaplains in each Armed Service, and 11 additional military chaplains who moved to join on August 14, 2022, *see* ECF 56, move the Court for a Preliminary Injunction to enjoin the Defendants' constitutional and statutory violations in connection with the Department of Defense's ("DoD") COVID-19 "vaccine" mandate ("DoD Mandate"), *see* Ex. 1, as set forth below and in Plaintiffs' May 18, 2022 complaint ("Compl."). *See* ECF 1.

INTRODUCTION

Plaintiffs seek to vindicate the Constitution's protection of religious liberties and "to ... Secure the Blessings of Liberty to ourselves and our posterity [.]" U.S. CONST., PREAMBLE.

Plaintiffs' First and Second Causes of Action challenge the DoD's nearly decade-long failure to implement § 533 of the 2013 National Defense Authorization Act ("NDAA") as modified by the 2014 NDAA, and willful violations thereof in connection with the DoD Mandate. Congress established specific protections in § 533(b) of Chaplains' rights to follow their conscience and faith and prohibited the specific actions Defendants have taken against them.

Plaintiffs' Third through Sixth Causes of Action challenge Military Defendants' directive or policy not to grant any religious accommodation requests ("RAR") to the DoD Mandate, without the individualized assessment required by law (the "No Accommodation Policy" or

"Categorical RA Ban"), as well as related discriminatory and retaliatory actions taken against Plaintiffs. Courts have called the RAR process "theater" and found that it likely violates the Religious Freedom Restoration Act ("RFRA") and the Free Exercise Clause. *See infra* ¶ 5. Military Defendants have also engaged in a systematic campaign of threats, intimidation and retaliation against Plaintiffs: to coerce Plaintiffs to violate their conscience; to compel Plaintiffs to "parrot" the government's position promoting vaccines and dismissing religious objections; to censor and exclude chaplains with religious objections from the RAR process or counseling service members with religious objections; that sends a clear message of overt hostility to religion and religious service members; and to establish a religious test for military service. *See infra* ¶¶ 14-15.These actions violate RFRA and the First Amendment's Free Exercise, Free Speech and Establishment Clauses, and the Constitution's Article VI No Religious Test Clause.

Plaintiffs' Seventh through Ninth Causes of Action raise claims regarding Defendants' violations of the Fifth Amendment Due Process Clause, the Administrative Procedure Act ("APA"), and the Separation of Powers. Each of the challenged agency actions—the DOD Mandate, the categorical bans on religious accommodations and pre-existing medical exemptions, and ignoring or revising pre-Mandate definitions of "vaccine" and "vaccination"—violate the U.S. Constitution, federal statutes, and/or the agency's own regulations. In taking these actions, which will result in the loss of tens or hundreds of thousands of service members, causing the Services to fall below congressionally mandated strength levels, and threatening national security, Defendants have "usurp[ed] major policy decisions properly made by Congress." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) ("*Ford*") (citation and quotation marks omitted). The Fourth Circuit has consistently found that such "major policy decisions," are justiciable, reviewable, and not due deference, even if these decisions affect only "scores" or hundreds of service members,

rather than the hundreds of thousands affected here. *See infra* ¶ 6 & Section I.A.

MILITARY CHAPLAIN PRECEDENTS ADDRESSING THESE ISSUES

Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985), rejected an Establishment Clause challenge to the Army Chaplain Corps. It held the chaplaincy was Congress' appropriate accommodation of the Establishment and Free Exercise Clauses' distinct constitutional commands. By removing soldiers "to areas where religious leaders of their persuasion and facilities were not available [the Army] could be accused of violating the Establishment Clause unless it provided them with a chaplaincy." *Katcoff*, 755 F.2d at 232 (*citing Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)). Absent a chaplaincy, the military "would deprive the soldier of his right under the Establishment Clause not to have his religion inhibited and of his right under the Free Exercise Clause to practice his freely chosen religion. *Id*. at 234. "The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here." *McDaniel v. Paty*, 435 U.S. 618, 642 (1978) (Brennan, J., concurring). The Establishment Clause's neutrality mandate demands DoD not restrict, deny or be hostile to religion. Military Defendants' Categorical RA Ban and apparent purge of those seeking accommodation is an overt Establishment violation.

In *Chaplaincy of Full Gospel Churches v. England,* 454 F.3d 290 (D.C. Cir. 2006) ("*CFGC*"), Navy chaplains sought a preliminary injunction against a Navy practice permitting Catholic clergy to stay on active duty beyond the statutory separation age of 60 by illegally transferring them to the "Retired Reserve" and then recalling them to active duty. This was a sham because these chaplains did not qualify for "retired reserve" status. The *CFGC* court found that such Establishment Clause violations also constituted irreparable harm.

> But the Establishment Clause is implicated as soon as the government engages in impermissible action. Where, as here, the charge is one of official preference of one religion over another, such governmental endorsement sends a message to nonadherents [of the favored denomination] that they are outsiders, not full

> members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

CFGC, 454 F.3d at 302. The constitutional injury "occurs merely by virtue of the government's purportedly unconstitutional policy or practice establishing a religion." *Id.* Sending the forbidden message of preference or hostility is the irreparable harm, without the need for chaplains to make any further showing. Military Defendants' actions communicate clear, forbidden messages of hostility to religion, *e.g.*, zero RAR approvals and the extraordinarily vicious and vindictive threats and punishments that would destroy these chaplains' future ministry and their families.

FACTUAL BACKGROUND

Defendants' Unlawful Vaccine Mandate

1. On July 21, 2021, in a CNN Town Hall, President Biden informed the American people that "You're not going to get COVID if you have these vaccinations."[1] On August 23, 2021, Defendant Food and Drug Administration ("FDA") approved Pfizer/BioNTech's Comirnaty, and the very next day, on August 24, 2021, Secretary Austin issued the DoD Mandate. Roughly two weeks later, on September 9, 2021, President Biden President Biden announced a series of executive orders and other vaccine mandates that would cover 100 million Americans requiring COVID vaccination as a condition for employment, education, or participation in the Nation's social or economic life. *See generally* Ex. 2, September 9, 2021 Biden Remarks.

2. On July 21, 2022, exactly one year later, a fully vaccinated and double boosted President Biden had contracted COVID. Contrary to previous statements, his spokesperson informed the American public that the President and his doctors "knew this was going to happen"

[1] *See* Jason Lemon, *Video of Biden Saying Vaccinations Prevent COVID Resurface After Infection,* Newsweek (July 21, 2022), available at: https://www.newsweek.com/joe-biden-2021-video-saying-vaccinations-prevent-covid-resurfaces-1726900 (last visited Aug. 8, 2022).

and that "at some point, everyone is going to get COVID."[2] It long been known that the mandated mRNA vaccines cannot prevent infection or transmission,[3] and at most, can reduce the severity of infections, like other COVID treatments. Former officials have similarly acknowledged that they "knew" at the time that vaccines would "not protect against infection."[4] Presumably in recognition of these facts, on August 11, 2022, the Centers for Disease Control and Prevention ("CDC") issued new guidance that no longer distinguishes between vaccinated and unvaccinated.[5]

3. The DoD and other Defendants similarly knew at the time not only that the mRNA treatments would not prevent infection or transmission, but that they were not "vaccines" at all. On September 1, 2021, one week after the issuance of the DoD Mandate, Defendants Department of Health and Human Services ("HHS") and the CDC had to change the definition of "vaccine" and "vaccination" because they (correctly) recognized that the mRNA treatments did not meet the definitions set forth in their governing statutes, regulations, and their website (the "HHS/CDC Vaccine Redefinition"). *See* Compl., ¶¶ 131-140. The mRNA treatments also cannot satisfy the DoD's own immunization regulation, *see* Ex. 6, DoD Instruction 6205.02, "DoD Immunization Program" (July 23, 2019) ("DoDI 6205.02") & ECF 41 at 2 & n.1. The DoD also eliminated,

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[2] Ex. 3, July 21, 2022 White House Press Briefing, at 16. Vice President Harris, Secretary Austin, Chairman of the Joint Chiefs of Staff Milley, Commandant of the Marine Corps Berger, and other fully vaccinated and boosted senior military officers also caught COVID. *See* Compl. ¶ 16 & n.3.

[3] *See* Ex. 4, McCullough Decl., ¶¶ 8-10; Ex. 5, Bhattacharya Decl., ¶¶ 28-32. *See also* Cory Stieg, *Dr. Fauci on CDC mask guidelines: 'We are dealing with a different virus now',* CNBC (July 28, 2021), available at: https://www.cnbc.com/2021/07/28/dr-fauci-on-why-cdc-changed-guidelines-delta-is-a-different-virus.html (last visited Aug. 8, 2022).

[4] Fox News Staff, *Dr. Deborah Birx Says She 'Knew' COVID Vaccines Would Not 'Protect Against Infection'* (July 22, 2022), available at: https://www.foxnews.com/media/dr-deborah-birx-knew-covid-vaccines-not-protect-against-infection (last visited Aug. 8, 2022).

[5] *See* CDC Press Release, *CDC Streamlines COVID-19 Guidance to Help the Public Better Protect Themselves and Understand Their Risk* (Aug. 11, 2022), available at: https://www.cdc.gov/media/releases/2022/p0811-covid-guidance.html (visited Aug. 15, 2022).

without any scientific or legal basis, pre-existing categories of medical exemptions such as natural immunity ("Categorial ME Ban"). *See* Compl., ¶¶ 250, 259 & Ex. 7, Army Regulation 40-562, "Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases" (Oct. 7, 2013) ("AR 40-562").

4. While there is much debate as to the efficacy of the mRNA treatments for the Omicron variant, the following facts are not disputed. First, no active-duty service member, whether vaccinated or not, has died from COVID since November 2021 when the Omicron variant became prevalent. *See* ECF 39-3, Rans Decl., at 12-13 & Table. Second, Defendant HHS' own data shows that the treatment for the virus has killed more service members (119), *see* Ex. 8, Dr. Teresa Long Decl. at 13, than the virus itself (96), and in a much shorter time period. *See* ECF 39-3, Rans Decl. ¶ 12. Third, Pfizer's CEO, the *New England Journal of Medicine*, and apparently Defendants acknowledge that the mandated two-dose regimen "offer[s] little, if any protection against [Omicron] infection."[6] Fourth, the military will lose hundreds or even thousands because of non-vaccination for each live lost to COVID, *see infra* Section I.A.1, but has not provided any estimate of lives saved by vaccination. Fifth, these vaccinations have "led to more than 12,000 deaths and more than 13,000 permanently disabled Americans." Ex. 4, McCullough Decl., ¶ 17.

5. President Biden's federal administrative mandates have not fared well in the courts. The five other federal mandates were quickly enjoined by the Courts.[7] Several courts have

[6] ECF 39-1, Stanley, Decl., ¶ 20. *See also New COVID-19 Vaccine That Covers Omicron 'Will Be Ready in March,' Pfizer CEO Says* Yahoo!Finance (Jan. 10, 2022) (transcript of video interview with Pfizer CEO Albert Bourla), available at: https://finance.yahoo.com/video/covid-19-vaccine-covers-omicron-144553437.html (last visited Aug. 8, 2022).

[7] *See Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661 (2022) ("*OSHA*") (enjoining OSHA mandate, which was subsequently withdrawn); *Feds for Medical Freedom v. Biden*, 2022 WL 188329 (S.D. Tex. Jan. 21, 2022) (nation-wide stay of federal employee mandate), *vacated and remanded* 30 F.4th 503 (5th Cir. Apr. 7, 2022), *reh'g en banc granted and vacated*, 2022 WL 2301458 (5th Cir. June 27, 2022) (reinstating nationwide stay); *Georgia, v. Biden*, 2021 WL

enjoined the DoD Mandate and the Categorical RA Ban,[8] including two that have issued service-wide injunctions for all members of the Air Force and Navy who have submitted RARs.[9]

6. Secretary Austin's Mandate and the other challenged agency actions may result in the loss of up to 300,000 service members.[10] They are also directly responsible for massive recruiting shortfalls, with the Army having reached only 40% of its FY22 target with less than three months left.[11] As a result, the Army will fall short of its FY22 end strength goal by up to 40,000,[12] while over 60,000 unvaccinated Army reserve and National Guard were barred from

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5779939 (S.D. Ga. Dec. 7, 2021) (nation-wide stay of federal contractor mandate); *Texas v. Becerra*, 2021 WL 6198109 (N.D. Tex. Dec. 31, 2021) & *Louisiana v. Becerra*, 2022 WL 16571 (W.D. La. Jan. 1, 2022) (staying Head Start Mandate in 25 states). The Healthcare Mandate was stayed nationwide in *Louisiana v. Becerra*, 2021 WL 5609846 (W.D. La. Nov. 30, 2021), but that injunction was dissolved and the case remanded by the Supreme Court in *Biden v. Missouri*, 142 S. Ct. 647, 654–55 (2022). The healthcare worker mandate is now back before the district court to consider constitutional challenges not addressed in the Supreme Court's decision.

[8] *See generally U.S. Navy SEALs 1-26 v. Biden*, 2022 WL 34443 (N.D. Tex. Jan. 3, 2022) ("*Navy SEALs 1-26*"), *stay denied*, 27 F.4th 346 (5th Cir. Feb. 28, 2022) ("*Navy SEALs 1-26* Stay Order"); *Navy SEAL 1 v. Austin,* 2022 WL 534459 (M.D. Fla. Feb. 18, 2022) ("*Navy SEAL 1*"), *stay denied pending appeal* No. 22-10645 (11th Cir. Mar. 30, 2022); *Air Force Officer v. Austin*, 2022 WL 468799 (M.D. Ga. Feb. 15, 2022) ("*Air Force Officer*"); *Poffenbarger v. Kendall*, 2022 WL 594810 (S.D. Oh. Feb. 28, 2022) ("*Poffenbarger*"); *Doster v. Kendall*, 2022 WL 982299 (S.D. Oh. Mar. 31, 2022) (*"Doster*").

[9] *See Navy SEALs 1–26 v. Austin*, 2022 WL 1025144 (N.D. Tex. Mar. 28, 2022) (Navy class-wide preliminary injunction), *appeal filed* No. 22-10534 (5th Cir. May 27, 2022); *Doster v. Kendall*, 2022 WL 2974733 (S.D. Ohio July 14, 2022) (Air Force class-wide PI).

[10] This includes over 7,000 who have already been discharged, at least 25,000 who have submitted religious accommodation requests, *see* Compl., ¶¶ 109 & Table 1, and nearly 270,000 service members who are partially-, but not fully-, vaccinated as of July 13, 2022. *See* DoD. *Coronavirus: DOD Response*, Table: DOD Vaccination Data, available at: https://www.defense.gov/Spotlights/Coronavirus-DoD-Response/ (last visited July 19, 2022).

[11] *See* Courtney Kube & Molly Boigon, *Every Branch of the Military is Struggling to Make its 2022 Recruiting Goals, Official Say*, NBCNews (June 27, 2022), available at: https://www.nbcnews.com/news/military/every-branch-us-military-struggling-meet-2022-recruiting-goals-officia-rcna35078 (last visited Aug. 8, 2022).

[12] *See* Opinion: Michael R. Bloomberg, *Military Recruitment Woes Endanger National Security*, Bloomberg (Aug. 8, 2022) (the Army "could end [FY22] with as few as 445,000 troops, nearly 40,000 smaller than the force size authorized by Congress."), available at:

service or being paid effective July 1, 2022.[13] The losses of current personnel and future recruits due to these policies are so great that they pose a "long-term threat to the all-volunteer force."[14]

Defendants' Systematic Violations of Service Members' Religious Liberties

7. Plaintiffs' Complaint describes Military Defendants' nearly decade-long failure to implement § 533 and Congress' repeated directives requiring DoD leadership to implement in DoD regulations, training, and policies the statutory protections and rights of chaplains and military personnel to exercise their conscience and faith. Compl., ¶¶ 77-93. The 2018 NDAA specifically explained Congress' intent "to recognize the importance of protecting the rights of conscience of members of the Armed Forces," and it provided specific guidance to the Secretary that compliance with § 533 "requires an intentional strategy for developing and implementing a comprehensive training program on religious liberty issues … at all levels of command," and it urged DOD to develop such training "in consultation with the chief of chaplains" for each Armed Service. ECF 1-6, 2018 NDAA Senate Committee Report, at 149-150.

8. On September 1, 2020, more than seven years after § 533's passage, DoD issued DoD Instruction 1300.17, "Religious Liberty in the Military Services" ("DoDI 1300.17"). *See* ECF 1-4. DoDI 1300.17 recites part of the statutory language. *Compare* §§ 533(a)-(b) *with* DoDI 1300.17, ¶¶ 1.2(b)-(c). But DoDI 1300.17 does not mention, much less prohibit, the specific

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https://www.bloomberg.com/opinion/articles/2022-08-08/us-military-has-a-recruitment-and-retention-problem-here-s-how-to-fix-it (last visited Aug. 8, 2022).

[13] *See* Allie Griffin, *Army Bars More Than 60K National Guards, Reservists from Service, Cutting Off Pay*, NY Post (July 8, 2022), available at: https://nypost.com/2022/07/08/army-cuts-pay-from-over-60k-unvaccinated-national-guard-reserves/ (last visited Aug. 8, 2022).

[14] Tom Jurkowsky, *The Military Has a Serious Recruiting Problem – Congress Must Fix it*, The Hill (June 21, 2022) (*quoting* Sen. Thom Tillis (R-N.C.)), available at: https://thehill.com/opinion/national-security/3527921-the-military-has-a-serious-recruiting-problem-congress-must-fix-it/ (last visited July 17, 2022). *See also supra* note 11, Kube & Boigon ("2022 is the year we question the sustainability of the all-volunteer force").

retaliatory personnel actions against chaplains § 533 expressly forbids. Rather than develop "an intentional strategy for developing and implementing a comprehensive training program" as the 2018 NDAA specifically directed, the Secretary delegated to the Service Secretaries with no instruction or guidance, "training concerning religious liberty". *See id.*, ¶ 2.3(7) (Responsibilities).

9. Publishing DoDI 1300.17 with parts of § 533's language does not ensure DoD, its leadership and personnel know or understand "religious liberty," a phrase appearing only in 1300.17's title. Defendants' uniform refusal to grant any RARs while ignoring 1300.17's RAR process and retaliating against Plaintiffs show they are in fact overtly hostile to religious liberty and service members' free exercise of religion. *See generally* Compl., ¶¶ 94-107 & ¶¶ 108-114.

10. DoD established the No Accommodation Policy, or Categorical RA Ban, implemented by each of the Armed Services. The Service Secretaries appear to have directly ordered their chain of commands not to approve any accommodations. *See* Compl., ¶¶ 97-101 (directives from Air Force Secretary and Chief of Army Chaplain Corps). The Navy (whose chaplains also serve the Marine Corps and Coast Guard) has adopted a process that does not even permit the possibility of approval. *See* Ex. 9, *Navy SEALs 1-26* Whistleblower Decl.

11. Each of the Services adopted new rules and centralized procedures for RARs to designate as the approval and final appeal authorities the most senior military officials, three-star or four-star flag officers who in most cases report directly to the Service Secretary.[15] As a result

[15] *See* ECF 39-4, ¶ 18 (the Surgeon General of the U.S. Army, (three-star) Lieutenant General R. Scott Dingle is the "only approval or disapproval authority" for Army RARs, and "the Assistant Secretary of the Army for Manpower and Reserve Affairs … is the final appeal authority"); ECF 39-5, ¶ 12.b (for the Navy, the approval authority is the Deputy of Chief of Naval Operations and the final appeal authority is the Chief of Naval Operations, (four-star) Admiral Michael Gilday); ECF 39-7, ¶ 15 (for the Marine Corps, the approval authority is the Deputy Commandant, Manpower, and Reserve Affairs, (three-star) Lieutenant General David Ottignon, and the appeal authority is Commandant of the Marine Corps, (four-star) General David Berger); 39-13, ¶¶ 13 & 16 (for the Air Force the approval authority is the MAJCOM commander, a three-star Lieutenant

of these express directives and centralized procedures, none of the tens of thousands of RARs have been granted, while the handful of approved RARs are in fact administrative exemptions granted where the requester was already programed for retirement or separation.[16]

Defendants' Violations of Plaintiffs' Religious Liberties and Retaliation Against Them

12. At least seven Plaintiffs have had their RAR appeals denied, and a majority (at least 17 of 31) have had their initial RARs denied, all by form letters that are nearly identical to those received by every other member of the Armed Service in question. *See* Compl., ¶¶ 121-122.

13. Exhibit 10 is a table summarizing the Defendants' violations of § 533 with respect to each Plaintiff, *i.e.,* religious discrimination and "denial of promotion, schooling, training, of assignment on the basis of the refusal by the chaplain to comply [with the vaccine mandate]" specifically prohibited by § 533. Exhibit 11 includes a table summarizing other First Amendment violations and irreparable harms to Plaintiffs.

14. Nearly all Plaintiffs describe a pervasive, hostile environment created by Defendants intended to isolate, ostracize, stigmatize, and humiliate Plaintiffs and others with religious objections to the vaccination.[17] Plaintiffs have been punished for and prohibited from performing their duties to minister to service members in accordance with their faith, conscience,

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General or four-star General, and the final appeal authority is the Air Force Surgeon General, (three-star) Lieutenant General Dorothy Hogg).

[16] *See* Compl., ¶ 109 n.7 & Table 1 & ECF 45, July 25, 2022 Hearing Trans. At 38:13-15 (Defendants' counsel acknowledging that "a great many of those" whose RAs were granted "are in one way or another preparing to leave the service.").

[17] *See generally* Ex. 11; *see also* ECF 1-2, Hirko Decl., ¶ 12 (all unvaccinated soldiers removed from training "at the last minute for maximum embarrassment and coercion," and leaving his unit without a chaplain), ECF 1-3 ("senior members of the chaplain corps revel in … the harsh and abusive measures to be taken against 'refusers'" and that these measures would deter service members from submitting them "so the chaplain corps would have less work to process the requests.").

and vocation—which for chaplains is the free exercise of their religion—when they were directed to discourage or dissuade service members not to submit RARs; were removed from religious review teams ("RRTs"); and prohibited from conducting RARs reviews. Plaintiff chaplains suffered other forms of retaliation and adverse actions merely for submitting an RAR or even expressing their own religious objections; expressing sympathy for other with such objections; or advising service members of their rights to seek religious accommodations.[18] Plaintiffs' chain of command consistently drove home the message that no RARs would be granted (or if they were that the service member would be discharged).[19]

15. Defendants have also attempted to coerce and coopt chaplains to be complicit in these constitutional violations—"weaponiz[ing] the Chaplain Corps against its own core function," ECF 56-10, Schrader Decl., ¶ 17—by giving them "script[s]" for interviews to dismiss service members' religious objections;[20] to "parrot" the government-endorsed position, *see* ECF 1-3, Schnetz Decl., ¶ 18; and to convince them their sincerely held religious objections are instead political, not religious in nature, insincere or invalid.[21]

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[18] *See* Compl. ¶¶ 103 & 117; Ex. 11 (Plaintiffs Fussell, Gentilhomme, Nelson & Schnetz removed from RAR process); ECF 1-2, Brown Decl., ¶ 15 (reprimanded for assisting service members with RARs); ECF 1-3, Cox Decl., ¶ 32 (removed from position and put on unpaid status on October 1, 2021, after expressing religious objections).

[19] *See, e.g.,* ECF 1-2, Brown Decl., ¶ 15 ("It has been disheartening to hear from Command and Chaplain leadership that none of the religious accommodations will be approved and even they were that we would still be discharge from service."); ECF 1-3, Young Decl., ¶ 18.v (informed that his RAR "would certainly result in failure, *i.e.*, expulsion from the military," and that the RAR process was "intended to achieve 100% compliance," *i.e.*, no religious exemptions).

[20] *See, e.g.,* ECF 1-3, Young Decl., ¶ 18.s ("From the high level of the branch, chaplains were coached and resourced from a pro-vaccine viewpoint on how to combat potential vaccine 'refusers'" and describing the "scripted" interview process they were ordered to conduct).

[21] *See* ECF 1-2, Brown Decl., ¶ 16; ECF 1-3, Schnetz Decl., ¶ 18 (command chaplain informed him that "it was my responsibility to assuage any religious concerns that Solider might have to receiving the vaccine"); ECF 56-10, Schrader Decl., ¶ 17.

16. All Plaintiffs face adverse employment or disciplinary actions, up to and including separation, discharge for "misconduct," court martial, loss of postseparation veterans' benefits, and permanent damage to their reputation and employment prospects resulting from less than a full "honorable" discharge. In the meantime, they are non-deployable; have been removed from leadership positions; received one or more letters of reprimand; and prohibited from travel, training, permanent change of station ("PCS"), promotion, and new assignments.[22] Plaintiffs' discharge status will result in denial of VA benefits and the loss of medical care for dependents ongoing lifesaving medical treatment. They have faced these adverse actions even while their RAR was pending, and in many cases because they submitted RARs. Despite the unconstitutional and unconscionable treatment by Defendants, Plaintiffs have performed their duties with the highest degree of professionalism, and they ask only that they be permitted to serve their country.

STANDARD OF REVIEW

To obtain a preliminary injunction, a plaintiff must show that:

> [1] It will likely succeed on the merits; [2] It is likely to suffer irreparable harm absent preliminary relief; [3] The balance of equities tips in its favor; and [4] An injunction is in the public interest.

Centro Tepeyac v. Montgomery Cty., 722 F.3d 184, 188 (4th Cir. 2013) (en banc).

Satisfying the first element is dispositive for the other factors when First Amendment values are at issue. An allegation of a Free Exercise or Establishment Clause violation satisfies the

[22] *See* Compl., ¶¶ 142-143 & Ex. 10. The travel and training restrictions have prevented Plaintiffs Henderson, Lee and Nelson from attending their Chaplain Endorser-mandated conferences. This is not only a violation of Service regulations, but it prevents them from performing their current ministry duties, training to maintain qualifications for their current positions, and/or remaining an approved Chaplain. Due to their vaccination status, all Plaintiffs are prevented from PCS and taking new assignments, leaving them and their families in a state of limbo. Plaintiffs Pak, Shour, and Troyer, Plaintiffs and their families were stranded outside the United States without the ability to return home.

irreparable injury criteria for an injunction. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct 63, 67 (2020) ("*Cuomo*"); *see also Committee for Public Education v. Nyquist,* 413 U.S. 756, 794 (1973) (courts must carefully examine any practice "challenged on establishment grounds with a view to ascertaining whether [the practice] furthers any of the evils against which that Clause protects."). This applies equally to violations of statutes that enforce First Amendment freedoms like RFRA, *see Navy SEAL 1-26*, 2022 WL 34443, at * 13 (citation omitted), and § 533. The Defendants' expression of overt hostility to religion also establishes irreparable harm. *CFGC*, 454 F.3d at 302.

The Complaint, Plaintiffs' Declarations, and this Motion describe a range of conduct that violates one or more provisions of the First Amendment, as implemented through RFRA and Section 533, including Defendants' Categorical RA Ban and creation of a "sham" RAR process; systematic hostility to religion; compelled speech supporting government policy and censorship and suppression of religious expression; and their campaign of threats, intimidation and retaliation against Plaintiffs and other service members with religious objections. Once Plaintiffs have shown *prima facie* violations of RFRA and the First Amendment, strict scrutiny is triggered and the burden of proof shifts to the government. *See, e.g., O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) ("*O Centro*") (RFRA and Free Exercise clause); *County of Allegheny v. ACLU*, 492 U.S. 573, 608-09 (1989) ("*Allegheny*") (Establishment Clause). Because § 533 prohibits governmental conduct analogous to that prohibited by the Free Exercise and Establishment Clauses, the Court should apply the same strict scrutiny analysis.

The No Religious Test Clause prohibits not only oaths, but government actions that "establish[] a religious classification" that imposes "a test for office based on religious conviction

as one based on denominational preference." *McDaniel,* 435 U.S. at 632 (Brennan, J., concurring). Such tests are "absolutely prohibited," *id*.; once the Court determines that the government has imposed a religious test, then such a test must be found unlawful without the need for any further scrutiny. *Accord Torcaso v. Watkins*, 367 U.S. 488, 494 (1961) ("*Torcaso*").

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION.

A. The Challenged Actions Are "Major Policy Decisions."

Plaintiffs challenge a series of discrete, final, coordinated and unlawful agency actions by Defendants[23] to enable the illegal, *ultra vires* mandates and to discipline and discharge Plaintiffs and hundreds of thousands of other service members. Each challenged action is at a minimum a "major policy decision," rather than a routine, "day-to-day" exercise of agency discretion, enforcement decisions, or "personnel management decisions." *Nat'l Treasury Employees Union v. Horner*, 854 F.2d 490, 496 (D.C. Cir. 1988).[24]

The Military Defendants' actions apply without exception or individualized assessment to over two million service members, as well as hundreds of thousands of DoD civilian employees. These policies substantially modify the terms of eligibility for enlistment, retention, deployment, promotion, completing an existing term of service, and disciplinary rules. These actions have

[23] The Complaint challenges the following agency major policy decisions: (1) the DoD Mandate; (2) the No Accommodation Policy or Categorical RA Ban; (3) Categorical ME Ban; (4) § 533 Non-Implementation; and (5) the HHS/CDC Vaccine Redefinition.

[24] Each of these actions also violates the "Major Questions" doctrine insofar as they directly impose, or intentionally enable, a federal vaccine mandate, without express statutory authorization. Federal vaccine mandates are "major questions" because they impact the lives and livelihoods of millions and impose billions of dollars in costs. *See, e.g., OSHA*, 142 S.Ct. at 668 (2022) (Gorsuch, J., concurring) (OSHA Mandate); *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021) ("*BST*") (same); *Kentucky v. Biden*, 23 F.4th 585, 607-608 (6th Cir. 2022) (federal contractor mandate).

resulted in the discharge of several thousand; may result in the loss of up to 300,000 service members; and caused massive recruiting shortfalls and the Services to fall short Congressionally mandated strength levels by tens of thousands. *See supra* ¶ 7. Each DOD action easily meets the requirement for a justiciable and reviewable "major policy decision," which need only affect "scores" or hundreds,[25] rather than an unreviewable individual personnel or enforcement action.[26]

The Supreme Court has recently and repeatedly struck down agency rules, and denied agencies deference, where they acted in seeking to enact "public health" measures using emergency authorities,[27] where "the agency has no comparative expertise." *EPA*, 142 S.Ct. at 2613 (*quoting Kisor v. Wilkie*, 139 S.Ct. 2400, 2417 (2019)). The DoD Mandate, and the other challenged agency actions, are just one part of the Biden Administration's efforts to impose near-

[25] *See, e.g., Harrison v. Austin*, 2022 WL 1183767, at *11 (E.D. Va. Apr. 6, 2022) ("*Harrison*") (rejecting justiciability, reviewability, and military deference arguments and finding that DoD deployment policy for HIV-positive service members based on "major policy decisions" doctrine). This Court and the Fourth Circuit have enjoined and treated as "major policy decisions" categorical bans affecting HIV positive service members who accounted for only 0.027% of active-duty service members (a few hundred at most). *See Roe v. Shanahan*, 359 F.Supp.3d 382, 421 (E.D. Va. 2019) ("*Roe I*"), *aff'd sub nom.*, *Roe v. Dept. of Defense*, 947 F.3d 207 (4th Cir. 2020) ("*Roe II*"). The Fourth Circuit followed the D.C. Circuit in enjoining the military's transgender ban and refusing to grant deference for "major personnel policy changes," *Stone v. Trump*, 280 F.Supp.3d 747 (D. Md. 2017) ("*Stone I*"), *stay denied pending appeal* 2017 WL 9732004 (4th Cir. Dec. 21, 2017), that affected only "scores of individuals." *Doe 1 v. Trump*, 275 F.Supp.3d 167, 206 (D.D.C. 2017) ("*Doe 1*"), *stay denied pending appeal* 2017 WL 6553389 (D.C. Cir. Dec. 22, 2017).

[26] The challenged HHS/CDC actions also meet these requirements. Neither agency may directly impose a vaccine mandate. But the DOD Mandate—and the five other federal vaccine mandates announced by President Biden within two weeks each other—relied on the HHS/CDC action to impose unlawful mandates on nearly 100 million Americans.

[27] The Supreme Court summarized these cases and the criteria it applies in *W. Va. v. EPA*, 142 S.Ct. 2587, 2608 (2022) ("*EPA*") (*discussing OSHA*, 142 S.Ct. 661 (staying OSHA Mandate because it was a "broad public health regulation") & *Alabama Assn. of Realtors v. HHS*, 141 S.Ct. 2485 (2021) (striking down CDC rent moratorium)). Deference also is not due where Congress has repeatedly debated the matter in question yet declined to take action on the matter. *See EPA*, 142 S.Ct. 2614. Congress has spent trillions of dollars and passed several pieces of major legislation to address COVID-19, but has declined to impose any federal vaccine mandates.

universal federal vaccine mandates, *see supra* ¶ 5, and as such is part of a "broad public health regulation" beyond the DoD's comparative expertise.

1. The Challenged Actions Exceed Agency Authority and Violate the U.S. Constitution, Federal Statutes and/or Agency Regulations.

Congress has "plenary authority" "'To raise and support Armies'; 'To provide and maintain a Navy'; "and 'To make Rules for the Government and Regulation of the land and naval Forces.'" *Chappell v. Wallace*, 462 U.S. 296, 301, 103 S.Ct. 2362 (1982) (*quoting* U.S. Const. Art. I, § 8, cls. 12-14). This includes the authority to regulate who may, or must, serve, and to set the conditions of eligibility for service, accession, and retention. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57, 101 S.Ct. 2646 (1981). While the "primary business" of the Armed Forces is "to fight or be ready to fight wars," "the responsibility for determining how best [they] shall attend to that business rests with Congress" and the President. *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975) (citations and quotations marks omitted).

Thus, "major policy decisions" affecting strength levels and the ability of the military to fight wars are to be made by Congress and the President acting together, and no deference is due to an agency—even the DOD—where it "attempt[s] to usurp major policy decisions properly made by Congress." *Ford,* 441 U.S. at 497. While Congress has undoubtedly granted Secretary Austin and Secretary Mayorkas the authority to enact measures regarding the health and welfare of military personnel, it has not precluded judicial review of those measures, nor has it authorized them to violate the Constitution, express federal statutory prohibitions, or their own regulations in implementing such measures. Nor has it delegated the authority to major new policies to purge tens or hundreds of thousands with religious objections.[28]

[28] The same applies to the HHS/CDC Vaccine Redefinition that was adopted without any legal basis, public notice or comment, or any public explanation at all. It was only through a FOIA request that the agencies' rationale was revealed: the public had recognized that the pre-September

2. No Deference For Categorical Bans Imposed without Deliberation or Exercise of Military Judgment or Discretion.

Deference to military judgment or discretion, or to agency expertise more generally, is due only where the agency actually applied its discretion and went through a deliberative process in adopting the policy or rule. Here, as in the case of the Military HIV+ and Transgender Bans, these decisions were made "without any of the formality or deliberative processes that generally accompany the development and pronouncement of major policy changes that will gravely affect the lives of many Americans." *Doe 1*, 275 F.Supp.3d at 213. The "level of deference," if any, due to the military in such cases is based on the extent to which the decisions and policies are "support[ed]" by the record, *Stone II*, 400 F.Supp.3d at 351, and an underlying deliberative process.[29] There is no record evidence demonstrating any deliberative process at all.

Categorical bans like those for RARs and MEs are unlawful on their face where the relevant statute and/or regulations require individualized assessment of the exemption request and the service members fitness for service. RFRA and DoDI 1300.17 require individualized assessments of RARs, while AR 40-562 requires individualized assessment of medical exemptions. Moreover, no deference to military judgment or discretion can be given because the categorical ban precludes the exercise of such discretion. *See, e.g., Roe I*, 359 F.Supp.3d at 406; *Roe II*, 947 F.3d at 218. They are also particularly disfavored when based on arbitrary criteria, animus, or "obsolete" scientific evidence or assumptions. *See infra* Section II.D. These categorical bans were adopted

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2021 definitions of "vaccine" and "vaccination" did not cover the cover Pfizer/BioNTech and Moderna mRNA gene therapies and the agencies had to radically change these definitions to cover these products and to implement the vaccine mandates. *See* Compl. ¶¶ 131-140 & ECF 1-8.

[29] *See also Doe 2 v. Shanahan*, 917 F.3d 694, 704 (D.C. Cir. 2019) (Wilkins, J. concurring) (review of military policy considers "whether the policy was motivated by animus, … what military purposes are furthered by the policy, whether those purposes are legitimate, and whether … the Executive used considered professional judgment and accommodated the servicemembers' rights in a reasonable and evenhanded manner").

based on overt hostility to religion and an obsolete vaccine based on obsolete understanding that the vaccines could prevent infection and transmission. *See supra* ¶¶ 2-4.[30]

B. Plaintiffs' Claims Are Justiciable and Satisfy the *Mindes v. Seaman* Tests.

The Supreme Court has repeatedly and emphatically rejected Defendants' "military nonjusticiability" argument. *See* ECF 39 at 16.

> [I]t is the function of the courts to make sure … that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander. ... A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution and engrossed by Congress in our Public Laws.

Winters v. United States, 89 S. Ct. 57, 59–60 (1968).[31] Congress has rejected this argument as well. RFRA expressly grants a "person whose religious exercise has been burdened in violation of" RFRA the right to "assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the government." 42 U.S.C. § 2000bb-1(c).[32]

To date, at least five U.S. District Courts have found that RFRA and Free Exercise Claims similar to Plaintiffs' satisfy the two-tier tests for justiciability set forth in *Mindes v. Seaman*, 453

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[30] With respect to deference, they also suffer from a further problem, namely, that the Military Defendants have denied that there are any categorical bans and that service members do in fact receive the individualized assessment required by RFRA and their own regulations (*i.e.*, DODI 1300.17 and AR 40-562). But there can be no deference to agency expertise or discretion, nor to the agency's deliberative process, where the agency itself denies the existence of the policy.

[31] *See also Emory v. Secretary of Navy*, 819 F.2d 291, 294 (D.C. Cir.1987) ("The military has not been exempted from constitutional provisions that protect the rights of individuals. It is precisely the role of the courts to determine whether those rights have been violated.")(citation omitted); *Matlovich v. Sec'y of the Air Force*, 591 F.2d 852, 859 (D.C. Cir. 1978) ("It is established, of course, that the federal courts have the power and the duty to inquire whether a military discharge was properly issued under the Constitution.");

[32] With respect to Plaintiffs' APA claim, the APA does not impose any exhaustion requirement, and instead "incorporates exhaustion requirements established by statute or agency rule." *Standage*, 526 F.Supp.3d at 84 (*discussing Darby v. Cisneros*, 509 U.S. 137 (1993) ("*Darby*")). Further, there is "no military exception to *Darby*." *Id.* (citations and quotations marks omitted).

F.2d 197, 201 (5th Cir. 1971) ("*Mindes*") (*i.e.*, exhaustion or exemption therefrom and the four-factor test). *See supra* notes 8-9. RFRA "sets the standards binding every department of the United States", and "[i]t undoubtedly applies in the military context." *Navy Seals 1-26* Stay Order, 27 F.4th at 346 (citation and quotation marks omitted). Plaintiffs' Establishment and No Religious Test Clause claims are also justiciable and do not require administrative exhaustion.[33] In any case, there are no specific administrative procedures to bring an Establishment Clause claim, nor are there any military administrative bodies that can adjudicate or remedy such claims.[34]

1. Plaintiffs Have Exhausted Military Remedies and Qualify for Exemption from Exhaustion.

Each Plaintiff has pursued military remedies and submitted an RAR, most of which (17 of 31) have been denied. To date, at least seven have had their appeals denied as well (namely, Plaintiffs Alvarado, Barfield, Brobst, Gentilhomme, Henderson, Jackson, and Layfield). *See* Compl., ¶ 120. Plaintiffs pursuit and exhaustion of the RAR process easily meet the *Mindes* and any other applicable exhaustion requirement, as several courts have found. *See, e.g., Air Force Officer*, 2022 WL 468799, at *6; *Poffenbarger*, 2022 WL 594810, at *9. The concerns underlying this judicially-created exhaustion doctrine "are diminished to a vanishing point in this case," *Roe*

[33] *See, e.g., CFGC*, 454 F.3d at 295 (listing over a dozen cases where military chaplains raised Establishment Clause claims deemed justiciable); *Adair v. England*, 183 F.Supp.2d 31, 55 (D.D.C. 2002) (no exhaustion requirement for military chaplain's Establishment Clause claims); *Laird v. Anderson*, 466 F.2d 283, 284 (D.C. Cir. 1972) *cert. denied*, 409 U.S. 1076 (1972) (permitting review of No Religious Test Clause claim without exhaustion requirement).

[34] The same analysis applies to Plaintiffs' § 533 claims, as § 533 enforces and reinforces military chaplains' rights under the Free Exercise and Establishment Clauses. Defendants' failure to implement § 533 and their defiance of Congressional directives to do so is the foundation for Plaintiffs' § 533 and other religious liberty claims. *See* Compl., ¶¶ 180-188 (Second Cause of Action). If the DoD had complied with, rather than defied, Congress' commands in § 533, there would have been administrative avenues to vindicate these rights, and if it complied with Congress' training directives, these violations might not have occurred at all. Military Defendants cannot rely on their own failure to fulfill their statutory duties to avoid judicial review.

I, 359 F.Supp.3d at 402, because Plaintiffs' RARs were addressed through a "complex, tiered administrative review process," "culminating in an extensive administrative record and final written decisions" reviewed and approved by senior leadership acting as "the final appeal authority," *id.*, either a three-star or four-star flag officer and/or Assistant Secretary who report directly to the Service Secretary in question. *See supra* ¶ 11 & n. 16.

To the extent that any Plaintiffs or other class members are deemed not to have exhausted military remedies, they should be excused therefrom on multiple grounds.[35] The administrative procedure available (namely, the RAR process) is both futile and inadequate "theater." *Navy SEALs 1-26*, 2022 WL 34443, at *1; *Air Force Officer*, 2022 WL 468799, at *1. The outcome (denial) is "pre-determined." *Navy SEALs 1-26*, at *6 (*quoting McCarthy v. Madigan*, 503 U.S. 140, 148 (1992)). This is demonstrated by Defendants' own data demonstrating that no RARs have been granted (or less than 1% if administrative exemptions are included).[36] The Air Force and Navy appear to have directly ordered their chains of command not to approve any RARs, *see* Compl., ¶¶ 97-101, while the Navy (whose chaplains also serve the Marine Corps and Coast Guard) has adopted a process that does not even permit the possibility of approval. *See Navy SEALs 1-26*, at *6 & Ex. 9, *Navy SEALs 1-26* Whistleblower Affidavit, at 2-4. Where, as here, "[t]he record all but compels the conclusion that the military process will deny relief, exhaustion is

[35] The four exhaustion exemptions are: (1) futility; (2) inadequacy; (3) irreparable harm if review is denied; (4) request raises "substantial constitutional questions. *See Navy SEALs 1-26*, at *6 (*discussing Von Hoffburg v. Alexander*, 615 F.2d 633, 638-40 (5th Cir. 1980)). The third and fourth exhaustion exemptions are largely identical to the second and first *Mindes* criteria, respectively. Plaintiffs qualify for these exemptions that are discussed in the following sub-section.

[36] *See* Compl., ¶ 109 & Table 1 (five out of 25,000 initial RARs granted); ECF 41 at 10 & Table (178 out of nearly 25,000 initial RARs granted or less than 1% of RARs granted). Further, no one has received a religious accommodation and been permitted to remain in the service; the approvals that have been granted are in fact administrative exemptions for service members at the end of their term of service. *See* Compl., ¶ 110 & n.7 & *supra* ¶ 10.

inapposite and unnecessary." *Navy SEALs 1-26*, at *5 (citation and internal quotation omitted); *see also Roe I*, 359 F.Supp.3d at 403 (remedies are futile when no exemptions actually granted).

Military Defendants have erroneously claimed that service members must exhaust remedies up to and through the applicable Board of Correction of Military Records ("BCMR"). *See* ECF 36 at 15-16. BCMRs may "interpret the content and effect of military regulations and decide whether [a] military tribunal's decision was in error or unjust," but "it cannot adjudicate a claim that the [Armed Service's] policies and regulations *themselves* are unconstitutional or otherwise unlawful."[37] Of equal importance, BCMR decisions are merely recommendations to the Service Secretaries executing Secretary Austin's Categorical RA Ban and may disregard or overrule the BCMR's recommendation.[38] The final appeal authorities whose decisions the BCMRs are reviewing are three-star or four-star flag officers who report directly to the Service Secretary. *See supra* ¶ 11. "Nothing suggests that the [BCMRs] would depart from the conclusions" of the Service Secretaries or other senior decisionmakers "and conclude that [their] determinations contained an 'error' to 'correct' or an 'injustice' to 'remove.'" *Roe I*, 359 F.Supp.3d at 403. Accordingly, exhaustion does not require a further appeal to a BCMR before seeking relief in federal court. *Roe I*, 359 F.Supp.3d at 404; *see also Standage*, 526 F.Supp.3d at 84 (same).

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[37] *Roe I*, 359 F.Supp.3d at 403 (citations and quotation marks omitted)(emphasis in original); *see also Adair*, 183 F. Supp. 2d at 55 ("resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board.")(citation omitted); *May v. Gray*, 708 F.Supp. 716, 719 (E.D.N.C. 1988) (appeal to BCMR not required for constitutional challenge because it was "undisputed that the [BCMR] is not … empowered" to rule on constitutionality of an Army regulation or to change an unconstitutional regulation).

[38] *See* 10 U.S.C. § 552(a)(1) ("The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department."). *See also Hodges v. Callaway*, 499 F.2d, 423 (5th Cir. 1974) ("the Service Secretary ***always*** has the final say over decisions by … the BCMR[.]") (emphasis added).

2. Plaintiffs Satisfy the Four *Mindes* Factors.

First, review is favored where, as here, Plaintiffs raise constitutional claims "founded on infringement of specific constitutional rights," such as those found in the First Amendment and Fifth Amendment, *Navy SEALs 1-26,* at *7 (citation omitted), or statutes like RFRA and § 533 that enforce those rights. Plaintiffs' statutory and constitutional claims are strong. Several courts have found similar RFRA and Free Exercise claims to have a substantial likelihood of success and to satisfy *Mindes* for that reason. *See supra* note 8. Plaintiffs demonstrate that their other religious liberty claims are strong, *see infra* Section II, though they only need to make this showing for one to satisfy *Mindes'* first factor. *See, e.g., Air Force Officer*, 2022 WL 468799, at *7.[39]

Second, Plaintiffs face irreparable harm from the infringement of their rights under the First Amendment, and the violations of the statutory schemes for enforcing those rights in § 533 and RFRA. *See infra* Section III; *see also* Ex. 10 (§ 533 Injuries) & Ex. 11 (First Amendment injuries). In addition to the presumptively irreparable harms from the loss of these fundamental rights, *see Elrod v. Burns*, 427 U.S. 347, 374 (1976) ("*Elrod*"), they face harm from loss of careers; veterans benefits; medical coverage; for some retirement eligibility; severe trouble in finding civilian employment consistent with their calling and training; and severe family disruptions. They are already experiencing injuries and harm from the very practices § 533 prohibits. *See supra* ¶¶ 13-16. Several Plaintiffs have suffered injury because they submitted" RARs, namely, duty and ministry restrictions, reassignment, and exclusion from RRT and RAR interview. *See supra* ¶ 14. "[W]ithholding judicial review is particularly illogical when participation in the administrative

[39] Review is also favored where Plaintiffs raise "far-reaching" challenges to generally applicable regulations that threaten to categorically exclude a substantial number of similarly situated class members "who wish to serve their country," but are "being irrationally and arbitrarily swept from the ranks." *Roe I*, 359 F.Supp.3d at 406.

process invites the very harm Plaintiffs seek to avoid." *Navy SEALs 1-26*, at *8.

Third, judicial review would not interfere with military functions. Plaintiffs' claims largely seek to require DoD to follow its own regulations and "stated policies and make nonarbitrary, individualized determinations about each service members fitness for service." *Roe II*, 947 F.3d at 218. "Requiring the military to follow its own policies does not interfere with its functions." *Id.* Moreover, it is "illogical to … argue, that Plaintiff[s'] religious based refusal to take a COVID-19 vaccine would 'seriously impede' military function," when Defendants have permitted thousands of "other service members still on duty who are just as unvaccinated as" Plaintiffs. *Air Force Officer*, at *7 (*quoting Mindes*, 453 F.2d at 201); *infra* Section II.A.1 (20,000 secular exemptions).

Fourth, the constitutional issues in this case do not implicate military expertise or discretion. Whether the Categorical RA Ban "can withstand strict scrutiny doesn't require military judgment. … Such an issue is purely a legal matter" appropriate for judicial review. *Air Force Officer*, at * 8 (*quoting Mindes*, 453 F.2d at 201). By adopting the Categorical RA and ME Bans, the DOD "declin[ed] to make individualized determinations regarding servicemembers' fitness for service," and thereby "failed to apply its expertise to the evidence before it. And the military cannot claim that a failure to follow its own written policies is discretionary." *Roe II*, 947 F.3d at 218.

C. Defendants' Actions Are Reviewable.

Exceptions to judicial review are "very narrow" and "reserved for those rare instances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Weyerhauser Co. v. U.S. Fish and Wildlife Servs.*, 139 S. Ct. 361, 370 (2018) (citation and quotation marks omitted). The Defendants' actions are reviewable because they are "high-level policy decisions made far from the field of battle." *Harrison*, 2022 WL 1183767, at *12 (citation and quotation marks omitted). In fact, the DoD's

actions are not uniquely military in nature at all and instead were a relatively small part of the Biden Administration's illegal federal vaccine mandates. *See supra* ¶ 5.

Plaintiffs allege that the Military Defendants violated RFRA, § 533, and their own regulations, each of which "provide a standard by which to review [their] conduct." *Deese v. Esper*, 483 F.Supp.3d 290, 309 (D. Md. 2020) ("*Deese*"). Courts have had no difficulty in applying RFRA's standards to the military. *See supra* ¶ 5 & nn. 8-9. Similarly, Plaintiffs allege that Military Defendants violated their own regulations, in particular: (1) the Categorical RA Ban violates DoDI 1300.17, which implements RFRA and requires individualized assessments of RARs; (2) the DoD Mandate violates DoDI 6205.02, which governs immunizations and defines "vaccine" and "vaccinations" in a manner that excludes the mRNA gene therapies from being treated as vaccines; and (3) the Categorical ME Ban violates AR 40-562, which governs medical exemptions and requires individualized assessments. Each regulation provides clear standards for review.

D. Plaintiffs Have Standing.

1. Article III Standing

Plaintiffs have: (i) "concrete and particularized and actual and imminent" injuries, *Spokeo, Inc. v. Robbins*, 578 U.S. 330, 339 (2016) (citations and internal quotation marks omitted), that are (ii) "fairly traceable to the challenged conduct of" Defendants and (iii) that are "likely to be redressed by favorable judicial decision." *Spokeo*, 578 U.S. at 338 (citations omitted). Courts have routinely found that service members have standing to challenge new vaccine mandates applicable to them, both against the DoD and civilian agencies like the FDA and HHS that enabled the mandate.[40] The latter two elements, traceability and redressability, normally "overlap as two sides

[40] *See generally John Doe No. 1 v. Rumsfeld*, 297 F. Supp. 2d 119, 135 (D.D.C. 2003) ("*Rumsfeld I*"), *modified sub nom. John Doe No. 1 v Rumsfeld*, 341 F. Supp. 2d 1 (D.D.C. 2004) ("*Rumsfeld II*"), *modified sub nom. John Doe No. 1 v. Rumsfeld*, 2005 WL 774857 (D.D.C. Feb. 6, 2005)

of the causation coin." *Dynalantic Corp. v. DoD*, 115 F.3d 1012, 1017 (D.C. Cir. 1997). Where, as here, the plaintiff "is the object of the challenged agency action, there is usually little doubt of causation." *Teva Pharmaceuticals USA, Inc. v. FDA*, 514 F.Supp.3d 66, 91 (D.D.C. 2020) ("*Teva*"). Plaintiffs' injuries are directly traceable to the actions of the Defendants in adopting or enabling the DoD Mandate and would be redressed by the relief sought in this Motion.

"The Supreme Court has explained that standing requirements are somewhat relaxed in First Amendment cases," *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013), where plaintiffs need not "risk punishment" by breaking the rule and instead need only show the "danger of chilling" "protected [First Amendment] activity." *Id.* (citation omitted). Plaintiffs here have directly challenged the directives from Military Defendants and their Chaplain Corps leadership to dissuade service members from submitting RARs and to dismiss their religious objections, and faced retaliation for doing so. *See supra* ¶ 14. Moreover, several Plaintiffs were sidelined and reassigned to prevent them from engaging in protected activities, *see supra id.*, which constitutes active censorship (rather than self-censorship).

Plaintiffs have also suffered concrete injuries from violations of the rights under Section 533, RFRA, and the First Amendment. *See* Ex. 10 (§ 533) & Ex. 11 (First Amendment). Plaintiffs' declarations detail additional injuries they have suffered, in particular, reassignment and/or removal from the RAR process due to submitting an RAR; overt hostility to religion; constant threats, retaliation, intimidation and coercion to take the vaccine and to counsel others to disregard their religious beliefs; and adverse personnel and disciplinary actions. *See supra* ¶¶ 14-16.

Plaintiffs also face imminent injury from being discharged under a category (General) that

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("*Rumsfeld III*"); *see also Rempfer v. Eschenbach*, 535 F.Supp.2d 99 (D.D.C. 2008) ("*Rempfer*"), *aff'd sub. nom, Rempfer v. Sharfstein*, 583 F.3d 860 (D.C. Cir. 2009) (same).

will deny them benefits, tar them as discipline problems, and prevent them from future military or civilian employment as chaplains (*i.e.*, over and above any obstacles created by being unvaccinated). Moreover, "Plaintiffs will be separated—and thus deprived of the economic, medial, and nonpecuniary benefits associated with … service—earlier than" their current term of service "amounts to classic injury-in-fact sufficient to support Article III standing." *Roe I*, 359 F.Supp.3d at 407.[41] Finally, Plaintiffs suffer from "the stigma associated with being singled out as unfit for service," and such "[s]tigmatic injury" is "sufficient to support standing" in the instant case. *Stone*, 280 F.Supp.3d at 764.

2. Prudential Standing for Statutory Claims.

Plaintiffs also have standing to bring their statutory RFRA and § 533 claims. The standing of service members to bring RFRA claims is so self-evident that, as far as Plaintiffs are aware, it has not been seriously challenged by Defendants or addressed in any depth in related cases. For Plaintiffs' § 533 claims, the standard is whether they fall within the "zone of interests" protected by § 533, a relaxed standard that does not require Congress to have enacted a statutory provision "specifically intend[ing] to benefit the plaintiff." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 118 S.Ct. 927, 935 (1998). Of course, § 533 is specifically intended to benefit—and protect—Chaplains, who are the only ones who could bring a § 533(b) claim.

E. Plaintiffs' Claims Are Ripe.

Even if there is some "uncertainty regarding the exact details of the military's future policy

[41] This injury is imminent and sufficiently certain for standing purposes, as several Plaintiffs have been directly informed by their chains of command that their RAR would be denied and that they will receive a general discharge. This is nearly the same as in *Doe 1*, 275 F.Supp.3d at 203, where the Court found standing satisfied for APA and constitutional claims where evidence available and chain of command "unequivocally" indicated that transgender individuals would not be permitted to serve, just as those who remain unvaccinated for religious reasons will not be permitted to serve.

towards … service members" who remain unvaccinated due to religious objections, "there is no uncertainty regarding" Secretary Austin's directives, *Doe 1*, 275 F.Supp.3d at 205, requiring 100% vaccination with no exceptions for religious objections. "The only uncertainties are how, not if, the policy will be implemented." *Stone*, 280 F.Supp.3d at 767. "There is no reason to believe that" Secretary Austin "will alter these directives, and the Court must assume that they will be faithfully executed by the military." *Doe 1*, F.Supp.3d at 205 (citations omitted). Further, Plaintiffs' claims are ripe because they are already suffering "the stigma of being set apart as inherently unfit, facing the prospect of discharge," and being denied "assignments." *Stone*, 280 F.Supp.3d at 767. Waiting for judicial review "only subjects them to substantial risk of even greater harms." *Id.*

1. RFRA and Free Exercise Claims.

"Much like standing, ripeness requirements are also relaxed in First Amendment cases." *Cooksey*, 721 F.3d at 240. Plaintiffs easily meet the requirements for RFRA and Free Exercise claims. All Plaintiffs have submitted requests for religious accommodation. Most have had their initial requests denied (17 of 31), and seven have had their appeals denied as well. *See supra* ¶ 12.

The claims of Plaintiffs with pending RARs are also ripe. In assessing fitness for review, the Court must consider not merely the existence, but the *degree* of contingency. Here the outcome is certain and inevitable. The purported contingency of RAR approval has a likelihood somewhere between 0.0% and 1.0%, *see supra* ¶ 10 & *infra* Section II.A.1 & Table, and is sufficiently remote that the court can make a "firm prediction" as to the outcome to find their claims ripe. *Immigrant Assistance Project of Los Angeles AFL-CIO v. INS*, 306 F.3d 842, 860-67 (9th Cir. 2002).

Plaintiff chaplains, given their unique constitutional role and ministry duties, have been deprived of their Free Exercise rights apart from the RAR process and these injuries occurred much earlier than the denial of an RAR. *See, e.g., Navy SEAL 1*, at *14 n.5 (Such denial may arise before a plaintiff's "request and appeal is conclusively denied if a plaintiff receives targeted punishment

for requesting an exemption.")(citation omitted). In particular, Plaintiffs have been prohibited from performing their duties to minister to service members in accordance with their faith and conscience and vocation; directed to discourage or dissuade service members not to submit RARs; removed from RRTs, prohibited from conducting RARs reviews, and suffered other forms of retaliation and adverse actions merely for submitting an RAR or even expressing their own religious objections. *See supra* ¶¶ 14-16.

2. Establishment and No Religious Test Clause and § 533 Claims

"[T]he Establishment Clause is implicated as soon as the government engages in impermissible action." *CFGC*, 454 F. 3d at 302. Plaintiffs have suffered myriad injuries from Defendants' discriminatory actions, overt hostility to their religions and religious beliefs; compelled speech; endorsement of a government religion (or non-religion); and establishment of a prohibited religious test for service. Plaintiffs have suffered discrimination and the precise adverse personnel actions § 533(b) specifically prohibits because they have followed the commands of their religion and demands of their conscience. *See supra* ¶¶ 13-14 & Ex. 10.

Plaintiffs' challenges present legal issues that do not require further factual development. *See, e.g., Awad v. Ziriax*, 670 F.3d 1111, 1124-25 (10th Cir. 2012). They are ripe because compliance with the Mandate and vaccination orders require "an immediate and significant change in the plaintiffs' conduct … with serious penalties attached to noncompliance." *City and Cty. of San Francisco v. Azar*, 411 F.Supp.3d 1001, 1010 (N.D. Cal. 2019). The Court should reach the same conclusion, for the No Religious Test Clause and Section 533 claims.

II. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS.

A. RFRA and Free Exercise Claims.

1. Defendants Have Substantially Burdened Plaintiffs' Free Exercise Rights, Triggering Strict Scrutiny.

RFRA restricts governmental action that "substantially burden[s] a person's exercise of religion[,] even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1.[42] Defendants have substantially burdened Plaintiffs' free exercise rights because the mandate forces them to "decide whether to lose their livelihoods or violate sincerely held religious beliefs." *Navy SEALs 1-26*, at *9. But for chaplains the violation of conscience is even more severe as the government seeks to coerce Plaintiffs to endorse and be complicit in Defendants' wrongdoing by counseling service members to ignore the demands of their conscience and forego their rights to seek religious accommodation, or else be removed and censored for performing their duties consistent with their conscience and faith. *See supra* ¶¶ 14-16.

Defendants have done so through a sham RAR process that amounts to "theater", *Navy SEALs 1-26*,, at *1, because the result (denial) is "pre-determined." *Id.*, at *4; *see also id.* ("the Plaintiffs' requests are denied the moment they begin."). Moreover, the Categorical RA Ban was set at the level of Secretary Austin and/or the Service Secretaries and implemented with review and appeals by flag officers who report directly to the Service Secretaries. *See supra* ¶¶ 11. The high level, centralized control ensures complete uniformity of results: no RAR approvals.

[42] Because RFRA "provides greater protection … than is available under the First Amendment," if a Plaintiff's "RFRA claim fails, the service member's First Amendment claim necessarily fails." *Navy SEAL 1*, at *12. Accordingly, Plaintiffs here follow the approach in *Navy SEAL 1* and other recent cases in focusing their analysis on the RFRA claim, because if Plaintiffs can establish a likelihood of success for RFRA claims, then for "the same reasons" they are "likely to prevail on [their] First Amendment claim[s]." *Air Force Officer*, at *11.

Several courts have already addressed Military Defendants' overt discrimination against religion, by treating comparable secular activity—medical and administrative exemptions—more favorably than religious exemptions. *See supra* notes 8-9. More recent statistics provided by Defendants, and summarized in the Table below from Plaintiffs' Reply Brief, *see* ECF 41 at 10 & Table, show that the Military Defendants' the Armed Services have granted more than 100 times more secular exemptions than RARs, and for the Army the ratio approaches 1000 times.

Table: Religious Accommodations vs. Secular Exemptions

Service	RARs Submitted	RARs Approved	% RAR Approved	Med/Admin Approved	Secular vs. RAR
Air Force	9,139	109	1.2%	1,608	14.8:1
Army	7,701	19	0.25%	17,338	913:1
USMC	3,733	7	0.19%	602	86:1
Navy	4,235	43	1.0%	273	6.3:1
Total	**24,808**	**178**	**0.7%**	**19,821**	**111:1**

Plaintiffs have thus presented *prima facie* evidence, using Defendants' own data, that Defendants have substantially burdened Plaintiffs' exercise of religion and have discriminated against religious exercise. This evidence triggers strict scrutiny and shifts the burden to the government to demonstrate that its policy satisfies strict scrutiny. *See O Centro*, 546 U.S. at 429.

2. The Categorical RA Ban Does Not Further a Compelling Governmental Interest.

While "[s]temming the spread of COVID-19 is unquestionably a compelling interest," *Cuomo*, 141 S. Ct. at 67, "its limits are finite." *Navy SEALs 1-26*, at *10. To satisfy strict scrutiny under RFRA, there must be a compelling interest "supporting the specific denial of a specific plaintiff's exemption and the absence of an alternative for that plaintiff." *Navy SEAL 1*, at *10. Military Defendants' "broadly formulated interest in national security," *id.*, will not suffice. Nor will simply invoking "magic words" like "military readiness and health of the force." *Id.* at *17

(citation omitted). But "[w]ithout individualized assessment" of service members fitness for service, the Defendants "cannot demonstrate a compelling interest in vaccinating these particular Plaintiffs." *Navy SEALs 1-26*, at *10.

Defendants have manifestly failed to demonstrate that they have a compelling governmental interest in denying Plaintiffs' RARs and appeals; censoring or removing Plaintiffs from their positions for submitting an RAR; coercing and compelling government-endorsed speech; and corrupting the RAR process to ensure it achieves the result (uniform denials) demanded by Secretary Austin and the Service Secretaries. The denial letters simply recite the same set of magic words—preventing the spread of disease, military readiness, unit cohesion, and good order and discipline with slight variations by letter or service, *see* Compl, ¶¶ 121-122 & n.16— without applying these to Plaintiff's individual circumstances or fitness for service.

Defendants' assertion of a compelling governmental interest in 100% vaccination with no exception is contradicted by their actions and their acknowledgment that the mRNA treatments cannot prevent infection or transmission of COVID. The Armed Services have granted tens of thousands of exemptions for secular reasons, while categorically banning religious accommodations. Such "underinclusiveness … is often regarded as a telltale sign that the government's interest in enacting a liberty-restraining pronouncement is not in fact compelling." *Navy SEALs 1-26* Stay Order, 27 F.4th at 352 (*quoting BST*, 17 F.4th at 616). Defendants, along with the White House, have acknowledged that mandated treatments cannot prevent infection or transmission of COVID—with the CDC now recommending that vaccinated and unvaccinated should be treated the same—and thus cannot further any compelling government interest in stopping the spread of disease or military readiness. *See supra* ¶¶ 2-4.

Government's claimed compelling purposes are to be evaluated by their results. *McDaniel*,

435 U.S. at 632-41 (Brennan, J., concurring). Searching review is required because the First Amendment "forbids subtle departures from neutrality, religious gerrymanders, as well as obvious abuses." *Gillette v. U.S.*, 401 U.S. 437, 452 (1971) (citation and quotation marks omitted). The RAR process was designed to categorically ban religious accommodations and to purge religious service members. The DoD's real compelling purpose is a prohibited religious gerrymander.

3. Defendants' Policy Is Not the Least Restrictive Means for Achieving Government's Interests.

Defendants have failed to demonstrate that the Categorical RAR Ban is the least restrictive means of furthering their purportedly compelling interests or that any less restrictive alternatives to vaccination were ever seriously considered. Several plaintiffs proposed alternative, less restrictive means and provided evidence that these alternatives had been employed successfully over the past two years achieving mission objectives and limiting the spread of COVID-19. *See, e.g.,* ECF 31-7, Hirko Decl., ¶ 10; Jackson Decl., ¶ 12. The denial letters failed altogether to mention proposed alternatives. Defendants also dismissed, or failed altogether to consider, natural immunity (possessed by 17 of 31 Plaintiffs), and the cumulative impact of natural and herd immunity with Plaintiffs' proposed less restrictive measures. *See* Compl., ¶ 128.

In these denial letters, Defendants failed to demonstrate, as they must, that the less restrictive measures "were tried and failed, or that the alternatives were closely examined and ruled out for good reason." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016). Instead, these letters indicate that Plaintiffs' proposed alternatives were denied because the government's "chosen route [of 100% vaccination] was easier," rather than a determination that "imposing lesser burdens on religious liberty would fail to achieve the government's interests." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020) (citation and quotation marks omitted).

B. Establishment Clause and No Religious Test Clause Claims.

1. DoD's Actions Are Not Neutral, Demonstrate Hostility to Religion, and Establish a Religious Test Violating the Establishment Clause.

Defendants' RAR process described above also violates the Establishment Clause. "[T]he Establishment Clause forbids [government] to hide behind an application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995). The RAR process was not an honest attempt to comply with RFRA's and §533 emphasis on maximum accommodation. It was designed to hinder the exercise of religion. This is in fact hostility to religion, which the Establishment Clause forbids. *See, e.g., Katcoff*, 755 F.2d at 234; *Everson,* 330 U.S. at 15. The DoD Mandate:

> [E]stablishes a [prohibited] religious classification – involvement in protected religious activity – governing the eligibility for office … The provision imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity. Such a classification as much imposes a test for office based on religious conviction as one based on denominational preference.

McDaniel, 435 U.S. at 632 (Brennan, J., concurring).[43] If a chaplain believes his faith requires him to follow his conscience, he is in DoD's "not wanted here" religious classification. "[A] law targeting religious beliefs as such is never permissible." *Id*. at 626 (plurality opinion)

The RAR system is similar to the "50% income from church members" test to determine if a church could be regulated that *Larson v. Valente*, 456 U.S. 228 (1982), found unconstitutional. The Supreme Court struck down the statute because it did "not operate evenhandedly" and was intended to impose "selective … burdens and advantages upon particular denominations." *Id*. at 254. That describes the RAR process here: a process designed to destroy Plaintiffs' careers and

[43] Justice Brennan's concurrence found the challenged law violated both Establishment and Free Exercise Clauses, *id*. at 630, and "imposes a test for office based on religious conviction", *id*. at 632. All three clauses serve the same function, protect religion from government interference.

faith through a selective and intentionally discriminatory process. The RAR process discriminates against Plaintiffs based on their beliefs, while granting preferences to those of other denominations or beliefs, violating the "clearest command of the Establishment Clause." *Id.* at 244.

In preferring a specific religious position, *i.e.,* abortion is not "sin", and the Secretary's contemptuous disregard for RFRA by pre-ordaining the denial of all RARs appears to be an attempt to purge from the military those who believe they must follow their conscience as formed by their faith. Almost all the RARs cite the use of abortion related stem cell lines and object to the use of abortion byproducts. The military has already punished them for doing so and has made clear that they will not be permitted to serve due to their religious objections. Military Defendants have thus sent the message that the military is hostile to religion and Plaintiffs' core religious beliefs—the sanctity of life and refusal to benefit from the evil of abortion that many consider akin to child sacrifice—and have attempted to compel government-endorsed speech promoting vaccination and dismissing religious objections. This is an Establishment violation. *CFGC,* 454 F.3d at 302 (Navy's twin messages of preference and hostility violate Establishment Clause).

The Military Defendants' policies require exclusion of those who believe that conscience requires them not to participate in the evil of abortion, especially vaccines that do not work and may change DNA or immune systems. The Categorical RA Ban also amounts to a prohibited religious test for military service prohibited by both the Establishment and the No Religious Test Clauses. Military-mandated atheism or celebration of its rituals is no more permissible than the military academies' mandatory church attendance enjoined in *Laird*. *See supra* note 33.

2. Defendants' Actions Are Evidence of Hostility Toward Religion and their Policies Were Made in Bad Faith.

These Chaplains' RAR's all emphasized the Mandate's requirements burdened their conscience. *See* ECF 31-9 (table summarizing Plaintiffs' religious objections). They could not,

consistent with their faith, accept the vaccine for the valid reasons they provided. Section 533 defines and protects that right. The Defendants' punitive and retaliatory actions against these Chaplains for exercising their § 533 right to follow their conscience are the very ones § 533 prohibits, *e.g.*, denying assignments, travel and schooling. Moreover, Defendants seek to destroy Plaintiffs' careers, deny them benefits lawfully earned, and cripple their ministry by labeling them as miscreants and troublemakers through a General Discharge, all for the sake of retaliation against chaplains who follow their conscience.

Plaintiffs allege that Military Defendants actions are motivated by religious hostility, bias and bad faith evidenced by the Categorical RA Ban and other First Amendment violations in implementing the DoD Mandate; the DoD's disobedience in not publishing regulations implementing § 533's protections; refusing to implement and develop the religious liberty instruction addressing § 533 and RFRA that Congress ordered in the FY 2018 NDAA; and the draconian punishments for those who raise religious objections. The Military Defendants actions in constructing a scheme with the appearance of neutrality but whose purpose was to deny religious accommodation show they had no intent of following the rule of law. This is per se bad faith.

3. The Government Seeks to Enforce Government-Endorsed Beliefs.

While Military Defendants' retaliation against Plaintiffs had the effect of silencing certain Plaintiffs who were removed from the RAR process, the ultimate goal was to coerce the remaining chaplains to support the DOD Mandate and No Accommodation Policy, either censoring their own religious or conscientious objections, persuading service members to ignore their own, or expressing support for a policy they opposed.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). In doing so, Military Defendants also violated rights of service members not to have their religion inhibited, *see, e.g., Katcoff*, 755 F.2d at 234, by having their chaplain's guidance dictated to them by the chain of command, rather than their conscience and faith. *See supra* ¶ 14.

4. The Categorical RA Ban Cannot Withstand Strict Scrutiny.

These *prima facie* violations of the Establishment Clause trigger scrutiny and shift the burden of proof to the government. *See Allegheny*, 492 U.S. at 608-09 (citations omitted). The sham RAR process and the Military Defendants' other actions expressing hostility to religion fail strict scrutiny because these actions demonstrate that the military prefers some religious viewpoints and beliefs over others. The alleged compelling purpose of the vaccine, protection of the force, is a farce. The fact the military leadership contracted COVID despite being "fully vaccinated" shows the vaccine does not immunize military personnel from COVID. The CDC has recognized this fact and eliminated discriminatory treatment of the unvaccinated. That military leaders and personnel become infected by COVID and rapidly recover with no recorded evidence of loss of efficiency or readiness, belies their claim there is no less restrictive measure. Secretary Austin's objective is not military readiness, but 100% vaccination, regardless of its costs. Further, to the extent it is a religious test, it is "absolutely prohibited," *see McDaniel*, 435 U.S. at 632 (Brennan, J., concurring), without regard to the government's purported justification.

5. The RAR Process Is A Religious Test Forcing Religious Service Members to "Out" Themselves, Then Used to Purge Them.

This case shares many similarities with the Military Transgender cases. In particular, the Services provided an opportunity to seek religious accommodations. Service members with sincere religious objections relied on the military's obligation to follow the law and self-identified through the RARs process and detailed their objections. The Services then used these RARs to identify

those with religious beliefs of sufficient intensity of belief that they would risk the loss of their careers for expulsion. *See Doe 1*, 275 F.Supp.3d at 213 ("transgender service members identified themselves to their commanding officers in reliance on" the previous policy permitting transgenders to serve, and then this information was used to expel them). The Military Defendants have thus used the RAR process to impose a religious test and to purge believers from the military.

C. Section 533 Claims

1. Protection of Chaplains' Right of Conscience Is A Compelling Purpose.

Section 533's headings, language, and context show Congress' intent to protect the right of service personnel and chaplains to exercise their faith and to act in accord with their conscience. No other Group has received special protection for decisions based on conscience flowing from their faith. Section 533(b), "Protection of chaplain decisions relating to conscience, moral principles, or religious beliefs" specifically established each chaplain's right to follow their conscience and faith, protecting them from the very actions Defendants have taken against Plaintiffs. Congress again addressed its concern for § 533's provisions and protections in the 2016 and 2018 NDAAs. *See* ECF 1-5, 2016 NDAA Report & 1-6, 2018 NDAA Report. The DoD never produced what Congress told it to do, apart from a passing reference in DoDI 1300.17. Instead, Defendants' negative personnel actions against Plaintiffs are the very actions § 533 prohibits.

The undisputed evidence shows § 533(b) is Congress's decision on the respect, legitimacy, and honor due chaplains' individual expressions of faith and decisions "related to conscience, moral principles, or religious beliefs." Defendants have not shown such decisions concerning the Mandate are contrary to good order and discipline, or how mandating vaccine that does not prevent the spread of COVID is a more compelling purpose than protecting chaplains' religious liberties.

2. Defendants Have in Fact Made the Shot a Rite, Ritual or Ceremony by Mandating it in Violation of § 533.

Plaintiffs allege Defendants' mandate to receive the COVID vaccination despite Plaintiffs' religious objections in violation of § 533 has made COVID vaccination a rite, ritual and/or a ceremony of a government-established religion, or non-religion, that is not only not neutral, but overtly hostile to their religious beliefs. There is a historical, biblical example of the principles and issues at play here supporting Plaintiffs' arguments found in the First Book of Maccabees. Chapters 1 and 2 describe the incident that began the Maccabean Revolt against Antiochus IV (or Antiochus Epiphanes) of Syria, an heir to Alexander the Great's empire.

Antiochus hated the Jewish religion. He "issued a proclamation to his whole kingdom that all were to become a single people, each renouncing his particular customs", I Maccabees 1:41 (Jerusalem Bible), which for the Jewish people meant following the Covenant and the Law. "Anyone not obeying the king's command was to be put to death" and "the king appointed inspectors for the whole people and directed all the towns of Judah to offer sacrifice one after another." *Id.* at 52-53.

Mattathias, a Jewish priest, and his family left Jerusalem to return to his hometown, Modein, *id* at 2:1. The "king's commissioners" came to Modein and asked Mattathias, "a respected leader" to "be the first to step forward and conform to the king's decree" for which he would be "reckoned among the friends of the king." Mattathias refused to forsake "the covenant of our ancestors". "As for the king's orders, we will not follow them: we will not swerve from our own religion either to the right or to the left." *Id.* at 2:17-22.

When a Jew went forward to offer sacrifice, Mattathias "slaughtered him on the altar, killed the king's Commissioner and tore down the pagan altar. "Let everyone who has a fervor for the law and takes his stand on the covenant come out and follow me." *Id*. at 2:23-28. Mattathias's son

Judas, "called Maccabeus" [the hammer] took over Mattathias' command of the revolt when he died. *Id*. at 3:1.

The town meeting in Modein was a ceremony or ritual in which persons were asked to publicly state who ruled their conscience. The question presented to Mattathias was would he follow his conscience or abandon his God and submit to another god. "God" is the authority to which a person submits in making decisions how he/she lives their lives, distinguishes between good and evil, and interacts with others. There are only two options, (1) a divine code created by a divine being which man cannot change or (2) **the** person becomes his or her own authority. Mattathias chose the God of the Covenant. Those same two options are presented to Plaintifs.

The Mandate, No Accommodation Policy, and the directives to violate conscience—both for Plaintiff chaplains' own vaccination decisions and also to lead their flock astray by pressuring them to advise service members to ignore their own conscience and beliefs—puts Plaintiffs in the same position as Matthias at Modein. Plaintiffs are being told to publicly admit through the vaccination process they replace the God who has ruled their conscience with the authority of man to do something which they know is wrong in God's sight, and of equal importance, to use their authority as a chaplain to pressure those to whom they minister to do so, or else be expelled from the military and denied the opportunity to continue in their vocation of serving God, country, fellow soldiers, and fellow citizens in future civilian life. Section 533 allows these plaintiffs to say "no thank you" which is exactly what they have done.

3. The Terms "Rite," "Ritual" and "Ceremony" Are Religious Ministry Terms, Not Secular

Section 533(b) protects chaplains' decisions concerning "any rite, ritual, or ceremony that is contrary to the conscience, moral principles, or religious beliefs of the chaplain." CAPT (Ret) Steve Brown, a retired chaplain and current Endorser, explains in Exhibit 12 that in DoD's

pluralistic Chaplain Corps, what one chaplain may consider a rite or ceremony may be considered nothing by another chaplain depending on his faith and endorsement. ¶7. A chaplain is always a chaplain; common events can become "sacred moments" which can be rites, rituals, or ceremonies of major importance to that chaplain because of his faith. ¶¶ 8, 10, 12. DoD has no authority to decide what those religious ministry terms mean to a chaplain. Chaplains are the religion experts whose decisions § 533(b) protects.

4. Defendants' Conduct Is Prohibited Retaliation.

To state an unconstitutional retaliation claim a plaintiff must show (1) he or she engaged in constitutionally protected conduct, here the First Amendment; (2) the defendant took some retaliatory action that adversely impacted the plaintiff; and (3) a causal link between the exercise of the constitutional right and the adverse action taken against him or her. *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005). Section 533 grants military chaplains a statutory mechanism to enforce the U.S. Constitution's religious liberty clauses and to protect them from discrimination or adverse personnel actions for exercise of those rights.

The Plaintiffs' declarations show how Defendants have systematically violated § 533. *See* Ex. 10. Defendants' prohibited discriminatory and adverse personnel actions are directly and causally related to Plaintiffs' exercise of their constitutionally protected religious liberties, as enforced through both RFRA and § 533. What is telling—and dispositive for the § 533 retaliation claim—is that these adverse and discriminatory actions were taken based on Plaintiffs' own religious objections, and because they sought to perform their unique constitutional role as chaplains. The free exercise rights of both chaplains and service members requires the Secretary permit chaplains to perform their duties—ministering to, advising, and assisting service members with religious objections to the Mandate—in accordance with their conscience and faith.

5. Secretary Austin's Failure to Issue Regulations, Implement Training, and/or Establish § 533 Enforcement Procedures Violated § 533.

The DoD has deliberately ignored Congress' specific protections and instructions concerning chaplains' religious liberty and conscience. This blatant insubordination and/or subversion attacks one of our Republic's fundamental principles: the military is subordinate to civilian authority and must obey the Constitution and Congress' instructions. DoD's nearly decade-long refusal to publish regulations implementing § 533's protections and refusal to develop and implement the "comprehensive training program" on religious liberty instruction, including § 533 and RFRA, that the 2018 NDAA ordered demonstrate DoD's bias and bad faith. The DoD Mandate and Categorical RAR Ban systematically violate service members religious liberties and punish those who follow their conscience. These actions constitute a forbidden bureaucratic insurgency against Congress that this Court must address promptly and decisively quell.

D. APA and Major Questions Claims

An agency violates the APA where it adopts a categorical ban, like the Categorical RA Ban and ME Bans, when the statute in question or DoD "regulations require individualized determinations based on objective evidence to determine a servicemembers fitness for duty or separation." *Roe II*, 947 F.3d at 222. The regulations at issue here—DoDI 1300.17 (and Service-specific implementing regulations) and AR 40-562—each specifically require such individualized determinations. The record, which consists of a one or two page form denial letters for most Plaintiffs, "is entirely lacking in an explanation reflecting an individualized determination for each servicemember." *Id.* at 224. Under the APA and the DOD's own regulations, a "categorical predictive assessment," "based on speculation" rather than evidence or individualized assessments, is "not 'a satisfactory explanation' for discharging each servicemember." *Id*. Defendants also provide "no explanation at all, let alone support, for their" conclusion, stated in every RAR denial

letter, "that the presence of" service members who are unvaccinated for religious reasons "may be harmful to 'unit cohesion.'" *Doe 1*, 275 F.Supp. at 212.

The APA arbitrary and capricious standard of review has been described as "indistinguishable" from the rational basis review under the Equal Protection Clause. *Harrison,* 2022 WL 1183767, at *12. Classification and unequal treatment based on animus, a desire to harm a politically unpopular group, or other improper purpose is irrational and arbitrary and capricious. *See Doe 1*, 275 F.Supp.3d at 211-213. In such circumstances, it is entirely appropriate to "consider[] the circumstances surrounding the announcement" of Secretary Austin's directive "[i]n determining whether a law is motivated by an improper animus or purpose." *Doe 1*, 275 F.Supp.3d at 213 (citation and quotation marks omitted). The challenged agency actions were made "without any of the formality or deliberative processes that generally accompany the development and pronouncement of major policy changes that will gravely affect the lives of many Americans." *Id.* at 213. "[T]he departure from normal procedures," demonstrate that the decision to expel tens or hundreds of thousands of service members demonstrate that the decision "was not driven by genuine concerns regarding military efficacy." *Doe 1*, 275 F.Supp.3d at 213.

Purging and excluding altogether a group from the military based on "obsolete" science and false factual predicates is similarly irrational and arbitrary and capricious. While there is uncertainty as to many issues regarding the treatments, there is no question that the treatments do not prevent infection or transmission, and therefore cannot further the government's interest in "preventing the spread of COVID-19." President Biden has gone from claiming that "if you get vaccinated, you will not get COVID," *supra* ¶ 1, to "at some point, everyone is going to get COVID," *supra* ¶ 2, while the CDC has (belatedly) updated its guidance to largely treat vaccinated and unvaccinated the same. "Such obsolete understandings," *i.e.*, that a treatment will actually

prevent infection or transmission, "cannot justify a [categorical] ban, even under a deferential standard of review." *Deese*, 483 F.Supp.3d at 314; *see also Roe II*, 947 F.3d at 228 (same).

III. PLAINTIFFS HAVE SUFFERED IRREPARABLE HARM.

Plaintiffs have shown above they are being deprived of First Amendment rights and RFRA's and Section 533's protections intended to enforce these rights. *See generally* Exs. 10 & Ex. 11. *Cuomo* observed there is "no question" that these types of religious exercise restrictions "will cause irreparable harm." *Cuomo*, 141 S.Ct. at 67; *see also Elrod*, 427 U.S. at 373 (plurality opinion) ("[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury."). This applies to violations of statutes like RFRA and § 533 that enforce First Amendment freedoms. *See Navy SEAL 1*, at *19 (citation omitted).

All Plaintiffs whose appeals have been denied now must either "follow a direct order contrary to a sincerely held belief or … face immediate processing for separation or other punishment," which "undoubtedly causes irreparable harm" and is "redressable by a preliminary injunction." *Navy SEAL 1*, at *19 (citation omitted); *see also Air Force Officer*, at *12; *Navy SEALs 1-26*, at *1. These same results will follow for the other Plaintiffs whose appeals remain pending when their appeals are inevitably denied, and they are "already suffering injury while waiting for the [Armed Services] to adjudicate their requests." *Navy SEALS 1-26*, at *12.

While a general discharge alone may not constitute irreparable injury, it may where the "circumstances surrounding … discharge, together with the resultant effect on the employee … so far depart from the normal situation that irreparable injury may be found." *Sampson v. Murray*, 415 U.S. 61, 90 (1974). The Defendants' deprivation of Plaintiffs' First and Fifth Amendment Rights meet this high standard "because these injuries are inextricably intertwined with Plaintiffs' loss of constitutional rights," and because "[t]he crisis of conscience imposed by the mandate is itself an irreparable harm." *Navy SEALs 1-26*, at *13 (citation omitted).

Plaintiffs will also suffer irreparable harm because they will be "discharge[d] without an individualized assessment of their fitness for continued service and for reasons unrelated to their ability to serve," coupled with a discharge with a misconduct characterization that they will have to disclose along with their unvaccinated status. *Roe II*, 947 F.3d at 218. This is "a particularly heinous brand of discharge based on outmoded policies" and obsolete science on vaccine efficacy "bear[ing] no relationship to their ability to perform their jobs,"[44] that will "brand[] and stigmatize[] Plaintiffs as less capable of serving the military" or even "unfit for service." *Doe 1*, 275 F.Supp.3d at 216. Such stigmatic injuries cannot be "address[ed] … through post-discharge intra-service procedures." *Roe II*, 947 F.3d at 218.

Plaintiffs and class members risk loss of retirement eligibility with more than 15 years of service, or being dropped into the inactive ready reserve, resulting in irreparable harm from the loss of military medical insurance for themselves and family members. It is well-settled that the loss of medical coverage, particularly for dependents with special needs or undergoing lifesaving medical treatment in itself constitutes irreparable harm.[45] Here, Plaintiffs are faced not only with the loss of their sole source of income and medical insurance, but their discharge and vaccination status may preclude future employment as chaplains (and medical insurance) and retirement

[44] *Id.* (citations and quotation marks omitted). *See also Casey v. United States*, 8 Cl.Ct. 234, 242 (1985) ("*Casey*") ("a 'stigma' may attach to a servicemember's discharge either from the characterization of the discharge or from the reasons recorded for the discharge") (citation and quotation marks omitted); *May*, 708 F.Supp. at 722 (rejecting claims that general discharge under honorable conditions "does not impose a stigma" because "military separation codes are known, understood and available to the par of society that count—i.e., prospective employers.").

[45] *See, e.g., Fitzgerald v. Schweiker*, 538 F.Supp. 992, 998 (D. Md. 1982); *Peter B. v. Sanford*, 2010 WL 5912259 (D.S.C. Nov. 24, 2010) (collecting cases and finding that loss of medical care "constitutes … the kind of harm which equitable relief is suited to enjoin."); *Beck v. Hurwitz*, 380 F.Supp.3d 479, 484-85 (M.D.N.C. 2019) (delays in cancer treatment constitutes irreparable harm).

income and benefits, pushing some into poverty and depriving them of the income needed to procure alternate insurance and everything else they need to support their families.

IV. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR ISSUANCE OF INJUNCTION.

The third and fourth requirements for issuing a stay and/or preliminary injunction—the balance of harms and whether the requested injunction is in the public interest—"merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Both factors favor Plaintiffs and issuance of the injunction requested by Plaintiffs. "[I]njunctions protecting First Amendment freedoms are always in the public interest." *Navy SEALs 1-26 Stay Order*, at *13. Further, there is no injury to the public interest "from recognizing a person's constitutional or statutory right …, especially when the statute creating the right [*i.e.*, RFRA] expressly authorizes such judicial vindication." *Navy SEAL 1*, at *20. "It is in the public interest to prevent [Plaintiffs'] discharge for apparently arbitrary and indefensible reasons, at least until the Court can definitively decide the merits of plaintiffs' claims." *Roe I*, 359 F.Supp.3d at 421.

The Defendants cannot claim to suffer any harm that "results only from [D]efendants' own failure to comply with RFRA." *Navy SEAL 1*, at *20. Nor can a "bare invocation of 'national defense' defeat every motion for preliminary injunction that touches on the military." *Doe 1*, 275 F.Supp.3d at 217. Moreover, it is Defendants' systematic violations of constitutional rights that threaten national security. Defendants' imposition and enforcement of an unlawful vaccine mandate threatens to purge hundreds of thousands of service members, is destroying recruitment, and even threatens the viability of the AVF. *See supra* ¶ 6.

V. CONCLUSION

This Court should grant the relief requested in the Complaint and issue the Proposed Order.

Dated: August 15, 2022 Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 15th day of August, 2022, the foregoing Plaintiffs' Motion was e-filed using the CM/ECF system.

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