No. 20-1794

# 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

## PETITIONERS' SUPPLEMENTAL BRIEF

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## INTRODUCTION

Petitioners, 54 former and retired Navy Non-liturgical or Evangelical chaplains (the "Chaplains"), respectfully submit this Supplemental Brief in further support of their petition for review of the U.S. Court of Appeals for the District of Columbia's decisions in their case. They seek meaningful review and reversal of the D.C. Circuit's denial of their Establishment Clause claims of religious preference and denial of discovery foreclosing their Petition Clause right to bring their First and Fifth Amendment (Equal Protection) claims.

This Supplemental Brief addresses a consistent pattern of troubling judicial behavior rejecting Religious Liberty precedent, subverting the First Amendment's Religious Liberty guarantees. *In re Navy Chaplaincy* demonstrates that prejudicial pattern against these Chaplains ignoring the Constitution's Religious Liberty guarantees and controlling precedent that should have ended this case 17 years ago. This Brief highlights that pattern and the need to confront it here with the Constitution's stated purpose, to "secure the Blessings of Liberty to ourselves and our Posterity," as the standard of review and the unifying principle for all First Amendment values.

This Brief addresses this Court's decisions following the Chaplains' June 14, 2021, petition including grants of certiorari and other pending petitions involving Religious Liberty principles the anti-religious pattern attacks. A series of cases this Court addressed last term whose issues will resurface in the next highlights this pattern. These cases ignored well-established precedents and the legal principles upon which they rest, rejecting the

Constitution's command and judicial duty to "secure the Blessings of Liberty. "

This brief suggests that command become the unifying principle for all First Amendment guarantees and values the Bill of Rights protects. It precludes the below cited pattern that substitutes the rule of man for the rule of law that *In re Navy Chaplaincy* exemplifies.

## I. *Chaplaincy* Illustrates a Dangerous Pattern of Ignoring Binding Precedent

Petitioners argue here "securing the Blessings of Liberty" is a constitutional duty imposed on every judge requiring **detailed** examination of facts when the religion clauses are at issue."What our cases require is careful examination of any [practice] challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause protects." *Committee for Public Ed. v. Nyquist,* 413 U.S. 756, 794 (1973). A primary evil is "a fusion of government and religious functions". *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982) (citing various authorities).

*In re England* explicitly recognized the fusion of government and religious power in chaplains, defining their "unique" role "involving **simultaneous service** as ... a 'professional representative' of a particular religious denomination and as a commissioned naval officer." 375 F.3d 1169, 1171 (D.C. Cir. 2004) (emphasis added) (citation omitted), *cert denied*, 543 U.S. 1152 (2005). No *Chaplaincy* court ever addressed that **simultaneous service** in the context of Inspectors General investigations showing chaplain promotion board members "zero out" candidates and advance denominational preferences with zero accountability. Petition Facts ("Facts") 3-7.

*Chaplaincy* ignored the fusion issue despite Petitioner's evidence that the Navy allows chaplains to exercise the Sovereign's authority **only** on promotion boards. Fact 2. Delegating denominational-representatives unbridled power to advance or destroy chaplains' careers is "an excessive entanglement with religion." *County of Allegheny v. ACLU*, 492 U.S. 116, 126 (1989). *Larkin, ibid.,* and *Bd. of Education of Kyrias Joel v. Grumet*, 512 U.S. 687, 698-704 (1994) control this case.

The specific Blessings of Liberty at issue here are freedom from religious factors influencing the award of government benefits, *i.e.*, promotions. To fulfill their judicial obligation of ensuring the Blessings of Liberty, the judges below should have immediately demanded the Secretary release board members from their secrecy oath allowing testimony about denominational preferences they witnessed.

The Blessings of Liberty include the right to challenge denominational preferences. *Chaplaincy* held these Chaplains had no right to discovery to prove their "colorable constitutional claims", Appendix A2, effectively overruling *Webster v. Doe*, 486 U.S. 592, 603-04 (1988). This denies Petitioners the Blessings of Liberty.

*Chaplaincy* rejected the Chaplains' argument the Establishment Clause's no denominational preferences mandate defined their equal protection standard, not intent and "stark" statistics, Appendix A2. That too ignores precedent.

If "securing the Blessings of Liberty" is the standard, *County of Allegheny* states the proper rule here: "we have expressly required strict scrutiny of practices suggesting a denominational preference in keeping with the unwavering vigilance that the

Constitution requires against any violation of the Establishment Clause." 492 U.S. at 608-09 (citation omitted). *Chaplaincy* rejected that standard.

## II. "Secure the Blessings of Liberty to Ourselves and Our Posterity" Is the Common Principal Uniting all First Amendment Rights

The Court has not addressed the Constitution's clear **command** to protect religious liberty, clearly stated in the Constitution's purpose, its preamble:

> WE THE PEOPLE ... in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, **and secure the Blessings of Liberty to ourselves and our Posterity**, do ordain and establish this Constitution for the United States of America. (Emphasis Added)

To "**secure the Blessings of Liberty to ourselves and our Posterity**" provides the unifying principle for all First Amendment values and guarantees, as well as the Bill of Rights' other protections. That phrase provides the judicial objective, duty and standard to evaluate governmental actions when challenged as unconstitutional. Its application addresses the destructive avoidance of precedent pattern discussed below.

The **"secure the Blessings of Liberty to ourselves and our Posterity**" language is not an accident. It has never been explained like one would expound a statute or constitutional provision,

examined in its historical context, and applied to this Court's decisions. These Chaplains suggest that failure causes the current confusion and perceived lack of common principles addressing our constitutional rights. It is the antidote to the rejection of precedent that disparages, disrespects, and minimizes religion and its historical importance and benefits.

"Blessings" is not a legal or political term, but a spiritual term meaning favor from God, often unmerited, or something that turns men from their "wicked ways." *See* Acts 3:26 (NIV). Securing the "Blessings of Liberty" is critical to accomplish the Constitution's other purposes, *e.g.*, "establish Justice, insure domestic Tranquility."

The Declaration of Independence's history and its words show that in declaring independence from the tyranny of a king, our Founders declared their **dependence** on "Nature's God," the "Creator" of all mankind, the "Supreme Judge of the world," and the "divine Providence" on whom they relied for support and protection.

The Preamble is the Founders' admission their liberty was not something they alone earned, but a gift from the God to whom the Declaration appeals for "the rectitude of our intentions."

The Declaration's 56 signers challenged the 18th Century's Superpower with **no** Army, **no** Navy, **no** finances, **no** arms industry and **no** friends except the divine Providence to whom they appealed. They signed the Declaration knowing General Washington would soon battle a British mercenary army two-three times his strength.

The Declaration is our national charter; the Constitution establishes its bylaws. The Founders knew the "Blessings of Liberty" were divine Providence's reward for the Declaration's unique

statement that our rights come from God and it is government's responsibility to protect them.

The reality of the phrase "we hold these truths to be self-evident" is not found in pre-Declaration governments or societies but in *Genesis* 1:26-27 (NIV): "Then God said, let us make man in our image, in our likeness[.]*** So God created mankind in his own image, in the image of God he created them; male and female he created them."

When the Constitutional Convention was about to disintegrate because delegates could agree on nothing, Benjamin Franklin reminded them that during their War for Independence, they daily sought God's help and protection.

> Our prayers, sir, were heard, and they were graciously answered. All of us who were engaged in the struggle must have observed frequent instances of a superintending Providence in our favor. *** And have we not forgotten our powerful friend? Or so we imagine that we no longer need his assistance?
> I have lived sir, a long time, and the longer I live the more convincing proofs I see of this truth – *that God intervenes in the affairs of men*; .....

Elliott's Debates. vol.5, p. 253 (emphasis in the original).

Many consider Franklin's speech the turning point in the Constitutional Convention. The "Blessings of Liberty" is a reminder to all that our liberty was God's gift because He intervened. "And have we not forgotten our powerful friend?"

Asking almost any group of Americans if they know about "the Divine Fog" produces a blank stare. On August 27, 1776, George Washington suffered one of his worst defeats, the Battle of Long Island. Surrounded by over 30,000 British soldiers, Washington decided to evacuate his 9000 soldiers to Manhattan the evening of August 29. When daylight came, over half of the Army and Gen. Washington were still on Long Island.

A heavy dense fog suddenly settled on the area where Washington was conducting his withdrawal, hiding only that part of Long Island where the American army was evacuating. It remained until the last soldier and Washington reached Manhattan. The Battle of Brooklyn Heights and the Providential Fog, https://myemail.constantcontact.com/Battle-of-Brooklyn-Heights---the-Providential-Fog-allowing-Washington-s-Escape-.html?soid=1108762609255&aid=ysaU-RSpp3A

Divine intervention was the only way to explain the fog and other associated facts. It was one of many examples of God's "intervention in the affairs of men" that led to General Cornwallis' Yorktown surrender and the eventual peace treaty. American military history shows similar Divine interventions, *e.g.*, the answer to General Patton's "Grant us fair weather for Battle" prayer during the Battle of the Bulge.[1]

This is a history that testifies of God's intervention "ensuring the Blessing of Liberty." Yet, if one were to teach about the Divine Fog, or other historical miraculous events in public schools, it would

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[1] *See* Msgr. James O'Neill, The True Story of the Patton Prayer (Review of the News 10/6/1971), http://www.pattonhq.com/prayer.html

be challenged by those professionally offended by any mention of the God who blessed us with liberty.

The "Blessings of Liberty" is not some abstract concept, the Declaration of Independence states them: the equality of all men, their unalienable rights, and the enumeration of 27 "abuses and usurpations" showing King and Parliament deprived Americans of their rights as Englishmen. To ensure there was no question as to those Blessings of Liberty, our Founders insisted upon a Bill of Rights to secure them from encroachment by government and officials.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

*West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 638 (1943).

The very essence of the Blessings of Liberty is to be free from arbitrary control by government officials in exercising constitutional rights. This Court's precedents recognize that "blessing" in the area of parade/meeting permits and licenses. The First Amendment requires objective standards to preclude prejudice, retaliation or petty tyranny when government grants permission to engage in First

Amendment activity. *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940) (official's unbridled power to determine if cause was religious "is a denial of liberty protected by the First Amendment"); *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150–51 (1969) ("freedoms" the Constitution safeguards cannot be "contingent upon the uncontrolled will of an official"); *Larkin*, 459 U.S. at 125-27; *Lovell v. Griffin*, 303 U.S. 444, 451 (1938) (enjoyment of the freedom which the Constitution guarantees cannot be contingent upon the uncontrolled will of administrative officers). *Chaplaincy's* refusal to evaluate the fact of fusion and evidence of denominational retaliation and prejudice is a prima facie example of ignoring Religious Liberty precedent.

## III. A Judicial Pattern Rejecting Religious Liberty Precedent

### A. The Ministerial Exception

A dangerous pattern of rejecting precedent is apparent in the "ministerial exception" jurisprudence that *Hosana-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) articulated. Despite *Hosana-Tabor*'s simplicity and clarity, *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2014 (2020), had to remind the Ninth Circuit that *Hosana-Tabor's* principles had not aged out and religious organizations, not judges, determine who the organizations' ministers are.

*Gordon College v. Margaret Deweese-Boyd*, No. 21-145, petition filed 8/3/2021, seeks certiorari on the same issue: does a religious college determine whether its teachers must adhere to, reflect, and support the

religious organization's beliefs to best serve its religious purposes? Massachusetts' Supreme Judicial Court holds judges can make that decision despite contrary controlling precedent. This destroys the "Blessings of Liberty."

*Trustees of the New Life in Christ Church v. City of Fredericksburg, Virginia*, No. 21-164, petition filed 8/4/2021, asks whether the church or government bureaucrats/officials decide if a youth pastor is a "minister." *Hosanna-Tabor* and *Our Lady of Guadalupe* should have determined that answer.

### B. Benefits Available to Citizens Denied Religious Organizations Because They Are Religious

*Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2024 (2017), held "denying a qualified religious entity a public benefit solely because of its religious character ... violates the Free Exercise Clause." *Id*. Despite *Trinity Lutheran*'s clarity, *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020) had to repeat the message.

*Espinoza* found Montana's policy excluding religious schools and the families whose children attend them "from the [State] scholarship program here is 'odious to our Constitution' and 'cannot stand.'" *Id*. at 2263 (quoting *Trinity Lutheran*).

Despite the clarity of *Trinity Lutheran*'s and *Espinoza's* principles, *Carson v. Makin*, No. 20-1088, petition granted 7/02/21, challenges Maine's similar discrimination against religious practioners, resurfacing the issue.

### C. Religious Organizations Punished for Their Religious Belief

*Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021), decided three days after the Chaplains' petition was filed, found the City's attempted imposition of an ideology and theology contrary to the Catholic Social Services ("CSS") beliefs concerning marriage violated the Free Exercise Clause. *Id.* at 1887, 1882. Six justices are on record in *Fulton* and other cases criticizing *Employment Division v. Smith*, 494 U. S. 872 (1990), for a variety of valid reasons. Justice Gorsuch, joined by Justices Thomas and Alito believe that "*Smith* failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public meaning and has proven unworkable in practice." *Id.* at 1926. Although agreeing with the majority's conclusion, they criticized the decision because it rests on "showing that the [challenged] policy isn't 'generally applicable.'" *Id.* They explained CSS's "free exercise of religion" battle against the City is not resolved. "It's litigation has already lasted years-and today's resolution promises more of the same." *Id.* at 1929.

They also cite Jack Phillips, "whose religious beliefs prevented him from creating custom cakes to celebrate same-sex weddings," *id.* at 1930, in *Masterpiece Cake Shop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018), whose "nine-year odyssey thus barrels on." Others who "cannot afford such endless litigation under *Smith*'s regime have been and will continue to be forced to forfeit religious freedom that the Constitution protects." *Id.* at 1930. *Fulton* failed "to ensure the Blessings of Liberty" before and after certiorari.

These Chaplains, in their over-21-year challenge to the Navy's "blackball" promotion system and denominational preferences, understand CSS's, Jack Phillips', and others' frustration with lower courts' failure to apply established precedent enforcing the Constitution's clear commands.

### D. Suppression of Religious Liberty

Petitioners cite and discuss here *Tandon v. Newsom*, 141 S.Ct. 1294 (2021) (per curium), a Free Exercise case decided before filing this petition. The "ignore Religious Liberty precedent" pattern's scope was not manifest until after *Fulton* and the cited grants of certiorari and petitions were filed. But *Kennedy v. Bremerton School District*, No. 21-48, petition filed 9/14/2021, repeats the same pattern and issue.

*Tandon* provides the clearest example of one Circuit following an "ignore Religious Liberty precedent pattern" and this Court's belated recognition of that reality's seriousness.

> This is the **fifth time** the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise." *Harvest Rock Church v. Newsom*, 141 S.Ct. 889 (2020); *South Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716, 718 (2021); *Gish v. Newsom*, 141 S.Ct. 1290 (2021); *Gateway City Church v. Newsom*, 141 S.Ct. 1460 (2021)). It is unsurprising that such litigants are entitled to relief.

*Id*. at 1297-98 (emphasis added).

*Tandon* shows the Ninth Circuit's analysis ignored controlling precedent: "This Court's decisions have made the following points clear." *Id*. at 1296. *Tandon* then establishes four "points" or principles, *id*. at 1296-97. "These principles dictated the outcome in this case, as they did in *Gateway City Church v. Newsom*, 141 S.Ct. 1460 (2021)." *Tandon*, 141 S.Ct. at 1247. The Court then applied its four identified points to the Ninth Circuit's erroneous *Tandon* decision, highlighting the Ninth Circuit's search for alternative reasons to deny religious liberty. This included the Ninth Circuit's erroneous rejection of "these comparators simply because this Court's previous decisions involve public buildings as opposed to private buildings." *Id.* at 1297. *Tandon* also cited *Roman Catholic Dioceses of Brooklyn v. Cuomo*, 141 S.Ct. 63, 68 (2020) (per curiam).

*Tandon*'s principles at issue and precedent were clear, just like *Chaplaincy's* issues, unless one wanted to avoid applying controlling precedent to them, knowing that this Court can only review so many cases. It is easy for Americans and the hypothetical "objective observer" who understands the judiciary's duty to follow precedent to suspect some courts are more interested in marginalizing rather than securing religious liberty. That is dangerous and divisive, possibly suggesting some kind of judicial resistance. *Chaplaincy* provides the opportunity to confront and terminate the pattern and avoid any such suggestion.

## CONCLUSION

This Court should grant the Chaplains' petition and address whether fusion occurs and the courts below secured or destroyed Petitioners' Blessings of Liberty.

Respectfully submitted,

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