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

APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5204 **September Term, 2020**

FILED ON: NOVEMBER 6, 2020

IN RE: NAVY CHAPLAINCY,

CHAPLAINCY OF FULL GOSPEL CHURCHES, ET AL.,
APPELLEES

ASSOCIATED GOSPEL CHURCHES,
APPELLANT

v.

UNITED STATES NAVY, ET AL.,
APPELLEES

Consolidated with 19-5206

Appeals from the United States District Court
for the District of Columbia
(No. 1:07-mc-00269)

Before: SRINIVASAN, *Chief Judge*, RAO, *Circuit Judge*, and GINSBURG, *Senior Circuit Judge*.

J U D G M E N T

The court considered this appeal on the record from the United District Court for the District of Columbia and on the briefs and oral argument of the parties. The court afforded full consideration to the issues presented and determined a published opinion is not warranted. *See* D.C. Cir. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the judgment of the district court expressed in an opinion and order issued on August 30, 2018 be **AFFIRMED**. In that opinion the court denied the Plaintiffs' motions to lift a discovery stay and to stay summary judgment pending further discovery. In addition, the district court denied summary judgment for the Plaintiffs and granted

summary judgment for the Navy on the Plaintiffs' claims that the Navy's selection board policies and procedures violate the First and Fifth Amendments to the Constitution of the United States, and on their claim that 10 U.S.C. § 613a is unconstitutional as applied to the facts of this case. The Plaintiffs appealed each of these decisions.

Our review of a district court's decision to grant or deny a motion for summary judgment is *de novo*. *Capitol Sprinkler Inspection, Inc. v. Guest Servs.*, 630 F.3d 217, 223-24 (D.C. Cir. 2011). We review a district court's ruling on discovery matters under the more deferential abuse of discretion standard. *See, e.g.*, *Willoughby v. Potomac Elec. Power Co.*, 100 F.3d 999, 1003 (D.C. Cir. 1996).

First, the district court did not abuse its discretion in declining to permit further discovery. Judge Bates inherited this action in late 2017, nearly two decades after it began. By the time it reached him, the Plaintiffs had taken extensive discovery, including 25 interrogatories, 136 requests for production, and 17 depositions. Between 2002 and 2009, discovery was open for over five years net of intermittent stays. The district court was surely correct in concluding the Plaintiffs had had "ample opportunity" to conduct discovery. *See* Fed. R. Civ. P. 26(b)(2)(C)(ii).

Second, the district court was right to reject the Plaintiffs' most recent attempt to evade the statute that prohibits discovery of selection board proceedings. On appeal, the Plaintiffs have still "advanced no coherent theory" to explain their assertion that the statute violates the Constitution simply because discovery of board proceedings might help the Plaintiffs' case. *In re Navy Chaplaincy* 323 F. Supp. 3d 25, 51 (D.D.C. 2018) (quoting *Adair v. Winter*, 451 F. Supp. 2d 210, 220 (D.D.C. 2006)).

Third, the district court made no mistake in granting summary judgment for the Navy on the Plaintiffs' various First Amendment[1] challenges to its selection board policies. *See Chaplaincy*, 323 F. Supp. 3d at 35-36, 55-56. With regard to the claims that certain selection board policies violated the Establishment Clause, the Plaintiffs had to show each policy had an unconstitutional effect; that is, the Plaintiffs had to show "the selection policies appear[ed] to endorse religion in the eyes of a reasonable observer." *In re Navy Chaplaincy*, 738 F.3d 425, 430 (D.C. Cir. 2013) (emphasis and internal quotation marks omitted). To prove an endorsement with statistics, the Plaintiffs had to show a stark disparity in outcomes during the relevant period, *id.* at 431, but the statistics they offered came nowhere close to doing so. The Plaintiffs' alternative argument, an analogy to *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), is foreclosed by the law of the case. *See In re Navy Chaplaincy*, 697 F.3d 1171, 1179 (D.C. Cir. 2012).

It is

[1] The Plaintiffs do not press their Fifth Amendment challenges on appeal.

FURTHER ORDERED and **ADJUDGED** that the district court's opinion and order dismissing for lack of standing appellant Associated Gospel Churches' (AGC's) claim challenging the Navy's alleged policy of recruiting chaplains without regard to the Navy's "free exercise needs" be **REVERSED** in relevant part, and that this claim be **REMANDED** to the district court for further consideration.

AGC, a chaplain endorsing agency, joined this action in its own right and as a representative of its members to challenge various aspects of the Navy's policies and procedures for accessing and promoting chaplains. In February 2015, the Navy moved to dismiss AGC's challenges to its accession policies for lack of standing. AGC implicitly conceded it lacked standing to pursue most of its accession claims, but argued it had both organizational and representational standing to attack the Navy's alleged policy of setting chaplain accession goals that do not correspond to the "free exercise needs" (i.e., religious demographics) of the Navy. In 2016, the district court held AGC did not have organizational or representational standing to pursue this claim. *In re Navy Chaplaincy*, 170 F. Supp. 3d 21, 31-33. Later that year, AGC abandoned its remaining claims and asked the district court to dismiss AGC from the action so it could join a Rule 54(b) motion some of the Plaintiffs planned to file.

On appeal, AGC argues it has standing in its own right to challenge the Navy's faith-neutral accession goals.[2] We agree. AGC alleged the Navy's accession goals resulted in AGC's chaplain candidates entering the Navy at a significantly lower rate than they otherwise would have. AGC further alleged, because it relies upon its chaplains for financial support, it loses money when its ability to find placements for its candidates is hindered. AGC also alleged its low rate of success placing candidates in the Navy tarnished its reputation. These allegations satisfy all three elements of standing. We express no opinion on the sufficiency of the allegations in any other respect. The claim will be remanded to the district court for further proceedings.

It is

FURTHER ORDERED and **ADJUDGED** that the district court's order holding certain Plaintiffs' claims untimely under 28 U.S.C. § 2401(a) be **VACATED** in relevant part and these claims be **REMANDED** to the district court for consideration whether equitable tolling applies to any or all of these claims under a theory of fraudulent concealment.

In 2014, the district court granted summary judgment for the Navy on each claim based upon policies or personnel actions finalized more than six years before the filing of the

[2] AGC forfeited any argument for standing on behalf of its members by failing to develop it beyond a conclusory recitation of elements. *See Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 179 (D.C. Cir. 2019) ("A party forfeits an argument by mentioning it only in the most skeletal way" (quotation omitted)).

respective suit. Twenty-three Plaintiffs were dismissed from the action as a result.

The Plaintiffs had argued the statute of limitations should be equitably tolled because the Navy fraudulently concealed its alleged misconduct. The district court rejected this argument pursuant to then-controlling precedent holding the statute of limitations in 28 U.S.C. § 2401(a) is jurisdictional, and therefore not subject to equitable tolling. *See, e.g.*, *Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014) ("We have long held § 2401(a) creates a jurisdictional condition attached to the government's waiver of sovereign immunity") (cleaned up); *P & V Enters. V. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1026 (D.C. Cir. 2008) (applying this rule). Shortly thereafter, however, the Supreme Court held equitable tolling is available under § 2401(b), calling our view of § 2401(a) into doubt. *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015). The Plaintiffs moved for reconsideration, which was denied, as the district court correctly stated it "remain[ed] bound by Circuit precedent as it currently" stood. While this case was on appeal, this court overturned our precedent on § 2401(a). *Jackson v. Modly*, 949 F.3d 763, 776-78 (Feb. 14, 2020) ("[W]e hold that § 2401(a)'s time bar is nonjurisdictional and subject to equitable tolling").

Constrained by our former interpretation of § 2401(a), the district court never had occasion to consider the merits of the Plaintiffs' fraudulent concealment arguments. The Navy urges us to decide the issue in the first instance. Appellee's Br. at 24-25 (citing *Liff v. Off. of Inspector Gen.*, 881 F.3d 912, 919 (D.C. Cir. 2018) (holding the court of appeals may decide certain "straightforward legal question[s]" not considered by the district court)). We decline this invitation. Fraudulent concealment is a fact-bound inquiry, entailing questions such as: "Did the Navy use some trick or contrivance to conceal the alleged discrimination?"; "Were the affected Plaintiffs on notice of it regardless?"; and "Did the affected Plaintiffs exercise diligence?". *See Hobson v. Wilson*, 737 F.2d 1, 33-36 (D.C. Cir. 1984). On remand, the district court will determine whether any claims are to be resurrected due to equitable tolling.

It is

FURTHER ORDERED and **ADJUDGED** that the judgment of the district court dismissing certain Plaintiffs' claims that the Government infringed their First Amendment rights by allowing chaplains to rate other chaplains is **AFFIRMED**. The district court correctly held the Plaintiffs did not state a claim on this point because the relevant allegations were speculative and implausible. *Adair v. England*, 183 F. Supp. 2d 31, 60-61 (2002). On appeal, the Plaintiffs construe this holding as resting on an "irrebuttable presumption" that naval officers always act with regularity. We disagree with the Plaintiffs' reading.

To state a claim under the Establishment Clause, the Plaintiffs had to allege either that the policy failed under *Larson v. Valente*, 456 U.S. 228 (1982), in that it granted a denominational preference without narrow tailoring to serve a compelling government interest, or that the policy failed under the three part test of *Lemon v. Kurtzmann*, 403 U.S. 602 (1971) (holding a law

violates the Establishment Clause if its (1) purpose or (2) effect favors a religion, or it creates (3) excessive entanglement between Government and religion). *See Adair*, 183 F. Supp. 2d at 47-49. Allowing chaplains to sit on chaplain selection boards does not create a *de jure* denominational preference and does not create excessive entanglement. The purpose of the policy is innocuous: "Staff corps promotion boards have been traditionally composed of officers who are members of the same staff corps" because "those in the same profession are more qualified to evaluate others in their profession." *Id.* at 61 (quoting *Emory v. Secretary of the Navy*, 708 F. Supp. 1335, 1339 (D.D.C. 1989)) (cleaned up). All that is left is discriminatory effect, but to believe this policy has a discriminatory effect would require the court to "believe that the usual rule for a chaplain sitting on a promotion board will be to discriminate." *Id.* at 60. The district court rightly found this conclusion implausible, especially given the Plaintiffs had only "highly speculative" allegations to support it. *Id.* at 60-61.

The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(b).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: NAVY CHAPLAINCY	**Misc. Case No. 07-269 (JDB)**

MEMORANDUM OPINION

More than a decade ago, these consolidated cases were brought by a group of Protestant U.S. Navy chaplains who allege that the Navy has discriminated against them in various ways because of their faith. Though plaintiffs' consolidated complaint runs over one hundred pages and asserts eighteen separate counts, prior rulings in this case have whittled their claims down to nine, six of which are currently before the Court on cross-motions for summary judgment. Each of these claims relates to the so-called "selection boards" that the Navy uses to select chaplains (and all other commissioned officers) for promotion and, in some cases, for involuntary retirement.

Plaintiffs' primary claim is that, until 2002, the Navy maintained an unconstitutional policy of placing at least one Roman Catholic chaplain on every selection board, which resulted in Catholic chaplains being promoted at a disproportionately high rate compared to other religious groups. Plaintiffs also challenge a host of other allegedly unconstitutional selection-board policies and procedures—some of which, plaintiffs claim, continue to this day. Finally, plaintiffs challenge a statute that privileges selection-board deliberations from disclosure in litigation, arguing that it is unconstitutional as applied to their case because it denies them access to information that they need to prove their constitutional claims. To redress these wrongs, plaintiffs—each of whom was either passed over for promotion or selected for early retirement by a board that was allegedly tainted by one or more of the challenged procedures—seek an order directing the Navy to reinstate them to active duty, if necessary, and to convene new, properly constituted selection boards to

reconsider the personnel actions taken against them. Alternatively, plaintiffs ask the Court to permit them to take further discovery to prove their claims.

To a considerable extent, the result in this case is dictated by prior rulings of both the D.C. Circuit and this Court. The legal standards applicable to plaintiffs' challenges to the selection-board policies and procedures were laid out several years ago by the D.C. Circuit in this very litigation. Consequently, there is little left to do here but to apply those standards to the evidence adduced by the parties on summary judgment—which, as explained below, does not even come close to showing the degree of discrimination required for plaintiffs' challenges to succeed. Likewise, this Court has already twice considered and twice rejected plaintiffs' constitutional challenge to the statutory privilege for selection-board proceedings, and plaintiffs offer no persuasive reason to reach a different conclusion this time around. Plaintiffs' motions for summary judgment as to these claims will therefore be denied, and the Navy's will be granted. Finally, because plaintiffs have had ample opportunity to conduct discovery previously in this litigation, and because they would be unlikely to prevail on their claims even if they were permitted to take further discovery, plaintiffs' requests for additional discovery will be denied.

BACKGROUND

I. THE NAVY CHAPLAIN CORPS

The Navy employs a corps of over 800 chaplains to serve the religious needs of service members deployed across the United States and throughout the world. In re England, 375 F.3d 1169, 1171 (D.C. Cir. 2004). In addition to performing religious services, Navy chaplains provide service members with counseling and ethics instruction, and they sometimes advise naval officers on the moral and ethical implications of their decisions. Id. Chaplains have performed these and other important functions aboard U.S. Navy ships since the Founding. Id.

Plaintiffs are thirty-nine Protestant chaplains who belong to denominations that the Navy categorizes as "non-liturgical" because their services do not follow a set liturgy (that is, a prescribed order of worship). Id. at 1172. Protestant denominations falling within this category include Baptism, Evangelicalism, and Pentecostalism; conversely, "liturgical" denominations include Methodism, Lutheranism, and Presbyterianism. Id. At all times relevant to this litigation, for administrative purposes, the Navy treated liturgical Protestants, non-liturgical Protestants, and Roman Catholics as three distinct "faith group categories"; a fourth and final category, "Special Worship," included all other Christian denominations, as well as all other religions. Id. The Navy used these faith group categories to document service members' religious needs and to ensure that those needs were being met.

Although chaplains' religious role within the Navy is unique, chaplains progress through the Navy's promotion system in the same manner as all other commissioned officers. See, e.g., 10 U.S.C. § 624 (describing the promotion process); id. § 638 (providing for the involuntary "selective early retirement" of an officer who has been considered but not selected for a promotion either a certain number of times or after a certain number of years, depending on the officer's rank). To be promoted to the next rank, a chaplain must be recommended by a "selection board." 10 U.S.C. § 611(a). That board must consist of at least five officers, all of whom must rank higher than the candidates under consideration, id. § 612(a)(1), and at least one of whom must be a chaplain, id. § 612(a)(2)(A); see In re England, 375 F.3d at 1172 ("[I]f a selection board is considering chaplains, at least one board member must be a chaplain."). The same requirements apply to a board convened to select chaplains for early retirement. See 10 U.S.C. § 611(b).

The convening of selection boards is further governed by Navy regulations. See id. § 611(c).[1] Initially, during the time frame relevant here, Navy regulations required that each chaplain selection board consist of "five or more" officers, at least one of whom was not a chaplain. SECNAVINST 1401.3, Encl. 1 ¶ 1(c)(1). The Navy would then seek to fill the remaining seats, to the extent practicable, with "a mix of qualified and available chaplains from the different Faith Group Categories." See Decl. of Captain Stephen B. Rock ("Rock Decl.") [ECF No. 281-2] ¶ 8. Beginning in 2003, however, the Secretary of the Navy directed that chaplain selection boards be composed of five non-chaplain officers and two chaplains. See Decl. of Commander James Francis Buckley ("Buckley Decl.") [ECF No. 281-23] ¶ 3. Then, in 2005, the Navy formally amended its regulations to require that "Chaplain Corps boards shall include five [non-chaplain] officers as members, and two members from the Chaplain Corps." SECNAVINST 1401.3A, encl. 1 ¶ 1(c)(1)(f).

Statutory and regulatory requirements also prohibit unlawful discrimination by selection boards (or by those tasked with convening them). For example, by statute, selection board members must swear an oath to fulfill their duties "without prejudice or partiality and having in view both the special fitness of officers and the efficiency of [the Navy]." 10 U.S.C. § 613. Navy regulations further provide that "[e]xclusion from board membership by reason of gender, race, ethnic origin, or religious affiliation is prohibited." SECNAVINST 1401.3 ¶ 4(a); SECNAVINST 1401.3A ¶ 4(a). They also specifically state that members of chaplain selection boards "shall be nominated without regard to religious affiliation." SECNAVINST 1401.3, encl. 1 ¶ (1)(c)(1)(e);

[1] The Navy refers to its regulations as "Instructions" from the Secretary of the Navy, abbreviated as "SECNAVINST." The Instructions at issue here are SECNAVINST 1401.3, see Ex. 3 to Def.'s Opp'n to Pls.' Mot. for Summ. J. and Cross-Mot. for Summ. J. ("SECNAVIST 1401.3") [ECF No. 281-3], which was promulgated in December 1989, and SECNAVINST 1401.3A, which superseded SECNAVINST 1401.3 in December 2005, see Ex. 5 to Def.'s Opp'n to Pls.' Mot. for Summ. J. and Cross-Mot. for Summ. J. ("SECNAVIST 140.3A") [ECF No. 317-5]. Both instructions contain three "enclosures," the first of which sets out further provisions applicable to the Navy's selection boards.

SECNAVINST 1401.3A, encl. 1 ¶ (1)(c)(1)(f). Similarly, during the relevant time period, "precepts" addressed to individual selection boards instructed those boards to "ensure that officers are not disadvantaged because of their race, creed, color, gender, or national origin." See, e.g., Precept Convening FY-02 Promotion Selection Board [ECF Nos. 281-20] at C-1.

II. PROCEDURAL HISTORY

The plaintiffs in this consolidated litigation are a group of non-liturgical Protestant chaplains who claim that they were either denied a promotion or selected for early retirement because of their religious affiliation. See generally Consolidated Compl. ("Compl.") [ECF No. 134] add. A. Over its nearly twenty-year life span, plaintiffs' case has been before the D.C. Circuit at least five times, seen the retirement of two district judges, and generated over a thousand pages of briefing on dispositive motions. Its history is nothing if not complex.

A. Church of Full Gospel Chaplains v. Danzig and Adair v. Winter

The first two of the three cases consolidated in this action were filed in this district in 1999 and 2000, see Chaplaincy of Full Gospel Churches v. Danzig ("CFGC"), Civil Action No. 99-2945 (D.D.C. filed Nov. 5, 1999); Adair v. Winter, Civil Action No. 00-566 (D.D.C. filed Mar. 17, 2000), and later consolidated before Judge Ricardo Urbina. The plaintiffs—many of whom remain in the litigation to this day—asserted constitutional claims related to the hiring, promotion, and retention of chaplains, see Adair v. England, 183 F. Supp. 2d 31, 55–63 (D.D.C. 2002); the treatment of non-liturgical Protestants within the chaplaincy, see id. at 63–67; and individual alleged instances of constructive discharge and retaliation, see id. at 67. The Navy moved to dismiss their claims for lack of jurisdiction and failure to state a claim, but Judge Urbina denied the motion as to most claims. See id. at 68. Judge Urbina later granted the plaintiffs' motion for class certification, see Adair v. England, 209 F.R.D. 5, 13 (D.D.C. 2002), and the cases proceeded

to discovery, see Aug. 27, 2002 Order, CFGC, ECF No. 119; Aug. 27, 2002 Order, Adair, ECF No. 72.

Soon thereafter, a dispute arose over plaintiffs' request to depose members of prior chaplain selection boards. At the time, a federal statute provided that, "[e]xcept as authorized or required by this section, proceedings of a selection board convened under [10 U.S.C. §] 611(a)"—that is, selection boards for promotions but not for early retirement—"may not be disclosed to any person not a member of the board." 10 U.S.C. § 618(f). Nevertheless, Judge Urbina granted the plaintiffs' motion, concluding that § 618(f) did not apply in litigation because it "does not contain specific language barring discovery" and "because of the circuit's emphasis on providing litigants full access to relevant information." Chaplaincy of Full Gospel Churches v. Johnson, 217 F.R.D. 250, 260 (D.D.C. 2003).[2]

The Navy appealed, and the D.C. Circuit reversed, explaining that "[d]isclosure of selection board proceedings in civil discovery would certainly undermine, if not totally frustrate, the purpose of Section 618(f)." In re England, 375 F.3d at 1178. The D.C. Circuit also rejected plaintiffs' reliance on the Supreme Court's statement in Webster v. Doe that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear," 486 U.S. 592, 603 (1988), explaining that here, plaintiffs "remain free to litigate their discrimination claims and to support them with other evidence." Id. at 1180 n.2. Hence, the court concluded,

[2] While plaintiffs' motion to compel was pending before Judge Urbina, plaintiffs filed a motion for a preliminary injunction that "would, among other things, 'require the Navy to separate immediately those chaplains it has allowed to continue on active duty beyond age 60,'" which plaintiffs sought in light of the Navy's allegedly "'well established practice of allowing Catholic . . . chaplains, and only Catholic chaplains,' to remain on active duty beyond mandatory separation age limits." Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 296 (D.C. Cir. 2006) (citation omitted). Judge Urbina denied this motion, concluding only that plaintiffs had failed to demonstrate irreparable injury, but the D.C. Circuit reversed, concluding that "the Navy's alleged violation of the Establishment Clause per se constitutes irreparable harm." See id. at 296, 299. On remand, the district court ruled that plaintiffs lacked standing, and this time the D.C. Circuit affirmed, noting that "plaintiffs have conceded that they themselves did not suffer . . . discrimination" but rather argued that "other chaplains" did. In re Navy Chaplaincy, 534 F.3d 756, 758 (D.C. Cir. 2008), aff'g 516 F. Supp. 2d 119 (D.D.C. 2007).

§ 618(f) "applies to block civil discovery of promotion selection board proceedings in civil litigation." Id. at 1181 (emphasis added). But because the statutory language referred only to "section 611(a)" of Title 10, which governs the convening of promotion boards, while the convening of selective early retirement boards is governed by § 611(b) of that title, the D.C. Circuit remanded for the district court to consider in the first instance whether § 618(f) applied to the proceedings of selective early retirement boards. Id. at 1181–82.

On remand, plaintiffs argued not only that § 618(f) was inapplicable to selective early retirement boards, as the D.C. Circuit had suggested, but also that it was unconstitutional as applied to their discovery requests for promotion board proceedings, because it deprived them of evidence that they needed to prove their constitutional claims. Judge Urbina agreed with plaintiffs as to the first point, see Adair v. Winter, 451 F. Supp. 2d 202, 206 (D.D.C. 2006) (allowing discovery of selective early retirement board proceedings), but not the second, see Adair v. Winter, 451 F. Supp. 2d 210, 212 (D.D.C. 2006) (barring discovery of promotion board proceedings). In his view, § 618(f) was constitutional as applied to plaintiffs both because promotion board proceedings were not essential to their claims, see id. at 217–19, and because in any case there was no "constitutional right of access to evidence essential to establishing constitutional claims," id. at 220.

A little more than a month after Judge Urbina's rulings, Congress enacted the John Warner National Defense Authorization Act, Pub. L. No. 109-364, § 547(a)(2), 120 Stat. 2083, 2216 (2006), which repealed § 618(f) and replaced it with 10 U.S.C. § 613a. Section 613a clarified that "[t]he proceedings of a selection board convened under section . . . 611 . . . of this title may not be disclosed to any person not a member of the board"; by its terms, therefore, the new statute applied to selective early retirement boards. Moreover, § 613a explicitly states that:

> The discussions and deliberations of a selection board . . . and any written or documentary record of such discussions and deliberations—(1) are immune from

> legal process; (2) may not be admitted as evidence; and (3) may not be used for any purpose in any action, suit, or judicial or administrative proceeding without the consent of the Secretary of the military department concerned.

10 U.S.C. § 613a(b). The statute also specifies that it "applies to all selection boards . . . regardless of the date on which the board was convened." Id. § 613a(c). Following the enactment of § 613a, Judge Urbina granted the Navy's motion for reconsideration of his decision allowing discovery of selection-board proceedings, concluding that those materials were no longer discoverable. See In re Navy Chaplaincy, 512 F. Supp. 2d 58, 61 (D.D.C. 2007).

B. Gibson v. United States Navy and In re Navy Chaplaincy

Earlier in 2006, following what the Navy called a series of "tactical defeats" suffered by plaintiffs in CFGC and Adair,[3] a third case was filed in the Northern District of Florida. See Gibson v. U.S. Navy, Civil Action No. 3:06-187 (N.D. Fla. filed Apr. 28, 2006). The Gibson plaintiffs—again, a group of non-liturgical Protestant chaplains—were represented by the same counsel as the plaintiffs in Adair and CFGC and, according to the Navy, asserted "nearly identical" claims. Aug. 17, 2006 Order at 2, Gibson, ECF No. 33. The Navy successfully moved to transfer Gibson to this Court, see Order, Gibson v. U.S. Navy, Civil Action No. 06-1696 (D.D.C. Sep. 29, 2006), ECF No. 1, and proceedings were later stayed pending the Navy's motion to consolidate the case with Adair and CFGC and a series of appeals related to the Northern District of Florida's transfer order. See Nov. 7, 2006 Min. Order, Gibson (imposing stay); July 3, 2008 Min. Order, In re Navy Chaplaincy (lifting stay). In 2007, the three cases were consolidated and captioned In re Navy Chaplaincy. See June 18, 2007 Mem. Order at 4, Gibson, ECF No. 11 at 4–5.

[3] Order at 2, Gibson v. U.S. Navy, Civil Action No. 3:06-187 (N.D. Fla. Aug. 17, 2006), ECF No. 33. According to the Navy, see id., these included the D.C. Circuit's affirmance of Judge Urbina's denial of plaintiffs' motion for a temporary restraining order (which would have barred the Navy from discharging a single plaintiff) and its denial of plaintiffs' request to assign the case to a new district judge. See Adair v. Holderby, No. 06-5074 (D.C. Cir. Apr. 20, 2006) (per curiam) (unpublished), aff'g Adair v. England, 417 F. Supp. 2d 1 (D.D.C. 2006).

In late 2008 and early 2009, once the appeals related to Gibson's transfer were resolved, the parties filed a series of dispositive motions in the newly consolidated cases. While the briefing on these motions was pending, plaintiffs served a new set of discovery requests, which prompted the Navy to request a stay of discovery pending the resolution of the motions. The Court granted this request "informally" in July 2009. See Mem. of P & A in Opp'n to Pls.' Mot. to Lift Disc. Stay ("Navy's Disc. Opp'n") [ECF No. 263] at 9; Case Mgmt. Order #1 at 3 [ECF No. 124].

In 2011, while briefing on the dispositive motions was still pending, plaintiffs moved for a preliminary injunction prohibiting the Navy from implementing three selection-board procedures: "(1) staffing the seven-member selection boards with two chaplains, (2) enabling members to keep their votes secret . . . , and (3) allowing the Chief of Chaplains or his deputy to serve as the selection board president." In re Navy Chaplaincy, 738 F.3d 425, 427 (D.C. Cir. 2013); see Pls.' Mot. for Prelim. Inj. [ECF No. 95]. Judge Urbina denied plaintiffs' motion in January 2012, concluding that plaintiffs lacked standing and that, in any case, they were unlikely to succeed on the merits of their claims. See Jan. 30, 2012 Mem. Op. [ECF No. 108] at 8–12. On appeal, the D.C. Circuit reversed Judge Urbina's determination that plaintiffs lacked standing and remanded for clarification as to whether the district court viewed the insufficiency of the chaplains' claims to be "legal or factual." See In re Navy Chaplaincy, 697 F.3d 1171, 1173, 1180 (D.C. Cir. 2012). On remand, the district court (now Judge Gladys Kessler, see infra) again denied plaintiffs' motion, explaining that plaintiffs' constitutional claims were unlikely to succeed on the merits because plaintiffs had provided no "evidence demonstrating that Defendants intentionally discriminated against them." In re Navy Chaplaincy, 928 F. Supp. 2d 26, 33–37 (D.D.C. 2013). This time, the D.C. Circuit affirmed. See In re Navy Chaplaincy, 738 F.3d at 428.

In early 2012, while plaintiffs' appeal of the preliminary injunction ruling was still pending, Judge Urbina resolved one of the dispositive motions that was then pending in the underlying case, see In re Navy Chaplaincy, 850 F. Supp. 2d 86, 105–117 (D.D.C. 2012) (granting in part and denying in part the Navy's 2008 motion to dismiss on exhaustion, standing, and mootness grounds and for failure to state a claim), and retired soon thereafter. The case was then reassigned to Judge Gladys Kessler.

C. Proceedings Before Judge Kessler

In July 2012, Judge Kessler entered a comprehensive case management order. See Case Mgmt. Order #1. Among other things, the order: (1) directed plaintiffs to file a new, consolidated complaint, see id. at 2; (2) continued the discovery stay, see id. at 3, apparently based on the Navy's representation that it intended to file a motion to dismiss on jurisdictional grounds, see Pls.' Mot. to Lift the Current Disc. Stay for All Remaining Claims ("Pls.' Disc. Mot.") [ECF No. 255]at 5; and (3) directed the parties to file motions on class certification and statute-of-limitations issues, see Case Mgmt. Order #1 at 3. Judge Kessler also denied the pending dispositive motions without prejudice. See July 25, 2012 Minute Order.

Pursuant to Judge Kessler's case management order, plaintiffs filed a 120-page consolidated complaint asserting eighteen separate counts, see Compl. at 28–108,[4] and a motion for class certification, see Pls.' Mot. for Class Certification [ECF No. 147], and the Navy filed a motion for partial summary judgment on statute-of-limitations grounds, see Defs.' Mot. for Partial

[4] Judge Kessler would later summarize the claims in the consolidated complaint as follows: (1) a challenge to the Navy's use of faith group categories, (2) allegations that the Navy "used religious quotas to apportion chaplain opportunities among various faith groups," (3) challenges to various selection-board practices, including the three practices challenged in their earlier preliminary injunction motion and an additional practice by which "each selection candidate's three-digit 'faith group identifier' code was prominently displayed throughout the selection board process," and (4) claims "relating to a variety of specific instances, many of which date back as far as the 1970s and 1980s, in which they allegedly suffered discrimination and free exercise harm while serving in the Chaplain Corps." In re Navy Chaplaincy, 69 F. Supp. 3d 249, 253 (D.D.C. 2014).

Summ. J. as to Claims that Accrued Outside the Limitations Period [ECF No 159]. Due to a number of extensions in the briefing schedules on these motions,[5] they were not resolved until September 2014, when Judge Kessler denied plaintiffs' motion for class certification, see In re Navy Chaplaincy, 306 F.R.D. 33, 38 (D.D.C. 2014), and granted defendants' motion for partial summary judgment on statute-of-limitations grounds, see In re Navy Chaplaincy, 69 F. Supp. 3d 249, 251 (D.D.C. 2014). Specifically, Judge Kessler concluded that any claim filed "more than six years after finalization of the policies and personnel actions on which [it was] based" was time-barred. Id. at 256 (citing 28 U.S.C. § 2401(a)). The parties later stipulated that this ruling required the dismissal of twenty-three of the sixty-five individual plaintiffs then in the action, all of whose alleged adverse personnel actions had taken place prior to the applicable six-year statute of limitations cutoff (1993 for the CFGC plaintiffs, 1994 for the Adair plaintiffs, and 2000 for the Gibson plaintiffs). See Status Report [ECF No. 199] at 2 n.1, 4–5. The Court later held that one additional plaintiff, Thomas Rush, fell outside the statute-of-limitations period for similar reasons. See In re Navy Chaplaincy, 170 F. Supp. 3d 21, 44 (D.D.C. 2016).

In early 2015, the Navy filed another motion to dismiss, this time on standing and other jurisdictional grounds. See Defs.' Mot. to Dismiss on Jurisdictional Grounds [ECF No. 217]. Judge Kessler granted that motion in part and denied it in part in early 2016. See In re Navy Chaplaincy, 170 F. Supp. 3d at 27, 31–46. Specifically, Judge Kessler dismissed: (1) ten distinct claims related to "several of the Navy's alleged policies or practices relating to accession, personnel management, promotions, and career transition," id. at 31; (2) claims alleging a "culture

[5] During this period, the parties litigated a dispute over the scope of an exception to the discovery stay that allowed either party to depose "any individuals whose testimony may well be subject to loss if not taken in the very near future," Case Mgmt. Order #1 at 3; see Nov. 29, 2012 Mem. Op. [ECF No. 146] (resolving the dispute in late 2012). The parties were also engaged in litigation over plaintiffs' preliminary injunction motion, which was finally resolved by the D.C. Circuit in December 2013. See In re Navy Chaplaincy, 738 F.3d at 428.

of bias and hostility toward Non-liturgical chaplains," id. at 39; (3) other "claims alleging ad hoc actions against certain Plaintiffs," except for one claim alleging interference with prayer, id. at 40, 44; and (4) certain other individual claims that fell outside the limitations period, see id. at 44–46. The order accompanying Judge Kessler's opinion detailed the nine claims in the consolidated complaint that survived dismissal on jurisdictional and statute-of-limitations grounds:

1. Plaintiffs' challenge to the alleged policy of staffing one Roman Catholic chaplain on each promotion board since November 5, 1993 [six years before CFGC, the earliest of the three consolidated cases, was filed], set forth in Counts 2 and 4;
2. Plaintiffs' challenge to the inclusion of the Chief of Chaplains as president of certain promotion boards since November 5, 1993, set forth in Count 4;
3. Plaintiffs' challenge to the use of procedures employed by promotion boards since November 5, 1993, set forth in Counts 2 and 4;
4. Plaintiffs' challenge to the use of procedures employed by Selective Early Retirement ("SER") boards since November 5, 1993, set forth in Counts 2 and 4;
5. Plaintiffs' constitutional challenge to 10 U.S.C. § 613(a), set forth in Count 16;
6. Plaintiffs' claims under the Religious Freedom Restoration Act, 42 U.S.C. § 2000-bb et seq., set forth in Count 14;
7. Plaintiffs' challenge to the alleged constructive discharge of certain Plaintiffs since November 5, 1993, set forth in Count 11;
8. Plaintiffs' challenge to alleged retaliation against certain Plaintiffs since November 5, 1993, set forth in Count 12;
9. Plaintiffs' challenge to alleged instances of interference with the form of prayer of certain Plaintiffs since November 5, 1993, set forth in Count 9.

March 16, 2016 Order at 4–5 [ECF No. 238].

In November 2016, following a status conference at which plaintiffs asked that the discovery stay be lifted, the Court entered a scheduling order dividing plaintiffs' remaining claims into three groups and continuing the stay. See Nov. 18, 2016 Order [ECF No. 246]. The Court's order directed that, of the nine claims listed in its March 16, 2016 order, the first six would be addressed through summary judgment briefing, with the remaining three to be addressed thereafter. See Pls.' Proposal to Move the Case Forward [ECF No. 245] at 4.[6] Thus, the Court

[6] In its separate case management proposal, the Navy indicated an intent to move to sever the remaining individual claims from the consolidated litigation, explaining that "[t]hese claims are inherently fact-specific, and

ordered three rounds of summary judgment briefing: first, as to the constitutionality of 10 U.S.C. § 613a as applied to plaintiffs in this litigation ("Claim 1");[7] second, as to the Navy's alleged policy of placing one Roman Catholic chaplain on every chaplain selection board convened before late 2002, when the Navy began staffing the boards with only two chaplains ("Claim 2");[8] and third, as to plaintiffs' remaining challenges to selection-board procedures, as well as their parallel challenges under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb–1 to –4 ("Claim 3").[9] See Nov. 18, 2016 Order at 1–2; Pls.' Proposal to Move the Case Forward at 3–4. The Court also continued the existing discovery stay. See Nov. 18, 2016 Order at 2.

Plaintiffs then filed a memorandum explaining their need for further discovery, see Pls.' Mem. Supporting Limited Disc. [ECF No. 247], but the Court ordered the parties to adhere to its November 2016 schedule, noting that plaintiffs had not requested relief by motion, see Jan. 10, 2017 Order [ECF No. 253]. Plaintiffs then filed a motion to lift the discovery stay in March 2017. See Pls.' Disc. Mot. Later that year, plaintiffs filed another motion—styled as a motion under Federal Rule of Civil Procedure 56(d)—to stay summary judgment briefing until the discovery stay was lifted. See Pls.['] Rule 56(d) Mot. [ECF No. 292]. Both motions are currently pending.

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litigating them in consolidated fashion would impose unnecessary and counter- productive burden, expense, and delay on the parties and the Court." Def.'s Updated Case Mgmt. Proposal [ECF No. 244] at 7.

[7] See Pls.' Mot. for (1) Summ. J. that 10 U.S.C. § 613(a) [sic] is Unconstitutional as Applied to Pls.' Establishment and Due Process Claims and (2) an Order Directing the Sec'y to Release Selection Bd. Members from their Oath of Secrecy ("Pls.' Claim 1 MSJ") [ECF No. 254]; Def.'s Opp'n to Pls.' Mot. for Summ. J and Cross-Mot. for Summ. J. ("Navy's Claim 1 Opp'n") [ECF No. 260]; Pls.' Reply Mem. of P. & A. to Def.'s Opp'n ("Pls.' Claim 1 Reply") [ECF No. 266]; Pls.' Opp'n/Resp. to Defs.' Cross-Mot. for Summ. J. ("Pls.' Claim 1 Opp'n") [ECF No. 267]; Reply in Supp. of Def.'s Cross-Mot. for Summ. J. ("Navy's Claim 1 Reply") [ECF No. 269].

[8] See Pls.' Mot. for Summ. J. that the Defs.' Policy of Placing at Least One Roman Catholic Chaplain on Every Selection Bd. Until the Practice Was Terminated in Fiscal Year 2003 Is Unconstitutional ("Pls.' Claim 2 MSJ") [ECF No. 276]; Def.'s Opp'n to Pls.' Mot. for Summ. J. and Cross-Mot. for Summ. J. ("Navy's Claim 2 Opp'n") [ECF No. 281]; Pls.' Mem. in Reply to Defs.' Opp'n to Pls.' Summ. J. Mot. ("Pls.' Claim 2 Reply") [ECF No. 291]; Pls.' Opp'n to Def.'s Mot. for Summ. J. ("Pls.' Claim 2 Opp'n") [ECF No. 293]; Reply in Supp. of Defs.' Cross-Mot. for Summ. J. ("Navy's Claim 2 Reply") [ECF No. 298].

[9] See Pls.' Mot. for Summ. J. Concerning Pls.' Phase III Claims Challenging Defs.' Selection Bd. Practices as Unconstitutional ("Pls.' Claim 3 MSJ") [ECF No. 313]; Def.'s Opp'n to Pls.' Mot. for Summ. J. and Cross-Mot. for Summ. J. ("Navy's Claim 3 Opp'n") [ECF No. 317]; Pls.' Reply Mem. in Supp. of Their Mot. for Summ. J. ("Pls.' Claim 3 Reply") [ECF No. 325]; Reply in Supp. of Defs.' Cross-Mot. for Summ. J. ("Navy's Claim 3 Reply") [ECF No. 330].

D. Proceedings Before This Court

In October 2017, while briefing on the parties' summary judgment and discovery motions was underway, Judge Kessler retired, and this case was reassigned to the undersigned judge. The Court later set a hearing on the pending motions and advised the parties that although it "ha[d] reviewed and taken under advisement [255] plaintiffs' motion to lift the discovery stay," it would "defer ruling on that motion until the motions hearing." Jan. 11, 2018 Order [ECF No. 302].

Plaintiffs thereafter moved to stay summary judgment briefing on Claim 3 (by then, briefing on Claims 1 and 2 was complete) pending the Court's disposition of their motion to lift the discovery stay and their constitutional challenge to 10 U.S.C. § 613a. See Pls.' Rule 56(d) Mot. for a Stay in the Summ. J. Proceedings [ECF No. 303]. The Court denied that motion, construing it as one for reconsideration of its January 2018 order and explaining that, "instead of reopening discovery on the eve of scheduled summary judgment briefing, the Court will consider plaintiffs' specific discovery requests in the context of their motion for additional discovery under Federal Rule of Civil Procedure 56(d)." Mar. 1, 2018 Order [ECR No. 310] at 2.

Plaintiffs then petitioned the D.C. Circuit for a writ of mandamus compelling the Court to stay summary judgment briefing, lift the discovery stay, and address the constitutionality of § 613a, see Navy Chaplain Pls.' Pet. for a Writ of Mandamus, In re Navy Chaplaincy, No. 18-5070 (D.C. Cir. Mar. 14, 2018), but the D.C. Circuit denied the petition, see Order, In re Navy Chaplaincy, No. 18-5070 (D.C. Cir. July 9, 2018). Plaintiffs thereafter filed a motion to submit additional Rule 56(d) declarations. See Pls.' Mot. for Leave to File a Suppl. to Their Mot. to Lift the Stay and Counsel's Rule 56(d) Decls. ("Pls.' Mot. to File Decls.") [ECF No. 328].

A motions hearing was held on July 19, 2018. The pending discovery motions and cross-motions for summary judgment are now fully briefed and ripe for decision.

LEGAL STANDARD

A party is entitled to summary judgment "if [it] shows that there is no genuine dispute as to any material fact and [it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is 'material' if a dispute over it might affect the outcome of a suit under the governing law," and "[a]n issue is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Holcomb v. Powell, 433 F.3d 889, 895 (D.C. Cir. 2006) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "In determining whether a genuine issue of material fact exists, the court must view all facts, and draw all reasonable inferences, in the light most favorable to the party opposing the motion." Lane v. District of Columbia, 887 F.3d 480, 487 (D.C. Cir. 2018). However, if the movant shows that "there is an absence of evidence to support the nonmoving party's case," judgment should be entered in the movant's favor. Durant v. D.C. Gov't, 875 F.3d 685, 696 (D.C. Cir. 2017) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)), cert. denied sub nom. Durant v. District of Columbia, 138 S. Ct. 2608 (2018).

Under Federal Rule of Civil Procedure 56(d), "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition" to a summary judgment motion, "the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." The purpose of this rule "is to prevent railroading the non-moving party through a premature motion for summary judgment before [it] has had the opportunity to make full discovery." Kakeh v. United Planning Org., Inc., 537 F. Supp. 2d 65, 71 (D.D.C. 2008) (citation omitted). Thus, although motions under Rule 56(d) "are routinely granted, . . . the rule is not properly invoked to relieve counsel's lack of diligence." Id. (quoting Berkeley v. Home Ins. Co., 68 F.3d 1409, 1414 (D.C. Cir. 1995)). To prevail on a Rule 56(d) motion, the party opposing

summary judgment "must (1) 'outline the particular facts [it] intends to discover and describe why those facts are necessary to the litigation'; (2) 'it must explain' why the nonmoving party could not produce those facts in opposition to the summary judgment motion; and (3) 'it must show that the information is . . . discoverable.'" Moore v. Carson, Civil Action No. 14-2109 (JDB), 2017 WL 1750248, at *5 (D.D.C. May 3, 2017) (quoting Convertino v. U.S. Dep't of Justice, 684 F.3d 93, 99–100 (D.C. Cir. 2012)).

DISCUSSION

I. THE NAVY'S SELECTION BOARD POLICIES AND PROCEDURES

Plaintiffs' central contention in this litigation is that, at various times throughout the 1990s and early 2000s, several Navy policies governing the staffing and proceedings of chaplain selection boards favored liturgical Christians (i.e., Roman Catholics and liturgical Protestants) at the expense of non-liturgical Protestants. Chief among the challenged policies is an alleged practice of placing at least one Catholic chaplain on every selection board convened before late 2002. See Pls.' Claim 2 MSJ at 7–9; Compl. ¶¶ 57(e), (g), 88(g), 90. Plaintiffs also challenge various other procedures governing selection board proceedings, most of which were in place throughout the entire period relevant to this litigation. See Pls.' Claim 3 MSJ at 1–2.

Plaintiffs contend that these policies violate the First Amendment's Establishment Clause, the Fifth Amendment's Equal Protection Clause, and RFRA. They seek, among other things, a declaration that the challenged policies were unlawful, that "all boards using [them]" were "void ab initio," and that the Navy must reconsider any adverse action taken against any plaintiff by one of those boards. Compl. at 111.[10] Plaintiffs also seek an injunction directing the Navy to cease

[10] In Dilley v. Alexander, the D.C. Circuit concluded that several plaintiffs who had been denied promotions by unlawfully constituted military selection boards and later discharged from service were "entitled to be reinstated to active duty and to be considered anew by two properly constituted promotion selection boards." 603 F.2d 914, 916

those challenged policies that are still in place, see id. at 112, to establish a "monitor[ing]" and "reporting" system for "claims of denominational preference," id. at 114, and to develop a "fitness report for chaplains" that is based on "objective performance criteria," id.

The Navy contends that plaintiffs lack Article III standing to assert these claims.[11] It also contends that plaintiffs have failed to raise a genuine issue of material fact that the challenged policies were facially discriminatory or adopted for a discriminatory purpose, as D.C. Circuit precedent requires. The Navy therefore seeks summary judgment in its favor.

A. Article III Standing

At an "irreducible constitutional minimum," Article III's standing requirement has three elements:

> First . . . is injury-in-fact: A would-be plaintiff must have suffered "an invasion of a legally protected interest" that is (i) "concrete and particularized" rather than abstract or generalized, and (ii) "actual or imminent" rather than remote, speculative, conjectural or hypothetical. Second is causation: The asserted injury must be "fairly traceable to the challenged action of the defendant." Third is redressability: It must be "likely that a favorable decision by the court would redress the plaintiff's injury."

In re Navy Chaplaincy, 534 F.3d 756, 759 (D.C. Cir. 2008) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)). On summary judgment, the plaintiff must establish each of these elements with "specific facts" set out by affidavit or other admissible evidence. United States v. $17,900 in U.S. Currency, 859 F.3d 1085, 1090 (D.C. Cir. 2017) (quoting Lujan, 504 U.S. at 561). This showing is required "for each claim [the plaintiff] seeks to press and for each form of relief

(D.C. Cir. 1979), decision clarified, 627 F.2d 407 (D.C. Cir. 1980). The court declined to declare the boards "void [a]b initio," however, because such a declaration "would create an untenable situation for the Army with regard to those officers who actually were promoted" by the selection boards in question. Dilley, 603 F.2d at 921.

[11] The Navy presents the Article III standing issue later in its briefs, as something of an afterthought to its merits discussion. See Navy's Claim 2 Opp'n at 36–38; Navy's Claim 3 Opp'n at 40–42. But the Court is not at liberty to "'assum[e]' jurisdiction for the purpose of deciding the merits," Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998), so it will address standing first.

that is sought." Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650 (2017) (citation omitted).

The Navy contends that plaintiffs lack Article III standing because they have failed to demonstrate that the adverse personnel actions taken against them were the result of the policies they challenge. On the contrary, the Navy argues, plaintiffs' own complaint attributes those actions "to causes entirely independent of the challenged procedures." Navy's Claim 3 Opp'n at 41 (pointing to allegations of "manipulation of the assignment process by senior chaplains," "manipulation of officer service records by unspecific persons," "inaccurate or incomplete fitness reports," and "retaliation, personal animosity, or 'blackballing'" (citations omitted)). Moreover, the Navy claims, even if the plaintiffs' allegations were sufficient to demonstrate causation, plaintiffs have failed to cite any evidence substantiating those allegations. See id. 41. Thus, plaintiffs have failed to carry their burden as to the causation element of standing.

Plaintiffs respond by pointing out—correctly—that "[t]he 'injury in fact' in an equal protection case" alleging unlawful discrimination in a competitive process "is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." Pls.' Claim 3 Reply (quoting Gratz v. Bollinger, 539 U.S. 244, 262 (2003) (citing Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville ("Associated Gen. Contractors"), 508 U.S. 656, 666 (1993)); see Worth v. Jackson, 451 F.3d 854, 859 (D.C. Cir. 2006) (applying this rule in the employment context).[12] Thus, a plaintiff asserting such a claim "need only demonstrate that [he or she] is able and ready" to compete "and that a discriminatory

[12] Plaintiffs also cite the D.C. Circuit's 2006 decision in Chaplaincy of Full Gospel Churches for the proposition that the "unconstitutional preference is in itself a constitutional injury." Pls.' Claim 2 Opp'n at 40. But that case held only that "a party alleging a violation of the Establishment Clause per se satisfies the irreparable injury requirement of the preliminary injunction calculus," Chaplaincy of Full Gospel Churches, 454 F.3d at 304 (emphasis added), and it expressly stated that its conclusion "presupposes, of course, that the party has standing to allege such a violation," see id. at 304 n.8. It therefore does not establish that plaintiffs have an injury-in-fact for standing here.

policy prevents [him or her] from doing so on an equal basis." Gratz, 539 U.S. at 262 (quoting Associated Gen. Contractors, 508 U.S. at 666). When a plaintiff alleges such an injury, moreover, "[i]t follows from [the Supreme Court's] definition of 'injury in fact' that [the plaintiff] has sufficiently alleged" that the policy "is the 'cause' of its injury and that a judicial decree directing the [government] to discontinue [the policy] would 'redress' the injury." Associated Gen. Contractors, 508 U.S. at 666 n.5.[13]

Properly framed, therefore, the question here is not whether other factors aside from the allegedly discriminatory policies contributed to plaintiffs' non-promotions or selections for early retirement, see Scahill v. District of Columbia, 271 F. Supp. 3d 216, 228 (D.D.C. 2017) (explaining that "[a] defendant need not be the 'but-for cause' of a plaintiff's injuries" to establish standing), but rather whether a discriminatory Navy policy prevented plaintiffs from competing in those processes "on an equal basis," Gratz, 539 U.S. at 262 (citation omitted); accord Monterey Mech. Co. v. Wilson, 125 F.3d 702, 707 (9th Cir. 1997) (explaining that the plaintiff in this type of equal protection case "need not establish that the discriminatory policy caused it to lose" the benefit sought). Moreover, because courts "must be careful not to decide the questions on the merits" when evaluating standing, the Court "must assume arguendo that the Navy's operation of its [selection boards] favors Catholic chaplains and disfavors non-liturgical Protestant chaplains." In re Navy Chaplaincy, 534 F.3d at 760 (citation and internal quotation marks omitted). Thus, plaintiffs also need not prove that the policies they challenge were discriminatory to establish standing; rather, all they must show is that each plaintiff received an adverse recommendation from a selection board that employed (or was convened pursuant to) the challenged policies.

[13] At a minimum, this is true of plaintiffs' equal protection claims. Because plaintiffs' Establishment Clause claims allege the same injury—that plaintiffs were discriminated against based on their religion—the Court concludes that the same theory of Article III standing governs those claims.

When so clarified, Article III's standing requirement is easily satisfied in this case. The Navy does not dispute that each individual plaintiff received an adverse recommendation from a promotion or selective early retirement board convened when at least some of the challenged policies were in place. See, e.g., Compl. add. A ¶ 1 (alleging that one plaintiff, Robert H. Adair, was "selected for early retirement in FY 95"—a fiscal year in which all of the challenged policies were allegedly in place—"by a Selective Early Retirement Board . . . that selected only Non-liturgical chaplains while allowing Liturgical chaplains with inferior records to continue on active duty"). This is sufficient to permit the Court to conclude that plaintiffs have standing. See Fed. R. Civ. P. 56(e) ("If a party fails . . . to properly address another party's assertion of fact . . . , the court may . . . consider the fact undisputed for purposes of the motion."). Indeed, the Court is mindful that this case has been before three district judges and at least five panels of the D.C. Circuit—each of which had an independent obligation to determine its own subject-matter jurisdiction, see Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006)—and that none found standing to be lacking. The Court explicitly confirms the implicit conclusions of these prior courts that plaintiffs have standing and turns now to the merits of plaintiffs' claims.[14]

B. Legal Standards

The D.C. Circuit set out the legal standards that govern plaintiffs' Establishment Clause and equal protection claims in a prior decision in this very litigation. See In re Navy Chaplaincy, 738 F.3d at 428–31 (concluding that plaintiffs' challenges to several of the same selection-board

[14] The Court also rejects the Navy's argument that two plaintiffs lack standing because they have since received the promotions that they were initially denied. See Navy's Claim 3 Reply at 22. Because the injury at issue is not plaintiffs' failure to be promoted, but rather the alleged unequal treatment by the prior selection boards, see Gratz, 539 U.S. at 262, the fact that these two plaintiffs were later promoted does not obviate the relevant injury for standing purposes. Indeed, as the D.C. Circuit has recognized, the remedy for a servicemember who was improperly not selected for promotion is generally retroactive, and hence these plaintiffs—were they to prevail on the merits—could be eligible for "back pay, allowances and other benefits of constructive service." Dilley, 627 F.2d at 408.

procedures at issue here did not warrant preliminary injunctive relief because they were unlikely to succeed on the merits). The Court reviews those standards only briefly here.

To evaluate plaintiffs' equal protection claim, the Court must first determine whether the challenged selection-board policy "on its face prefers any religious denomination." Id. at 428. If it does, then strict scrutiny applies; if it does not, then for strict scrutiny to apply plaintiffs must show either that the policy was "adopted with discriminatory intent" or that it led to a "pattern of disparate outcomes from which unconstitutional discriminatory intent could be inferred." Id. at 429. To imply discriminatory intent on its own, a pattern of disparate outcomes must be "stark," id. (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)), which means that it must be on par with the patterns at issue in two illustrative Supreme Court cases: one in which the boundaries of a city were altered so as to remove nearly all of its 400 African American voters but not a single white voter, and another in which a city refused to waive a building ordinance for over 200 Chinese applicants but waived the requirement for all non-Chinese applicants except one. See id. at 428–30 (first citing Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960); then citing Yick Wo v. Hopkins, 118 U.S. 356, 359 (1886)). Unless strict scrutiny applies for one of these three reasons, plaintiffs must demonstrate that "the polic[y] lack[s] a rational basis." Id. at 430. Otherwise, their equal protection claim fails.

The Establishment Clause inquiry proceeds along similar lines. The first question is "whether the law facially differentiates among religions." Id.; accord Trump v. Hawaii, 138 S. Ct. 2392, 2417 (2018) ("[T]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." (citing Larson v. Valente, 456 U.S. 228, 246 (1982))). If it does, then strict scrutiny applies; if it does not, then the court "proceed[s] to apply the customary three-pronged Establishment Clause inquiry derived from Lemon v.

Kurtzman, 403 U.S. 602 (1971)." In re Navy Chaplaincy, 738 F.3d at 430 (citation omitted). Under that test, a law or policy is valid only if it "(1) ha[s] a secular legislative purpose; (2) ha[s] a principal or primary effect that neither advances nor inhibits religion; and (3) [does] not result in excessive entanglement with religion or religious institutions." Id. (citations omitted).

A law or policy has an unconstitutional purpose if "the government acted with the purpose of advancing or inhibiting religion." Agostini v. Felton, 521 U.S. 203, 222–23 (1997). It has an unconstitutional effect if it "appear[s] to endorse religion in the eyes of a 'reasonable observer,' who 'must be deemed aware of the history and context underlying a challenged program.'" In re Navy Chaplaincy, 738 F.3d at 430 (emphasis omitted) (quoting Zelman v. Simmons–Harris, 536 U.S. 639, 655 (2002)).[15] As in the equal protection context, to satisfy the "effects" test with statistical evidence alone, plaintiffs must show a stark pattern of disparate outcomes. See id. at 431 (concluding that "plaintiffs' statistics fail to show government endorsement of particular religions under the reasonable observer test for the same reason that, in the equal protection context, they failed to show intentional discrimination paralleling that of Gomillion or Yick Wo"); see also Harkness v. Sec. of Navy, 858 F.3d 437, 447–451 (6th Cir. 2017) (applying the same standards to nearly identical Establishment Clause claims on summary judgment), cert. denied sub nom. Harkness v. Spencer, No. 17-955, 2018 WL 3013822 (U.S. June 18, 2018).

[15] The D.C. Circuit did not have the occasion to articulate the legal standards applicable under the third prong of the Lemon test—entanglement—when this case was last before it. See In re Navy Chaplaincy, 738 F.3d at 430 (noting that plaintiffs did not press an entanglement claim). But according to the Navy, see Navy's Claim 2 Opp'n at 44–45, the Court need not consider plaintiffs' entanglement claims because the Supreme Court has "recast" the entanglement inquiry as "simply one criterion relevant to determining a statute's effect." Mitchell v. Helms, 530 U.S. 793, 808 (2000) (citing Agostini, 521 U.S. at 232–33). Although some language from Agostini and later decisions suggests that Agostini's gloss on the Lemon test applies only to claims involving government monetary aid, see, e.g., Mitchell, 530 U.S. at 807 (noting that "in Agostini we modified Lemon for purposes of evaluating aid to schools"); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2041 n.1 (2017) (stating that "[government aid that has the 'purpose' or 'effect of advancing or inhibiting religion' violates the Establishment Clause" (emphasis added) (citing Agostini, 521 U.S. at 222–223, 234)), this case is similar to Agostini in that the entanglement alleged—discrimination in favor of certain denominations—manifests as an effect on plaintiffs' careers. Thus, as in Agostini, "it is simplest" to "treat [entanglement] . . . as an aspect of the inquiry into a statute's effect." 521 U.S. at 233.

C. The Navy's Alleged "One Roman Catholic" Policy

Plaintiffs first seek summary judgment on their constitutional challenge to the Navy's alleged policy of placing at least one Roman Catholic chaplain on each chaplain selection board convened between 1948 and late 2002. See Pls.' Claim 2 MSJ at 7. Plaintiffs challenge this policy only under the Establishment Clause, not the Equal Protection Clause, see id. at 5–7; as noted above, however, the analysis laid out by the D.C. Circuit is essentially the same under either provision.[16] According to plaintiffs, that policy was facially discriminatory under Larson, see Pls.' Claim 2 MSJ at 18–29, and also fails at each step of the Lemon test, see id. at 29–34. The Navy cross-moves for summary judgment, arguing that plaintiffs have not demonstrated either that the policy existed, see Navy's Claim 2 Opp'n at 16–21, or that it was adopted with discriminatory intent, see id. at 21–35. For the reasons given below, plaintiffs' motion will be denied, and the Navy's will be granted.

1. The Navy's Board-Staffing Policies Were Facially Neutral.

The parties do not dispute that until late 2002, the Navy staffed chaplain selection boards with one or two (or at most three) non-chaplain officers and filled the remaining seats with chaplains. See Decl. of Killian Kagle ("Kagle Decl.") [ECF No. 47-9] at 35–46 (listing the denominational affiliation and faith group category of every member of every promotion selection board convened between 1988 and 2002 and every selective early retirement board convened between 1991 and 2002); SECNAVINST 1401.3, Encl. 1 ¶ 1(c)(1) (providing that "[a]t least one member shall be a [non-chaplain] officer" and that "[t]he remaining members should be

[16] Plaintiffs also contend that the policy violates the Constitution's No Religious Test Clause. See U.S. Const., art. VI, cl. 3 ("[N]o religious test shall ever be required as a qualification to any office or public trust under the United States."). The Navy argues that this claim fails because plaintiffs "never contend that a Chaplain must be a Roman Catholic to sit on a selection board." See Navy's Claim 2 Opp'n at 39. Because plaintiffs allege that they were discriminated against because of their religion—not that a particular "religious test" was "required as a qualification" to the chaplaincy—the Court agrees that their claim is better analyzed under the Establishment Clause.

[chaplains]"). The record is also clear that every promotion board convened between 1988 and 2002 had between four and seven chaplains and that, with one exception, at least one of those chaplains was Catholic.[17] See Kagle Decl. at 35–46. Plaintiffs contend that this fact alone demonstrates that the Navy had a "policy" of placing at least one Catholic chaplain on every board, and that this policy triggers strict scrutiny because it was facially discriminatory.

The Navy's evidence tells a different story. According to the Navy, during the relevant time period, chaplain selection boards were staffed with chaplains from a "mix" of faith group categories—including Catholics—as part of a larger effort to ensure selection-board diversity. See Rock Decl. ¶ 5–8 (testimony of former Navy personnel officer that selection boards "represented, to the extent possible, the different experiences of the many chaplains within the Chaplain Corps," including "east-coast chaplains, west-coast chaplains, Navy chaplains, Marine Corps chaplains, Coast Guard chaplains, and chaplains from each faith-group category"). Thus, of the 202 chaplains staffed on the forty-two chaplain promotion boards convened between 1988 and 2002, sixty-six were liturgical Protestants, sixty-nine were non-liturgical Protestants, forty-eight were Catholic, eighteen fell in the Special Worship faith group category, and one was unknown. See Kagle Decl. at 35–44. Similarly, of the twenty-seven chaplains staffed on the twelve selective early retirement boards convened between 1991 and 1998, ten were liturgical Protestants, ten were non-liturgical

[17] Plaintiffs also allege that, beginning in 1977, the Navy had a policy of placing two Roman Catholic chaplains on every selection board. See Compl. ¶ 8 & n.8. According to plaintiffs, that practice ended in 1986, when plaintiffs' counsel secured a preliminary injunction against the practice from a district court in the Southern District of California, see Prelim. Inj., Wilkins v. Lehman, Civil Action No. 85-3031 (S.D. Cal. Feb. 10, 1986), ECF No. 135-3, and the Navy later settled with the plaintiff in that case, see Compl. ¶ 88(e). This alleged policy is not at issue here, however, because it falls outside the limitations period established by the Court's 2016 ruling on the Navy's motion to dismiss. See In re Navy Chaplaincy, 69 F. Supp. 3d at 256.

Protestants, four were Catholic, and two were Special Worship. Id. at 45–46. Among the four faith groups, then, the Navy's policies hardly resulted in outsized representation for Catholics.[18]

The Navy also points to its own regulations, which represent the only written evidence of its board-staffing policies during the relevant time period. Far from directing selection boards (or those responsible for convening them) to discriminate against non-liturgical Protestants, those regulations expressly prohibited discrimination on the basis of religion. See SECNAVINST 1401.3 ¶ 4(a) ("Exclusion from board membership by reason of gender, race, ethnic origin, or religious affiliation is prohibited."); SECNAVINST 1401.3, Encl. 1 ¶ (1)(c)(1)(e) (stating that members of chaplain selection boards "shall be nominated without regard to religious affiliation"). Moreover, a federal statute requires selection board members to swear an oath to act "without prejudice or partiality and having in view both the special fitness of officers and the efficiency of [the Navy]." 10 U.S.C. § 613. These sources all suggest that the Navy's board-staffing policies were nondiscriminatory—at least on their face. See Harkness, 858 F.3d at 447 (concluding that other procedures employed by the Navy's selection boards were not facially discriminatory under Larson, in part because of the Navy's facially neutral regulations).

Plaintiffs offer nothing to rebut this evidence. Instead, they quibble with the applicable legal standard, arguing that the presence of one Catholic on each board triggers strict scrutiny because it "suggest[s] 'a denominational preference.'" Pls.' Claim 2 MSJ at 17 (emphasis added) (quoting County of Allegheny v. ACLU, 492 U.S. 573, 609 (1989) (quoting Larson, 456 U.S. at 246), abrogated on other grounds by Town of Greece v. Galloway, 134 S. Ct. 1811 (2014)). But

[18] In response, plaintiffs argue that the Navy's policies "singled out one denomination for an advantage which it gave to no other": "a reserved seat on every selection board." Pls.' Claim 2 MSJ at 26 (emphasis added). Thus, while the selection boards may have been balanced among faith groups, they were not balanced among denominations. See id. at 19–20 (chart purporting to show that, between 1977 and 2002, twice as many selection board members were Roman Catholic as compared to any other denomination). But plaintiffs do not explain why this is the relevant point of comparison for purposes of their Establishment Clause claim—which, after all, alleges discrimination against non-liturgical Protestants as a whole, not against any particular non-liturgical Protestant denomination.

this precise argument was rejected by the Sixth Circuit in Harkness, which concluded—relying in part on the D.C. Circuit's 2013 decision in this case—that "strict scrutiny applies only when the law facially prefers one religion over another." 858 F.3d at 447 (collecting cases and concluding that this approach was "more consistent with both Supreme Court and [Sixth Circuit] precedent"). And in any case, this Court is not free to depart from the legal standards previously articulated by the D.C. Circuit in this litigation. "Larson teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions." In re Navy Chaplaincy, 738 F.3d at 430 (emphasis added) (citing Hernandez v. Comm'r, 490 U.S. 680, 695 (1989)). At most, the presence of one Catholic on each selection board suggests that the Navy's facially neutral board-staffing policies may have resulted in disproportionate representation among denominations. But it does not show the existence of a facially discriminatory policy and so does not trigger strict scrutiny under Larson.[19]

2. Plaintiffs Have Not Demonstrated that the Navy's Facially Neutral Board-Staffing Policies Were Adopted for a Discriminatory Purpose.

Similarly, plaintiffs have failed to raise a genuine issue of material fact that the Navy's facially neutral board-staffing policies were adopted for a discriminatory purpose. Although the record reveals a policy of staffing selection boards with a "mix" of chaplains from different faith group categories, see Rock Decl. ¶¶ 5–8, plaintiffs have pointed to nothing in the record to suggest

[19] Plaintiffs' reliance on stray language from County of Allegheny appears to derive from a decision by this Court in 2002, which quoted that same language and then stated that "if the plaintiffs can demonstrate after discovery that some or all of the Navy's policies and practices suggest a denominational preference," strict scrutiny would apply. Adair v. England, 217 F. Supp. 2d 7, 14 (D.D.C. 2002). But as the Court clarified over a decade later—after noting that plaintiffs had "misread[]" its prior statement—it meant that "although policies that explicitly discriminate on the basis of religion are subject to strict scrutiny, such scrutiny should not be applied to policies that do not explicitly discriminate on the basis of religion unless '[P]laintiff[s] can demonstrate after discovery that some or all of the Navy's policies and practices suggest a denominational preference[.]'" In re Navy Chaplaincy, 928 F. Supp. 2d at 35 (citation omitted).

that this policy was intended to benefit any denomination at the expense of another.[20] On the contrary, the Navy's evidence suggests that the policy was intended to "maximize" a selection board's ability to consider candidates from diverse backgrounds, as well as to "dispel any potential appearance of bias or impropriety." Id. ¶ 6. Plaintiffs offer no direct evidence to contravene the asserted secular objectives of the Navy's board-staffing policies.

Instead, plaintiffs argue (in essence) that the sheer improbability that at least one Catholic would appear on nearly every chaplain selection board during a 54-year period demonstrates that the Navy's placement of Catholics on the boards was intentional. See, e.g., Pls.' Claim 2 MSJ at 7–9. But the relevant question for Lemon's purpose prong is not whether the challenged policy was intentional or unintentional; rather, the question here is whether its purpose was specifically to prefer one religion over another. See Larson, 456 U.S. at 254 (invalidating a Minnesota statute whose legislative history "demonstrated[] that [it] was drafted with the explicit intention of including particular religious denominations and excluding others," including, for example, evidence that legislators "delet[ed] . . . clause[s] . . . for the sole purpose of exempting the [Roman Catholic] Archdiocese from the . . . Act"); Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (invalidating an Alabama school prayer statute where "[t]he legislature enacted [the law] . . . for the sole purpose of expressing the State's endorsement of prayer activities"). Because plaintiffs have offered no direct evidence of any such purpose here, their Establishment Clause claim fails at the purpose prong of the Lemon test.

[20] Nor have plaintiffs persuasively addressed the Navy's asserted secular purpose of the faith group categories themselves. As the Navy explains, "Chaplains in each category were deemed generally capable of meeting the religious needs of personnel encompassed by those categories." Navy's Claim 2 Opp'n at 24; see id. at 24–25 (explaining that whereas a non-liturgical Protestant chaplain could perform religious services for any service member in that faith group category, the Navy had determined that "Roman Catholic personnel have distinct needs, some of which can be met only by Roman Catholic Chaplains" (citing Rock Decl. ¶ 14)).

3. Plaintiffs Have Not Demonstrated that the Navy's Facially Neutral Board-Staffing Policies Had a Sufficient Discriminatory Impact.

Plaintiffs fare no better at Lemon's effects prong. Here, plaintiffs argue that the Navy's board-staffing policies "gave [Catholic] chaplains a reserved seat for every promotion board which resulted in higher promotion rates for [Catholics] than other denominations." Pls.' Claim 2 MSJ at 34; see Compl. ¶ 57(e) (alleging that the Navy's board-staffing policies "led to a high[er] selection rate for Catholics not based on performance or other legitimate selection criteria"). For this proposition, plaintiffs rely chiefly on a third-party study showing at most a 14.5% differential in the promotion rates of Catholic chaplains as compared to non-liturgical Protestant chaplains. See Ex. 17 to Pls.' Claim 2 MSJ ("Faith Group Promotions") [ECF No. 276-19]. Plaintiffs also rely on the expert declaration of Dr. Harald Leuba, a statistician, who concludes that the differential in promotion rates is statistically significant. See Apr. 6, 2017 Decl. of Harald Leuba [ECF No. 276-46] at 17; Harkness, 858 F.3d at 449 (explaining that a finding of statistical significance "means only that the disparity in promotion decisions was not 'due to chance'" (citing In re Navy Chaplaincy, 738 F.3d at 431)).

But as the D.C. Circuit explained earlier in this litigation, to make out a disparate-impact claim using statistics, a plaintiff must demonstrate a "stark" disparity in outcomes between the classes at issue. In re Navy Chaplaincy, 738 F.3d at 429, 431. The D.C. Circuit previously concluded that plaintiffs were unlikely to succeed on the merits of their disparate-impact claim because their evidence of "a 10% advantage in promotion rates" did not "remotely approach the stark character" necessary to make this showing. Id. at 429. The same is true here. Plaintiffs point to a differential in promotion rates between Catholic and non-liturgical Protestant chaplains that varies, based on the rank in question, between 2.5% (a 79.5% promotion rate for non-liturgical Protestant chaplains at the lieutenant commander rank versus an 82% promotion rate for Catholics)

and 14.5% (a 69.2% promotion rate for non-liturgical Protestants at the commander rank versus an 83.7% promotion rate for Catholics). See Pls.' Claim 2 MSJ at 20–21 (citing a study conducted by the Center for Naval Analysis ("CNA") in 1998); see also Faith Group Promotions. If a 10% disparity does not "remotely approach" the showing necessary to prevail on a disparate-impact claim, then surely a 14.5% disparity is likewise insufficient. Cf. Gomillion, 364 U.S. at 341; Yick Wo, 118 U.S. at 359. Moreover, even if it were sufficient, plaintiffs have offered no evidence that the alleged one-Roman-Catholic policy caused the disparity. See In re Navy Chaplaincy, 738 F.3d at 429 (observing that statistically significant disparities in chaplain promotion rates are potentially influenced by multiple causes).

Hence, plaintiffs have failed to establish that strict scrutiny applies under a disparate-impact theory (or any other theory). And because plaintiffs have likewise failed to establish that the Navy's board-staffing policies lack a rational basis, they have failed to make out their constitutional challenge to the Navy's alleged policy of placing one Catholic chaplain on every chaplain selection board. The Navy is therefore entitled to summary judgment as to that claim.

D. Selection-Board Procedures

Next, plaintiffs challenge a set of procedures used by the selection boards themselves, arguing that those procedures unconstitutionally disadvantage non-liturgical Protestant chaplains. See Pls.' Claim 3 MSJ at 1–2. Specifically, plaintiffs challenge the following: (1) the boards' use of secret ballots; (2) the Chief of Chaplains' role as president of the selection boards and involvement in choosing each board's members; (3) the practice whereby a single board member first reviews a candidate's file and only then briefs the full board on the candidate; (4) the practice of allowing board members to discuss a candidate's file before voting; and (5) a prior practice whereby each candidate's denomination was disclosed to the selection board. See id.

The D.C. Circuit previously rejected plaintiffs' motion for a preliminary injunction against the first and second of these practices: secret voting and the Chief of Chaplains' role in convening the selection boards.[21] See In re Navy Chaplaincy, 738 F.3d at 427. The court concluded that: (1) the policies were facially neutral, see id. at 428–29 (explaining that "even if one of the chaplains always serves as board president (as the chaplains allege), the board president . . . must be a person chosen for the board without regard to religious affiliation" and that "the practice of secret voting is neutral on its face"); (2) "the chaplains have presented no evidence of discriminatory intent in the policies' enactment," id. at 429; and (3) plaintiffs' statistical evidence was insufficiently "stark" to raise an inference of discriminatory intent, see id. (rejecting evidence of "a 10% advantage in promotion rates for officers of the same denomination as the Chief of Chaplains"). Plaintiffs' statistics were further undermined by the fact that they had "made no attempt to control for potential confounding factors, such as promotion ratings, education, or time in service." Id.

Little has changed since the D.C. Circuit's decision in 2013. As plaintiffs' counsel conceded at the motions hearing, neither the two policies at issue then nor the three additional policies challenged now—briefing, discussion, and the now-discontinued practice of disclosing chaplain denominations—facially discriminates against any specific denomination, and plaintiffs point to no evidence that they were adopted for a discriminatory purpose. Moreover, save for a new report from Dr. Leuba and two largely inapposite studies, see Pls.' Claim 3 MSJ at 28–33, plaintiffs present no new statistical evidence concerning the challenged policies—and certainly no evidence demonstrating a "stark" disparity in promotion rates on par with Gomillion or Yick Wo.

[21] According to the Navy, although "[t]he D.C. Circuit's opinion did not explicitly address the briefing of officers' records," that practice was "challenged as part and parcel of Plaintiffs' argument," so "the constitutionality of that procedure . . . was squarely before the court." Navy's Claim 3 Opp'n at 12 n.4.

Plaintiffs contend that Dr. Leuba's new report accounts, at least, for the "confounding factors" identified by the D.C. Circuit in its review of his prior analysis. See Pls.' Claim 3 MSJ at 28–31. But Dr. Leuba's new report—entitled "Promotions in the U.S. Navy Chaplain Corps Are Not Now, Nor Have They Ever Been, Merit Based, Nor Have They Ever Been Denominationally Neutral[,] Let me Explain Why"—fails to meaningfully respond to the D.C. Circuit's concern that the statistical disparities identified by plaintiffs could have resulted from other factors. See, e.g., Feb. 22, 2018 Decl. of Harald Leuba [ECF No. 313-40] ¶ 75 (concluding that "there is no basis for observing or testing the value or benefit of an additional amount of education"); id. ¶ 94 (acknowledging that Dr. Leuba had not controlled for promotion ratings). Nor are the two new studies cited by plaintiffs of any more than tangential relevance, since neither purports to examine the chaplaincy during the time period at issue in this litigation. See Pls.' Claim 3 MSJ at 31–32 (discussing a study analyzing Methodists in the chaplaincy between 1975 and 1987 and a 1992 PhD dissertation analyzing the relationship between faith group categories and promotion rates). And in any case, none of this new evidence even attempts to argue that plaintiffs' statistical evidence demonstrates a sufficiently stark disparity to support their constitutional claims.

Instead of attempting to show a disparity of the required magnitude, plaintiffs urge this Court to disregard the D.C. Circuit's prior decision in this litigation and to apply instead the standards articulated in Palmer v. Shultz, 815 F.2d 84 (D.C. Cir. 1987), a Title VII case involving a disparity in selection rates between male and female job applicants, see id. at 87, 91–92 (suggesting that a "5% probability of randomness" in disparate outcomes would raise an inference of intentional discrimination under Title VII). But the D.C. Circuit has previously rejected plaintiffs' attempts to rely on Title VII cases involving "statistically significant" disparities, doubting not only that plaintiffs' "statistical evidence properly controlled for confounding

variables," but also that "a court could properly impute a belief in denominational favoritism to the reasonable observer simply on the basis of statistics that might satisfy a plaintiff's Title VII burden." In re Navy Chaplaincy, 738 F.3d at 431. Thus, even if the 14.5% promotion rate disparity identified by plaintiffs were statistically significant, that fact alone would be insufficient to support plaintiffs' constitutional claims. See id. ("[W]hen reasonable observers find that 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 convey a message of government endorsement."); see also Burgis v. New York City Dep't of Sanitation, 798 F.3d 63, 69 (2d Cir. 2015) ("[T]o show discriminatory intent in a[n] . . . Equal Protection case based on statistics alone, the statistics must not only be statistically significant in the mathematical sense, but they must also be of a level that makes other plausible non-discriminatory explanations very unlikely.").

Plaintiffs' specific argument that they have brought a "religious disparate impact" claim—one that requires no proof of discriminatory intent—is similarly misguided. See Pls.' Claim 3 Reply at 18–20. Plaintiffs are correct that under Title VII, a plaintiff may make out a prima facie case of discrimination by presenting "statistical evidence . . . that 'observed, nonrandom disparities' in hiring, firing, or other significant employment decisions 'were caused by a "facially neutral" selection criterion.'" Davis v. District of Columbia, 246 F. Supp. 3d 367, 393 (D.D.C. 2017) (quoting Palmer, 815 F.2d at 114). They are also correct that under this so-called "disparate impact" theory of discrimination, "[p]roof of discriminatory motive . . . is not required." Id. at 392 (quoting Anderson v. Zubieta, 180 F.3d 329, 338 (D.C. Cir. 1999)). But the Supreme Court has repeatedly made clear that this theory of discrimination is not available under the Equal Protection Clause, see City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 194 (2003) ("'[P]roof of racially discriminatory intent or purpose is required' to show a violation of the Equal

Protection Clause." (quoting Arlington Heights, 429 U.S. at 265)); Washington v. Davis, 426 U.S. 229, 247 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious . . . discrimination forbidden by the Constitution."), and plaintiffs offer no reason to reach a different conclusion as to the Establishment Clause. Their attempt to repackage their constitutional claims under a "disparate impact" theory is therefore unavailing.

In sum, plaintiffs' challenges to the selection-board policies at issue here fail for essentially the same reason that plaintiffs previously failed to secure a preliminary injunction against those policies: plaintiffs have failed to demonstrate that the challenged policies either were facially discriminatory, were adopted with discriminatory intent, or had a stark enough disparate impact on non-liturgical Protestant chaplains that discriminatory intent could be inferred. See In re Navy Chaplaincy, 738 F.3d at 428–31. Under the standards previously articulated by the D.C. Circuit, therefore, the Navy is entitled to summary judgment on these claims.

Perhaps recognizing this to be the case, plaintiffs attempt to reframe their claims in various ways. For example, they argue that the Chief of Chaplain's role in choosing selection board members impermissibly "delegate[s] . . . discretionary civic authority to the Chief and other denominational representatives." Pls.' Claim 3 MSJ at 39; see id. at 37–42 (first citing Larkin v. Grendel's Den, Inc., 459 U.S.116 (1982); and then citing Board of Education v. Grumet, 512 U.S. 687 (1994)). But this Court and the D.C. Circuit have repeatedly rejected this argument. See In re Navy Chaplaincy, 697 F.3d at 1179 (explaining that unlike in Larkin, where "a Massachusetts statute grant[ed] religious institutions an effective veto power over applications for liquor licenses" without requiring any "reasons, findings, or reasoned conclusions," here "Congress and the Secretary of the Navy have articulated secular, neutral standards to guide selection board members in evaluating candidates for promotion"); Adair, 417 F. Supp. 2d at 6 (rejecting plaintiffs'

"assumption" that "the usual rule for a chaplain sitting on a promotion board will be to discriminate against promotion candidates on the basis of religious denomination" (citation omitted)); Adair, 183 F. Supp. 2d at 61–62 (distinguishing Larkin on the ground that chaplains on selection boards act "first and foremost [as] Naval officers . . . evaluating a fellow officer's fitness for promotion," not "private clergy" exercising unchecked discretion); see also Harkness, 858 F.3d at 449–50 (rejecting the same argument on summary judgment). Plaintiffs provide no reason to reach a different conclusion this time around.

Similarly unpersuasive is plaintiffs' argument that the challenged procedures impermissibly "vest[] . . . unbridled discretion in a government official." See Pls.' Claim 3 MSJ at 21–26 (quoting Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 132–33 (1992)). Even assuming that this theory applies in the Establishment Clause context—Forsyth County, on which plaintiffs chiefly rely, was a free-speech case—plaintiffs have simply not raised a genuine factual issue that the procedures vest anyone with the type of unchecked power at issue in plaintiffs' cited authorities. See Forsyth County, 505 U.S. at 133 (striking down an ordinance that "left [it] to the whim of" a county official to set the fee amount for a public assembly permit, where the official was "not required to rely on any objective factors" or to "provide any explanation" for his "unreviewable" decision). Plaintiffs have not explained how an individual member of a seven-member selection board could exercise such authority, and they do not dispute that the decisions of the selection boards themselves are subject to multiple layers of administrative and judicial review. See 10 U.S.C. § 628(g). Hence, plaintiffs' alternative legal theories also fail, and the Navy is entitled to summary judgment on plaintiffs' challenges to its selection-board procedures.

II. PLAINTIFFS' CONSTITUTIONAL CHALLENGE TO 10 U.S.C. § 613a

Plaintiffs also challenge the constitutionality of 10 U.S.C. § 613a's ban on the disclosure of selection board proceedings. See Pls.' Claim 1 MSJ at 1. That provision states that "[t]he proceedings of a selection board convened under section . . . 611 . . . of this title may not be disclosed to any person not a member of the board," 10 U.S.C. § 613a(a), and specifically provides that the "discussions and deliberations" of such a board "are immune from legal process," "may not be admitted as evidence," and "may not be used for any purpose in any action, suit, or judicial or administrative proceeding without the consent of the Secretary of the military department concerned," id. § 613a(b). Plaintiffs allege that § 613a is unconstitutional as applied to them, because it deprives them of evidence needed to prevail on their constitutional challenges to the various selection-board procedures described above. See Pls.' Claim 1 MSJ at 2.

But plaintiffs have already unsuccessfully challenged § 613a—as well as its statutory predecessor, § 618(f)—several times. They brought their first challenge after the D.C. Circuit held in 2004 that § 618(f) prohibited the disclosure of selection-board proceedings in litigation. See In re England, 375 F.3d at 1181. In 2006, this Court rejected plaintiffs' argument that § 618(f) "bars judicial review of constitutional claims arising out of promotion-board proceedings," explaining that the statute "merely restricts the evidence available to the plaintiffs in support of their claims." Adair, 451 F. Supp. 2d at 215–17. And in any case, because plaintiffs "challenge the Navy's policies, not simply the alleged impermissible intentions and actions of individual board members," id. at 219, the evidence barred by § 618(f) was not strictly necessary to proving their claims, see id. at 218 (noting that § 618(f) "does not preclude testimony . . . concerning directives, orders, or policies (written or unwritten) communicated to board members that may have been intended to infuse a denominational preference into the promotion selection process"). Finally,

the Court concluded that even if § 618(f) did bar plaintiffs from accessing information necessary to proving their claims, plaintiffs had failed to establish the existence of "a constitutional right of access to evidence essential to establishing constitutional claims, even when that evidence is privileged by statute." Id. at 220. Thus, given "the absence of any precedent recognizing a right to statutorily privileged information in a civil case involving constitutional claims, the thinness of the plaintiffs' legal theory, and the broad deference constitutionally afforded Congress to regulate the Navy," the Court in Adair rejected plaintiffs' challenge to § 618(f). Id. at 222.

Plaintiffs again challenged the constitutionality of the statutory privilege for selection-board proceedings after Congress repealed § 618(f) and enacted § 613a. See In re Navy Chaplaincy, 512 F. Supp. 2d 58, 61 (D.D.C. 2007) (reversing the Court's earlier ruling that plaintiffs could discover selective early retirement board proceedings under § 618(f) and rejecting plaintiffs' argument that "to deny them discovery of [those] proceedings would effectively deny them judicial review of their causes of action by denying them the evidence necessary to vindicate them"). The Court reiterated its earlier conclusion that "'information may be withheld [pursuant to a statutory privilege], even if relevant to the lawsuit and essential to the establishment of plaintiff's claim,' whether statutory or constitutional." Id. (quoting Baldrige v. Shapiro, 455 U.S. 345, 351, 360 (1982)). It then warned: "Whatever wisdom may be associated with the adage 'the third time's the charm,' the plaintiffs are advised to accept this second ruling as conclusive and refrain from testing their luck a third time before this court." Id. at 62.[22]

[22] Judge Urbina addressed the constitutionality of § 613a again in 2012, when he denied without prejudice the Navy's 2008 motion to dismiss the affirmative constitutional challenge to the statute that plaintiffs had raised in Gibson. See In re Navy Chaplaincy, 850 F. Supp. 2d at 115. Without citing his 2007 opinion in Adair (which had approved the application of § 613a to selective early retirement board proceedings), Judge Urbina noted that while "[a]t first blush, the court's prior reasoning concerning the constitutionality of § 618(f) would appear to also apply in determining the constitutionality of § 613a," further briefing on the differences between the two statutes might persuade him otherwise. Id. Plaintiffs do not address any such differences here, however.

Plaintiffs have not heeded that admonition, offering no new authority to buttress their third attempt to assert a constitutional right to evidence in support of their constitutional claims. Rather, they argue chiefly that the reasoning underlying Judge Urbina's 2006 and 2007 decisions was undercut in 2013, when this Court—and, later, the D.C. Circuit—held that discriminatory intent was a necessary element of their constitutional claims. See Pls.' Claim 1 MSJ at 2, 12–15 (arguing that "the current law of the case requires Plaintiffs [to] demonstrate intent to discriminate on the part of the chaplain board members"); see also In re Navy Chaplaincy, 738 F.3d at 428–31, aff'g 928 F. Supp. 2d 26 (D.D.C. 2013).

But the reasoning of those prior decisions remains valid here. For one thing, the law concerning the role of intent in equal protection and Establishment Clause challenge was established by Supreme Court precedent well before the early 2000s, so plaintiffs' suggestion that the 2013 decisions of this Court and the D.C. Circuit somehow upset the prevailing legal framework underlying Judge Urbina's earlier decisions is simply unfounded. See, e.g., In re Navy Chaplaincy, 738 F.3d at 429–30 (citing, among other authorities, Larson, Lemon, and Arlington Heights—all Supreme Court cases from the 1970s and 1980s). And even if those decisions had altered the applicable legal framework, that fact still would not undermine the reasons that Judge Urbina actually gave for his decision: that the proceedings of individual selection boards are of limited relevance to plaintiffs' constitutional claims, see Adair, 451 F. Supp. 2d at 217–19, and that in any case plaintiffs have "advanced no coherent theory supporting" an unqualified right of access to information needed to prove such claims, see id. at 220. Because plaintiffs have still not meaningfully addressed these points—which Judge Urbina first articulated over a decade ago—the Navy is entitled to summary judgment on plaintiffs' challenge to the constitutionality of § 613a.

III. PLAINTIFFS' REQUESTS FOR ADDITIONAL DISCOVERY

Finally, plaintiffs have filed several motions for additional discovery. These include plaintiffs' March 2017 motion to lift the discovery stay, see Pls.' Discovery Mot., their September 2017 motion under Federal Rule of Civil Procedure 56(d) to stay summary judgment briefing until the discovery stay was lifted, see Pls.['] Rule 56(d) Mot., and their July 2018 motion seeking leave to file additional declarations, see Pls.' Mot. to File Decls. For the reasons that follow, plaintiffs' discovery motions will be denied.

A. Plaintiffs' March and September 2017 Rule 56(d) Motions

The March 2017 motion to lift the discovery stay seeks discovery of various materials in support of the challenges to the Navy's selection-board policies.[23] In support of the challenge to the Navy's alleged one-Roman-Catholic policy, plaintiffs seek the following documents: (1) unredacted copies of two reports prepared by the inspectors general of the Department of Defense and the Navy concerning allegations of religious discrimination by chaplain selection boards in 1997 and 1998 (the "IG reports"), see Pls.' Discovery Mot. at 25–27; (2) documents related to the Navy's alleged decision to stop staffing chaplain selection boards with two Roman Catholic chaplains beginning in 1986 and its decision to staff selection boards with two chaplains and five non-chaplain officers beginning in 2003, see id. at 27–28; (3) documents mentioning the phrase "denominational balancing," id. at 28–29; (4) communications between the Chief of Chaplains and his staff regarding the chief's nominations to chaplain selection boards, see id. at 29–30; and (5) data from various sources regarding the denominational composition of selection boards

[23] Because briefing on the parties' cross-motions for summary judgment is now complete, the Court will treat plaintiffs' motion to lift the discovery stay as a motion for additional discovery under Rule 56(d). See Mar. 1, 2018 Order at 2 ("[I]nstead of reopening discovery on the eve of scheduled summary judgment briefing, the Court will consider plaintiffs' specific discovery requests in the context of their motion for additional discovery under Federal Rule of Civil Procedure 56(d) and in light of the summary judgment briefing on their claims.").

throughout the 1970s, 1980s, and 1990s, see id. at 30–31.[24] In support of their challenge to the procedures employed by the selection boards themselves, plaintiffs seek (among other things) the results of promotion board proceedings from 2005 to 2016 (including "identification of those seeking promotion as well as those selected"), "Alpha rosters" from 2013 to 2017, and "[c]opies of complaints about [chaplain] board misconduct and all investigations of [such] misconduct from 1993 to the present." Pls.' Discovery Mot. at 34–36.[25]

Plaintiffs' primary argument in support of their discovery requests is that the Court never formally established a cutoff for discovery. See id. at 11–15. The Navy responds that the parties agreed to a nine-month discovery period in 2002 (although this period was admittedly stayed several times and was never formally closed), and that since then plaintiffs have had ample time to obtain the discovery they need. See Navy's Discovery Opp'n at 1–2; Fed. R. Civ. P. 26(b)(2)(C)(ii) (providing that a court "must" limit discovery where "the party seeking discovery has had ample opportunity to obtain the information by discovery in the action"); Moore, 2017 WL 1750248, at *5 (a party seeking to stay summary judgment pending discovery of additional facts "' . . . must explain' why [it] could not produce those facts in opposition to the summary judgment motion" (quoting Convertino, 684 F.3d at 99–100)). Moreover, the Navy argues, most of the discovery that plaintiffs now seek is either irrelevant, privileged, or duplicative, and hence cannot support reopening discovery now.

As a brief review of the history of discovery in this litigation demonstrates, the Navy is correct that plaintiffs have had ample time to conduct discovery. Discovery in CFGC and Adair began in 2002, after the Court resolved the parties' first round of dispositive motions. See Aug.

[24] Plaintiffs also seek certain admissions, depositions of certain witnesses interviewed in the investigations by the inspectors general, and permission to examine certain Chaplain Corps records. Pls.' Discovery Mot. at 31–33.

[25] Plaintiffs also aver that the discovery sought in connection with the Navy's board-staffing policies is relevant to their challenge to the other selection-board policies. See Pls.' Discovery Mot. at 32–33.

27, 2002 Order, CFGC, ECF No. 119; Aug. 27, 2002 Order, Adair, ECF No. 72. At the Court's direction, the parties submitted a joint discovery plan that outlined a nine-month discovery period, which would begin in November 2002 and conclude in August 2003. See Status Report at 2, CFGC, ECF No. 121.[26] Despite this agreed-upon discovery cutoff—which apparently was never enforced—discovery continued during the dispute over plaintiffs' motion to compel deposition testimony of selection board members and their subsequent constitutional challenge to 10 U.S.C. § 618(f). See Status Report at 2–3, CFGC, ECF No. 182 (noting that by February 2005, both parties had deposed several additional witnesses); Status Report, CFGC, ECF No. 178 (noting that between November 2002 and January 2004, plaintiffs had served their first round of document requests and deposed six witnesses). The Court stayed discovery "informally" in July 2009, and in mid-2012 Judge Kessler continued the stay based on the Navy's representation that it intended to file a dispositive motion. See Pls.' Discovery Mot. at 5. In January 2018, this Court again continued the discovery stay, advising the parties that it would consider plaintiffs' requests for additional discovery once the parties' summary judgment motions were fully briefed. See Jan. 11, 2018 Order.

In short, discovery in this case—which the parties initially agreed would take only nine months—was open for a period of several years between 2002 and 2009. Plaintiffs are correct that discovery was "conducted on and off" during this period, Pls.' Reply Mem. of P. & A. in Supp. of Pls.' Mot. to Lift the Discovery Stay [ECF No. 268] at 6, and that significant other proceedings took place during that time. They are also correct that they were never formally put on notice that the 2009 discovery stay would later become permanent. See In re Navy Chaplaincy, 287 F.R.D. 100, 102 (D.D.C. 2012) ("Parties must remember that discovery has been stayed only, and no cut-

[26] Although this document is not accessible on CFGC's electronic docket, the Navy has provided it here. See Ex. A to Navy's Discovery Opp'n.

off date for its completion has been set. If and when discovery is reopened, Plaintiffs will have their full opportunity to proceed . . . ."). But neither the flurry of collateral proceedings—most of which, it bears mentioning, were initiated by plaintiffs—nor the lack of a formal warning that discovery would not remain open indefinitely excuses plaintiffs' failure to obtain earlier the discovery that they now seek. Indeed, according to the Navy, plaintiffs were able to take—and did in fact take—a substantial amount of discovery between 2002 and 2009.[27] Their failure to take additional discovery then is ultimately their responsibility. See Kakeh, 537 F. Supp. 2d at 71 (Rule 56(d) "is not properly invoked to relieve counsel's lack of diligence" (citation omitted)).

In their September 2017 Rule 56(d) motion, Pls.['] Rule 56(d) Mot. at 2, plaintiffs advance the additional argument that the D.C. Circuit's 2013 ruling that their claims required proof of "intent and specific harm"—as well as its more specific holding that their statistical evidence "had not covered certain factors such as 'education' and 'promotion factors'"—justify their failure to seek certain evidence earlier on. In re Navy Chaplaincy, 738 F.3d at 428–31. This argument is unpersuasive. As already noted, in holding that plaintiffs' claims could be proven using a showing of disparate impact, the D.C. Circuit relied on established Supreme Court case law from as early as 1886. See In re Navy Chaplaincy, 738 F.3d at 428–31 (citing Arlington Heights, Gomillion, and Yick Wo). Any reasonable counsel would have been aware that statistical evidence was at

[27] As the Navy explains,

> Plaintiffs have served—and received objections and responses to—twenty-five interrogatories, 136 requests for production of documents (to which the Navy responded by producing approximately 9,000 pages of documents), and ninety-one requests for admission. In addition, Plaintiffs have taken seventeen depositions in CFGC and Adair, as well as several more depositions in the related matter of Larsen v. United States Navy, including the depositions of three former Navy Chiefs of Chaplains. Plaintiffs' designated expert, Dr. Harald Leuba, has submitted at least fifteen reports consisting of at least 1,300 pages of argument and analysis in this litigation between 2000 and 2011, and the Navy's expert has submitted nine expert reports or declarations in this or related actions.

See Navy's Discovery Opp'n at 9–10.

least one method of pursuing the equal protection and Establishment Clause claims here, and counsel's failure to thoroughly pursue this evidence when discovery was open more than a decade ago does not provide a reason to reopen discovery now.

The Navy is also correct that many of the materials plaintiffs now seek either are undiscoverable or appear to be of limited probative value. Moore, 2017 WL 1750248, at *5 (explaining that materials sought on a Rule 56(d) motion must be both "discoverable" and "necessary to the litigation" (citation omitted)). For example, plaintiffs seek unredacted copies of the IG reports, which contain information that is not subject to discovery pursuant to 10 U.S.C. § 613a—a statutory privilege that this Court has already upheld as applied here. Other materials—including records of the membership and denominational composition of selection boards convened before 1993, promotion board results from 2007 to 2016, and "Alpha rosters" from 2013 to 2017—are only tangentially relevant to plaintiffs' claims because they pertain to boards convened either before 1993 (the applicable statute-of-limitations cutoff, see In re Navy Chaplaincy, 69 F. Supp. 3d at 256) or after 2006 (when the last of these three consolidated cases was filed). Still other materials sought by plaintiffs are duplicative of discovery already obtained and hence are likewise not necessary to the litigation. See, e.g., Navy's Discovery Opp'n at 19 (noting that plaintiffs request copies of communications between the Chief of Chaplains and his staff, but that plaintiffs have already deposed three former Chiefs of Chaplains).

In sum, plaintiffs have failed to demonstrate that they are entitled to additional discovery under Rule 56(d). Although plaintiffs have "outline[d] the particular facts [they] intend[] to discover," they have failed to explain "why [they] could not produce those facts in opposition to the [Navy's] summary judgment motion" earlier in the litigation. Moore, 2017 WL 1750248, at *5 (citation omitted). Moreover, plaintiffs have failed to show that many of those facts are

"necessary to the litigation" or even discoverable. Id. (citation omitted). Plaintiffs' March and September 2017 motions to lift the discovery stay will therefore be denied, and no further discovery will be permitted.

B. Plaintiffs' July 2018 Motion for Leave to Submit Additional Evidence

Although it is framed as a supplement to their March 2017 discovery motion, plaintiffs' July 2018 motion seeks leave to present additional declarations and other evidence in support of their challenges to the Navy's selection-board policies. See Pls.' Mot. to File Decls. at 1. Plaintiffs appear to claim that this previously uncited evidence provides grounds both to deny the Navy's summary judgment motions and to reopen discovery. See id. at 1–2. In fact, it does neither.

First, the motion cites a declaration by Commander David Gibson, a plaintiff, which recounts his "unsolicited recollection of important events just prior to Plaintiffs[']filing [of] their" final summary judgment brief, which "[c]ounsel did not have time to address." Id. at 2. Gibson declares that he heard statements: (1) by one selection board member that his board had "ma[de] room for a Roman Catholic [candidate] when [it] discovered no Catholic had been selected," (2) by another board member that he routinely used the practice of "zeroing out"—that is, a practice whereby one selection board member rates a candidate so low that the candidate is virtually guaranteed not to be selected—to "advance [his] agenda," and (3) by a Navy captain that promotion boards "make selections based on . . . denominational considerations." Id. at 2.

The first and third statements have no apparent connection to any of the challenged selection-board policies, so they are irrelevant. And although the second statement relates to the policy of keeping selection-board votes secret—plaintiffs allege that "zeroing out" is feasible as a tool for religious discrimination only because the alleged discriminator is not required to disclose his or her "zero" vote to the entire board, see Pls.' Claim 3 MSJ at 24 & n.4—nothing about the

statement itself suggests that the speaker's allegedly invidious "agenda" was one of religious discrimination. Nor do the assortment of additional declarations and testimony cited by plaintiffs—most of which was filed in other cases—permit that inference. See id. at 3–4 (discussing statements about "agendas" made by persons other than the speaker referred to in Commander Gibson's declaration). Commander Gibson's declaration therefore does not provide a reason to deny the Navy's summary judgment motion or to reopen discovery here.

The remainder of the evidence cited in plaintiffs' motion is equally unpersuasive. For example, the motion asks the Court to consider evidence that purportedly shows a "culture" within the Navy of discouraging servicemembers from reporting misconduct by their superiors—evidence that includes, among other things, statements made to counsel during a medical appointment with his personal doctor, an Army physician who never responded to counsel's request for a formal declaration. See id. at 4–6. The motion also asks the Court to consider the fact that Rear Admiral Brent Scott, who will be the first member of a certain non-liturgical Protestant denomination to assume the position of Chief of Chaplains, will also be the first Chief of Chaplains not to be promoted to the two-star rank of Rear Admiral (upper half). Id. at 6–7. This evidence is even further afield from the selection-board policies that plaintiffs challenge here.

In sum, plaintiffs' July 2018 discovery motion relies on evidence whose relevance to this case is tangential at best and that, for the most part, could have been presented much earlier in the litigation. Therefore, the motion presents no reason to deny the Navy's summary judgment motion or to reopen discovery, and it will be denied.

CONCLUSION

For the foregoing reasons, plaintiffs' motions for summary judgment as to Claims 1, 2, and 3 will be denied, and the Navy's corresponding cross-motions for summary judgment will be

granted. Plaintiffs' March 2017, September 2017, and July 2018 discovery motions will also be denied. A separate order has been issued on this date.

/s/

JOHN D. BATES
United States District Judge

Dated: August 30, 2018

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 6, 2013 Decided December 27, 2013

No. 13-5071

IN RE: NAVY CHAPLAINCY,

CHAPLAINCY OF FULL GOSPEL CHURCHES, ET AL.,
APPELLANTS

v.

UNITED STATES NAVY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:07-mc-00269)

Arthur A. Schulcz Sr., argued the cause and filed the briefs for appellants.

Sushma Soni, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Ronald C. Machen Jr.*, U.S. Attorney, and *Marleigh D. Dover*, Attorney.

Before: TATEL and KAVANAUGH, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* WILLIAMS.

WILLIAMS, *Senior Circuit Judge*: Plaintiffs, whom we'll call simply the chaplains, are a group of current and former officers in the Navy Chaplain Corps who identify themselves as non-liturgical Christians, plus two chaplain-endorsing agencies. They sued in district court, claiming (among other things) that several of the Navy's policies for promoting chaplains prefer Catholics and liturgical Protestants at the expense of various non-liturgical denominations. The basic argument is that the policies amount to disparate treatment of the non-liturgical chaplains, violating the equal protection component of the Fifth Amendment and the Establishment Clause of the First Amendment.

The case has already been before this court several times. See *In re Navy Chaplaincy*, 697 F.3d 1171 (D.C. Cir. 2012); *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290 (D.C. Cir. 2006). The judgment now on review is that of the district court denying plaintiffs' motion for a preliminary injunction against the Navy's use of the challenged practices. *In re Navy Chaplaincy*, 928 F. Supp. 2d 26 (D.D.C. 2013). The district court reviewed the statistical evidence offered by the plaintiffs to show inter-denominational discrimination, and found it wanting. We affirm.

* * *

The Navy uses "selection boards" to choose officers for promotion. See 10 U.S.C. § 611(a). By law, such boards must have at least five members. 10 U.S.C. § 612(a)(1). Except in certain circumstances not at issue here, at least one member of a selection board for a competitive category—

here, the Chaplain Corps—must be from that competitive category. 10 U.S.C. § 612(a)(2)(A). Selection boards for chaplains before fiscal year 2003 consisted of five or more members, at least one of whom was not a chaplain. Under a change in Navy regulation, boards for fiscal year 2003 and thereafter are composed of seven officers, two of whom are chaplains "nominated without regard to religious affiliation." SECNAVINST 1401.3A, Encl. (1), ¶ 1.c.(1)(f). Either the Chief of Chaplains or one of his two deputies serves as selection board president. According to a Defense Department Inspector General report cited by plaintiffs, "sleeves" hide the board members' hands as they depress buttons reflecting their votes, making them secret ballots. According to the chaplains, the boards take an initial secret vote and then the board president recommends two score cut-offs: candidates above the higher score are treated as clearly deserving promotion, and ones below the lower score are treated as deserving no further consideration. Candidates who fall between the two are re-evaluated for the remaining available promotions.

The chaplains asked the district court to enjoin three current Navy selection board policies—(1) staffing the seven-member selection boards with two chaplains, (2) enabling members to keep their votes secret via the "sleeves," and (3) allowing the Chief of Chaplains or his deputy to serve as the selection board president—that they claim result in disparate treatment of the non-liturgical candidates. Plaintiffs' (July 22, 2011) Motion for a Preliminary Injunction 1. The disparate treatment, they say, is shown by various statistical data, which we'll consider shortly.

The chaplains' theory is that a candidate is more likely to be promoted if he or she shares a religious denomination with one of the chaplains on the selection board, or with the Chief of Chaplains. The bottom line is an advantage in promotion

rates for Catholics and liturgical Protestants over non-liturgical Christians. The chaplains posit that the small board size, combined with secret votes, enables each board's chaplains to ensure that a particular candidate will not be promoted, thus increasing the odds for their preferred (and discriminatory) results.

Pending resolution of their summary judgment motion, the chaplains asked the district court for a preliminary injunction halting the challenged policies. The district court denied the request, but we vacated the denial and remanded for the district court to clarify its reasoning on the chaplains' likelihood of success on the merits; we were unsure whether the district court viewed the insufficiency of the chaplains' claims to be legal or factual. See *In re Navy Chaplaincy*, 697 F.3d at 1180. On remand, the district court concluded that the chaplains were unlikely to succeed on the merits of either claim because the statistics they offered failed to show any discriminatory intent behind the challenged policies or the resulting outcomes. *In re Navy Chaplaincy*, 928 F. Supp. 2d at 36-37.

The chaplains appeal to us again, claiming that the court erred in requiring a showing of intent to prove either an equal protection or establishment clause violation. We find that the chaplains' equal protection attack on the Navy's facially neutral policy could prevail only if they showed a likelihood of success in proving an intent to discriminate (which they have not shown) or the lack of a rational basis for the policies (which they have not claimed). As to the Establishment Clause, the chaplains have not shown a likelihood of success under any test that they have asked the court to apply. We therefore affirm the district court's denial of the preliminary injunction.

* * *

In order to determine whether to issue a preliminary injunction, the district court applies four familiar criteria: (1) likelihood of success on the merits; (2) irreparable injury; (3) lack of substantial injury to other parties; and (4) furthering the public interest. *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. We have already found an absence of any error in the district court's analysis of the last three factors, and have made clear that the only unresolved issue is whether the chaplains have shown a likelihood of success on the merits. *In re Navy Chaplaincy*, 697 F.3d at 1179. The chaplains in effect argue that the district court used improper legal standards on that issue. But the record and the district court's findings allow us to resolve the question of likelihood of success on the merits on our own, and we accordingly do so. See *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297 (legal conclusions upon which denial of preliminary injunction relies are reviewable de novo).

Equal protection. The chaplains argue that the three challenged policies result in disparate treatment of non-liturgical chaplains. But none of the challenged practices on its face prefers any religious denomination. The regulation behind the practice of staffing boards with two chaplains explicitly requires denominational neutrality. "Chaplain Corps board members shall be nominated without regard to religious affiliation." SECNAVINST 1401.3A Encl. (1), ¶ 1.c.(1)(f) (Dec. 20, 2005). Thus, even if one of the chaplains always serves as board president (as the chaplains allege), the board president, necessarily a board member, must be a person chosen for the board without regard to religious affiliation. Finally, the practice of secret voting is neutral on its face. All three policies together, then, are facially neutral with respect to denomination.

The chaplains nonetheless claim that the policies either were adopted with discriminatory intent or have been applied in such a manner as to favor denominations other than the non-liturgical ones. As the district court found, the chaplains have presented no evidence of discriminatory intent in the policies' enactment. Nor have they shown a current pattern of disparate outcomes from which unconstitutional discriminatory intent could be inferred under the prevailing understanding of equal protection. For such claims, "Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). The district court found, at best, only a 10% advantage in promotion rates for officers of the same denomination as the Chief of Chaplains (the difference between a 73.3% promotion rate for candidates of different denominations and an 83.3% rate for candidates of the same denomination). *In re Navy Chaplaincy*, 928 F. Supp. 2d at 37.

There is some internal contradiction in the chaplains' position on these figures. Their brief states that they cover promotions in the period 2003-2012, when the current procedures were in place (Appellants' Br. at 15), but it cites Joint Appendix ("J.A.") 1107, an affidavit that situates the data in 1981-2000, before the proportion of chaplains on the selection boards was decreased. Giving the chaplains the benefit of the doubt, we assume the data apply to the later period, the one governed by the rules they seek to enjoin. The chaplains' only efforts to show a larger disparity rely on data for selections occurring before the 2003 changes.

The district court correctly noted that the disparity between 73.3% and 83.3% does not remotely approach the stark character of the disparities in *Gomillion* or *Yick Wo*. *Id.*

For reinforcement, plaintiffs cite their expert's opinion that this disparity is statistically significant. The record does not explain the reasoning behind the choice of one set of statistical tests for significance over another (e.g., a "simple binomial" test versus a standard test of the differences in proportions), or demonstrate the actual calculations. See, e.g., Appellants' Br. at 15. But assuming arguendo that the methodology for determining statistical significance is reasonable, the finding does little for our analysis. "Correlation is not causation." *Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1044 (7th Cir. 1988). Statistical significance, assuming it has been shown, indicates only a low probability for one possible cause of the alleged disparities—random chance. The chaplains have made no attempt to control for potential confounding factors, such as promotion ratings, education, or time in service. (That statement must be qualified by recognition that time in service is broadly reflected in occasional references to whether the candidates were "in zone" (*i.e.*, were within a group of a predetermined number of the most senior officers who had not previously been considered for promotion to a given grade) or "above zone" (*i.e.*, had previously been considered for promotion to a given grade). See, e.g., J.A. 1468-70 (chaplains' tables noting comparisons of in zone candidates, and of in zone and above zone candidates); J.A. 1289-92 (Navy employee affidavit describing the zone compositions).) Thus the label "statistically significant" does nothing to elevate plaintiffs' figures into the realm of *Yick Wo* or *Gomillion*.

Given facially neutral policies and no showing of intent to discriminate, the chaplains' equal protection attack on the Navy's specific policies could succeed only with an argument that the policies lack a rational basis. See *Washington v. Davis*, 426 U.S. 229, 242 (1976); *United States v. Thompson*, 27 F.3d 671, 678 (D.C. Cir. 1994). The chaplains attempt no

such argument. So we agree with the district court that they have not shown the requisite likelihood of success.

Establishment. The chaplains say that under *Larson v. Valente*, 456 U.S. 228 (1982), we must subject the challenged selection methods to strict scrutiny on the ground that they "grant[] a denominational preference," *id*. at 246, or, failing that, find that they run afoul of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), notably the element of *Lemon* now generally described as the "endorsement" test.

The chaplains' proposed analytical sequence matches the structure laid down by the Supreme Court for measures assailed as denominational preferences. "*Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971)." *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 695 (1989). As the challenged policies are facially neutral, *Larson* doesn't trigger strict scrutiny, and we proceed to *Lemon*.

Lemon presents us again with a multipart test: "In order to pass constitutional muster under the *Lemon* test, laws and government practices involving religion must: (1) have a secular legislative purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) not result in excessive entanglement with religion or religious institutions." *Bonham v. D.C. Library Admin.*, 989 F.2d 1242, 1244 (D.C. Cir. 1993) (citing *Lemon*, 403 U.S. at 612-13). The chaplains naturally do not challenge the chaplaincy program as a whole; the Second Circuit has found it compatible with the Establishment Clause, in an opinion that does not precisely track *Lemon*. *Katcoff v. Marsh*, 755 F.2d

223 (2d Cir. 1985). Nor do the chaplains claim that the first or third element of *Lemon* cuts against the disputed selection procedures.

Rather they claim that the challenged policies have the "effect" of advancing particular denominations, which at least in this context entails application of the "endorsement" test. *Bonham*, 989 F.2d at 1245. That in turn takes us to the question of whether the selection policies *appear* to endorse religion in the eyes of a "reasonable observer," who "'must be deemed aware' of the 'history and context' underlying a challenged program." *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) (quoting *Good News Club v. Milford Central School*, 533 U.S. 98 (2001)). As the policies themselves are facially neutral, the chaplains under this theory argue in effect that a reasonable observer, contemplating the results of the policies (as gathered in the chaplains' statistical evidence), would infer that the government had as a practical matter endorsed the liturgical denominations.

Assuming arguendo that it is proper to see the "reasonable observer" as a hypothetical person reviewing an array of statistics (the observer is already a judicial construct rather than a human being), the figures in this case would not lead him to perceive endorsement. Here the plaintiffs' statistics fail to show government endorsement of particular religions under the reasonable observer test for the same reason that, in the equal protection context, they failed to show intentional discrimination paralleling that of *Gomillion* or *Yick Wo*. The only new wrinkle, perhaps, is that we must impute to the reasonable observer either enough grasp of statistics not to be misled by the assertion of "statistical significance," or at least the modesty not to leap to a conclusion about the data without making an elementary inquiry on the subject. We feel confident that when reasonable observers find that the term means only that there

is little likelihood that the "discrepancy" is due to chance, they are most unlikely to believe that the policies convey a message of government endorsement.

Plaintiffs cite Title VII cases in which we found that statistically significant "disparities" in such matters as hiring and pay were enough to support district court findings of racial discrimination. See, e.g., *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395 (D.C. Cir. 1988); *Segar v. Smith*, 738 F.2d 1249, 1277-79, 1286-87 (D.C. Cir. 1984). But in these cases the court found liability only after being satisfied that the statistical evidence properly controlled for confounding variables. See, e.g., *Berger*, 843 F.2d at 1413-21 (reviewing potential non-discriminatory explanations); *id.* at 1419 (reasoning that the "entire notion of employing statistical proof is to eliminate non-discriminatory causes" of the disparities); *Segar*, 738 F.2d at 1274-77. Here, as we observed in the equal protection analysis, the chaplains point to no serious effort at such controls for any of their statistical comparisons. Accordingly, even assuming that a court could properly impute a belief in denominational favoritism to the reasonable observer simply on the basis of statistics that might satisfy a plaintiff's Title VII burden, the chaplains' data fail to meet that standard and thus fail to show a likelihood of success on the merits.

Finally, the chaplains point to our observation in *Bonham* that there is no "*de minimis* exception to traditional Establishment Clause analysis." 989 F.2d at 1245. But the *de minimis* defense that we rejected there was a notion that state actions could be excused, even though a reasonable observer would have regarded them as endorsing religion, so long as the action in question had only a trivial impact, for example, an action affecting "only a single day of the year." It was, obviously, not a suggestion that the "reasonable observer" should be deemed to spot "endorsement" on a bare surmise.

The district court's order denying the chaplains' motion for preliminary injunction is therefore

Affirmed.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5071 **September Term, 2013**

1:07-mc-00269-GK

Filed On: February 24, 2014

In re: Navy Chaplaincy,

Chaplaincy of Full Gospel Churches, et al.,

Appellants

v.

United States Navy, et al.,

Appellees

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges; and Williams, Senior Circuit Judge

O R D E R

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: NAVY CHAPLAINCY	)	**Case No. 1:07-mc-269 (GK)**

MEMORANDUM OPINION

Plaintiffs, current and former non-liturgical Protestant chaplains in the United States Navy ("Navy"), endorsing agencies for non-liturgical Protestant chaplains, and a fellowship of non-denominational Christian evangelical churches, bring this action against Defendants, Department of the Navy and several of its officials. Plaintiffs allege that Defendants discriminated against them on the basis of religion when making personnel decisions in violation of the First Amendment's Establishment Clause and the equal protection component of the Fifth Amendment's Due Process Clause, and that Defendants also violated the Establishment Clause by delegating governmental authority over personnel decisions to chaplains who sat on chaplain selection boards.

This matter is before the Court on Plaintiffs' Motion for a Preliminary Injunction [Dkt. No. 95] on remand from the Court of Appeals.[1] Upon consideration of the Motion, Opposition [Dkt. No.

[1] The District Court denied this Motion on January 30, 2012. Plaintiffs appealed that judgment and the Court of Appeals reversed and remanded for further proceedings. See infra Section

98], Reply [Dkt. No. 99], and the entire record herein, and for the reasons set forth below, Plaintiffs' Motion is **denied.**

I. BACKGROUND

A. Factual Background[2]

Congress provided for the organization of the Navy Chaplain Corps, "whose members are commissioned Naval officers who possess specialized education, training and experience to meet the spiritual needs of those who serve in the Navy and their families." Adair v. England, 183 F. Supp. 2d 31, 35 (D.D.C. 2002) (Adair I) (internal quotation marks omitted). The Navy divides the Chaplain Corps into four "faith groups": Catholic, liturgical Protestant, non-liturgical Protestant, and Special Worship. In re Navy Chaplaincy, 697 F.3d 1171, 1173 (D.C. Cir. 2012).

The term "liturgical Protestant" refers to "those Christian Protestant denominations whose services include a set liturgy or order of worship." Adair I, 183 F. Supp. 2d at 36. In contrast, the term "non-liturgical Protestant" refers to "Christian

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I.B. (setting out in detail the procedural background of this matter).

[2] For a more detailed account of the facts in this case, refer to Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 293-96 (D.C. Cir. 2006) and Adair v. England, 183 F. Supp. 2d 31, 34-38 (D.D.C. 2002) (Adair I).

denominations or faith groups that do not have a formal liturgy or order in their worship service." Id. Plaintiffs are current and former non-liturgical Protestants, "represent[ing] Southern Baptist, Christian Church, Pentecostal, and other non-liturgical Christian faith groups." Id.

In order to become a Navy chaplain, "an individual must have an 'ecclesiastical endorsement' from a faith group endorsing agency certifying that the individual is professionally qualified to represent that faith group within the Chaplain Corps." In re Navy Chaplaincy, 697 F.3d at 1173. Chaplaincy of Full Gospel Churches and Associated Gospel Churches are two such endorsing agencies and are among the Plaintiffs in this case. Id.

The Navy uses the same personnel system for all of its officers, including chaplains. In re England, 375 F.3d 1169, 1172 (D.C. Cir. 2004). That system "seeks to manage officers' careers to provide the Navy with the best qualified personnel through three critical personnel decisions: (1) promotion; (2) continuation on active duty; and (3) selective early retirement." Id. Chaplains, like all Navy officers, "are recommended for promotion by 'selection boards' convened to consider whether particular candidates should be promoted to a

higher rank." In re Navy Chaplaincy, 697 F.3d at 1173. Chaplain selection boards are currently composed of seven members: two chaplains and five other officers. Id. (citing SECNAVINST 1401.3A, Suppl. ¶ 1.c.(1)(f)).

Plaintiffs allege that Defendants "discriminated against [] [them] on the basis of their religion, by establishing, promoting and maintaining illegal religious quotas and religious preferences in their personnel decision making." In re Navy Chaplaincy, 841 F. Supp. 2d 336, 341 (D.D.C. 2012). More specifically, Plaintiffs allege that "the Navy's selection board process results in denominational favoritism that advantages Catholic and liturgical chaplains while disadvantaging non-liturgical chaplains" and that "this alleged systematic bias has left non-liturgical chaplains underrepresented in the Navy." Id. 340.

Plaintiffs claim that, under the selection board process, "[c]haplain promotion board members 'vote the record' by depressing one of five buttons in a 'sleeve' which hides the voter's hands, ensuring the secrecy of the vote" and that "[t]he buttons coincide with degrees of confidence the voter has in the record considered, ranging from 0 to 100 in 25 degree increments." Pls.' Mot. for Prelim. Inj. at 4 (internal

quotation marks omitted). Plaintiffs allege that the secrecy of the vote enables chaplain promotion board members to engage in the practice of "zeroing out" candidates, a practice in which "a single [board] member voting zero" ensures that a candidate will not be selected "because of the small number of board members who vote[.]" Id. No other branch of the military uses the same or similar procedures in the management of the careers of its religious leaders.

Plaintiffs claim that, under this promotion system, which has no accountability, their "[s]tatistical analysis [] shows that in every [Navy Chaplain Corps] personnel management category that can be measured by data, the Navy has a preference for Catholics first, Liturgical Protestants second, with non-liturgical or Special Worship [faith group clusters] alternating third and fourth." Id. at 4-5.

Plaintiffs now move for a preliminary injunction, asking the Court to enjoin the Navy from "(1) the use of the Chief of Chaplains (the 'Chief') or his Deputy as chaplain selection board president; (2) the use of secret votes thereon with no accountability; and (3) placing chaplains on chaplain selection boards without effective guarantees [that] the power to distribute government benefits will be used solely for secular,

neutral and non-ideological purposes." Id. at 1. Plaintiffs request that the preliminary injunction remain in force "until the Court can evaluate on their merits the partial summary judgment (PSJ) motions pending before this Court."[3] Id. at 2.

B. Procedural Background

This dispute involves three cases, Chaplaincy of Full Gospel Churches v. England, Civ. No. 99-2945, Adair v. England, Civ. No. 00-566, and Gibson v. Dep't of Navy, Civ. No. 06-1696, the earliest of which was filed in 1999, and each with a complaint of over 85 pages, containing multiple constitutional claims. On June 18, 2007, the District Court concluded that the three cases raised "substantially similar constitutional challenges to the Navy Chaplaincy program" and accordingly consolidated the cases under the caption In re Navy Chaplaincy. Order (June 18, 2007) at 3-4 [Dkt. No. 1].

On July 22, 2011, Plaintiffs filed the present Motion for a Preliminary Injunction - which is their sixth such motion for injunctive relief.[4] On August 26, 2011, Defendants filed their

[3] As discussed below, these motions are no longer pending. The Court did not reach the merits of the motions, but denied them without prejudice for case management purposes. See infra Section I.B.3.

[4] The District Court denied all five of Plaintiffs' previous motions for preliminary injunctive or similar emergency relief.

Opposition to Plaintiffs' Motion, and on September 12, 2011, Plaintiffs' filed their Reply in support of their Motion.

Plaintiffs' motion was denied by the District Court on January 30, 2012. See In re Navy Chaplaincy, 841 F. Supp. 2d 336. Plaintiffs appealed that judgment, and on November 2, 2012, the Court of Appeals reversed and remanded for further proceedings.[5] See In re Navy Chaplaincy, 697 F.3d 1171.

1. District Court Proceedings

In denying Plaintiffs' motion, the District Court "began by concluding that plaintiffs lacked Article III standing, reasoning that their asserted future injury was too speculative because it rested on the assumption that chaplains sitting on future selection boards would 'necessarily favor candidates affiliated with [their] own denomination,' an assumption that the court found implausible given that Naval officers 'are presumed to undertake their official duties in good faith.'" In re Navy Chaplaincy, 697 F.3d at 1175 (quoting In re Navy Chaplaincy, 841 F. Supp. 2d at 345).

The District Court then concluded that "even if Plaintiffs had Article III standing, the balance of the four preliminary

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[5] The Court of Appeals issued its Mandate on January 18, 2013 [Dkt. No. 154].

injunction factors[6] weighed against granting injunctive relief." In re Navy Chaplaincy, 697 F.3d at 1175. More specifically, "[a]lthough the [District] [C]ourt presumed the existence of irreparable harm because plaintiffs had alleged an Establishment Clause violation, the court found that plaintiffs were unlikely to succeed on the merits, and that the balance of the equities and the public interest weighed against granting preliminary injunctive relief." Id. (citations omitted).

2. Court of Appeals Proceedings

On appeal, the Court of Appeals reversed the District Court's conclusion that Plaintiffs lacked Article III standing, reasoning that "[P]laintiffs' allegation that the challenged policies will likely result in discrimination is sufficiently non-speculative to support standing." Id. at 1177. The Court then "review[ed] the district court's ultimate decision to deny injunctive relief, as well as its weighting of the preliminary injunction factors[.]" Id. at 1178. The Court concluded that

[6] In order to obtain a preliminary injunction, a plaintiff "must establish [1] that [she] is likely to succeed on the merits, [2] that [she] is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of the equities tips in [her] favor, and [4] that an injunction is in the public interest." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); see infra Section II (setting out in detail the legal standard for injunctive relief).

"the district court correctly assumed that plaintiffs have demonstrated irreparable harm" and agreed with the District Court's conclusion that the balance of the equities and the public interest weighed against granting the injunction. Id. at 1179 (stating that "in assessing the balance of the equities and the public interest, we must 'give great deference to the professional judgment of military authorities' regarding the harm that would result to military interests if an injunction were granted") (quoting Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008)).

Noting that the remaining issue was likelihood of success on the merits, the Court of Appeals saw "no error in the district court's conclusion that plaintiffs are unlikely to succeed on the merits" of their delegation theory.[7] Id. at 1179.

However, the Court of Appeals noted that "[w]e have a different view of the district court's resolution of plaintiffs' denominational preference theory, i.e., that the Navy discriminates against non-liturgical Protestants on the basis of their religious denomination." Id. at 1179-80. Plaintiffs claim

[7] Under this theory, Plaintiffs claim that the Navy impermissibly delegates governmental authority to religious entities by permitting chaplains to make promotion decisions without effective guarantees that the authority will be exercised in a secular manner.

that "their statistical analysis provides strong evidence of a pattern of discrimination." Id. at 1180. Defendants challenge Plaintiffs' statistical evidence and offer their own expert analysis, which they claim demonstrates that no such discrimination exists. Id.

The Court of Appeals observed that "the district court made no factual findings to resolve these competing claims" and that "[a]ll it had to say about the issue was this: 'the plaintiffs have submitted no evidence from which the court could assume that the future promotion boards will follow any putative pattern of alleged discrimination.'" Id. (quoting In re Navy Chaplaincy, 841 F. Supp. 2d at 346)). The Court then concluded that "[t]he district court's entirely conclusory statement gives us no insight at all into whether the court perceived the defect in the Establishment Clause claim to be legal or factual, or, if factual, whether it thought the weakness lay in the evidence of past or future discrimination." Id. Accordingly, the Court of Appeals vacated the District Court's denial of Plaintiffs' Motion and remanded for further proceedings consistent with its opinion.

3. Reassignment of the Case

On May 31, 2012, Judge Ricardo Urbina, who had handled this dispute since 2001, retired and thereafter, the Calendar Committee reassigned it to the undersigned Judge. Because of the complexity of the procedural and constitutional issues raised, which the parties have now been litigating for well over a decade, the Court held a lengthy Status Conference on July 24, 2012 to fully explore the most efficient procedure for resolving it. After hearing from the parties at that Status Conference, this Court dismissed without prejudice nine outstanding motions, at least five of which were dispositive, and issued a Case Management Order (July 25, 2012)[8] [Dkt. No. 124, later amended] setting numerous deadlines in order to move the case towards resolution.

4. Record Considered in Resolving Plaintiffs' Motion

On November 2, 2012, the Court of Appeals issued its opinion on Plaintiffs' Motion, reversing and remanding for further proceedings. On November 19, 2012, this Court ordered

[8] Under the Case Management Order, as amended, the parties will have fully briefed their cross-motions for summary judgment on statute of limitations grounds by May 20, 2013. After deciding those motions, the Court will, if necessary, set a briefing schedule for comprehensive dispositive motions on the merits of the constitutional issues raised by Plaintiffs.

the parties to submit a joint statement identifying those briefs and exhibits they believed constituted the record to be considered on remand in resolving Plaintiffs' Motion. Order (Nov. 19, 2012) [Dkt. No. 143]. On December 21, 2012, the parties filed their joint statement identifying, among other filings, briefings and exhibits on four dispositive motions, which they agreed constituted the relevant record. Joint Statement (Dec. 12, 2012) [Dkt. No. 152]. The Court considered that robust record for purposes of resolving Plaintiffs' Motion.

II. LEGAL STANDARD FOR INJUNCTIVE RELIEF

A preliminary injunction is an "extraordinary and drastic remedy," Munaf v. Geren, 553 U.S. 674, 689 (2008), and "may only be awarded upon a clear showing that the plaintiff is entitled to such relief," Sherley v. Sebelius, 644 F.3d 388, 392 (D.C. Cir. 2011) (internal quotation marks omitted) (quoting Winter, 555 U.S. at 22); see Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (noting that "the movant, by a clear showing, carries the burden of persuasion").

A party seeking a preliminary injunction must establish "[1] that [she] is likely to succeed on the merits, [2] that [she] is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of the equities tips in

[her] favor, and [4] that an injunction is in the public interest." Winter, 555 U.S. at 20.

In the past, these four factors "have typically been evaluated on a 'sliding scale[,]'" such that "[i]f the movant makes an unusually strong showing on one of the factors, then [she] does not necessarily have to make as strong a showing on another factor." Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1291-92 (D.C. Cir. 2009). However, the continued viability of the sliding scale approach is uncertain "as the Supreme Court and the D.C. Circuit have strongly suggested, without holding, that a likelihood of success on the merits is an independent, free-standing requirement for a preliminary injunction." Stand Up for California! v. U.S. Dep't of the Interior, Nos. 12-309, 12-2071, 2013 WL 324035, at *6 (D.D.C. Jan. 29, 2013); Sherley, 644 F.3d at 393 ("[W]e read Winter at least to suggest if not to hold that a likelihood of success is an independent, free-standing requirement for a preliminary injunction . . . [but] [w]e need not wade into this circuit split today.") (internal quotation marks omitted).

Nor need this Court resolve this unsettled issue because a preliminary injunction is not appropriate here, even under the less demanding "sliding scale" framework. See Stand Up for

California!, 2013 WL 324035, at *6 ("If the plaintiffs cannot meet the less demanding 'sliding scale' standard, then a fortiori, they cannot satisfy the more stringent standard alluded to by the Supreme Court and the Court of Appeals.").

III. ANALYSIS

Plaintiffs' claims rest on two distinct theories, i.e., their delegation and denominational preference theories. Because the Court of Appeals affirmed the District Court's rejection of Plaintiffs' delegation theory, this Court need only consider whether Plaintiffs are entitled to injunctive relief under their denominational preference theory.

A. Likelihood of Success on the Merits

According to Plaintiffs, the expert testimony they have submitted "suggests, if not establishes, [that] the challenged practices result in clear denominational preferences in the award of government benefits, advancing some denominations and inhibiting others to the detriment of Plaintiffs[.]" Pls.' Mot. for Prelim. Inj. at 17. Plaintiffs further contend that "[t]he challenged practices are not narrowly tailored to achieve a compelling purpose," and therefore "fail all Establishment Clause tests and result in unequal treatment for all chaplains." Id.

Defendants respond that liability for discrimination based upon religion cannot "be predicated solely on statistical evidence of disparate impact in favor of or against certain denominations[,]" Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. at 19, because "proof of intent is a prerequisite to a finding of unconstitutional discrimination upon the basis of religion[,]" id. at 27. Defendants further contend that "[t]here is no empirical evidence that would suggest denominational favoritism or discrimination correlated to the denominational affiliation of chaplain board members." Id. at 19-20. In support of their argument, Defendants put forward evidence from their own expert witness, "[who] analyzed Plaintiffs' claims and found no disparate impact" but did find "serious flaws in [Plaintiffs' expert's] analyses." Id.

The Court of Appeals directed this Court to resolve these competing claims and to determine whether Plaintiffs are likely to succeed on the merits of their denominational preference theory. In re Navy Chaplaincy, 697 F.3d at 1180.

1. Proof of Intent Is a Prerequisite to a Finding of Unconstitutional Discrimination on the Basis of Religion

As a threshold legal issue, the parties dispute whether Plaintiffs must show that the discrimination alleged was

intentional.[9] Defendants argue that Plaintiffs must prove that the Navy intentionally adopted policies designed to maintain liturgical Christian control over the Chaplain Corps. Defs.' Mot. for Summ. J. at 10-11; see Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. at 26-31. Plaintiffs respond that Defendants' "argument that the plaintiffs must show intentional discrimination" is "inconsistent with Establishment Clause precedent" and "contrary to the law of the case." Pls.' First Mot. for Summ. J. Reply at 10.

a) Plaintiffs Bear the Burden of Demonstrating Discriminatory Intent

The Court of Appeals recognized that, under their denominational preference theory, Plaintiffs claim that "the Navy discriminates against non-liturgical Protestants on the basis of their religious denomination." In re Navy Chaplaincy, 697 F.3d at 1179-80 (emphasis added); see Adair First Am. Compl. at 43 (claiming that Defendants "are deliberately motivated by

[9] The parties debate this point in the briefs on Plaintiffs' instant motion, see Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. at 26-31; Pls.' Mot. for Prelim. Inj. Reply at 20-23, as well as in several of the parties' merits briefs, see Defs.' Mot. for Summ. J. at 10-11 [Dkt. No. 46]; Pls.' First Mot. for Summ. J. Reply at 7-10 [Dkt. No. 50]; Pls.' Opp'n to Defs.' Mot. for Summ. J. at 10-17 [Dkt. No. 56]; Defs.' Mot. for Summ. J. Reply at 4-6, 10 [Dkt. No. 68]; Pls.' Second Mot. for Summ. J. Reply at 8-9 [Dkt. No. 70].

faith group bias") (emphasis added). Plaintiffs argue that their denominational preference theory raises First Amendment and Fifth Amendment considerations. Pls.' Mot. for Prelim. Inj. at 17-18.

Where, as here, "the claim is invidious discrimination in contravention of the First and Fifth Amendments, [the Supreme Court's] decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose." Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) (emphasis added) (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 540-41 (1993) (First Amendment); Washington v. Davis, 426 U.S. 229, 240 (1976) (Fifth Amendment)); see also Personnel Admin. of Mass. V. Feeney, 442 U.S. 256, 272 (1979) (Fourteenth Amendment) ("[E]ven if a neutral law has disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."); Brown v. Califano, 627 F.2d 1221, 1234 n.78 (D.C. Cir. 1980) ("Supreme Court cases have made clear that proof of discriminatory intent, not just disproportionate impact, is necessary to establish an equal protection violation of constitutional dimensions.").

Under Iqbal, "purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences . . . [i]t instead involves a decision maker's undertaking a course of action 'because of, not merely in spite of, [the action's] adverse effects upon an identifiable group.'" 556 U.S. at 676-77 (emphasis added) (quoting Feeney, 442 U.S. at 279).

It is true that, in exceptional cases, the disparate impact of a facially neutral policy may be so severe that the clear factual pattern is "unexplainable on grounds other than" purposeful discrimination. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (holding that plaintiffs' Fourteenth Amendment claim was not viable because plaintiffs failed to carry their burden of proving that the challenged government decision was motivated by discriminatory intent).

Such cases, however, are "rare" and "[a]bsent a pattern as stark as that in Gomilion or Yick Wo, impact alone is not determinative, and the Court must look to other evidence." Arlington Heights, 429 U.S. at 266 (emphasis added). In Gomilion v. Lightfoot, 364 U.S. 339 (1960), a local statute altered the shape of a city from a square to a 28-sided figure, which had the effect of removing from the city all but four of its 400

African American voters, and not a single white voter. In Yick Wo v. Hopkins, 118 U.S. 356 (1886), a city board of supervisors denied building ordinance waivers to over 200 Chinese applicants, but granted waivers to all but one non-Chinese applicant.

Accordingly, under Supreme Court precedent, Plaintiffs must either (1) point to evidence establishing the existence of a policy or practice that the government adopted "because of, not merely in spite of" its adverse effect on Plaintiffs, Feeney, 442 U.S. at 279, or (2) demonstrate disparate impact "as stark as that in Gomilion or Yick Wo," Arlington Heights, 429 U.S. at 266.

b) The Law of the Case Doctrine Does Not Relieve Plaintiffs of Their Burden to Demonstrate Discriminatory Intent

Plaintiffs argue that Defendants' position on the intent issue is contrary to the law of the case because "[Defendants] first raised this argument in [their] initial 2000 Motion to Dismiss . . . which the Court rejected." Pls.' Mot. for Prelim. Inj. Reply at 20-23. In support of their law of the case argument, Plaintiffs heavily rely on the District Court's statement in Adair v. England, 17 F. Supp. 2d 7 (D.D.C. 2002) (Adair II) that:

> [t]he defendants are somewhat mistaken when they repeatedly state that plaintiffs have the "burden to prove the threshold inquiry: [that] the Chaplain Corps instituted policies . . . that actually discriminate against non-liturgicals" before the court can apply strict scrutiny. E.g., Defs.' Mot. at 60. The plaintiffs' burden is not that onerous. Rather, under Supreme Court precedent, the plaintiffs in this case bear the initial burden to show that the challenged Navy policies "suggest[] 'a denominational preference . . . .'" County of Allegheny, 492 U.S. at 608-09 (1989). Accordingly, if the plaintiff can demonstrate after discovery that some or all of the Navy's policies and practices suggest a denominational preference, then the court will apply strict scrutiny to those policies and practices for which the plaintiffs have met this initial burden.

Pls.' Mot. for Prelim. Inj. Reply at 21 (quoting Adair II, 217 F. Supp. 2d at 14-15); see Pls.' Opp'n to Defs.' Mot. for Summ. J. at 11 (same); Pls.' Second Mot. for Summ. J. Reply at 9 (same).

Defendants respond that "nothing in the passage . . . implies [that] the Court would not require a showing of intentional discrimination (whatever that showing) in order to demonstrate denominational preference" and that "it is clear that the Court understood Plaintiffs' claim on this front to be one of intentional discrimination." Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. at 28; see Defs.' Mot. for Summ. J. at 10-11; Defs.' Mot. for Summ. J. Reply at 5-6.

Plaintiffs' contention that "Adair II rejected" the argument that Plaintiffs must show that Defendants acted with discriminatory intent to prevail on their First and Fifth Amendment claims, Pls.' Opp'n to Defs.' Mot. for Summ. J. at 11-12, reflects a misreading of the District Court's prior decisions in this case. In Adair II, the District Court determined that, although policies that explicitly discriminate on the basis of religion are subject to strict scrutiny, such scrutiny should not be applied to policies that do not explicitly discriminate on the basis of religion unless "[P]laintiff[s] can demonstrate after discovery that some or all of the Navy's policies and practices suggest a denominational preference[.]" Adair II, 217 F. Supp. 2d at 14. The District Court deferred "addressing the parties' dispute about how much of this showing can be comprised of statistical evidence until after discovery[.]" Id. at 15 n.9.

Defendants are correct that these passages do not imply, no less clearly state, that Plaintiffs need not show intentional discrimination in order to demonstrate denominational preference. And in any case, "[i]nterlocutory orders are not subject to law of the case doctrine and may always be reconsidered prior to final judgment." Langevine v. Dist. Of

Columbia, 106 F.3d 1018, 1023 (D.C. Cir. 1997); see Spirit of Sage Council v. Kempthorne, 511 F. Supp. 2d 31, 38 (D.D.C. 2007) ("[T]he law of the case doctrine leaves discretion for the Court to reconsider its decisions prior to final judgment.").

Moreover, the District Court had already addressed the intent issue in Adair I -- a ruling at the early motion to dismiss stage, delivered only months before Adair II. Therefore Plaintiffs were on notice of the District Court's view of "the importance of the government's intent in the Establishment Clause calculus[.]" 183 F. Supp. 2d at 56 n.24.

Significantly, the District Court based its Adair I ruling, that Plaintiffs had stated a claim under the Establishment Clause, on the fact that Plaintiffs alleged intentional discrimination. See id. at 56 ("[P]laintiffs have properly asserted that the Navy intentionally hires liturgical protestant chaplains dramatically out of proportion from their overall representation among [Navy] personnel.") (emphasis added); id at 56 n.24 ("[P]laintiffs allege that the Navy has deliberately adopted policies designed to maintain liturgical Christian control over the Chaplain Corps.") (emphasis added); id. ("[Plaintiffs] have clearly alleged an intentional preference.") (emphasis added); id. at 57 ("[P]laintiffs clearly offer well-

pled factual allegations that the Navy institutes 'a deliberate, systematic, discriminatory' retention policy 'whose purpose was to keep non-liturgical chaplains from continuing on active duty, thus ensuring they would not be considered for promotion and minimizing their future influence.") (emphasis added) (citation omitted).

Thus, far from rejecting the argument that Plaintiffs must prove intent, the law of the case, as clearly articulated in Adair I, recognizes that the central theory of Plaintiffs' Establishment Clause claim rested on their being subjected to intentional discrimination.

2. Plaintiffs Have Failed to Demonstrate that Defendants Acted with Discriminatory Intent

The Court of Appeals pointed out that "whether plaintiffs are likely to succeed on the merits [of their denominational preference theory] – turns on whether they have made a strong showing of a pattern of past discrimination on the basis of religious denomination and whether that pattern is linked to the policies they challenge." In re Navy Chaplaincy, 697 F.3d at 1180 (emphasis in original).

It is clear from the precedent discussed above that Plaintiffs bear the burden of demonstrating that Defendants' alleged "pattern of past discrimination" was motivated by

discriminatory intent. Although "[p]roof of discriminatory intent must necessarily usually rely on objective factors . . . [t]he inquiry is practical." Feeney, 442 U.S. at 279 n.24. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights, 429 U.S. at 266.

The evidentiary basis for Plaintiffs' denominational preference theory is a series of reports written by their expert, Dr. Harald Leuba. Plaintiffs argue that Dr. Leuba's statistical analysis shows: "[1] [that] the Chiefs' denominations benefitted from their position in terms of promotions and accessions . . . [2] the Chief's influence on the Chaplain Corps rank structure . . . [3] the Navy's denominational favoritism . . . [4] the Navy's hierarchy of favorite denominations and their respective promotion rates . . . [and] [5] prejudice against Southern Baptists compared to other denominations with Chiefs." Pls.' Mot. for Prelim. Inj. Reply at 11 (citations omitted).

Because a preliminary injunction is an "extraordinary and drastic remedy," Munaf, 553 U.S. at 689, it is axiomatic that "the one seeking to invoke such stringent relief is obliged to

establish a clear and compelling legal right thereto based upon undisputed facts," Belushi v. Woodward, 598 F. Supp. 36, 37 (D.D.C. 1984) (citing Rosemont Enterprises, Inc. v. Random House Inc., 366 F.2d 303, 311 (2d. Cir. 1966)). "If the record presents a number of disputes regarding the inferences that must be drawn from the facts in the record, the court cannot conclude that plaintiff has demonstrated a substantial likelihood of success on the merits." In re Navy Chaplaincy, 841 F. Supp. 2d at 345 (citing Suburban Assocs. Inc. v. U.S. Dep't of Housing & Urban Development, No. 05-00856HHK, 2005 WL 3211563, at *10 (D.D.C. Nov. 14, 2005); SEC v. Falstaff Brewing Corp., No. 77-0894, 1977 WL 1032, at *18 (D.D.C. Aug. 1, 1977)).

Based on the existing record, the Court finds that Plaintiffs have provided no evidence demonstrating that Defendants intentionally discriminated against them. The statistics proffered by Plaintiffs, without more, are not even minimally sufficient to demonstrate the need for the "extraordinary and drastic remedy" of a preliminary injunction. Munaf, 553 U.S. at 689. Even if we accepted Plaintiffs' contention that Dr. Leuba's statistical analysis "suggests, if not establishes, [that] the challenged practices result in clear denominational preferences in the award of government benefits,"

Pls.' Mot. for Prelim. Inj. at 17, Plaintiffs still would not have met their burden of demonstrating probable success on the merits because they made no attempt to show that Defendants' alleged pattern of past discrimination was motivated by discriminatory intent.

Instead, Plaintiffs repeatedly, and incorrectly, argue that they do not need to show intentional discrimination to demonstrate a likelihood of success on the merits of their denominational preference theory, and that it is sufficient for them to put forward statistics that merely "suggest a denominational preference." Pls.' Mot. for Prelim. Inj. Reply at 11-12, 20-23; see Pls.' Mot. for Prelim. Inj. at 17; Pls.' Opp'n to Defs.' Mot. for Summ. J. at 11; Pls.' Second Mot. for Summ. J. Reply at 9. Plaintiffs misunderstand their burden and have proffered no evidence that Defendants adopted the challenged policies "because of, not merely in spite of" their adverse effect on Plaintiffs. Feeney, 442 U.S. at 279

Moreover, the disparate impact demonstrated by Plaintiffs' statistics is not nearly "as stark as that in Gomilion or Yick Wo," and therefore, there is no justification for inferring that the pattern of their statistics is "unexplainable on grounds other than" purposeful discrimination. Arlington Heights, 429

U.S. at 266. For instance, Dr. Leuba found that when a candidate considered for promotion to Commander happened to be of the same denomination as the Chief of Chaplains, 83.3% of those candidates were selected for promotion. Pls.' Mot. for Prelim. Inj. at 8. In contrast, Dr. Leuba also found that when a candidate considered for promotion to Commander happened to be of a different denomination as the Chief of Chaplains, only 73.3% of those candidates were selected for promotion. Id.

A mere 10% difference between the promotion rate of candidates of the same denomination as the Chief of Chaplains and candidates of a different denomination as the Chief of Chaplains is certainly not "stark" as defined in Arlington Heights. Plaintiffs' demonstration of a 10% difference in promotion rate is far removed from the pattern in Gomilion, where the challenged local statute had the effect of removing from the city 99% of African American voters and not a single white voter, and the pattern in Yick Wo, where the building ordinance waiver was denied to over 200 Chinese applicants, but granted to all but one non-Chinese applicant.

Accordingly, Plaintiffs' statistical evidence does not sufficiently show that Plaintiffs are likely to succeed on the merits of their denominational preference claim.

B. Evaluation of the Preliminary Injunction Factors

As noted above, the Court of Appeals concluded that "the district court correctly assumed that plaintiffs have demonstrated irreparable harm" and it saw no error in the District Court's conclusion that the balance of the equities and the public interest weighed against granting the injunction. In re Navy Chaplaincy, 697 F.3d at 1179.

Evaluating the four preliminary injunction factors, this Court concludes that Plaintiffs are not entitled to injunctive relief. Significantly, Plaintiffs have not demonstrated that they are likely to succeed on the merits of their denominational preference theory because they have not provided any evidence that Defendants intentionally discriminated against them. Moreover, as the District Court previously observed, "[a]lthough plaintiffs' claims might demonstrate an irreparable injury if ultimately vindicated . . . plaintiffs have failed to demonstrate that an injunction would not substantially injure third parties" and "[they] have failed to show that the public interest would be furthered by the court's intrusion into military personnel decisions." In re Navy Chaplaincy, 841 F. Supp. 2d at 349 (citing Goldman v. Weinberger, 475 U.S. 503, 507-08 (1986); Weinberger v. Romero-Barcelo, 456 U.S. 305, 312

(1982) (noting that courts must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction")). Accordingly, Plaintiffs are not entitled to injunctive relief.

IV. CONCLUSION

Upon consideration of the Motion, Opposition, Reply, and the entire record herein, and for the reasons set forth in this Memorandum Opinion, Plaintiffs' Motion for a Preliminary Injunction is **denied.**

February 28, 2013

Gladys Kessler
United States District Judge

Copies to: attorneys on record via ECF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 10, 2012 Decided November 2, 2012

No. 12-5027

IN RE: NAVY CHAPLAINCY,

CHAPLAINCY OF FULL GOSPEL CHURCHES, ET AL.,
APPELLANTS

v.

UNITED STATES NAVY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:07-mc-00269)

Arthur A. Schulcz, Sr. argued the cause and filed the briefs for appellant.

Lewis Yelin, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Ronald C. Machen Jr.*, U.S. Attorney, and *Marleigh D. Dover*, Attorney.

Before: HENDERSON, ROGERS, and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: In this case, military chaplains, all "non-liturgical Protestants," allege that the Navy systematically discriminates against members of their religious denominations in the awarding of promotions in violation of "[t]he clearest command of the Establishment Clause . . . that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). The district court denied plaintiffs' motion for a preliminary injunction, concluding that they lacked Article III standing and, alternatively, were unlikely to succeed on the merits of their claims. For the reasons set forth in this opinion, we reverse the district court's determination that plaintiffs lack Article III standing and remand for further factual findings regarding their likelihood of success on the merits.

I.

The Navy maintains a Chaplain Corps of commissioned Naval officers who have the "responsibility . . . to provide for the free exercise of religion" for all members of the Navy and their families. *In re England*, 375 F.3d 1169, 1171 (D.C. Cir. 2004) (internal quotation marks omitted). Chaplains perform a "unique" role, serving both "as clergy or . . . professional representative[s] of a particular religious denomination and as . . . commissioned naval officer[s]." *Id.* (internal quotation marks omitted). The Navy divides the Chaplain Corps into four "faith groups": Catholic, liturgical Protestant, non-liturgical Protestant, and Special Worship. *Id.* at 1172.

Plaintiffs, current and former military chaplains, are "non-liturgical Protestants." Non-liturgical Protestants belong to Protestant denominations—including Baptist, Evangelical, Pentecostal, and Charismatic—that follow no formal liturgy

in worship services and baptize at the "age of reason" rather than at infancy. *In re Navy Chaplaincy*, 534 F.3d 756, 759 (D.C. Cir. 2008). In order to become a Navy chaplain, an individual must have an "ecclesiastical endorsement" from a faith group endorsing agency certifying that the individual is professionally qualified to represent that faith group within the Chaplain Corps. *In re England*, 375 F.3d at 1171–72. Two such endorsing agencies, Chaplaincy of Full Gospel Churches and Associated Gospel Churches, are among the plaintiffs in this case.

Like all Navy officers, chaplains are recommended for promotion by "selection boards" convened to consider whether particular candidates should be promoted to a higher rank. *Id*. at 1172. Because selection boards are required by statute to include at least one member from the "competitive category" being considered for promotion, selection boards considering chaplain promotions must have at least one chaplain as a member. 10 U.S.C. § 612(a)(2)(A). By instruction of the Secretary of the Navy, chaplain selection boards are currently composed of seven members: two chaplains and five other officers. SECNAVINST 1401.3A, Suppl. ¶ 1.c.(1)(f). Selection boards make initial promotion recommendations that are subsequently reviewed by the Secretary of the Navy and then submitted to the Secretary of Defense for transmittal to the President. 10 U.S.C. §§ 618(a)(1), (c)(1).

Plaintiffs contend that Naval selection boards discriminate against non-liturgical Protestant chaplains on the basis of religious denomination. Relying on statistical analysis by their expert and other evidence, they assert that non-liturgical Protestant chaplains are promoted to higher ranks at significantly lower rates than are liturgical Protestant and Catholic chaplains, and that candidates are more likely to be

recommended for promotion when they share the denomination of the chaplains who sit on the selection board.

Plaintiffs focus on certain "policies, practices, and procedures" that they allege "facilitate and allow denominational or faith group favoritism." Appellants' Br. 7 (emphasis omitted). Specifically, plaintiffs allege that the small size of the selection boards and the practice of voting in secret allow promotion decisions to be made on the basis of religious bias. Selection board members vote by pressing one of five buttons that indicate the degree of confidence the voter has in the candidate, ranging from zero to 100. Plaintiffs contend that because boards are composed of only seven members, a chaplain can essentially veto a candidate by voting a "zero" level of confidence, thus significantly reducing that candidate's chances of selection. According to plaintiffs, because chaplains can exercise this veto power in secret, they are free to select candidates based on their own religious conceptions of how ministry should be conducted. Plaintiffs also challenge the practice of appointing the Chief of Chaplains as president of chaplain selection boards, asserting that the Chief's "role and influence as a decision maker in the award of Navy benefits introduces religion into the decision and results in denominational favoritism." Pls.' Mem. in Supp. of Mot. for Prelim. Inj. 23. Plaintiffs tell us that "the other Armed Services" avoid these problems by convening larger selection boards and requiring public voting. Appellants' Br. 60.

As we understand it, plaintiffs' claim rests on two distinct theories. First, in what we shall call their "denominational preference" theory, they assert that selection boards discriminate against non-liturgical Protestants in making promotion decisions in violation of the Establishment Clause and the Fifth Amendment's equal protection component.

Second, plaintiffs assert that the Navy, also in violation of the Establishment Clause, impermissibly delegates governmental authority to religious entities by permitting chaplains to award government benefits in the form of promotions without effective guarantees that such authority will be exercised in a neutral, secular manner.

The Navy takes issue with both theories. With respect to the denominational preference theory, the Navy asserts that there is no "factual basis for [plaintiffs'] claims that Navy chaplain promotion boards had discriminated against plaintiffs in the past or would likely do so in the future." Appellees' Br. 36. Relying on its own statistical expert, the Navy challenges the methodology employed by plaintiffs' expert and asserts that its "own evidence establish[es] the absence of any religious discrimination by the promotion boards." Appellees' Br. 35. As to plaintiffs' second theory, the Navy asserts that the authority delegated to chaplains who sit on promotion boards is not at all standardless because the chaplains "must abide by statutory requirements and Navy instructions governing the selection of officers for promotion." Appellees' Br. 43.

Plaintiffs filed a motion for a preliminary injunction seeking to enjoin the challenged procedures. Denying the motion, the district court began by concluding that plaintiffs lacked Article III standing, reasoning that their asserted future injury was too speculative because it rested on the assumption that chaplains sitting on future selection boards would " 'necessarily favor candidates affiliated with [their] own denomination,' " an assumption the court found implausible given that Naval officers "are presumed to undertake their official duties in good faith." *In re Navy Chaplaincy*, 841 F. Supp. 2d 336, 345 (D.D.C. 2012) (citation omitted). The district court went on to conclude that even if plaintiffs had

Article III standing, the balance of the four preliminary injunction factors weighed against granting injunctive relief. Although the court presumed the existence of irreparable harm because plaintiffs had alleged an Establishment Clause violation, *id*. at 347, the court found that plaintiffs were unlikely to succeed on the merits, *id*. at 345–46, and that the balance of equities and the public interest weighed against granting preliminary injunctive relief. *Id.* at 347–49. Plaintiffs now appeal.

II.

We begin with the question of whether we have statutory jurisdiction to hear this case. In the district court, the Navy argued that the court lacked jurisdiction to consider plaintiffs' claims because courts are prohibited by statute from reviewing claims based "on the failure of a person to be selected for promotion by a promotion board" unless the person has first exhausted administrative remedies. 10 U.S.C. § 628(h)(1). The district court rejected this argument, *In re Navy Chaplaincy*, 841 F. Supp. 2d at 344, and the Navy has wisely chosen not to renew it on appeal. As the district court explained, jurisdiction is proper because plaintiffs ask us "to determine the validity of [a] law, regulation, or policy relating to selection boards," not to review the promotion decisions of individual selection boards. *Id*.; *see* 10 U.S.C. § 628(i)(1) ("Nothing in this section limits[] the jurisdiction of any court of the United States . . . to determine the validity of any law, regulation, or policy relating to selection boards."). We thus turn to the question of Article III standing, an issue we review de novo. *LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011).

"[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or

controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). To establish constitutional standing, a plaintiff must show (1) an injury in fact that is "concrete and particularized" and "actual or imminent"; (2) that the injury is "fairly traceable" to the defendants' challenged conduct; and (3) that the injury is likely to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks and alterations omitted). And, as we earlier explained in this very litigation, "[i]n reviewing the standing question, we must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *In re Navy Chaplaincy*, 534 F.3d at 760.

Where as here plaintiffs seek "forward-looking injunctive . . . relief, past injuries alone are insufficient to establish standing." *NB ex rel. Peacock v. District of Columbia*, 682 F.3d 77, 82 (D.C. Cir. 2012) (internal quotation marks omitted). Instead, plaintiffs must show that they face an imminent threat of future injury. *Lyons*, 461 U.S. at 105; *see also O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974). Here, plaintiffs contend that they face future injury because they will likely suffer discrimination on the basis of their religious denomination when they are considered for promotion by future selection boards. This assertion of future injury depends on two subsidiary premises: that plaintiffs will be considered for promotion by future selection boards and that selection boards will discriminate against them on the basis of their religious denomination.

The first premise is undisputed. The Navy concedes that future selection boards may very well consider the promotion of at least some plaintiffs. Appellees' Br. 19. Thus, this is not a situation in which plaintiffs have asserted mere " 'some day'

intentions" to engage in the conduct they claim will cause them injury. *Lujan*, 504 U.S. at 564; *see also Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1273–74 (D.C. Cir. 1994) (plaintiffs lacked standing to seek injunctive relief where they failed to allege that they would seek job referrals in the near future from the defendant they claimed would discriminate against them on the basis of race). Here, at least some plaintiffs will probably appear before selection boards in the near future.

The second premise—that selection boards are likely to discriminate against plaintiffs on the basis of their religious denomination—is disputed by the Navy on the grounds that the asserted future injury depends, as the district court found, on the questionable assumption that "chaplains who will serve as promotion board members will necessarily favor candidates affiliated with [their] own denomination." *In re Navy Chaplaincy*, 841 F. Supp. 2d at 345 (internal quotation marks omitted). According to the Navy, mere predictions that chaplains will someday behave in a biased manner are too conjectural to support standing. It is true that vague predictions of future discriminatory conduct are insufficient to demonstrate the imminent threat of future injury necessary to support standing to seek injunctive relief. In *Lyons*, for example, the Supreme Court held that a plaintiff who had previously been stopped by the police and subjected to a chokehold lacked standing to seek injunctive relief because the plaintiff's assertion that the police were likely to apply a chokehold to him again in any future encounter was too speculative to demonstrate an imminent threat of future injury. 461 U.S. at 105–06. We have similarly found standing lacking where plaintiffs claimed future injury based on speculation about alleged discriminatory practices unconnected to concrete policies. *See Worth v. Jackson*, 451

F.3d 854, 860 (D.C. Cir. 2006) (plaintiff failed to demonstrate likely future injury where he "challenge[d] no statute, regulation, or written policy committing HUD to favoring minorities or women, resting his claim instead on speculation, untethered to any written directive, about how HUD is likely to make future employment decisions").

In this case, however, plaintiffs' asserted future injury does not depend solely on speculation about whether individual chaplains will behave in a biased manner. Instead, plaintiffs challenge specific policies and procedures—the casting of secret votes, the small size of selection boards, and the appointment of the Chief of Chaplains as president—that they claim have resulted in denominational discrimination and, if not ended, will continue to do so in the future. Unlike in other cases, like *Lyons*, where plaintiffs speculated about the very existence of the unwritten discriminatory practices at issue, here the Navy acknowledges that the challenged policies and procedures not only exist, but will continue to govern the conduct of future selection boards. The prospect of future injury becomes significantly less speculative where, as here, plaintiffs have identified concrete and consistently-implemented policies claimed to produce such injury. For example, the Supreme Court suggested in *Lyons* that the plaintiff would have been able to show a likelihood of future injury had he alleged that the City maintained a policy directing or authorizing the use of chokeholds without provocation. 461 U.S. at 105–06. Similarly, in *NB ex rel. Peacock*, where Medicaid-eligible plaintiffs claimed they faced an imminent threat of future prescription coverage denials without the required notice, we found it significant that plaintiffs had alleged that the defendant maintained "a policy of denying prescription coverage without providing the various forms of notice that plaintiffs claim are required." 682 F.3d at 85. We emphasized that plaintiffs had alleged "not

only that numerous specific denials of coverage were made without adequate notice, but also that [the defendant's] guidance and manuals . . . contain no provisions for giving Medicaid recipients written notice of the reasons for coverage denials." *Id*. (citations omitted).

To be sure, plaintiffs here never allege that the challenged policies directly authorize discrimination against or require disparate treatment of non-liturgical Protestants. Instead, they assert that these policies facilitate or exacerbate discrimination by chaplains serving on selection boards. We take the Navy's point that the asserted causal link between the policies and the alleged discrimination is more attenuated here than in a case where the challenged policies directly authorize the allegedly illegal conduct. *Cf. Worth*, 451 F.3d at 859 (plaintiff had standing to challenge HUD's written affirmative action plan authorizing racial and gender goals in employment). That said, we conclude that plaintiffs' allegation that the challenged policies will likely result in discrimination is sufficiently non-speculative to support standing. For one thing, chaplains inclined to vote on the basis of their religious preferences may be more likely to do so under the cover of secret ballots. Moreover, it goes without saying that the small size of selection boards gives potentially biased chaplains more influence over the outcome of the proceedings.

We would have a different view of this issue if plaintiffs' claims of discrimination on the basis of religious denomination were the type of "fantastic" allegations that have given us pause elsewhere. *Tooley v. Napolitano*, 586 F.3d 1006, 1009 (D.C. Cir. 2009) (internal quotation marks omitted). But this is not such a case. Our nation has long grappled with the curse of discrimination on the basis of religious belief. The "spiritual tyranny" of the Anglican

Church was one reason why Thomas Jefferson proposed the Virginia Statute for Religious Freedom of 1786. Merrill D. Peterson, *Thomas Jefferson and the New Nation* 133–34 (1970 ed.). In the late nineteenth century, reflecting the then "pervasive hostility" towards the Catholic Church, the nation nearly adopted the infamous Blaine Amendment, which would have barred aid to "sectarian"—widely understood to mean "Catholic"—institutions. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). And in more recent times, courts have invalidated laws that discriminate against particular religious beliefs or practices by laying "the hand of the law . . . on the shoulder of a minister of [an] unpopular group." *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (invalidating municipal ordinance interpreted to prohibit preaching in public park by a Jehovah's Witness but to allow church services by Catholics and Protestants); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542, 546–47 (1993) (invalidating ordinances prohibiting animal sacrifice found to be aimed at suppressing the religious practices of Santeria adherents).

In response to plaintiffs' claims, the Navy attacks the evidentiary underpinnings of plaintiffs' allegations and argues that the challenged procedures do not result in discrimination against non-liturgical Protestants. This argument, however, goes to the merits of plaintiffs' claims, not their standing to bring them. To be sure, the Navy may challenge plaintiffs' evidence to the extent it relates to standing, but it may not "bootstrap standing analysis to issues that are controverted on the merits." *Public Citizen v. FTC*, 869 F.2d 1541, 1549 (D.C. Cir. 1989). Here, the Navy neither disputes plaintiffs' claims that they will expose themselves to potential injury by applying for promotions nor argues that it has any plans to change the procedures alleged to injure plaintiffs. Instead, the Navy argues that plaintiffs' evidence fails to demonstrate a

pattern of discrimination against non-liturgical Protestants. Perhaps the Navy is right about this, but that is a question for the merits, not for standing, and at this stage we must assume that plaintiffs will prevail on the merits. Thus, in *In re Navy Chaplaincy*, we "assume[d] arguendo that the Navy's operation of its retirement system favors Catholic chaplains and disfavors non-liturgical Protestant chaplains in violation of the . . . Establishment Clause." 534 F.3d at 760 (internal quotation marks omitted). Here too we must assume that plaintiffs will prevail on their claims that the Navy's promotion system operates in a similarly discriminatory fashion.

We are thus satisfied that at least those plaintiffs whose promotions will likely be considered by future selection boards operating under the challenged policies have standing to pursue their claims for injunctive relief. Although future injury is not certain, "absolute certainty is not required." *NB ex rel. Peacock*, 682 F.3d at 85. It is sufficient that plaintiffs have demonstrated a "likelihood of injury that rises above the level of unadorned speculation—that is, a realistic danger that [they] will suffer future harm." *Id.* at 85–86 (internal quotation marks omitted). Because only one plaintiff must have standing, we have no need to consider either the Navy's motion to dismiss certain retired and former chaplains from the appeal for lack of standing or whether the organizational plaintiffs have standing to pursue their claims. *Comcast Corp. v. FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009).

III.

We turn next to the district court's denial of plaintiffs' motion for a preliminary injunction. A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S.

7, 22 (2008). In order to obtain a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. We review the district court's ultimate decision to deny injunctive relief, as well as its weighing of the preliminary injunction factors, for abuse of discretion. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). We review the district court's legal conclusions de novo and its findings of fact for clear error. *Serono Laboratories, Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998).

In this case, although the district court presumed the presence of irreparable harm because plaintiffs had alleged an Establishment Clause violation, it ultimately denied their motion for a preliminary injunction, concluding that they were unlikely to succeed on the merits and that both the balance of equities and the public interest weighed against granting the injunction. As the Navy concedes, the district court correctly assumed that plaintiffs have demonstrated irreparable harm. Appellees' Br. 44; *see Chaplaincy of Full Gospel Churches*, 454 F.3d at 303 ("[W]here 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."). Moreover, the Supreme Court has instructed that, in assessing the balance of equities and the public interest, we must " 'give great deference to the professional judgment of military authorities' " regarding the harm that would result to military interests if an injunction were granted. *Winter*, 555 U.S. at 24 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)). This leaves the question of likelihood of success on the merits.

We begin with plaintiffs' delegation theory—that the Navy impermissibly delegates governmental authority to religious entities by permitting chaplains to make promotion decisions without effective guarantees that the authority will be exercised in a secular manner. In support, plaintiffs cite *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), in which the Supreme Court held that a Massachusetts statute granting religious institutions an effective veto power over applications for liquor licenses violated the Establishment Clause because the delegated power was "standardless, calling for no reasons, findings, or reasoned conclusions" and because there were no "effective means of guaranteeing that the delegated power will be used exclusively for secular, neutral, and nonideological purposes." *Id.* at 125; *see also United Christian Scientists v. Christian Science Board of Directors*, 829 F.2d 1152, 1170–71 (D.C. Cir. 1987). Plaintiffs emphasize that they object not to the mere delegation of civic authority, but rather to the fact that such delegation is, as in *Larkin*, devoid of standards and procedural guarantees to ensure the neutral exercise of such power.

This case is a far cry from the "standardless" delegation scheme at issue in *Larkin*. Here, Congress and the Secretary of the Navy have articulated secular, neutral standards to guide selection board members in evaluating candidates for promotion. Specifically, board members are required by statute to recommend for promotion those officers they deem "best qualified for promotion within each competitive category considered by the board," 10 U.S.C. § 616(a), and 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, and other information and guidelines as necessary to enable the board to perform its functions properly." SECNAVINST 1420.1B,

¶ 13.d.(2). And 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. 10 U.S.C. §§ 618(a)(1), (c)(1). We thus see no error in the district court's conclusion that plaintiffs are unlikely to succeed on the merits of their delegation theory.

We have a different view of the district court's resolution of plaintiffs' denominational preference theory, i.e., that the Navy discriminates against non-liturgical Protestants on the basis of their religious denomination. As discussed above, plaintiffs contend that their statistical analysis provides strong evidence of a pattern of discrimination. For its part, the Navy challenges plaintiffs' evidence and offers its own expert analysis that it claims demonstrates that no such discrimination exists.

Unfortunately, the district court made no factual findings to resolve these competing claims. All it had to say about the issue was this: "the plaintiffs have submitted no evidence from which the court could assume that the future promotion boards will follow any putative pattern of alleged past discrimination." *In re Navy Chaplaincy*, 841 F. Supp. 2d at 346. But this is the wrong legal standard. Whether "future" promotion boards are likely to discriminate on the basis of religious denomination is, as we have explained, the question we ask to determine whether plaintiffs have Article III standing. The issue before us now—whether plaintiffs are likely to succeed on the merits—turns on whether they have made a strong showing of a pattern of *past* discrimination on the basis of religious denomination and whether that pattern is linked to the policies they challenge. Perhaps by saying that

plaintiffs had "submitted no evidence from which the court could assume" future injury, *id*., the district court meant to say that plaintiffs' evidence of a pattern of past discrimination, when considered in light of the Navy's contrary evidence, was unpersuasive. Yet the district court never said so, much less explained why it reached any such conclusion. Under these circumstances, we have no findings to review for clear error. *See Lyles v. United States*, 759 F.2d 941, 944 (D.C. Cir. 1985) ("Where the trial court provides only conclusory findings, unsupported by subsidiary findings or by an explication of the court's reasoning with respect to the relevant facts, a reviewing court simply is unable to determine whether or not those findings are clearly erroneous.").

The Navy insists that the district court did make factual findings regarding plaintiffs' showing of past discrimination. In support, it points to the court's statement that "the evidence put forth by the plaintiffs at best establishes a colorable claim to relief under the Establishment Clause." *In re Navy Chaplaincy*, 841 F. Supp. 2d at 349. At oral argument, counsel for the Navy claimed that this amounts to an implicit factual finding to which we must defer unless clearly erroneous. Oral Arg. Rec. 34:05–34:32, 34:58–35:30; *see Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1159 (D.C. Cir. 2007) (applying clear error review to implicit factual finding of district court in granting preliminary injunction). But the cited statement cannot fairly be read as a finding—implicit or otherwise—about the strength of plaintiffs' showing of past discrimination. The district court's entirely conclusory statement gives us no insight at all into whether the court perceived the defect in the Establishment Clause claim to be legal or factual, or, if factual, whether it thought the weakness lay in the evidence of past or future discrimination.

IV.

For the foregoing reasons, we reverse the district court's determination that plaintiffs lack Article III standing to seek injunctive relief. We also vacate the district court's denial of a preliminary injunction and remand for further proceedings consistent with this opinion.

So ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5027 **September Term, 2012**

1:07-mc-00269-RMU

Filed On: January 3, 2013

In re: Navy Chaplaincy,

Chaplaincy of Full Gospel Churches, et al.,

Appellants

v.

United States Navy, et al.,

Appellees

BEFORE: Henderson, Rogers, and Tatel, Circuit Judges

O R D E R

Upon consideration of appellants' petition for panel partial rehearing filed on December 17, 2012, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: NAVY CHAPLAINCY	:	Civil Action No.:	07-0269 (RMU)
	:		
	:	Re Document No.:	95

MEMORANDUM OPINION

DENYING THE PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

This matter comes before the court on the plaintiffs' sixth motion for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65(a). The plaintiffs claim that the Navy Chaplain Corps' selection board process, in which Navy chaplains cast votes resulting in the promotion of other chaplains, violates the Establishment Clause of the First Amendment to the United States Constitution. More specifically, the plaintiffs allege that the Navy's selection board process results in denominational favoritism that advantages Catholic and liturgical chaplains while disadvantaging non-liturgical chaplains.[1] The plaintiffs contend that this alleged systematic bias has left non-liturgical chaplains underrepresented in the Navy. For the following reasons, the court denies the plaintiffs' motion for a preliminary injunction.

[1] The term "non-liturgical" denotes Christian denominations or faith groups that do not have a formal liturgy or order in their worship service. *Adair*, Mem Op. (Jan. 10, 2002) at 5.

II. FACTUAL & PROCEDURAL BACKGROUND

The court has recounted the rich factual history in this case on numerous occasions, and forgoes yet another recitation of the facts.[2] *See, e.g.*, *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 293-96 (D.C. Cir. 2006); *Adair v. England*, 183 F. Supp. 2d 31, 34-38 (D.D.C. 2002). For purposes of this memorandum opinion, the court notes that the plaintiffs claim that the Department of the Navy and several of its officials (collectively, "the defendants") have discriminated against the plaintiffs on the basis of their religion, by establishing, promoting and maintaining "illegal religious quotas" and religious preferences in their personnel decision-making. *Adair et al. v. England et al.*, Civ. No. 00-566 ("Adair"), 4th Am. Compl. ¶ 1; *Chaplaincy of Full Gospel Churches et al. v. England et al.*, Civ. No. 99-2945 ("CFGC"), 4th Am. Compl. ¶ 1; *Gibson v. Dep't of Navy*, Civ. No. 06-1696 ("Gibson"), Am. Compl. ¶ 1. More specifically, the plaintiffs allege that the Navy is discriminating against members of "non-liturgical" religions when, *inter alia*, making promotion decisions. *Adair*, Mem Op. (Jan. 10, 2002) at 5-9.

Three cases have been commenced, all raising "substantially similar constitutional challenges to the Navy Chaplaincy program." *In re Navy Chaplaincy*, Miscellaneous No. 07-269, Mem. Order (June 18, 2007) at 3-4. The court ultimately determined that these cases, *Adair v. England*, *CFGC v. England* and *Gibson v. Department of the Navy*, should be consolidated under the caption *In re Navy Chaplaincy*. *See id.* at 4.

[2] On June 18, 2007, the court consolidated these related matters and created a new miscellaneous action for the three consolidated cases, captioned *In re Navy Chaplaincy*. *See* Mem. Order (June 18, 2007).

Although their constitutional challenges are nearly identical, the plaintiffs in each case are varied. The *Adair* plaintiffs are 17 current and former non-liturgical chaplains in the Navy. *Adair*, Mem. Op. (Jan. 10, 2002) at 2. In the *CFGC* case, the plaintiffs are composed of an endorsing agency for non-liturgical military chaplains called the Chaplaincy of Full Gospel Churches, and seven of its individual members. *Id.* Lastly, the *Gibson* plaintiffs consist of 41 individual plaintiffs and one organizational plaintiff, the Associated Gospel Churches, which is "a fellowship of non-denominational, evangelical churches." *Gibson*, Am. Compl., ¶ 3.

As is immediately pertinent here, the Navy Chaplain Corps' selection process allows Navy chaplains to cast votes for or against chaplains, potentially resulting in the promotion of chaplains to higher ranks and larger pay. *See generally* Pls.' Mot. for Prelim. Inj. According to the plaintiffs, chaplain selection board members vote by pressing one of five buttons (ranging from zero to one hundred in twenty-five degree increments) that are concealed in a sleeve. *Id.* ¶ 3. If one chaplain on the selection board presses the button for "zero," that single vote "zeroes out" the other votes, resulting in the likely non-promotion of a candidate. *Id.* ¶ 4. Because the voting buttons are concealed in a sleeve, chaplains' votes are and remain secret. *Id.* ¶ 3.

As a result of this process, the plaintiffs now move for preliminary injunction, asking the court to enjoin the Navy from "(1) the use of the Chief of Chaplains (the 'Chief') or his Deputy as chaplain selection board president; (2) the use of secret votes thereon with no accountability; and (3) placing chaplains on chaplain selection boards without effective guarantees that the power to distribute government benefits will be used solely for secular, neutral and non-ideological purposes." *Id.* at 1. The plaintiffs have recently discovered that the government intends to proceed imminently with the selection board process, highlighting the plaintiffs' need

to swiftly prevent the government from beginning its promotion cycle. With the plaintiffs' motion ripe for adjudication, the court turns to the applicable legal standards and the parties' arguments.

III. ANALYSIS

A. Legal Standard for Injunctive Relief

This court may issue interim injunctive relief only when the movant demonstrates "[1] that [they are] likely to succeed on the merits, [2] that [they are] likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008) (citing *Munaf v. Geren*, 128 S. Ct. 2207, 2218-19 (2008)). It is particularly important for the movant to demonstrate a likelihood of success on the merits. *Cf. Benten v. Kessler*, 505 U.S. 1084, 1085 (1992) (per curiam). Indeed, absent a "substantial indication" of likely success on the merits, "there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review." *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 38 F. Supp. 2d 114, 140 (D.D.C. 1999) (internal quotation omitted).

The other critical factor in the injunctive relief analysis is irreparable injury. A movant must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 129 S. Ct. at 375 (citing *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983)). Indeed, if a party fails to make a sufficient showing of irreparable injury, the court may deny the motion for injunctive relief without considering the other factors. *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995). Provided the plaintiff demonstrates a likelihood of success

on the merits and of irreparable injury, the court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987). Finally, "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

As an extraordinary remedy, courts should grant such relief sparingly. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). The Supreme Court has observed "that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Id.* Therefore, although the trial court has the discretion to issue or deny a preliminary injunction, it is not a form of relief granted lightly. In addition, any injunction that the court issues must be carefully circumscribed and "tailored to remedy the harm shown." *Nat'l Treasury Employees Union v. Yeutter*, 918 F.2d 968, 977 (D.C. Cir. 1990).

B. The Court Denies the Plaintiffs' Motion for a Preliminary Injunction

1. The Court Has Jurisdiction to Entertain the Plaintiffs' Claims

As a threshold matter, the defendants challenge the court's jurisdiction to grant any injunctive relief, and to entertain the plaintiffs' claims insofar as they relate to the promotion boards. According to the defendants, "[t]he court does not possess jurisdiction to enjoin selection board proceedings" because Congress has statutorily limited the relief available by enacting 10 U.S.C. § 628. The plaintiffs respond that § 628 does not specifically address injunctions, and argue that "[h]ad [Congress] wanted to" deprive the court of jurisdiction in this

regard, it would have chosen more specific language. Pls.' Reply at 10. Additionally, the plaintiffs assert that the court has jurisdiction "to enjoin unconstitutional action by government officials." *Id.*

In 2001, Congress enacted legislation that limits a court's jurisdiction over those actions filed on or after December 28, 2001 which seek judicial review of a decision or recommendation by certain military boards. *See* 10 U.S.C. § 628(h). More specifically, the relevant provisions require that a person seeking judicial review of a decision made by a "promotion board" must first exhaust his or her administrative remedies by resorting to a "special selection board."[3] *See* 10 U.S.C. § 628(h). Section 628(h)(1) forbids any "court of the United States" from considering "a claim based to any extent on the failure of a person to be selected for promotion by a promotion board," unless "the person has first been referred by the Secretary concerned to a *special selection board* convened under [10 U.S.C. § 628] and acted upon by that board and the report of the board has been approved by the President." *Id.* § 628(h)(1) (emphasis added). Furthermore, 10 U.S.C. § 628(h)(2) states:

> No official or court of the United States may, with respect to a claim based to any extent on the failure of a person to be selected for promotion by a promotion board –
>
> except as provided in subsection (g), grant any relief on the claim unless the person has been selected for promotion by a special selection board convened under this section to consider the person for recommendation for promotion and the report of the board has been approved by the President.

[3] A "special selection board" is a board convened to consider an officer's eligibility for a promotion, *see* 10 U.S.C. § 628, or to review the decision by a selection board not to recommend an officer (or a former officer) for promotion, *see* 10 U.S.C. § 14502.

The plain language of these provisions indicates that a district court may review a promotion board's decisions only after a special selection board first considers a plaintiff's claim. 10 U.S.C. § 628(h); *see also Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 704 (D.C. Cir. 2009) (observing that determining whether a statute's exhaustion requirements are jurisdictional "is a question of statutory interpretation"); *Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin. Inc*., 502 U.S. 32, 44 (1991) (determining that the district court lacked jurisdiction because the relevant statute had "provide[d the Court] with clear and convincing evidence that Congress intended to deny the District Court jurisdiction" to review the case); *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 101-103 (D.C. Cir. 1986) (noting that "the inclusion of a detailed grievance procedure to resolve [] disputes . . . was the strongest evidence of Congressional intent" that a party exhaust administrative remedies before resorting to the federal courts"). Thus, a court lacks jurisdiction to review decisions by the promotion boards and special selection boards if a plaintiff fails to exhaust his or her administrative remedies under § 628. *See Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1095 (D.C. Cir. 2001) (determining that Congress's "unequivocal intent to cut off judicial review" for a specific type of claim meant that the court lacked jurisdiction over that claim); *Cotrich v. Nicholson*, 2006 WL 3842112, at *2 (M.D. Fla. Dec. 19, 2006) (dismissing the case, *inter alia*, for lack of jurisdiction due to the plaintiff's failure to exhaust the administrative procedures in § 1558). Additionally, the court may not grant "any relief" unless certain procedural hurdles have been satisfied, *i.e.* the convening of a special selection board and approval of that board's report by the President. 10 U.S.C. § 628(i).

There is, however, one critical exception carved out by Congress. Section 628(i) states that "nothing in this section" limits "the jurisdiction of any court of the United States under any provision of law to determine the validity of any law, regulation, or policy relating to selection boards." 10 U.S.C. 628(i). Stated otherwise, under § 628(i), a court retains jurisdiction to review the actions by a selection or promotion board so long as the claim seeks that the court decide the "validity of any law, regulation, or policy relating to selection boards." 10 U.S.C. §§ 1558(g), 628(i).

In reviewing § 628(i) and § 628(h), the court is persuaded that Congress did not intend to deprive this court of jurisdiction to review the alleged unconstitutional policies that guide a promotion board. The plaintiffs specifically challenge the policies used by the Navy to determine the composition and decision-making of the promotion boards. Thus, because the plaintiffs' claims challenge the validity of policies relating to promotion boards, the court concludes that it maintains jurisdiction to review these claims pursuant to § 628(i). Moreover, the court believes that § 628(h), when read in conjunction with § 628(i), does not limit the court's ability to provide injunctive relief when such relief is taken as part of determining the validity of promotion boards' policies. *Motion Picture Ass'n of Am., Inc. v. Fed. Commc'ns Comm'n*, 309 F.3d 796, 801 (D.C. Cir. 2002) (noting that individual sections of a single statute should be construed together).

2. The Plaintiffs Fail to Demonstrate Standing for the Injunctive Relief Requested

The plaintiffs assert that they have standing because they "include active duty and active duty Reserve chaplains and two endorsing agencies with active duty Navy chaplains and

chaplain candidates who will be reviewed by the selection board procedures they challenge." Pls.' Mot. at 2. The defendants argue that the plaintiffs do not meet their burden in demonstrating standing because the plaintiffs cannot "show any injury-in-fact sufficient to establish their standing to seek prospective relief enjoining any future [promotion] boards." Defs.' Opp'n at 12. Specifically, the defendants contend that in requesting injunctive relief, the plaintiffs ask the court to rely on "dubious presumptions." *Id.*

To demonstrate standing, a plaintiff must have suffered (or in this case, will suffer) an injury in fact, which is defined as a harm that is concrete and actual or imminent, not conjectural or hypothetical. *Byrd v. Envtl. Prot. Agency*, 174 F.3d 239, 243 (D.C. Cir. 1999) (citing *Steel Co.*, 523 U.S. at 103). This Circuit has made clear that no standing exists if the plaintiff's allegations are "purely 'speculative[, which is] the ultimate label for injuries too implausible to support standing.'" *Tozzi v. Dep't of Health & Human Servs.*, 271 F.3d 301, 307 (D.C. Cir. 2001) (quoting *Advanced Mgmt. Tech., Inc. v. Fed. Aviation Admin.*, 211 F.3d 633, 637 (D.C. Cir. 2000)). Finally, if a plaintiff is an association, it may demonstrate standing as long as "its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires members' participation in the lawsuit." *Consumer Fed'n of Am. v. Fed. Commc'ns Comm'n*, 348 F.3d 1009, 1011 (D.C. Cir. 2003) (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

As the defendants observe, the plaintiffs essentially ask the court to assume that the chaplains who will serve as promotion board members will "necessarily favor candidates affiliated with his or her own denomination," and that the future promotion boards' decision will

be controlled by the voting habits of these allegedly biased chaplain members. As the court has previously explained to the parties, when a Navy chaplain sits on a promotion board, they act "first and foremost as Naval officers," and are presumed to undertake their official duties in good faith. *See Adair*, Mem. Op. (Jan. 10, 2002) at 48-49. Absent compelling evidence to the contrary, the plaintiffs' suggestions cannot support a finding that the plaintiffs have standing. *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980) (noting that standing does not exist where the court "would have to accept a number of very speculative inferences and assumptions in any endeavor to connect [the] alleged injury with [the challenged conduct]"). As such, the court determines that the plaintiffs lack standing to move for the injunctive relief requested in their motion. *Trans World Airlines, Inc. v. National Mediation Bd*., 1981 U.S. Dist. LEXIS 13618, at *27 (D.D.C. 1981) (noting that the harm suggested by the plaintiff was "too speculative and minimal to generate standing to move for injunctive relief").

3. Substantial Likelihood of Success on the Merits

The plaintiffs argue that the evidence they have submitted makes a clear showing that the defendants will promote personnel who belong to certain denominations over others. Pls.' Mot. at 17. According to the plaintiffs, their expert testimony suggests that the defendants are engaging in practices which "result in clear denominational preferences in the award of government benefits, advancing some denominations and inhibiting others to the detriment of Plaintiffs." *Id.* at 17. They further contend that "[t]he challenged practices are not narrowly tailored to achieve a compelling purpose," and therefore "fail all Establishment Clause tests and result in unequal treatment for all chaplains." *Id.*

The defendants respond that "[t]here is no empirical evidence that would suggest denominational favoritism or discrimination correlated to the denominational affiliation of chaplain board members." Defs.' Opp'n at 19-20. In support of this argument, the defendants put forth testimony from their own expert which "found serious flaws in [the plaintiffs' expert's] analyses." *Id.* at 20. They further argue that establishment clause liability cannot "be predicated solely on statistical evidence of disparate impact in favor of or against certain denominations." *Id*.

Because a preliminary injunction is an "extraordinary and drastic remedy," it is axiomatic that "the one seeking to invoke such stringent relief is obliged to establish a clear and compelling legal right thereto based upon undisputed facts." *Belushi v. Woodward*, 598 F. Supp. 36, 37 (D.D.C. 1984) (citing *Rosemont Enterprises, Inc. v. Random House Inc.*, 366 F.2d 303, 311 (2d Cir. 1966)). If the record presents a number of disputes regarding the inferences that must be drawn from the facts in the record, the court cannot conclude that the plaintiff has demonstrated a substantial likelihood of success on the merits. *Suburban Assocs. Inc. v. U.S. Dep't of Housing & Urban Development*, 2005 WL 3211563, at *10 (D.D.C. 2005); *Secs. & Exchange Comm'n v. Falstaff Brewing Corp.*, 1977 WL 1032, at *18 (D.D.C. 1977).

Here, the court concludes that the plaintiffs have not made the necessary showing that they have a substantial likelihood of success on the merits. First, the plaintiffs have submitted no evidence from which the court could assume that the future promotion boards will follow any putative pattern of alleged past discrimination. *See* Defs.' Opp'n at 23. Second, the plaintiffs' constitutional theory is not one that has been endorsed by this Circuit or the Supreme Court. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540-43 (1993); *Larson*

v. Valente, 456 U.S. 228, 246 (1982); *cf. Lemon v. Kurtzman*, 403 U.S. 602 (1971). Accordingly, the court concludes that the plaintiffs have not made a clear showing that they are likely to succeed on the merits of their Establishment Clause claim.[4]

4. Irreparable Harm

With regard to the irreparable harm prong, this Circuit has "set a high standard" in order for a plaintiff to establish the existence of an irreparable injury. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). The injury must be both certain and great, and must be actual and not theoretical. *Id.* In addition, the injury must be beyond remediation. *Id.* "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Id.* (quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (internal quotation marks omitted)). The plaintiffs claim that absent the injunction, they will be denied benefits in the form of promotions, continuation of active duty and key assignments. Pl.'s Mot. at 24. These losses, however, constitute the very type of injury that the Circuit has indicated are insufficient to establish irreparable harm. *See England*, 454 F.3d at 297. The loss of money, time and energy from these benefits comprise the types of injuries that do not fall within the scope of relief of a preliminary injunction.

4 In addition, the defendants maintain that one of the plaintiffs' central arguments – that certain duties have been impermissibly delegated to religious functionaries – has already been rejected by this court. Defs.' Opp'n at 24. The court need not reiterate its previous analysis; suffice it to say that a religious individual need not be hermetically sealed from the decision-making process. The presence of a religious employee on a board that evaluates another fellow officer's fitness for promotion does not, by itself, make a clear showing that a constitutional injury is imminent. *Adair*, Mem. Op. (Jan. 10, 2002) at 47-50.

Furthermore, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Id.* at 297-98 (quoting *FPC*, 259 F.2d at 925). The defendants here correctly point out that even if the plaintiffs suffer injury in the form of denied benefits, any such injury may be reparable through the Navy's special selection board procedures to remedy past promotion decisions that were influenced by discrimination. Def.'s Opp'n at 3. This Circuit has noted that "former officers who prevail before the special selection board are entitled to revision of their military record to correct an error or remove an injustice resulting from not being selected for promotion by the initial board." *England*, 454 F.3d at 298 (internal quotations and citations omitted). Accordingly, the plaintiffs fail to establish that the harms alleged above are irreparable.

The plaintiffs assert that the defendants' challenged practices violate the Establishment Clause by discriminating against the plaintiffs on the basis of their religious affiliation, and therefore the defendants' alleged violation is sufficient to satisfy the irreparable harm prong. Pl.'s Mot. at 36. This Circuit has indeed held that the mere allegation that the government is violating the Establishment Clause may suffice to satisfy this prong. *England*, 454 F.3d at 304. The Circuit has further noted, however, that a "preliminary injunction will not issue unless the moving party also shows, on the same facts, a substantial likelihood of success on the merits, that the injunction would substantially injure other interested parties, and that the public interest would be furthered by the injunction." *Id.* The Circuit has indicated that "unsupported or undeveloped allegations of government establishment . . . will not withstand scrutiny concerning the movant's likelihood of success on the merits, thereby defeating a request for a preliminary

injunction." *Id.* "Likewise," the Circuit has concluded, is the fate of preliminary injunction motions that "inflict untoward detriment on persons not party to the case," as it is for "motions that do not further the public interest." *Id.* Thus, while the Circuit has found that a violation of the Establishment Clause is sufficient to constitute irreparable harm, its holding does not "in any way lessen[] the burden for parties seeking preliminary injunctive relief [and instead] merely focuses greater attention on the three other factors that indisputably enter into the preliminary injunction determination." *Id.* Accordingly, the court presumes that irreparable harm is present and weighs more heavily the other factors discussed herein in deciding the plaintiffs' preliminary injunction motion.

4. Substantial Injury to Others

The plaintiffs argue that a preliminary injunction would not substantially injure any third parties. Pls.' Mot. at 37-38. In contrast, the defendants argue that the issuance of a preliminary injunction would affect those potential chaplains who are currently entitled to a promotion. Defs.' Opp'n at 38. The defendants further note that scores of military personnel currently rely on a fully staffed chaplaincy corps; these individuals would be harmed by a judicial order that interrupts the flow of military personnel decisions. *Id.*

Whether or not third parties would be affected by a preliminary injunction is of central importance when deciding whether to issue a preliminary injunction. *National Wildlife Federation v. Burford*, 835 F.2d 305, 315 (D.C. Cir. 1987). A preliminary injunction should only be issued if "[t]hird parties are not subject to its prohibitions." *Id.* at 316. Here, it appears that two groups of people would be directly or indirectly affected by the injunction the plaintiffs

seek. First, the injunction the plaintiffs seek would necessarily halt the promotion of those individuals who are currently scheduled to be promoted. *See* Defs.' Opp'n at 38. An injunction would prevent those individuals from receiving all the benefits (monetary or otherwise) that accompany the higher rank to which they are presumably entitled. *Id.*

Second, those military employees who rely upon a properly staffed chaplaincy corps would be indirectly affected by enjoining promotion boards. Should the chaplaincy corps be understaffed, these individuals would not be able to consistently rely on the religious services provided by military chaplains. Defs.' Opp'n at 38. The plaintiffs do not dispute this fact in their briefing. *See* Pls.' Reply at 24-25.

In sum, the defendants have shown that there is a substantial group of third parties who would be affected – both directly and indirectly – by the judicial injunction sought by the plaintiffs. Accordingly, the court's analysis of the third prong of the preliminary injunction framework militates against a finding that the plaintiffs have made "clear showing" of their entitlement to injunctive relief. *See Mazurek*, 520 U.S. at 972.

5. Public Interest

The plaintiffs argue that a preliminary injunction would serve the public interest because such an order would provisionally remedy any potential constitutional violations. Pls.' Mot. at 38. The plaintiffs thus argue that the public would be served by an order requiring the military to comply with the Constitution's First Amendment guarantees. *Id.* In contrast, the defendants argue that a preliminary injunction would harm the Navy by interrupting its personnel decisions and causing its chaplaincy corps to be understaffed. Defs.' Opp'n at 38. The defendants

maintain that a halt in the flow of chaplaincy personnel decisions would cause increased gaps in the ability of chaplains to carry out their mission. *Id.* In addition, the defendants maintain that the public at large would be harmed by an unwarranted judicial intrusion into military matters. *Id.*

As the Supreme Court held in *Goldman v. Weinberger*, "[the judicial] review of military regulations [that are] challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." 475 U.S. 503, 507 (1986). Judicial deference is therefore "at its apogee" when a court is asked to review the constitutional propriety of military affairs. *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). Similarly, case law counsels extreme caution before second-guessing decisions relating to the military's personnel decisions. *Blevins v. Orr*, 721 F.2d 1419, 1423 (D.C. Cir. 1983) ("It is beyond the expertise, as well as the authority, of the judiciary to second-guess the military with respect to overall manpower needs and promotion policies or to pass judgment on military policy concerns, such as possible congressional antipathy to officer promotion practices."). This is particularly true where, as is the case here, it is unclear that any constitutional violation is imminent. *See Bors v. Allen*, 607 F. Supp. 2d 204, 212 (D.D.C. 2009).

The court is acutely aware of the nature and gravity of the constitutional injuries alleged. Nevertheless, the judiciary must defer to military considerations even when the challenges involve First Amendment guarantees protected by the Constitution. *Goldman*, 475 U.S. at 597-08. In addition, the public may suffer when the judiciary interferes with the efficient administration of the military. *Kosnik v. Peters*, 31 F. Supp. 2d 151, 158 (D.D.C. 1998) ("It would be damaging to shift the decision [as to the composition, training, equipping, and control

of a military force] from trained military professionals to a non-specialist judiciary."). Moreover, "interference in military personnel decisions causes great harm to the military because of the potential cumulative effect of multiple injunctions." *Bors v. Allen*, 607 F. Supp. 2d 204, 212 (D.D.C. 2009).

The defendants maintain that a judicially ordered halt in military personnel decisions would hamper the military's ability to carry out its mission. *Id.* In addition, the defendants maintain that the public would be harmed by an unwarranted judicial intrusion into military matters inasmuch as it would open the door to further intrusions. *Id.* The plaintiffs offer no evidence with which to rebut the defendant's arguments, opting instead to claim that these matters are "specious" or unsubstantiated. *See* Pls.' Reply at 24. In doing so, the plaintiffs misconstrue their duty to satisfy the "extraordinary" burden that is borne by a party seeking a judicial remedy prior to the commission of any constitutional injury. *Mazurek*, 520 U.S. at 972. The plaintiffs argue that the public's strong interest in the efficient administration of the military only applies when the military strictly adheres to the Constitution. Pls.' Reply at 25. This puts the cart before the horse, however; the plaintiffs have not yet shown unequivocally that the military will commit any constitutional error. *See* Part III.B.3, *supra*. Until the plaintiffs have done so "by a clear showing," *Mazurek*, 520 U.S. at 972, the court must defer to the military's personnel decisions, *Goldberg*, 475 U.S. at 507. Accordingly, the court concludes that the plaintiffs have not made a clear showing that a preliminary injunction would serve the public interest.

In sum, the court concludes that the plaintiffs have not satisfied their burden of showing their entitlement to injunctive relief. The court notes that the evidence put forth by the plaintiffs at best establishes a colorable claim to relief under the Establishment Clause. Absent a clearer showing of the plaintiffs' likelihood of success on the merits, there is no justification for the court to deviate from the ordinary course of adjudication and judicial review. *See Am. Bankers Ass'n*, 38 F. Supp. 2d at 140. Although the plaintiffs' claims might demonstrate an irreparable injury if ultimately vindicated, *see England*, 454 F.3d at 304, the plaintiffs have failed to demonstrate that an injunction would not substantially injure third parties. In addition, the plaintiffs have failed to show that the public interest would be furthered by the court's intrusion into military personnel decisions. *Goldman*, 475 U.S. at 507-08; *Weinberger v. Romero-Barcelo*, 456 U.S. at 312 (noting that courts must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction"). Accordingly, the court denies the plaintiffs' motion.

IV. CONCLUSION

For the foregoing reasons, the court denies the plaintiff's motion for injunctive relief. An Order consistent with this Memorandum Opinion is separately and contemporaneously issued this 30th day of January, 2012.

RICARDO M. URBINA
United States District Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5204 **September Term, 2020**

1:07-mc-00269-JDB

Filed On: January 15, 2021

In re: Navy Chaplaincy,

Chaplaincy of Full Gospel Churches, et al.,
Appellees

Associated Gospel Churches,

Appellant
v.

United States Navy, et al.,

Appellees

Consolidated with 19-5206

BEFORE: Srinivasan, Chief Judge; Henderson, Rogers, Tatel, Garland*, Millett, Pillard, Wilkins, Katsas*, Rao, and Walker, Circuit Judges; and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

*Circuit Judges Garland and Katsas did not participate in this matter.

451 F.Supp.2d 210
United States District Court,
District of Columbia.

Robert H. ADAIR et al., Plaintiffs,
v.
Donald C. WINTER,[1] Secretary of the Navy et al., Defendants.
Chaplaincy of Full Gospel Churches et al., Plaintiffs,
v.
Donald C. Winter, Secretary of the Navy et al., Defendants.
Civil Action Nos. 00–0566 (RMU), 99–2945(RMU).

|
Sept. 11, 2006.

Synopsis
Background: Current and former Non-Liturgical Protestant chaplains and their endorsing agency filed two separate suits against the Secretary of the Navy, other Navy officials, and the Navy, alleging that the Navy's policies and practices discriminated against them in favor of Catholic and Liturgical Protestant chaplains in violation of the First and Fifth Amendments. After the suits were consolidated, plaintiffs moved to compel the testimony of chaplain selection-board personnel. The United States District Court for the District of Columbia, 217 F.R.D. 250, granted the motion, and defendants filed interlocutory appeal and petition for mandamus. The Court of Appeals, 375 F.3d 1169, reversed in part and vacated and remanded in part. Thereafter, plaintiffs moved for declaratory judgment that statute barring any disclosure of proceedings of military officer selections boards was unconstitutional.

Holdings: The District Court, Urbina, J., held that:

[1] determination by Court of Appeals, that there was no exception to statutory ban on disclosure, was not law of case barring suit on constitutionality of statute;

[2] statute was not unconstitutional, on grounds that it barred all judicial review of officer selection process;

[3] barred information was not necessary to proof of claimant's case; and

[4] statute was not unconstitutional as applied.

Declaratory judgment motion denied.

See, also, 451 F.Supp.2d 202, 2006 WL 2587577.

West Headnotes (4)

[1] Federal Courts Law of the case in general

Law of the case doctrine, barring reconsideration of previously decided issue in later phase of same case, did not preclude district court from reviewing on remand claim that statute prohibiting disclosure of military officer selection board proceedings to any person was unconstitutional, following Court of Appeals determination that there was no exception for discovery in civil suit; constitutional determination was neither made nor implied in Court of Appeals' decision. 10 U.S.C.A. § 618(f).

1 Cases that cite this headnote

[2] Armed Services Appointment and Promotion

Statute prohibiting disclosure of proceedings of military officer selection board was not unconstitutional, on grounds that it barred any judicial review of officer selection process; restriction was not of review, but rather of access to information which could be presented as part of review procedure. U.S.C.A. Const. Art 1, § 3; 10 U.S.C.A. § 618(f).

Cases that cite this headnote

[3] Armed Services Appointment and Promotion

Statute barring disclosure of proceedings of military officer selection boards was not unconstitutional, as applied to chaplains attempting to obtain information in support of their claim that preference in retention and promotions in Navy was being given to chaplains from liturgical Christian denominations, despite allegation that without information chaplains could not proceed with their claims; as far as challenge was directed to specific policies, information regarding individual selection procedures was irrelevant, and insofar as actions of specific boards were challenged, other evidence of statistical nature was available. U.S.C.A. Const.Amend. 1; 10 U.S.C.A. § 618(f).

Cases that cite this headnote

[4] Armed Services Appointment and Promotion

Disclosure of proceedings of military officer selection board was not constitutionally required, in suit by chaplains bringing as applied challenge to statute barring disclosure of proceedings of military officer selection board, sought in furtherance of claim that Navy favored chaplains from liturgical Christian denominations in retention and promotion; there was absence of precedent recognizing right to statutorily privileged information in civil case involving constitutional claims, and court was required to show deference to Congressional regulation of Navy. U.S.C.A. Const.Amend. 1; 10 U.S.C.A. § 618(f).

2 Cases that cite this headnote

Attorneys and Law Firms

*211 Arthur A. Schulcz, Sr., The Law Office of Arthur A. Schulcz, Sr., Vienna, VA, for Plaintiffs.

Michael Q. Hyde, U.S. Department of Justice, Civil Division/Federal Programs Branch, Washington, DC, for Defendants.

Opinion

MEMORANDUM OPINION

URBINA, District Judge.

Denying the Plaintiffs' Motion for Declaratory Judgment

I. INTRODUCTION

The plaintiffs in this consolidated case are current and former Navy chaplains and an ecclesiastical endorsing agency for military chaplains. The plaintiffs charge that the hiring, retention and promotion policies of the Navy Chaplain Corps demonstrate an unconstitutional endorsement of liturgical Christian sects over non-liturgical Christian sects. Currently before the court is the plaintiffs' motion for declaratory judgment.[2] This motion does not *212 directly concern the plaintiffs' underlying constitutional claims. Rather, the plaintiffs' instant motion comprises a constitutional challenge to 10 U.S.C. 618(f),[3] which, as the D.C. Circuit determined in a previous appeal in this case, serves as an absolute bar to civil discovery of the proceedings of Naval officer promotion selection boards. *In re England,* 375 F.3d 1169 (D.C.Cir.2004). In essence, the plaintiffs argue that 618(f), as applied to their underlying constitutional challenges of Naval policy, denies them an opportunity for meaningful judicial review because the evidence barred by 618(f) is essential to their claims. Because there is no general constitutional right to statutorily privileged evidence essential to establishing a constitutional claim and because evidence of the proceedings of individual promotion boards is not essential to the plaintiffs' constitutional challenges to Naval policies, the court denies the plaintiffs' motion for declaratory judgment.

II. BACKGROUND

A. Factual Background

Because the court has published nearly a dozen opinions in this case, it will dispense with a full recitation of the lengthy and convoluted factual background.[4] The plaintiffs' claims fall into three principal categories: First Amendment Establishment Clause claims, Free Exercise Clause claims and Equal Protection Clause claims. *Adair v. England,* 183 F.Supp.2d 31, 41 (D.D.C.2002). First, the plaintiffs charge that the Navy has established and maintained an unconstitutional religious quota system which enables the Navy to hire, promote and retain chaplains from liturgical denominations at a rate greater than the liturgical Christian representation among all Navy personnel. *Id.* at 41–42. Second, the plaintiffs allege a variety of constitutional challenges to the Navy's chaplain-promotion system, including the placement of one Catholic chaplain on each promotion board, the use of chaplains to rate other chaplains, the application of "faith group identifier" codes,[5] and the general domination of promotion

boards by liturgical Protestant and Catholic chaplains. *Id.* at 42–44. Finally, the plaintiffs assert that the Navy's discriminatory policies against, and general hostility toward, non-liturgical denominations deny non-liturgical chaplains and their would-be congregants the constitutional right to free exercise of their religion. *Id.* at 44–45.

*213 B. Procedural History

Without unnecessarily expending judicial resources providing a full exposition of the lengthy procedural background of this case,[6] the court notes the following. In a previous decision in this case, the court granted the plaintiffs' motion to compel, ruling that 618(f)'s general bar on disclosure did not bar civil discovery of promotion-board proceedings. *Chaplaincy of Full Gospel Churches v. Johnson,* 217 F.R.D. 250 (D.D.C.2003). The D.C. Circuit reversed, holding that 618(f)'s command that promotion-board proceedings "may not be disclosed" includes "no inherent ambiguity ... that would justify departing from those plain terms pursuant to a judicially-crafted exception." *In re England,* 375 F.3d at 1177. The provision, therefore, constitutes an absolute statutory privilege from civil discovery of those proceedings under Rule 26(b)(1) of the Federal Rules of Civil Procedure. *Id.* As a result of the D.C. Circuit's decision in *In re England,* the plaintiffs argue that § 618(f) is unconstitutional. The court now turns to the plaintiffs' motion.

III. ANALYSIS

A. The Plaintiffs' Current Constitutional Challenge is Not Barred by the Law–of–the–Case Doctrine

[1] The government argues that by previously questioning the constitutionality of § 618(f) to the D.C. Circuit in *In re England,* the plaintiffs are barred from raising their present constitutional challenge. Defs.' Opp'n at 10–12. Accordingly, before addressing the difficult constitutional issues posed by the plaintiffs, the court will consider whether the law-of-the-case doctrine bars the plaintiffs from raising those claims. To do so, the court will briefly summarize the issues at play before the D.C. Circuit in *In re England* and the plaintiffs' arguments levied in that proceeding.

In *In re England,* the D.C. Circuit ruled that § 618(f) constitutes a statutory bar to civil discovery of promotion-board proceedings. *In re England,* 375 F.3d at 1181 (stating that despite the "harsh outcome," § 618(f) "applies to block civil discovery of promotion selection board proceedings in civil litigation"). In appellate briefing to the *In re England* court, the plaintiffs argued that if § 618(f) constituted a statutory bar to civil discovery of promotion-board proceedings, it should not apply in cases (such as this) in which plaintiffs raise constitutional claims. Defs.' Opp'n Ex. 6 at 22.

To support this argument, the plaintiffs relied on *Webster v. Doe, id.* at 529–32, 108 S.Ct. 2047, a case in which a CIA employee claimed that the CIA violated his constitutional rights by terminating him because of his sexual orientation. *Webster v. Doe,* 486 U.S. 592, 596, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988). At issue in *Webster* was Section 102(c) of the National Security Act, which allows the CIA Director to terminate employees whenever he "shall deem such termination necessary or advisable in the interests of the United States." 5 U.S.C. § 701(a)(2). The Court ruled that § 102(c) "fairly exudes deference to the Director, and appears ... to foreclose the application of any meaningful judicial standard of review." *Webster,* 486 U.S. at 600, 108 S.Ct. 2047. The Court, however, declined to infer that ***214** Congress intended § 102(c) to bar judicial review of constitutional challenges finding no "clear intention" to that effect. *Id.* The *Webster* Court utilized this "clear intention" requirement for interpretations of congressional bars to judicial review of constitutional claims to avoid "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* at 603, 108 S.Ct. 2047 (quoting *Bowen v. Mich. Acad. of Family Physicians,* 476 U.S. 667, 681 n. 12, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986) (noting that "all agree that Congress cannot bar all remedies for enforcing federal constitutional rights") (citation omitted)).

Attempting to shove § 618(f) into the *Webster* framework, the plaintiffs relied in their appellate brief on the legal assumption that a bar to civil discovery of promotion-board proceedings is tantamount to a legislative attempt to preclude judicial review of their constitutional claims. Defs.' Opp'n Ex. 6 at 22. The D.C. Circuit rejected this argument, noting that "[s]ection 618(f) ... does not preclude judicial review of the [plaintiffs'] claims, and the government has not argued that it does." *In re England,* 375 F.3d at 1180 n. 2. The Circuit noted that the "plaintiffs here remain free to litigate their discrimination claims and to support them with other evidence." *Id.*

The law-of-the-case doctrine applies to issues expressly addressed in a previous judicial decision and those issues decided by "necessary implication." *Bouchet v. Nat'l Urban League,* 730 F.2d 799, 806 (D.C.Cir.1984). Although the plaintiffs raised *Webster* concerns to the D.C. Circuit, they did not directly challenge the constitutionality of § 618(f). Rather, the plaintiffs cited *Webster* to encourage the D.C. Circuit to interpret § 618(f) so as not to bar civil discovery of promotion-board proceedings. Defs.' Opp'n Ex. 6 at 22–23. In interpreting § 618(f), the circuit court rejected the existence of any *Webster*-like concern. *In re England,* 375 F.3d at 1180 n. 2. A necessary implication of this ruling, however, is not that the circuit considered, much less ruled, on the constitutionality of § 618(f). Indeed, the plaintiffs could not have challenged the constitutionality of § 618(f) (because of its total bar on civil discovery), until the D.C. Circuit first interpreted the statute as a total bar to civil discovery of promotion-board proceedings. Accordingly, the plaintiffs' constitutional challenge to § 618(f), via its current motion for declaratory judgment, is not barred by the law-of-the-case doctrine. The court now turns to an analysis of the plaintiffs' motion.

B. The Court Denies the Plaintiffs' Motion for Declaratory Judgment

1. Legal Standard for Declaratory Judgment Act

Under the Declaratory Judgment Act, a court "may declare the rights and other legal relations of any interested party" in "a case of actual controversy within its jurisdiction." 28 U.S.C. § 2201(a). "The term 'actual' is ... one of emphasis, and not indicative of a different standard from Article III as to what qualifies as a controversy." *Fed. Express Corp. v. Air Line Pilots Ass'n,* 67 F.3d 961, 963 n. 2 (D.C.Cir.1995). "To satisfy the Constitution's case or controversy requirement, a party filing a declaratory judgment action must show that there is a controversy of 'sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' " *Mova Pharm. Corp. v. Shalala,* 140 F.3d 1060, 1073 (D.C.Cir.1998) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.,* 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941)). There must be "a real and substantial controversy admitting of specific *215 relief through a decree of a conclusive character as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Fed. Express,* 67 F.3d at 963–64. If "an action has no continuing adverse impact and there is no effective relief that a court may grant, any request for judicial review of the action is moot." *Sw. Bell Tel. Co. v. Fed. Commc'n Comm'n,* 168 F.3d 1344, 1350 (D.C.Cir.1999). Even if a controversy exists, however, a district court has broad discretion to withhold declaratory judgment. *Wilton v. Seven Falls Co.,* 515 U.S. 277, 287, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995) (noting "the unique breadth of [a district court's] discretion to decline to enter a declaratory judgment"); *Jackson v. Culinary Sch. of Wash., Ltd.,* 59 F.3d 254, 256 (D.C.Cir.1995) (stating that the Supreme Court "took great pains to emphasize the singular breadth of the district court's discretion to withhold declaratory judgment").

2. Section 618(f) Does Not Bar Judicial Review of Constitutional Claims and is Not Unconstitutional as Applied to the Plaintiffs

According to the plaintiffs, discovery into promotion-board proceedings constitutes the sole means of collecting evidence to support their underlying constitutional claims. Pls.' Mot. at 13–14. Thus, they argue that by denying discovery into promotion-board proceedings, 618(f) strips them of access to any meaningful judicial review. *See, e.g.,* Pls.' Mot. at 16 (stating that "[t]he practical effect of 618(f)'s bar to discovery is to also bar Plaintiffs' claims that their rights under ... the Due Process Clause were violated through illegal criteria and considerations in the selection board process and proceedings"); *id.* at 17 (stating

that "[t]o deny the means to obtain such proof is to deny the claim").

The plaintiffs ask the court to rule either (1) that § 618(f) is unconstitutional because it denies judicial review of constitutional claims arising from promotion-board proceedings or (2) that § 618(f), as applied to these plaintiffs, is unconstitutional because it so severely limits relevant discovery so as to deny the plaintiffs *meaningful* judicial review of their constitutional claims. For reasons that follow, the court rules that § 618(f) does not bar judicial review of constitutional claims and is not unconstitutional as applied to the plaintiffs.

a. Section 618(f) Does Not Bar Judicial Review of Constitutional Claims

[2] The plaintiffs contend that 618(f) is unconstitutional because it bars judicial review of constitutional claims arising out of promotion-board proceedings. *See, e.g.,* Pls.' Mot. at 22 (arguing that "[b]y barring discovery that provides critical evidence establishing the validity of Plaintiffs' claims, Congress has deprived the courts of judicial review"). The plaintiffs make two principal arguments in support of this position, both of which are unpersuasive.

First, the plaintiffs claim that the *In re England* court ruled that Congress intended 618(f) to bar judicial review of their claims. *See, e.g.,* Pls.' Mot. at 16. The plaintiffs' interpretation of *In re England* stems from their reliance on *Webster,* which requires a "clear statement" of congressional intent for the court to rule that Congress intended to preclude judicial review of colorable constitutional claims.***216** *See supra* at 5–6. As the plaintiffs' argument goes, "[b]y holding that Congress intended to bar discovery into promotion board proceedings ... *In re England* implicitly held that Congress intended to extinguish Plaintiffs' constitutional rights." Pls.' Mot. at 16.

This convoluted argument is plausible only if 618(f) precludes judicial review in a similar way as did the National Security Act at issue in *Webster*—by foreclosing any "judicial standard of review" through statutory delegation of promotion decisions to the sole discretion of the Secretary of the Navy. *Webster,* 486 U.S. at 600, 108 S.Ct. 2047. Section 618(f), however, does not alter or foreclose any judicial review of Naval policies, it merely restricts the evidence available to the plaintiffs in support of their claims. *In re England,* 375 F.3d at 1180 n. 2.

Second, the plaintiffs argue that § 618(f) is unconstitutional because it "bars the judiciary from exercising its power to review the constitutional issue arising from or on promotion boards and transfers that power" to the Secretary of the Navy. Pls.' Mot. at 24. In support of this argument, the plaintiffs cite *Bartlett v. Bowen,* 816 F.2d 695 (D.C.Cir.1987). *Id.*

In *Bartlett,* the plaintiff challenged the constitutionality of a provision of the Social Security Act which barred Medicare payments for nursing care to anyone who had received similar care in a Christian Science nursing facility. *Id.* at 697. At issue in that case was the constitutionality of an amount-in-controversy provision of the Medicare Act that explicitly barred judicial review of any benefits determination when the amount in controversy was less than $1,000.00. *Id.*

The plaintiffs cite *Bartlett* for its statement that "a statutory provision precluding all judicial review of constitutional issues removes from the courts an essential judicial function under our implied mandate of separation of powers and deprives an individual of an independent forum for the adjudication of a claim of constitutional right." Pls.' Mot. at 24 (quoting *Bartlett,* 816 F.2d at 703). The plaintiffs then remind this court that the D.C. Circuit had "little doubt that such a limitation on the jurisdiction of ... federal courts to review the constitutionality of federal legislation ... would be an unconstitutional infringement of due process." *Id.* (quoting *Bartlett,* 816 F.2d at 703). Though the words cited by the plaintiffs appear at first blush to lend great weight to their argument, the plaintiffs quotation is selective and takes the D.C. Circuit's statement grossly out of context.

Had the plaintiffs quoted the *Bartlett* court's previous three sentences, the plaintiffs would have learned that the D.C. Circuit's

concern for a preclusion of judicial review emanates from a situation in which a plaintiff "would have no judicial forum whatsoever (in either a federal or state court) in which to pursue her constitutional claim." *Bartlett,* 816 F.2d at 703. The *Bartlett* court's concern comes into play only in instances in which a litigant "would have *no forum at all* for the pursuit of her claims." *Id.* at 703–704 (emphasis in original). As the D.C. Circuit stated, due process places limits on Congress' power "when Congress denies *any* forum—federal, state or agency—for the resolution of a federal constitutional claim." *Id.* (emphasis in original).

The present case does not present a situation in which legislation precludes "*all* judicial review of constitutional issues." *Id.* Section 618(f), as the circuit court ruled, simply does not preclude judicial review of the plaintiffs' claims. *In re England,* 375 F.3d at 1180 n. 2.

***217** As a corollary to their *Bartlett*-based constitutional challenge, the plaintiffs argue that 618(f) violates the separation of powers by removing from this court its constitutional authority under Article III. Pls.' Mot. at 25. According to the plaintiffs, a bar of judicial review of constitutional claims realigns the Constitution's assigned powers, expands the congressional power, and "deprive[s] the judiciary of its powers under the Constitution to declare the law." *Id.* at 21.

Because the plaintiffs' arguments rest on the faulty assumption that 618(f) bars judicial review of the plaintiffs' constitutional claims, the court rejects them. Even if § 618(f) did bar judicial review, however, the plaintiffs' separation of powers argument is without merit. The plaintiffs suggest that § 618(f) "[e]xpands Congress' power over the judiciary by legislatively altering the judiciary's power to review constitutional claims and issues while increasing the executive's power by removing it from judicial accountability." Pls.' Mot. at 21–22. But, the Constitution vests the judicial power in the Supreme Court and "such inferior Courts as the Congress shall from time to time ordain and establish." U.S. Const. art. III. That is, a statute proscribing the jurisdiction of the inferior courts or otherwise limits its judicial power "cannot be in conflict with the Constitution." *Sheldon v. Sill,* 49 U.S. (1 How.) 441, 449 (1850); *see also, Webster,* 486 U.S. at 611–612, 108 S.Ct. 2047 (Scalia, J., dissenting) (stating that the Court "long ago held that the power not to create any lower federal courts at all includes the power to invest them with less than all of the judicial power") (citing *Sheldon,* 49 U.S. (1 How.) 441).

b. Section 618(f) is Not Unconstitutional as Applied to the Plaintiffs' Claims

The plaintiffs' as-applied challenge to § 618(f) rest on two predicates: (1) that discovery of promotion-board proceedings is essential to the plaintiffs' claims, and (2) that the Constitution confers to civil litigants a right of access to discovery (though privileged), which is essential to their constitutional claims. The court rules that such discovery is not essential to the plaintiffs' challenges to Naval chaplain promotion guidelines and that civil litigants do not have a constitutional right of access to discovery essential to their constitutional claims.

i. Discovery of Promotion–Board proceedings is Not Essential to the Plaintiffs' Claims

[3] The plaintiffs argue that testimony of promotion-board proceedings is essential to their claims because such evidence can establish that the Navy utilized a denominational preference in deciding which chaplains to promote.[8] Pls.' Mot. at 16. According to the plaintiffs, their claims require a showing that "forbidden denominational preferences or improper considerations did, in fact, influence the decisions of the challenged boards," and "[d]irect evidence that discrimination indeed occurred and was intended can only come from the testimony of board personnel." *Id.* at 17. In support of this position, the plaintiffs cite *Larson v. Valente,* 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982), *Wallace v. Jaffree,* 472 U.S. 38, 58–59, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985), *Edwards v. Aguillard,* 482 U.S. 578, 587, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). Pls.' Mot. at 18–19. The plaintiffs' reliance on these ***218** cases is misplaced and demonstrates the plaintiffs' confusion between challenges to actions by government actors and challenges to agency policy.

The cases cited by the plaintiffs do not stand for the proposition that a plaintiff cannot establish a claim of discrimination absent proof that government actors *themselves* discriminated by implementing an allegedly discriminatory policy. These cases involve judicial inquiry into the legislative motives for the allegedly discriminatory law or policies, not the motivations of government officials in implementing those laws or policies.[9] *See, e.g., Larson,* 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (reviewing the comments of legislators prior to enactment of a statute in determining that the statute "does not operate evenhandedly [among religious groups], nor was it designed to do so"); *Wallace,* 472 U.S. at 58–59, 105 S.Ct. 2479 (reviewing the legislative history of a statute requiring a moment of silence at the beginning of each school day before determining that the practice had no secular purpose); *Edwards,* 482 U.S. at 587, 107 S.Ct. 2573 (reviewing the statement of the legislative sponsor of a bill requiring educators to teach creation science in conjunction with evolution as evidence that the purpose of the bill was "to narrow the science curriculum").

The plaintiffs' claims do not depend on demonstrating that individual promotion boards applied an impermissible denominational preference. The plaintiffs also challenge several Navy promotion policies themselves (irrespective of the intentions of the promotion board members operating under those policies). The plaintiffs challenge the Navy's practice of identifying the faith group of the chaplain under consideration by promotion board members, the policy of allowing Chiefs or Deputies of Chaplains to approve the membership of promotion boards, and the alleged practice of "stacking" boards with liturgical chaplains to the exclusion of non-liturgical chaplains. *See generally* Compl. Evaluation of the board "stacking" claim, for example, to the extent it results from a tacit rather than express Navy policy, cannot possibly depend on testimony from individual board members regarding decisions made *after* having been placed on the board. Similarly, the plaintiffs' allegation that the Navy instituted a "thirds policy," in which it reserves one-third of its slots in the Chaplain Corps for liturgical Christians does not depend on testimony about the actual proceedings of individual promotion boards. While § 618(f) prevents individual board members from testifying about the proceedings of a selection board, it does not preclude testimony of board members or Navy administrators concerning directives, orders, or policies (written or unwritten) communicated to board members that may have been intended to infuse a denominational preference into the promotion selection process.

As the court noted previously, the Supreme Court has rejected the position that "the plaintiffs ... should have to shoulder 'a burden of unmistakable clarity' to demonstrate 'government favoritism for specific sects' in order to hold the favoritism in ***219** violation of the Establishment Clause." *Adair v. England,* 217 F.Supp.2d 7, 14 (D.D.C.2002) (quoting *County of Allegheny v. ACLU,* 492 U.S. 573, 608–09, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989)). Instead, when 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. *Id.* (quoting *County of Allegheny,* 492 U.S. at 608–609, 109 S.Ct. 3086) (emphasis added). The plaintiffs challenge the Navy's policies, not simply the alleged impermissible intentions and actions of individual board members.[10]

Although discovery into the proceedings of individual promotion boards is relevant to the plaintiffs' claims concerning individual boards' actions, such evidence is not a necessary element of a claim of religious discrimination. Indeed, the plaintiffs proffered substantial statistical and demographic data related to the hiring, promotion, and selection for early retirement of Naval chaplains. Pls.' Mot. Ex. 6. This data may constitute compelling evidence suggesting an intent to employ a denominational preference in promotion decisions. *See* Defs.' Opp'n Ex. 11 (*Wilkins v. United States,* Civ. No. 99–CV–1579–IEG, Slip Op. at 15 (S.D.Cal.2005) (reviewing competent statistical evidence of the retirement recommendation rates for liturgical and non-liturgical Naval Chaplains as evidence indicating the absence of a discriminatory intent in permitting chaplains to sit on selection boards)).

To summarize, the plaintiffs challenge both Naval policies and actions of specific promotion boards. Regarding their challenge to Naval policies, discovery of specific promotion-board proceedings are not essential to their constitutional claims. Regarding the plaintiffs' challenges to specific promotion boards, because the plaintiffs have available to them other evidence supporting their claims (*e.g.* statistical data), discovery of promotion-board proceedings, though relevant, is not essential.

ii. Discovery into Promotion–Board proceedings is Not Constitutionally Required

[4] The second predicate of the plaintiffs' as-applied challenge is more novel and is based on the proposition that litigants ***220** have a constitutional right of access to evidence essential to establishing constitutional claims, even when that evidence is privileged by statute. The Supreme Court has never announced such a right, and the plaintiffs have advanced no coherent theory supporting one.[11]

Supreme Court precedent suggests that when Congress creates a discovery privilege, the fact that evidence qualifying under the privilege is essential to a constitutional claim cannot defeat the privilege. In *Baldrige v. Shapiro,* 455 U.S. 345, 102 S.Ct. 1103, 71 L.Ed.2d 199 (1982), the city of Denver, Colorado sought to compel disclosure of "raw" federal census data that included questionnaires from individual persons and address lists under Rule 26 of the Federal Rules of Civil Procedure and the Freedom of Information Act. *Id.* at 348–52, 102 S.Ct. 1103. The city of Denver sought such data to challenge the accuracy of the census, which it alleged had erroneously undercounted the city's population. *Id.* at 351, 102 S.Ct. 1103. The city argued that it would be under represented in Congress as a result of this undercount. *Id.; see also* U.S. Const. art I, 2, cl. 3 (requiring that representation in the House of Representatives be apportioned among states based on their population as determined by the census). The Census Act, however, prohibited the disclosure of such data. *Baldrige,* 455 U.S. at 354–55, 102 S.Ct. 1103; 13 U.S.C. 9(a) (prohibiting the Census Bureau from disclosing census data whereby "the data furnished by any particular establishment or individual ... can be identified").

The district court in *Baldrige* concluded that without this census information, "the city was denied any meaningful ability to challenge the Bureau's data."*Baldrige,* 455 U.S. at 351, 102 S.Ct. 1103. Nevertheless, the Supreme Court ruled that the Census Act was an absolute privilege from civil discovery of raw census data. *Id.* at 361, 102 S.Ct. 1103 (citing 13 U.S.C. § 9(a)). And because Congress is "vested by the Constitution with authority to conduct the census 'as they shall by Law direct,' " the privilege was a valid exercise of congressional authority, the wisdom of which was "not for [the Court] to decide in light of Congress' 180 years' experience with the census process." *Id.* at 361, 102 S.Ct. 1103. Despite the city of Denver's demonstrated need for the information, "[a] finding of 'privilege' ... shields the requested information from disclosure". *Id.* at 362, 102 S.Ct. 1103.

Although the Court did not address whether a different analysis is appropriate for constitutional claims, the city of Denver's interest in congressional representation according to an accurate determination of its population is arguably equally as weighty as those constitutional rights implicated in the plaintiffs' complaint. *See Reynolds v. Sims,* 377 U.S. 533, 568, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (holding that the Equal Protection Clause demands "no less than substantially equal state legislative representation for all citizens"). Furthermore, and as discussed *infra,* the Constitution confers broad authority to Congress to "make Rules for the Government and Regulation of the land and naval forces," U.S. Const. art. II, 8, cl. 14, similar to the specific power granted to conduct the decennial census "in such Manner as [Congress] shall by Law direct ..." *Id.* art. I, 2, cl. 3.

*221 Generally speaking, criminal proceedings are the only context in which statutory rules prohibiting the introduction of certain kinds of evidence yield to constitutional rights afforded criminal defendants.[12] Nevertheless, under the plaintiffs' theory, whenever a plaintiff brings a constitutional claim and asserts that the evidence is essential to the claim, courts would have to disregard evidentiary privileges, including possibly, privileges for state secrets, information implicating national security, information privileged by the attorney-client privilege, and other such important and universally recognized privileges.[13]

Though § 618(f) may have a collateral effect on a plaintiffs' ability to access evidence relevant to the litigation of constitutional claims (and may undercut the likelihood of the plaintiffs' ultimate success on the underlying merits), the court recognizes no constitutional right of access to discovery in this circumstance, in large part because of Congress' plenary power to regulate the Navy. Article II gives Congress the power "to provide and maintain a Navy," U.S. Const. art. II, 8, cl. 13, and "[t]o make Rules for the Government and Regulation of the land and naval forces." *Id.* art. II, 8, cl. 14. The "specificity" with which these "technically superfluous grant[s] of power" are given to Congress by the Constitution denotes the "insistence ... with which the Constitution confers *222 authority over the Army, Navy, and militia upon the political branches." *United States v. Stanley,* 483

U.S. 669, 681–82 & n. 6, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987); *see also* *Orloff v. Willoughby,* 345 U.S. 83, 93–94, 73 S.Ct. 534, 97 L.Ed. 842 (1953) (ruling that "judges are not given the task of running the Army. The responsibility for setting up channels through which ... grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates"). "The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Orloff,* 345 U.S. at 93–94, 73 S.Ct. 534.

The plaintiffs argue that the goals furthered by 618(f) are presumptively invalid in the face of demonstrated need by the plaintiffs in alleging constitutional violations. Pls.' Mot. at 35–36 (asking the court to find § 618(f) invalid, in part, because "Congress has identified no national threat which it must protect by giving deliberations on promotions 'top secret' security classification, nor has it explained how hiding unconstitutional conduct contributes to the national defense"). Contrary to this position, however, the D.C. Circuit has cited with approval the executive branch's concerns which underlie § 618(f). As the circuit stated, § 618(f) is meant to encourage "frank and open discussion" regarding promotion decisions, a goal that would be seriously inhibited if such discussions were "open to public scrutiny." *In re England,* 375 F.3d at 1169 (quoting Gordon R. England, Secretary of the Navy). The circuit continued by stating that "[d]isclosure of selection board proceedings in civil discovery would certainly undermine, if not totally frustrate, the purpose of Section 618(f)." *Id.,* at 1178.

The role of federal courts in reviewing legislation governing the exercise of military powers is necessarily limited, particularly regarding hiring and promotion decisions, to "ensure that the courts do not become a forum for appeals by every soldier dissatisfied with his or her ratings, a result that would destabilize military command and take the judiciary far afield of its area of competence." *Miller v. Dep't of Navy,* 383 F.Supp.2d 5, 10 (D.D.C.2005); *see also* *Mier v. Owens,* 57 F.3d 747, 751 (9th Cir.1995) (describing the promotion of military officers as "one of the most obvious examples of a personnel action that is integrally related to the military's structure"). For these reasons, courts are deferential to congressional decisions as to the appropriate structure of the military and the rules governing its internal operations, including the decision embodied in 618(f) to shield promotion-board proceedings from later disclosure. *See* *Gilligan v. Morgan,* 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973) (noting that the Constitution vests "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force" exclusively in the legislative and executive branches).

Given the absence of any precedent recognizing a right to statutorily privileged information in a civil case involving constitutional claims, the thinness of the plaintiffs' legal theory, and the broad deference constitutionally afforded Congress to regulate the Navy, the court declines to adopt the plaintiffs' theory that the Constitution requires discovery in derogation of an absolute statutory privilege. The court holds that 618(f) is not unconstitutional as applied to the plaintiffs' claims.

*223 IV. CONCLUSION

For the foregoing reasons, the court denies the plaintiffs' motion for declaratory judgment. An order consistent with this Memorandum Opinion is separately and contemporaneously issued this 11th day of September, 2006.

All Citations

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Footnotes

1 The court substitutes the current Secretary of the Navy, Donald C. Winter, acting in his official capacity, for his predecessor Gordon R. England. Fed.R.Civ.P. 25(d)(1).

2 The plaintiffs, in the alternative, move for summary judgment. Pls.' Mot. at 14. The court is at a loss as to how the present motion is one for summary judgment, even in the alternative. The motion focuses solely on the constitutionality of 10 U.S.C. 618(f)'s bar to discovery, not on the plaintiffs' underlying constitutional and statutory claims. *Id.* Indeed, the plaintiffs' central argument is that without discovery into promotion-board proceedings, they will be *unable* to prove their claims. Bizarrely, in their reply, the plaintiffs suggest that if the court denies the plaintiffs' motion for declaratory judgment, the court should grant summary judgment in the *defendants'* favor. Pls.' Reply at 6 (arguing that "[w]here the plaintiff has the burden, all the defendant must do is show that the plaintiff cannot meet the burden [and] no evidence of discrimination or discriminatory intent on promotion boards means no facts which meets Plaintiffs' burden; in effect, this means no viable claim and no judicial review"). Also, the plaintiffs have not filed a statement of undisputed material facts, as required by the Local Rules. LcvR 56.1.

3 Section 618(f) provides that "[e]xcept as authorized or required by this section, proceedings of a selection board convened under section 611(a) of this title may not be disclosed to any person not a member of the board." 10 U.S.C. § 618(f).

4 For a detailed account of the factual allegations underlying both complaints, see *Adair v. England,* 183 F.Supp.2d 31, 34–38, 40–45 (D.D.C.2002). In January 2001, the court's Calendar Committee transferred these cases from Judge June L. Green to this member of the court. Prior to the transfer, and pursuant to the parties' joint recommendation, Judge Green consolidated the two cases for pretrial purposes. Order (Sept. 26, 2000).

5 Although promotion boards may consider only merit and not denominational affiliation, a three-digit "faith group identifier" code, which identifies the denominational affiliation of the candidate being considered, is allegedly prominently displayed during the promotion process. Compl. at 37. For example, 500 signifies a Catholic and 523 signifies a Southern Baptist. Pls.' Mot. at 3 n. 2.

6 Most recently, the court denied the plaintiffs' motion for a temporary restraining order blocking the Navy from discharging plaintiff Michael Belt and other naval chaplains from active duty in February, 2006. *Chaplaincy of Full Gospel Churches v. England,* 417 F. Supp 2d 1 (D.D.C.2006). On April 20, 2006, the D.C. Circuit summarily affirmed this court's denial of injunctive relief. *Adair v. Holderby,* No. 06–5074 (D.C.Cir. April 20, 2006).

7 Although this case involves challenges to selection board practices, the current motion concerns only the plaintiffs' lack of access to discovery of promotion-board proceedings. *In re England,* 375 F.3d at 1181–1182 (reserving judgment on "whether proceedings of other statutory selection boards are discoverable"). The court presumes, therefore, that the plaintiffs' reference to selection boards rather than promotion boards is in error.

8 In a previous ruling, the court noted that "if the plaintiffs can demonstrate after discovery that some or all of the Navy's policies suggest a denominational preference, then the court will apply strict scrutiny to those policies and practices." *Adair,* 217 F.Supp.2d at 14–15.

9 The court notes that, given the uncertainty as to the controlling test for Establishment Clause claims, evidence of an impermissible purpose may not be required. *See, e.g., Lynch v. Donnelly,* 465 U.S. 668, 690, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring) (stating that "[t]he purpose prong of the *Lemon* test asks whether [the] government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid").

10 Actually, were the plaintiffs' claims limited to allegations of illegal conduct by individual promotion boards and board members, the plaintiffs may have failed to exhaust their administrative remedies. Previously, the court rejected the defendants' arguments that the plaintiffs should be required to exhaust their remedies within the Navy before challenging Naval promotion policies in court. *Adair,* 183 F.Supp.2d at 55. The court based its decision on the fact that the plaintiffs challenge specific policies of the Navy in their complaint, the constitutionality of which are "essentially legal issues." *Id.* Similarly, the Ninth Circuit distinguished claims by military chaplains challenging the "structure of the Chaplain Corps" and "policies affecting the structure of the military chaplaincy"—which were not subject to exhaustion requirements—from those alleging "administratively correctable procedural errors, even when these errors are failures to follow due process." *Wilkins v. United States,* 279 F.3d 782, 786, 789 (9th Cir.2002). The Board of Corrections of Naval Records ("BCNR") has the power to review a promotion board's recommendations to the Secretary of the Navy to determine if the board followed selection guidelines and applied proper criteria in making its decisions. 10 U.S.C. § 1552(a); *Saad v. Dalton,* 846 F.Supp. 889, 891 (S.D.Cal.1994) (holding that a Naval officer was required to exhaust her administrative remedies before bringing a constitutional claim challenging the decision to separate her from active duty). Because Naval guidelines do not permit promotion decisions based on religious affiliation, individual board decisions violating those guidelines are redressible, first, through the BCNR process.

11 The plaintiffs' only argument that denial of access to such evidence implicates the Constitution is based on cases discussing the implications of a congressional preclusion of access to "any forum" for consideration of constitutional claims. As previously explained, *supra* at 10–11, this reliance is unpersuasive.

12 *See Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (holding that the Sixth Amendment right to compulsory process guarantees the admission of hearsay evidence, even when it does not fall into an established hearsay exception, when the evidence is critical and bears persuasive assurances of trustworthiness); *see also Holmes v. South Carolina,* 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (indicating that a state rule of evidence yields to a criminal defendant's constitutional right to a "meaningful opportunity to present a complete defense" when the state rule is "arbitrary" and not based on "any legitimate interest"); *cf. Crawford v. Washington,* 541 U.S. 36, 68–69, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (holding that the Confrontation Clause of the Sixth Amendment prohibits introduction of "testimonial" hearsay statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant). It is unclear, however, whether the Constitution requires introduction of privileged evidence critical to a criminal defendant's defense. *See Washington v. Texas,* 388 U.S. 14, 23 n. 21, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (applying the Compulsory Process Clause to defeat a state evidence rule, but noting that "[n]othing in this opinion should be construed as disapproving testimonial privileges ..."); *Morales v. Portuondo,* 154 F.Supp.2d 706 (S.D.N.Y.2001) (holding that the priest-penitent privilege could not prevent introduction of evidence the exclusion of which would render the defendant's trial fundamentally unfair).

13 Although the plaintiffs appear to concede that privileges for evidence implicating national security concerns are sufficiently weighty to justify barring discovery of evidence essential to even a constitutional claim, Pls.' Reply at 25, they propose no feasible method for the court to render this balance on a case-by-case basis. While judicial balancing is appropriate in determining whether to recognize a privilege pursuant to Rule 501 of the Federal Rules of Evidence, a statutory privilege represents a conclusion of both the legislative and executive branches that the interests furthered by the privilege outweighs the "normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States,* 445 U.S. 40, 50–51, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980). The plaintiffs have articulated no rationale supporting the position that federal courts should supplant this bicameral determination. *In re England,* 375 F.3d at 1180–1181 (stating that the D.C. Circuit's "unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from 'deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill' ") (quoting *Lamie v. United States Tr.,* 540 U.S. 526, 539, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004)).

End of Document

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The First Amendment to the Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

***

The Fifth Amendment to the Constitution provides in relevant part:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

***

10 U.S.C. § 613a. "Nondisclosure of board proceedings", states:

> **(a) Prohibition on disclosure.**--The proceedings of a selection board convened under section 573, 611, or 628 of this title may not be disclosed to any person not a member of the board, except as authorized or required to process the report of the board. This prohibition is a statutory exemption from disclosure, as described in section 552(b)(3) of title 5.
>
> **(b) Prohibited uses of board discussions, deliberations, notes, and records.**--The discussions and deliberations of a selection board described in subsection (a) and any written or documentary record of such discussions and deliberations–
>
> > **(1)** are immune from legal process;
> >
> > **(2)** may not be admitted as evidence; and
> >
> > **(3)** may not be used for any purpose in any action, suit, or judicial or administrative proceeding without the consent of the Secretary of the military department concerned.
>
> (**c) Applicability.** This section applies to all selection boards convened under section 573, 611, or 628 of this title, regardless of the date on which the board was convened.

***

10 U.S.C. § 618(f) (repealed and replaced by 10 U.S.C. § 613a in the FY 2007 National Defense Authorization Act) stated:

(f) Except as authorized or required by this section, proceedings of a selection board convened under section 611(a) of this title may not be disclosed to any person not a member of the board.

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DoD Instruction 1304.28 (Dated June 11, 2004)
SUBJECT: Guidance for the Appointment of Chaplains for the Military Departments

E2. ENCLOSURE 2 DEFINITIONS

E2.1.7. Endorsement. 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.

Note: DoD Instruction 1304.28 was revised effective May 12, 2021. It clarifies the former version. Its relevant parts applicable to the Petition are:

Purpose: In accordance with the authority in DOD Directive 5124.02, this issuance:

- Establishes policy, assigns responsibilities, and identifies education and ecclesiastical requirements for appointing chaplains in the Military Departments.

- Establishes requirements, procedures, and responsibilities for religious organizations to endorse religious ministry professionals RMPs for the chaplaincy.

- Establishes criteria and provides procedures for the administrative separation and loss of professional qualifications for chaplains of the Military Departments.

- Establishes policy for chaplains on:
    - Meeting the religious requirements and caring for the spiritual needs of Service members and other authorized persons.
    - Advising individuals and commands on religion, morals, ethics, well-being and morale.

DoDI at 1.

***

SECTION 3: REQUIREMENTS FOR CHAPLAINCY

3.1. CAPABILITY REQUIREMENTS .

Chaplains:

a. Meet the religious requirements and care for the spiritual needs of Service members and other authorized persons.

b. Advise individuals on religion, morals, ethics, well-being and morale.

c. In accordance with DoDI [DODInstruction] 1300.17, have a primary role in providing for the free exercise of religion and other religious requirements associated with the free exercise of religion that the U.S.government would be otherwise unable to provide to Service members and other authorized persons.

d. Are RMPs able to personally meet the religious requirements of persons in the units to which they are assigned, potentially an isolated or combat environments. Chaplains belong to the religious-endorsing organizations and conduct religious ministry activities consistent with the tenets of their respective religious-endorsing organizations.

DoDI at 5.

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3.2 CHAPLAIN APPOINTMENT CONSIDERATIONS

To be considered for appointment to serve as a chaplain, an RMP must receive an endorsement from a qualified religious-endorsing organization verifying that the RMP: [lists requirements not relevant to this Petition]

DoDI at 6.

The Glossary, DODI at 19, defines "endorsement" as: "The internal process that religious organizations use when designating RMPs to represent the religious organizations to the Military Departments and confirm the ability of their RMPs to conduct religious observances or ceremonies in a military context.

***

SECRETARY OF NAVY ("SECNAV') INSTRUCTION 1730.7, Subj: RELIGIOUS MINISTRY SUPPORT WITHIN THE DEPARTMENT OF THE NAVY

The above SECNAV provides in relevant part

4 Definitions

a. Chaplains. As commissioned officers, Navy chaplains are professionally qualified clergy of a certifying faith group who provide for the free exercise of religion for all military members of the Department of the Navy, their family members, and other authorized persons, in accordance with reference (a). Chaplains advise commands in matters of morale, morals and spiritual well being. In accordance with Article 1063 of reference (b), chaplains shall be detailed or permitted to perform only such duties as are related to religious 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.

Results of Interview #1

On 19 February 1998, RADM Anderson B. Holderby, CHC, USN, Chief of Chaplains, was interviewed by Mr. Philip P. Cooper, NAVINSGEN (NIG-52). Mr. Cooper advised Chaplain Holderby of the provisions of the Privacy Act of 1974. The interview was tape-recorded and Chaplain Holderby provided testimony under oath.

He is a Lutheran with the Evangelical Church of America.

Chaplain Holderby does not recall whether, at the time he convened the FY97 Board, he knew that two of the board members, [Redacted] were en route to be prospective detailers. He did not know [Redacted] personally; Chaplain Holderby's predecessor picked [Redacted] To be the senior Chaplain detailer. Chaplain Holderby knew [Redacted] who had worked for him at the Naval Academy, and had recommended that he be a detailer. Since [Redacted] and [Redacted] did not have previous access to chaplain records, their serving on the board prior to reporting aboard as detailers was not impacted by their new assignments.

Chaplain Holderby has served on three or four chaplain boards, and in every case, he made the point of saying that neither denomination or age would be a consideration, that records would be the only criteria for selection. There was no discussion on those issues.

Chaplain Holderby does not remember whether he briefed [Redacted] record or [Redacted] record nor does he specifically remember [Redacted] record being discussed. Furthermore, he does not remember any of the records he briefed or who briefed which records.

Chaplain Holderby asked the recorders to pass out the records to board members, without any reference to him or to any board member. Approximately six records were distributed to each board member who served as primary briefer for those records. After each primary briefer reviewed the assigned records, he or she passed them to the secondary briefer. Neither Chaplain Holderby nor any board member other than the recorders was involved in choosing who reviewed which records. Chaplain Holderby's experience on boards has been doing the best he could during the proceedings and then "pretty much forget" what took place, even to the extent of not remembering who was selected. He remembers that as President of the Board, he went forward and presented the selection list to the call-outs, but that there was nothing unusual about that process in the case of the FY 97 board.

There was only one denomination issue during the deliberations. One of the members of the board [Redacted], made "an impassioned plea" for selecting a Catholic priest, stating that he was an outstanding chaplain, a quiet but very spiritual man, and a man that the chaplain corps would do well to have

promoted. That selection was probably the board's last selection. That priest was not up against [Redacted] but against another chaplain who had a perfect record. The board struggled with the decision, and Chaplain Holderby thought that if the board selected the priest, the other chaplain would be selected next time around; however, the other chaplain was not selected next time around.

[Redacted], the minority representative, may have asked the board to go back and give a second look at someone, an African American, he was interested in getting selected; as it turned out, the board did not select that person.

Prior to the board, Chaplain Holderby did not know [Redacted] [Redacted] Neither did he know [Redacted] by reputation. Chaplain Holderby had been aware of [Redacted] [Redacted] name which had come up in relation to his being asked to serve with Admiral Lopez. It's not unusual for a particular chaplain to be liked by someone who asks for him, and Chaplain Holderby does not recall whether [Redacted] record was in the group of records set aside as tentative selectees after the board's first confidence vote, and does not recall any one else's record which was in that group.

Chaplain Holderby does not recall any discussion about [Redacted] [Redacted] record. There was a rule during the proceedings that board members could only say positive things about candidates. Chaplain Holderby does not recall any negative comments made about any candidate.

Chaplain Holderby tried to explain to the board what "fully and best qualified" meant in relation to chaplains. Chaplains do not have a career path akin to that of line officers. Therefore, it does not matter what their assignments are, but whether they do good ministry for which they are recognized. The chaplain boards focus on what commanding officers say about a chaplain's ministry.

Medals carry a little weight, in the sense that if a commanding officer says that a chaplain's ministry was good, then a medal shows that he really meant what he said. Some value is given to multiple sea duty tours, as reflecting experience at "deck plate ministry." Some value is also given to a Flag officer's endorsement of a chaplain.

Chaplain Holderby was familiar with some of the chaplains considered for selection. He does not remember any controversy or contentious briefings during the proceedings. The board went out of its way to accommodate anyone who was not satisfied with a briefing and who wanted a record re-briefed.

Chaplain Holderby stated:

"I'm aware of the fact that as President of the Board, [Redacted] conceivably if I wanted to keep emphasizing something, that might have some bearing on it [the way members voted]*, although I have no bearing on what somebody does as far as pushing buttons in there [i.e., secret voting in the 'tank']; I tried to stay away from that; I let the board members talk among themselves; my only job, as I saw it, was if we got off on a tangent, if somebody started talking about something that we should not be talking about, I would mention that and say that I think we ought not to talk about this; that is to say, even if someone would say something like "This priest you can tell has been very . . .' and at that point I would say, "We're not talking about denomination; we're talking chaplain. . .' There's certainly never been a denominational quota system in our selection process, [although] maybe there is one in our accession process.

"The [FY]97 board was done as fairly as we know how to do it. Now look9ing at this [Redacted] memo for CNP of 23 Dec 97], certainly [Redacted] has a very fine record, according to this. I haven't seen his record since that time. And it strikes me that others do too [i.e., have very fine records] on boards, and in some ways I think that's a sign of the times; we [chaplain corps] have the lowest percentage of selection, I think, of anybody in the Navy right now: 50% for Commander, 50% for Captain; that means half of your people in zone are not going to be selected, and some very fine records are being left behind; there is no doubt about that. I don't think that's due to discrimination; it's due to honest determination on the part of the board to pick the best people they know how to pick, in terms of ministry. . .I'm sure that there is no quota system in effect, in terms of using a board to enforce a quota system. . . I empathize with [Redacted] I think he has a very fine record, from what I see here. I don't think people are selected necessarily just on how many A's and how many B's they got; I think an awful lot goes into what the [fitrep] write-ups say, what's said about ministry. . . about a person's spirituality."

Every record was not reviewed by every person on the board. Chaplain Holderby made notes on the officer summary sheets (OSR's) for records he reviewed. Those OSR's were projected on the screen in the tank and all the board members were therefore privy to Chaplain Holderby's notations, as well as notations made by other members. All the board members used an A/B/C/D/E grading system, and so annotated the OSR's they reviewed, to give their overall impressions of the records. The kinds of comments Chaplain Holderby made on the OSR's wee commanding officer comments which he extracted out of the fitrep narratives. He would give A++++ to a record if he were really impressed by it; however, he doesn't specifically remember any instance of doing that during the board proceedings in question.

* Brackets in original NIG Investigation Interview Report

The only person considered by the board whom Chaplain Holderby may have made a concerted effort to "sell" to the board was [Redacted] an ELCA chaplain [Redacted] who was picked up above zone. Chaplain Holderby had just previously seen [Redacted] do a devotion in the presence of a group of chaplains and was somewhat impressed with his ability. [Redacted] had previously once passed over for promotion; Chaplain Holderby does not know why.

Chaplain Holderby also knew [Redacted] who had served in Hawaii when Chaplain Holderby was there; he had not previously served with him and they were not in the same command in Hawaii; Chaplain Holderby therefore could not speak to his performance based on any personal knowledge of his performance.

As the Pacific Fleet chaplain, Chaplain Holderby accompanied Chaplain Dave White then Chief of Chaplains, on a final trip in the western Pacific prior to Chaplain White's retirement. During the stop in Sasebo, Japan, Chaplain Holderby met [Redacted] who was stationed there. That was the only time they met.

Chaplain Holderby does not know [Redacted] at all.

Denominations of the chaplains considered for selection were obvious to the members of the board, as they were shown on the OSR's.

Chaplain Holderby was aware of the fact that as President of the Board, a Flag Officer, and Deputy Chief of Chaplains at the time, he could easily influence a junior member of the board, just by a comment or an extra plus on the overall grade he gave to a record. He tried not to throw in subtle suggestions, as he felt that would be unfair.

Chaplain Holderby does not think that there was any board member predisposed to vote on the basis of denomination.

Chaplain Holderby does not know [Redacted].

Chaplain Holderby knew [Redacted] who was assigned to the Naval Station, Hawaii, when Chaplain Holderby was assigned to CINCPACFLT. They therefore did not work together. Chaplain Holderby went to services that [Redacted] conducted and thought that "he was certainly an adequate preacher [with] a lot of enthusiasm, . . .not . . .necessarily a weak chaplain." Chaplain Holderby thought he "did a pretty good job," but didn't think his name "jumped out as being a water walker."

"Theologically there is a little bit of a separation" between LCMS and ELCA, "although both groups have the exact same founding documents to which they refer. LCMS is more conservative and ELCA is more liberal.

Corps reputation is not discussed on selection boards. However, individual board members may have their own feelings about a candidate's reputation.

Chaplain Holderby stated,

"The others on the board will have to comment on my performance. But I will tell you that the board, as a whole, was above reproach. They prayed before they started that they would do the right thing, and they prayed when it was finished that they did the right thing, and I think they went away from there feeling that we did the right thing."

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On 4 March 1998, telephonically re-interviewed Chaplain Holderby

Chaplain Holderby stated that the LCMS and ELCA work together, especially in the military. They hold joint conferences. Until 1991, he served on a committee comprised of civilian and military Lutherans, represented by both the ELCA and LCMS.

ADM Lopez wanted to establish a new Chaplain billet in support of CINC, Allied Forces, Southern Europe, and have [Redacted] [Redacted] ordered into it. That was bit "an eleventh hour" request, but one which allowed for the "normal course of events" lead time (3-6 months) for processing orders. Prior to sitting on the FY97 board, Chaplain Holderby was aware that this request had been made.

Results of Interview

On 4 February 1998, [redacted], Naval Air Warfare Center Aircraft Division, Patuxent River, was [redacted] telephonically interviewed by Mr. Philip P. Cooper, NAVINSGEN (NIT-52). Mr. Cooper advised [redacted] of the provisions of the Privacy act of 1974. [redacted] provided the following information under oath, and the interview was tape recorded.

A few days prior to this interview, [redacted] spoke with [redacted], his predecessor in his current position. At that time, [redacted] was not aware that [redacted] had been a member of the FY97 0-5 CHC Promotion Board. He told [redacted] that he had been talking to [redacted] who works for [redacted] and that [redacted] had told him that the FY97 Board had considered him for promotion, that the board members were going to be released from their oath for purposes of facilitating an investigation.

The FY97 Board in question was the only board of any kind which [redacted] sat on. He was present during all the board deliberations. He thought the board was handled according to the guidelines of the precept. However, inasmuch as it was his first board, there were some things about it that made him uncomfortable.

There's "sort of a mystique out there:" that boards, as manifested by the board in question, take records and go over them with a fine tooth comb, and they "compare this with that and the value of apples against oranges, and the value of bananas against pineapples kind of thing." [redacted] who was taking more time than the other board members, would like to have had more time to review all of the records in more detail. It's hard to guess what's going on in the board members' minds and to know what expertise is being applied to review of the records. Admiral Holderby, who has sat on a number of boards, can review a record much faster than anyone else. There was another chaplain on that board who is reputed to have sat on many, many boards, who also could review a record much faster than could [redacted] Admiral Holderby talked to [redacted] about his slowness in reviewing records, saying, "Move along a little quicker; you're behind everyone else."

A board normally has ten days to conduct its business. Chaplain Corps boards are reputed for taking only 2 ½ days. Since the Chaplain Corps is relatively small, members of the promotion boards should have the luxury of being even more judicious about their reviews and deliberations.

[redacted] opined that he would have constructed the board membership differently. Detailers are not normally assigned to promotion boards. The Chaplain Corps has two detailers, one Protestant and one Catholic. One is generally 0-6 and the other

is an 0-5. Two members of the FY97 board, and at the time the board met, either had orders to the detailers' office or had been notified that they would be getting such orders. Such membership generates a perception of conflict of interest, given the allegiance of detailers to the Chief of Chaplains office. "Maybe' that's helped fan the flames in the minds of some people that something askew was going on." Therefore, had been President of the Board, he would not have allowed to have been members.

The Chaplain Corps does not have a lot of African-American 0-6 chaplains. There is a requirement that an African-American chaplain sit on promotion boards. does not believe that the same minority representative should sit on as many chaplain boards as has who sat on the Board in question. The requirement for minority representation on chaplain boards could be met with minority officers taken from the line community. Therefore, again for perception reasons, had been President of the Board, he would have found someone other than to sit on the board as the minority representative.

cannot remember specifically what was said during the discussion of the precept, in regards to the interpretation of "fully qualified" and "best qualified." He does remember guidance given in the tank with respect to how to review and assess the records of minority candidates; the occasion for this guidance was a briefing given by the non-chaplain member of the board.

In the tank there were several discussions about officers who had been to sea a lot and moved around a lot, and who had experience in the Fleet. [redacted] does not remember any of the names of those individuals. There was, however,, some weight attached to leadership positions which had been held in direct support of Fleet Operations.

[redacted] Is a Southern Baptist. [redacted]

[redacted] “major sore point” concerns the consideration of denomination at one point during the proceedings of the board. It was nothing that he could have gone to the Secretary of the Navy and said, “This was done illegally.” But it was done “with such finesse at one point” that he felt that “one officer was passed over due to “denominational considerations.” This was serious, given the fact that when a chaplain at the 0-4 level is passed over, “it’s more than just a pass over;” it frequently means that an officer must leave the Navy.

[redacted], a Roman Catholic priest, was the last one selected for promotion during the FY97 board. The vote had been tied between him and either [redacted], a Southern Baptist, or [redacted] also a Southern Baptist.

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[redacted] was selected, but his record was inferior to that of a number of those who had been passed over. [redacted], the Catholic member of the Board, strongly encouraged the board to vote for [redacted]. In spite of the B's on [redacted] fitreps, his congregations loved him, and said that the board needed to give him consideration because he was a hermit for a number of years before entering the chaplain corps and therefore had problems relating to people. During the final stages of discussion, [redacted] suggested that consideration be given to the needs of the chaplain corps, which is "sort of a catch phrase" in the chaplain corps to indicate that the greatest need was for more Catholic chaplains. (All of the board members, with the possible exception of [redacted] understood what [redacted] was implying.) Admiral Holderby, who was sitting next to [redacted] put his hand on his arm to indicate, "Be quiet." If [redacted] had pursued this issue and said blatantly that the board should consider denomination in this case, then [redacted] would have reported the incident to the Secretary of the Navy. The very next vote was overwhelmingly in favor of [redacted] [redacted] left the board "pretty well disgusted over that issue." He thought that what had happened was inappropriate, but nothing he "could raise a red flag over." Admiral Holderby did the right thing, "but the damage had already been done."

[redacted] did not hear anything else during the board's proceedings which indicated that denomination was factored into the deliberations. The President of the Board did not share any philosophy or give any guidance to indicate that denominational balance in the Chaplain Corps should be a consideration.

[redacted] has no reason to say that any of the board members were predisposed to selecting one group of Lutherans over any other.

[redacted] was under the impression that [redacted] , based on his good record, had been selected. After the first session, there was a confidence vote taken. All those who were in the top 96%, approximately 5, were set aside as tentatively selected. [redacted] was under the impression that [redacted] had been in that group.

[redacted] found out that he had been in the first group of selectees; he could only have discovered that fact by a leak from someone on the board.

The recorders passed out the records randomly to various primary briefers. The primary briefers were also secondary briefers for other groups. There was a color code that was used. [redacted], who is a Baptist, gave [redacted] a group of Baptist records which were not included in his primary review, and suggested that he might want to review them. "That was kind of a denominational thing that took [redacted] back a bit," as [redacted] walked over and said, "These are some

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Baptist records that I thought you'd want to look at now." This was out of the norm for what [the board members] did." The records were non-minority Baptists.

Results of Interview

On 4 February 1998, [redacted] Chaplain at Naval Security Group Activity, Chesapeake, VA was telephonically interviewed by Mr. Philip P. Cooper, NAVINSGEN (NIG-52). Mr. Cooper advised [redacted] of the provisions of the Privacy Act of 1974. [redacted] provided the following information under oath. The interview was tape-recorded.

His denomination is Christian Churches/Church of Christ. He was one of the assistant recorders for the FY 97 O-5 CHC Promotion Board, which was the first board to which he had been assigned. He was present during all the board proceedings. Nothing about the proceedings jumped out at him as something unusual. The president of the board read through the precept and told the board members the provisions of the precept were designed to help them select the best chaplains for promotion regardless of denomination or race. It seemed to be very fair with respect to what the President was saying. [redacted] does not remember the President of the Board going into detail about what the precept meant by "fully qualified" or "best qualified."

The recommended procedure was for the briefer to vote prior to briefing the record and then the rest of the board members could vote at any time during the briefing.

One briefing was contentious. ([redacted] cannot remember whose record was being briefed.} Everyone with the exception of the minority representative, [redacted] had voted.[redacted] Upon learning that only his vote was remaining to be cast, [redacted] said that he did not like the fact that all the other votes had been cast, as he felt the whole record should be briefed before the votes were cast. And so he asked for a re-vote. He either had felt pressure to vote or he had a special interest in the particular candidate being briefed.

[Redacted] does not recall that there was any discussion concerning the importance of considering a candidate's leadership positions in support of operational commanders. There was no real career track and it was only a question of what extent to which a chaplain excelled at his assignments. So much of what the board members evaluated in any one record depended on the person doing the briefing.

If denomination was considered in the selection process, it was not obvious. [Redacted] does not recall any remarks made by the President of Board regarding denomination. It was only after all the voting had been done, that the selections in terms of denomination, race, and gender were looked at from a statistical point of view. The statistics were "in the ball park" of what was a desirable distribution, but such was not the focus of the board during the deliberations.

[redacted] also does recall any discussion concerning the two Lutheran Missouri-Synod candidates, [redacted] Nor does he recall any discussion concerning the four Lutheran Evangelical candidates. Likewise there was no discussion of note on [redacted] who received a 100% confidence vote on the first round. [Redacted] had received a Meritorious Service Medal and the now-Commandant of the Marine Corps had hand-written special praise on his fitrep.

All of the records were distributed randomly by the senior recorder. The board members became the "primary briefer" for those records initially distributed to them. They would serve as secondary briefers for all other records.

The President of the Board had much input. He asked good questions during the briefings. He "set the tone for people because he had the star on his shoulder." He did not, however, exercise any undue influence.

What was most surprising was that there were a couple of board members who "couldn't brief at all." In particular, [redacted] "looked at people differently." When Chaplain Holderby briefed to record, if he felt that his candidate had a great record, he might flash on the screen "A +++." On the other hand, [redacted] idea of what might be a great chaplain was something like a B+ or a B++." Those grades have a psychological effect on the board members, regardless of the remarks made during the briefings. [Redacted] would not have wanted [redacted] briefing his record if the had been one of the candidates for selection.

[Redacted] does not believe there was any hidden agenda during the course of the briefing proceedings. It came down to who was briefing the record. "Everything looked above board and equitable." The only thing that bothered [redacted] about the proceedings was the fact that the records of minorities were reviewed more times than those of non-minorities in the same zone.

DEPARTMENT OF DEFENSE
OFFICE OF INSPECTOR GENERAL

REPORT OF INVESTIGATION

CASE NUMBER
P98C69119125

DATE

APR - 1 1999

ALLEGED DENOMINATIONAL DISCRIMINATION AND OTHER IMPROPRIETIES:
NAVY FISCAL YEAR 1997 AND 1998 SELECTION BOARDS FOR
ACTIVE DUTY CHAPLAIN CORPS COMMANDER

Prepared by Program Integrity Directorate

Office of Departmental Inquiries

In Re Navy Chaplaincy
07-mc-269 (GK)
EXHIBIT 8

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ALLEGED DENOMINATIONAL DISCRIMINATION AND OTHER IMPROPRIETIES: NAVY FISCAL YEAR 1997 AND 1998 SELECTION BOARDS FOR ACTIVE DUTY CHAPLAIN CORPS COMMANDER

I. INTRODUCTION AND SUMMARY

We initiated the investigation to address allegations that denominational discrimination and other improprieties in the conduct of the Navy Fiscal Year 1997 (FY 97) and 1998 (FY 98) Selection Boards for Active Duty Chaplain Corps Commander (O-5), were responsible for the failure of those boards to select Lieutenant Commander (LCDR) Stanley M. Aufderheide, Chaplain Corps, U.S. Navy, for promotion to Commander.

FY 97 Board[1]

With respect to the FY 97 board, we initially focused our inquiry on the allegation that intra-denominational discrimination resulted in a 100 percent selection rate for Lutheran chaplains affiliated with the Evangelical Lutheran Church in America (ELCA), compared to a zero percent selection rate for chaplains affiliated with the Lutheran Church-Missouri Synod (LMS).[2] Because [redacted] who served [redacted] of the FY 97 board, was a Lutheran chaplain affiliated with the ELCA, it was alleged that improper influence or other impropriety on his part caused the significant disparity in selection rates for Lutheran chaplains to the detriment of LCDR Aufderheide.[3]

After an investigation by the Naval Inspector General (IG) did not substantiate allegations of denominational discrimination on the part of [redacted] several Members of Congress asked that we review the matter further. In support of the request for further investigative work, the Members of Congress noted that, contrary to the findings of the Naval IG, a Navy Equal Opportunity (EO) investigation had earlier concluded that allegations of denominational discrimination during FY 97 board proceedings had merit and recommended a special selection board for LCDR Aufderheide. In addition, the following specific irregularities in FY 97 board proceedings, some of which implicated [redacted] were alleged as having unfairly reduced LCDR Aufderheide's selection opportunity.

- The distribution of personnel records to board members was designed to benefit certain eligible officers.
- One member of the board was improperly rushed to make decisions.

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[1] We will refer to the two selection boards at issue as the "FY 97 board" or "FY 98 board" as appropriate. The FY 97 board met in April 1996, and the FY 98 board met in April 1997.

[2] Among other eligible officers, the FY 97 board considered six Lutheran chaplains for selection for promotion--four ELCA and two LMS. The four ELCA chaplains were selected. Both LCDR Aufderheide and the other eligible LMS chaplain failed selection.

[3] At the time [redacted] was the [redacted] U.S. Navy. He has since been appointed [redacted]

- that the appointment of "detailers" (officers charged with duty assignments and other career management responsibilities) as board members created the perception of a conflict of interest (that is, detailers, in the course of their official duties, normally have access to a wide variety of personal information about eligible officers that should not be considered by a selection board); and

- that a board member violated his oath of secrecy by "leaking" information about board proceedings.

Although we found some indication that the well recognized shortage of Roman Catholic chaplains may have been a factor in the final selection made by the FY 97 board (after several votes, a Roman Catholic was picked over a Baptist), we found evidence insufficient to conclude that denomination was the primary consideration—or that any board member openly advocated the need to select Roman Catholics. Accordingly, we concluded that the selection was consistent with law and regulation that pertain to selection board proceedings. Further, we found that current detailers were not appointed to the board. Rather, two prospective detailers, who had not yet gained access to personal information that might have affected their independence, served on the board. Finally, evidence regarding an alleged "leak" was insufficient to substantiate impropriety by any board member.

By memorandum dated July 8, 1998, we advised the Assistant Secretary of Defense (Force Management Policy) that we did not substantiate allegations of misconduct involving [redacted] b

FY 98 Board

We further addressed allegations that irregularities occurred in the FY 98 board which were to the specific detriment of LCDR Aufderheide and, therefore, caused his nonselection. Specifically, we investigated the following allegations.

- Like the FY 97 board, a chaplain who did not meet Navy physical readiness standards was improperly selected for promotion.

- The appointment of two Roman Catholic chaplains as FY 98 board members violated the establishment clause of the United States Constitution.[4]

- The existence of denominational discrimination favored the selection of Roman Catholic chaplains. In that regard, the FY 98 board allegedly selected two Roman Catholic chaplains who had not been selected by

[4] The establishment clause of the United States Constitution states "Congress shall make no law respecting an establishment of religion." The Supreme Court has interpreted the clause to mean: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance."

previous boards and whose records were inferior to those of other eligible officers under consideration.

- One board member made inappropriate, critical remarks about LCDR Aufderheide because of a prior disagreement between that board member and LCDR Aufderheide.

For reasons set forth above, we did not substantiate the allegation that the FY 98 board improperly selected an officer who did not meet Navy physical readiness standards. Further, we found that the appointment of two Roman Catholic chaplains to the FY 98 board violated no law or regulation and was reasonable given the shortage of potential appointees with requisite backgrounds.

With respect to the remaining allegations, we found some evidence that denominational considerations may have been a factor in selections made by the FY 98 board. Specifically, we concluded that the [redacted] Roman Catholic board member may have made comments that were designed to remind fellow board members of the shortage of Roman Catholic chaplains and, because of his concerns in that regard, may have stressed the qualifications of eligible officers who were Roman Catholic priests. However, the evidence was insufficient to conclude that he made an overt denominational appeal or, more importantly, that, as a result of his comments, denomination took precedence over the qualifications of eligible officers as a selection criterion. As a result, we concluded that the FY 98 selection of two Roman Catholic chaplains, who were not selected by previous boards, was consistent with law and regulation which pertain to selection board proceedings.

Of consequence to the specific case of LCDR Aufderheide, however, was our determination that a FY 98 board member made adverse comments regarding LCDR Aufderheide that caused another board member to alter his vote to the detriment of LCDR Aufderheide. Although the board member who allegedly made the adverse comments did not recall making them, we found persuasive the testimony of two other board members and two recorders to the effect that unfavorable information concerning LCDR Aufderheide was, in fact, introduced during board deliberations. Because that information was based on personal knowledge and had not been included in the information regarding LCDR Aufderheide placed before the board, we concluded that consideration of the unfavorable comments constituted "material error" within the meaning of applicable selection board statutes and regulations. We recommend that the Secretary of the Navy consider a special selection board because of that error.

In considering all evidence gathered during our investigation, we found little indication of deficiencies in the Navy selection board process. We do not consider the unfavorable comments made about LCDR Aufderheide as evidence of systemic weakness, but rather an isolated deviation from an otherwise sound process. Accordingly, we make no recommendations for systemic change.

This report sets forth our findings and conclusions based on a preponderance of the evidence.

first and second briefings will be conducted by different briefers (one primary and one secondary briefer). Records are to be distributed randomly by recorders to voting members for briefing.

Board members work in two rooms--a records review room and the "tank." All deliberations on the records and all voting occur in the tank, where the summarized record of each eligible officer is projected on a screen while a board member briefs the record. After each briefing, members may discuss the record under consideration, then each must "vote the record" by depressing one of five buttons in a "sleeve" which hides the voter's hand, ensuring the secrecy of the vote. The buttons coincide with degrees of confidence the voter has in the record being projected, ranging from zero to 100 in 25-degree increments.[9]

The briefer is responsible for reviewing the entire record of the eligible officer he or she is briefing, and for bringing to the attention of the other board members important points that highlight the eligible officer's career. The other members review the eligible officer's Officer Summary Record projected onto a screen as the record is briefed.[10] The remainder of the eligible officer's record, to include fitness reports with narratives prepared by rating officers, is available to all board members but is generally reviewed only by the briefers of the record.

After an initial briefing of all records in-zone and above-zone, selection boards generally conduct a "confidence vote" to determine how the records are distributed on a scattergram.[11] All records scoring above a certain level (a number selected by the board, usually between 90 and 100) are set aside as "tentative" or "probable" selects. These records are often selected for promotion without any further discussion. Likewise, all records below a certain confidence level are set aside as probable nonselects. The remaining records between these two cut-off points are said to fall in the "crunch." Normally, multiple briefings and votes, and much discussion, will precede final selection of records from the crunch to fill the remaining available promotion slots.

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[9] For example, a board member who strongly believes an eligible officer is qualified for promotion might depress the button indicating a 100-degree of confidence. The member's votes are electronically tabulated.

[10] The Officer Summary Record is a condensed document, consisting of personal information on the eligible officer--to include age, service dates, education, and awards--and a tabulation of the performance ratings the eligible officer has received on fitness reports throughout his or her career.

[11] Records considered by selection boards fall into three categories based on the eligible officers' dates of rank: in-zone; above-zone; and below-zone. Records in-zone for a particular board are all those records of eligible officers who were promoted to their current grade during the period between two dates selected by the Secretary of the Navy for that fiscal year's board. Records above-zone are those of eligible officers who were promoted to their current grade before the earliest date defining the zone, and who have previously been considered and nonselected in a prior year's "in-zone." Records below-zone are records of eligible officers who were promoted to their current grade after the latest date defining the current in-zone. Subject to certain restrictions and guidelines prescribed by the Secretary of the Navy in the board precept, selection boards may select for promotion records from any of these three categories.

Secretary of the Navy memorandum, Precept Convening a FY 97 Selection Board, dated April 9, 1996

The precept instructs members not to disclose board proceedings to any individual who was not a board member or board recorder, except under circumstances authorized by law or regulation.

SECNAVINST 1401.3, Selection Board Members, dated December 1, 1989

Paragraph 4.g. of the Instruction states that officers assigned as detailers may not be appointed as board members while serving in those assignments or for one year following reassignment.

SECNAVINST 1730.7A, Religious Ministries within the Department of the Navy, dated September 2, 1993

Enclosure 1, paragraph 1.b .of this Instruction directs the Chief of Chaplains to provide appropriate ministries to support the religious needs and preferences of all members of the naval service, eligible family members, and other authorized personnel throughout the Department of the Navy.

Facts

Last Selection by the FY 97 Board

As mentioned above, one member of the FY 97 board testified to a Naval IG investigator that he had witnessed one selection made during the board proceedings that he believed was based on denominational considerations. The board member (a Baptist chaplain) stated that the selection was for the last available promotion and the choice was between a Roman Catholic priest and one or two Baptists. Other witnesses to this selection remembered a third, below-zone officer as having been in competition with the priest, but no board member mentioned LCDR Aufderheide as a competitor for the final board selection. Accordingly, we determined that events associated with the final selection had no impact on his selection opportunity.

[redacted]

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DCU 16

OPPOSITION

[redacted] RADM Holderby [redacted] RADM Holderby [redacted] RADM Holderby [redacted]

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[redacted] RADM Holderby [redacted] RADM Holderby's [redacted]

In sworn testimony to us, RADM Holderby did not remember this specific incident, but he vaguely recalled stopping one member from making a denominational reference. With respect to the final selection, RADM Holderby told us,

> "...we struggled with [denominational requirements]. Along the lines of needs of the Navy versus a record that looks awfully good here. Finally, after a long time as I remember the board voted for— on the needs of the Navy side of the house."

When we asked RADM Holderby what he meant by "needs of the Navy" in this context, he stated, "I'm talking about the fact that we need priests who are effective...." We asked him to explain this reference to religious denomination in light of his admonition to the board not to consider denomination. He answered:

> "...we tend to ... look at priests the same way we look at minorities and ... women ... we justify it in terms of who needs what kind of care.... [W]hen we talk of needs of the Navy it includes priests. It includes minorities. It includes women and it includes very effective ministers. I don't see it as a code word for priests."

Appointment of detailers as board members

In a letter to this office dated May 7, 1998, Senator John Glenn questioned whether the appointment of two detailers as board members created an apparent conflict of interest.[23] Further, as indicated in the standards section above, Navy policy prohibits detailers from serving on a selection board. In testimony from knowledgeable

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[22] It was generally acknowledged among all board members we interviewed that there is a shortage of Roman Catholic chaplains within the Navy Chaplain Corps. Representatives from the offices of both the Air Force and Army Chiefs of Chaplains reported similar shortages.

[23] Chaplain Corps detailers are responsible for arranging the duty assignments of other ch other matters that involve career management.

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the first ballot of the FY 97 board. However, the board member asserted that his recollection of the discussion was accurate, and that someone had, therefore, divulged privileged information concerning board proceedings.

Discussion

We concluded that denomination may have been a factor in the last selection made by the FY 97 board based on the clear recollection of the "needs of the Navy" incident by one board member that was, to some extent, corroborated by the vague recollections of [redacted] and the [redacted] chaplain involved. However, because no other board members recalled the "needs of the Navy" statement with respect to the final selection, we believe that any intended denominational inference had minimal impact on their decision in the matter. In that regard, we found no evidence that a board member made an open appeal for more Roman Catholic selections. Further, the fact that the person making an appeal to the needs of the Navy was a non-Roman Catholic suggests that the appeal was motivated by a belief in legitimate manpower requirements (that is, the Navy's need for skills possessed by Roman Catholic chaplains) and not a reflection of a denominational bias.

Moreover, we found no law or regulation that precluded consideration of denomination as one factor in making selections for promotion. In that regard, the precept directed that board members "give due consideration to the needs of the Navy for officers with particular skills" in recommending the best qualified officers for promotion.[25] Even if reference to the "needs of the Navy" in the context of the selection of a Roman Catholic priest were considered improper, the evidence indicates that [redacted] reacted correctly by stopping such discussion.

With respect to the remaining issues involving the FY 97 board, we found that current detailers were not appointed to the board and that no violation of Navy policy occurred. Rather, two prospective detailers, who had not yet gained access to personal information, served on the board.

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[25] We consider it beyond the scope of this investigation to address the implications of the establishment clause of the Constitution with respect to denominational considerations in the selection process. However we note the following: (1) The second component of the religion provisions in the First Amendment to the Constitution is the free exercise clause; (2) in the seminal case of *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985), the U.S. Appeals Court for the Second Circuit determined that an important constitutional basis for the military chaplaincy was the Government's legitimate attempt to facilitate the free exercise of all religions for Service members who may be removed due to military service from access to practice their faith; (3) the shortage of Roman Catholic priests to minister to the needs of Roman Catholic service personnel and their families is generally recognized in all the Military Services. In this regard, we note that SECNAVINST 1730.7A defines the mission of the Navy Chaplain Corps as supporting "the religious needs and preferences of all members of the naval service and other eligible persons." In this context, the shortage of Roman Catholic chaplains would appear to be a legitimate consideration in some Chaplain Corps personnel decisions (for example, accessions and assignments).

The board member who allegedly made the unfavorable comments about LCDR Aufderheide confirmed that he had served with LCDR Aufderheide in London and that he had "several arguments, several disagreements with him" at the time. However, the board member denied that LCDR Aufderheide confronted him over alleged alcohol consumption or womanizing, and denied telling LCDR Aufderheide that he would prevent LCDR Aufderheide's selection for promotion.

[redacted]

The three remaining board members (including [redacted] and one recorder stated that they had no memory of adverse comments made about LCDR Aufderheide.

Discussion

Of the four possible irregularities in FY 98 board proceedings that we address above, we concluded that two did not merit further consideration:

- As previously stated, we determined that the failure to meet Navy physical readiness standards does not disqualify an eligible officer for consideration by a selection board. Indeed, we found nothing in law, regulation or precept which identified physical readiness as a matter of particular importance for consideration by selection boards. Accordingly, the selection by the FY 98 board of an officer who did not comply with weight standards at some point in his career did not constitute a violation of law or material error which would justify a special selection board for those eligible officers who were not selected.

- Regarding the appointment of two Roman Catholic chaplains to the FY 98 board, we found no law or regulation that precluded such board composition. Further, the preliminary injunction, which gave rise to the allegation that two Roman Catholics on a selection board was improper, was based on Navy policy that was no longer in effect when the FY 98 board was constituted. Finally, the explanation for appointing two Roman Catholic board members in this case was unrelated to their denomination and was reasonable under the circumstances.

With respect to the remaining allegations, we found some evidence that denominational considerations may have been a factor in above-zone selections made by the FY 98 board. Specifically, we concluded that the [redacted] Roman Catholic board member may have made comments that were designed to remind fellow board members of the shortage of Roman Catholic chaplains and may have supported eligible officers who were Roman Catholic priests because of his concerns in that regard.

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However, the evidence was insufficient to conclude that he made an overt appeal to consider above-zone Roman Catholic eligible officers, as the "pitch" was described to us by one board member. Eight other individuals, who were presumably in the room at the time the precept was discussed, denied hearing any denominational appeal of that type. Moreover, we believe it unlikely that a board member would have made such an obvious denominational appeal shortly after [redacted] had specifically prohibited calling attention to "faith group." Clearly, if such an appeal were made, it is reasonable to suggest that [redacted] or other board members would have questioned it—or, at a minimum, recalled it. Finally, although some board members were either aware of the priest shortage in the Navy or vaguely recalled that the shortage may have been alluded to during deliberations, we found no evidence that voting was influenced by that issue.

As a result we concluded that denomination may have been a factor in FY 98 above-zone selections, but it was not of sufficient influence in the decision process to render those selections inconsistent with law or regulation which pertain to selection board proceedings.[31] The preponderance of testimony from board members and recorders demonstrated that denomination did not take precedence over the qualifications of eligible officers as a selection criterion.

Of consequence to the specific case of LCDR Aufderheide, however, was our determination that a FY 98 board member made adverse comments regarding LCDR Aufderheide that caused another board member to alter his vote to the detriment of LCDR Aufderheide. Although the board member who allegedly made the adverse comments did not recall making them, we found persuasive the testimony of two other board members and two recorders to the effect that unfavorable comments concerning LCDR Aufderheide were, in fact, introduced during board deliberations. We believe that those comments constitute information that was ineligible for consideration by a selection board.

Specifically, DoDI 1320.14 allows board members to discuss their own personal knowledge of eligible officers, only to the extent that such matters are not precluded by law or regulation from inclusion in an officer's personnel record. Navy regulations specify that adverse material may not be placed in an officer's personnel file unless the officer has been notified of the intent to do so and been afforded an opportunity to comment. In elaborating on this principle, the opening brief by the FY 98 board recorder stipulated that members could not comment adversely on eligible officers unless such adverse information was already included in the eligible officer's fitness reports or the material placed before the board.

In this case, we found no evidence that unfavorable information of the nature introduced by one board member (that is, his experience in serving with LCDR Aufderheide in London) had been incorporated into LCDR Aufderheide's personnel file. Accordingly, the FY 98 board's consideration of that information constituted a procedural error, which "more likely than not" deprived LCDR Aufderheide of fair and impartial consideration, as evidenced by the fact that at least one board member changed his vote negatively in reliance on the adverse information. As such,

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31 That is, any FY 98 board selection based primarily on denomination—rather than other qualities itemized in the "best qualified" standard—could constitute a departure from the precept which would constitute "material error" within the meaning of law and regulation.

SUMMARY OF DANIEL ROYSDEN'S DEPOSITION TESTIMONY

CH Daniel Roysden was deposed over the course of two days, August 4- 5, 2004. The cites to his deposition transcripts are proved but to provide the pages as has been done with ChH Wilder, would unnecessarily increase the volume of documents. If they are requested, Plaintiffs will provide them.

CH Roysden joined the chaplain candidate program in 1981, was initially commissioned as a chaplain endorsed by the United Methodist Church and accessed into the Navy reserve [28:1-21].

Before coming on active duty, he had numerous assignments filling the short-term recalls for active duty as a Naval Reserve chaplain. He he had good reports and a good reputation.

Before coming to active duty, CH Roysden changed his endorsement from United Methodist to Chaplaincy of Full Gospel Churches ("CFGC"). He testified that although he attempted to get this changed officially, the Chaplain Corps (the CHC) did not change his endorsement officially for many years. [34:17-23]. He testified in retrospect the CHC's error may have allowed him to be promoted to Lieutenant Commander (LCDR) because he was promoted as a United Methodist, not from CFGC [35:15-16], [36:2-8]. His detailer warned him against changing endorsements from the liturgical United Methodist to the Non-liturgical CFGC:

> When he found out I was switching from United Methodist to CFGC his statement was, "You just signed your death sentence." He said, "If you at switched from non-liturgical to liturgical, you'd probably be okay." He said, "In fact, I had done that"-himself-but he said, "by switching the opposite way, is: be very difficult for you in the future." [51:5-12].

Roysden's first assignment as an active duty chaplain was to a ship stationed in Yokosuka, Japan. Just before his first deployment, the SURPAC senior chaplain, CAPT O'Donnell, visited Roysden's ship and requested an interview with the Captain without telling

Roysden the specific purpose. When CH Roysden's CO signed Roysden's fitness report as the ship's chaplain, his Captain informed him CAPT O'Donnell had warned the CO "do not be surprised if we have to relieve [Roysden] for cause. He's from a church group that has no good track record, they're a brand-new denomination." [79:4-25].

> I would love to see not only myself, but every chaplain on active duty being given an environment in which we can minister effectively to our personnel without fear of office bullies, of retaliation, of manipulation. And it's not just non-liturgicals that I'm concerned about, I have liturgical friends, I have Roman Catholic friends who have been abused and mistreated horribly.
>
> I think the Chaplain Corps is an unhealthy place and I, first of all, would like to see the court somehow be able to address that issue. I don't know how the Court can do that, but I would love to see the Court address the issue of making the Chaplain Corps what it should be, not what it is. Which should be a place where we can meet the needs of the soldiers and sailors, the Marines, even civilians that I work with. I do a lot of ministry to our civilian employees.

[72:2-19]

CH Roysden's next duty station was Naval Station Pearl Harbor. He found a charismatic group meeting on base without approval, a violation of Navy policy. CH Craycraft would not permit them to use the chapel for services, but CH Roysden found a place for them to hold services at the Family Service Center, bringing them under the purview of the Command Religious Program. CH Craycraft was upset that they were meeting in the Family Service Center and told CH Roysden, "[p]eople like them, people who were Pentecostal Charismatics not only had no business holding worship on naval property, they had no business being in the Navy." And he knew fully well that I was endorsed by the Chaplaincy of Full Gospel Churches. [139:2-7]

CH Roysden's record was superior to others selected on the FY 98 board, a fact known because the Stafford Report provided the rankings and scores of those selected. His record, with the exception of "two Bs as a reservist, all this active duty evaluations were all "As".[72: 23-

73:9].

Roysden's reason for joining the litigation was the improper investigation of CAPT Young in San Diego. "I was not gonna be given a fair hearing by the Navy, that there was already the appearance of a cover up in that investigation, including what I believe is the JAG officer's inability to give me proper counseling following that investigation, it was a botched investigation, was an improper investigation, and I was characterized as a discrimination complainant when it was a whistleblower's violation complaint and retaliation." [75:19-76:2].

CAPT Young had told him that "he would make sure that I did not make commander", [85:23-25] and Young was a personal friend of the Chief, Admiral Holderby, because they were roommates in chaplain school and "most of the 0-6's have a connection system and will talk up or talk down certain chaplains." [86:2-12].

> In fact, the person from San Diego that was on that board, after the board met, was in the hospital perhaps a month later and he was meeting the chaplains. The statement he made to me was, "oh, you're CH Roysden." Which, for some reason, I couldn't understand why he would make the statement. Instead of "Oh, it's nice to meet you," his statement was "Oh, you're CH Roysden." [86:16-23].

The BCNR recognized Roysden had been harmed but refused to follow logic or reason in denying his appeal of CH Young's damaging reports.

> The interesting note in it [the denial of the appeal] was they said, "we recognize the appearance of discrimination, retaliation, and a hostile work environment, but we feel that this in no way impacted your fitness reports and your chances for promotion." [122:12-16]

> Under CH Young, there was racism against the three black chaplains, they were always rated the lowest of their respective ranks, including the fact that when CH Shamburger showed up as the senior commander, rather than putting him in as the deputy–and the CH Corps likes to have its director and a deputy from different faith groups, it kind of balances things out–he chose CH Panes [a Catholic] to be put in as the deputy director. **Panes was so inept that CH Paul had to be assigned all of CH Panes's administrative duties. ***Yet, CH Young put chaplain Panes in–and I believe it was in 1998–for chaplain of the year, through the BUMED system, for his administrative acumen. [124:11 125:3].

When Roysden attempted to mentor and train Junior chaplains who had come to the San Diego Middle Center, or attempted to get CH Young to discussn issues with his Junior chaplains who were having troubles, CH Young berated him. [80:13-84: 1]. CH Young said "I will make sure you never make 0-5. You can count on that." [83:25-84:1]. While CH Young would give others "glowing reports" about Roysden, "in my personal encounters with him, he was always this very abusive, I don't like you, you're this way or that way." [84:6-10].

CH Young would get together with the other two Catholic priests and "make policy for the Protestant Chapel". "The three of them would decide on promotion recommendations for their chaplains." [105:12-15]. They also made decisions affecting ministry, including Protestant worship, without consultations with the Protestant chaplains. [239:22-240:9].

When CH Roysden returned from the Korean Air Crash Disaster on Guam, Young told him not to discuss anything about what happened, what he saw, and the ministry with any others, greatly increasing Roysden's PTSD. "I want you to shut up about this crap. You're not allowed to talk to anybody else about this" [207:1-2].

Despite the fact Roysden "did more debriefings anybody else on the team [the San Diego Medical Center "Sprint team" - a special team comprised of a chaplain and medical personnel to handle the traumatic effects of both victims and crash responders], he had more involvement than anybody else in setting up and planning the stuff, even more than Dr. Hammer [208:5-10], the hospital denied recommendation for a "Navy Commendation Medal" for Roysden, downgrading it to Navy Achievement Medal [207:19-208:4]. Young refused to fight for Roysden's award, [208:5-15], disparaging his service and effort for his outstanding service as part of the Sprint team. Young also disparaging Roysden's other significant accomplishments in Nicaragua following Hurricane Mitch.

A female chaplain, Fran Stuart, came to Roysden for counseling because she was being sexually harassed by CH Young, When she filed a complaint, CH Young attacked Roysden and removed him from his responsibilities in administration and as his number two person when Young was gone. When told he could not do that, CH Young said, "I can do whatever I want. You betrayed me by not telling me that Fran Stewart was going to file a sexual harassment complaint against me" [189:25-190 : 10].

When Roysden complained of CH Young's retaliation, the JAG and the EEO at the San Diego Medical center, "filed it illegally, as I understand it now, under Fran Stewart's sexual harassment complaint." [127:7-12].

The CEO investigation found Roysden's removal "as the administrative second-in-command had the appearance of retaliation. And [CH Young] was directed to reinstate me to all the responsibilities I had before his removal of me from those responsibilities, and he refused to comply with that directive." [128:25-129:10].

CH Young knew of but did nothing about sexual "misconduct by one of the chaplains concerning senior nurses", and the sexual harassment continued. [128:2-16].

Roysden points out numerous deficiencies in the resulting investigations of both Stewart and his complaints. His whistleblowing complaint, which should have been handled by the JAG, was sent to the Equal Opportunity office for investigation along with CH Stewart's complaint but he was not given "advocate", a requirement under the EEO regulations [191:7-25].

CH Young barred Roysden from "any official part of the office", refused to talk to Roysden, and tried to have him reassigned to Puerto Rico on short notice to an isolated post, contrary to regulations. The Junior detailer was a Catholic and told Roysden that he would take the orders despite regulations which precluded this assignment. Roysden had to call Mrs. Berto at

the Chief's office, who informed the detailer that a reassignment was improper, after which the detailer canceled the orders. [192:2-194:10].

CH Young also attempted to degrade Roysden's performance by failing to address the significant participation in the Korean Airlines crash despite the fact Roysden "had done more debriefings than anyone else on the team" and played a significant role in the post crash operations and memorial ceremonies. [195:17-196:19].

Young favored Catholics who did not like evangelicals and always gave them the highest-ranking, [34:6-7], but acted with prejudice to those who did a good job in their ministry, cooperated with other chaplains and/or objected to his high-handed prejudice. Young retaliated against any priest or anyone else who objected to his decisions while being very favorable to his fellow priests that just towed the party line with him. This included Catholic CH D'Auarora ("loves everybody, he does a good job"), [233:10-18]. Young gave D'Auarora the lowest ranking, [234:8-13], despite "doing more work than most of the other lieutenants." [235:7-12]; he was given the "early promote" and the number one ranking after Young left.

Young moved Catholic CH Dombrowski early because he challenged CH Young's ranking him above CH Paul. [235:20-to 36:17]. Dombrowski was "highly respected throughout the hospital and a person who was open to friendship and ministry to anyone of any faith background." [238:7-18].

CH Young moved Catholic CH Klarer early so he would not have to compete against the other LCDRs under a new command chaplain. [237:1-11].

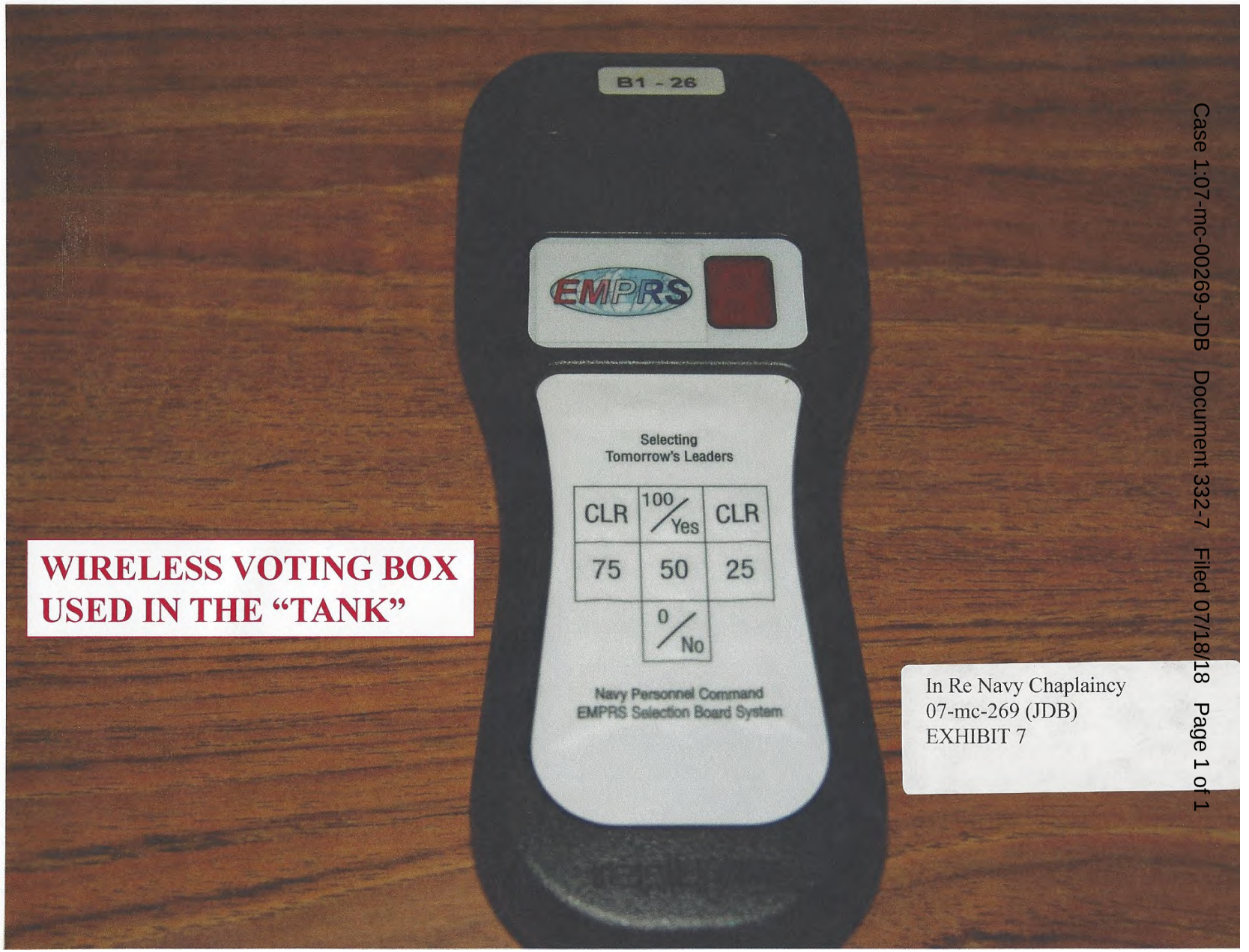
CH Young "hated Michael Belt with a passion" although CH Belt "was willing to do whatever he could to make an impact in the hospital. He never seemed to tire, he loved being with patients and with staff." [241:15-22]. CH belt and CH Smith developed a project providing

ministry to the operating rooms; at first, CH Young opposed it and didn't want them to be doing it. After it got off the ground and was what I would term a success, CH Young tried to claim credit for it as well, saying it would never have happened had he not suggested to those two chaplains that they go do it. [241:23-242:22].

On the other hand, CH Young gave CH Livingood, who was not liked on the wards and whom the staff did not like, the number one Lieutenant among six. When CH Young left, "CH Livingood, was ranked dead last." [243:13- 245:24].

CH Roysden testified he was checking out of the hospital when Admiral Diaz, the Medical Center's commander spoke to CH Roysden. He apologized for what happened with the investigation. He told me that he never dreamed, when he was given orders to the medical center, that his biggest problem when he showed up would be the chaplain's office. He was amazed at what was going on. And after the investigation came back, he said "I couldn't control the investigation." He said, in fact, "I could only go on the recommendations." And he said they were not the recommendations he would've made. He said that immediately upon the release of investigation, he, [Diaz] fired CH Young. [However] CH Young was not fired "due to the reported intervention of Young's three-star friend." [281:4-25].

CH Roysden reports that he filed a written request for an investigation for "an improper removal of a fitness report from my records and an attempted cover-up of that removal by the individual who did it [at] BUPERS." This involved a special fitness report done by Admiral Diaz "documenting my participation in the Hurricane Mitch recovery efforts in Honduras and Nicaragua", a very good report which was removed from his file before the FY 2000 board for commander, a fact admitted by Mr. Pool at BUPERS. [288:6-290:9]. The investigation was a farce, like those before it.



WIRELESS VOTING BOX USED IN THE "TANK"

In Re Navy Chaplaincy
07-mc-269 (JDB)
EXHIBIT 7

REPORT OF INTERVIEW

RADM Barry C. Black, CNC, USN, [Redacted] was interviewed in person on 14 June 2000 by [Redacted] 1, and [Redacted], BUPERS IG regarding the conduct of the FY00 Chaplain Corps (CHC) 0-6 Selection Board and its failure to select [Redacted] for promotion to [Redacted]. RADM Black was President of the FY00 CHC 0-6 Selection Board. RADM Black is assigned as the Deputy Chief of Chaplains.

1. How many female officer records did tie board review? Do you recall reviewing the service record of [redacted]? Who briefed the record?

RADM Black did not recall how many female officer records were reviewed by the FY-00 CHC O-6 Selection Board.

2. How would you characterize [Redacted]***record? Was it competitive with the Chaplains who were selected for promotion? In your opinion, why wasn't she selected for promotion?***

RADM Black stated that he know: [Redacted]and may have even briefed her record to the board. He said that [Redacted] had a ""strong" and "competitive" record. RADM Black said, "I have admired her [Redacted] work." He reiterated that he felt [Redacted] record was "quite competitive." RADM Black recalled that the board reviewed eligible records at least twice. He said [Redacted] record might have been reviewed three times in the crunch. RADM Black stated that all briefers provided good records presentations. He continued that at the 0-6 level, Chaplain Corps rarely selects "above zone" and the fact that [Redacted] selected "above zone" on the FY-01 board was indicative of her strong record.

3. Was there any discussion about [Redacted] ***record? What was said? By whom? Did this influence how you voted? In what way?***

RADM Black stated that no board member said anything negative about [Redacted] record. RADM Black indicated he was absolutely certain that there was no discussion. He reaffirmed that never once did a board member make negative comments about any record. He said, "I monitored that very closely.

RADM Black stated that he did make positive comment that [Redacted] was a "class act". He said that one board member made a disapproving facial expression. RADM Black continued, "I would rather not say who it was." He said he did not discuss anything with the person who made the facial expression. He felt he was the only one on the board who could have identified the non-verbal cue.

4. During the voting was: [Redacted] ***"zeroed out"? Was a revote conducted? What was the result of the revote? How did you vote?***

RADM Black commented that [Redacted] was not selected because a board member voted "zero". He said he was disturbed by that fact. RADM Black indicated he might have called for a re-vote in the event someone had hit the wrong button while voting. He continued that every time [Redacted] record came up it was "zeroed out". RADM Black also recalled that the record of [Redacted] was "zeroed out" and he felt [Redacted] record was the strongest in terms of narrative remarks. He said that at least twice [Redacted] record was zeroed out". As Board President, he called attention to it. RADM lack said, "I felt the need to speak out on this one." RADM Black stated that he voted "100" for [Redacted].

RADM Black said that he has spoken to CHNAVPERS about concerns with the selection process. He indicated that a board member can vote "zero" in a "preemptive strike" and take out a record. RADM Black gave an example of how 4 members voting "100" and 1 member voting "0" can affect the selection of a record without accountability.

5. Did [Redacted] ***make any comments about*** [Redacted] ***or her record? Were the comments positive or negative? What did she say? What was the response of the other board members to her comments?***

RADM Black stated that [Redacted] did not make a single negative statement about [Redacted] during the board. He also said that outside of the board he never heard [Redacted] make any negative comments.

6. Have you ever heard [Redacted] ***Make any derogatory statements about*** [Redacted]***? When were these comments made; before, during, or after the selection board?***

RADM Black stated that outside of the board he never heard [Redacted]make any negative comments about [Redacted].

REPORT OF INTERVIEW

[Redacted] was interviewed telephonically on 18 May 2000 by [Redacted], BUPERS IG regarding her allegation of misconduct by [Redacted] , during the FY00 Chaplain Corps (CHC) 0-6 Selection Board which resulted in her failure of selection.

[Redacted] motivation for filing the complaint was to preserve the integrity of the selection process. She noted there are lots contesting board results and the number will rise. She stated there is a perception in the Chaplain Corps that board members can't be trusted, tenets are ignored, and private agendas are pursued. She knew of instances where chaplains who were known to be dishonest or who had "caught red-handed" acting improperly on a board, continued to be allowed to sit on selection boards [Redacted] [Redacted] as one who had been improperly passed over by a selection board. She stated his record was eventually corrected and he receive the promotion, however the board member concerned, an 0-6, continued to sit on selection boards. She also stated [Redacted] (sp?), a senior chaplain a [sic] at Naval Hospital, complained about certain officers serving on boards to the detailer [Redacted] but nothing was done. [Redacted] stated she was not concerned about her own promotion date and had not initially questioned the board's result or membership until other chaplains began expressing their concerns to her.

The following questions were discussed with [Redacted]

1. Do you know [Redacted] *personally? When and how did you meet? Have you ever served with her?*

[Redacted] stated she had met [Redacted] 17-18 years ago when they were both assigned to sub tenders. Their contact with each other over the years has been limited to brief encounters and professional correspondence. She remembered both had once attended a 1-2 day seminar on ministering to submariners but did not recall having daily discussions wit! [Redacted] remembered exchanging greetings with her once in the Chief of Chaplains office and that [Redacted] had given a lecture at the Supervisor Chaplain course while [Redacted] the Basic Course. [Redacted] current position at CNETis not in [Redacted] chain of command, however, she is in [Redacted] chain of influence. They exchange business e-mails concerning statistics and notices.

2. Were you aware of the opinions expressed by [Redacted] *to* [Redacted] *concerning you? How did you become aware? When?*

[Redacted] stated she initially had not been concerned about not making 0-6, even knowing that [Redacted] had been a member of the board. Two-three weeks after she heard she had been passed over [Redacted] called her to offer his condolences. During the call he told her "here's some information regarding why you may have been passed over" and related the information contained in her complaint [Redacted] stated he had never mentioned this information to her before. [Redacted] told her he believed [Redacted] was entirely capable of working to get her passed over intentionally and dishonestly and that he would help [Redacted] if she contested the board [Redacted] stated she was surprised at the information he told her.

3. Have you ever heard of her expressing these opinions to anyone else? Has she ever expressed them to you?

[Redacted] stated that soon after receiving the phone call from [Redacted] she received one from [Redacted] saying similar things. [Redacted] told her [Redacted] and everything she stood for, and as soon as she heard [Redacted] member of the board she knew [Redacted] was doomed. [Redacted] many other chaplains called her after she failed to select and indicated they felt [Redacted] had precluded her promotion but did not have any specific information. She described it as an "outpouring of concern" not just toward her but geared toward the promotion possibility of conservative women chaplains. [Redacted] stated she was unaware of [Redacted] opinions toward her and indicated she was always "sweet and smiley to her face".

4. Why do you think [Redacted] holds these opinions?

[Redacted] stated that [Redacted] has a service reputation of being a militant feminist and is, according to the Chaplain Corps grapevine, a "femi-nazi" feeling that the more conservative female chaplains were bad for the cause of women. [Redacted] indicated there were four other female O-6 chaplains who all had the same reputation. She stated [Redacted] emphatically believed all these officers "were in cahoots" together to keep conservative females from getting anywhere in the Chaplain Corps. Chaplain Graham told [Redacted] she feared reprisal and would not write a letter regarding the information she had her to include in the complaint. When asked why she felt [Redacted] might make the comments [Redacted] had related to her, she indicated she could only base an opinion on gossip and innuendoes. [Redacted] did state that she and [Redacted] present themselves differently as women officers [Redacted] stated she does not downplay her femininity when in uniform, while [Redacted] does not emphasize hers. It was her opinion that [Redacted] may feel threatened by that and based or [Redacted] experience counseling rape victims she felt [Redacted] seemed to fit the pattern of someone who had been sexually assaulted or abused.

5. When did you learn [Redacted]was a member of the selection board? How did you find this out?

[Redacted] stated board membership is secret until the board convenes, then the detailers put out a message. She did not find out [Redacted] was on the board until then. While she recognized [Redacted] name, no flags were raised until she received the phone calls from [Redacted] and [Redacted] stated she had not corresponded with the board.

6. Do you believe these opinions prejudices [Redacted] against you and prevented her from carrying out her oath as a member of the selection board?

[Redacted] answered this question with a very strong yes. It was her belief that [Redacted] did not want to put her opinions aside in order to rate [Redacted] solely on the contents of her service record.

7. Have you ever served on a selection board? Based on that experience do you feel that one officer can influence the vote of the blard for or against someone's promotion? Why do you feel this way?

[Redacted] stated she had served on approximately six selection boards. She has seen the process and how it could be perverted if someone wanted because of the vehicle of secret voting. She felt [Redacted] could have influenced the board by voting 100 for other officers (inflating their score) and then zeroing her record out. She could not believe other board members would have tolerated comments. [Redacted] stated she would like to see the votes not be anonymous and be open like the Marine Corps does.

8. Selection boards review many outstanding records but can only select a finite number for promotion. Why do you feel [Redacted] *opinions caused you to fail to select rather than it simply being a matter of the board not being able to select everyone who was qualified?*

[Redacted] stated she would agree with this statement if her record had been ranked 25. However, she recalled a conversation Commanding Officer of SUBSCHCOOL [Redacted] at the time she was passed over. She stated he had offered condolences to her and told her RADM Padgett, Northwest Region, had told him the board could only select 12 and she had been ranked 13. Additionally, she receive a letter of condolence from Chaplain Black stating he was "personally disappointed that she did not make it." [Redacted] felt this indicated he may have had some suspicions. Based on the above and the information from other chaplains discussed earlier [Redacted] it was not simply a matter of her record not making the cut.

9. Have you had any contact with [Redacted] *since the selection board reported out?*

[Redacted] Stated her contact with [Redacted] Has been limited mostly to business e-mails and sending reports. [Redacted] stated she had sent [Redacted] a card when her father was ill and she had received a thank you note from her. [Redacted] sent her an e-mail of condolences when [Redacted] was passed over, however, she did not send any congratulations when [Redacted] was selected for promotion.

COUNSEL'S STATEMENT CONCERNING CDR WASHBURN'S IDENTIFICATION AS THE WITNESS FOR THIS SUMMARY OF TESTIMONY TO THE NAVAL INSPECTOR GENERAL

The interview here, and Exhibits 14 (the investigation report) and 15 (RADM Black), were obtained under a Freedom of Information Request for the Naval Inspector General's investigation concerning the complaint by then CDR Mary Washburn about misconduct on the FY 2000 Chaplain Captain selection board that led to her non-selection. The Navy's FOIA response provided documents specifically identifying CDR Washburn, her endorser, and the investigation of her complaint. The FOIA response fit with what was publicly known about the case, *e.g.*, she wrote Sen. Santorum for help and was subsequently selected for Captain in FY 01. The opening NIG statement identifies the witness as the originator of the complaint, then CDR Mary Washburn:

> [Redacted] was interviewed telephonically on 18 May 2000 by [Redacted], BUPERS IG regarding her allegation of misconduct by [Redacted] , during the FY00 Chaplain Corps (CHC) 0-6 Selection Board which resulted in her failure of selection. [Emphasis added]

That could only be then CDR Washburn, the person who filed the complainant based on "her allegation of misconduct ... which resulted in her failure of selection." (Emphasis added). *See* NIG Report, B-2, ¶ 6.a. Question 8 also asks about her failure of selection.

The second numbered question asks: "*Were you aware of the opinions expressed by [Redacted] to [Redacted] concerning you? How did you become aware?* This could only be directed at the complainant, CDR Washburn, given the context of the questions and investigation.

Many of the NIG's questions address issues and questions that could only be answered by CDR Washburn or had relevance only in the context of her as the complainant or victim, *e.g.*, Nos. 8 and 9. There is no question this is CDR Washburn's testimony.

/S/ Arthur A. Schulcz, Sr.
Arthur A. Schulcz, Sr.

Counsel for Plaintiff

Office of the Naval Inspector General Case Number: 200800991

Report of Investigation

27 March 2009

Subj: SENIOR OFFICIAL CASE 200800991; ALLEGED REPRISAL AND ABUSE OF TRAVEL AND LEAVE ICO RDML ALAN T. BAKER, CHC, USN

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Preliminary Statement

1. In a series of communications with NAVINSGEN between July and November 2008, [redacted], alleged that he was a victim of reprisal, as defined by the Military Whistleblower Protection Act (MWPA) (10 USC § 1034), because of protected communications he had made while serving in the office of the Chaplain of the Marine Corps [redacted]. Allegedly, in [redacted], he made written and verbal complaints of mistreatment and a hostile working environment against RDML Alan T. Baker, CHC, USN, Chaplain of the Marine Corps/Deputy Chief of Chaplains. Allegedly, [redacted], he also verbally admonished RDML Baker not to take certain planned trips at Government expense, because the trips were personal, rather than official. Allegedly, in February 2008, RDML Baker took reprisal action against [redacted] because of his protected communications by using his (the Admiral's) position and influence as President of the FY-09 Captain (O-6) Chaplain Corps (CHC) Promotion Selection Board to ensure [redacted] non-selection for promotion.

2. The protracted preliminary inquiry in this case was due to difficulty in determining whether there was sufficient evidence of protected communications or unfavorable personal actions (i.e., acts of reprisal) that met MWPA guidelines. Ultimately, however, we determined that there was sufficient credible evidence to warrant a full MWPA reprisal investigation. As well, we determined that an emergent allegation of travel and leave abuse also warranted investigation.[1] We so notified the DOD Inspector General on 4 December 2008.

Background

3. [redacted]. RDML Baker assumed duties as Chaplain of the Marine Corps/Deputy Chief of Chaplains on 14 June 2006. In August 2006, the Chief of

[1] Although not specifically alleged, leave abuse derives from alleged travel at Government expense for purposes that were personal and should have been conducted at personal expense, and possibly, while on leave.

In Re Navy Chaplaincy
07-mc-269 (JDB
EXHIBIT 14

A. As a sponsor I would, I would not have disallowed such a comment because it's part of the official record. If he said, "And refer back to the fitrep and see what the write-up says," then --

Q. "And you'll see that, you know, it's weak. And we're looking for leaders and basically leadership is not in there. But on the other hand when I was face-to-face with that officer, I...gave him a 5.0, EP, wrote in there "recommended for early selection to Captain." But now I'm on the board and I'm yanking that out from under him."

A. And I would say as a board sponsor that that happens all the time. We see frequently where reporting seniors will debrief an officer with their fitrep telling them they're the best thing since sliced bread, but when the record comes up before the board, a subtle communication to the board with respect to actually whether it's leadership qualities, whether it's, you know, whatever, the board interprets those differently.

Q. All right. Well, the [b7c] officers that were on the board that I talked to who had, who sat on a number of boards, one in particular was taken aback by comments that ADM Baker made on a number of occasions and wasn't sure that was because this was a staff corps board and we're a bunch of knuckle-headed line officers and we don't understand and we need to be educated or what, but was taken aback somewhat....And that officer's experience from sitting on other boards was that if a member of the board had been a reporting senior on an officer whose record was before the board, they would -- they would either say something very positive or not say anything at all.

A. That's typically my experience.

Analysis of the Board's Deliberations
On [b7c] Record

50. RDML Baker did not recall commenting on [b7c] record, but 5 of the 9 other persons present (members and recorders) specifically recalled that there was a discussion and that RDML Baker added his comments. RDML Baker denied that he commented negatively on the fitness report he issued to [b7c]. He reasoned that if he had, he would have been shouted down by other members and the PERS-80 representative, for to do so would have violated the board's precept. Conversely, 3 of those who recalled RDML Baker commenting, recalled that he commented negatively. Further, [b7c] opined that if RDML Baker had couched his comments in terms of the "write-up" of the fitness report he had issued, [b7c]) would "not have disallowed" it, even if it was a "subtle communication" that the board could have interpreted "differently."

51. It is not surprising that, as a group, the recorders had clearer recollections concerning b7c than did the voting members. All three were Chaplains, two were personally acquainted with b7c, and they had all spent the previous week scrubbing the records of all of the eligibles. They very consistently recalled that during deliberations on b7c record, RDML Baker did comment on the fitness report he had issued to b7c. Two recalled that it was a negative comment that could be interpreted as saying that b7c did not have the requisite leadership characteristics to be selected for O-6. The third could not characterize the comment, except to say that it had not raised a "red flag" with him and that b7c had not seen it "as inappropriate at the time."

52. Conversely, not a single board member recalled deliberations on b7c record until prompted, and then only vaguely. Only b7c, the b7c, b7c b7c. Five of the six members had a positive opinion of RDML Baker's performance as President. Only b7c expressed any concerns; b7c had strong feelings that RDML Baker had a "tendency through the board to add things that he probably shouldn't have." b7c recalled RDML Baker commenting negatively on b7c, but b7c testimony is offset by b7c, the b7c, who recalled RDML Baker commenting positively on b7c.

53. Conclusion. We find that the testimony of the recorders is powerful and sufficient to meet the preponderance of the evidence standard by which we conclude that RDML Baker did make a subtle, but negative comment about b7c during board deliberations. Further, given the informal resolution of b7c b7c EO complaint, RDML Baker's actions must be viewed in the context of his signed agreement to be fair if assigned to b7c O-6 promotion board. We conclude that the negative comment was not fair and that it constituted an unfavorable personnel action, in that it either affected or had the potential to affect b7c b7c career by negatively influencing board members who were voting at the time on whether or not b7c should be promoted.

54. **Did responsible management official(s) know about the protected communication prior to taking, withholding, or threatening the personnel action?**

55. Yes, as depicted in the table below, RDML Baker acknowledged that he was aware of most, but not all, of b7c protected communications.

Summary of CDR Brown's Protected Communications

Date	Communication	Protected Status	RMO Aware Yes/No
b7c	b7c verbally admonished RDML Baker not to take personal trips at Government expense.	Protected	No
b7c	b7c e-mail to RDML Baker alleges he has been treated unfairly (i.e., that he is a victim of discrimination).	Protected	Yes
b7c	b7c meeting with b7c b7c (RDML Baker Acting Chief at time), where he verbally expresses unfair treatment issues alluded to in his 1 Mar e-mail.	Protected	Yes
b7c	b7c sends memo to RDML Baker detailing his concerns about fairness and equal treatment.	Protected	Yes
b7c	b7c meets with RDML Baker and others to discuss his concerns about fairness and equal treatment.	Protected	Yes
b7c	b7c e-mail to b7c alleging "hostile working environment." b7c verbally alerts b7c, who believes he passed concerns on to RDML Baker.	Protected	No

56. **Does a preponderance of the evidence establish that the personnel action(s) would have been taken absent the protected communication?**

57. No, in that RDML Baker denied that he even took the action, he did not attempt to provide any independent basis that would have justified it. In fact, he argued that if the alleged comment had been made, it would have been wholly improper and a violation of the board's precept. We do not necessarily agree that such a comment would have violated the precept, but we did find that, within the guidelines of the Military Whistleblower Protection Act, it constituted an unfavorable personnel action. Therefore, absent the establishment of an independent basis for it, we must conclude that it would not have been taken, but for b7c protected communications.

Conclusion

58. By a preponderance of the evidence, we conclude that the allegation of reprisal by RDML Baker is substantiated.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAPLAINCY OF FULL GOSPEL CHURCHES)		
Plaintiff	)	
V.	)	
THE HONORABLE RICHARD J.DANZIG,.	)	Civil Action NO. 1:99CV02945
et al.,	)	

Affidavit of Floyd Cedric Ellison

1. May name is Floyd Cedric Ellison. I was born March 28, 1937 and reside at 535 "J." Street, Chula Vista, California, 91910. I have personal knowledge of and am competent to testify concerning the information presented in this affidavit.

2. I completed my undergraduate education at Augustana College in Rock Island, Illinois in June, 1959. My Master of Divinity in May of 1963, the Master of Religious Education, June 1971, and the Doctor of Ministry in June of 1981were degrees each completed with the American Baptist seminary of the West located in Berkeley California.

3. After I was endorsed by the American Baptist Churches, I was commissioned as a chaplain on March 22, 1972, and entered active duty in the Navy on February 1, 1974.

4. I was selected for early retirement by the Selective Early Retirement Board (SERB) for FY 1997, and I was separated (retired) from the Navy on August 1, 1997

5. During June of 1996 I turned over the position of Command (Senior) Chaplain, Naval Construction Battalion Center, Port Hueneme, California to the new incoming Command Chaplain,

Captain Jim Anderson. Captain Anderson had just that previous February 1996, set on the Chaplain Corps Captain selection board as one of its five Board members. He was the only Catholic chaplain on the board. Traditionally there was always a minimum of one priest on each board.

6. During Chaplain Anderson's and my turnover process, Chaplain Anderson described an event which he said occurred during the FY 97 Captain Selection Board proceedings conducted earlier that February of 1996. He said that after the initial votes were cast, not one Catholic chaplain had been selected for Captain. He mentioned his concern to the board, and a woman officer on the board told him, "Well I am Catholic, and I know several of these Catholic chaplains; they're certainly not Captain material!" According to Chaplain Anderson, the following day, he again brought up the issue, and said that there would be a hue-and-cry from the Catholic Military Archdiocese, and they would never hear the end of it, if at least on Catholic or not selected. Chaplain Anderson, a Columban Order priest, then brought out the record of fellow Franciscan Order priest, Lewis Iasiello, whom the board then voted on, and in fact selected two years junior to the other selectees. Chaplain Anderson did not mention any other faith groups threatening retribution if there candidates were not selected during the board's proceedings.

7. I turned over the position to Chaplain Anderson, and reported to Guam where the following year I was selected for early retirement, effective August 1, 1997.

Under penalty of perjury, I affirm that the above information is true and correct to the best of my ability and reflects the testimony I would give if called to testify in a court of law.

/S/ Floyd Cedric Ellison
Floyd Cedric Ellison
Captain, Chaplain Corps
U. S. Navy (retired)

In re Navy Chaplaincy
07-mc-269 (GK)
Exhibit 9

Subscribed and sworn to before me this 31st day of January, 2000.

/S/ Haydee La Bounty
Notary Public
My Commission expires: 11-2-2003

HAYDEE LA BOUNTY
NOTARY SEAL

In re Navy Chaplaincy
07-mc-269 (GK)
Exhibit 9

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAPLAINCY OF FULL GOSPEL CHURCHES,	)	
v.	)	Case Number 1: 99CV002945 (RMU)
THE HON. GORDON R. ENGLAND, et al.	)	
	)	**Consolidated with**
ROBERT H. ADAIR, et al.,	)	
v.	)	Case Number 1: 00CV00566 (RMU)
THE HON. GORDON R. ENGLAND, et al.	)	

DECLARATION OF KLON K. KITCHEN JR.

Pursuant to 28 U.S.C. § 1746, I, KLON K. KITCHEN JR. declare as follows:

1. I live at 107 Falcon Dr., Richmond Hill, GA 31324. I am competent to testify on and have personal knowledge of the matters addressed or discussed in this Declaration.

2. I am an Army chaplain at the grade of Captain, currently assigned to Fort Stewart, GA. I have recently been selected for promotion to the rank of Major (O-4).

3. Prior to becoming an Army chaplain, I was a Navy chaplain until I was separated after being twice not selected for promotion to Lieutenant Commander (LCDR). I am a plaintiff in the Chaplaincy of Full Gospel Churches lawsuit and this declaration addresses an incident that occurred during my time as a Navy chaplain.

4. Around May of 1996, I was assigned to Marine Air Group (MAG) 31 at Beaufort, S.C.

5. I was present at a luncheon with Chaplain (Captain) Wayne Bumbry from the 2D Marine Air Wing and Chaplain (Commander) Norman Brown, the MAG 31 senior chaplain, and Chaplain (LCDR) Dave Gibson, also of MAG 31.

6. During this luncheon, Chaplain Bumbry said that he had recently sat on a Chaplain

Captain selection board and that at the end of the board they realized that they had not selected any Catholics for Captain. He told us that the board members had to reconvene in order to pick a Catholic and deselected a Protestant to do so, i.e., took someone off the list that had already been selected.

7. I remember this distinctly because having been twice passed over (not selected) to Lieutenant Commander I was on my way out of the Navy, this was my last month on active duty, and I was upset that a promotion board would deselect someone merely to make sure they had a Catholic selectee.

I make this declaration under the penalty of perjury, it is true and accurate to the best of my ability, and it represents the testimony I would give if called upon to testify in a court of law.

Dated: January 16, 2002

/S/
KLON K. KITCHEN, JR.

DECLARATION OF GARY PAUL STEWART

Pursuant to 28 U.S.C. § 1746, I, Gary Paul Stewart, declare as follows:

1. I live at 10803 Tides Court, Fredericksburg, Virginia. I am a chaplain at the grade of Lieutenant Commander currently assigned to Marine Corps Base Quantico, VA. I am competent to testify on and have personal knowledge of the matters addressed or discussed in this declaration.
2. I was a recorder on the Fiscal Year 91 Chaplain Staff Corps Lieutenant Commander Promotion Board (the "Board").
3. As a recorder, I was responsible for making sure all the chaplain records appearing before the Board were complete and in order. This can only be accomplished by reviewing the records to make sure that all the appropriate information is current and complete, e.g., photos, awards, and reports, and no improper material is in a chaplain's file.
4. In doing this, I reviewed all the records of those appearing before the Board. 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 plaintiff. In addition, the the chaplain selected with the far inferior record was grossly overweight, a fact well known throughout the Chaplain Corps.
6. It was made known to me after the Board concluded that this chaplain had been charged with multiple counts of pedophilia while previously stationed in Sigonella, Italy, a fact that was not recorded in his records at the time the Board considered and promoted him to the rank of Lieutenant Commander.
7. I witnessed the discussion about and selection of this chaplain.
8. I am requesting that the Court, as a higher authority, direct the Secretary of the Navy to relieve me of my oath so that I can testify publicly to what I witnessed and heard. I believe it is highly relevant to the issue of misconduct on promotion boards and unconstitutional preferences within the United States Navy and the evidence I will reveal is not available from other, non restricted sources.
9. I am in no way being compelled to testify on this matter, but desire to testify of my own accord, to preserve a clear conscience, and to protect the Navy and those that serve it from discrimination and prejudice.

***

I make this declaration under the penalty of perjury, it is true and accurate to the best of my ability, and it represents a portion of the testimony I would give if called upon to testify in a court of law. It is here limited due to the oath of secrecy enforced upon me by the Secretary of the Navy.

Dated: 13 August 2004

/S/ Gary Paul Stewart
GARY PAUL STEWART

In re Navy Chaplaincy
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Exhibit 35

Exhibit 30

Faith group promotions

Faith Group	Promotion to LCDR	Promotion to CDR	Promotion to CAPT
All	80.1% (884)	74.0% (1,052)	56.8% (798)
Liturgical	78.5% (326)	72.0% (382)	59.1% (298)
Nonliturgical	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)
Unknown	75.0% (4)	100% (2)	100% (1)

Includes records of promotable active duty chaplains 1972 to present
Numbers in parentheses are totals for each category considered for promotion
Results highlighted in red are statistically different from the overall sample

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EXHIBIT 30