No. 23-154

In the Supreme Court of the United States

FRANK KENDALL III, SECRETARY OF THE AIR FORCE, ET AL., PETITIONERS

v.

HUNTER DOSTER, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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PARTIES TO THE PROCEEDING

The petition for a writ of certiorari identified James C. Slife, in his official capacity as Commander, Air Force Special Operations Command, as a defendant-appellee below. During the litigation, Tony D. Bauernfeind succeeded to the office of Commander, Air Force Special Operations Command. Commander Bauernfeind is substituted for his predecessor in office pursuant to Rule 35.3 of the Rules of this Court.

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The Sixth Circuit erred in upholding preliminary injunctions forbidding the Department of the Air Force from enforcing the military's COVID-19 vaccination requirement. Several weeks after the Sixth Circuit entered its judgment, however, Congress directed the Secretary of Defense to rescind the vaccination requirement, which he promptly did. Pet. 9-10; see James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (NDAA), Pub. L. No. 117-263, § 525, 136 Stat. 2571-2572. Those developments mooted these appeals. Consistent with this Court's ordinary practice, it should grant the petition for a writ of certiorari, vacate the judgment below, and remand with instructions to direct the district court to vacate its preliminary injunctions as moot pursuant to *United States* v. *Munsingwear*,

Inc., 340 U.S. 36 (1950). Respondents identify no sound basis to depart from the Court's ordinary practice.

A. These Appeals Are Moot

1. The government's interlocutory appeals from the preliminary injunctions at issue here became moot when the Secretary of Defense carried out Congress's directive to rescind the vaccination requirement that was the subject of both injunctions. Pet. 13-20. The government promptly brought the mootness issue to the Sixth Circuit's attention in a petition for rehearing, but the court denied the petition and proceeded to issue its mandate, stating that the "mootness question" should be addressed by "the district court * * * in the first instance." Pet. App. 180a.

As the petition explains (at 17-18), the Sixth Circuit lacked Article III jurisdiction to issue its mandate, and thus give effect to its judgment upholding the preliminary injunctions, after the appeals had become moot. See *Norwegian Cruise Line Holdings Ltd.* v. *State Surgeon Gen.*, 55 F.4th 1312, 1315 (11th Cir. 2022) ("[W]e must ensure—up until the moment our mandate issues—that intervening events have not mooted the appeal.") (citation omitted). And the court was wrong to treat mootness—a threshold jurisdictional matter—as an issue for remand. Respondents observe that an appellate court may remand for consideration of mootness when it is "unsure of the facts." Br. in Opp. 13 (citation omitted). But basic Article III principles require that any such remand *precede* the appellate court's decision on the merits.

Respondents also contend (Br. in Opp. 28-31) that the government could have sought this Court's review before these appeals became moot. That misperceives the requirements of Article III. Filing a petition for a

writ of certiorari immediately after the Sixth Circuit's decision in November 2022 would not have prevented these appeals from becoming moot when the NDAA was enacted in December 2022 and implemented, in relevant part, in January 2023. See Pet. 9-10. A live controversy must be "extant at all stages of review," *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted), including in this Court. Even if the Court had already granted review—or entered a stay, see Br. in Opp. 26—mootness still would have prevented the Court from reaching the merits.

More broadly, respondents are wrong to suggest (Br. in Opp. 15) that the government engaged in any dilatory tactics below. When the district court issued its individual-plaintiff injunction, the court limited its order to conform to the emergency relief that this Court had recently granted in parallel litigation. See Pet. 6 & n.2; *Austin* v. *U.S. Navy SEALs 1-26*, 142 S. Ct. 1301, 1301 (2022). The government appealed but did not seek additional emergency relief. When the district court later dramatically expanded the scope of preliminary injunctive relief to cover a class of about 10,000 servicemembers, the government promptly appealed and sought a stay. D. Ct. Doc. 83 (Aug. 15, 2022). The Sixth Circuit denied that request but expedited the government's appeal and stated that it would "strive" to issue a decision "in November." Pet. App. 95a. The court issued its decision on November 29, 2022, and the House of Representatives passed what would become the NDAA on December 8, 2022. See Gov't C.A. Mot. for Reh'g Extension 1, 3 (Dec. 15, 2022). Nothing about that sequence of events suggests any effort to "run the

clock" or "delay this Court's review." Br. in Opp. 11, 26.[1]

2. Respondents invoke the exceptions to mootness for cases involving voluntary cessation or collateral legal consequences. Neither exception applies here.

a. The NDAA directed the Secretary of Defense to "rescind the mandate that members of the Armed Forces be vaccinated against COVID-19." § 525, 136 Stat. 2571-2572. That directive—not any voluntary action by the Secretary—mooted these appeals. Respondents are thus wrong to assert (Br. in Opp. 2, 12-13, 17-18, 25, 32, 34) that the voluntary-cessation doctrine applies here.

Respondents emphasize that, in complying with the NDAA, the Secretary also took steps to ensure that servicemembers who "sought an accommodation on religious, administrative, or medical grounds" would not be separated from service "solely on the basis" of their refusal to be vaccinated and that the service records of such individuals would be updated to remove any "adverse actions solely associated" with their refusal to be vaccinated, including any letters of reprimand. Pet. App. 187a. But those additional steps do not support respondents' voluntary-cessation theory.

The NDAA itself sufficed to—and did—moot these appeals. The preliminary injunctions that were the subject of both appeals had forbidden the Air Force from

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[1] For similar reasons, respondents err in equating (Br. in Opp. 31, 35) these appeals with prior cases in which the government opposed *Munsingwear* vacatur based in part on a litigant's lengthy delays in seeking review. See Gov't Br. in Opp. at 18-19, *Electronic Privacy Info. Ctr.* v. *Department of Commerce*, 140 S. Ct. 2718 (2020) (No. 19-777) (petitioner waited "nearly ten months" even to request a preliminary injunction).

enforcing the COVID-19 vaccination requirement against respondents pending further litigation. Pet. App. 102a-104a, 177a-178a. Any Article III controversy about prospectively enjoining enforcement of the vaccination requirement became moot when the Secretary complied with the NDAA and rescinded the requirement. As other courts of appeals have correctly concluded, servicemembers have no concrete stake in enjoining a vaccination policy "that no longer exist[s]." *U.S. Navy SEALs 1-26* v. *Biden*, 72 F.4th 666, 672 (5th Cir. 2023); see Pet. 16-17 (collecting cases).[2]

Respondents also err in likening (Br. in Opp. 24-26) this case to *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18 (1994). That case involved an agreement to settle pending litigation. *Id.* at 20. The Court observed that, when a private litigant chooses to settle, it "voluntarily forfeit[s]" further review. *Id.* at 25. The same cannot be said when intervening legislation moots an appeal. To the contrary, this Court has repeatedly found disputes that were overtaken by legislative changes to be moot—including when, as here, the changes are mandated by Congress, and the Executive Branch is a party to the relevant litigation. Pet. 14; see, *e.g.*, *United States* v. *Microsoft Corp.*, 138 S. Ct. 1186, 1188 (2018) (per curiam). Respondents fail to address, let alone distinguish, those precedents.

b. Respondents also fail to demonstrate that they face any "collateral legal consequences" that would save these preliminary-injunction appeals from becoming moot. Pet. 18 (quoting *Lane* v. *Williams*, 455 U.S. 624, 632 (1982)). As just explained, the Secretary of Defense

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[2] Numerous district courts have reached the same conclusion. See *Coker* v. *Austin*, No. 21-cv-1211, 2023 WL 5625486, at *4 & n.6 (N.D. Fla. Aug. 25, 2023) (collecting cases).

has taken steps to ensure that individuals who sought religious or other accommodations—which necessarily includes all class members, see Pet. 14-15—do not face any future discipline for having refused to comply with the now-rescinded orders to be vaccinated, while also ensuring that service records are updated to remove any past adverse actions that were based solely on the denial of such accommodation requests. Pet. 18-19.

Respondents nonetheless contend that they face "ongoing negative effects" from the rescinded requirement because the Air Force maintains "a database of those who did not comply, used in assignment and promotion purposes, as well as to assess potential future military justice actions." Br. in Opp. 16; see *id.* at 14, 17. Respondents made similar claims in opposing mootness below, and the government explained that the database is an internal system for tracking cases within the Air Force Judge Advocate General's Corps. See D. Ct. Doc. 111, at 14 n.6 (May 2, 2023). Any entry in the database showing that a class member "had an adverse action that was later rescinded would not be authorized for release in a background check and would therefore not be used in making promotion decisions" or "career or assignment decisions." *Ibid.* (citation omitted). In any event, the database has no bearing on whether these appeals are moot because the preliminary injunctions did not address the database in any way.[3]

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[3] For *Munsingwear* purposes, the relevant question is whether the preliminary-injunction appeals that were the subject of the decision below are moot. See *Munsingwear*, 340 U.S. at 39. The government has also moved in the district court to dismiss respondents' underlying complaint on mootness grounds. On September 27, 2023, after briefing on that motion, the district court *sua sponte* stayed further proceedings pending this Court's disposition of the present petition.

Respondents suggest in passing (Br. in Opp. 14) that some class members also have unremedied past monetary harms as a result of the now-rescinded policy, such as loss of reservist pay or retirement credits. But that suggestion likewise cannot save these appeals from mootness. The preliminary injunctions operated only prospectively and did not order any damages to compensate for alleged past harms; respondents' complaint sought only injunctive and declaratory relief; and sovereign immunity would in any event preclude the award of any damages here. See D. Ct. Doc. 111, at 8-12.

B. Further Review Would Have Been Warranted Had These Appeals Not Become Moot

In the decision below, the Sixth Circuit upheld extraordinary injunctive relief that overrode the professional judgments of the Nation's most senior military commanders, based largely on perceived problems with the Air Force's internal process for addressing requests for religious accommodation—rather than any reasoned consideration of the evidence the government had submitted to demonstrate why vaccination against COVID-19 was the least restrictive means of furthering the government's compelling interests with respect to specific plaintiffs. Pet. 20-28. Respondents' efforts (Br. in Opp. 19-23) to minimize the significance of the decision below only confirm that further review would have been warranted had these appeals not become moot.

Respondents first contend (Br. in Opp. 19) that the waning of the COVID-19 pandemic would have deprived these appeals of any prospective importance. But servicemembers are required to meet strict medical readiness standards even in the absence of a deadly pandemic, including by receiving nine other mandatory vaccines. Pet. 2; see D. Ct. Doc. 27-6, at 36 (Mar. 9, 2022).

Whether and to what extent free-exercise rights can justify overriding those military readiness requirements as to 10,000 servicemembers is an issue of exceptional importance. Cf. *Austin*, 142 S. Ct. 1301 (granting the government's application for a partial stay of a preliminary injunction that applied to 35 servicemembers). And the Sixth Circuit's legal errors also would have warranted further review because they threaten to affect a wide range of future disputes involving challenges to military policies, including policies entirely unrelated to the COVID-19 pandemic.

Respondents further contend (Br. in Opp. 19-20) that this Court's review would have been unlikely absent "further percolation" or a permanent injunction. But the Sixth Circuit had already issued two published opinions in this litigation, see Pet. App. 1a-79a, 80a-95a, and respondents do not identify any reason to think the court's legal errors would have been corrected through further proceedings. Moreover, this Court routinely grants certiorari to review decisions interfering with important military polices even in the absence of any square conflict. Pet. 21; see, *e.g.*, *Winter* v. *NRDC, Inc.*, 555 U.S. 7, 19-20, 33 (2008).

Finally, respondents contend (Br. in Opp. 20-23) that certiorari would have been unlikely because, in their view, the decision below is correct and does not conflict with this Court's precedent. As the petition explains, however, the decision below cannot be reconciled with this Court's precedents establishing that federal courts must "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest," including in servicemembers' First Amendment challenges to military policies. *Goldman* v. *Weinberger*, 475 U.S. 503, 507

(1986); see Pet. 22-24. The court of appeals viewed those precedents as having been abrogated by the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* See Pet. App. 34a; cf. Br. in Opp. 20-21 (similar). But nothing in RFRA justifies disregarding this Court's pre-RFRA teachings—informed by the constitutional separation of powers—that judgments about "military readiness" are primarily for the Nation's military commanders to make. *Austin*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring). To the contrary, RFRA was understood to preserve the pre-RFRA tradition of "significant deference" to judgments by military authorities about military interests. Pet. 23 (quoting S. Rep. No. 111, 103d Cong., 1st Sess. 12 (1993)).

Accepting that proposition would not make First Amendment or RFRA claims "unreviewable." Br. in Opp. 20. *Goldman* itself confirms that appropriate judicial deference to military judgments does not render the First Amendment "nugatory" or otherwise wholly preclude judicial "review of military regulations challenged on First Amendment grounds." 475 U.S. at 507. It simply means that any review must give appropriate weight to the "considered professional judgment[s]" of the Nation's military leaders on matters of military readiness and national security. *Id.* at 508; see *Austin*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring) ("[I]t is 'difficult to conceive of an area of governmental activity in which the courts have less competence.'") (quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973)).

In myriad ways, the lower courts failed to honor those principles—including by extending preliminary injunctive relief to a class of 10,000 and treating the equities of doing so as interchangeable with the equities involved in granting the earlier injunction in favor of 18

individual plaintiffs. The lower courts gave no apparent consideration to Lieutenant General Schneider's declaration explaining the manifestly greater dangers of the broader injunction. Pet. 24-28. Respondents' cavalier assertion (Br. in Opp. 23) that General Schneider failed to appreciate the military's own "personnel" needs, or its "recruiting and retention" challenges, is emblematic of how this litigation went awry. Respondents have identified no sound basis for second-guessing General Schneider's assessment, nor did the lower courts.

Respondents are also wrong to suggest (Br. in Opp. 9, 23) that the government failed to present testimony to carry its burden under RFRA. The government's witnesses testified by declaration. See D. Ct. Doc. 25 (Mar. 8, 2022) (government's opposition to individual-plaintiff injunction, supported by more than a dozen declarations from military officials); cf. *Winter*, 555 U.S. at 29 (relying on Navy officer's declaration); *Austin*, 142 S. Ct. at 1302 (Kavanaugh, J., concurring) (similar). The lower courts failed to acknowledge that testimony, let alone afford it the weight due under this Court's precedent. Pet. App. 38a; see Pet. 25-26. Those and other errors would have warranted further review had these appeals not become moot.

C. The Equities Favor Vacatur

Because the Sixth Circuit's decision would have warranted plenary review if these appeals had not become moot, this Court should follow its "established practice" and vacate the judgment below. *Munsingwear*, 340 U.S. at 39. As the government has explained (Pet. 28-30), the equities favor vacatur here. The Secretary of Defense opposed proposals to rescind the COVID-19 vaccination requirement, but Congress nonetheless enacted Section 525 of the NDAA. Through a happen-

stance of timing, the NDAA caused these appeals to become moot after the Sixth Circuit had entered its judgment but before this Court had an opportunity to review that decision. And leaving the unreviewed and unreviewable decision below on the books threatens significant practical harm to the government and the public because the Sixth Circuit's published decision will govern future challenges by servicemembers to military policies.

There is no merit to respondents' assertion (Br. in Opp. 2, 15, 32-35) that the government was strategically awaiting the outcome of the Sixth Circuit proceedings before deciding whether to rescind the vaccination requirement. Indeed, that view of events entirely fails to account for the independent actions of Congress in enacting the NDAA and compelling rescission of the policy challenged here.

Moreover, the NDAA required the Secretary of Defense to rescind the COVID-19 vaccination requirement for *all* servicemembers in all service branches, not merely those who had sought religious accommodations, and the Secretary ordered additional steps to be taken to protect servicemembers who had sought accommodations on "religious, administrative, or medical grounds." Pet. App. 187a. In both respects, the events that caused these appeals to become moot plainly were not targeted at "only * * * those within the class," Br. in Opp. 33, which is limited to certain religious objectors in the Air Force.

Respondents' hypothesized "wait and see" strategy (Br. in Opp. 34) also fails to account for the government's victories in the lower courts. In numerous instances, the government had succeeded in persuading other district courts not to issue preliminary injunctions

at the request of servicemembers with objections to the COVID-19 vaccination requirement; interlocutory appeals in those parallel cases were pending when the NDAA was enacted; and those appeals also became moot, warranting vacatur of now-unreviewable orders where appropriate. See, *e.g.*, *Navy Seal 1* v. *Austin*, No. 22-5114, 2023 WL 2482927, at *1 (D.C. Cir. Mar. 10, 2023) (per curiam), cert. denied, No. 22-1201 (Oct. 2, 2023). The same equitable principles support vacatur of the judgment below here.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant the petition, vacate the judgment of the court of appeals, and remand with instructions to direct the district court to vacate its orders granting preliminary injunctions as moot under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

Respectfully submitted.

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NOVEMBER 2023