IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ISRAEL ALVARADO, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	**Case No.: 8:22-cv-1149-WFJ-CPT**
	:	
LLOYD AUSTIN, III, et al.,	:	
	:	
Defendants.	:	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT THEREOF

INTRODUCTION

Plaintiffs, 31 Military Chaplains from all Armed Services, respectfully move the Court for Preliminary Injunction to enjoin Defendants' constitutional and statutory violations set forth below and in Plaintiffs' May 18, 2022 complaint ("Compl."), Exhibit 1.

In addition to this case, there are at least 26 other challenges to the Mandate and/or Military Defendants' sham religious accommodation process. *See* ECF 16. While some of Plaintiffs' claims are similar to those raised in other proceedings, the central claims in this proceeding are unique constitutional and statutory claims that only Chaplains have standing to raise, in particular, Defendants' violations of the specific protections for Chaplains enacted in the 2013 National Defense Authorization Act's ("NDAA") § 533(b), as amended by

the 2014 NDAA (hereafter "§ 533"), and the Establishment Clause. Moreover, Plaintiffs bring these challenges on behalf of themselves and the service members to whom they minister, because the Defendants' actions deprive service members of their rights under both Religion Clauses and § 533.

First, Plaintiffs challenge Secretary Austin's willful violations of § 533. Congress established specific protections in § 533(b) of Chaplains' rights to follow their conscience and faith and prohibited the specific adverse actions Defendants have taken against them. Section 533 (emphasis added) states:

> (a) Protection of rights of conscience.
>
> > (1) Accommodation. Unless it could have an adverse impact on military readiness, unit cohesion, and good order and discipline, the Armed Forces shall accommodate individual expressions of belief of a member of the armed forces reflecting the sincerely held conscience, moral principles, or religious beliefs of the member and, in so far as practicable, may not use such expression of belief as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment.
> > (2) Disciplinary or administrative action. – Nothing in paragraph (1) precludes disciplinary or administrative action for conduct that is proscribed by chapter 47 of title 10, United States Code (the Uniform Code of Military Justice) [10 U.S.C.A. § 801 et seq.], including actions and speech that threaten good order and discipline.
>
> (b) **Protection of chaplain decisions relating to conscience, moral principles, or religious beliefs**. No member of the Armed Forces may
>
> > (1) require a chaplain to perform any rite, ritual, or ceremony that is contrary to the conscience, moral principles, or religious beliefs of the chaplain; or
> > (2) discriminate or take any adverse personnel action against a chaplain, including denial of promotion, schooling, training, or assignment, on the basis of the refusal by the chaplain to comply

> with a requirement prohibited by paragraph (1).
>
> (c) REGULATIONS.—The Secretary of Defense **shall issue** regulations implementing the protections afforded by this section.

Plaintiffs and class members are the **only** category of service members with standing to bring §§ 533(b) and (c) claims for violations of their rights thereunder, which do not vary by, or depend upon, their branch of service.

Second, Plaintiffs specifically challenge Secretary Austin's willful failure to obey and implement § 533(b) and (c)'s explicit order to "issue regulations implementing the protections afforded by this section." The DoD's inaction forced Congress to address its concern for § 533's provisions and protections for chaplains' religious liberty again in the FY 2016 NDAA, *see* Ex. 2, 2016 NDAA Senate Committee Report, and then once again in the 2018 NDAA. *See* Ex. 3, 2018 NDAA Senate Committee Report.

Plaintiffs' Third and Fourth Causes of Action challenge Defendants' sham process for evaluating religious accommodation requests ("RAR") that courts have called "theater" and found to have likely violated the Religious Freedom Restoration Act ("RFRA") and the Free Exercise Clause. The "theater" is based on Secretary Austin's directive not to grant any RARs, regardless of merit ("No Accommodation Policy"). Plaintiffs challenge Secretary Austin's orders directly because the Armed Services merely follow his directives to deny RARs and ignore § 533's protections. Addressing the

Service Secretaries does not provide effective relief because Secretary Austin has created the challenged policies.

Fifth, Secretary Austin's and his subordinate Secretaries' actions and orders violate the "No Religious Test" Clause in Article VI of the Constitution and the First Amendment's Establishment Clause. They adopted policies hostile to Plaintiffs' religions, established his own secular religion and retaliated against Plaintiffs for exercising their statutory and constitutional rights. His actions have been made in bad faith.

Plaintiffs' Sixth through Ninth Causes of Action raise claims under the First and Fifth Amendments, the Administrative Procedure Act ("APA"), and the Separation of Powers, all flowing from Defendants' orders and actions.

This Motion and Memorandum incorporate by reference the Facts in Plaintiffs' Complaint, Ex. 1, supporting Plaintiffs' causes of action, including § 533, the DoD's issuance and implementation of its Mandate; the penalties each Plaintiff has endured and still faces for not complying with the Mandate; and Defendants' religious prejudice and retaliation.

Plaintiffs' memorandum of points and authorities below shows they meet the criteria for a Preliminary Injunction. Plaintiffs respectfully move for relief, requesting the Court issue the Proposed Order, *see* Ex. 4, enjoining Defendants' (1) DoD Mandate implementation; (2) further retaliation against Plaintiffs; (3) enforcement of DoD's state religion; and (4) from taking punitive or

administrative action against Plaintiffs pending resolution of this litigation. The Court should further order Defendants to comply with § 533, the Establishment Clause and RFRA. *See* Ex. 4 (Proposed Order).

THE FACTUAL BACKGROUND SUPPORTING THIS MOTION

1. Plaintiffs' Compl. ¶¶ 77-80 detail Congress's focus on religious liberty in § 533's words and purpose. Compl. ¶¶ 81-93 highlight Congress' continued push to get Defendants to comply with its 2018 directive to inform DoD's leaders and members of religious liberty's importance and the rights of chaplains and military personnel to exercise their conscience and faith.

2. The 2018 NDAA Senate Committee Report 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:

> Complying with this law requires an intentional strategy for developing and implementing a comprehensive training program on religious liberty issues for military leadership and commanders. The Committee urges the Department, in consultation with commanders, chaplains, and judge advocates to ensure that appropriate training on **religious liberty** is conducted at all levels of command on the requirements of the law and to that end the committee directs the Secretary, in consultation with the chief of chaplains for the Army, Navy, and Air Force, to develop curriculum and implement training concerning **religious liberty** in accordance with the law.

Ex. 3, 2018 NDAA Senate Committee Report at 149-150 (emphasis added).

3. On September 1, 2022, more than seven years after § 533's passage, DoD issued DoD Instruction 1300.17, "Religious Liberty in the Military Services" ("DoDI 1300.17"), Ex. 5. DoDI 1300.17 recites **part** of the statutory language. *Compare* §§ 533(a)-(b) *with* 1300.17, ¶¶ 1.2(b)-(c). But DoDI 1300.17 does not mention, much less prohibit, the specific retaliatory personnel actions against chaplains that Congress expressly forbade in § 533.

4. Rather than develop "an intentional strategy for developing and implementing a comprehensive training program" as Congress specifically directed in the 2018 NDAA, the Secretary delegated, without instruction or guidance, "training concerning religious liberty" to the Service Secretaries. *See* Ex. 5, DoDI 1300.17, ¶ 2.3(7) (Responsibilities).

5. Publishing DoDI 1300.17 with parts of § 533's language does not ensure DoD and its leadership 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 "Free Exercise." *See generally* Ex. 1, Compl., Section V, ¶¶ 94-107 & Section VI, ¶¶ 108-114.

6. Plaintiffs' RARs almost universally cite the use of stem cell lines from aborted babies in developing or testing the vaccines as a reason their conscience cannot allow them to accept the vaccines. *See id.*, ¶ 115 & nn.8-9.

7. Exhibit 7 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. *See* Ex. 6; *see also* Ex. 1, Compl., ¶¶ 28-58 (individual Plaintiff hardships and harms) & ¶ 142 (summarizing retaliatory actions against Plaintiffs).

8. Plaintiffs were punished for and prohibited from performing their duties to minister to service members in accordance with their faith, conscience, 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"), 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, expressing sympathy for other with such objections, or advising service members of their rights to seek religious accommodations. *See,* Ex. 1, Compl. ¶¶ 103 & 117; Ex. 7, Fussell Decl., ¶ 12; Gentilhomme Decl., ¶ 14; Nelson Decl., ¶ 11; Schnetz Decl., ¶ 18.

9. DoD's alleged vaccine does not "produce immunity" or protect the recipient from that disease. Secretary Austin, the Chief of Staff and other high-ranking military officers, and the Vice President received COVID vaccines and booster shots and still caught COVID. Compl. ¶ 16 & n.3, and Ex. 8, CDC emails showing it changed vaccine definition of because the COVID-19

vaccines did not meet the old definition based on immunity.

10. DoD established a "No Accommodation Policy," implemented by each of the Armed Services. The Armed Services Secretaries appear to have directly ordered their chain of commands not to approve any accommodations. *See* Ex. 1, Compl., ¶¶ 97-101. The Navy (whose chaplains 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* 1/3/2022 PI Order, ECF 66 at 1 (process is "theater"). As a result of these express directives and 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. Compl., ¶ 109 n.7 & Table 1.

11. No Plaintiffs' medical accommodation request has been approved where the requester also requested a RAR.

12. Thousands of post-vaccine incidents affecting military personnel and dependents have been reported but not linked to the vaccines. *Id.*, ¶ 104.

STANDARD OF REVIEW

A district court may grant a PI where the moving party demonstrates:

> (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be averse to the public interest.

Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000); Local Rule 6.02 (PI).

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 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*"). This applies equally to violations of statutes that enforce First Amendment freedoms like RFRA, *see Navy SEAL 1* PI Order, 2022 WL 534459 at *19 (*citing Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012)), and § 533.

Additionally, Defendants' "No Accommodation Policy" is not neutral, violating RFRA; the Free Exercise and Establishment Clauses; and amounts to a forbidden Religious Test for military service. The Defendants' message to Plaintiffs and the public is very clear: "citizens who believe they must follow their conscience as formed by their faith are not welcome", a forbidden religious hostility message to Plaintiffs establishing irreparable harm. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006) ("*CFGC*") (sending messages of preference to favored religions and hostility, rejection and retaliation to plaintiffs is irreparable injury). It is also a message of preference on theological issues, *e.g.*, "abortion is not a sin" and your conscience is not to be followed, violating the Establishment Clause.

The Secretary's *prima facie* violations of RFRA and the Free Exercise Clause trigger strict scrutiny and shift the burden of proof to the government. *See, e.g., O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) ("*O Centro*"). "[P]ractices suggesting 'a denominational preference'" are Establishment violations triggering strict scrutiny. *County of Allegheny v. ACLU*, 492 U.S. 573, 608-09 (1989) ("*Allegheny*") (citation omitted).

The Mandate unconstitutionally "limit[s] public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept." *Torcaso v. Watkins*, 367 U.S. 488, 494 (1961) ("*Torcaso*").

> [I]t establishes a religious classification – involvement in protected religious activity – governing the eligibility for office, which I believe is absolutely prohibited. 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 v. Paty, 435 U.S. 618, 632 (Brennan, J., concurring). Military-mandated atheism or celebration of its rituals is no more permissible than the military academies' mandatory church attendance enjoined in *Laird v. Anderson*, 466 F.2d 283 (D.C. Cir. 1972) *cert. denied*, 409 U.S. 1076 (1972).

That no Court has addressed alleged violations of chaplains' rights under § 533(b) is not surprising given the truly unprecedented nature of Defendants' suppression of § 533 and violations of religious liberty. Because § 533 prohibits governmental conduct analogous to that prohibited by the Free Exercise and

Establishment Clauses, the Court should apply strict scrutiny.

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION

A. Plaintiffs' Constitutional and Statutory Claims Are Justiciable in this Court.

1. RFRA and Free Exercise Claims.

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). To date, at least five U.S. District Courts have found that RFRA and Free Exercise Claims similar to Plaintiffs are justiciable, have a substantial likelihood of success, and issued preliminary injunctions.[1] The Fifth Circuit rejected Defendants' arguments against justiciability, explaining that:

> Congress rendered justiciable Plaintiffs' claims under RFRA, which applies to every 'branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States[.]'

[1] *See generally Navy SEAL 1 v. Austin,* --- F.Supp.3d ---, 2022 WL 534459 (M.D. Fla. Feb. 18, 2022) ("*Navy SEAL 1*"), *stay denied* --- F.Supp.3d ---, 2022 WL 710321 (M.D. Fla. Mar. 2, 2022), ("*Navy SEAL 1* Stay Order"), *stay denied pending appeal* No. 22-10645 (11th Cir. Mar. 30, 2022); *U.S. Navy SEALs 1-26 v. Biden*, --- F.Supp.3d. ---, 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"); *Air Force Officer v. Austin*, --- F.Supp.3d ---, 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*, --- F.Supp.3d ---, 2022 WL 982299 (S.D. Ohio Mar. 31, 2022) ("*Doster*").

Navy Seals 1-26 Stay Order, 2022 WL 594375, at *7. RFRA, "sets the standards binding every department of the United States", and "[i]t undoubtedly 'applies in the military context.'" *Id.* (citation omitted). "Federal courts are therefore empowered to adjudicate RFRA's application to these Plaintiffs." *Id.*[2]

2. Establishment Clause Claim.

Courts routinely adjudicate military chaplains' Establishment Clause claims without even pausing to address whether such claims are justiciable. *See, e.g., CFGC*, 454 F.3d at 295 (listing over a dozen cases where military chaplains raised Establishment Clause claims deemed justiciable). Nor is there any requirement to exhaust administrative remedies to bring an Establishment Clause claim. *See, e.g., Adair v. England*, 183 F.Supp.2d 31, 55 (D.D.C. 2002). 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. *See supra* Section I.B.3.

3. No Religious Test Clause Claim.

"No Religious Test" Clause claims against the military are justiciable without any requirement for administrative exhaustion. *See, e.g., Anderson*,

[2] *See also Navy SEAL 1*, 2022 WL 534459, at *13 ("RFRA includes no administrative exhaustion requirement and imposes no jurisdictional threshold. No exemption, whether or express or implied, insulates the military from review in the district court."); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) (Gorsuch, J.) (observing that "RFRA operates as a kind of a super statute, displacing the normal operation of other federal laws").

466 F.2d at 284. Because religious classifications or tests that violate the No Religious Test Clause also violate Establishment Clause, the Court should apply the same justiciability analysis for these two, linked claims.

4. Section 533 Claims.

Section 533 must be justiciable in district court as there is no specific military administrative procedures available to address these claims. Plaintiffs expressly challenge Defendants' refusal to implement § 533, or to comply with the Congressional directive to implement an "intentional strategy" for "comprehensive training" to protect "religious liberty in accordance with the law." *See* Ex. 3 at 149-50. DoDI 1300.17 recites portions of the statutory language but fails to provide any mechanism to enforce § 533's protections for chaplains or applying § 533 in the RAR process. Denying Plaintiff chaplains' judicial review renders § 533 a dead letter in view of Defendants' inaction and hostility to the religious liberties § 533 protects.

B. Plaintiffs Satisfy the *Mindes v. Seaman* Requirements for Justiciability and Exemption from Exhaustion.

As noted above, at least five courts have found that RFRA and Free Exercise claims nearly identical to Plaintiffs satisfy the requirements for justiciability and exhaustion of remedies (or exceptions from exhaustion) set forth in *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971), which is still binding precedent in this Circuit, *see Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981). *Mindes* allows judicial review if there is "(a) an

allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intra service corrective measures." *Mindes*, 453 at 201. Plaintiffs meet those tests because they allege constitutional, statutory, and regulatory violations, and have exhausted or are exempt from exhaustion of military remedies to the extent they are available at all.

1. Plaintiffs Have Exhausted Military Remedies.

Each Plaintiff has pursued military remedies and submitted an RAR, most of which (17 of 31) have been denied; at least seven have had their appeals denied as well (namely, Plaintiffs Alvarado, Barfield, Brobst, Gentilhomme, Henderson, Jackson, and Layfield). *See* Ex. 1, Compl., ¶ 120.[3] Defendants will likely argue that exhaustion requires each Plaintiff to be discharged or separated and/or to pursue an appeal to one of the services' boards of correction of military records ("BCMR"), but that is most certainly not what the law and precedent in this Circuit requires. Instead, a RFRA or Free Exercise claim is "ripe" upon "the initial episode of denial of free exercise, "without the need to endure the denial of free exercise during the protracted exhaustion of every non-judicial remedy." *Navy SEAL 1 v. Biden*, 2021 WL 5448970, at *14 (M.D.

[3] Apart from the RAR process, there are no specific military procedures to address Plaintiffs' Establishment Clause, No Religious Test Clause, and § 533 claims. In fact, 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* Ex. 1, Compl. ¶¶ 180-188 (Second Cause of Action).

Fla. Nov. 22, 2021); *see also id.* (ripeness occurs "no later than the moment the member must irreparably receive the injection or irreparably defy an order.").

Several Chaplains have reached this point. Others, given their unique constitutional role and ministry duties, have been deprived of free exercise and acting in accordance with their conscience much earlier, and for much longer than that. In particular, Plaintiffs have been prohibited from performing their duties to minister to service members in accordance with their faith and conscience and vocation—which for chaplains is free exercise of their religion—when they were directed to discourage or dissuade service members not to submit RARs, were 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, expressing sympathy for other with such objections, or advising service members of their rights to seek religious accommodations. *See, e.g.,* Compl., ¶¶ 103 & 117; Ex. 7, Fussell Decl., ¶ 12; Gentilhomme, ¶ 14; Nelson Decl., ¶ 11; Schnetz Decl., ¶ 18.

2. Plaintiffs Are Exempt from Exhaustion.

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.[4] 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. *See* Ex. 1, Compl., ¶ 109 & Table 1. 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, e.g., Navy SEAL 1*, 2022 WL 534459, at *19 (Marine Corps approvals); *Poffenbarger*, 2022 WL 594810, at *13 n.6 (Air Force approvals). Where, as here, "[t]he record all but compels the conclusion that the military process will deny relief, exhaustion is inapposite and unnecessary." *Navy SEALs 1-26*, at *5 (citation and internal quotation omitted); *see also Navy SEAL 1*, at *14 (affirming the "likely futility" of military remedies) (citations omitted).

In addition to the statistics, the Armed Forces' Secretaries appear to have directly ordered their chains of command not to approve any

[4] 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, as discussed in Section I.B.4 below.

accommodations, *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. Where a service has "effectively stacked the deck against … exemptions," this is "sufficiently probative of futility," *Navy SEALs 1-26* Stay Order, 27 F.4th at 349, to excuse service members from *Mindes'* exhaustion requirement.

3. BCMRs Cannot Adjudicate Constitutional Issues.

In related proceedings, Defendants have asserted service members must pursue religious liberty claims through the applicable BCMR. This defense is based on a fundamental mischaracterization of BCMRs' role and authority.

> A BCMR is a clemency-oriented body with authority to "correct an error or remove an injustice, 10 U.S.C. § 1552(a), not to declare the law. … [It] has no authority to declare the challenged regulations invalid.

Glines v. Wade, 586 F.2d 675, 678 (9th Cir. 1978), *rev'd on other grounds sub nom. Brown v. Glines*, 444 U.S. 348 (1980). Accordingly, "resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board." *Adair*, 183 F. Supp. 2d at 55 (citation omitted). In any case, the logic underlying non-justiciability in military cases is "wholly inappropriate ... when a case presents an issue that is amenable to judicial resolution." *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979). Of equal importance, BCMRs only make recommendations to the Service Secretaries who are executing Secretary

Austin's No Accommodation Policy. The Service Secretaries may disregard or overrule the BCMR's recommendation.[5] BCMRs thus lack both the competence and authority to remedy constitutional violations.

4. Plaintiffs Satisfy the Four *Mindes* Factors.

a) Nature and Strength of Plaintiffs' Challenges.

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). Defendants' sham RAR process, retaliation against chaplains, and overt hostility to religion violates multiple provisions of the First Amendment, § 533 and RFRA's statutory enforcement of those rights, as well as the Fifth Amendment Due Process Clause. More than that, it creates a religious test and establishes and endorses a government religion (or non-religion), *see McDaniel*, 435 U.S. at 638) by rejecting Plaintiffs' consistent theme of opposition to abortion and the use of stem cells from aborted babies. Defendants' non-religiously neutral rejection policy violates the Establishment Clause. *Katcoff v. Marsh* 755 F. 2d 223, 232 (2d Cir. 1985) (inhibiting religion

[5] *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).

violates the Establishment Clause); *see also id.* at 334 (same)

Plaintiffs' 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 1, and Plaintiffs demonstrate that they have a substantial likelihood of success on their other religious liberty claims. *See infra* Section II. But even if they can only show a likelihood of success on only one of their claims, then that is dispositive for satisfying *Mindes'* first factor, *see, e.g., Air Force Officer*, 2022 WL 468799, at *7, and the second factor as well because First Amendment violations presumptively constitute irreparable harm. *See infra* Section III. The strength of their constitutional claims also provides an independent ground to exempt Plaintiffs from the exhaustion requirement. *See Von Hoffburg*, 615 F.3d at 638.

b) Plaintiffs Face Irreparable Harm Absent Review.

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 Section 533 and RFRA. *See infra* Section III. 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. *See* Compl. ¶¶ 28-58 (individual Plaintiff hardships and disciplinary actions) & ¶¶ 142-143 (summarizing same). They are already experiencing injuries and harm from the very practices § 533 prohibits. *See supra* Fact ¶ 7 & Ex. 6. Moreover, several Plaintiffs "have suffered injury *because* they submitted" RARs, namely, duty and ministry restrictions, reassignment, and exclusion from RRT and RAR interview. *See supra* ¶ 8. "[W]ithholding judicial review is particularly illogical when participation in the administrative process invites the very harm Plaintiffs seek to avoid." *Navy SEALs 1-26*, at *8. The harm to Plaintiffs provides an additional ground for exemption from exhaustion.

c) Review Would Not Interfere With Military Functions.

Most of the senior military leadership has caught COVID despite being vaccinated and boosted, yet they continued to work without serious detriment to the military mission. Moreover, the Defendants have permitted thousands of service members to remain unvaccinated for secular reasons, while refusing to permit any service members to do so for religious reasons. *See* Ex. 1, Compl., ¶¶ 109-111 & Tables 1 & 2. It is "illogical to think, let alone 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). *Accord Navy SEALs 1-26* Stay Order, F.4th at 349; *Doster*, 2022 WL 982299, at *10.

d) Decisions Under Review Do Not Implicate Military Judgment or Discretion.

The constitutional issues in this case do not implicate "[t]he complex[,] subtle, and professional decisions" that "are essentially professional military judgments." *Air Force Officer*, *8 (citations omitted). While "judges don't make good generals," *id.* (*citing Orloff v. Willoughby*, 345 U.S. 83, 93 (1953)), "Generals don't make good judges—especially when it comes to nuanced constitutional issues." *Id.* Whether the Mandate and No Accommodation Policy "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). *Accord Doster*, * 10; *Navy SEALs 1-26* Stay Order, 27 F.4th at 349. *See also Poffenbarger*, 2022 WL 594810, at *9.

C. 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). Exhibit 7 is a table cataloguing the injuries each Plaintiff has suffered due to § 533

violations. They are facing disciplinary actions and a discharge category (General) that 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). Plaintiffs thus have Article III injury and standing.

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[6] 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, when Congress enacted and the President signed the NDAAs that instituted § 533, they did specifically intend to benefit—and protect—Chaplains like Plaintiffs. Moreover, Chaplain Plaintiffs are the only ones that ***could*** bring a § 533 claim. Accordingly, there should be

[6] *See, e.g., Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2210 (2012) (the question of whether a plaintiff is "arguably within the zone of interests … protected by statute, "conspicuously" includes the word "arguably," and "is not meant to be especially demanding") (citations and internal quotation marks omitted).

no question as to Plaintiffs' standing to assert these claims.

3. Third-Party Standing for Constitutional Claims.

Congress, in creating the Armed Services, was "obligate[d] to make religion available to" service members who would otherwise be "deprive[d] of [their] right under the Establishment Clause not to have religion inhibited and of [their] right under the Free Exercise Clause to practice his religion." *Katcoff*, 755 F.2d at 234. By retaliating against, removing, and/or reassigning chaplains from the RAR process, Military Defendants have done just that. Accordingly, Plaintiffs also have standing on behalf of themselves and the service members who were deprived of their ministry to assert violations of the Religion Clauses.

D. Plaintiffs' Claims Are Ripe.

1. RFRA and Free Exercise Claims.

All Plaintiffs have submitted requests for religious accommodation. Most of those initial requests have been denied (17 of 31), *see* Ex. 1, Compl., ¶¶ 28-58; seven have had their appeals denied as well (Alvarado, Barfield, Brobst, Jackson, Gentilhomme, Henderson and Layfield). *See id.*, ¶ 120. "[T]he initial episode of denial of free exercise causes irreparable harm and satisfies the demands of 'ripeness.'" *Navy SEAL 1*, at *14. Such denial may arise before a plaintiff's "request and appeal is conclusively denied if a plaintiff receives targeted punishment for requesting an exemption." *Id.*, at *14 n.5 (*citing Singh v. Carter*, 168 F.Supp.3d 216, 228-32 (D.D.C. 2016)). *See also Navy SEALs 1-*

26, at *8. As explained herein, several Plaintiffs have suffered punishment, retaliation, and infringement of their religious liberties because they submitted an RAR; for expressing their own religious objections to the "vaccine;" or for performing their professional and religious duty to assist and advise service members regarding the Mandate or their rights to seek religious accommodation. *See supra* ¶ 8, & Ex. 6 (§ 533 Violations).

In other proceedings, Defendants have argued that service members' claims are not ripe because the injuries that they identified (discharge and unavailability of relief through relevant BCMR) are contingent and speculative events. This defense must be rejected at the outset. First, Plaintiffs' injuries are to their religious liberties, which occurs as soon as those liberties have been denied, or they are subjected to targeted punishment, which has already occurred for most, if not all Plaintiffs. A BCMR cannot turn back the clock and waiting months or years to review the BCMR process will unnecessarily prolong and exacerbate those injuries, which are irreparable.

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." *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1291-1292 (11th Cir.2010) (citations and internal quotation marks omitted). Plaintiffs' claims raise "no substantial fitness concern," *Mulhall*, 618 F.3d at 1293, where the contingency "very remote [or] … extremely unlikely" to occur.

Id. at 1292. Here the outcome is certain and inevitable. The purported continency of RAR approval has a likelihood somewhere between 0.0% and 0.1% (or one out of a thousand)[7] is sufficiently remote that the court can make a "firm prediction" as to the outcome such that their claims are ripe for review. *Immigrant Assistance Project of Los Angeles AFL-CIO v. INS*, 306 F.3d 842, 860-67 (9th Cir. 2002).

2. Establishment and No Religious Test Clause 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, and endorsement of a government religion (or non-religion). 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 apply the same analysis, and reach

[7] *See* Ex. 1, Compl., ¶ 109 & Table 1. The actual likelihood is almost 0.0%, however, given that the "accommodations" granted were in fact administrative exemptions, the evidence of direct orders not to grant any accommodations (Army and Air Force), and the use of processes designed to ensure denial (Navy). *See supra* ¶ 10.

the same conclusion, for the No Religious Test Clause.

3. Section 533 Claims.

Plaintiffs have suffered discrimination and the precise adverse personnel actions § 533(b) specifically prohibits (denial of promotion, schooling or training or assignments), because they have followed the commands of their religion and demands of their conscience. *See supra* ¶¶ 7-8 & Ex. 6. Accordingly, Plaintiffs' specific injuries and declarations provide a sufficient factual record to satisfy the "fitness" prong of ripeness review. In terms of the record for review, nothing "will be gained, but much will be lost" by permitting Plaintiff's religious liberty claims to be "hammered out," *Harrell v. The Florida Bar*, 608 F.3d 1241, 1258 (11th Cir.2010) (citation omitted), in any further military proceedings—where Chaplains acting in accordance with their professional and religious duties will be "hammered out" of the service—because the process is biased, with a pre-determined and certain outcome. On this record, there is no question that the "hardship" prong is satisfied.

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

A. Section 533 Claims

1. Congress' Actions Established Chaplains' Right of Conscience as a DoD 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* Ex. 2 & 3. 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. *See* Ex. 6.

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. Nor can Defendants show how mandating a vaccine that does not immunize the recipient, *see* Ex. 8 (Center for Disease Control changed definition of "vaccine" because COVID vaccines did not provide immunity), and thus remains an EUA vaccine qualifies as 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 Contrary to § 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. Exhibit 9 provides Plaintiffs' views of the Mandate as a religious exercise from their religious perspective.

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.

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. Defendants' Conduct Is Prohibited Retaliation.

To state an unconstitutional retaliation claim a plaintiff must show that: (1) he engaged in statutorily protected conduct; (2) he suffered adverse employment action; and (3) there is "some causal relation" between the two events. *Massa v. Sch. Bd. of Miami-Dade Cnty.*, 2018 WL 526543, at *4 (S.D. Fla. Jan. 22, 2018). Section 533 grants military chaplains a statutory mechanism to enforce the U.S. Constitution's guarantees of religious liberty, and to protect them from discrimination or adverse personnel actions for decisions related to conscience and religious beliefs.

Plaintiffs' declarations, *see* Ex. 6 & 7, show Defendants have ignored

§ 533, despite Congress repeating and reinforcing the directive on three occasions. Exhibit 7shows the forbidden negative personnel actions taken against each Plaintiff for having the temerity to seek a religious accommodation, a right guaranteed them by RFRA and the First Amendment.

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 and/or conscientious objections to the Mandate—in accordance with their conscience and faith.

4. Secretary Austin Violated § 533 by Failing to Issue Regulations, Implement Guidance and Training, or Establish § 533 Enforcement Procedures.

DOD and Secretary Austin have 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 Congress' instructions and the Constitution.

Military Defendants' directives are motivated by overt religious hostility and defiance of Congress. Their bias and bad faith are evidenced by the DoD's nearly decade-long refusal to publish regulations implementing § 533's protections and refusal to develop and implement "a comprehensive training program" on religious liberty instruction, including § 533 and RFRA, as Congress' 2018 NDAA ordered. Instead, the Mandate and RAR process establish a religious test for public office in violation of Article VI, creates a secular religion that requires agreement with abortion, and rejects and punishes those who follow their conscience. These actions constitute a forbidden bureaucratic insurgency this Court must address promptly and decisively quell.

B. RFRA and Free Exercise Claims.

1. Defendants' Religious Exemption Procedures Violate RFRA.

At least five U.S. District Courts have found that the DOD-wide directive to uniformly deny all religious accommodations likely violates RFRA and the First Amendment Free Exercise Clause. They enjoined the Mandate's implementation. *See* Note 1 *supra.*

Defendants' RAR system is not the simple accommodation process DoDI 1300.17 lays out in § 3.2.a ("Adjudication Authority"). It specifies RAR requests "will be reviewed and acted on at the lowest appropriate level of command or supervision[.]" The RAR process Plaintiffs challenge has predetermined

negative decisions being made at a very high level.

Navy SEALs 1-26 found the RAR process had a series of questions and forms which **theoretically** provided objective criteria upon which to evaluate whether a petitioner's religious belief was sincerely held. However, that Court found, it was all "theater", *id.*, at *1, because the result (denial) is "pre-determined," *id.*, at *4; "the Plaintiffs' requests are denied the moment they begin." *Id; see also Wallace v. Jaffree*, 472 U.S. 38, 75 (it is "the duty of the courts to distinguish a sham secular purpose from a sincere one") (1985) (O'Connor, J., concurring in judgment).

2. 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.[8] Defendants have substantially burdened Plaintiffs: "[b]y pitting their consciences against their livelihoods, the vaccine requirements would crush Plaintiffs' free exercise of religion." *Navy SEALs 1-26*, at *9. But for chaplains the violation of conscience is even more severe as

[8] 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* PI Order, 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. *See also Poffenbarger*, at *15 (same).

the government seeks to coerce Plaintiffs to endorse and be complicit in their wrongdoing by counseling service members to ignore the demands of their conscience and forego their rights to seek religious accommodation. *See* Ex. 1, Compl., ¶ 117 & Declarations discussed therein.

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.[9] Out of over 25,000 RARs, over 11,000 RARs have been denied, while thousands of medical and administrative exemptions have been granted. *See supra* note 1; Ex. 1, Compl., ¶¶ 109-111 & Table 1 & 2.

3. Defendants' Blanket Denial Policy Does Not Serve 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

[9] The Secretary's RAR process and No Accommodation Policy are like the restriction against the animal sacrifice *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534-538 (1993) found violated the Free Exercise Clause. "[T]he effect of a law in its real operation is strong evidence of its object." *Id.* at 535. The zero RAR approval clearly shows the objective of the process is to purge those with strong views about abortion and who believe they are obligated to obey their conscience and faith. While Defendants have approved administrative and medical accommodations or exceptions, the only RARs approved are those who are retiring or otherwise scheduled for separation. That is not an accident. Instead, "suppression of the central element" of Plaintiffs beliefs, their obedience to conscience, is the object of the RAR process. *See id.* at 534. This is a clear example of a "religious gerrymander." *Id.* at 535.

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). "Instead, the government must proffer "specific and reliable evidence" (not formulaic commands, policies or conclusions)." *Id.* at *15.

Defendants have manifestly failed to demonstrate that they have a compelling governmental interest in denying Plaintiffs' RARs and appeals. The RAR and appeal denial letters simply recite the same set of interests, in particular: (1) "preventing the spread of disease;" and/or (2) some sequence of military readiness, unit cohesion, and good order and discipline with slight variations by letter or service. *See* Ex. 1, Compl, ¶¶ 121-122 & n.16. These denials fail to address the "assignment, duty, and performance" of the individual Plaintiffs. *Navy SEAL 1* Stay Order, at 16. "Without individualized assessment," the Defendants "cannot demonstrate a compelling interest in vaccinating these particular Plaintiffs." *Navy SEALs 1-26* PI Order, at *10.

Moreover, the fact that the Armed Services have granted thousands of exemptions for secular reasons undermines their purported compelling interest in blanket denials of religious exemptions. 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, at *12 (citation and internal quotations marks omitted). Thus, the mandate "cannot be regarded as protecting an interest of the highest order … when it leaves appreciable damage to that supposedly vital interest unprohibited." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

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

Defendants have failed to demonstrate that their policies of uniformly denying Plaintiffs' religious exemption requests are the least restrictive means of furthering their purportedly compelling interests, or for that matter, 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.,* Ex. 7 Hirko Decl., ¶ 10; Jackson Decl., ¶ 12. The denial letters failed altogether to mention proposed alternatives.

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 and 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).

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* Ex. 1, Compl., ¶ 128. Defendants' conclusory assertions fail to show that "COVID-19 vaccine[s] … provide more sufficient protection" than Plaintiffs' "natural immunity coupled with other preventive measures." *Air Force Officer*, at *10 (citation omitted).

C. Establishment Clause Claims

1. The Government's Actions Violate the Establishment Clause Because They Are Not Neutral and Demonstrate Hostility to Religion.

Defendants' RAR process 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.

The RAR system is similar to the 50% income from members test to determine whether the Unification Church could be regulated found to be unconstitutional in *Larson v. Valente*, 456 U.S. 228 (1982). "[T]his statute does not operate evenhandedly, nor was it designed to do so." *Id.* at 253. Instead, the challenged rule "effects the selective [government] imposition of burdens and advantages upon particular denominations." *Id.* at 254. That describes the RAR process here: a process designed to destroy Plaintiffs' careers and faith under the cover of a fraudulent process.

If a Plaintiff objects because the vaccines were produced using stem cells from aborted babies, the RAR process burdens them by ending their careers, denying them benefits earned, and effectively destroying their ability to continue ministry with a discharge characterization designed for troublemakers with authority issues. By singling out Plaintiffs on the basis of their beliefs, the RAR process prefers some denominations over others, 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. In so doing they have created a government religion, an organization with religious

criteria for membership based on beliefs abortion its chief sacrament. Some religions or churches claim abortion as a sacrament. Almost all the RARs cite the use of abortion related stem cell lines; if you object to use of abortion byproducts you must be expelled. The Mandate's main doctrine requires rejection of anyone who disagrees that abortion is a sin, that sin matters, or that you are responsible for obeying your conscience as shaped by one's faith. The flipside of preference as shown here is the exclusion of those who believe that conscience requires them not to allow abortion related materials in their body, especially vaccines that do not work and change recipients' DNA. Thus, there is a clear religious test for continued employment and service in the military. This violates the Constitution's Article VI "no religious test" and the Establishment Clause.

2. Defendants' Actions Are Evidence of Hostility, Hatred, and Bigotry Toward People of Faith

These Chaplains' RAR's all emphasized the Mandate's requirements burdened their conscience. They could not, consistent with their faith, accept the vaccine for the valid reasons they provided. Section 533 defined and protected 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 sought to exercise their right to follow their conscience.

Plaintiffs allege the Secretary's actions show the Secretary is motivated by religious hostility; bias and bad faith evidenced by his issuance of the Mandate despite § 533; his disobedience in not publishing regulations implementing § 533's protections; refusing to implement and develop the religious liberty instruction addressing § 533 and RFRA Congress ordered in the FY 2018 NDAA; his draconian punishments for those who raise religious objections; his establishment of a no RAR policy; his denial of medical exemptions if an RAR is denied; and his refusal to grant any RAR based on opposition to abortion (or any other sincerely held religious belief for that matter). The Secretary's and Defendants' vindictive 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 or Coerce 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. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642, 63 S. Ct. 1178, (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.

4. The Mandate Cannot Withstand Strict Scrutiny under the Establishment Clause.

These *prima facie* violations of the Establishment Clause trigger scrutiny and shift the burden of proof to the government. To ensure religious and denominational neutrality, "we have expressly required 'strict scrutiny' of practices suggesting 'a denominational preference' in keeping with the 'unwavering diligence that the Constitution requires' against any violation of the Establishment Clause." *Allegheny*, 492 U.S. at 608-09 (citations omitted).

The RAR process fails strict scrutiny because the Secretary 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. 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.

D. No Religious Test Clause Claim

The Mandate and RAR process in fact establish a religious test for public office in violation of Article VI. Military Defendants' actions "establish[] a religious classification … governing the eligibility" for office or military service. *McDaniel*, 435 U.S. at 632. Moreover, it "imposes a unique disability upon those who exhibit a defined level of intensity of involvement in a protected religious activity," *id.*, namely, the willingness to follow the demands of conscience to seek religious accommodations, and the demands of duty both religious and secular to advise other service members with religious or conscientious objections. "Such a classification as much imposes a test … as one based on denominational preferences." *Id.*

All Plaintiffs—and all service members who share their religious objections—will be discharged or disciplined for their religious objections, as evidenced by Defendants' refusal to grant any authentic religious accommodations. *See supra* Section II.B. Accordingly, their No Accommodation

Policy is a religious test, which is "absolutely prohibited." *Id.; Torcaso, op. cit.*

III. PLAINTIFFS HAVE SUFFERED IRREPARABLE HARM.

Plaintiffs have shown above they are currently being deprived of First Amendment rights and RFRA's and § 533's statutory protections intended to enforce these rights. As the Supreme Court observed in *Cuomo*, there can be "no question" that these types of restrictions on religious exercise "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 equally 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 separation or discharge alone may not constitute irreparable harm, the Defendants' further and intentional deprivation of Plaintiffs' constitutional rights to free exercise of religion and due process 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).

IV. THE BALANCE OF EQUITIES AND PUBLIC INTEREST PLAINTIFFS HAVE SUFFERED IRREPARABLE HARM.

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, while "[t]he public has no interest in enforcing an unconstitutional" regulation. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). 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 expressly authorizes such judicial vindication." *Navy SEAL 1*, at *20.

The balance of equities strongly favors Plaintiffs insofar as Defendants seek to deprive them of their rights under the First and Fifth Amendments, RFRA, and § 533, as well as their livelihoods, by treating Plaintiffs' requests for lawful exemptions "as a refusal to obey a lawful order and a basis for discipline," *Navy SEAL 1 Stay Order*, at *13, based on an unconstitutional policy of uniformly denying religious exemptions across the board. Conversely, 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.

V. CONCLUSION

Plaintiffs have demonstrated a substantial likelihood of success on their claims. Section 533 is still good law and it provides Congress's authoritative decision as to the appropriateness and legitimacy of these Plaintiffs exercise of their conscience. The anger, retaliation, and over-the-top hostility directed against these Plaintiffs for following their conscience combined with Defendants' hostility to § 533 and overt abuse of the RAR system require an exercise of the Court's power to restrain Defendants' illegal and subversive acts that are a threat to good order and discipline. The PI should be granted, enforcing § 533's and RFRA's protections and the First Amendment's guarantees.

Dated June 29, 2022 Respectfully Submitted,

/s/ J. Andrew Meyer
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CERTIFICATE OF SERVICE

This is to certify that on this 29th day of June, 2022, the foregoing Plaintiffs' Motion was e-filed using the CM/ECF system.

Respectfully Submitted,

/s/ Arthur A. Schulcz
Arthur A. Schulcz