No. 23-717

In the Supreme Court of the United States

ISRAEL ALVARADO, ET AL., PETITIONERS

v.

LLOYD J. AUSTIN, III, SECRETARY OF DEFENSE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

In 2021, the Secretary of Defense ordered all military servicemembers to be vaccinated against COVID-19. Petitioners brought this action to challenge the military's COVID-19 vaccination requirement on various grounds, and the district court dismissed their complaint. After the dismissal, Congress passed legislation directing the Secretary to rescind the COVID-19 vaccination requirement that petitioners had challenged. Petitioners then moved for reconsideration of the dismissal of their complaint, which the district court denied, and petitioners appealed. In light of the rescission of the challenged vaccination requirement, the court of appeals dismissed petitioners' appeal as moot, vacated the district court's orders, and remanded with instructions to dismiss the complaint on mootness grounds pursuant to *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). The question presented is as follows:

Whether the court of appeals correctly determined that petitioners' challenge to the military's now-rescinded COVID-19 vaccination requirement is moot.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is available at 2023 WL 7125168. The opinions of the district court (Pet. App. 3a-27a, 28a-40a) are not published in the Federal Supplement but are available at 2022 WL 18587373 and 2023 WL 2089246, respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2023. On September 27, 2023, and December 1, 2023, the Chief Justice granted applications to extend the time within which to file a petition for a writ of certiorari, ultimately extending the time to and including December 29, 2023. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The U.S. military has relied on mandatory immunization since 1777, when George Washington directed that the Continental Army be inoculated against smallpox. Stanley M. Lemon et al., *Protecting Our Forces: Improving Vaccine Acquisition and Availability in the U.S. Military* 11-12 (2002). As of 2021, nine vaccines were required for all servicemembers, and eight other vaccines were required in some circumstances based on risk of exposure. Pet. App. 5a n.4.

In August 2021, after the Food and Drug Administration approved the first COVID-19 vaccine, the Secretary of Defense announced that vaccination against COVID-19 would be added to the required list. Pet. App. 5a. The Departments of the Army, the Navy, and the Air Force then issued "implementation guidance and set vaccination deadlines" for servicemembers in each branch. *Ibid.*

Each service branch permitted servicemembers to seek an exemption from the COVID-19 vaccination requirement for "medical, administrative, and religious" reasons. Pet. App. 5a. For requests for religious exemptions, the service branches relied on preexisting policies governing servicemembers' requests for religious accommodations from other generally applicable requirements, including other vaccination requirements. While those policies varied in some respects as between the service branches, they all provided for the involvement of a military chaplain, "review by a senior military leader," and an "appeals process" after an initial decision. *Id.* at 6a.

Servicemembers were not required to be vaccinated against COVID-19 while seeking a request for a medical, administrative, or religious exemption. Pet. App.

6a-7a. But if a servicemember's request for such an exemption was ultimately denied, the servicemember was required to comply with the order to be vaccinated. Servicemembers who refused to do so were offered an opportunity to retire, if eligible, or could be subject to discipline, including discharge from the service. *Ibid.*

2. In May 2022, petitioners brought this putative class action in the Middle District of Florida to challenge the military's COVID-19 vaccination requirement on various grounds. See Compl. ¶¶ 1-27. Petitioners are military chaplains in the Air Force, Army, and Navy who, as servicemembers, were subject to the vaccination requirement and who had submitted religious accommodation requests to their respective service branches. Compl. ¶¶ 28-58. At the time of the complaint, some of the plaintiffs alleged that their requests for religious accommodations had already been denied, while others alleged that their requests were still pending. See, *e.g.*, Compl. ¶¶ 28-31. After a hearing at which the district court questioned whether venue in the Middle District of Florida was appropriate, petitioners filed an unopposed motion to transfer the case to the Eastern District of Virginia. See 22-cv-1149 D. Ct. Doc. 46, at 1 (July 27, 2022). The Florida court granted that motion and transferred the case pursuant to 28 U.S.C. 1404(a). 22-cv-1149 D. Ct. Doc. 49, at 1 (July 27, 2022).

After the transfer, petitioners moved for a preliminary injunction to restrain the military from requiring them to be vaccinated during the pendency of the litigation. D. Ct. Doc. 59, at 1 (Aug. 15, 2022). As relevant here, petitioners argued that the military had adopted a de facto policy of denying all or nearly all religious-accommodation requests and that the alleged policy violated the Religious Freedom Restoration Act of 1993

(RFRA), 42 U.S.C. 2000bb *et seq.* See D. Ct. Doc. 60, at 29-32 (Aug. 15, 2022). Petitioners also invoked Section 533 of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, Tit. V, 126 Stat. 1727. See D. Ct. Doc. 60, at 37-41. Section 533 provides that the Armed Forces may not require a chaplain "to perform any rite, ritual, or ceremony that is contrary to the conscience, moral principles, or religious beliefs of the chaplain." § 533(b)(1), 126 Stat. 1727. Section 533 further provides that the Armed Forces may not "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 [Section 533(b)(1)]." § 533(b)(2), 126 Stat. 1727.[1]

The district court denied petitioners' motion for a preliminary injunction, dismissed the case *sua sponte* for lack of subject-matter jurisdiction, and denied as moot a pending motion for class certification. Pet. App.

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[1] By the time petitioners sought a preliminary injunction from the Virginia district court, other district courts had already preliminarily enjoined the Navy and the Air Force from enforcing the COVID-19 vaccination requirement against certified classes of servicemembers in those branches. See *Doster* v. *Kendall*, No. 22-cv-84, 2022 WL 2974733, at *1-*2 (S.D. Ohio July 27, 2022), aff'd, 54 F.4th 398 (6th Cir. 2022); *U.S. Navy SEALs 1-26* v. *Austin*, 594 F. Supp. 3d 767, 789 (N.D. Tex. 2022), appeal dismissed as moot, 72 F.4th 666 (5th Cir. 2023). The preliminary injunctions issued by the district court in *Doster* were the subject of this Court's order in *Kendall* v. *Doster*, 144 S. Ct. 481 (2023), granting the government's petition for a writ of certiorari, vacating the judgment below, and remanding the case to the Sixth Circuit with instructions to direct the district court to vacate its injunctions as moot pursuant to *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

3a-27a. The court determined that some of the petitioners had failed to "exhaust their available remedies within the armed forces." *Id.* at 15a (citing, *inter alia*, *Williams* v. *Wilson*, 762 F.2d 357, 359-360 (4th Cir. 1985)); see *id.* at 16a-21a. The court also determined that all of petitioners' claims were nonjusticiable under "the *Mindes* test," *id.* at 22a, which the Fourth Circuit applies to determine the justiciability of claims by servicemembers seeking judicial review of internal military affairs. See *Williams*, 762 F.2d at 359 (discussing *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971)).

3. The district court dismissed the complaint on November 23, 2022. Pet. App. 26a-27a. A few weeks later, Congress enacted the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (NDAA), Pub. L. No. 117-263, 136 Stat. 2395, which the President signed into law on December 23, 2022. Section 525 of the NDAA directed the Secretary of Defense to rescind, within 30 days, the "mandate that members of the Armed Forces be vaccinated against COVID-19." § 525, 136 Stat. 2571-2572.

Although the Secretary of Defense had opposed the enactment of Section 525 of the NDAA, he promptly complied with Congress's direction.[2] On January 10, 2023, the Secretary rescinded the COVID-19 vaccination requirement that he had previously imposed. Pet.

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[2] See, *e.g.*, Sabrina Singh, Deputy Pentagon Press Sec'y, Dep't of Def., *Press Briefing Tr.* (Dec. 7, 2022), perma.cc/EXQ2-FNBN (stating that the Secretary of Defense "support[ed] continuing the vaccine mandate in the NDAA"); Connor O'Brien, Politico, *Defense bill rolls back Pentagon's Covid vaccine mandate* (Dec. 6, 2022), perma.cc/YQ26-DYAL (quoting a government spokesperson's statement that "Secretary Austin has been very clear that he opposes the repeal of the vaccine policy").

App. 29a. The Secretary's memorandum rescinding the requirement also provided that "[n]o individuals currently serving in the Armed Forces shall be separated solely on the basis of their refusal to receive the COVID-19 vaccination if they sought an accommodation on religious, administrative, or medical grounds," and that "[t]he Military Departments will update the records of such individuals to remove any adverse actions solely associated with denials of such requests, including letters of reprimand." Gov't C.A. Mot. to Dismiss App. A254 (C.A. App.). The Secretary also directed each service branch to cease any ongoing review of current servicemembers' "religious, administrative, or medical accommodation requests solely for exemption from the COVID-19 vaccine or appeals of denials of such requests." *Ibid.*

For any servicemember who had been discharged "on the sole basis that the Service member failed to obey a lawful order to receive a vaccine for COVID-19," the Secretary of Defense noted that the military was "precluded by law from awarding any characterization less than a general (under honorable conditions) discharge." C.A. App. A255. But to the extent that former servicemembers wished to seek any correction in their personnel records, the Secretary observed that they may "petition their Military Department's Discharge Review Boards and Boards for Correction of Military or Naval Records." *Ibid.*

Each of the military services then issued its own implementing guidance to halt ongoing enforcement actions and remove adverse actions from servicemembers' personnel records. See*, e.g.*, Sec'y of the Air Force Pub. Affairs, *DAF Issues Guidance on COVID-related adverse actions; Religious Accommodation Requests*

(Feb. 27, 2023), perma.cc/4NF3-UFPD; Memorandum from Christine E. Wormuth, Sec'y of the Army, *Army Policy Implementing the Secretary of Defense Coronavirus Disease 2019 (COVID-19) Vaccination Mandate Rescission* (Feb. 24, 2023), perma.cc/7JZG-G2ZA; Dep't of the Navy, NAVADMIN 065/23, *Follow On COVID-19 Vaccine Rescission Actions* (Mar. 6, 2023), perma.cc/B2SG-JL76.

4. On December 17, 2022, after Congress had passed the NDAA, petitioners filed a motion under Federal Rule of Civil Procedure 59(e) seeking reconsideration of the dismissal of their complaint. Pet. App. 29a. Petitioners maintained, among other things, that the NDAA "amounted to a change in controlling law." *Ibid.* The district court denied petitioners' motion. *Id.* at 28a-40a.

5. Petitioners appealed the district court's orders dismissing their complaint and denying their Rule 59(e) motion. See D. Ct. Doc. 99, at 1 (Apr. 12, 2023). The government moved to dismiss the appeal as moot in light of the NDAA and the Secretary of Defense's rescission of the challenged COVID-19 vaccination requirement. See Gov't C.A. Mot. to Dismiss 1, 11-13. Petitioners opposed the motion, arguing principally that their claims had not been mooted by the rescission of the vaccination requirement because their complaint also included a request that the district court order the military to "take necessary actions to repair and restore [their] careers and personnel records." Pet. C.A. Mootness Opp. 9 (quoting Compl. 123-124). In particular, petitioners maintained that a live controversy about the lawfulness of the rescinded policy continued to exist because their refusal to comply with that policy when it was in effect had allegedly caused them to miss out on

"assignment[s], promotion[s], and schooling," with potential future ramifications for their military careers. *Ibid.*; see *id.* at 9-11. In the alternative, petitioners requested that the court of appeals vacate the district court's orders pursuant to the *Munsingwear* doctrine. *Id.* at 25; see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

In reply, the government explained that the military had already taken steps to address concerns about future assignments and promotions by ensuring that any adverse actions in servicemembers' personnel records associated solely with a refusal to comply with the COVID-19 vaccination requirement are removed. Gov't C.A. Mootness Reply Br. 2. The government also explained that, to the extent that petitioners were seeking an injunction that would require the military to promote them to a rank or position that they claim they would have occupied had the COVID-19 vaccination requirement never been in place, petitioners had failed to identify any lawful basis for such an order, which would go beyond restoring the status quo ante. See *id.* at 2-5.

The court of appeals granted the government's motion and dismissed petitioners' appeal in an unpublished order. Pet. App. 1a-2a. As requested by petitioners, the court of appeals also vacated the district court's orders and remanded the case with "directions to dismiss as moot." *Id.* at 2a. On October 23, 2023, the district court complied with the appellate mandate and entered an order dismissing the action as moot. D. Ct. Doc. 106.

ARGUMENT

The court of appeals correctly recognized that it lacked Article III jurisdiction over petitioners' appeal because this case is moot. Petitioners reprise their contention (Pet. 7-13, 17-18) that the allegations in their

complaint regarding lost training and promotional opportunities prevent this case from becoming moot. Petitioners also contend (Pet. 15-16) that an exception to mootness applies because the challenged policy is capable of repetition while evading review. Those contentions lack merit. Petitioners brought this case to seek prospective relief from the military's COVID-19 vaccination requirement. Any live controversy about that requirement ceased to exist when the Secretary of Defense complied with the NDAA and rescinded the vaccination requirement, while also taking steps to ensure that servicemembers' personnel records are corrected to remove adverse actions associated solely with refusing to comply with the COVID-19 vaccination requirement after the denial of a request for a religious, medical, or administrative exemption.

In any event, the unpublished order of the court of appeals dismissing petitioners' appeal on mootness grounds does not warrant plenary review by this Court. The order does not conflict with any decision of this Court or another court of appeal. To the contrary, this Court and numerous lower courts have treated analogous disputes as moot after the rescission of the military's COVID-19 vaccination requirement. See *Kendall* v. *Doster*, 144 S. Ct. 481 (2023) (granting, vacating, and remanding on mootness grounds); see also pp. 16-17, *infra* (collecting cases). The petition for a writ of certiorari should be denied.

1. The court of appeals correctly dismissed petitioners' appeal as moot. Pet. App. 2a. Any live controversy between the parties regarding the military's COVID-19 vaccination requirement ceased to exist after the rescission of the challenged policy, and no exception to mootness applies.

a. Under Article III, the jurisdiction of the federal courts is limited to the resolution of actual "Cases" or "Controversies." U.S. Const. Art. III, § 2, Cl. 1. "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (citation omitted). "A case that becomes moot at any point during the proceedings is 'no longer a "Case" or "Controversy" for purposes of Article III,' and is outside the jurisdiction of the federal courts." *United States* v. *Sanchez-Gomez*, 584 U.S. 381, 385-386 (2018) (quoting *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013)).

A case or appeal becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already*, 568 U.S. at 91 (citation omitted). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.'" *Ibid.* (citation omitted).

Mootness may result during litigation when a controversy is overtaken by new legislation that "significantly alters the posture of th[e] case." *United States Dep't of the Treasury* v. *Galioto*, 477 U.S. 556, 559 (1986). In *United States* v. *Microsoft Corp.*, 138 S. Ct. 1186 (2018) (per curiam), for example, the Court granted certiorari to address the circumstances under which "a U.S. provider of e-mail services must disclose to the Government electronic communications within its control" that are stored abroad, *id.* at 1187. While the case was pending, Congress enacted new legislation addressing the

same issue, and the government applied for and obtained a warrant under the new law. *Id.* at 1187-1188. The Court held that, as a result of those developments, "[n]o live dispute remain[ed] between the parties over the issue with respect to which certiorari was granted," and the case "ha[d] become moot." *Id.* at 1188; see, *e.g.*, *United States Dep't of Justice* v. *Provenzano*, 469 U.S. 14, 15 (1984) (per curiam) (holding that "new legislation * * * plainly render[ed] moot" the question presented); *Galioto*, 477 U.S. at 559 (similar).

b. The court of appeals faithfully applied those principles in dismissing petitioners' appeal as moot. As recited in the opening paragraph of the complaint, petitioners brought this action to "challenge [the Secretary of Defense's] COVID-19 vaccination mandate" and the military's alleged "policy of uniformly denying religious accommodations." Compl. ¶ 1. Although petitioners are military chaplains, the gravamen of the complaint was that they—like other servicemembers—faced the prospect of "disciplinary action for refusing an order to take the COVID-19 vaccine," *ibid.*, and they sought prospective injunctive relief from the vaccination requirement, see, *e.g.*, Compl. ¶¶ 179, 188, 205, 223. The NDAA and its implementation mooted any live controversy between the parties about those matters.

Section 525 of the NDAA provided that, "[n]ot later than 30 days after the * * * enactment" of the NDAA, "the Secretary of Defense shall rescind the mandate that members of the Armed Forces be vaccinated against COVID-19." § 525, 136 Stat. 2571-2572. Although the Secretary had opposed including any such provision in the NDAA, he complied with Congress's directive by formally "rescind[ing] the mandate that members of the

Armed Forces be vaccinated against COVID-19." C.A. App. A254.

The Secretary of Defense also ordered that current servicemembers may not be separated from the service "solely on the basis of their refusal to receive the COVID-19 vaccination if they sought an accommodation on religious * * * grounds." C.A. App. A254; cf. Pet. 5. The Secretary further directed that the military records of any such individuals be updated "to remove any adverse actions solely associated with" the denial of their requests for religious exemptions, "including letters of reprimand." C.A. App. A254. And each branch of the military has now taken steps to implement the Secretary's directives. See pp. 6-7, *supra*.

As a result, this case is now moot. Granting petitioners' request for prospective injunctive relief against the rescinded COVID-19 vaccination requirement would not benefit them in any concrete way because they are no longer subject to that requirement and face no prospect of being disciplined for failure to comply with it, now or in the past.

c. Petitioners' contrary arguments lack merit. Petitioners principally contend (Pet. 9) that their complaint alleges "ongoing" harms that are still capable of redress by an Article III court. According to petitioners, they missed out on unspecified opportunities for training or promotion while refusing to comply with the COVID-19 vaccination requirement when it was in effect, and those lost opportunities will continue to affect their future military careers in negative ways, either because petitioners will be "branded as 'not team players'" or because they are no longer on "equal footing" with other servicemembers who complied with the vaccination requirement. Pet. 17-18; see Pet. 7-13.

As already explained above, however, the Secretary of Defense and the military services have made clear that servicemembers who sought religious exemptions will not face any future discipline for not complying with the COVID-19 vaccination requirement when it still existed, and their service records will be corrected to remove any prior discipline. See C.A. App. A254; see also, *e.g.*, *U.S. Navy SEALs 1-26* v. *Biden*, 72 F.4th 666, 673 (5th Cir. 2023) (dismissing analogous appeals as moot and explaining that "the Navy has definitively restored [servicemembers who sought religious exemptions from the COVID-19 vaccination requirement] to equal footing with their vaccinated counterparts through repeated formal policy changes").

To the extent that petitioners seek an injunction that would require the military to treat them in the future as though they had received promotions or trainings that they did not in fact receive—thus "level[ing]" them up with others servicemembers whom petitioners perceive as now having an unfair "competitive advantage" (Pet. 18)—petitioners do not identify any lawful basis for such an extraordinary order. Any such order would go beyond restoring the status quo ante and would threaten to interfere with quintessentially military judgments about assignments and promotions. See, *e.g.*, *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) (describing the "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force" as "essentially professional military judgments" that are not fit for judicial resolution); *Orloff* v. *Willoughby*, 345 U.S. 83, 93 (1953) (observing that "judges are not given the task of running the Army").

Petitioners also do not identify any plausible examples of the equal-footing problem they purportedly now

face. Petitioners state (Pet. 5, 19) that a particular chaplain was separated from service as a result of being unable to attend a training while the chaplain was declining to comply with the COVID-19 vaccination requirement for religious reasons. But according to petitioners, that separation occurred on December 1, 2023 (Pet. 5), nearly a year after the Secretary of Defense rescinded the vaccination requirement. Even assuming for the sake of argument that the separation in question was the result solely of the missed training, petitioners offer no basis for concluding that any failure to complete the necessary training by December 2023 was attributable to a vaccination requirement that had already been rescinded by January 2023. *A fortiori*, petitioners identify no reason to think that, as time marches on, any future decisions about their assignments or promotions will be affected by a vaccination requirement that was rescinded more than a year ago.[3]

d. Petitioners alternatively contend (Pet. 15-16) that this case falls within the exception to mootness for disputes that are "capable of repetition, yet evading review." *Sanchez-Gomez*, 138 S. Ct. at 1540 (citation omitted). "A dispute qualifies for that exception only 'if

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[3] Petitioners are mistaken to suggest (Pet. 13-14) that the possibility of money damages under RFRA could provide an alternative basis for preventing this case from becoming moot. As petitioners acknowledge (Pet. 14), they did not actually seek such relief in their complaint. Nor could they have. Although RFRA "permits litigants, when appropriate, to obtain money damages against federal officials *in their individual capacities*," *Tanzin* v. *Tanvir*, 141 S. Ct. 486, 493 (2020) (emphasis added), all of the federal officials named as defendants here were sued solely in their official capacities, see Compl. 1-2. RFRA does not authorize money damages in official-capacity suits. See *Tanvir* v. *Tanzin*, 894 F.3d 449, 464-465 (2d Cir. 2018), aff'd, 141 S. Ct. 486 (2020).

(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.'" *Ibid.* (citation omitted).

Neither requirement is satisfied here. Although the Secretary of Defense continues to adhere to the view that vaccination "enhances operational readiness and protects" the Nation's armed forces, C.A. App. A254, no reasonable prospect exists at this time that petitioners will be subject to the same COVID-19 vaccination requirement again in the foreseeable future—let alone that they will continue to have religious objections to vaccination or will be denied religious accommodations. Speculation about the mere possibility of "future pandemics" (Pet. 15) does not suffice. And even setting aside that problem, petitioners have failed to show that any future controversy about mandatory COVID-19 vaccination in the military would be too short in duration to be fully litigated to a conclusion at that time.

2. The decision below does not conflict with any decision of this Court or another court of appeals. To the contrary, the Fourth Circuit's determination that this appeal is moot accords with the disposition of numerous similar challenges. Petitioners offer no persuasive reason to treat this appeal any differently. Nor do petitioners identify any other sound basis for further review.

a. This Court and the lower courts have consistently treated the NDAA and its implementation as having mooted disputes seeking prospective injunctive relief from the military's COVID-19 vaccination requirement, which no longer exists to be enjoined.

In *Kendall* v. *Doster*, *supra*, the Sixth Circuit had upheld two preliminary injunctions forbidding the Air

Force from enforcing the COVID-19 vaccination requirement against a certified class of airmen who had unsuccessfully sought religious exemptions—a class that would on its face appear to cover some of the plaintiffs here—as well as certain individual servicemembers. See Pet. at 5-9, *Kendall* v. *Doster*, *supra* (No. 23-154). The government then filed a petition for a writ of certiorari invoking the *Munsingwear* doctrine. *Id.* at 12-13. The premise of the petition was that the NDAA and its implementation had caused the parties' dispute about the lawfulness of the preliminary injunctions to become moot, because upholding those orders would no longer grant the plaintiffs any effectual relief. See *id.* at 13-17. This Court necessarily agreed with that premise when it granted the government's petition, vacated the Sixth Circuit's judgment, and remanded "with instructions to direct the District Court to vacate as moot its preliminary injunctions." *Kendall*, 144 S. Ct. at 481 (citing *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)). The district court in *Doster* has also recently concluded that the entire case is moot, granting the government's motion to dismiss and rejecting arguments similar to the ones that petitioners raise here. See Order at 5-8, *Doster* v. *Kendall*, No. 22-cv-84 (S.D. Ohio Mar. 18, 2024).

The Fifth Circuit likewise concluded that the NDAA and its implementation mooted the government's then-pending appeals in the *Navy SEALs* litigation, in which this Court had previously entered a partial stay. See *U.S. Navy SEALs 1-26*, 72 F.4th at 669; cf. *Austin* v. *U.S. Navy SEALs 1-26*, 142 S. Ct. 1301 (2022). The Fifth Circuit observed that the Navy, "[o]beying a newly enacted federal statute," had rescinded the COVID-19 vaccination policies that were at issue in that

litigation. *U.S. Navy SEALs 1-26*, 72 F.4th at 671-672. The court further observed that "[t]here is no need to enjoin policies that no longer exist." *Id.* at 672.[4]

Numerous other courts of appeals have reached the same conclusion. See, *e.g.*, *Robert* v. *Austin*, 72 F.4th 1160, 1165 (10th Cir. 2023) ("Congress's revocation of [the military's] vaccine mandate, and [the] implementation of Congress's instruction, means there is no more vaccine mandate to enjoin."), cert. denied, 144 S. Ct. 573 (2024); *Roth* v. *Austin*, 62 F.4th 1114, 1119 (8th Cir. 2023) ("The rescission of the COVID-19 vaccination mandate, as directed by the [NDAA], provides the Airmen all of their requested preliminary injunctive relief and renders this appeal moot."); *Navy Seal 1* v. *Austin*, No. 22-5114, 2023 WL 2482927, at *1 (D.C. Cir. Mar. 10, 2023) (per curiam) (dismissing appeals as moot in light of the implementation of the NDAA), cert. denied, 144 S. Ct. 97 (2023); *Dunn* v. *Austin*, No. 22-15286, 2023 WL 2319316, at *1 (9th Cir. Feb. 27, 2023) (same); *Short* v. *Berger*, No. 22-15755, 2023 WL 2258384, at *1 (9th Cir. Feb. 24, 2023) (same).

b. Petitioners do not identify any persuasive basis for distinguishing their appeal from the numerous other appeals that have been found to be moot under similar circumstances. Petitioners contend (Pet. 3) that this Court's order in *Doster* can be distinguished on the theory that the "*Doster* plaintiffs-respondents did not claim

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[4] The district court in the *Navy SEALs* litigation has nonetheless concluded that the plaintiffs there still have justiciable claims about "the Navy's broader religious accommodations process." Order at 5, *U.S. Navy SEALs 1-26* v. *Austin*, No. 21-cv-1236 (N.D. Tex. Feb. 14, 2024). That case is presently stayed pending settlement discussions and mediation before a magistrate judge. Order at 1, *U.S. Navy SEALs*, *supra* (N.D. Tex. Mar. 11, 2024).

a need to protect themselves from residual harms." In fact, the respondents in that case opposed mootness in part on the theory that they would continue to suffer "ongoing negative effects" from the denial of their requests for religious accommodations because (they contended) the military had maintained records of their refusal to be vaccinated to use in making future decisions about promotions or assignments. Br. in Opp. at 16, *Doster*, *supra* (No. 23-154); see *id.* at 14, 17, 20. The government explained, however, that the military had already taken steps to ensure that the service records that are used for promotions and assignments are updated to remove any past adverse actions that were based solely on the denial of requests for religious accommodations. Gov't Reply Br. at 6, *Doster*, *supra* (No. 23-154).

Petitioners are therefore incorrect to assert that *Doster* did not involve any claim of lingering harms akin to the concerns that petitioners raise here. And just as those arguments did not save the appeals in *Doster* from mootness, petitioners' speculative concerns about being at a competitive disadvantage for future assignments or promotions do not suffice to keep this controversy alive.

Petitioners likewise err in suggesting (Pet. 16) that they are differently situated than the respondents in *Doster* because they are chaplains. Petitioners' claims largely revolved around their *own* requests for religious exemptions from the requirement to be vaccinated against COVID-19. See Compl. ¶¶ 162-274; cf. Pet. App. 3a (noting that petitioners sought a preliminary injunction against "enforcing the military's vaccine directive or taking any adverse action against [petitioners] * * * on the basis of [petitioners'] refusal to vaccinate against COVID-19"). In that respect, petitioners were not in a

materially different position from any of the other servicemember plaintiffs who brought suit after their requests for religious exemptions were denied, and whose cases then became moot after the NDAA. The only arguable exception is petitioners' theory that their First Amendment rights were abridged insofar as they were required to or prohibited from participating as consulting chaplains in the religious-accommodation process for other servicemembers seeking exemptions from the vaccination requirement. See Pet. App. 8a. But any claims based on that theory are moot as well because, after the NDAA, the military ceased to process any requests for religious accommodations from the now-rescinded requirement. C.A. App. A254.

3. The two questions presented in the petition (Pet. i) both concern mootness. Petitioners do not contend that the court of appeals' nonprecedential order concluding that this case is moot conflicts with any decision of another court of appeals or otherwise satisfies this Court's traditional certiorari standards. And much of the petition is devoted to entirely distinct issues that the court of appeals did not address, such as whether petitioners had Article III standing to bring the case in the first place, Pet. 16-22; whether petitioners' claims were ripe for adjudication, Pet. 22-24; and whether any other threshold issues would preclude the exercise of jurisdiction over this case, Pet. 24-35. The fact that this case also raises a host of other potential threshold problems before any Article III court could reach the merits is a reason to deny further review, not to grant it. To the extent that petitioners are seeking this Court's review of those other issues in addition to their mootness questions, any such request should be denied. It would be anomalous for this Court to grant review to address

such threshold jurisdictional matters in a case in which the court of appeals had no occasion to reach them, dismissing instead on mootness grounds. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (observing that this Court generally sits as "a court of review, not of first view"). And because this case is moot, it would make no difference to the disposition of the case to address whether it should or should not have also been dismissed on other threshold grounds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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