No. _____

In The
Supreme Court of the United States

IN RE: NAVY CHAPLAINCY,

CHAPLAINCY OF FULL GOSPEL CHURCHES, ET AL.,
Petitioners,

V.

UNITED STATES NAVY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Background and Context

Petitioners, 54 Navy Non-liturgical (aka, "evangelical") chaplains, *see* Glossary, challenge specific Navy Chaplain Corps' selection board[1] procedures under the Establishment and Due Process Clauses. "A Navy chaplain's role within the service is '**unique**,' involving **simultaneous service as clergy or a 'professional representative[]' of a particular religious denomination** and as **a commissioned naval officer**." *In re England*, 375 F.3d 1169, 1170 (D.C. Cir. 2004), *cert denied*, 543 U.S. 1152 (2005) (emphasis added-citation omitted). This Circuit law implicates, if not holds, commissioning a denominational-representative to provide religious ministry fuses civic and religious power. Yet, the D.C. courts for over 20 years have rejected Petitioners' constant argument commissioning denominational-representatives as naval officers does not change their "denominational agent" status, fuses civic and religious power, and *Bd. of Ed. of Kiryas Joel v. Grumet*, 512 U.S. 687, 703-708 (1994) governs this case.

Until fiscal year ("FY") 2003, after this litigation challenged Navy selection board procedures, Navy selection boards were staffed by five or six chaplains, one of whom was always a Catholic. The Department of Defense ("DoD") defines chaplains as denominational-representatives, *i.e.*, agents of a religious organization, whose primary duty is to provide religious ministry. Inspector General investigations of

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[1] "Selection" boards refers to statutory boards that select chaplains for promotions and selective early retirement ("SER").

four chaplain boards established the challenged board procedures allow a single board member, without accountability, to (1) anonymously destroy a chaplain candidate's career for any reason and (2) manipulate the board to promote denominational favorites despite records inferior to those not selected. Over time, Petitioners' denominations suffered statistically significantly lower selection rates. Fact 6, *infra*. Some Petitioners allege religious retaliation by hostile board members or through a "cat's paw."

Questions Presented

The First question presented is whether the Navy's grant of unbridled power to reject Non-denominational chaplains to denominational-representatives serving as chaplain selection board members violated rulings in *Grume*t, 512 U.S. at 703-708, and *Larkin v. Grendle's Den, Inc.,* 459 U.S. 116, 125-26 (1982) that the delegation of discretionary civic power to persons defined by their religious nature requires "effective means of guaranteeing the government power will be and has been neutrally employed." *Grume*t, 512 U.S. at 703.

The Second question presented is whether the courts below denied Petitioners' right of access to the courts by denying them discovery necessary to establish their claims by (1) ignoring Inspectors General investigations' undisputed evidence one chaplain selection board member can and did anonymously destroy other chaplain careers for religious or retaliatory reasons; (2) ignoring Petitioners' requests for judicial release from their secrecy oath to testify about denominational preferences and prejudice they witnessed on boards by Chiefs and Deputy Chiefs of

Chaplains as board presidents and other board members; and (3) using classic equal protection precedent to nullify Establishment Clause guarantees.

PARTIES TO THE PROCEEDING

The 54 Petitioners here are the remaining plaintiffs in the consolidated cases making up *In re: Navy Chaplaincy*, 07mc269: *Chaplaincy of Full Gospel Churches v. Harker* (the acting Secretary of Navy), 99cv2945, filed 11/5/1999; *Adair v. Harker*, 00cv0566, filed 3/17/20; and *Gibson v. U.S. Navy*, 06cv1696, filed 4/28/06.

1. Petitioning retired and former Navy Non-liturgical chaplains:

Richard L. Arnold; Ray A. Bailey; Michael Belt; William C. Blair; Rick P. Bradley; George P. Byrum; Andrew Calhoun; Martha Carson; Greg Demarco; Timothy J. Demy; Patrick T. Doney; Joseph E. Dufour; Larry Farrell; Alan Garner; David L. Gibson; John Gordy; Richard F. Hamme; Furniss Harkness; William A. Hatch, Jr.; Gary Heinke; Robert L. Hendricks; Frank Johnson; Laurence W. Jones; Samuel David Kirk; Frank S. Klapach; Thomas G. Klappert; Jan C. Kohlmann; Allen L. Lancaster; Michael Lavelle; Aria Drexler, successor and representative of original plaintiff George W. Linzey; James Looby; Jairo Moreno; Walker E. Marsh, Jr.; Denise Y. Merritt; David Mitchell; Timothy D. Nall; Edith Rene Porter-Stewart; Cynthia Prince, successor and representative of original plaintiff James V. Prince; Rafael J. Quiles; Daniel E. Roysden; Thomas Rush; Lloyd Scott; Mary Helen Spalding; Gary Paul Stewart; Fred A. Thompson, Jr.; Glenn Thyrion; Armando Torralva; Thomas R. Watson; James M. Weibling; David Wilder; Barby Wilson; Wilson W. Wineman; Michael A. Wright; and Chris Xenakis.

2. Respondents

Respondents are the defendants in the three consolidated cases. The original named parties sued in their official capacities have been replaced by successors to their office. All persons are sued in their official capacities. They are:

The United States Navy; the Acting Secretary of Navy, the Hon. Thomas W. Harker and successors; Chief of Naval Personnel, Vice Admiral John B. Nowell and successors; Navy Chief of Chaplains ("Chief"), Rear Admiral ("RADM") Brent W. Scott and successors; and Deputy Chief of Chaplains (the "Deputy"), RADM Gregory N. Todd and successors.

RELATED CASES

There are four related cases resulting from the division of the Petitioners' claims into two categories, systemic claims, which this Petition addresses, and Petitioners' individual claims: retaliation, constructive discharge, and interference with religious speech and activities. *Chaplaincy*'s 11/8/2018 Severance Order, ECF 344, severed all individual claims after it granted summary judgment on the systemic claims to Respondents.

These related cases have the same basic issue, did *Chaplaincy*'s resolution of the systemic claims also resolve the individual claims despite the fact the individual claims were never addressed? The cases are:

Richard Arnold, et al., v. Secretary of Navy, 19cv 02755 (JDB) (D.D.C), dismissed 09/09/ 2020, ECF 40 (Final Judgment), currently on appeal in the Court of Appeals for the D.C. Circuit, Appeal No. 20-5330.

Allen Lancaster v. Secretary of Navy, Civil Action No. 2: 19-cv-95 (RCY) (E.D.VA), pending and delayed due to COVID ramifications and effects.

Barby E. Wilson v. Secretary of Navy, No. 2:19-cv-515 (E.D.VA), dismissed 01/21/20, ECF 12. No appeal taken because plaintiff's witnesses have all died

In re: Navy Chaplaincy, 07-mc-269 (JDB). The Court of Appeals reversed the dismissal of 23 plaintiffs based on statute of limitations after the D.C. Circuit reversed its earlier precedent that 28 U.S.C. § 2401(a) was jurisdictional. The reversal came after Petitioners filed their opening brief which included a challenge to the statute of limitations. The issue before the district court is whether tolling applied to individual claims of retaliation, constructive discharge and interference with religious speech or services raised by 18 dismissed plaintiffs still in the case.

The *Chaplaincy* court's review only applies to those claims which were severed from the main case, raising the same issues as the other cases above, did the district court's prior resolution of the systemic claims with judgment for the defendants also resolve the plaintiffs' individual claims.

The severed claims are no longer part of the case and/or isues before this Court.

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GLOSSARY

A. Abbreviations. The following abbreviations are used throughout this Petition:

Naval Rank:

CAPT - Captain

CDR - Commander

LCDR - Lieutenant Commander

LT - Lieutenant

LTJG - Lieutenant junior grade

RADM - Rear Admiral

Organizational Abbreviations

AGC - Associated Gospel Churches

CFGC - Chaplaincy of Full Gospel Churches

CHC - Navy Chaplain Corps

Chief - Chief of Chaplains

CNA - Center for Naval Analysis

Deputy - Deputy Chief of Chaplains

DoD - Department of Defense

DoDIG - DOD Inspector General

DoDI - DOD Instruction

FY - Fiscal Year

FGC - Faith Group Categories or Clusters

NIG - Naval Inspector General

SECNAVINST - Secretary of Navy Instruction

Other Abbreviations

Axx - Appendix

PI - Preliminary Injunction

B. Relevant Terms

Accession. An accession is a chaplain applicant who has met all the qualifications to be appointed as a military chaplain and become a member of the Chaplain Corps. The term is relevant here because Petitioners' evidence shows a correlation between Chaplain Corps' prejudice against certain denominations and the low acceptance rates of their applicants, *i.e.*, accessions, and their chaplains' promotion rates to Commander.

FOS- Failure of Selection, considered for promotion but not selected.

Faith Group and **denomination**: Not all religious bodies or organizations consider themselves "denominations"; some reject the concept of a religious "denomination". DoD refers to these as faith groups, and uses that term collectively, as in "faith group cluster" and individually, to refer to endorsers. While DoD uses the terms "faith group"and "denomination" interchangeably, Petitioners use denomination herein because it is a well-understood term. Petitioners use of the term "denomination" includes faith groups and is consistent with constitutional protections. The terminology is not a central issue in this Petition.

Faith Group Categories ("FGCs"). The Navy divides its chaplains and personnel

into four general faith group categories or clusters ("FGCs") according to alleged faith group similarities: Catholic, Liturgical Protestant, Non-liturgical and Special Worship. A Chief of Chaplains' 7/31/87 Memorandum to the Asst. Secy. of the Navy, Subj: Chaplain Corps Faith Group Imbalance, explains how the Chaplain Corps uses faith group clusters in its management:

1. Catholic refers only to Roman Catholic. The Navy has historically categorized other religious entities which identify themselves as "Catholic" but are not in union with Rome as Special Worship.

2. "Liturgical Protestant" collectively describes Christian denominations which trace their origins to the Protestant Reformation, "emphasize a sacramental theology including infant baptism, worship under officially adopted forms, wear vestments" and "follow a cycle of lectionary readings [a list of scripture readings to be read in church services at specific times throughout the year]." *Id*. at 2. "Protestant liturgical" includes chaplains of the various Anglican, Congregational, Episcopal, Lutheran, Methodist, Methodist Episcopal, Presbyterian, and Reformed faith groups.

3. "Non-liturgical Christian" or "Non-liturgical" refers to Christian denominations or faith groups without a formal liturgy or order in their worship service. In general, they "emphasize a Word-centered theology", baptize only adults or children who have reached the age of reason, and their clergy "do not wear vestments and do not follow a cycle of lectionary readings" during services. *Id*. Some Navy chaplains refer to these faith groups as "evangelicals". Baptist, Bible,

Charismatic, Churches of Christ, Evangelical, and Pentecostal are examples of Non-liturgical Christian faith groups.

4. "Special Worship" category includes small Christian and non-Christian faith groups whose ministry needs, per the USN CHC, "differ from" Roman Catholic, and traditional Liturgical and Non-liturgical Protestant needs. Buddhist, Christian Science, Greek Orthodox. Hindu, Jehovah's Witnesses, Jewish, Latter Day Saints (Mormons), Moslem, Seventh Day Adventist, and Unitarian faith groups are examples in this category.

5. "Liturgical" or "liturgical tradition" refers to both Catholic and Protestant Liturgical faith groups.

Precept - the Secretary of Navy instructions or guidance to the promotion board. It is normally drafted by the branch or category holding promotions. Precept is relevant because (1) 10 U.S.C. § 615(b) refers to it and (2) the Navy Chaplain Corps' precepts explicitly connect a chaplain's "skill" with his/her denomination, thereby facilitating denominational preferences.

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for writ of certiorari to review the United States Court of Appeals for the District of Columbia Circuit's final judgment in this case.

OPINIONS BELOW

The U.S. Court of Appeals for the District of Columbia's November 6, 2020, decision denying petitioners' appeal of the District Court's grant of summary Judgment to the Navy is unreported and set forth in the Appendix at A1-5. The D.C. Circuit's January 15, 2021, denial of Petitioners' *en banc* review petition is at A15-16. The District Court's decision granting Respondent' Summary Judgment is A128.

The U.S. Court of Appeals for the District of Columbia's, decision above relied on two earlier decisons entered in a preliminary injunction ("PI") motion, refusing to reconsider Petitoners' argument those decisions were inconsistent with this Court's precedent and incompatible with the Establishment Clause's neutrality and "no de minimis violation" mandates. The first is the D.C. Circuit's December 27, 2013, decision denying Petitioners' appeal of the denial of their preliminary injunction motion (the "PI") and their Establishment Clause and Equal Protection arguments, reported at 738 F.3d 425 (D.C. Cir. 2013), *cert denied,* 574 U.S. 922 (2014), and set forth in the Appendix at A51-61. The second is its November 2, 2012, decision vacating the district court's PI denial and remanding, 697 F.3d 1171 (D.C. Cir. 2012), and set forth in the Appendix at A92-108.

JURISDICTION

The D.C. Circuit entered its judgment November 6, 2020, and denied Petitioners' request for rehearing *en banc* January 15, 2021. 28 U.S.C. § 1254(1) provides the Court jurisdiction.

28 U.S.C. §§ 1331, 1343, 1346, 5 U.S.C. § 702 and 42 U.S.C. § 2000-bb gave the District Court jurisdiction over Petitioners' challenges to the Chaplain Corps' selection board procedures and policies, the basis for the issues on appeal.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Relevant constitutional, statutory, and regulatory provisions are set forth in the Appendix, A141-43.

STATEMENT OF THE CASE

A. Introduction

The Establishment Clause's "objective observer" would be familiar with the facts in this case's 21 plus year history and the relevant law. That means knowing (1) Establishment Clause mandates (a) forbid the fusion of civic and religious power absent effective guarantees religious factors will not influence government decisions and (b) require religious neutrality when awarding government benefits, here promotions; and (2) the First Amendment guarantees a fair opportunity to bring and prove valid constitutional claims. The observer, applying the law to the facts would come to one conclusion, this case is a disgrace.

The "observer" would know (1) the case concerns claims by a distinct group of commissioned officers uniquely defined by their religious identity, *chaplains*; (2) the

two main legal issues here, (i) the Establishment Clause's mandates of no fusion of discretionary civic with religious power and (ii) no preference among denominations, are very simple and governed by well-established law; (3) the chaplains' evidence gathered from DoD and Navy Inspectors General ("IG") investigations of four chaplain promotion boards clearly establishes both fusion and denominational preferences in selection board results; (4) former board members have asked to be released from their oath of secrecy to testify about board non-neutrality and unfairness; (5) this Court's precedents are very clear: courts must carefully examine any practice "challenged on establishment grounds with a view to ascertaining whether [the practice] furthers any of the evils against which that Clause protects", *Committee for Public Ed. v. Nyquist,* 413 U.S. 756, 794 (1973); and (6), there is no hint any lower court **ever** considered fusion or examined Petitioner's largly unchallenged evidence in accord with the Establishment mandates.

The objective observer would be greatly concerned at this overt injustice and the judiciary's failure to fulfill its duty to "support and defend the Constitution" knowing the Bill of Rights protects the people from the government, not visa versa.

B. Facts

1. Chaplains are denominational-representatives 24/7

"A Navy chaplain's role within the service is 'unique,' involving simultaneous service as clergy or a 'professional representative[]' of a particular religious denomination and as a commissioned naval officer." *In re England*, 375 F.3d at1170 (citation omitted).

This reflects the reality of military chaplains' history as denominational-representatives reflected in DoD Instruction ("DoDI")1304.28 (2004), "Guidance for the Appointment of Chaplains for the Military Departments." DoDI at 2, ¶ 5.1, defines "military chaplains" as "Religious Ministry Professionals (RMPs)" who must "receive an endorsement from a qualified Religious Organization", *id* at 3, ¶ 6.1. Enclosure 2 ("E2.") ("Definitions"), defines "Endorsement" as "The internal process that Religious Organizations use when designating RMPs **to represent their Religious Organizations to the Military Departments** and confirm the ability of their RMPs to conduct religious observances or ceremonies in a military context, ¶ E2. ¶1.7 (emphasis added), A142. A chaplains' skill is identified as as his/her endorser.

The new May 12, 2021, DoDI 1304.28 does not change the definition of a chaplain as a denominational-representative, but reinforces it. "Chaplains belong to the religious-endorsing organizations and conduct religious ministry activities consistent with the tenets of their respective religious-endorsing organizations." *Id.* 3.1.d. There is no time when a chaplain ceases to be a denominational-representative, *i.e.*, an agent for a religious organization. When a chaplain ceases to be a denominational-representative, 10 U.S.C. § 643 requires his/her separation.

2. The Navy denies chaplains the Sovereign's power exercised by all other officers except to anonymously advance their denomination's members or destroy other chaplains' careers

The Navy recognizes commissioning denominational-representatives as naval officers, *i.e.*, ***chaplains***, results in the fusion of civic and religious power creating

an Establishment issue if chaplains exercised the Sovereign's power inherent in being an officer. To prevent this, the Navy denies chaplains the right as a Naval officer to use the Sovereign's power. Secretary of the Navy Instruction (SECNAVINST) 1730.7B, "Subj: Religious Ministry Support Within the Department of the Navy", specifically defines chaplains by their religious identity, "professional clergy of a certifying faith group who provide for the free exercise of religion for all members of the Department of the Navy." A143, ¶ 4.

1730.7B ¶ 4, *id*., specifically excludes chaplains from participation in the duties common to all other naval officers that employ the Sovereign's power, limiting chaplains to duties solely related to religious exercises and ministry:

> In accordance with Article 1063 of [Navy Regulations, 1990], **chaplains shall be detailed or permitted to perform only such duties as are related to ministry support**. Chaplains **shall not** bear arms. Chaplains **shall not** be assigned collateral duties which violate the religious practices of the chaplain's faith group, require services as director, solicitor, or treasurer of funds other than administrator of a Religious Offering Fund, serve on a court-martial or stand watches other than that of duty chaplain. (Emphasis added).

Chaplains cannot be a "superior commissioned officer with respect to a person in the naval service who is junior in rank", U.S. Navy Regulation 1140.3. They have "rank without command," *Rigdon v. Perrry,* 962 F.Supp. 150, 157, 159 (D.D.C. 1997) (Quoting, 10 U.S.C. §§ 3581, 8581). The Geneva Convention grants them special rights due to their religious nature.

3. The Chaplain Corps uses a "blackball" promotion procedure allowing one board member to destroy other chaplains' careers without accountability

Unlike the other Services, no Chaplain Corps promotion board voting member reads all candidates' records. Instead, a board member briefs the candidate's file(s) assigned to him/her followed by all board members "voting the record." They insert their hand in a literal black sleeve and depress one of five buttons, "0-25-50-75-100" indicating the member's evaluation of the candidate's promotability. Voting Machine at Appendix A172. Members vote anonymously, no record is kept of a member's vote. There is no accountability for members' votes.

RADM Black, then the Deputy Chief and Board President, explained to the Navy IG investigating the FY 2000 CAPT Chaplain promotion board (the "Washburn NIG") how pressing the voting machine's "zero" button, *see* A172 (voting machine), could "take out" a candidate's record in a "preemptive strike", guaranteeing a candidate's failure of selection and destruction of his/her career with no accountability, a process called "zeroing out". Black knew Washburn was being "zeroed out" but failed to stop or report the injustice. He indicated zeroing out was a Corps wide problem. The voting machine and the small board membership allow a board member to manipulate the board results, allowing favored unqualified chaplains to stay in the selection process until they were promoted. RADM Black's NIG testimony A174, ¶ 4.

The IG complainant, CDR Mary Washburn, testified she had seen "zeroing out" on six boards where she had served as a recorder or board member. A177, ¶ 7.

No other Armed Service uses a "blackball" procedure allowing one board member to anonymously deny a candidate promotion, destroying his/her career.

4. Inspector General Investigations of four chaplain promotion boards show the challenged procedures encourage positive and negative denominational preferences and retaliation

CAPT J. N. Stafford, the Navy Equal Opportunity Officer, investigated Chaplain (Lieut. Commander) Aufderheide's claim of religious discrimination in the FY 1997 and 1998 chaplain commander selection boards. 12/23/97 Memorandum for the Chief of Naval Personnel (the "Stafford Report") ECF No.313-33. Stafford concluded "the board may have systematically applied a denominational quota system", *id*. at 1, ¶ 3. He could not understand how Catholic chaplains whose records showed consistent poor performance and failures of body fat and physical readiness standards could be promoted. *Id.* at 3.

The follow-on Naval Inspector General Investigation ("NIG Report") Re: LCDR Aufderheide's Allegations of Denominational Preference on the FY 97 and 98 Chaplain CDR Promotion Boards, rejected Aufderheide's claims of denominational bias by the Board President and retaliation by one of the board members. ECF 313-19 at 14. This conclusion ignored obvious indications of denominational preferences, retaliation and serious threats to the integrity of the board process. Lutheran ("ELCA") RADM Holderby admitted to the Navy's IG he could influence board members' decisions because of his rank and position (Chief and Board President), NIG Report Interview # 1, A146-47, denied he did so; but admitted (1) he successfully lobbied for a previously failed of selection fellow Lutheran candidate on the basis of a "devotional" the candidate gave during a Holderby visit, A147, an event not in the chaplain's record or a criteria for selection; and (2) a priest with an

inferior record was selected for denominational reasons over a chaplain with a perfect record, A145. A Baptist board member complained of very "slickly" done denominational preference, A150-51; and a board recorder testified a chaplain's promotion depended on how well his/her record was briefed by the assigned board member. A153-54.

LCDR Aufderheide then requested a Department of Defense Inspector General ("DoD IG") investigation, Investigation Extracts at A156. The DoD IG documented obvious misconduct and clear evidence that denomination played a part in both boards' promotions and rejections, but failed to note systemic problems.

RADM Holderby repeated to the DoD IG his Navy IG testimony, admitting his advocacy could influence junior board members and this he had successfully lobbied for a prior failed of selection ("FOS") ELCA chaplain based on a single verbal religious performance not in the Secretary's instructions, *i.e.*, a"devotional", nor in the chaplain's record.

Holderby admitted a Catholic with an inferior record was selected over a Baptist with an excellent record due to denominational considerations and Catholics were treated as "minorities", meaning given special consideration, Extracts of DoD IG Report at 24, A161, and members' comments outside the record were a common occurrence contrary to regulations. *Id.* and A163 (re: "comments").

A FY 97 board member remembered lowering his vote due to fellow board member CAPT John Madden's negative comment about Aufderheide not reflected in the record. The DoD IG at A158, labeled that a "material error." Aufderheide

claimed he confronted Catholic Madden over his womanizing and drinking in London and Madden swore revenge. The DoD IG concluded Madden's misconduct denied Aufderheide fair consideration and recommended Aufderheide be given a standby promotion board, *id*., which selected Aufderheide for Commander.

Like the Navy IG, the DoD IG found obvious evidence of denominational preferences and retaliation. This included finding denominational considerations in both FY 97 and 98, A157-158, A160-164 ("some evidence of denominational considerations"); and choosing a Catholic with a poor record over a Protestant with a perfect record "for the needs of the Navy", A161, a phrase used to remind board members of an imaginary "shortage of priests", *id.,* not supported by statistics. A blatant example of a denominational factor determining promotions.

The Navy IG Investigation of the FY 2000 Chaplain CAPT Promotion Board, *see* 3 above, found the female chaplain board member unlawfully denied CDR Mary Washburn promotion over a disagreement with Washburn's view of women's ministry. Washburn NIG, ECF 313-36 (Board member's "piranhic [sic] problem with [Washburn] seems to be a difference in philosophy concerning how women [chaplains] in the Navy should conduct themselves and represent the gender.").

The NIG FY 2009 Chaplain CAPT board investigation (the "Baker NIG") validated a Non-liturgical non-selectee's retaliation complaint against Deputy Chief, RADM Baker, the Board President. Two recorders testified Baker made a "subtle but negative comment that did or could have negatively influenced board members", Baker NIG Extract, A182, ¶ 53; the IG found reprisal, A183, ¶ 58.

No board member on any investigated board reported misconduct on their boards as their duty required them before the IG investigated.

5. Chiefs of Chaplains have used their influence and power to advance denominational interests producing favored denominations *du jour*

The IG promotion board inspections provided evidence of Chiefs or their Deputy's using their rank and status to obtain favorable promotion decisions. One of the FY 97 Commander board members contrasted RADM Holderby's laid-back approach with other Chiefs/board presidents who were bullying and more aggressive. The Chiefs also approved the chaplain promotion board members.

Petitioners' expert, Dr. Harald Leuba, PhD, examined the Chiefs' influence and effect on the award of government benefits, here promotions, after the Navy reduced the number of chaplain board members to two; by policy one is the Chief or Deputy: *Statistical Evidence of the Navy's Religious Preferences* ("*Preferences*") (1/11/11), ECF 313-45. *Preferences* shows the Chiefs' denominations receive significant benefits during and after the Chief's tenure in terms of promotions. This applies year after year for every Chief's denomination. *Id.* ¶ 2.2d.3-4.

Preferences' Table 9 and its commentary below, ECF 33-45 at 73, shows the Chief's impact on promotions:

What Happens when the Chief of Chaplains and Candidates for Promotion Share a Denomination – or Do Not have a Common Faith?

(Navy Data for FY 2003-2012 promotions from Berto 8/26/11 Declaration)

Rank	Match conditions	Number of Considers	Number of Selections	% Selected
CDR	Match	48	40	**83.33**
CDR	No Match	287	210	**73.17**
Capt	Match	28	22	**78.57**
Capt	No Match	444	224	**50.45**

> 2.20.5. There were 48 occasions when some candidate being considered for promotion to CDR happened to be the same denomination as the Chief of Chaplains; 40 of these candidates were selected for promotion. *** [T]his success rate, 83.3%, is statistically significantly higher (by 2 standard deviations using a simple binomial test) than the 73.3% success rate which was experienced by the candidates who differed from the Chief of Chaplains on that occasion.
>
> 2.20.5.1 Similarly, there were 28 occasions when some candidate being considered for promotion to Captain happened to be the same denomination as the Chief of Chaplains; 22 of these candidates were selected for promotion. Their success rate, 78.6%, is statistically significantly higher (by 3 standard deviations using a simple binomial test) than the 50.0% success rate which was experienced by the candidates who differed from the Chief of Chaplains on that occasion.

6. The Navy's own statistics from FY 1972-2000 show clear denominational preferences not explainable by chance

The Chaplain Corps hired the Center for Naval Analysis ("CNA") to help it plan for the new century. CNA found widespread discontent with the Chaplain Corps' promotion process and conducted an independent promotion investigation. In doing so it collected promotion statistics from FY 72 through 2000 by each faith group category, Catholic, Liturgical Protestant, Non-liturgical Protestant, and Special Worship. CNA's Senior Leadership Conference 2000 briefing chart (the "Chart"), A190, shows the following promotion rates and data for FY 1972-2000:

Faith Group Cluster	LCDR Promotion %	CDR Promotion %	CAPT Promotion %
Liturgical	78.5% (326)	72.0% (382)	59.1% (298)
Non-liturgical	**79.5%** (327)	**69.2%** (364)	**53.3%** (242)
Roman Catholic	82.0% (183)	83.7% (264)	57.8% (232)
Special Worship	88.6% (44)	70.0% (40)	52.0% (25)

The Chart's promotion rate differences are statistically significant, beyond 3 standard deviations, when compared by Faith Group Clusters or denominations. Harald R. Leuba, PhD, *Old Warnings, New Data* ("Warnings") ECF 313-44 at 5, ¶ 16; *see also id.* at 2, ¶ 8.

On their face, the statistics show significant differences in promotion rates between favored and disfavored denominations. CNA only reported statistical significance in the Catholic chaplain promotion rate to commander, but wrongly measured the part against the whole, rather than measuring each category against others, *e.g.*, Non-liturgical versus Catholic and versus liturgical Protestant. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 337-38 (1977).

7. The Navy has no effective procedures guaranteeing denominational neutrality and preventing preferences on Chaplain Corps' selection boards

The Inspector General investigations show (1) allowing one board member to brief a record, (2) the blackball voting machine and (3) having the Chief and/or Deputy as Board President all but guarantee denominational preferences. CDR Washburn reported seeing zeroing out on at least six boards on which she had

served as a recorder or board member. No board member reported religious preferences, retaliation, zeroing out, or misconduct despite having a duty to report any misconduct. The reason why is obvious, to report misconduct would be criticism of the Rear Admiral Board President who holds the career of every chaplain in his hands. Military subordinates risk their careers to correct senior officers who can retaliate in numerous ways. Petitioner Xenakis' reports in the Consolidated Complaint, ECF 134, Addendum-1, ¶ 65:

> Without commenting on specific board proceedings, he was dumbfounded by the arbitrary comments board members, including board presidents, were allowed to make and how even an innocuous and subtle comment about "Corps reputation" could sway the entire board's decision for or against a given candidate. "Corps reputation" is not in the records, the only basis on which promotion decisions are supposed to be made.

Eleven Petitioners and two other former chaplains who served on selection boards as recorders or projectionists have requested relief from their oath of secrecy so they can provide evidence of denominational preferences and board unfairness.

Numerous sworn declarations show the Chaplain Corps' promotion system is riddled with denominational preferences, has no accountability, and denominational prejudice pursuing denominational preferences goes unchallenged.

CAPT Bumbry, a FY 97 CHC CAPT board member, told CH Kitchen, in South Carolina, a Protestant was removed from the FY 97 promotion list to add a Catholic picked from below zone by the Catholic board member, to appease the Catholic community, *see* Kitchen Declaration, A187-88, ¶¶ 6-7.

In California, CAPT Anderson, the Catholic board member, told CH Ellison

the same story CAPT Bumbry told CH Kitchen. CAPT Anderson provided details about (1) some board members' reaction concerning the Catholic in-zone candidates' quality, (2) the lack of board members' objection, and (3) his personal selection of the Catholic selectee below the zone; CH Ellison Declaration, A 185, ¶¶ 5-6.

LCDR Gary Stewart went through all the candidates' files to ensure their completeness as part of his recorder duties for the FY 91 LCDR CHC board. Stewart's Declaration, A189, states:

> 4. *** I was in a position to have seen the quality of the fitness reports and records of those considered by the Board, both those selected and not selected.
> 5. I can state without equivocation, and without revealing the "proceedings" of the Board, that the record of one Catholic selected for promotion to Lieutenant Commander was grossly inferior to other chaplains who were passed over for promotion, including at least one non-liturgical chaplain who is a named [*Adair*] plaintiff. In addition, the chaplain selected with the far inferior record was grossly overweight, a fact well known throughout the Chaplain Corps.
> Stewart asked for release from his secrecy oath to testify to what he saw, ¶ 8.

C. The Judicial Proceedings

Chaplaincy of Full Gospel Churches ("CFGC"), *v. Danzig*, 99-cv-2445 (D.D.C.) (11/5/1999) challenged Chaplain Corps' promotion and accession procedures penalizing CFGC chaplains and chaplain candidates due to their religious beliefs.

Sixteen non-CFGC Non-liturgical chaplains challenged Chaplain Corps promotion policies, retaliation and restrictions of preaching and religious prejudice and sought a class action for all Non-liturgical Navy chaplains in *Adair v. Danzig*, 00-cv-0556 (3/17/2000).

Adair v. England, 183 F.Supp.2d 31 (D.D.C. 2002) addressed the Navy's

motion to dismiss. *Adair* rejected the Navy's argument "relaxed strict scrutiny" should apply in reviewing denominational preference claims, distinguishing Free Exercise from Establishment claims. "[T]his case requires the court to apply strict scrutiny test to any practice suggesting a denominational preference." *Id*. at 57 (quoting *County of Allegheny v. ACLU,* 492 U.S. 573, 608-09 (1989)).

Adair made a legal error hobbling Petitioners throughout this case by holding the presumption of regularity applied to chaplain promotion boards since chaplains served as naval officers, not denominational-representatives. *Id*. at 60-62. This turned a rebuttable presumption into an irrebuttable presumption and violated the rule that a plaintiff's well-pleaded facts are taken as true in reviewing motions to dismiss. Plaintiffs' well-pleaded facts supported by evidence from IG investigations showed chaplain board members in fact acted as denominational-representatives. The District Court refused numerous requests to reconsider its holding until *Adair v. Winter*, 451 F.Supp.2d 210 (D.D.C. 2006), A129, when it changed its holding to reject petitioners constitutional challenged to *In re England*, 375 F.3d at 1180, holding' 10 U.S.C. § 618(f) barred discovery of promotion board proceedings.

Adair v. England, 209 F.R.D. 5 (D.D.C.2002) granted plaintiffs' motion for class certification but never defined the class or approved class representatives and class counsel. *In re England*, *op. cit*, reversed *Adair*'s order requiring the Secretary release board members from their oath of secrecy, rejecting Petitioner's argument § 618(f) did not show Congress's intent to preclude constitutional claims and *Webster*

v. Doe, 486 U.S. 592, 603-04 (1988) granted plaintiffs right to discovery to prove their claims. *In re England* said plaintiffs could bring their claims but could not get discovery to prove them.[2] *Id.*, n.2.

The plaintiffs sought an injunction to stop the Navy's policy of commissioning Catholic clergy beyond the age 40 regulatory limit and keeping them illegally on active duty past the statutory separation age of 60 until reaching 20 years service and a pension. The district court denied the motion for lack of irreparable injury. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 304 (D.C. Cir. 2006), reversed: "where a movant alleges a violation of the Establishment Clause, this is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination."

On remand, the court found the plaintiffs lacked standing despite the previous ruling of irreparable harm. *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008), *cert denied,* 556 U.S. 1167 (2009), in a divided opinion affirmed, "the Navy is not communicating a religious message through religious words or religious symbols" despite the fact allowing this fraud communicated a message.

In 2006, the Navy discharged the last active duty plaintiff destroying the still undefined class. The district court also denied the plaintiffs' declaratory judgment

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[2] *In re England* relied on *Baldridge v. Schapiro*, 455 U.S. 345, 348-52 (1982), rejecting Colorado's challenge to obtain census information. As in many decisions here, the Court of Appeals forgot or ignored this case involves the Establishment Clause. The Constitution gave Congress power to regulate the census, but denies the government power to use religious factors in awarding promotions. *In re: England* does not enforce constitutional limits, but holds Congress can shield the Navy from constitutional claims despite the Supremacy Clause.

motion attacking the board procedures, holding the presumption of regularity applied to the boards. Forty-one new Non-liturgical chaplains filed suit in the Northern District of Florida, *Gibson v. U.S. Navy*[3], which was transferred to the District of Columbia. This made 65 total Non-liturgical plaintiffs and added the Associated Gospel Churches ("AGC"), an endorser challenging accession and chaplain promotion prejudice similar to CFGC.

The court consolidated all cases into *In re Navy Chaplaincy* in 2007 and allowed Petitioners to amend their complaints. Immediately after the amendments' approval in early 2009, Petitioners served new discovery to resolve long-standing disputes, *e.g.*, failure to produce unredacted IG investigations. Petitioners sought to compel production but *Chaplaincy* stayed discovery in July 2009 due to pending dispositive motions and never lifted the stay.

On 12/30/2008, Petitioners filed a partial summary judgment motion ("PSJ"), ECF 34, attacking chaplain promotion procedures under the Establishment Clause. On 7/22/2011 Petitioners sought a Preliminary Injunction, ECF 95, enjoining chaplain promotion boards until their PSJ was decided. On 1/30/12, Petitioners filed an emergency motion in the D.C. Circuit (No. 12-5024) before the FY 2013 boards were due to begin. The district court then found no standing, denied the PI and Petitioners appealed.

In re: Navy Chaplaincy, 697 F.3d 1171, 1177-78 (D.C. Cir. 2012), A92-108,

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[3] Filing this case in the District of Columbia would be malpractice under the D.C.'s Rule of Professional Responsibility given the case and Circuit law.

reversed the PI denial; found Petitioners (1) had standing, A103; (2) would fail on their *Larkin* "improper delegation" of civic authority to chaplains argument because the Navy reviewed board results and provided standards, A105-06; but (3) had valid claims of denominational discrimination, A106-07; and remanded to the District Court to examine if "the defect in the Establishment Clause claim" was "legal or factual." A107-08.

On remand, the court rejected the previous law of the case, "evidence suggesting denominational-preferences" would result in strict scrutiny of the challenged practices. *Adair v. England*, 217 F.Supp.2d 7, 14-15 (D.D.C. 2002)(citing *County of Allegheny*, *op. cit.*); **changed** Petitioners' denominational preference claim to "intentional discrimination", *i.e.*, disparate treatment, A78-801, a claim dropped from the Amended Complaints; rejected Petitioners' statistics for failure to meet the "stark" criteria of *Yick Wo v. Hopkins*, 118 US 356, 359 (1886), A80-85, A88-90; and denied the PI because Plaintiffs provided no evidence of **intentional** discrimination against them, A85-89, without mentioning Establishment precedent.

In re: Navy Chaplaincy 738 F.3d 425 (D.C. Cir. 2013), *cert denied,* 574 U.S. 922 (2014), A51-61, affirmed the PI's denial and reached the merits of Petitioners' Establishment claims using a disparate treatment standard rejecting Petitioners argument Establishment precedent controlled, not the intent required for classic equal/disparate treatment. A55-57. The Circuit rejected Petitioners' disparate impact argument because their unrebutted statistics were not *Yick Wo* "stark, A56,

and cited alleged missing variables Respondents never raised: promotion ratings - an unknown term not in the record, education, and time in service, (Congress' criteria setting "in-zone" categories is "time in grade"), A57, A60; and questioned Petitioners' methodologies after oral argument, *id*. *Chaplaincy* erroneously concluded strict scrutiny was inappropriate as "the challenged policies are facially neutral", A55, A57, and the objective observer would find the practices conveyed no message of preference: "when reasonable observers find the term [statistically significant] means only that there is little likelihood that the discrepancy is due to chance, they are most unlikely to believe that the policies conveyed a message of government endorsement", A59-60. This despite more than **40 years** of statistically significant denominational promotion rate differences. *Chaplaincy* ignored CNA's findings, IG findings of religious prejudice and other evidence Petitioners cited.

On remand, *Chaplaincy* reduced Petitioners' claims to nine, organized into two groups, six systemic and three individual. A17. Systemic claims, were to be decided by summary judgment in three phases: Phase I, the constitutionality of 10 U.S.C. § 613a's bar on discovery as applied here; Phase II, the practice of having at least one Roman Catholic on every chaplain selection board not requiring admirals; and Phase III, the constitutionality of chaplain promotion procedures, including using the blackball voting machine allowing one person to veto a promotion and career, having a board member brief the record, and using the Chief and Deputy as Board presidents; and whether the Religious Freedom Restoration Act applied. A18.

Chaplaincy granted Respondents summary judgment on all systemic claims.

It stated it was bound by the earlier 2013 Circuit ruling, A7, and rejected Petitioners' statistics, claims of "disparate impact" and discrimination because the statistics did not meet the *Yick Wo* "stark" standard. A26, A33, A35-36, A38. Ignoring the 54 years of having a Catholic on every board with a blackball voting process, the court held the board staffing procedures were neutral with no evidence of discriminatory intent, A28-32. *Chaplaincy* rejected Petitioners' challenge to 10 U.S.C. § 613a's bar of discovery of board proceedings because discovery was not needed and there was no right to discovery for constitutional claims. A40-42.

The D.C. Circuit affirmed the district court's summary judgments, A1-2; its rejection of Petitioners' attack on § 613a and motion to lift the discovery stay, A2; Petitioners' failure to meet *Yick Wo*'s "stark" statistics standard, A2; rejected Petitioners' fusion argument citing its 2012 decision the Secretary's precept was a "standard" and *Larkin* did not apply, *id.*; and ignored the IG results showing the procedures and voting machine produced denominational preferences and religious factors determined promotions.

REASONS FOR GRANTING THE WRIT

Before the Court is the central issue of fusion, the constitutionally forbidden combination of religious and civic power absent "effective guarantees that the power will be used exclusively for secular, neutral, and nonideological purposes." *Larkin*, 459 U.S. at 125-27. Fusion, an issue since day one, has yet to be addressed with the careful examination mandated to preclude "subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses" this Court's precedents require.

Gillette v. U.S., 401 U.S. 437, 452 (1971) (citation omitted); *Nyquist, obid.*

The issue is simple. The case could have been resolved 17 years ago had the lower courts asked Respondents these five serially dispositive questions: Do you agree: (1) commissioning religious ministry professionals as denominational-representatives with the title "chaplain" and then assigning them to statutory government benefit boards fuses civic and religious power"; (2) the IG investigations show the blackball voting procedure allows one board member to "zero out" a candidate's promotion and career; (3) the Chief or Deputy as Board President can influence board members by their comments about candidates or actions on the board; (4) the Chief's or Deputy's role as board president chill the board members' duty to report bias; and (5) chaplain promotion results are not free of denominational bias? Either "Yes" or "No" responses show the bad faith Respondents have prosecuted and the courts have supported.

Only this Court can now ask those ignored questions and revoke an unjust precedent contrary to the First Amendment that corrupts the Judiciary's duty.

I. Well-established Precedent Requires Any Delegation of Discretionary Civic Power to Persons Defined by Their Religious Identity to Include "Effective Guarantees the Delegated Power Will Be Used Solely for Secular, Neutral, and Nonideological Purposes"

> [T]he core rationale underlying the Establishment Clause is preventing "a fusion of governmental and religious functions," *School District of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963) [and other authorities]. The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.

Larkin, 459 U.S. at 126–27.

This case addresses the grant of unbridled discretionary civic power to commissioned denominational-representatives whose loyalty is shared between their religious organization and the Navy. The purpose of that power is to perform a key governmental function on behalf of the sovereign, the selection for promotion of naval officers who are denominational-representatives. This would seem to be the very essence of fusion, persons defined by their religious identity and character being granted discretionary civic power to act on the Sovereign's behalf.

A. The Establishment Clause Forbids the Fusion of Discretionary Civic and Religious Power

Larkin explained the importance of keeping discretionary civic and religious power separate. 459 U.S. at 122-123, 125-27. Given the variety of religious viewpoints, denominations and churches, any appearance of favoritism towards one to the exclusion of others undermines the unity of respect and toleration for all religions in accordance with the Free Exercise and Establishment Clauses. *Id.* It also destroys the basic right of equal treatment regardless of individual faith.

This concept was foreign to many established nations when the Declaration of Independence was signed and the Constitution and Bill of Rights were ratified. Our Founders saw religious persecution and resolved it would not be allowed here. Government favoritism towards one religious perspective "enmeshes [religious organizations] in the processes of government and creates the danger of political fragmentation and divisiveness on religious lines. *Id.* at 127 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1972)). This produces envy, division, resentment, and

civil strife, the ills the First Amendment was designed to prevent.

Larkin and *Grumet* each "presented an example of united civic and religious authority, an establishment rarely found in such straightforward form in modern America." *Grumet*, 512 U.S. at 697. The issue here is even more straightforward than either case. In *Larkin*, the State's regulatory power to approve liquor licenses for restaurants was delegated to any church within 500 feet church of the food establishment. 459 U.S. at 117. This vested "discretionary governmental powers in religious bodies." *Id.* at 123. In *Grumet*, the delegation was "the State's discretionary authority over public schools to a group defined by its character as a religious community." That distinction made no difference. *Id*. at 698.

Grumet distinguished between the delegation of civic power to "individuals who happened to be religious", *e.g.*, religious legislator, and the "deliberate delegation of "discretionary power to an individual, institution, or community on the ground of religious identity." *Id.* at 699.

> Where "fusion" is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion in a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority."

As shown below, the delegation of civic authority to chaplains to select other chaplains for promotion, an exercise of the Sovereign's authority they are otherwise precluded from exercising, results in the forbidden fusion of civic and religious authority offensive to the Constitution.

B. The Courts Below Rejected or Ignored Fusion

The issues before the Court in this section are whether Respondents' chaplain selection process meets *Grumet*'s criteria for fusion and whether *Chaplaincy*'s adulteration of *Larkin*'s "standard" requirement fails as an "effective guarantee" precluding religious factors from influencing the result. The answer is a clear "yes!"

Grumet established some clear criteria to assist courts in evaluating whether unconstitutional fusion is present. First, is there a purposeful delegation of political authority or power "on the basis of religion." 512 U.S. at 699. *Grumet* looked at the context of the statutory authority creating the school district which identified "these recipients of governmental authority by reference to doctrinal adherence, even though [the law] does not do so expressly." *Id.*

Second, the delegation of authority or power must not be an aberration of how that power has been traditionally used. *Id.* at 701-02. *Grumet* found the special "School District is exceptional to the point of singularity", *id.* at 701, and its "creation ran uniquely counter to state practice", reflecting religion as the criteria for receiving civic authority, *id.* at 70.

Third, the courts must have a means of evaluating whether the governmental authority was exercised in a religiously neutral way. The Court must have a "direct way to review such state action for the purpose of safeguarding a principal at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion." *Id.* at 703.

The Facts applied to the law show unconstitutional fusion is an issue here.

1. Fusion occurs when denominational-representatives are commissioned as naval officers and appointed as chaplains

Fact 1 shows chaplains are denominational-representatives 24/7. That is what they were hired/commissioned to be. DoD defines chaplains as religious ministry professionals, selected by a religious organization to represent that organization to the Services. *Id.* Their role and function are to provide ministry, a religious term not otherwise defined, which differs depending on the denominational perspective. "A Navy chaplain's role within the service is '**unique**,' involving **simultaneous** service as clergy or a 'professional representative[]' of a particular religious denomination and as a commissioned naval officer." *In re England*, 375 F.3d at1170 (emphasis added). They represent their denomination or endorser to the Navy to provide ministry which the Establishment Clause forbids the Navy itself from officially provideing to its religious personnel.

This fusion is constitutional because the Navy denies chaplains the Sovereign's power exercised by all other officers, Fact 2. Chaplains have rank without command and can never be a superior officer over one who is junior in rank. U.S. Navy Regulation 1140.3. They don't pull duty watches unless for a chapel. Regulations and practice preclude the mixing of roles and exercise of the Sovereign's power. Chaplains also fulfill a very critical and important governmental purpose, ensuring both the Establishment and Free Exercise Clauses are honored, not violated. *See Katkoff v. Marsh*, 755 F.2d 223, 232, 234 (2d Cir. 1985).

2. Placing chaplains on Navy promotion boards with their

unique selection procedures unconstitutionally fuses government and religious power

The delegation of discretionary civic power to promote or deny promotion to denominational-representatives, *i.e.*, chaplains, is a **purposeful** delegation on the basis of religion. Selecting officers for promotion is a uniquely governmental act performed by the Sovereign. 10 U.S.C. § 612(a)(2)(A) (composition of selection boards) requires "at least one officer from each competitive category of officers to be considered by the board." Fact 1 establishes that a chaplain is defined as a denominational-representative. Chaplains have their own "competitive category" and their promotion boards require at least one commissioned denominational-representative.

It is impossible for a chaplain serving on a selection board to enter the board room with two hats, one as a naval officer and one as a religious representative, and take the second one off while he/she votes. If a "chaplain" ceases to be a denominational-representative, he/she is no longer a chaplain, Fact 1, destroying the statutorily required board composition.

Grumet's second fusion consideration is also met here, exercising the Sovereign's power on a selection board is an aberration of a chaplain's use of power, he/she are denied the use of the Sovereign's power. Fact 2. In fact, using the power to destroy other chaplains careers or manipulate the boards to advance one's own denomination is the only exercise of the Sovereign's power chaplains are permitted.

Navy chaplain selection boards fail *Grumet*'s third test, evaluating whether

the governmental authority was exercised in a religiously neutral way, 512 U.S. at 703, with flying colors. The board proceedings are protected by statute, which the D.C. Circuit has interpreted as barring any promotion related discovery, especially what occurred on the boards, even when there is evidence of misconduct. Here, the Navy has refused to provide unredacted copies of the FY 97 & 98 CDR Chaplain Boards IG and other investigations. The DoD IG extracts, A156-64, produced under the Freedom of Information Act ("FOIA"), have large sections redacted . The context clearly suggests board discussions of denominational factors.

Page A160 is the lead in to an alleged incident where denominational considerations, which RADM Holderby admitted were not supposed to be discussed, in fact occurred. A large redacted section precedes Holderby's admission on A161 "we struggled with denominational requirements"; his answer clearly indicates that denominational considerations were more important than a perfect record, a violation of the Establishment and possibly the Free Exercise Clause. In the copies of the various witness transcripts produced under FOIA, whole sections are redacted and the Navy has refused to provide unredacted copies. This was one of the discovery disputes that was squashed by Chaplaincy's imposition of the stay in July 2009. The Navy argued the Secretary withdrew his waiver of security given so the IGs could conduct their investigation. The courts have not insisted the material be produced, nor asked for the Secretary's withdrawal order nor the legal theory by which a document declassified and distributed to the public can be recalled. The result is the courts have no idea of what happened on any of the boards.

Respondents have shown no intention of releasing anything, objecting to witnesses testifying about denominational preferences and retaliation they saw.

Finally, examining the actual results of the challenged procedures revealed by IG investigations of four Chaplain boards (two Commander and two Captain) show the challenged procedures allowed and encourage both positive and negative denominational preferences and religious retaliation. Fact 4. The *Chaplaincy* courts labeled the challenged procedures "neutral", rejecting the detailed examination of the contrary evidence provided by the IG reports and other declarations and affidavits, *e.g.*, A184-188. This examination is a duty required by numerous Court precedents, *e.g.*, *Church of Lakumi Babalu v. Hialeah*, 508 U.S. 520, 534 (1993), but totally absent here along with any reference to the judicial responsibility to carefully examine any practice "challenged on establishment grounds with a view to ascertaining whether [the practice] furthers any of the evils against which that Clause protects." *Nyquist,* 413 U.S. at 794.

In summary, placing denominational-representatives on chaplain promotion boards unconstitutionally fuses discretionary civic and religious power.

C. *Chaplaincy*'s Holding *Larkin* Does Not Apply Is Contrary to and Seriously Undermines *Larkin* and *Grumet*

In re: Navy Chaplaincy, 697 F.3d at 1177-78, A105-06, reversing Petitioners' PI denial, rejected Petitioners' argument *Larkin*, 459 U.S. at 125 (citation omitted), mandated "effective means of guaranteeing that the delegated power will be used exclusively for secular, neutral, and nonideological purposes." A105. *Chaplaincy*

held: "This case is a far cry from the "standardless" delegation scheme at issue in *Larkin"* since "Congress and the Secretary ... have articulated secular, neutral standards to guide selection board members in evaluating candidates for promotion." *Id*. The finding "the Navy provides to each selection board specific "guidance relating to the needs of the Navy . . . for officers with particular skills in each competitive category" is technically correct but misleading and false in the context of evaluating chaplains' ministry, a religious term not otherwise defined.

This is another example of the courts' below failure to carefully and thoroughly examine the record in violation of its duty to carefully examine the facts and allegations to protect Establishment Clause principles and values. *See Nyquist, op. cit*.; *Gillette, op. cit*.; *Church of Lakumi*, *op. cit*.; *County of Allegheny*, *op. cit*.

No Navy document in the record describes for board members in secular, neutral terms how to evaluate ministry, the duty for which chaplains are commissioned and whose evaluation determines promotion. Many precepts say nothing about "skills." Chaplains use the same fitness report as other officers.

Especially concerning is the Court of Appeals' reliance on words on pieces of paper to provide the "effective guarantees" that the selection boards' resulting decisions are free from religious preference or bias. Setting out a regulation saying decisions will be impartial without consideration of denomination does not meet that standard as shown by the IG investigations of four chaplain boards. The evidence from the Washburn NIG clearly indicates many boards were contaminated by denominational bias. CDR Mary Washburn's testimony states she had seen

"zeroing out" on at least six boards on which she served, A177. The request for judicial relief from their oath of secrecy by at least 13 witnesses, some who served on multiple boards, so they could provide relevant evidence concerning the boards' adherence to denominational neutrality and standards of fairness shows this is not a small or *de minimus* problem.

Courts are required to look at the results of the challenged procedures. That they produce bias is evidenced in Facts 3-5 and the CNA's statistics from FY 1972 to 2000. *Chaplaincy* showed no concern about whether those differences in Faith Group Category promotion rates were not due to chance or, combined with evidence the Inspectors General investigation produced plus requests for relief from their oath, indicated a major violation by a major and prominent government agency.

The guidance the D.C. Circuit cited referring to skills, A105, consistent with the oath all board members swear to make decisions in light of the skills needed, ignores the fact the Navy identifies a chaplain's skill as his/her denomination. Citing "skills" is an invitation to chaplains to advance or hinder denominations based on skill perceptions, as the Washburn NIG showed. How can a chaplain or the Chief not think **his** particular denomination is the best thing for the Navy?

1. IG Investigations showed the procedures allowed denominational considerations to determine promotions

Equally duplicitous in light of Facts 3-5 is *Chaplaincy*'s holding, A106:

> unlike in *Larkin*, where the churches had final say over the liquor license applications, 459 U.S. at 125, here the two chaplains on the selection boards share decision making authority with five others, and the board's promotion decisions are subject to further review by the

Secretary of the Navy and the Secretary of Defense.

This is willful blindness to the blackball voting procedure; zeroing out is incompatible with sharing in "decision making authority". Once again, a failure to look for clear and overt violations of Establishment Principles is readily apparent.

RADM Black's (A174) and CDR Washburn's (A177) testimony about "zeroing out" with the blackball voting machine show *Chaplaincy*'s "shared decision-making" finding is a prejudicial myth contrary to the evidence and the truth. The other IG investigations show denominational preferences and retaliation. *See* Facts 3-5.

The Secretary's administrative review proceeds on the presumption the board results are *regular*. It never compares the records of the selectees versus those not selected as CAPT Stafford did. To hold that words on a piece paper are "standards" providing "effective guarantees" is absurd, contrary to this Court's many precedents; only **procedures** providing effective review and accountability provide "effective guarantees." This is a dangerous precedent revoking for the Circuit the Court's well-established duty expressed in *Nyquist*, *Gillette*, and many others.

2. Sworn reports of bias and board members' requests for secrecy oath release created a judicial duty to investigate

Petitioners also presented sworn statements how two board members described the removal of a Protestant already selected for promotion because no Catholic had been selected. A184-88. Eleven Petitioners have requested judicial relief from their oath of secrecy to testify about unfairness and religious non-neutrality on the boards they witnessed. *See, e.g.*, LCDR Stewart, A189. This

Court's precedents suggest to not pursue this evidence violates 28 U.S. § 453, the judicial oath to "faithfully and impartially discharge and perform all the duties ... under the Constitution[.]"

D. Rejecting Fusion and Affirming Chaplains' Ability to Blackball Other Chaplains for Promotion Created a Circuit Split

Examples "of united civic and religious authority "in modern America" are rare. *Grumet*, 512 U.S. at 697. Two circuit courts have specifically addressed fusion. *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337, 1343 (4th Cir. 1995) and *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 429 (2d Cir. 2002), *cert denied*, 537 U.S. 1187 (2003), both struck down "kosher fraud" laws regulating what constituted "kosher" food. Neither examined the motives of the legislators involved nor looked for specific denominational prejudice. Both examined the effect of the laws and found the laws unconstitutionally fused "governmental and religious functions" because government delegated "its civic authority to a group chosen according to a religious criterion." *Barghout*, *op. cit.*; Commack, *op. cit.*

Chaplaincy's rejection of fusion and refusing to address the delegation of career ending authority to denominational agents has created a Circuit split.

E. The Chief and Deputy Chief Have Conflicts of Interest When Acting as Chaplain Selection Board Presidents

Chaplaincy rejected Petitioners' challenge to having the Chief and Deputy serve as chaplain board presidents. *Chaplaincy* ignored the fact chaplains are denominational-representatives and advancing their religion "is their very

purpose." *Corp. of Presiding Bishop v. Amos*, 485 U.S. 327, 337 (1987). The Chief and Deputy are the senior Navy representatives of their endorsing agency. That creates a conflict vividly illustrated by RADM Holderby's admission as president and Chief, he could influence other board member by his comments, denied he did it because it would be "unfair", A147, and admitted he advocated for a FOS member of his denomination on the basis of a "devotional", A146, a religious exercise evaluated from a denominational perspective. If allowed discovery of promotion boards, Petitioners will present evidence that board presidents carefully examined votes and criticized low scores for their denominational candidates. "The Potential for conflict inhere's in the situation," *Larkin* 459 U.S. at 125 [citation omitted].

II. The Courts below Violated Their Duty to Follow Well-established Precedent Protecting Every Citizen's Right of Access to Courts for Resolution of Constitutional Claims

> [Litigants] must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights. "The very essence of civil liberty,. . . "certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

Davis v. Passman, 442 U.S. 228, 242 (1979) (quoting *Marbury v. Madison*, 5 U.S. 137, 163, 1 Cranch 137, 163 (1803)). *Accord , Bell v. Hood*, 327 U.S. 678, 684 (1946). The record shows Petitioners have been denied a meaningful opportunity to present their claims by using Due Process precedent as a means to eviscerate Establishment protections; denying Petitioners discovery of board proceedings and witnesses' testimony of board misconduct and denominational preferences; and

ignoring unchallenged evidence that religious factors influenced chaplain promotions.

A. The Lower Courts Used Equal Protection to Destroy Establishment Principles and Guarantees

This Court has been very clear when addressing due process-equal protection claims in a specific constitutional context, the provisions of the specific amendment at issue determine the appropriate due process/equal protection standards.

> Where a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing" such a claim.

Albright v. Oliver, 510 U.S. 266, 273 (1994) (citation omitted here).

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) applied this principle in the First Amendment Establishment-Free exercise context.

> In weighing arguments of the parties **it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake**. *** Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. (Emphasis added)

Here the pertinent liberty interest flows directly from the Establishment Clause's neutrality mandate, "protection against government imposition of a ... religious preference." *CFGC v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006).

Religious neutrality and freedom from denominational preferences is the equal protection to which every chaplain is entitled. "This protection ... requires no affirmative conduct on the part of the individual before its guarantees are implicated by government action." *Id*. A violation requires no showing of intent. *Id*.

Prior to *In re: Navy Chaplaincy*, 928 F. Supp. 2d 26, 35 (D.D.C.) (*"Chaplaincy-2013*"), *aff'd*, 738 F.3d 425 (D.C. Cir. 2013), *cert denied,* 574 U.S. 922 (2014), the law of the case protected that interest:

> [W]hen litigants challenge a policy on the grounds that it amounts to a denominational preference, while not explicitly discriminating on the basis of religion, they must **only present competent evidence that " 'suggest[s] a denominational preference' " to trigger strict scrutiny**. *Adair v. England*, 217 F. Supp. 2d 7, 14–15 (D.D.C. 2002) (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 608–609 (1979)). The plaintiffs challenge the Navy's policies, not simply the alleged impermissible intentions and actions of individual board members.

Adair v. Winter, 451 F. Supp. 2d 210, 218-19 (D.D.C. 2006) (Emphasis added).

The keywords are "evidence **suggesting** a denominational preference." This is consistent with precedent holding the Establishment Clause forbids "subtle departures" from neutrality. *Gillette*, *op. cit*., and *County of Allegheny*, *op. cit*.

Chaplaincy-2013's false claim Petitioners' central theme was disparate treatment and adoption of Fifth Amendment precedent, overrode *Adair* and its *County of Allegheny's* Establishment Clause denominational preference standard. *Chaplaincy*'s embrace of *Yick Wo* "stark" for statistics, A81, A88-89 is incompatible with "subtle departures" or suggestions of denominational preference.

This Court's affirmance of *Chaplaincy-2013* substitution of "disparate treatment" for "denominational preference" ignored *Barnette*, *Albright* and similar precedents' clear command that First Amendment, not Fifth Amendment, principles and precedent establish the standard for evaluating the challenged actions under Due Process and Equal Protection. This illegal substitution effectively destroyed Petitioners' Establishment Clause protections by its prejudicial application of classic equal protection criteria. This is obvious by the Circuit's affirmance of *Chaplaincy-2013's* erroneous impositions of (1) *Yick Wo v. Hopkins*, 118 U.S. 356, 359 (1886)'s "stark" standard to disqualify Petitioners' statistics, A2, A56; and (2), requiring Petitioners to show intent to discriminate, A54, A56-57.

The Circuit rejected Petitioner's argument statistical significance, *i.e.*, the result is not due to chance, is a well-known standard that would establish "evidence suggesting" a denominational preference under *County of Allegheny*. It shows clearly whether denomination had relevance in a chaplain's standing in his military community, *see County of Allegheny*, at 492 U.S. at 593-94 (citation omitted).

B. *Chaplaincy* Abrogated *Webster V. Doe* and Similar Precedent to Protect Clear Unconstitutional Conduct

1. *Webster* provides the basis for Petitioner's right to seek discovery to support their colorable constitutional claims

Chaplaincy rejected Petitioners request for discovery of promotion board proceedings, A2, A40-42, and other documents holding they had no right for

such discovery. A47. This is willful blindness to *Webster v. Doe*'s clear precedent, 486 U.S. 592, 603-04 (1988). *Webster* established two principles *Chaplaincy* deliberately ignored. First, "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. *Id*. at 603 (citing other precedent establishing and reaffirming "that view"). That "heightened showing" avoids "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id*. 10 U.S.C. § 613a has no such language and Petitioners certainly have "colorable constitutional claims"; allowing the Navy to violate the Constitution abrogates the Judiciary's duty under the Supremacy Clause.

Second, important agency needs can be addressed because "the District Court has the latitude to control any discovery process ... to balance respondent's need for access to proof which would support a colorable constitutional claim against the [Navy's alleged] needs[.]" *Id*. at 604. This case does not involve national security, but "quality of life issues", *Adair*, 183 F.Supp.2d at 50.

2. ***Webster*** **was clearly focused on allowing discovery to expose constitutional violations**

Webster clearly articulated there was an important governmental interest in allowing discovery to pursue "colorable constitutional claims.

Facts 3-5 clearly show unconstitutional denominational factors determined and influenced decisions in the Chaplain Corps promotion boards the IGs examined.

The evidence shows more boards, including ones these Petitioners challenge because they were denied selection, were affected by the denominational preferences and retaliation identified by the IGs as realities from the procedures. *Bowen v. Michigan Acad. of Fam. Physicians*, 476 U.S. 667, 681 (1986), cited by *Webster*, 486 U.S. at 603, addressed whether certain Medicare regulations could be judicially reviewed. *Bowen* articulated an important point applicable here: " We ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." That principle is no less important when constitutional provisions are at issue, especially the Establishment Clause, because it denies the power of the government to act in areas of religion. Congress expects the courts to enforce the Constitution, especially where the Executive is concerned. That means any such religious action is beyond the authority of government officials, here, board members and Navy officials.

It would be a strange anomaly if Congress could pass legislation essentially authorizing an agency, here the Navy, to violate the Constitution. If the Supremacy Clause means what it says, Congress has no power to authorize what the Constitution forbids. *Webster*'s rule that discovery is available is a mandate unless Congress has clear language indicating constitutional claims are barred, or involves specific areas constitutionally committed to other branches, *e.g.*, census, national security, foreign affairs or state secrets, historically protected venues.

Chaplaincy essentially holds the Navy may do what the Constitution forbids. This cannot be allowed. Petitioners ask this Court to affirm their right to discovery to "support their colorable constitutional claims", a right *Webster* clearly establishes but which *Chaplaincy* and the D.C. Circuit have abrogated.

C. The Lower Courts Had a Duty to Honor Petitioners' Requests to Be Released from Their Oath of Secrecy, Pursue Discovery and Enforce the Establishment Clause's Commands

Petitioners have previously argued "Sworn reports of bias and board members' requests for secrecy oath release created a judicial duty to investigate" in keeping with this Court's well-established precedents to carefully examine Establishment claims to preclude subtle or overt weakening of the Establishment Clause principles and protections. §I.C.2 above. It is inconceivable how courts faced with chaplain requests to be able to testify about conduct relevant to whether promotion boards were conducted free of denominational influences is alleged could not recognize their duty as defenders of the Constitution to allow that to happen. It is also puzzling why courts would refuse to lift a discovery stay imposed in the midst of a discovery dispute after dispositive motions were decided, the stay's basis.

It would seem that the courts went out of their way to avoid their responsibilities, despite being faced with unchallenged evidence from Inspector General investigations, requests by former members of promotion boards to testify about misconduct they witnessed. Petitioners respectfully ask this Court to address this judicial lack of concern for the fundamental values at issue.

CONCLUSION

Examples "of united civic and religious authority "in modern America" are rare. *Grumet,* 512 U.S. at 697. Commissioning denominational representatives as naval officers fuses civic and religious authority. Navy's regulations acknowledge this by denying chaplains the Sovereign's authority. Only on selection boards may chaplains use the Sovereign's power to "zero out" careers with no accountability. That is truly unbridled authority which the First Amendment forbids.

The issue is simple, the evidence undisputed and the precedent clear. But for 21+ years, the courts below have seemed to go out of their way to avoid applying *Grumet* and *Larkin* lest these chaplains win. Fifth Amendment due process-equal protection rules have been substituted for Establishment precedent despite the obvious prejudice and disregard for precedent. This case sends a clear message to these military chaplains that they are not welcome in the District of Columbia.

Petitioners respectfully ask this Court to grant certiorari and tell the courts below (1) the precedents which control this case have not died of old age and (2) it is the courts' duty to conduct thorough and careful review of Establishment claims to protect that Clause's guarantees and values.

Respectfully submitted,

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