

No. 17-955

IN THE
SUPREME COURT OF THE UNITED STATES

FURNISS HARKNESS,
Petitioner,

v.

RICHARD V. SPENCER,
Secretary of the Navy
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITIONER'S BRIEF IN REPLY

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INTRODUCTION

The rule of law is the foundational principle at issue here. Harkness challenges Respondent's violation of the fundamental rule underlying the First Amendment: government cannot "ma[k]e enjoyment of the freedom which the Constitution guarantees contingent upon the uncontrolled will of administrative officers" (the "F.A.Rule"), Petition ("Pet.") 5-6, (quoting *Jones v. City of Opelika*, 316 U.S. 584, 599–600 (1943)), 42-43. Respondent fails to address the F.A.Rule and its violation.

Contrary to Respondent's suggestion, Response ("Resp.") 11, this is not a run-of-the-mill promotion case or special selection board ("SSB") request. The precedent it sets on important First Amendment issues and the judiciary's role as guardians of those rights has far-reaching implications. Although this Court mandates careful examination of Establishment Clause challenges to procedures demonstrating denominational preferences, the lower courts avoided clear evidence before them demonstrating such preferences. The objective observer could easily conclude placing a thumb on justice's scales to protect a rogue agency is judicially acceptable.

Comparing the Petition with the Resp. illustrates the importance of this Court's review. Rather than address Harkness's "Questions for Review", Respondent creates strawmen to dismember while hiding, ignoring or misrepresenting

facts and applicable legal principles. The differences between Petitioners' and Respondent's case-characterization highlight the Sixth Circuit's conflict with its own and this Court's precedent.

Justice Brandeis's oft quoted *Olmstead v. United States* dissent describes the disastrous consequences when the government becomes a lawbreaker, "it invites anarchy. Against that pernicious doctrine this Court should resolutely set its face." 277 U.S. 438, 485 (1928). Petitioner presents such a "pernicious doctrine", unfortunately validated by the courts below.

REPLY

I. Chaplains Are "Unique" Naval Officers, Denominational Representatives Whose First Loyalty Is Their Endorsing Agency

A. Respondent's Deception, Chaplains Are Like Secular Naval Officers, Seduced the Courts Below

The lower courts adopted Respondent's subtle, pernicious argument and/or suggestion chaplains are not denominational representatives but just like other officers. Respondent defends that argument here, Resp. 9-10, 20-21. This is contrary to law, ignores the facts and the Sixth Circuit's own precedent. "The defining feature of the Chaplain Corps is that each chaplain serves 'as clergy or a

professional representative of a particular religious denomination.” *Harkness v. U.S.*, 727 F.3d 465, 467 (6th Cir. 2013) (citing *In re England*, 375 F.3d 1169, 1171 (D.C. Cir. 2004)). *England* held, “A Navy chaplain's role within the service is ‘unique,’ involving simultaneous service as clergy or a ‘professional representative’ of a particular religious denomination and as a commissioned naval officer.”

Clarity on this issue is essential to comprehend the magnitude of Respondent’s deception and the gravity of the judiciary’s failure to recognize that uniqueness’s constitutional application. This highlights the necessity for this Court’s intervention.

Respondent admits appointment as a chaplain requires a *theological* degree and an ecclesiastical endorsement, and he manages chaplains based on endorser beliefs and practices, Resp. 2, but ignores the admission’s significance. Department of Defense Instruction (“DODI”) 1304.28, ¶ E2.1.7, defines “endorsement” as a religious organization’s certification the chaplain, a “religious ministry professional”, is qualified “to represent that organization to the military” and provide the organization’s military members appropriate religious ministry. 10 U.S.C. § 643 requires a chaplain’s separation upon loss of endorsement.

**B. Respondent Hires and Uses
Chaplains Solely as
Denominational Representatives**

The Sixth Circuit's decision a chaplain can separate his status as both a denominational representative and a naval officer, Pet.App.25a, shows it bought Respondent's deceitful argument a naval officer's specialty, here providing religious ministry, is ancillary to being a naval officer. This is false.

Contrary to Respondent's argument here, he treats chaplains differently than all other officers because of chaplains' unique and inherent religious nature and identity. Respondent applies *Board of Educ. of Kiryas Joel v. Grumet's* holding government cannot delegate discretionary civic power to persons defined by their religious identity, 512 U.S. 687, 698-99 (1994). Respondent's NAVINST 1730.10 limits chaplains' duties to ministry-related areas, denying chaplains all aspects of the Sovereign's power delegated to other officers, *e.g.*, duty officer, control of funds, command. Pet.App.2d ¶e. Those restricted areas can be checked for compliance with regulations. Respondent does not explain why he delegates the Sovereign's authority to chaplains for promotions where there are no checks and unfettered discretion reigns. *See* Pet. 46.

DOD regulations prohibit chaplains from exercising the Sovereign's authority even if a chaplain is the only officer among prisoners of war. The Geneva Convention's treatment of chaplains conclusively demonstrates a chaplain cannot separate his/her roles as denominational

representative and naval officer.¹

**C. Promotion Is a Reward for
Performing Religious Activities
Better than Other Chaplains**

Chaplains are hired to perform ministry, DODI 1304.28. Promotion is based on superior officers' evaluation of that "ministry", a uniquely religious term with no definition or objective standards. The record shows chaplains evaluate ministry based on their endorsers' denominational perspectives.²

Respondent ignores the fact chaplains are the only officers whose promotion "touches on religion", involving the Establishment Clause. Promotion involves choosing which denominational representatives from different sects provide better ministry without objective, neutral standards for evaluating ministry. Respondent claims he provides objective standards, Resp. 20, but identifies no such standards for **ministry**, the subject of chaplains' performance reports. Respondent's board guidance is

¹ Harkness's Appellate Brief at 10-12 identified all these facts.

² Chaplains evaluating other chaplains' ministry involves content based judgments, implicating *Reed v. Gilbert*, 135 S.Ct. 2218, 2228 (2015), and strict scrutiny.

in subjective terms unrelated to ministry.

Apparently the courts below characterized Harkness as an officer who should not complain about discriminatory practices because, accepting Respondent's view, chaplains are merely naval officers with a religious degree who must accept their superiors' decisions. Cognitive dissonance distorts the resulting analysis to justify that characterization, ignoring the fact Respondent's regulations treat chaplains as unique officers, **unlike** other naval officers.

The difference between a chaplain being a denominational representative appointed as a naval officer or, as the courts below found, a naval officer with a theological degree, is a constitutional chasm.

Harkness asks this Court to address that chasm and require Respondent recognize chaplains on promotion boards are still denominational representatives and Establishment Clause restrictions apply.

II. Respondent's Argument the Constitution Does Not Protect a Chaplain from Retaliation for Petitioning for Redress Is Pernicious and Dangerous

The lower courts' validation of Respondent's argument he may freely retaliate against a chaplain or other naval person for lawfully exercising their First Amendment right to petition to redress Establishment and Due process violations, Resp. 11-

15, is incredulous, dangerous and pernicious. Left unaddressed, it is an open invitation to abuse, further litigation and an obstacle to recruiting.

Respondent's argument shows the depth of Agency resentment against Harkness for challenging its irreligious patronage system.

Respondent's argument, Resp. 13, contains another serious error. Petitioner, Pet. 23-24, disputes the Sixth Circuit's findings of "lack of detail and clarity" and no "significant or judicially remediable injury". The District Court rejected those claims denying Respondent's Fed.R.Civ.P. 12(b)(6) motion.

**A. Respondent Mischaracterizes
Harkness's Claim of
Unconstitutional Retaliation as a
Challenge to Duty Assignments**

Respondent, Resp. (I), falsely claims Harkness challenges his duty assignments. Harkness challenges Respondent's retaliation against him for lawfully petitioning for redress against Respondent's Establishment Clause violations, denominational preferences and prejudices. Harkness was selected for various assignments over other chaplains but Respondent's officials interfered with Harkness's ability to carry out those duties like denying funds to travel to his Naples, Italy, assignment. As the District Court found, Harkness stated a claim for unconstitutional retaliation. Pet.App.66b. Challenges to duty assignments *per se* do not usually involve the

Constitution; retaliation for exercising First Amendment rights, also a violation of Respondent's regulations, raises constitutional questions.

B. Orloff Does Not Prevent Courts from Examining Unlawful Decisions

Respondent ignores Harkness's *Orloff v. Willoughby*, 347 U.S. 83 (1953), analysis explaining why the Court placed the word "legitimate" in its holding the judiciary should not "interfere with **legitimate** Army matters", Pet. 22 (quoting *Orloff*, 347 U.S. at 94). Instead, Respondent claims *Orloff* addressed no "illegal acts" and rejected the argument "courts must intervene in military affairs whenever a plaintiff raises a constitutional claim". Resp. 12-13. This is a deceptive half-truth based on willful blindness to *Orloff's* Supreme Court journey.

Dr. Orloff, drafted under the Doctor's Draft Act, was originally assigned as a lab technician, not a doctor. The lower courts held they had no jurisdiction to review the assignment. This Court granted certiorari to address the question whether the Army had to follow the law and assign Dr. Orloff doctor duties. After *certiorari*, the Army changed its position, agreed the lower courts erred, and assigned Dr. Orloff duties commensurate with both his training and his enlisted status. *Orloff*, 347 U.S. at 86-87. *Orloff* was clear, the Army had to obey the law or be guilty of "bad" faith and "discrimination." *Id.*

at 88, 92.

“The Circuit’s decision mirrors the Army’s illegal position **before** certiorari.” Pet. 22 (emphasis in the original). This Court should reject *Orloff* as justification for ignoring unconstitutional actions.

**C. Respondent Provides No
Justification for the Sixth Circuit’s
Violating Precedent Controlling
Review of Motions to Dismiss and
the Cross-Appeal Rule**

Respondent provides no response to Petitioner’s argument, 23-24, the Circuit’s dismissal of Harkness’s claim applying *Mendez v. Seaman*, 453 F.2d 197 (5th Cir. 1971), violated well-established precedent courts presume the well-pleaded facts are true when evaluating motions to dismiss for lack of jurisdiction. *See id.* at 198 (“Dismissal for want of jurisdiction is appropriate only if the federal claim is frivolous or a mere matter of form.”).

The District Court had found Harkness stated a viable retaliation claim under Rule 12(b)(6) but the Circuit found his claim lacked clarity, reversing the District Court’s decision Respondent had not appealed.

Respondent claims the Cross-appeal Rule does not apply because the Circuit can rely on any basis in the record to justify a decision, Resp. 14, but his cited cases contradict his argument. *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015), held: “An appellee who

does not take a cross-appeal may ‘urge in support of a decree any matter appearing before the record’” (Citation omitted). That cannot apply here.

Respondent, appellee in the Circuit, did not renew his previously rejected claim as support for affirming the District Court’s decision.

Thigpen v. Roberts, 468 U.S. 27, 32 (1984), affirmed the Circuit’s dismissal of a criminal conviction on due process grounds rather than the Circuit’s double jeopardy holding. “The due process issue was argued before both the District Court and the Court of Appeals.” Respondent’s Circuit briefing did not challenge his Rule 12(b)(6) denial.

Respondent’s argument the Cross-appeal Rule does not apply “if the [victorious] party is not seeking to expand the judgment in its favor”, Resp. 14 (citing *Jennings, ibid.*), omits a critical element. *Jennings*’ quoted language addresses appellees “attacking the reasoning of the lower court” and bars it when doing so lessens an adversary’s rights. Respondent did not attack the District Court’s reasoning. Adopting Respondent’s rejected argument denied Harkness the ability to address the argument his unconstitutional retaliation claim lacked detail and identified no injury the court could remedy.

Harkness seeks a record accurately portraying his accomplishments and a board’s objective evaluation of it. Respondent and the Circuit ignored the judiciary’s remedial powers to order Respondent to use administrative procedures directing boards take past prejudice into account positively.

Harkness brought to the District Courts' attention Commander George Byrum's case. Byrum successfully petitioned Respondent for a new Selective Early Retirement Board, showing his original board was illegally composed. A subsequent SSB selected Byrum for Captain following the Secretary's instructions to assume Byrum would continue at the same level of performance prior to his separation. Respondent has provided similar remedies for other prejudice victims. Respondent's denial of his ability to remedy victims of prejudice despite his history suggests bad faith.

III. Respondent's "Blackball" Promotion System Defense Highlights the Need for This Court's Review

Respondent's blackball promotion system defense, Resp. 11-21, avoids addressing controlling constitutional issues. This shows courts cannot defer to agency evaluation of Establishment claims, emphasizing the need for this Court's review.

A. Respondent Fails to Address Petitioner's Facts Showing the Courts Below Ignored Their Duty to Carefully Examine Evidence Showing Establishment Violations

Respondent fails to challenge Petitioner's facts showing the lower courts failed to carefully examine

evidence of Establishment violations.

Respondent does not deny:

1. Harkness made Respondent aware his blackball voting system “allows one board member to manipulate the board” and anonymously destroy the career of any chaplain candidate for promotion, Pet.App.9e; and “[t]he Navy’s chaplain-board investigations” supported his claims, Pet.App.4e.

2. Respondent knew of (a) the four IG investigations and their results because he authorized the investigations, released board members from their oath and approved the subsequent SSBs and their results; and (b) the Center for Naval Analysis promotion study (1972-2000) results showing denominational preferences.

3. The only promotion board practice changes after 2002 were the reduction of chaplain board members and a procedure to alert (without correcting) the board if a member voted “zero.”

4. Harkness’s “38-Years of Denominationalism” statistical study covered the period after those changes yet Respondent offered no evidence reducing chaplain board members eliminated denominational preferences.

5. Respondent’s voting machine, Pet.App.1h, on its face is not neutral, given the IG results establishing its ability to anonymously destroy a candidate’s career.

6. Respondent has no effective means guaranteeing denominational factors cannot influence promotion decisions.

7. Respondent offers no rebuttal to Petitioner's assertion the Circuit's imposition of missing speculative factors was prejudicial based on its lack of expertise in military promotions and Respondent's and his expert's failure to use any of those factors in their statistics despite their expertise. Pet. 28-29.

B. Respondent Fails to Address His Unlawful Delegation of Unbridled Authority to Denominational Representatives

Respondent's "blackball" promotion system defense, Resp. 11-21, ignores Harkness's application of the F.A.Rule to Respondent's blackball voting system and the Sixth Circuit's improper exclusion of the F.A.Rule from its analysis. Pet. 5-6, 42-43. "The First Amendment prohibits the vesting of such unbridled discretion in a government official." *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 132-33 (1992).

Respondent's IG established his blackball voting allowed one chaplain board member to anonymously deny any candidate's promotion and manipulate the board process favorably for preferred candidates. Pet.App.1f-11f. This is "unbridled discretion in a government official" establishing the forbidden fusion of religious and governmental power.

Harkness's SSB request cited Respondent's IG inspections finding denominational preferences. The

lower courts excluded the reports, failing to conduct the searching analysis *Committee for Public Education v. Nyquist*, 413 U.S. 756, 794 (1973), and *Gillette v. U.S.*, 401 U.S. 437, 452 (1971), require. Pet. 39.

C. This Court Should Review the Sixth Circuit’s Rejection of *County of Allegheny’s* Strict Scrutiny Criteria

County of Allegheny v. ACLU, 492 U.S. 573, 608-09 (1989), rejected an argument Establishment plaintiffs meet a burden “demonstrating that the government had favored a particular sect or creed”, as here.

On the contrary, we have expressly required “strict scrutiny” of practices suggesting “a denominational preference,” *Larson v. Valente*, 456 U.S. [228], 246 [(1982)], in keeping with “the unwavering vigilance that the Constitution requires” against any violation of the Establishment Clause. [Citation omitted]

The Court has had no case to apply that principle. This case provides the situation allowing the Court to apply *County of Allegheny’s* “suggestion of preference” triggering strict scrutiny and emphasize careful examination of challenged

practices for subtle erosions of Establishment values.

D. Rejection of Statistical Significance Is Inconsistent with Courts' Duty to Deter Subtle Establishment Violations

The Sixth Circuit rejected statistical significance as a measure of religious preference. The Petition, 34-36, argues this is absurd, inconsistent with the duty to carefully examine facially neutral procedures' results for denominational preferences or subtle erosions of Establishment values. Respondent has no rebuttal. This case illustrates statistical significance establishing credible evidence a practice "suggests" denominational preferences and/or evaluates denominational neutrality.

Respondent and the courts below mischaracterize the controlling issue as endorsement of religion rather than denominational preferences. Statistics and IG results suggest, if not establish, the procedures produce denominational preferences.

There is a constitutional difference between advancing "religion" and denominational preference. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987), held a religious organization Title VII exemption was "not unconstitutional because it allows churches to advance religion[.]"

E. *Commack* and *Barghout* Are on Point

Contrary to Respondent's assertion, Resp. 20, the question whether Respondent can delegate discretionary civic power to denominational representatives to award promotions without demonstrating **effective** guarantees religious factors will not influence outcomes is a question of law. *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337 (4th Cir. 1995), and *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2nd Cir. 2002), *cert. denied*, 37 U.S. 1187 (2005), illustrate that point. In both cases, government delegated discretionary civic authority over an area touching religion to persons defined by their religious identity. The rabbis' religious identity was the reason they were selected for their positions, just as chaplains are selected for membership on chaplain boards rewarding the best ministry providers; chaplains have experience with ministry, the religious subject being evaluated.

IV. Respondent Ignores Harkness's Claim Courts Cannot Defer to Respondent on Constitutional Questions

Respondent claims the ability to address constitutional claims administratively, Resp. 21-22, but fails to meet the same standards courts use, careful examination for subtle and overt Establishment violations. Although knowing the IG investigations found his promotion procedures allowed denominational preferences and one board

member to “zero out” and/or advance some chaplains, Respondent found no Establishment violations. This failure demonstrates the Agency’s incompetence and insufficiency addressing Establishment claims, an important legal standard the Court needs to clarify. Deferring to Respondent’s review of Establishment claims conflicts with the judiciary’s duty to carefully examine challenged practices.

CONCLUSION

Harkness shows multiple violations of this Court’s precedent including: justiciability of military personnel claims challenging government misconduct; consideration of statistics alleging discrimination; the F.A.Rule’s viability; Establishment Clause review criteria, and the judiciary’s role in reviewing agency determinations thereof. Certiorari is necessary to uphold the rule of law.

Respectfully submitted,

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