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.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
923 Gardens Blvd.
Charlottesville, VA 22901
(434) 978-3888

Arthur A. Schulcz, Sr.
Counsel of Record
CHAPLAINS COUNSEL, PLLC
21043 Honeycreeper Pl.
Leesburg, VA 20175
(703) 645-4010
art@chaplainscounsel.com

Counsel for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED FOR REVIEW

Petitioners, 65 Navy Non-liturgical, evangelical chaplains and two chaplain endorsing agencies, challenge specific Navy Chaplain Corps' ("CHC") promotion procedures under the Establishment and Due Process Clauses. Petitioners' unrebutted evidence shows the challenged procedures allow the CHC's favored religious denominations to benefit with statistically significantly higher promotion rates, prejudicing Petitioners because their denominations are not favored.

The Court of Appeals' denied Petitioners' preliminary injunction motion ("PI") holding Respondents' demonstrated denominational preferences did not violate the Establishment Clause because Petitioners failed to show **deliberate intent** to discriminate, either with direct evidence of intent or sufficiently "stark" promotion rate disparities as defined by *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (all Chinese rejected-all Caucasians accepted).

The decision below unilaterally changed Petitioners' claims of denominational preferences producing disparate impact into a "disparate treatment" claim, changed the objective observer standard, and ignored the controlling standard of *Bazemore v. Friday,* 478 U.S. 385 (1986), in rejecting Petitioners' statistical evidence.

The questions presented for review are:

1. Did the Court of Appeals commit constitutional error when it converted Petitioners' Establishment Clause denominational preferences claim into a "disparate treatment" claim that Petitioners never raised, creating a "disparate treatment" category for Establishment Clause claims that abandons and is contrary to all Establishment and Due Process Clause precedent?

2. Should this Court reject the Court of Appeals' unprecedented new Establishment Clause standard requiring "deliberate discriminatory intent" or "stark" statistical disparities because it (a) is contrary to *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), (b) abandons this Court's standard of review for denominational neutrality as established in *Bd. of Ed. of Kiryas Joel v. Grumet*, 512 U.S. 687, 703-708 (1994), and (c) eviscerates uniform Establishment Clause precedent?

3. Did the Court of Appeals abandon its obligation to follow precedent by rejecting the Petitioners' statistical evidence in violation of this Court's rule established by *Bazemore v. Friday*?

PARTIES TO THE PROCEEDING

The petitioning parties listed below are the plaintiffs in the three consolidated cases that make up *In re Navy Chaplaincy*, 07mc269 (GK), the caption in the District Court. Those cases are *Chaplaincy of Full Gospel Churches v. Mabus* (the current Secretary of Navy), 99cv2945, filed11/5/1999; *Adair v. Mabus*, 00cv0566; and *Gibson v. U.S. Navy*, 06cv1696.

1. Petitioning Endorsing Organizations.

The Associated Gospel Churches and the Chaplaincy of Full Gospel Churches, on behalf of their Navy chaplains and themselves.

2. Petitioning Navy Non-liturgical Chaplains, including Active Duty, Active Reserve, Retired and former Navy Non-liturgical chaplains.

Robert H. Adair; Richard L. Arnold; Ray A. Bailey; Michael Belt; William C. Blair; Rick P. Bradley; George P. Byrum; Andrew Calhoun; Martha Carson; Greg Demarco; Timothy J. Demy; Patrick T. Doney; Joseph E. Dufour; Floyd C. Ellison; Larry Farrell; Alan Garner; David L. Gibson; John Gordy; Richard F. Hamme; Furniss Harkness; William A. Hatch, Jr.; Gary Heinke; Robert L. Hendricks; Frank Johnson; Mark R. Johnston; Laurence W. Jones; Samuel David Kirk; Klon K. Kitchen Jr; Frank S. Klapach; Thomas G. Klappert; Jan C. Kohlmann; Allen L. Lancaster; Michael Lavelle; George W. Linzey; James Looby; Manuel Mak; Jairo Moreno; Walker E. Marsh, Jr.; Denise Y. Merritt; David

Mitchell; Timothy D. Nall; Dan Nichols; Edith Rene Porter-Stewart; James V. Prince; Duane Purser; Rafael J. Quiles; Javier Roman; Daniel E. Roysden; Thomas Rush; Lloyd Scott; Mary Helen Spalding; Gary Paul Stewart; Lyle Swanson; Fred A. Thompson, Jr.; Glenn Thyrion; Armando Torralva; Thomas Daniel Tostenson; James Twamley; Thomas R. Watson; James M. Weibling; David Wilder; Barby Wilson; Wilson W. Wineman; Michael A. Wright; and Chris Xenakis.

3. Respondents

Respondents are the defendants in the three consolidated cases.

The original named parties sued in their official capacities have been replaced by successors to their office. The identified parties are the primary defendants and identified on defendants' Counsel's Notice of Appearance. All persons are sued in their official capacities. They are:

The United States Navy; The Secretary of Navy, the Hon. Ray Mabus and successors; Chief of Naval Personnel, Scott R. Van Buskirk and successors; Navy Chief of Chaplains, RADM Mark Tidd; Deputy Chief of Chaplains, RADM Margaret G. Kibben and successors.

CORPORATE DISCLOSURE STATEMENTS

Petitioner Associated Gospel Churches ("AGC") is a Department of Defense recognized chaplain endorsing agency. It is a fellowship of non-denominational Christian evangelical churches that has endorsed chaplains to the military services since 1943. AGC is a 501(c)(3) organization incorporated in Pennsylvania and has no publically traded stock. Its offices are located at 209 Pine Knoll Drive, Suite B, Greenville, South Carolina.

Petitioner Chaplaincy of Full Gospel Churches ("CFGC") is a Department of Defense recognized endorsing agency established to endorse chaplains from Christian Charismatic nondenominational churches, fellowships and associations. CFGC is a 501(c)(3) organization, a corporation organized and registered under Texas law, and has no publicly traded stock. Its offices are located at 150 E Hwy 67, Suite 250, Duncanville, Texas 75137.

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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The U.S. Court of Appeals for the District of Columbia's December 27, 2013, decision denying petitioners' appeal of the denial of their preliminary injunction motion (the "PI") and their Establishment Clause and Equal Protection arguments, the "Decision", is reported at 738 F.3d 425 (D.C. Cir. 2013) and set forth in the Appendix at A-1-12. The D.C. Circuit's February 24, 2014, denial of Petitioners' *en banc* review petition is at A-13-14. The District Court's decision denying Petitioners' PI is at A-15-39.

JURISDICTION

The D.C. Circuit entered its judgment December 27, 2013, and denied Petitioners' request for rehearing *en banc* February 24, 2014. 28 U.S.C. §1254(1) provides the Court jurisdiction.

CONSTITUTIONAL PROVISIONS

The First Amendment guarantees in relevant part:

> Congress shall make no law respecting an establishment of religion....

The Fifth Amendment states in relevant part: No person shall ... be deprived of life, liberty, or property, without due process of law; ....

INTRODUCTION

Petitioners ask whether the courts below can:
● rule on a **disparate treatment** claim Petitioners **never** made to deny Petitioners' actual Establishment Clause claim of positive and negative **denominational preferences** (disparate impact) resulting from specific Navy Chaplain Corps ("CHC") promotion procedures; and
● abandon multiple binding precedents to create a new Establishment Clause **disparate treatment** standard while ignoring the record.

STATEMENT OF THE CASE

Petitioners have asked the courts for over 14 years whether the Establishment Clause mandates the CHC to distribute benefits -- here promotions -- only through procedures effectively guaranteeing denominational neutrality[1] or may it prefer some denominations over others.

The Decision validated CHC's practices conferring denominational preferences because:
● **one** promotion selection rate difference between the preferred denominations and the

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[1] *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 512 U.S. 687, 703 (1994).

nonpreferred denominations was not "stark", as defined by *Yick Wo*, A-6-8, 10-11; and
● Petitioners did not show "intentional discrimination." A-11-12.

The Decision **changed** Petitioners' **denominational preferences** and disparate **impact** claims into **disparate treatment** claims and held an objective observer would conclude the CHC promotion system was neutral and conveys no official message of denominational favoritism-advancement-preferences, A-10-12, despite knowing:

● the Center for Naval Analysis ("CNA") hired by the Navy to study the CHC, reported "perceptions of bias in the promotion system are wide spread" and "[m]ost chaplains we spoke to mentioned it as a personal concern."[2]
● the Naval Inspector General ("NIG") investigating the fiscal year 2000 Captain CHC promotion board (the "Washburn NIG") documented the CHC's voting system allows one member to anonymously control the board results and destroy a chaplain's career;
● promotion rates for denominations with a Chief of Chaplains ("Chief") are consistently higher compared to denominations without a Chief, a result not explained by chance;
● candidates whose denomination matches a board member's have a 50% greater promotion probability than those with no match;
● the record shows denomination is a crucial factor affecting promotion results, Opening Brief ("OBR") 9-27.

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[2] March 2000 CNA Promotion Study ("CNA-Study"), ECF Doc. 34-21, pp. 1 & 7.

Petitioners ask the Court reverse the Decision by:

- enforcing well-established precedent forbidding the government from preferring some denominations over others, *e.g., Everson v. Board of Ed.*, 330 U.S. 1, 15 (1947);
- "requir[ing] 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", *County of Allegheny v. ACLU*, 492 U.S. 573, 608-09 (1989) (citations and internal quotes omitted);
- applying *Grumet*'s precedent, 512 U.S. at 698-99, that discretionary civic authority may not be delegated to persons defined by their religious identity without effective guarantees "that governmental power will be and has been neutrally employed", *id.* at 703, because the "potential for conflict inheres in the situation", *Larkin v. Grendel's Den Inc.*, 459 U.S. 116, 126 (1982); and
- enjoining the challenged procedures.

The facts of record, culled from Respondents' provided data, set the stage and provide incontrovertible evidence supporting Petitioners' claims and arguments.

Fact: Petitioners Never Claimed Disparate Treatment

Petitioners' complaints and preliminary injunction ("PI") claimed specific promotion procedures produced denominational preferences, advancing the preferred and prejudicing those not preferred. Consolidated Complaint, ECF 132-1, Count-4, ¶¶73-80, 85-104, 121-122; PI, ECF 190, pp.1 -2.

The Complaints claims do not assert and do not depend upon proof of disparate treatment by promotion boards.[3] The Consolidated Complaint's ¶ 159 claims CHC policies result in unconstitutional disparate **impact**.

Fact: The Navy Denies Chaplains the Sovereign's Power -- Except to Advance or Destroy Other Chaplains' Careers

Chaplains are hired to represent their religious organizations to the Navy. DOD Instruction 1304.28. Their duties include providing religious services to those of similar faith and education, counseling, and other forms of ministry to all service personnel regardless of denomination. *Id*.

Chaplains are unique naval officers with a dual loyalty. Although naval officers, they remain accountable to their religious organizations for their ministry. *In re England*, 375 F.3d 1169, 1171 (D.C. Cir. 2004), *cert denied*, 543 U.S. 1152 (2005).

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[3] Only plaintiff Michael Wright claims disparate treatment, Consol.Compl., Addendum 1, p.72, ¶ 64.

Chaplains who lose their endorsement must be separated from the Service. 10 U.S.C. § 643.

Secretary of Navy Instruction 1730.7B and regulations forbid chaplains from exercising the Sovereign's power in accord with the Establishment Clause's prohibition on fusing government and religious power. *See Grumet*, 512 U.S. at 697-99. Nonetheless, the Navy allows chaplains to exercise the Sovereign's power granting and denying benefits that either advance or terminate careers, *e.g.,* CHC promotions.[4]

Chaplain promotions are a reward for past religious activity; boards evaluate candidates' past ministry as an indication of effective "ministry" at the next rank. "Ministry" is a religious term with no objective evaluation standards whose use is often based on a denominational perspective. CAPT Poe Declaration, ¶¶ 7-23, ECF 99-2. At the CDR and CAPT ranks, chaplains supervise others providing ministry. No CHC positions require a specific denomination. CAPT Hendricks Declaration, ¶ 11, ECF 150-10.

10 U.S.C. § 612 requires promotion boards have at least five officers, including one from the category under consideration. Chaplains staffed CHC promotion boards until 1986 when one line officer replaced a chaplain member to settle a lawsuit. In 2002, following this litigation, CHC reduced chaplain membership to two, including the Chief or Deputy.

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[4] 10 U.S.C. § 632 requires separation after two failures to reach commander.

Fact: The Navy Possessed Evidence of CHC's Denominational Preferences

CNA examined CHC promotion procedures and policies in 1998-99 after "widespread" complaints about CHC promotion inequity and favoritism. CNA-Study, p.1. CNA reviewed 1972 to 2000 promotion statistics by faith group cluster ("FGC") and presented its findings to senior Navy and CHC leadership in 2000. JA 1055. It reported these promotion rates:

FGC	LCDR %	CDR %	CAPT %
Roman Catholic	82.0%	83.7%	57.8%
Liturgical	78.5%	72.0%	59.1%
Non-liturgical	**79.5%**	**69.2%**	**53.3%**
Special Worship	88.6%	70.0%	52.0%

Catholic and Liturgical Protestant chaplains were the preferred denominations with Petitioners' FGC always below Liturgical promotion rates at the key ranks of CDR and CAPT. CNA reported the differences at commander are not due to chance.[5] CNA's findings presaged the findings of Petitioners' statistical expert, Dr. Leuba. JA1060 ¶ 16; JA 1057 ¶ 8.

An Equal Opportunity Officer investigated the FY 1997-98 CDR Promotion boards and concluded

[5] CNA improperly measured each group against the average, not against each other. ECF 34-21, p.81.

promotions appeared to follow a denominational quota system. ECF 135-18, ¶ 3.

NIG and Dept. of Defense IG ("DODIG") follow-on investigations showed denomination was a factor in chaplain promotions. JA 952-61.

The Washburn NIG found CDR Washburn was denied promotion by the "zero" vote of a single board member who disagreed with Washburn's view of female ministry. JA 84, JA 356-59.

The NIG FY 2008 Captain board investigation found that an innocuous comment by RADM Baker, Deputy Chief and board president, had prejudicially influenced board members' votes. JA 1000-01, ¶ 26.

Fact: The CHC Uses a "Blackball" Promotion Voting Procedure

No CHC promotion board member reads all records. Instead, a board member briefs a candidate's file. Following the briefing, board members "vote the record" by depressing one of five buttons, 0-25-50-75-100, in a black "sleeve" that hides the voter's hand as it "votes" the member's evaluation of the candidate's promotability. DODIG Report, p. 8 (JA 956). No member's vote is identified or recorded; only the board's average vote is posted.

Voting "zero" guarantees a candidate's non-selection because of the small number of board members. JA 981-82 (RADM Black[6] Washburn NIG

[6] Chief and board president

testimony). CDR Washburn testified she served on several boards and saw "zeroing out" used. JA 985.

No other Armed Service uses a "blackball" procedure allowing one board member to anonymously deny a candidate promotion, destroying his/her career. The other Services use larger boards, require that each member evaluate each candidate and record their votes. *See* JA 1024 (Army Memorandum 600-2 requiring every member review and vote records individually; "[a] typical board ... consists of 18-21 officers"); *Curtis v. Peters,* 107 F.Supp.2d 1, 3 (D.D.C. 2000) (25 board members).

Fact: The CHC Has No Procedures Guaranteeing Denominational Neutrality or Preventing Preferences

Petitioners' take no issue with denominations *per se*, nor with having **a** chaplain board member. Petitioners challenge the **unfettered** discretionary civic power the Navy gives the Chief and chaplain board members to anonymously destroy or advance chaplains' careers on denominational-theological grounds.[7] The "blackball" vote epitomizes this delegation. The record identifies **no** Navy/CHC checks evaluating whether the Chief's and boards' decisions are denominationally neutral. Petitioners' evidence demonstrates with scientific certainty board results are not denominationally neutral.

Total lack of oversight of the CHC's use/abuse of its delegated power to advance and destroy careers

[7] Denominations reflect different theologies, *e.g.*, Lutheran, Baptist, clearly "touching" religion.

is compounded by the Navy Secretary's instructions to CHC boards to select from among the fully qualified, those whose selection is "in the best interests of the Naval Service for officers with particular **skills**." ECF 34-18, ¶3. "Skill" in CHC personnel records means denomination.

Fact: Petitioners' Unrebutted Evidence Exposes CHC's Long Standing History of Denominational Preferences

Denominational preferences in promotions involve both denominational favoritism and denominational prejudice; one produces the other. Differences in denominational promotion rates not explainable by chance indicate both. Every reliable measure shows the Non-liturgical chaplains' promotion rates are statistically significantly lower than Catholic and Liturgical Protestants. Respondents' investigations identify the procedures allowing these long-standing preferences.

Petitioners' unrebutted evidence[8] shows a Chief's tenure normally benefits his denomination in accessions and promotions, OBR 6-28, a result consistent with the purpose of denominations and

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[8] Respondents opposed Petitioners' PI statistical evidence with its expert's declarations (Dr. Siskin) predating Petitioners' post 11/29/06 denominational statistical evidence. Dr. Siskin admitted he never evaluated Petitioners' denominational statistics. ECF 78-6, ¶6. Respondents identified no missing factors, calculation, or methodology errors in Dr. Leuba's denominational studies. The Decision correctly ignored Dr. Siskin's reports.

their representatives, to **advance** *their* religion. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987). The challenged procedures allow the Chief and senior chaplains to exercise their denominational bias without accountability, advancing their denominations and expressing preferences among others. Illustrations follow:

- one string of four Chiefs had three Lutherans; the CHC's Lutheran proportion increased;
- Lutheran dominance lessened when a Roman Catholic became Chief;
- with Presbyterians (USA) now Chief and Deputy, Catholics are no longer the preferred denomination, having decreased from 21 Captains in 2009 to six in 2013.[9]

The FY 97-98 and 2000 (Baker) NIGs show the Chief and Deputy, Rear Admirals in an agency deferential to higher rank, exercise great influence as CHC promotion board presidents, advancing their own or favored denominations and hindering others, knowingly or unknowingly.

Examining promotion data since 1950 organized by the Chiefs' denominations shows four CHC denominationally different data-sets:

- Catholic ("RC"),
- Southern Baptist ("SB"),
- all other denominations which "Have-Had-a-Chief" (four large Liturgical denominations plus three small denominations (RCA, OBSC,

[9] Leuba, *38 Years of Denominationalism*, ECF 186-7 pp. 21-25.

SDA)[10] with few chaplains, and
● all denominations which "Have-Never-Had-a-Chief."

Examining each data-set's change as a percent of the CHC at each rank as rank increases shows denominational preference at work. The four sample charts below show the CHC composition at each rank for each of the above data-sets at different times, illustrating self-perpetuating denominational preferences.

Each data-set begins with the LTJG/LT actual entry level share of the CHC normalized at 1.0.[11] The number on the chart's left side is the factor a data-set increases its entry-level initial percentage of the CHC. The line for each data-set would consistently center around the 1.0 entry value in a denominationally neutral system. They do not.

The history of Catholic and Southern Baptist chaplains illustrates the Chiefs' impact on **denominational preference**.

Catholic share at each rank *decreased* as rank increased *before* RADM O'Connor became Chief in 1977, *see* 1974 Alfa Roster chart.[12] After his tour, Catholic percentages increased at each rank.

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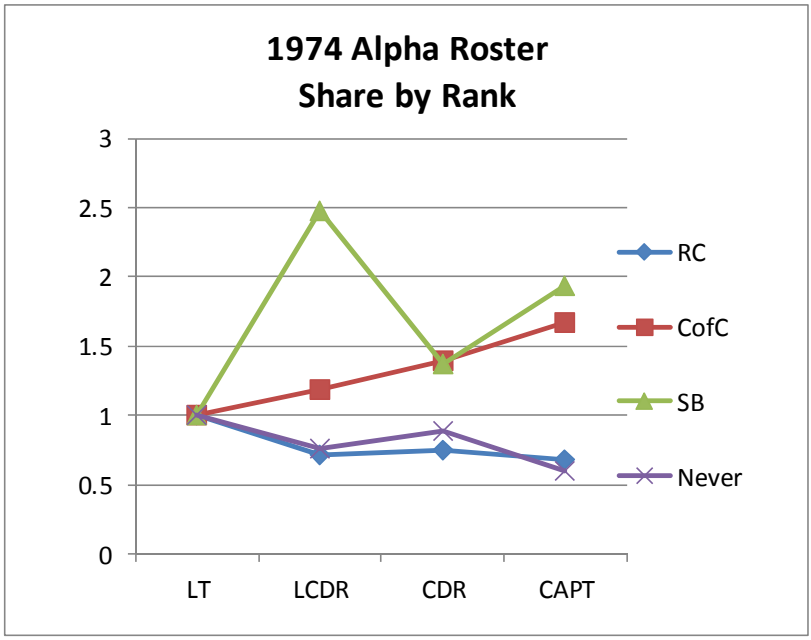
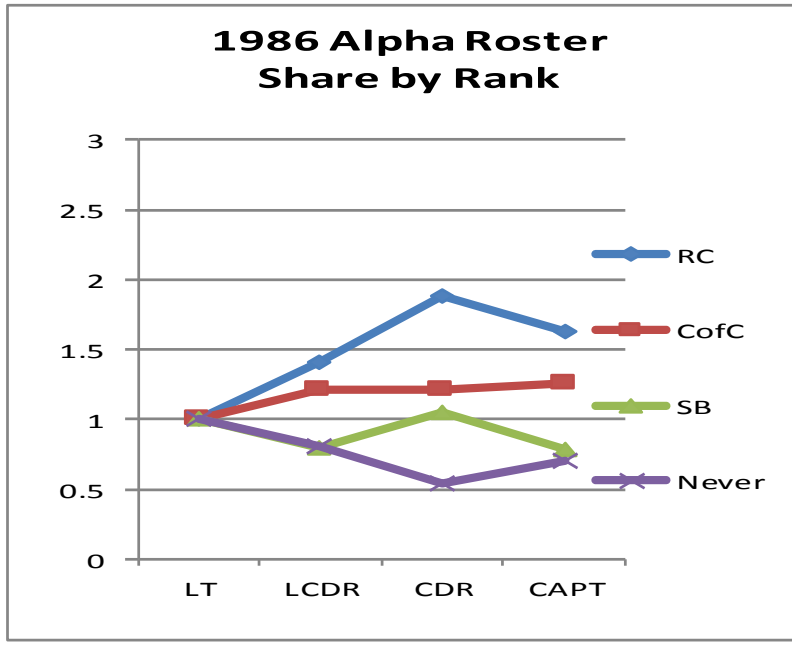
[10] CHC denominational codes at A-40.
[11] Normalization controls for confounding due to differences in accession ratios at LTJG/LT.
[12] Alpha Rosters list all CHC chaplains on active duty at a given date by name, rank and denomination.

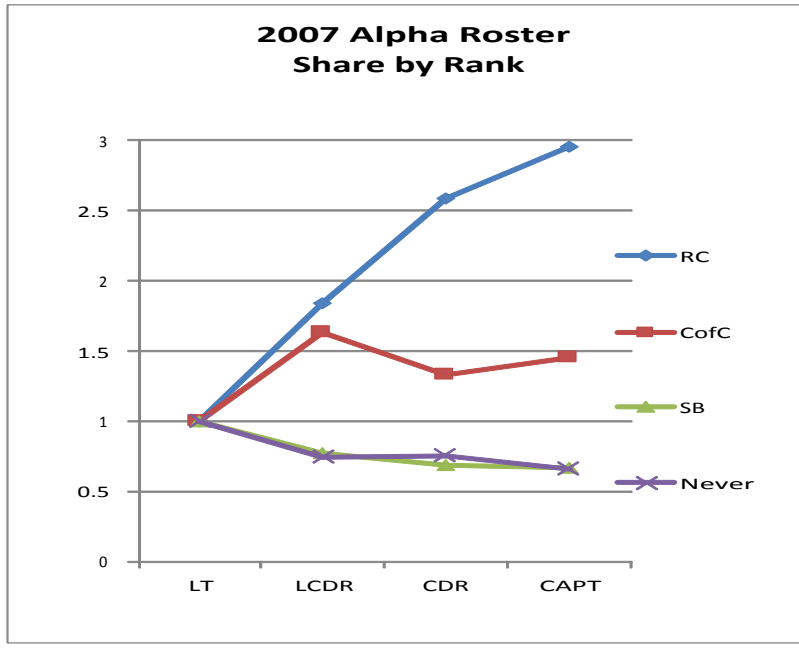


Southern Baptists' only Chief, RADM Kelly, served so long ago (1965-70) the Chief's denominational benefit has waned; they are *consistently* the lowest among the Chiefs, although rising again under a PUSA Chief. Leuba, *Reasons Change, Seasons Change* ("*Change*"), JA1172-1175, ¶ 60.3-61.

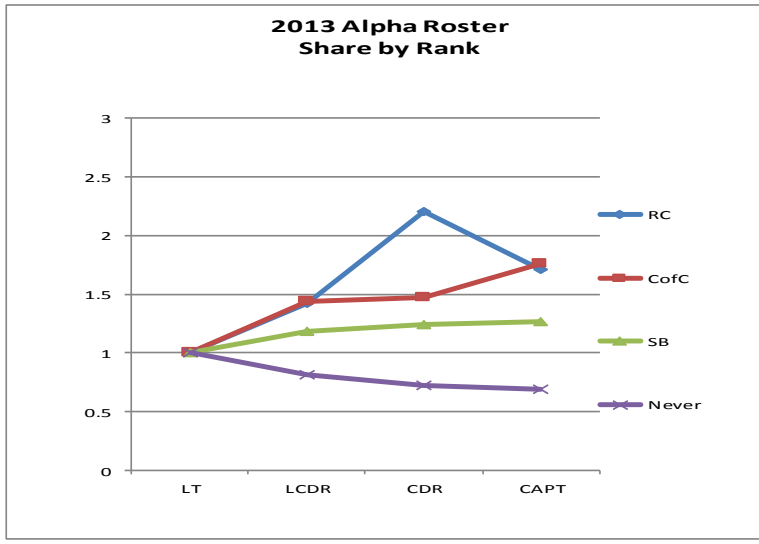
The Have-Had-a-Chief group increase their CHC percentage at every rank.

The Never-Had-a-Chief group is **always** lowest, *id.*, showing promotions are not neutral; the statistically significant differences exceed 3 standard deviations. *Change* ¶ 60.7.


1986 Alpha Roster
Share by Rank
3
2.5
2
1.5
1
0.5
0
LT
LCDR
CDR
CAPT
RC
CofC
SB
Never


2007 Alpha Roster
Share by Rank
3
2.5
2
1.5
1
0.5
0
LT
LCDR
CDR
CAPT
RC
CofC
SB
Never

The 2007 chart above shows Catholic Captains 3 times their entry-level percentage following a Catholic Chief. The 2013 chart below shows Catholic CAPTs have decreased statistically significantly - the impact of new denominational leadership (PUSA).



Petitioners' *38 Years of Denominationalism*, ECF 186-7, provides data counts, statistical tests and charts for 1974-75, 78-79, 82, 86-91, 96-2012. All the Chiefs' plots, ¶¶ 60-60.7, produce similar results, demonstrating the same pattern and types of preferences depending on who is Chief.[13] *See* OBR 19 (2000, 2004, 2008, 2010 charts).

Dr. Leuba examined the benefit to candidates with the Chief's denomination using 1977-2002 promotion data. *Statistical Evidence of the Navy's*

[13] *See also* 2012 Alpha Roster Analysis, ECF 140-1, pp. 3-7.

Religious Preferences ("*Preferences*"), JA 1075-1155. *Preferences*' Table 9, JA1107, modified[14] below shows "What Happens when the Chief of Chaplains and a Candidate for Promotion Share a Denomination ...."

Rank	Match Conditions	% Selected	Benefit Absolute	Benefit Relative
CDR	Match	**83.33**	10%	14%
CDR	No Match	**73.17**		
CAPT	Match	**78.57**	28%	56%
CAPT	No Match	**50.45**		

The success rates for candidates who share a Chiefs' denomination are statistically significantly higher than are the rates for those who do not, by 2 standard deviations at CDR, 3 at CAPT. JA 1107-08.

Opposing Petitioners' PI, Respondents produced 2003 to 2012 promotion statistics. *Failed Course Corrections*, JA 1460-1556, analyzed the new data, showing the CHC's Denominational Favoritism continued and increased.

> When being considered for CAPT or CDR, the advantage of having a match on the board is roughly equivalent to a 50% increase in the likelihood of selection. This is statistically

[14] Benefit column added for clarity. "Absolute Benefit" = Match - Non-Match; Relative Benefit = (Match - Non-Match)/Non-Match.

> significant … using the Chi Square test. *Id.* ¶ 43.

Fact: The CHC Has Favorite Denominations

The CHC placed **two** Catholic chaplains on **every** promotion board from 1977 until 1986, when Lieutenant Wilkins challenged the practice. *Wilkins v. Lehman*, No. 85-3031, Slip op. (S.D.Cal. 2/10/86) (ECF 147-2), enjoined Wilkins's discharge, finding his Establishment challenge would likely succeed. The CHC promoted Wilkins, mooting his case, and thereafter placed **one** Catholic on **every** board until Petitioners challenged the policy as a denominational preference. No other denomination was granted a reserved seat on every promotion board.

The CHC awarded five *de facto* favorite denominations 80% of all promotion board memberships from 1977 to 2002. Analysis of commander promotion boards' frequency of denominational board membership shows a distinct four tier **denominational hierarchy**. Each tier has a statistically significant different promotion rate;

I-48.34%;
II-45.07%;
III-36.12%;
IV-27.00%.

Most of Petitioners' denominations and half of all chaplains fall in tier IV, the lowest promotion rate, *see* OBR 12, Fact 17. "1977 thru 2002 Denominational Appearance as Promotion Board Members" is at A-42.

Chaplain promotion opportunity is **not** equal. Candidates sharing a board member's denomination have a higher probability of selection than candidates without such identification/advantage. JA159, ¶ 58 (cited by JA 373, Fact 84).

Respondents have not legitimately challenged these statistics.

The Judicial Proceedings

In re Navy Chaplaincy, 07-mc-269, consolidated three separate chaplain cases: *CFGC v. Danzig*, 99-cv-2445; *Adair v. Danzig*, 00-cv-0556; and *Gibson v. U.S. Navy*, 06-cv-1696. Each case challenges denominational preferences in all CHC operations that distribute benefits and affect careers, here promotions. *See* Consolidated Complaint, ECF 132-1.

Petitioners filed a partial summary judgment motion ("PSJ"), ECF 34 (12/30/2008), attacking CHC promotion procedures under the Establishment Clause because they:

- established denominational preferences and employed denominational hierarchies;
- delegated discretionary civic authority to chaplains - denominational representatives - without effective guarantees the power would be used solely for secular, neutral and non-ideological purposes with or without the blackball system; and
- used denominational representatives as board President, the Chief or Deputy Chief.

Petitioners discovered new statistical evidence in 2011: candidates sharing the Chief's denomination had statistically significant higher promotion rates than candidates who did not.

Petitioners sought a PI, ECF 95 (7/22/2011), enjoining CHC promotion boards until their PSJ was decided. Petitioners specifically attacked using the Chief as President and the "blackball" voting system.

The District Court found no standing and denied the PI, following Petitioners' 1/30/12 emergency motion in the D.C. Circuit (No. 12-5024) before the FY 2013 boards were due to begin. Petitioners appealed.

In re Navy Chaplaincy, 697 F.3d 1171, 1177-78 (D.C. Cir. 2012) found that Petitioners (1) had standing; (2) would not succeed on their "improper delegation" of civic authority to chaplains argument because the Navy reviewed board results; but (3) had valid claims of denominational discrimination, *id*. at 1179-80. It reversed the PI denial and remanded to the District Court to determine if "the defect in the Establishment Clause claim" was "legal or factual." *Id*. Petitioners' rehearing petition on the "delegation" finding was denied.

On remand, the District Court acknowledged Petitioners raised Establishment Clause claims challenging chaplain promotion board procedures that produced denominational preferences; rejected the previous law of the case, *Adair v. England*, 217 F.Supp.2d 7, 14-15 (D.D.C. 2002) ("evidence suggesting denominational-preferences" would result

in strict scrutiny of the challenged practices) (citing *County of Allegheny*, *op. cit.*), A-34; incorrectly found that "the central theory of Plaintiffs' Establishment Clause claim rested on their being subjected to **intentional discrimination**", A-36 (addressing accessions), a claim Petitioners never made in promotions; and denied the PI because Plaintiffs provided no evidence of intentional discrimination. A-28-38.

The District Court cited the 10% higher Commander promotion rate for chaplains sharing the Chief's denomination, but found this difference "not as stark as that in "*Gomilion [v. Lightfoot*, 364 U.S. 339 (1960)] or *Yick Wo*", A-37-38, cited no Establishment Clause precedent; and ignored the 28% absolute and 56% relative difference in Captain promotion rates and statistical significance.

Petitioners' Appeal argued:

- they never claimed intentional denominational promotion discrimination;
- intent was not relevant under Establishment Clause precedent because evidence "suggesting" denominational preference requires strict scrutiny review;
- the procedures produced denominational preferences, violating *Lemon v. Kurtzman*'s second prong, 403 U.S. 602, 612-13 (1972), and the "objective observer" test;
- denominational promotion rate differences were not due to chance, "suggesting" denomination is important to a chaplain's chance of promotion;

- the challenged practices -- *e.g.,* zeroing-out-- do not produce denominationally neutral results and violate due process;
- preferring some denominations over others results in disparate impact; and
- Petitioners' statistics were unchallenged because the CHC's objections did not meet *Palmer v. Shultz*'s statistical rebuttal criteria[15] and its expert admitted he had not analyzed Petitioners' denominational statistics.

The Decision rejected those arguments, affirmed the PI's denial and reached the merits of Petitioners' Establishment claims using a disparate treatment standard.

The Panel ignored *Bazemore*, *Palmer, op. cit.*, to reject Petitioners' unrebutted statistics, citing supposedly relevant variables neither party raised: promotion ratings, education, and time in service ("TIS"), A-8; then questioned, without opportunity for Petitioners to respond, why Petitioners used a "simple binomial" rather than a "difference in proportions" test, and had not "shown the actual calculations", A-7.

The Decision concluded strict scrutiny was inappropriate because "the challenged policies are facially neutral", A-8-10, and then held the objective observer would conclude Petitioners failed to show **intentional** discrimination, A-11, and the practices communicated no message of preference, *id*., despite statistically significant differences in denominational

[15] 815 F.2d 84, 101 (D.C. Cir. 1987).

promotion rates for more than **40 years** with Petitioners always prejudiced, evidence the blackball system was used to denominational advantage, and Navy investigations showing denomination influenced promotions. *See* p.3 *supra* comments on observer. The Decision concluded:

> We feel confident that when reasonable observers find the term [statistically significant] means only that there is little likelihood that the discrepancy is due to chance, they are most unlikely to believe that the policies conveyed a message of government endorsement.

A-11.

The Decision ignores CNA's FGC favoritism findings, Respondents' and DODIG investigations, and all other evidence.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari because the Decision abandons and rejects all Establishment precedent and creates its own. It uses faulty logic to arrive at a conclusion destructive to Petitioners, the Circuit, military personnel, and the Constitution. The Decision mischaracterizes Petitioners' denominational preference claim and then creates a forbidden "disparate treatment" Establishment test that grants the Executive Branch an Establishment Clause exception without justification.

Requiring Petitioners to show "intentional discrimination" on secret boards[16] and "stark" differences abandons *Lemon's* second test within the Circuit, making "neutrality" irrelevant.

The Decision establishes a safe-harbor among all Circuits that authorizes governmental religious prejudice, provided it's not "stark" and defendants can conceal intentional discrimination. This diminishes the religious liberty of all within the Circuit's jurisdiction, destabilizing well-settled precedent and undermining the judicial objective of uniform constitutional precedent.

The Decision rejects *Grumet* and *County of Allegheny* while establishing as Circuit law the argument *County of Allegheny* specifically rejected.

The Decision's objective observer is a grotesque caricature of one who knows all the facts and the Establishment Clause's purpose and history.

It defies reason and precedent to believe that an informed observer would conclude procedures no other Service uses have not communicated CHC's preference for favorite denominations through 40 years of granting higher promotion rates to favored denominations, evidence that chance cannot explain; the Navy's own data and investigations show denomination is a factor in chaplain promotions.

The Decision embraces reasoning this Court rejected in *Bazemore v. Friday,* 478 U.S. 385 (1986),

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[16] *In re England*, 375 S.3d at 1181 (discovery of board proceedings barred).

creating another conflict with the relevant precedent that this Court should resolve.

I. CATEGORIZING AN ESTABLISHMENT CLAIM AS "DISPARATE TREATMENT" IS GRAVE CONSTITUTIONAL ERROR

The Decision mischaracterized Petitioners' Establishment claim as "disparate treatment", A-2, a concept hostile to and incompatible with Establishment Clause precedent. The mischaracterization lacks any basis in law or fact, changes the facts and legal basis for Petitioners' claims, denies them Due Process, and abrogates their Right to Petition for Redress of Grievances.

The Decision unilaterally changed Petitioners' Complaint and PI's constitutional challenge of promotion board policies based on denominational preferences and prejudices into a Title VII claim.

A. Petitioners Attack Respondents' Denominational Preferences

Petitioners' Appeals, Complaints and arguments did not use the phrase "intentional discrimination" or make any claim of "disparate treatment", OBR 49-58, contrary to the District Court's holding. The Decision incorrectly found Petitioners' "basic argument is that the policies amount to disparate treatment", A-2. Neither that term nor "intentional" appear in Petitioners' Complaints or in any PI brief. Neither the Decision nor the District Court decision identify specific language supporting this distortion.

The PI's title and argument challenged specific practices that violated the neutrality mandate, producing denominational preferences. *E.g.,* PI at1-2. The PI supporting memorandum, ECF 95, uses "denominational preferences" 16 times. Petitioners' briefings and evidence, OBR 6-27, focused on establishing denominational preferences in accordance with the then law of the case, if plaintiffs could show "suggestions" of denominational preferences, the court would apply strict scrutiny. *Adair*, 217 F.Supp.2d at 14-15.

B. The Establishment Clause's Neutrality Mandate Provides the Equal Protection Standard

The Decision improperly applied a Fifth Amendment standard to an Establishment Clause claim, contrary to *W.Va. State Board of Ed. v. Barnette*.

> [I]t is important to distinguish between the due process clause of the [Fifth] Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the [Fifth] Amendment, because it also collides with the principles of the First, is much more definite than the test when only the [Fifth] is involved. **Much of the vagueness of the due process clause disappears**

> **when the specific prohibitions of the First become its standard**.

319 U.S. 624, 639 (1943) (emphasis added).

"[I]t is the more specific limiting principles of the First Amendment that finally govern this case", *id.*, because Petitioners raise Establishment claims. The Establishment Clause's neutrality mandate is the standard for claims of equal protection from denominational discrimination under *Barnette's* precedent, not *Yick Wo* starkness or deliberate intent. The Decision abandoned *Barnette*, rejecting well-settled Establishment criteria for an improper Fifth Amendment standard. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Gomillion*, 364 U.S. at 345.

Promotions are a zero-sum exercise; preference for some denomination(s) produces unequal promotion opportunity and denominational prejudice for all others. "The Establishment Clause ... prohibits government ... from making adherence to a religion relevant in any way to a person's standing in the political community." *County of Allegheny*, 492 U.S. at 593-94 (citation omitted).

Equal protection shields citizens from arbitrary and irrational discrimination; government actions substantially burdening a fundamental right or targeting a suspect class require strict scrutiny. *Plyler v. Doe*, 457 U.S. 202, 216-217 (1982). This includes Non-liturgical chaplains' equal opportunity for promotion without denominational barriers.

C. Disparate Treatment Is Incompatible with Establishment Clause Jurisprudence

No Establishment precedent uses a disparate treatment standard; it is fundamentally contrary to Establishment precedent. Any "practice which **touches upon religion** ... must neither advance nor inhibit religion in its principal or primary effect" to survive an Establishment challenge. *County of Allegheny,* 492 U.S. at 592 (citing *Lemon*).

Procedures promoting chaplains for ministry **touch** upon religion. The Establishment Clause's focus is precluding actions tending to "establish" religion, especially those "making adherence to a religion relevant in any way to a person's standing in the political community." *Id.* at 594 (citation omitted). The focus on governmental action's "effect" makes discriminatory intent irrelevant.

Disparate treatment, a Title VII concept, focuses on deliberate prejudice. Under the Decision's rationale and logic, a practice failing *Lemon*'s second prong by favoring some religions in promotions, as in this case, would not qualify as a Establishment claim because intent to discriminate **against** specific denominations was lacking. This is absurd.

The Decision repeated the District Court's mistake, wrongly assuming Petitioners' claims of "prejudice" implied intent. A board member advancing his denomination over others through the blackball system may not intend his preference to establish religion or deliberately harm those not

selected. The Secretary's instructions concerning the "needs of the Navy" allow board members to think the Navy needs more of his/her denomination and act accordingly.

Preferences produce prejudice to those not selected by establishing a religious test for office, using a forbidden factor to deny Petitioners equal opportunity to fairly compete for government benefits. Allowing board members to manipulate the selection apparatus makes "religion relevant in [a very important] way to a person's standing in the political community", *County of Allegheny, op. cit.* (citing *Lemon*). These are not violations under the Decision's "disparate treatment" criteria nor a violation of *Lemon*'s first prong, which examines whether the government's intent is to *advance* religion, not hinder a theological adversary or help one's own kind which *Lemon*'s second prong addresses.

Lemon's second prong's focus is similar to Title VII's "disparate **impact**" jurisprudence. A neutral practice or law raises an inference of discrimination if it produces disparate impact. The Decision committed constitutional error by ignoring the procedures' impact, denominational preferences, and not foreclosing either subtle or overt neutrality violations.

The evidence shows the CHC established preferred hierarchies resulting in non-neutral preferential and discriminatory promotion rates, the focus of Petitioners' attack. This is clearly

unconstitutional under *Lemon* and *Grumet*, and must be so under the Fifth Amendment.

II. THE NEW "STARK" AND INTENTIONAL PREJUDICE STANDARDS FOR ESTABLISHMENT AND EQUAL PROTECTION CLAIMS ABANDON PRECEDENT

Lower courts are required to apply precedent matching a case's facts and issues until this Court changes the controlling precedent. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). The Decision is contrary to all applicable Establishment and Equal Protection precedent.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Grumet*, 512 U.S. at 714 (quoting *Larson v. Valente,* 456 U.S. 228, 244 (1982)). Almost every Establishment case since *Everson* has cited this absolute prohibition against government "prefer[ring] one religion over another." 330 U.S. at 15. That Clause "prohibits government from abandoning secular purposes ... to favor the adherents of any sect or religious organization", *Gillette v. U.S.*, 401 U.S. 437, 450 (1971), and requires courts to ask whether the challenged government action "has the effect of advancing or inhibiting religion." *Agostini*, 521 U.S. at 222-23.

The question here is will the Court allow one Circuit to abandon that standard, approving significant aberrations contrary to this Court's precedents?

A. The Decision Abandons the Constitution's Religious Neutrality Mandate

This Court's use of contrasting terms such as "advancing or inhibiting", and descriptive terms such as "preferring one religion over another", "aiding" or "hindering" referring to denominations, religion and irreligion emphasize the Establishment Clause's "requirement of governmental neutrality" when it comes to religion. *Mitchell v. Helms*, 530 U.S. 793, 810-813 (2000) (emphasizing neutrality); *Grumet*, 512 U.S. at 703-05 (government power must be used "in a religiously neutral way"). This Court has called this the Establishment Clause's "religious neutrality mandate" which "at the very least, prohibits government from ... making adherence to a religion ***relevant in any way*** to a person's standing in the political community." *County of Allegheny*, 492 U.S. at 594 (citation omitted) (emphasis added).

Prior to the Decision, all Circuits evaluating Establishment claims used denominational/religious neutrality as their legal standard of review, *i.e.*, neutrality means neither government preference nor prejudice in areas touching religion. *See Grumet,* 512 U.S. at 703-708.

The D.C. Circuit's new "starkness" standard on its face is incompatible with and abandons this Court's accepted and defined meaning of neutrality. *Yick Wo*'s facts, all or nearly all Chinese applicants for laundry licenses denied while all Caucasian applications accepted -- the D.C. Circuit's new criteria for an Establishment violation -- is

incompatible with this Court's oft repeated requirement that courts must examine challenged practices to prevent "subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses." *Gillette*, 401 U.S. at 452 (citation omitted); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993) (Court must meticulously survey governmental actions "to eliminate ... religious gerrymanders"). *Yick Wo* starkness, the opposite of subtle and by definition an **overt** departure, invites and approves both *subtle and overt* departures from denominational neutrality as long as they are not "stark."

This Court's precedents found government actions unconstitutional without any suggestion or evidence of religious preferences because the "potential for conflict inheres in the situation." *Larki*n, 459 U.S. at 125 (citation omitted); *Lemon*, 403 U.S. at 619-20. The Decision rejects that principle; the Decision's logic is government can exercise preference in varying degrees, *e.g., de minimis*, small, medium, large, provided it's not "stark"; therefore all "potential for conflict" is permissible, only "stark" conflict is prohibited.

The Bill of Rights protects individuals. The CHC's basing selection or rejection of a chaplain for promotion on denominational preferences rather than a superior record violates all rejected chaplains' rights not to be prejudiced by the CHC's establishment of its variable "denominational preferences." The *de facto* imposition of a religious test, the message of second-class citizenship, and the denial of an equal opportunity to compete for a

government benefit cannot be measured by degrees. Whether one chaplain or many are disadvantaged by the preference/prejudice is not a relevant Establishment question.

Petitioners' evidence shows that a preference results depending on who is Chief and who sits on a promotion board, a consistent pattern from 1917 to the present. *See Preferences*, ECF 95-4, ¶¶ 2.2.1-2.3.1.1. The Decision found ONE statistically significant datum of preference was not "stark", A-8, but ignored ALL other stark-preference evidence, *e.g.*, CNA, NIG, DODIG, *Preferences* -- 28% absolute and 56% relative difference in Captain promotion rates; two Catholic promotion board reserved seats from 1977 to 1986, then one from 1987 through 2002; a current 50% greater promotion probability for candidates sharing a board member's denomination.

The neutrality mandate forbids hostility as well as preference. CFGC provided 32 Navy chaplains between 1984 and 1999 when it filed suit. Seven made LCDR and none made CDR even though the average CHC LCDR selection rate was 80%; CDR 60-70%.

The differences between (7/32) and 80% and (0/32) and 70% are "stark." OBR 62. Dr. Leuba found Petitioners' "denominations, especially AGC and CFGC, are still under promoted, and ... will continue to be under promoted", Reply at 27, and linked accession bias to promotion prejudice, OBR 22, Fig. 2. The Decision holds this is acceptable because it is not "stark."

The CHC's own data, presented by CNA, shows its procedures, still unchanged, produced a distinct faith group cluster hierarchy with differing promotion rates, clear winners and losers based on a chaplain's denominational identity. This is not denominational neutrality under *Grumet* or any other precedent. Yet the D.C. Circuit has held this is now acceptable because **unintentional** denominational differences, inexplicable by chance, are not "stark."

The Decision, improperly found the challenged practices "neutral", A-6-8, failing to examine their impact in terms of denominational advancement/hindering or gerrymandering. Well-established precedent is clear: courts must not stop at the language of a statute or regulation, or appearance of a practice. *Grumet*, 512 U.S. at 698-99; *Gillette, op.cit*; *Church of Lukumi*, *op.cit*. Courts must conduct a detailed examination of the impact of the challenged practice to protect Establishment principles and values from subtle or stark erosion. *Gillette, op.cit*.

Government facial discrimination among religions need not expressly distinguish between denominations by name. *Larson*, 456 U.S. at 232 n.3.

Such discrimination can be evidenced by objective factors such as a practice's real effect while in operation. *Id.* at 254*; Church of Lukumi*, *op. cit*. The Decision avoided this examination, especially the blackball voting procedure, the Chief's influence and the Precept's standard instructions boards consider

the Navy's need "for special skills", which means "denomination" to chaplains.

B. The Challenged Practices Are Unconstitutional under *Grumet*

The Decision's establishment of a "stark" disparities standard ignores Petitioners' argument that *Grumet* controls and decides this case. OBR 41, 47. *Grumet* held New York's creation of a special school district for a Satmar Jewish village, enabling the village to provide its handicapped children special-needs education, violated the "constitutional command" of neutrality toward religion. 512 U.S. at 696.

The State "delegat[ed] the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurances that governmental power has been or will be exercised neutrally." *Id.* The legislation's facial neutrality -- not specifically identifying the community's religious nature -- did not end the Court's analysis. This Court looked at the statute's practical effect, its application to and effect on a religious community, *id.* at 698-99.

Grumet distinguished the delegation issue before it from *McDaniel v. Paty,* 435 U.S. 618 (1978), which held a minister could not be precluded from being a constitutional convention delegate because he was a minister. "Where 'fusion' is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to

religion, to individuals whose religious identities are incidental to their receipt of civic authority." *Grumet,* 512 U.S. at 699.

Grumet found the legislative process which delegated civic authority to the Satmar community had no guarantees similar benefits would be provided equally to other religious and nonreligious groups. That process "leaves the Court without any direct way to review such state action for the purpose of safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion over another, or religion to irreligion." *Id.* at 703 (citations omitted). The State's allocation of political power on a religious criterion with no guarantees or requirements of "governmental impartiality toward religion" constitutes an establishment. *Id.* at 690, 710.

This case fits *Grumet*'s fact pattern and issues **perfectly.** Chaplains are hired as denominational representatives, a distinctly religious identity, to perform religious activities and ministry. The Navy uses that distinctive religious identity to deny chaplains the exercise of the Sovereign's power, a prerogative given to every other officer.

The CHC provides specific chaplains a significant exception to that blanket restriction on exercising the Sovereign's power, the power to destroy some chaplains' careers and advance others through selection board membership. The power to promote "ranks at the very apex of the function of a [military]", *id.* at 709-10. Petitioners' evidence and IG investigations show "the absence of an 'effective

means of guaranteeing' that governmental power will be and has been neutrally employed." *Id.* at 703 (quoting *Larkin*, 459 U.S. at 125). The challenged procedures have **no** effective mechanisms to "foreclose religious favoritism", *id*. at 710, and encourage denominational preferences.

The delegation of power to the Chief to act as promotion Board President is an active manifestation of fusion of civil and religious authority. The delegation of authority to the Chief or other chaplains, denominational representatives, to veto a chaplain's career or further the careers of other denominational representatives is a clear delegation of discretionary civic authority on the basis of religious identity. *Grumet* and *Larkin* define this as the forbidden fusion of civic and religious power "in a manner that fails to foreclose religious favoritism", *Grumet*, 512 U.S. at 710, creating an establishment as the record shows. It "singles out [] particular religious sect[s] for special treatment", *id.* at 706, the power to advance their own denomination and hinder others because of the blackball voting system. "In this respect, it goes beyond even *Larkin,* transferring political authority to a single religious [individual] rather than to any church or school." *Id*. at 707 n.10.

Barghout v. Bureau of Kosher Meat and Food Control, 66 F.3d 1337 (4th Cir. 1995) and *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2d Cir. 2002), *cert denied*, 537 U.S. 1187 (2003), applied *Grumet* to Kosher control boards regulating what constituted kosher food and held them unconstitutional. Those courts, examining the law's effects, found delegating government's "civic

authority to a group chosen according to a religious criterion" unconstitutionally fused "governmental and religious functions". *Barghout*, 66 F.3d at 1343. That describes this case, the delegation of selection and rejection authority to persons hired as denominational representatives.

The unrebutted evidence shows candidates for promotion who share a denomination with either the Chief or a board member have a 50% greater probability of promotion than candidates who do not share a denomination with the Chief or board member. Not only does the "potential for conflict inheres in the situation", *Larkin, op. cit.*, the Washburn NIG shows the conflict has influenced promotions, a fact statistics verify. One board member's ability to destroy another chaplain's career presents the epitome of symbolic and actual union of arbitrary civic and religious power, the antithesis of the Establishment Clause's purpose. Without certiorari, this union is acceptable in the D.C. Circuit, but forbidden elsewhere.

C. The Decision Establishes as Precedent the Test *County of Allegheny* Rejected

County of Allegheny rejected the argument that an Establishment Clause claimant must meet a "burden of unmistakable clarity" to demonstrate denominational favoritism in order to prevail. 492 U.S. at 608-09.

> Our cases, however, impose no such burden on demonstrating that the

> government has favored a particular sect or [group]. On the contrary, **we have expressly required "strict scrutiny" of practices suggesting "a denominational preference**," *Larson v. Valente*, 456 U.S. at 246, in keeping with "the unwavering vigilance that the Constitution requires" against any violation of the Establishment Clause. [Citing various authorities].

Id. (emphasis added).

The Decision's ruling that Petitioners must show both "stark" promotion rate differences and intentional discrimination for an Establishment claim adopts the rule *County of Allegheny* rejected, requiring petitioners to meet a "burden of unmistakable clarity", *i.e.*, starkness and intent, rather than *County of Allegheny*'s "suggestion of preference." *See id.*

D. The Decision Abandons *Lemon* and the Objective Observer Test

The Decision's so-called objective observer test and adoption of "intentional discrimination" as the Circuit standard for an Establishment Clause violation, A-10-11, is serious constitutional error. Precedent is clear that even if the challenged government action passes *Lemon*'s first test, a secular, neutral purpose/intent, failure of the second or third prongs renders the action unconstitutional. 403 U.S. 612-613.

Lemon's second prong examines whether the challenged practices aid, benefit or advance one or some denominations over others, as here. These results-oriented inquiries make intent irrelevant.

The facts above show the blackball voting and use of the Chief/Deputy as Board presidents are not neutral, producing preferences advancing some denominations over others. *See Grumet*, 512 U.S. at 599 ("our analysis does not end with the text of the statute"). The practices suggest preferences. Under *County of Allegheny's* precedent, *op. cit.*, they are subject to and fail strict scrutiny since the record contains neither compelling purposes nor narrow tailoring.

The Decision is incompatible with *Larson* and strict scrutiny. "Our cases clearly reject the argument that motives [or intent] affect the strict scrutiny analysis." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 741 (2007).

This Court's major Establishment cases ascribed no intent to the legislators or other actors involved in the challenged governmental actions. *E.g.*, *Lemon*, 403 U.S. at 618. *Lemon*'s question here is: do the CHC's practices advance or benefit some denominations at the expense of others? All the evidence shouts "Yes"!

The few courts addressing "intent" in an Establishment Clause context have drawn the clear distinction between intent as an implicit element in

Lemon's first prong and its irrelevance to *Lemon's* second prong. *Borden v. Sch. Dist.*, 523 F.3d 153 (3d Cir. 2008); *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 993 (7th Cir. 2006); *Lambeth v. Bd. of Comm'rs*, 407 F.3d 266, 272 (4th Cir.) *cert denied*, 546 U.S. 1015 (2005) (Complaint's allegations "on the Board's intent are inapplicable to the *Lemon* test's second prong"). Only the Decision has found intentional discrimination is a valid Establishment claim standard.

The Decision's so-called observer concluded the CHC's message was not one of denominational preference because Petitioners' statistics failed to show **intentional** discrimination, A-8-12. The Decision's objective observer is neither objective, observant, nor plausible. The objective observer knows the history, context and relevant facts as well as the appropriate legal principles to properly evaluate the message the challenged practice communicates. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862, 866 (2005).

The Court's objective observer here would understand Petitioners' historic and statistical evidence presented in the facts above and the record. The objective observer would also know:

- ●intentional discrimination is not a test under *Lemon*'s second or third prongs or any other Establishment precedent;
- ● Petitioners never made "intentional discrimination" claims for promotions;
- ● *Lemon* and other precedents have specifically not accused officials of intentionally advancing religion;

- Petitioners' CDR and CAPT promotion rates are always below Catholics and Liturgicals;
- courts infer discrimination from statistical promotion rate differences not due to chance and require defendants provide legitimate reasons for the rate differences;
- Respondents have provided no reasons or explanation for the rate differences in this case despite years of opportunity to do so; and
- the Secretary's instruction to boards to consider a chaplain's "skill", is an invitation to discriminate "honorably" in the absence of effective guarantees to prevent discrimination.

No other Circuit has abandoned *Lemon*, *Grumet*, *County of Allegheny* or employed such a blatantly uninformed observer. The Court should squelch the D.C. Circuit's stark aberration lest the Establishment Clause be eroded by a precedent completely at odds with the Federal Judiciary's role as a bulwark against religious discrimination.

III. THE DECISION ABANDONED *BAZEMORE*

Bazemore is this Court's definitive guidance on how subordinate courts must evaluate and respect statistical evidence in discrimination cases. *Bazemore*'s reversal of the Fourth Circuit's abuse of discretion established a standard defining the judiciary's role as an impartial statistical evaluator protecting the interests of justice.

Bazemore concerned a Title VII civil rights action challenging North Carolina Extension

Service's racially discriminatory employee pay. The district court refused to accept plaintiffs' regression analyses and the Fourth Circuit affirmed, attacking plaintiffs' regression analyses for not including additional factors. 478 U.S. at 399.

This Court reversed, admonishing the Fourth Circuit for rejecting the plaintiffs' statistics and failing to consider all of plaintiffs' evidence. "The Court of Appeals erred in stating that petitioners' regression analyses were 'unacceptable as evidence of discrimination,' because they did not include 'all measurable variables thought to have an effect on salary level.'" *Id.* at 400 (quoting the Fourth Circuit).

> Importantly, it is clear that a regression analysis that includes less than "all measurable variables" may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence. [Citations omitted]. Whether, in fact, such a regression analysis does carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant. However, as long as the court may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible

> discrimination exists, the plaintiff is entitled to prevail.

Id. at 400-401.

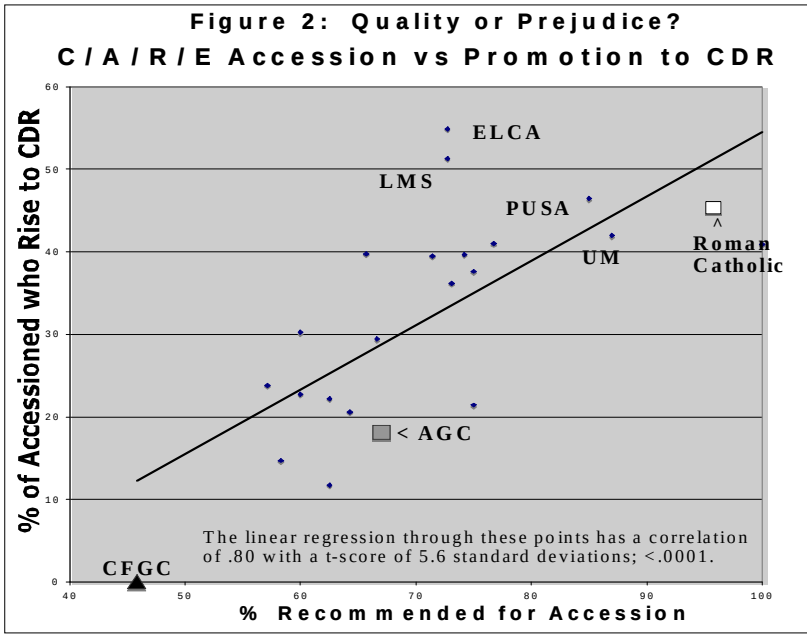
Despite supporting the plaintiffs' statistics, *Bazemore* remanded to the Fourth Circuit to reevaluate the case based on the entire record because the State challenged the plaintiffs' and U.S.'s statistical evidence. *Id*.

A. *Bazemore* Applies Here

As with *Grumet*, this case fits *Bazemore* **perfectly**. *Bazemore*'s plaintiffs used multiple regression analysis, defendants' statistics supporting their case, and other evidence of discrimination as Petitioners do here, *e.g.*, CNA, IG investigations. All experts used similar criteria; none used the Fourth Circuit criteria cited in rejecting plaintiffs' statistics. *Id*. at 398-99. Neither party here used the Decision's alleged missing factors.

The Decision, rejecting Petitioners' statistical studies, embraced the Fourth Circuit's actions prompting *Bazemore*'s reversal.

Petitioners' Figure 2 below, OBR 21-23, shows the regression/correlation between preference-prejudice in accessioning, bringing civilian clergy into the CHC, and promotions for AGC and CFGC compared with other denominations.



The Decision held "Correlation is not causation", A-7. Establishing "causation" and intent was not Petitioners' burden under Establishment precedent until the Decision created a new "disparate treatment" Establishment precedent. *McCreary County*, 545 U.S. at 863 ("Establishment Clause analysis does not look to the veiled psyche of government officers"). Only the "absentminded" or willfully-blind objective observer, *see id.* at 866, cannot perceive in Figure 2 CHC's clear message communicating second-class acceptability of CFGC and AGC clergy in both accessions and promotions.

The Decision improperly held Petitioners "made no attempt to control for potential confounding factors, such as promotion ratings, education, or time in service [TIS]", A-8, repeating the Fourth Circuit's

error. The Decision made no showing why these irrelevant factors were potentially "confounding."[17]

The Panel's holding Petitioners failed to control for "promotion ratings", *id*., a term not in the record, is clear error. Each candidate's "ministry" performance evaluations are the grist for the promotion board and cannot be a *confounding* variable.

Education is a criterion for **appointment** as a chaplain, DOD Instruction 1304.28, ¶ 6.1.5 (chaplain education requirements). Once on active duty, education plays no role in promotion evaluation.

10 U.S.C. § 619 uses TIS and time in grade to determine "[e]ligibility for consideration for promotion" by a board. TIS is solely an eligibility gate every candidate must pass through before promotion consideration. Since it determines primary zone eligibility, it cannot influence promotions. The Decision expressed confusion about the role of TIS, A-8 (citing "occasional references" to "in zone" and "above zone"), but never asked the parties to explain TIS's function.

The Decision also improperly criticized Petitioners for (1) choosing a "simple binomial test versus standard test for the differences in proportions" in determining statistical significance, not realizing **they are the same**, and (2) not showing the calculations. A-7. Every statistical report Petitioners' expert submitted includes the test name and the numbers used. An objective observer

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[17] *See* Glossary, A-45.

could easily conclude the Court of Appeals improperly assumed the defendant's role, raising specious objections Respondents never made.

This is not a case of unsophisticated parties or unknowledgeable experts. Petitioners' Motion to Strike Dr. Siskin, ECF 73, challenges not his credentials, but his methods which vary depending on whom he represents. Dr. Siskin's declarations in this litigation cited none of the D.C. Circuit's factors or criticisms. He used "faith group cluster" instead of denomination as the independent variable - thereby confounding denominations.

Petitioners argued Respondents' failure to provide credible expert rebuttal for Petitioners' post-November 2006 statistics, despite numerous opportunities, was a waiver, leaving Petitioners' statistics unchallenged. The Decision's failure to cite Respondents' expert is tacit acknowledgment that Petitioners' argument was valid.

The Circuit cannot claim ignorance of *Bazemore*. *Palmer,* 815 F.2d at 101, held *Bazemore* "contemplates that defendants generally must introduce evidence to support their attack on plaintiffs' statistics. Mere conjectures and assertions usually will not suffice." *Palmer* requires a party objecting to another party's statistics show specific counting, computational and/or methodology errors and provide allegedly correct answers using the "correct" methodology. *Id*. Petitioners argued Respondents' attempts to discredit Dr. Leuba failed *Palmer*'s criteria. OBR 58-60. Petitioners' en banc

petition reminded the Circuit of *Palmer* and *Bazemore*.

B. Statistical Significance Indicates Establishment

The Decision ignored CNA's data, four CHC board investigations and rejected statistical significance as an appropriate standard for determining when procedures produce denominational preferences. A-8-12. "Statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue." *Int'l Bhd. of Teamsters v. U.S*, 431 U.S. 324, 339 (1977) (citation omitted). *Castaneda v. Partida*, 430 U.S. 482, 497 n.17 (1977), recognized statistical significance allows an inference of discrimination by eliminating chance.

Statistical significance fits this Court's emphasis on identifying and eliminating subtle as well as overt deviations from neutrality and provides a reasonable standard to determine whether the distribution of benefits is religiously neutral. It supports and provides a practical standard for *County of Allegheny's* statement practices "suggesting" denominational preferences require strict scrutiny. 492 U.S. at 608-09.

Petitioners do not argue statistical significance is the only standard. It is a reasonable one in this case because a secrecy oath silences all board members unless released by the Secretary, who refuses to do so. *See In re England, op. cit*.

Some Petitioners who were selection board recorders have testified they have relevant testimony about the boards' denominational neutrality if released from their oath. *See, e.g.*, Demy Declaration, ECF 178-4, ¶44; Stewart Declaration, 00-cv-566 ECF 123-3, ¶¶ 4-8. "In many cases the only available avenue of proof is the use of [denominational] statistics to uncover clandestine and covert discrimination" such as here. *Teamsters,* 431 U.S. at 340 n. 20.

The issue here is the Circuit's abandonment of *Bazemore* as binding precedent by embracing the Fourth Circuit's exact errors, making them Circuit law and applying them to support rejecting Establishment precedent. The Decision creates binding Circuit precedent contrary to this Court's binding precedent, undermining the Rule of Law and the concept of uniform federal law. *See Agostini*, 521 U.S. at 237. The Panel asked no questions about statistical factors or analysis during oral argument, making the Decision highly unusual and prejudicial.

The Decision's holdings rejecting both Petitioners' statistics and statistical significance as evidence of non-neutrality are serious prejudicial errors contrary to precedent and should be reversed.

CONCLUSION

For the above reasons, the Court should grant certiorari to review the Decision. It establishes dangerous new precedent by abandoning uniform precedent enforcing the Establishment Clause's neutrality mandate. "A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Town of Greece v. Galloway*, 2014 U.S. LEXIS 3110, 20 (5/5/14) (citation omitted).

The Decision masks abandonment of precedent by mischaracterizing Petitioners' denominational preference Establishment claims as disparate treatment. This permits the CHC to do what the Establishment Clause's words prohibit.

No other Circuit has approved procedures guaranteeing denominational preferences by abandoning *Lemon*, *County of Allegheny* and *Grumet*.

The Decision's abandonment of *Bazemore* is another significant rejection of precedent, compelling justification for the Court to exercise its supervisory function and reverse the Decision.

The Decision conveys a disturbing message to all Service personnel. If the CHC can advance some preferred denominations and prejudice Petitioners provided it's not stark as defined by a willfully-blind observer, the Constitutional protections they swear to defend don't apply to them.

Respectfully submitted,

Arthur A. Schulcz, Sr.
21043 Honeycreeper Pl.
Leesburg, VA 20175
(703) 645-4010
Counsel of Record for
the Petitioners
Participating Attorney
On Behalf of The
Rutherford Institute

John W. Whitehead
Douglas R. McKusick
The Rutherford Institute
923 Gardens Blvd.
Charlottesville, VA 22901
(434) 978-3888
Counsel for the Petitioners

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.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia

APPENDIX

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
923 Gardens Blvd.
Charlottesville, VA 22901
(434) 978-3888

Arthur A. Schulcz, Sr.
Counsel of Record
CHAPLAINS COUNSEL, PLLC
21043 Honeycreeper Pl.
Leesburg, VA 20175
(703) 645-4010
art@chaplainscounsel.com

Counsel for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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, 403 U.S. App. D.C. 1 (D.C. Cir. 2012); *In re Navy Chaplaincy*, 534 F.3d 756, 383 U.S. App. D.C. 29 (D.C. Cir. 2008); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 372 U.S. App. D.C. 94 (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 cutoffs: 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. *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, 307 U.S. App. D.C. 221 (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, 102 (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, 300 U.S. App. D.C. 370 (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, 269 U.S. App. D.C. 67 (D.C. Cir. 1988); *Segar v. Smith*, 738 F.2d 1249, 1277-79, 1286-87, 238 U.S. App. D.C. 103 (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

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

In Re: Navy Chaplaincy	) No. 1: 07-mc-269 (GK)

AMENDED 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

[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

consideration of the Motion, Opposition [Dkt. No. 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, 403 U.S. App. D.C. 1 (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 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

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Section 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.)

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, 363 U.S. App. D.C. 29 (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].

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[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.

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 [30] filed their 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).

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

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

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

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[6] In order to obtain a preliminary injunction, a plaintiff "must establist [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).

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, 129 S. Ct. 365, 172 L. Ed. 2d 249 (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 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

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[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.

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]

[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

[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 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, [32] 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, 396 U.S. App. D.C. 1 (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)

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necessary, set a briefing schedule for comprehensive dispositive motions on the merits of the constitutional issues raised by Plaintiffs.

(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, 387 U.S. App. D.C. 205 (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, freestanding 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 at least 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

[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

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 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; see In re Navy Chaplaincy, 697 F.3d at 1174 (noting that under their denominational preference theory, Plaintiffs "assert that selection boards discriminate against

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Summ. J. at 10-11 [Dkt. No. 46]; Pls.' First Mot. For Summ. J. Reply at 7-10 [Dkt. No. 50]; Pls.' First Mot. For Summ. J. at 10-17 [Dkt. No. 56]; Defs.' Motion for Summ. J. Reply at 4-6 [Dkt. No. 68]; Pls.' Second Mot. For Summ. J. Reply at 8-9 [Dkt. No. 70].

non-liturgical Protestants in making promotion decisions in violation of the Establishment Clause and the Fifth Amendment's equal protection component").

Where, as here, Plaintiffs specifically claim that Defendants engaged in "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)); [34] see also Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 272, (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, 217 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 [35] 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 Mortg. 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 [38] 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

/s/
Gladys Kessler
United States District
Judge

Copies to: attorneys on record via ECF

Church or Religious Organization Abbreviations Used in this Petition

Various charts identify specific denominations and churches by abbreviations or acronyms used by the Navy Chaplain Corps. The chart below was extracted from LCDR Sarkaney's 5/28/09 Declaration in ECF 47-13, and Volumes IX and X (Biographies) of the, History of the Chaplain Corps, U.S. Navy.

Acronym	Endorsing Organization
ABC	American Baptist Churches USA
AGC	Associated Gospel Churches
AME	African Methodist Episcopal Church
BGC	Baptist General Conference
CC(DC)	Christian Church (Disciples of Christ)
CFGC	Chaplaincy of Full Gospel Churches
CGIC	Church of God in Christ
CME	Christian Methodist Episcopal Church
CRC	Christian Reformed Church in America
CS	Church of Christ Scientist
ECCA	Evangelical Congregational Church
ELCA	Evangelical Lutheran Church in America
EPIS	Episcopal Churches
GARB	General American Regular Baptists
J	Jewish Chaplains Council (Jewish Welfare Board)
LMS	The Lutheran Church-Missouri Synod
LDS	The Church of Jesus Christ of Latter-Day Saints
NBCUS	National Baptist Convention USA
OBSC	Open Bible Standard Churches, Inc.
ORTH	Orthodox Churches

PNBC	Progressive National Baptist Convention
PUSA	The Presbyterian Church (USA)
RC	The Roman Catholic Church
RCA	Reformed Church in America
SB	Southern Baptist Convention
SDA	General Conference of Seventh Day Adventists United States
UCC	United Church of Christ
UMC	The United Methodist Church

1977 thru 2002 Denominational Appearance as Promotion Board Members

FGC →	**RC**	**Liturgical Prot.**	**Non-Lit. Prot.**	**Spec. Worsh.**	**% Sel to CDR**
Tier **I** 100%	RC (102)				**48.34 %**
Tier **II** - 25 to 40%		PUSA (43) ELCA (29) UM (21) LMS (15) ABC (12) UCC (10) CC/DC (10)	SB (37)	SDA (11)	**45.07 %**
Tier **III** - 7-15% 4 to 8 seats in 25 years		AME (8) RCA (7) EPIS (7)	NBCUS (7) PNBC (7)	J (6)	**36.12 %**
Tier **IV** - 0 - 5% 0 to 3 seats in 25 years	Other Catholic type] (0)	CRC (3) ECCA (3) CME (2) 53 Others (0-2)	BGC (5) GARB (4) CGIC (3) 109 Others (0-2)	LDS (4) ORTH (3) CS (1) 10 Others (0)	**27.00 %**

OBR 12, Fact 17 (citing *Siskin Conjecture*, ECF 34-22, ¶¶ 36, 48); Consolidated Complaint, ¶ 93, ECF-134

GLOSSARY

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

Naval Rank:

CAPT - Captain

CDR - Commander

LCDR - Lieutenant Commander

LT - Lieutenant

LTJG - Lieutenant junior grade

RADM - Rear Admiral

Organizational Abbreviations

AGC - Associated Gospel Churches

CFGC - Chaplaincy of Full Gospel Churches

CHC - Navy Chaplain Corps

Chief - Chief of Chaplains

CNA - Center for Naval Analysis

Deputy - Deputy Chief of Chaplains

DOD - Department of Defense

DODIG - DOD Inspector General

DODI - DOD Instruction

FY - Fiscal Year

NIG - Naval Inspector General

SECNAVINST - Secretary of Navy Instruction

Other Abbreviations

A - Appendix

JA - Joint Appendix

PI - Preliminary Injunction

C/A/R/E - Chaplain Accession and Recall Eligibility: a CHC administrative board that evaluates chaplain candidates' packets for accessioning (*see* below) into the CHC. This term is found on Figure 2, p. 45 *infra*, comparing denomination accession rates and promotion to commander.

B. Relevant Terms

Accession. An accession is a chaplain applicant who has meet all qualifications for appointment as a military chaplain, including a C/A/R/E board successful review, and becomes a chaplain in the Chaplain Corps. The term is relevant only as Petitioners' evidence shows a correlation between CHC prejudice against AGC and CFGC in terms of

the low accessions rates, and their chaplains' promotion rates at Commander.

Confounding. Confounding occurs when the experimental controls do not allow the experimenter to reasonably eliminate plausible alternative explanations for an observed relationship between independent and dependent variables. //stattrek.com/statistics/dictionary.aspx?definition=Confounding

Endorsement. A formal certification from a DOD "recognized" endorser/denomination that the candidate is qualified to meet its military members religious needs and authorized by that denomination to "represent" it. Endorsement may be withdrawn by the denomination at any time and for any reason. Chaplains whose endorsement is withdraw MUST be severed from the Service. *See* DODI 1304.28: Guidance for the Appointment of Chaplains for the Military Departments

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

Faith Group Categories ("FGCs"). The Navy divides its chaplains and personnel into four general faith group categories or clusters ("FGCs") according to alleged faith group similarities: Catholic, Liturgical Protestant, Non-liturgical Protestant and Special Worship. A Chief of Chaplains' 7/31/87 Memorandum for the Asst. Secy. of the Navy, Subj: "Chaplain Corps Faith Group Imbalance", explains how the Chaplain Corps uses faith group clusters in its management. *See* Note at the end of this FGC section.

1. Catholic refers only to Roman Catholic. The Navy has historically categorized other religious entities which identify themselves as Catholic as Special Worship.

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

3. "Non-liturgical Protestant", "Non-liturgical Christian" or "Non-liturgical" refers to Christian denominations or faith groups without a formal liturgy or order in their worship service. In general, they "emphasize a Word or Bible-centered theology",

baptize only adults or children who have reached the age of reason, and their clergy "do not wear vestments and do not follow a cycle of lectionary readings" during services. *Id*. Some Navy chaplains refer to these faith groups as "evangelicals". Baptist, Bible Church, Charismatic, Churches of Christ, Evangelical, and Pentecostal are examples of Non-liturgical Christian faith groups.

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

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

Note: Petitioners challenge the Navy's FGC categorization system particularly as it is applied to their category under the Establishment Clause. The system places in the Petitioners' FGC category denominations which reject and are hostile to other Non-liturgical denominations' worship practices and theologies. This contrasts with the single denomination RC "cluster" (sic) and the worship and theological similarities common to the Liturgical Protestant category. The FGC classifications enable and hide denominational prejudice within the internally disparate clusters.

"Denomination *du jour",* or "*pro tem"* – means the denomination(s) in charge for a period of time; historically this is the Chief's denomination, of if the Chief is from a small denomination, this is the Deputy Chief's denomination and/or the denomination of a plurality of the Captains.

Precept - the Secretary of Navy instructions or guidance to the promotion board. It is normally drafted by the branch or category holding promotions.

The "Washburn NIG" means the NIG's investigation of the FY 2000 CHC Captain board after CDR Mary Washburn complained she was illegally denied promotion to Captain when the female chaplain board member "zeroed out" CDR Washburn because of theological differences, a claim the NIG substantiated.