

Defendants' counsel stated they will oppose this motion. The Parties have accordingly conferred and Plaintiffs will file contemporaneous with this Motion an Unopposed Motion for an Order establishing a briefing schedule for this Preliminary Injunction Motion.

Respectfully submitted,

Dated: July 22, 2011

/s/ Arthur A. Schulcz, Sr.
ARTHUR A. SCHULCZ, Sr.
D.C. Bar No. 453402
Counsel for *CFG*C and the *Adair* Plaintiffs
2521 Drexel Street
Vienna, VA 22180
703-645-4010

Of Counsel:
Douglas McKusick, Esq.
THE RUTHERFORD INSTITUTE
P.O. Box 7482
Charlottesville, VA 22906-7482

INDEX

INDEX..... i

TABLE OF AUTHORITIES..... iv

GLOSARY..... vi

INTRODUCTION..... 1

THE PLAINTIFFS HAVE STANDING. 2

PROCEDURAL BACKGROUND..... 2

THE FACTUAL BACKGROUND SUPPORTING THIS MOTION..... 3

STANDARDS OF REVIEW..... 15

 A. Standard for an Injunction..... 15

 B. Standard of Review for Establishment Clause Challenges. 15

SUMMARY OF ARGUMENT..... 16

ARGUMENT..... 17

I. CHAPLAINS ARE UNIQUE NAVAL OFFICERS WHO ARE COMMISSIONED DENOMINATIONAL REPRESENTATIVES ON LOAN FROM THEIR FAITH COMMUNITIES. 18

 A. Chaplains Are Denominational Representatives on Loan from Their Faith Community. 19

 B. Navy Regulations, the Military Code of Conduct and the Geneva Convention Recognize Chaplains’ Religious Nature Makes Them Unique Officers. 20

 C. Chaplains Act as Denominational Representatives When Awarding Benefits to Denominational Representatives. 21

II. PLAINTIFFS WILL SUCCEED ON THE MERITS OF THEIR CLAIM THE CHALLENGED PRACTICES VIOLATE THE ESTABLISHMENT CLAUSE..... 21

 A. The Navy’s Award of Government Benefits to Clergy and Commissioned Denominational Representatives is not Denominationally Neutral..... 22

1.	<u>The Chief of Chaplains’ role and influence as a decision maker in the award of Navy benefits introduces religion into the decision and results in denominational favoritism.</u>	23
2.	<u>The denomination of the Chief of Chaplains benefits during his tenure as Chief and afterward in every personnel management area that awards benefits to chaplains.</u>	25
B.	The Navy’s Chaplain Selection Board Secret Voting Procedures Violate the Establishment Clause’s Mandate that the Distribution of Government Benefits To Denominational Representatives Must Be Religiously Neutral	26
C.	The Denomination of Chaplain Selection Board Members Improperly Influences the Board results.	27
D.	The Challenged Practices Fail Strict Scrutiny.	27
1.	<u>Using the Chief or Deputy as a chaplain selection board president is not narrowly tailored to achieve a compelling government purpose.</u>	28
2.	<u>Using chaplains as chaplain selection board members results is not narrowly tailored to achieve a compelling government purpose.</u>	28
E.	The Challenged Practices Violate the <i>Lemon</i> Test.	28
1.	<u>The challenged practices fail <i>Lemon</i>’s second prong by creating denominational preferences and prejudice.</u>	31
2.	<u>The challenged programs entangle the government with religion.</u>	31
D.	The Challenged Programs Fail the Reasonable Observer Test.	33
1.	<u>The reasonable observer examines the challenged programs history and purposes.</u>	33
2.	<u>The reasonable observer would conclude the challenged programs result in illegal preferences that advance denominational interests.</u>	34
III.	PLAINTIFFS WILL SUCCEED ON THEIR CLAIM THE CHALLENGED PRACTICES VIOLATE DUE PROCESS.	35
IV.	THE CHALLENGED PROGRAMS CAUSE IRREPARABLE HARM.	36

V. PLAINTIFFS MEET THE OTHER INJUNCTION CRITERIA..... 37

 A. Terminating Defendants’ Unconstitutional Practices Pose No Burden or Injury on Defendants..... 37

 B. There Are No Third Party Rights That must Be Addressed. 38

 C. Terminating Defendants’ Unconstitutional Practice Is in the Public Interest. . . . 38

CONCLUSION..... 41

LIST OF EXHIBITS. 42

TABLE OF AUTHORITIES

FEDERAL CASES:

Accardi v. Shaughnessy, 347 U.S. 260 (1954)..... 40

Adair v. England (Adair I), 183 F.Supp.2d 31 (D.D.C. 2002)..... 16, 18, 30, 31

Adair v. England (Adair II), 217 F.Supp.2d 7 (D.D.C. 2002)..... 16, 22

Anderson v. Laird, 466 F.2d 283..... 29, 30

Bonham v. D.C. Library Admin., 989 F.2d 1242 (D.C. Cir. 1993)..... 15

Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290
(D.C.Cir. 2007)..... 2, 15, 35, 36, 37, 40, 41

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973)..... 15

Connection Distributing Co. v. Reno, 154 F.3d 281 (6th Cir. 1998)..... 38

Cooney v. Dalton, 877 F. Supp. 508 (D.Hawai’i 1995)..... 40

Corporation of Presiding Bishop v. Amos, 485 U.S. 327 (1987)..... 33

County of Allegheny v. ACLU, 492 U.S. 573 (1979)..... 16, 22, 25, 28, 31-33

Dilley v. Alexander, 603 F.2d 919 (D.C. Cir. 1979)..... 37, 38, 40

Elrod v. Jones, 427 U.S. 347 (1976)..... 37

Engel v. Vitale, 370 U.S. 421 (1962)..... 30, 39

Everson v. Board of Ed., 330 U.S. 1 (1947)..... 39

Gillette v. United States, 401 U.S. 437 (1971)..... 15

Hernandez v. C.I.R., 490 U.S. 680 (1989)..... 15

In re England, 375 F.3d 1169, 1171 (D.C. Cir. 2004), *cert denied*, 543 U.S. 1152 (2005)..... 19

Kiryas Joel v. Grumet, 512 U.S. 687 (1994)..... 17, 26, 31

Lac Vieux Desert Band of Lake Superior Chippewa v. Michigan Gaming Control Board, 276
F.3d 876 (7th Cir.), *cert denied*, 536 U.S. 923 (2002)..... 28

Larkin v. Grendel’s Den Inc., 459 U.S. 116 (1982)..... 22, 27, 31-33, 36, 39

Larson v. Valente, 456 U.S. 228 (1982). 16, 17, 29

Lemon v. Kurtzman, 403 U.S. 602 (1971)..... 16

McCreary County v. ACLU of Ky., 545 U.S. 844 (2005). 22, 34

McGowan v. Maryland, 366 U.S. 420 (1961). 30

Miller v. City of Cincinnati, 622 F.3d 524 (6th Cir. 2010). 36

Rigdon v. Perry, 962 F.Supp. 150 (D.D.C. 1997). 19, 40, 43

Schlesinger v. Ballard, 419 U.S. 498 (1975)..... 18

Sherbert v. Verner, 374 U.S. 398 (1963)..... 25

Thomas v. Review Board, 450 U.S. 707 (1981)..... 25

Torcaso v. Watkins, 367 U.S. 488 (1961). 30

United Christian Scientists v. First Church of Christ Scientist, 829 F.2d 1152
(D.C. Cir. 1987)..... 29

Utah Licenced Bev. Ass’n v. Leavitt, 256 F.3d 1061 (10th Cir. 2001). 40

Wallace v. Jaffree, 472 U.S. 38 (1985). 25, 35

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)..... 36

Wilkinson v. Legal Services Corp., 27 F. Supp. 2d 32 (D.D.C. 1998)..... 40

FEDERAL STATUTES

10 U.S.C. § 643. 20, 21

GLOSSARY AND ABBREVIATIONS

<u>Abbreviation</u>	<u>Term or Description</u>
DOD	Department of Defense
DODD	DOD Directive
DOD I	DOD Instruction
DODIG	DOD Inspector General
IG	Inspector General
NIG	Naval Inspector General
NR	Naval Regulation(s)
OPNAVISNT	Operational Navy Instruction
SECNAVINST	Secretary of the Navy Instruction

RANKS

CAPT	Captain
CDR	Commander
LCDR	Lieutenant Commander
LT	Lieutenant
LTJG	Lieutenant Junior Grade
RADM	Rear Admiral

INTRODUCTION

Plaintiffs seek an Order enjoining three specific Navy chaplain selection board practices: (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 the power to distribute government benefits will be used solely for secular, neutral and non-ideological purposes. The term “selection board” refers to chaplain selection boards unless specified otherwise.

This is a simple case about Navy denominational favoritism and prejudice in the award of government benefits. It is now in the twelfth year despite the simplicity of its major theme and question: does the Establishment Clause forbid the Navy from preferring some denominations over others when awarding government benefits? The word “chaplain” is a short, historical term for a denominational representative commissioned to provide religious ministry to those military members of the chaplain’s faith community, others of like faith, and to facilitate the exercise of religion for all. *See* I.A. *infra*. To emphasize the inherent religious nature of chaplains, Plaintiffs will sometimes refer to them in this brief as “denominational representatives”, what they are hired and appointed to be. *Id.*

Simple numerical analysis of the results of government benefit decisions shows the involvement of the Chief and chaplains in the challenged procedures suggests denominational preferences for those seeking chaplain appointments, and actual denominational preferences in awarding government benefits to commissioned denominational representatives, *see* above. The challenged practices also include procedures that unconstitutionally delegate discretionary civic power to denominational representatives to award benefits to persons defined by their religious identity. The challenged procedures allow the delegated power to be used for non-neutral, non-

secular and ideological purposes, in violation of the Establishment Clause. The challenged practices and procedures cause irreparable harm and fail strict scrutiny.

Plaintiffs bring this Motion to force the Navy to stop violating the Establishment Clause through its challenged procedures until the Court can evaluate on their merits the partial summary judgment (PSJ) motions pending before this Court. It is necessitated by the Navy's bad faith and delay to the timely resolution of the important constitutional questions and violations which constitute irreparable harm according to the law of the case and Circuit. This Motion addresses some of the issues pending before the Court, *e.g.*, Plaintiffs' PSJs on the Navy's chaplain promotion and accession systems identified below, because they involve the use of the Chief in the benefit awarding decisions, the practices overlap, and they facilitate the Navy's continued violation of the Establishment Clause's neutrality mandate.

It is time the Navy is forced to obey the Constitution it is supposed to defend. For 11 years the Navy has denied the denominational preferences clearly shown by its own consultant, studies, reports, and Plaintiffs' evidence, all of which show the Navy denominational bias.

THE PLAINTIFFS HAVE STANDING

Plaintiffs include active duty and active duty Reserve chaplains and two endorsing agencies with active duty Navy chaplains and chaplain candidates who will be reviewed by the selection board procedures they challenge and which subject them to official denominational prejudice. This is irreparable injury as a matter of law. *Chaplaincy of Full Gospel Churches v. England* ("CFGC"), 454 F.3d 290, 302-04 (D.C. Cir. 2006). The plaintiff endorsing agencies seek prospective relief for their Navy chaplain members and chaplain candidates in their representative capacities.

PROCEDURAL BACKGROUND

Plaintiffs' PSJ attacking the Navy's promotion system with its secret board procedures without accountability (the "Prom. PSJ") is currently pending before the Court, Doc. No. 34 (filed 12/30/08). Those board procedures allow one board member to manipulate the board, a fact established by the Naval Inspector General's ("NIG") own investigations. *See id.* at 37-44.

Plaintiffs' PSJ attacking the Navy's arbitrary accession system, aka "the Thirds Policy" (the "TP-PSJ"), Doc. No. 55 (8/18/09), challenges the Navy's chaplain accession system which has established denominational favorites, no constitutional criteria, and allows the use of arbitrary denomination accession goals unrelated to the Navy's free exercise needs. Because the Chief's denomination has a significant effect on accessions, that policy is also challenged here.

Plaintiffs recently filed a Partial Summary Judgment Motion addressing the impact of the Chief on decisions awarding benefits to denominational representatives, Doc. No. 90. The Navy has moved to strike this motion, Doc. No. 91. The Navy filed its Motion after Plaintiffs stated they would not seek an injunction in the midst of the just completed promotion cycle, after the statistical data showing the impact of the Chief was developing in another case, but would give the Court an opportunity to resolve the issue before the next promotion cycle began. The Navy's Motion to Strike further delays resolution of this issue and continues the Establishment Clause violations readily apparent through simply counting promotions by denomination and comparing promotion rates between those denominations which have had a Chief compared and those who have not. These PSJ's and their undisputed material facts are incorporated by reference.

THE FACTUAL BACKGROUND SUPPORTING THIS MOTION

1. The fundamental issue of this case from its beginning to the present is Plaintiffs' claim the Navy Chaplain Corps (the "CHC") uses policies, practices, and procedures that facilitate and allow denominational or faith group favoritism and its corresponding prejudice against the non-

avored faith groups Plaintiffs represent. All three initial Complaints allege the Navy has favored Catholics and Liturgical Protestant faith group clusters (“FGCs”) (*see* glossary). The 2008 amendments thereto specifically allege the Navy has engaged in denominational favoritism and prejudice and cite as examples the denominational hierarchy identified in No. 11 below.

2. The NIG and the DOD Inspector General (DODIG) have investigated and found misconduct on four chaplain promotion boards, Prom. PSJ Facts (“Prom. Facts”) (incorporated by reference), [Docket No. 34-2], 117-125. The DODIG investigated the CHC Commander (“CDR”) boards for fiscal years (“FY”) 97 and 98 and found evidence that denomination influenced both board selections, *id.* at 124; the NIG investigation of (a) the FY 00 CHC Captain (“CAPT”) selection found the female board member’s religious prejudice denied then CDR Mary Washburn promotion to CAPT (the ‘Washburn NIG’), *id.* at 121-122; and (b) the FY 08 CAPT Board (the “Baker NIG”, incorp. by ref.) found Deputy Chief, RADM Baker’s negative inference was sufficient to result in a candidate’s failure of selection. TP-PSJ Ex. 52, ¶¶ 26, 50-53.

3. Chaplain promotion board members “‘vote the record’ by depressing one of five buttons in a ‘sleeve’ which hides the voter’s hand, ensuring the secrecy of the vote. The buttons coincide with degrees of confidence the voter has in the record considered, ranging from 0 to 100 in 25 degree increments.” *Id.* at 123 (citing DODIG Report, p. 8 (Extracts at Prom. Exhibit 29)).

4. RADM Black, then Deputy Chief of Chaplains, explained to the Washburn NIG the CHC practice of “zeroing out” a candidate (Prom. PSJ Exhibit 26), how a single member voting zero ensures a candidate will not be selected because of the small number of board members who vote in secret with no accountability. Prom. PSJ Material Fact (incorporated by reference) 123.

5. Statistical analysis now shows that in every CHC 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 FGCs alternating third and fourth. Prom. PSJ at 22-23 (citing Dr. Leuba's Allonge Declaration at 2, ¶ 6; Compendium at 2-4, ¶¶ 3-10, and App. K at 11, Table K) (incorporated by reference). *See also* 6 and 11 below.

6. Detailed analysis of the CHC's management practices shows the FGC system hides the Navy's denominational preferences and prejudice, the issue at hand. The CHC treats different faith groups within its faith group cluster system in vastly different ways. Theologically more conservative denominations have been treated prejudicially when compared with those of more liberal beliefs within the FGCs. For example, Baptists, which the Navy categorizes as non-liturgical, have been treated differently than non-Baptist non-liturgicals, masking the Navy's prejudice against Non-liturgicals; the liberal Presbyterian Church USA ("PUSA") is treated as a favorite while the conservative Liturgical Protestant Presbyterian Church of America ("PCA") is treated prejudicially along with Plaintiffs faith groups as shown by the accession statistics below.

Denomination		Applications from 1985 to 2000		Applications after 2000	
		Number	% Recommended	Number	% Recommended
Roman Catholic	RC	391	93.35%	59	94.92%
Other Catholic		2	0.0%	2	0.0%
Presbyterian PUSA	L	81	86.42%	9	77.78%
Presbyterian PCA	L	27	74.07%	5	100.00%
Lutheran LMS	L	84	83.33%	13	92.31%
Lutheran ELCA	L	87	83.91%	12	91.67%
Methodist	L	124	80.65%	33	69.70%
Church of Christ	NL	21	71.43%	2	50.00%
Southern Baptist	NL	185	66.49%	88	80.68%
Natl Baptist Conv	NL	43	72.09%	12	83.33%
AGC	NL	9	66.67%	9	66.67%
CFGC	NL	44	59.09%	11	72.73%
Jewish	SW	31	83.87%	18	86.89%
Mormon	SW	21	66.67%	1	100.00%
SDA	SW	28	67.86%	17	94.12%

Harald R. Leuba, Ph.D., 12/24/08 Expert Declaration, "Features (policies and practices) of the

Chaplain Corps' personnel system" (Exhibit 1) at 9, ¶ 36, Table 2.1 (Plaintiffs AGC and CFGC in bold and shaded). See Prom. PSJ Fact 49.

7. The Navy's own consultant, the Center for Naval Analysis (the "CNA"), examined the Navy's promotion system immediately prior to the chaplains' litigation and found clear evidence the CHC's promotion system produced statistically significant benefits to Catholics. It presented that data to the Navy senior leadership at the 2000 CHC Senior Leadership Conference (SLC); Plaintiffs' Supplemental Evidence Exhibit 2, Docs. No. 83, 84, incorporated by reference.

8. CNA's SLC 2000 briefing chart, Ex. 2, shows the following promotion rates and data:

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

9. CNA's SLC 2000 promotion data briefing chart itself validates the Plaintiffs' Expert's finding that Catholics and liturgicals were the preferred denominations and, when the CNA's promotion statistics are compared by FGCs, the differences are statistically significant. Harald R. Leuba, PhD., *Old Warnings, New Data* ("Warnings") (Exhibit 3), ¶ 16; see also ¶¶ 8, 11.

10. Analysis of the denominational frequency of promotion board and other selection board memberships from FY 1977 to 2002 establishes a distinct hierarchy of CHC favorites, easily organized into four tiers. See 11 below; Prom. PSJ at 28-30.

11. Five denominations were awarded 80% of all promotion board memberships between 1977 and 2002. The hierarchy falls into four tiers with only Catholics in Tier 1 (100% participation on all boards), and primarily Liturgical Protestant denominations comprising Tier 2

(double digit percentage representation on all boards), but including Southern Baptists, who despite their favorite status, still are not treated as favorably as liturgical. With the exception of Southern Baptists, Plaintiffs' faith groups fall into Tier 4 (0 to 5% participation on boards).

1977 thru 2002 Denominational Appearance as Promotion Board Members

() = total number of appearances

Faith Group Cluster →	Roman Catholic	Liturgical Protestant	Non-Liturgical Protestant	Special Worship	% Selected 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 to 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	5 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 %

Id. and Prom. PSJ Fact 82 (incorporated by reference).

12. Each tier has a statistically significant selection rate (the difference is not by chance) for the award of benefits when compared with the other tiers. The favored denominations receive higher selection rates resulting in receiving more benefits than the less favored denominations.

13. This also shows the opportunity for promotion among chaplain denominations is not equal because denomination influences who receives Navy benefits. Prom. Facts 50-58, 62, 64, 69-72, 82-93.

14. Dr. Harald Leuba recently (1/11/11) examined the influence and effect of the Chief in the award of government benefits, including promotions and the appointment of chaplains, *Statistical Evidence of the Navy's Religious Preferences* ("Preferences"), Exhibit 4. The evidence from that analysis in terms of promotions and actual accessions shows the Chiefs' denominations receive significant benefits during and after the Chief's tenure in both categories. See Figure 3 on page 32 (promotions) and Fig. 6 on p. 21 (accessions). This applies across the board regardless of the denomination. In promotions:

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

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

Id. at 35, Table 9.

15. Dr. Leuba found:

2.20.5. There were 48 occasions when some candidate being considered for promotion to CDR happened to be the same denomination as the Chief of Chaplains; 40 of these candidates were selected for promotion. Some of them were surely well qualified and deserved to be recommended for promotion, i.e., submitted to the Chief of Chaplains for his subsequent approval. But the fact is that this success rate, 83.3%, is statistically significantly higher (by 2 standard deviations using a simple binomial test) than the 73.3% success rate which was experienced by the candidates who differed from the Chief of Chaplains on that occasion.

2.20.5.1 Similarly, there were 28 occasions when some candidate being considered for promotion to Captain happened to be the same denomination as the Chief of Chaplains; 22 of these candidates were selected for promotion. Their success rate, 78.6%, is statistically significantly higher (by 3 standard deviations

using a simple binomial test) than the 50.0% success rate which was experienced by the candidates who differed from the Chief of Chaplains on that occasion.

Id. All three current Navy CHC flag officers are endorsed by PUSA.

16. Analysis of the CHC's rank structure shows the Chiefs' influence on the CHC. Their denominations typically start out at the lieutenant level below their representative share of the CHC¹ but thereafter increase their percentage at each of the career grades. The Non-liturgicals, who generally start at LTJG and LT above their fair share, thereafter decrease at every rank.

Table 6.*	% of the Chaplain Corps when at LT	% of those "Considered" for LCDR	Relative % Gain (Change in "Market Share")
Roman Catholic	15.43	19.76	↑ 26.5
Liturgical	28.40	36.38	↑ 28.1
Non Liturgical	48.77	43.86	↓ 10.0

* All the data in this Table, and the following series of numbered Tables, come from Navy Exhibits (mostly Smith, et al. 2000) and none of it has been corrected for: (1) Faith Group confounding, (2) Above Zone promotions, or (3) Favorable Period of Time sampling. Each of those errors distorts the data toward the Navy's "there are no substantial differences" posture - and even so, the pattern of bias and preference is still evident - at $p < .01$, or three standard deviations.

Table 7.	% of the Chaplain Corps when at CDR	% of those Considered for CAPT	Relative % Gain (Change in "Market Share")
Roman Catholic	20.77	28.30	↑ 36.3
Liturgical	34.62	33.65	↓ 2.8
Non Liturgical	44.62	38.05	↓ 14.7

Id. at 29, Tables 6 & 7.

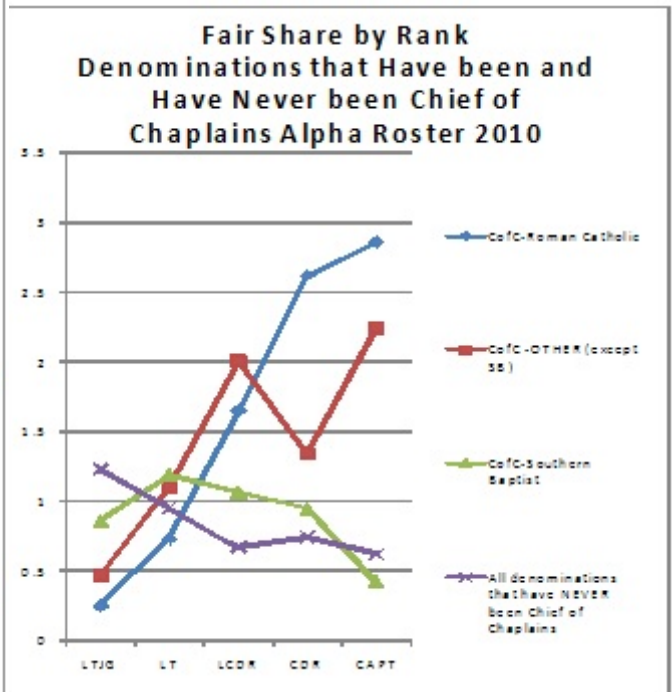
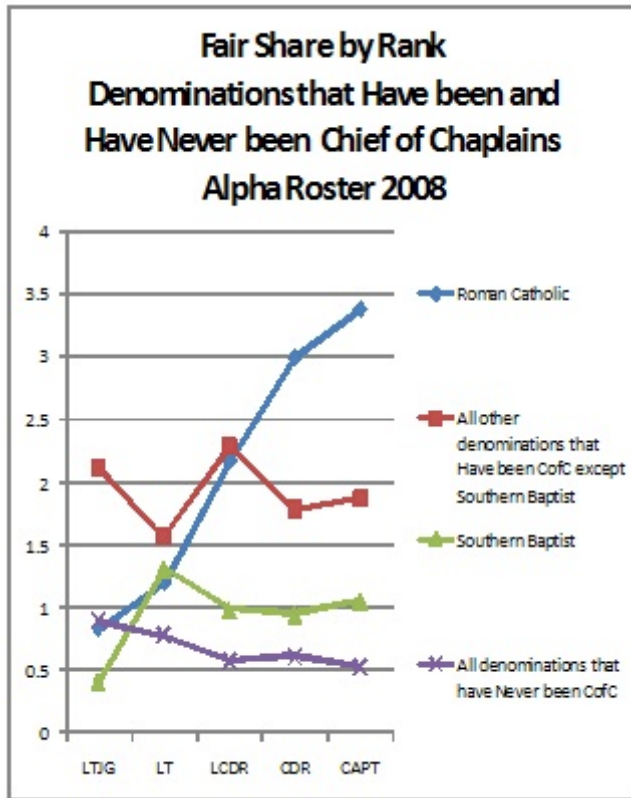
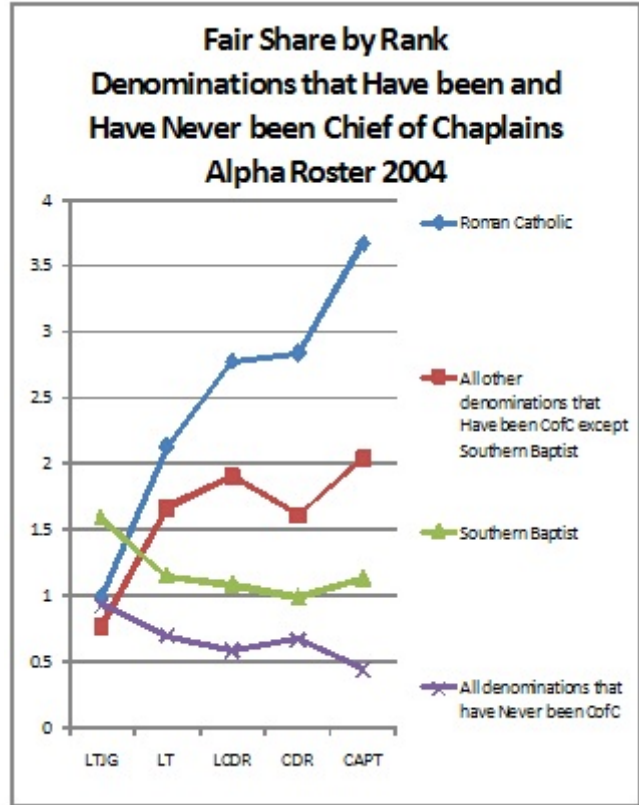
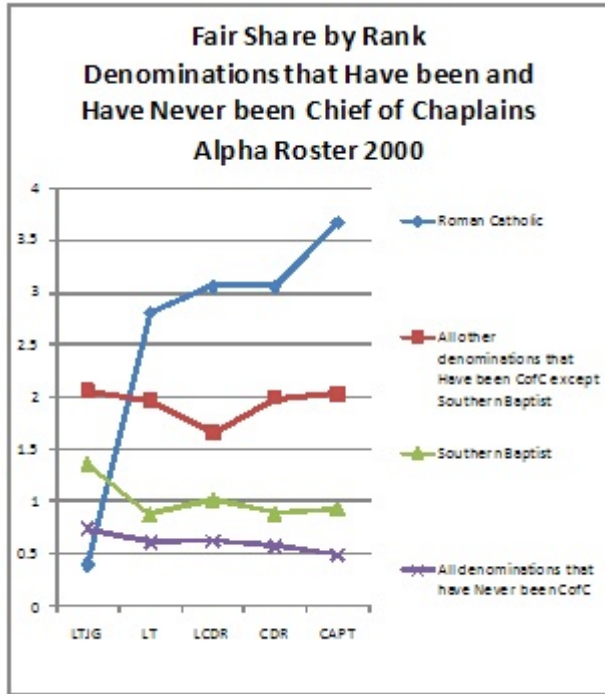
¹ The term "representative" or "fair" share refers to the approximate percentage of the population available to serve. See *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 650 (1989) (quoting *Hazelwood School Dist. v. U.S.*, 433 U.S. 299, 308 (1977)) ("The 'proper comparison is between the [clergy] composition of the at-issue jobs and the [clergy] composition of the qualified ... population in the relevant labor market.'").

17. The exception to the pattern of preference for denominations who have had a Chief is the Navy's treatment of Southern Baptists. Their only Chief, RADM Kelly (1965-70), served in the Vietnam War era when the Navy needed lots of Non-liturgical evangelical chaplains. Southern Baptists have benefitted but not at the same rate or with the same magnitude as the Liturgical Chiefs. Harald R. Leuba, PhD., *Reasons Change, Seasons Change* (Exhibit 5), ¶ 60.4.

18. The Chiefs' denominations receive a statistically significant legacy benefit.

a. Analysis of CHC Alfa Rosters from 2000 through 2010 show the Chiefs' denominations, except for Southern Baptists, benefit from their influence with a measurable legacy effect evident in the liturgical denominations' consistent over-representation at the ranks of LCDR, CDR and CAPT when compared to their fair share of the clergy available to serve. Three denominational groups have had Chiefs: Catholic, So. Baptist, and all other denominations that have had a Chief. The fourth group in the charts below for FY 2000, 2004, 2008 and 2010 is those "Denominations that ... have never been Chief of Chaplains." All the plots produce similar results demonstrating continuing and systematic bias. *Id.* ¶¶ 60-60.7.

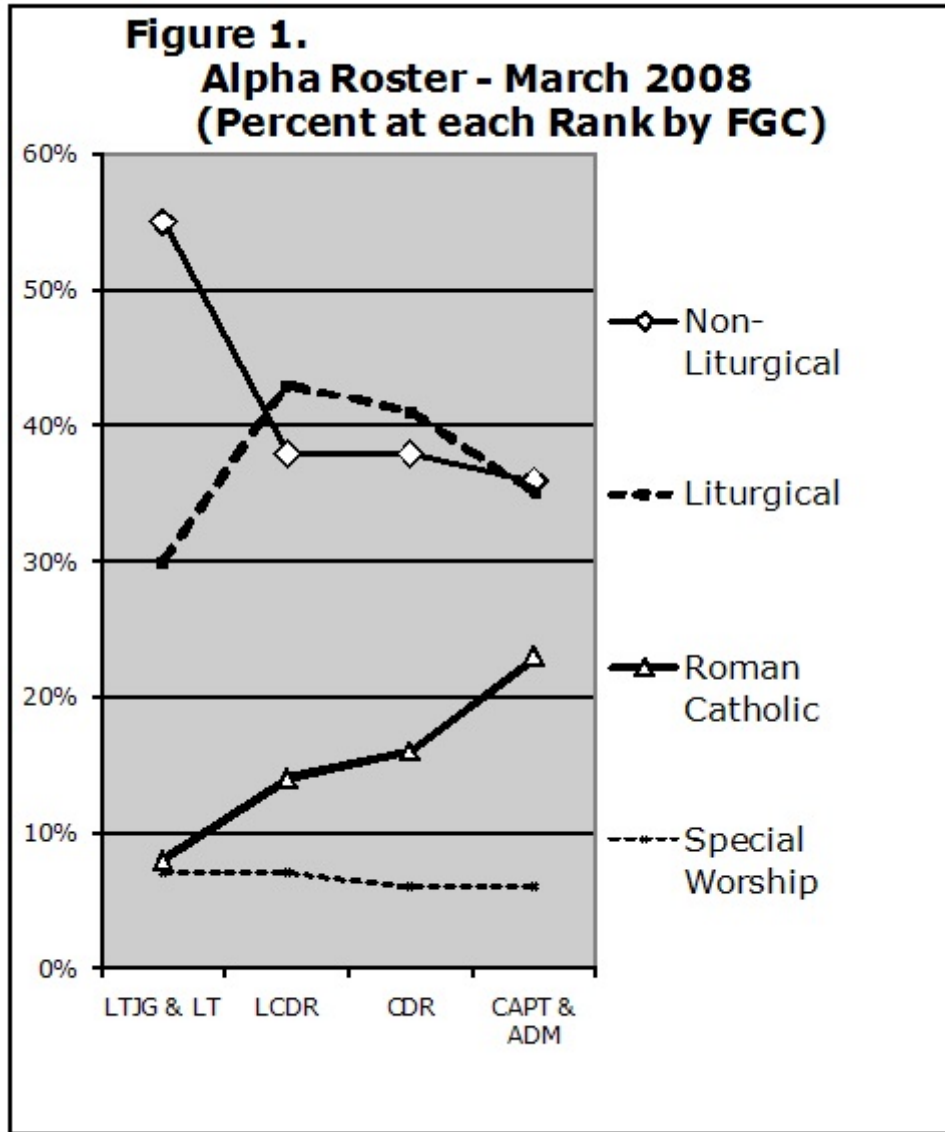
b. If the denominational distribution by rank were denominationally neutral, the lines for each group would be parallel to the abscissa and clustered about 1.0 on the ordinate. *Id.* Instead, in each time period, Catholic chaplains begin their careers below their fair share at the rank of LTJG - LT, but then increase their percentage of the Corps at every rank vis a vis their fair share. The slope for Catholics is always steepest and highest. Catholics are followed by the denominations other than So. Baptist who have been Chief who also increase percentage of the Corps at every rank. So. Baptist do consistently worse than Catholics and other denominations who have been Chief, while those who have never had a Chief are always at the bottom of in every period. *Id.* This is not the characteristic of a denominationally neutral system.



“These results are statistically significant beyond 3 standard deviations.” *Id.* ¶ 60.7.

19. Analysis of the 2008 Alf Roster shows the CHC reflects the Thirds Policy distribution at the CAPT rank despite 11 years of litigation, *Preferences* at 40, ¶¶ 2.23.3-2.23.4 and Fig.1.

2.23.3 March 2008, at **the lowest ranks**, each Faith Group’s presence is on a rough par with its share in the Population Available to Serve.



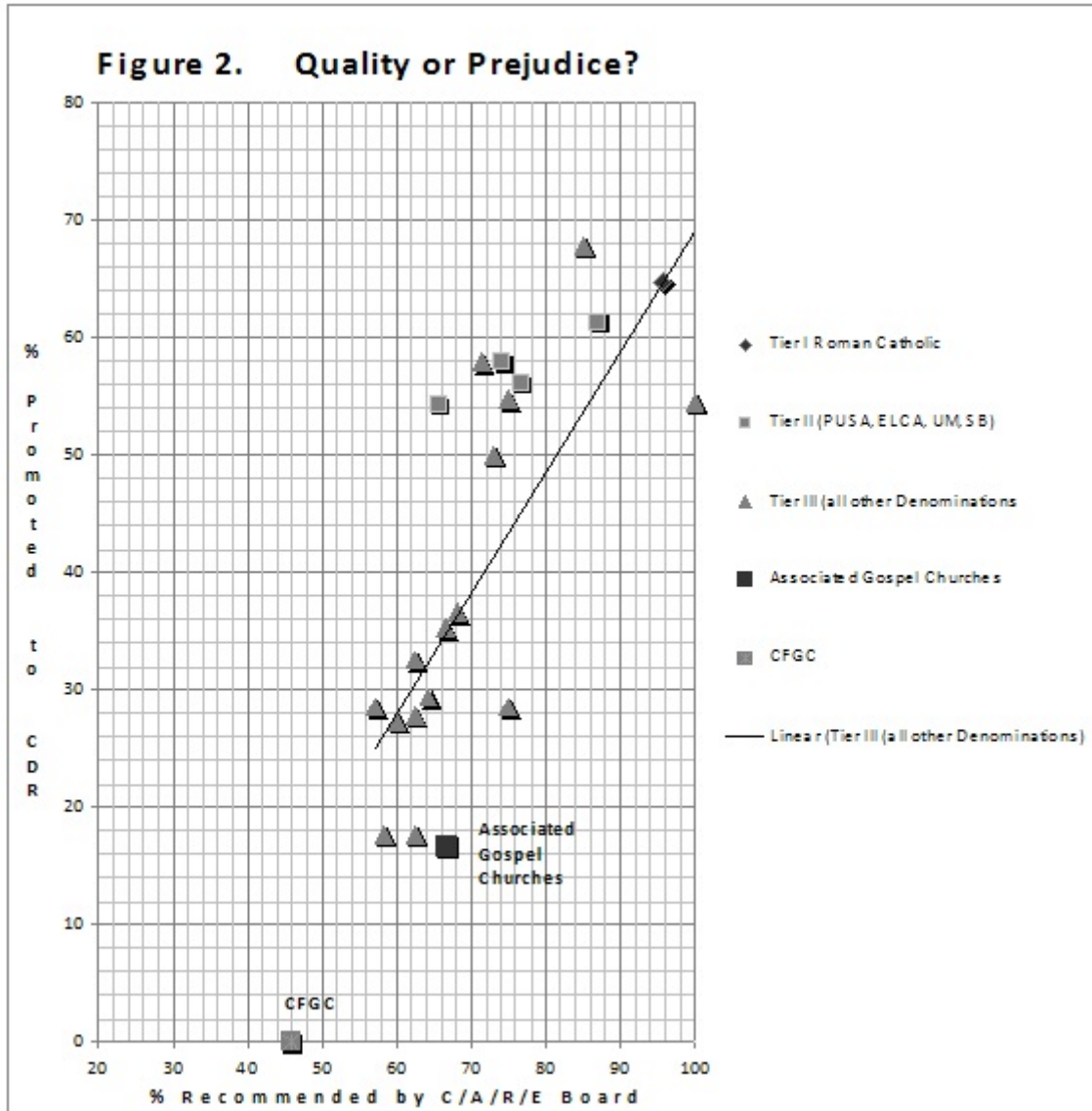
- As rank increases, Non-Liturgicals lose share at **every rank**. By the time the survivors arrive at the leadership ranks they are only a third of the total.

- Liturgicals **gain share** overall, and end up at the infamous “third”, with Non-Liturgicals who out-number them 2:1 in the Population Available to Serve.

- Roman Catholics gain share at **every rank** and end up (including the Special Worship Group in their “third”) at the arbitrary, and now 26 year old, “best needs of the Naval service”, 30%. (*cf* text block p 9 above.)

2.23.4. This is not “the product of a denominationally neutral promotion system.”

20. The Navy’s prejudice against Plaintiffs, manifest at accessions, *see* No. 6 above, is also manifest in promotion results as shown in the *Preferences* Fig. 2 at 41, ¶ 2.23.5, chart below.



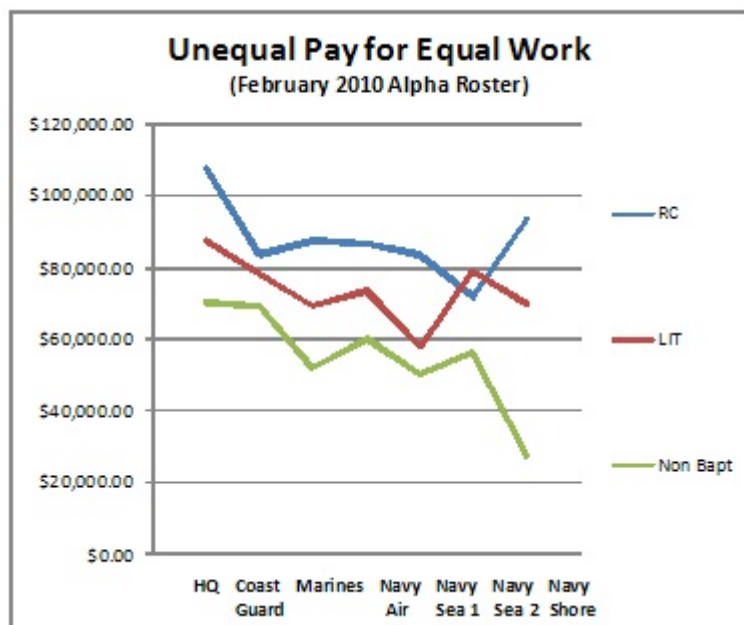
The linear correlation here is .74 for the Tier III denominations and .80 for all the data. This has a t score of 5.6 standard deviations; $p < .0001$.

“The fact that the **denominations** distribute along the percentage scales demonstrates differences in treatment”, *id.*, ¶ 2.23.6, and the fact that the denominations distribute in the **same ordinal**

sequence along both scales, demonstrates the existence of an underlying stable **pattern of denominational preference**”, ¶ 2.23.7 (emphasis in original).

21. Dr. Leuba examined the financial impact of the Navy’s religious preferences as revealed in the February 2010 CHC Alpha Roster, *Preferences*, ¶¶ 25.1-25.8.3, sorted it “by MMC (Major Manpower Claimant [the Navy’s major commands that make claims upon its resources, e.g., the Atlantic and Pacific Fleets]) and then [] calculated the average rank, by denomination, for all the chaplains, in each type of duty, *id.* at ¶ 2.25.3 “The data demonstrate, and Figure 4 shows, that Roman Catholics are the best paid religion/denomination, by a wide margin, in six of the seven categories of job assignment, and that the Non-Baptist, Non-Liturgicals are the worst paid in every category.” *Id.* at ¶ 2.25.6. “Baptists, Non-Baptists and Special Worship Chaplains are all paid less for the same work than are either Liturgicals or Roman Catholics.” *Id.* at ¶ 2.25.7. These differences are statistically significant “well beyond two standard deviations.” ¶¶ 2.25.8.

Figure 4



2.25.8.2 The fact that the Non-Baptist denominational group is at the bottom of the chart for every kind of duty station is powerful evidence of the relative advantage in pay that the Roman Catholics and the Liturgicals receive when working side-by-side with their Non-Baptist brethren.

2.25.8.3 If there were no denominational preference in the Navy Chaplain Corps, no statistical relationship here, then all the lines in this figure would be random scatters on the chart, oscillating and intertwined about the average. [See also Seidel, Marc-David L. (2006)

“Friends in High Places: The Effects of Social Networks on Discrimination in Salary

Negotiations” *Administrative Science Quarterly*, available (10/18/06) at http://www.findarticles.com/p/articles/ml_m4035/ls_2-45/ai_64705571/print.]

22. Chaplains dominate Navy chaplain accession and recall eligibility (“CARE”) boards, rely on subjective criteria to evaluate chaplain candidates, have no “established rating scheme or objective criteria by which they determine the ‘best qualified’ candidate for any accessioning program or active duty”, TP-PSJ Facts 55, 58.g. The results demonstrate a pattern and practice of denominational preferences and prejudices, *id.* Nos. 58.h, 69, 79, 99; Facts 6, 19, 20 *supra*.

STANDARDS OF REVIEW

A. Standard for an Injunction

To warrant preliminary injunctive relief, the moving party must show (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction. *E.g.*, *Mova Pharm. Corp.*, 140 F.3d 1060, 1066 (D.C. Cir. 1998) (quoting *City Fed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)) (internal quotation marks omitted).

CFGC, 454 F.3d at 297. Plaintiffs meet this criteria.

B. Standard of Review for Establishment Clause Challenges

The standard for reviewing Establishment Clause claims is well established: courts must carefully examine any practice “challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause protects.” *Committee for Public Education v. Nyquist*, 413 U.S. 756, 794 (1973). Searching review is required because “the Establishment Clause forbids subtle departures from neutrality, ‘religious gerrymanders,’ as well as obvious abuses.” *Gillette v. U.S.*, 401 U.S. 437, 452 (1971) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). There is no “de minimus” exception to traditional Establishment Clause analysis; *Bonham v. D.C. Library Admin.*, 989 F.2d 1242, 1245 (D.C. Cir. 1993).

Hernandez v. C.I.R., 490 U.S. 680, 695 (1989) provides specific guidance for judicial review of all Establishment Clause claims.

Our decision in *Larson v. Valente*, 456 U.S. 228 (1982), supplies the analytic framework for evaluating petitioners' [Establishment Clause] contentions. *Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the [practice] 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).

A practice evidencing a denominational preference is subject to strict scrutiny. *County of Allegheny v. ACLU*, 492 U.S. 573, 608-09 (1979) (“we have expressly required ‘strict scrutiny’ of practices suggesting ‘a denominational preference’”) (quoting *Larson*, 456 U.S. at 246).

The Court has embraced the *County of Allegheny* standard in the law of the case: “if the plaintiffs 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.” *Adair v. England (Adair II)*, 217 F.Supp.2d 7, 14-15 (D.D.C. 2002) (citing *County of Allegheny*, *op. cit.*); *see also Adair v. England (Adair I)*, 183 F.Supp.2d 31, 55 (D.D.C. 2002) (“the relaxed strict-scrutiny standard for some cases involving the military does not apply in this case, and the court will apply the usual strict-scrutiny standard.”).

SUMMARY OF ARGUMENT

Plaintiffs meet all the criteria for an injunction. First, plaintiffs will succeed on their Establishment and Due Process Clause violation claims because the clearest command of the Establishment Clause, that the government may not prefer one denomination over another, is the law of this case: if the Plaintiffs can provide evidence that the Navy's challenged practices suggest denominational preferences, the Court will apply strict scrutiny to those practices.

The evidence suggests, if not establishes, 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; the Chiefs' denominations are especially benefitted. The challenged procedures allow denomination to become relevant to a chaplain's standing in the Navy and chaplain communities. The challenged practices are not narrowly tailored to achieve a compelling purpose; they fail all Establishment Clause tests and result in unequal treatment for all chaplains.

Second, Plaintiffs' evidence supporting their allegations of an Establishment Clause violation shows they have suffered irreparable harm.

Finally, an injunction will not injure the Navy or other interested parties. The Navy can show no harm by having to follow the Constitution, and in fact, it is in the highest public interest to have the Armed Forces strictly adhere to the Constitution's requirements and mandates.

ARGUMENT

This case involves two distinct Establishment Clause principles. First, the Establishment Clause's clearest command forbids denominational preferences of any kind, *Larson*, 456 U.S. at 244. Second, the Constitution forbids the delegation of discretionary civic power to persons defined by their religious identities to award government benefits to other denominational representatives. *Kiryas Joel v. Grumet*, 512 U.S. 687, 698-99 (1994), explains that principle. The challenged practices illustrate that granting denominational representatives unchecked power to award benefits to persons defined by their religious identity results in denominational preferences for some and prejudice others.

The basic question underlying this motion is: may the Navy delegate discretionary civic power to persons defined by their religious identity without effective guarantees the power will by

used in a religiously neutral manner? *Grumet* answers this question with a resounding “No!” The issue of denominational preferences also raises Fifth Amendment considerations because promotions in the career grades of Lieutenant Commander, Commander and Captain are limited by law and there are more applicants than openings. *See Schlesinger v. Ballard*, 419 U.S. 498, 502-03 (1975) (explaining the Navy’s up or out promotion system). Religious favoritism results in advancement of certain denominations and prejudices others because there are only a limited number of benefits available, *e.g.*, promotions and chaplain appointments.

I. CHAPLAINS ARE UNIQUE NAVAL OFFICERS WHO ARE COMMISSIONED DENOMINATIONAL REPRESENTATIVES ON LOAN FROM THEIR FAITH COMMUNITIES

The religious nature of chaplains is at the heart of the issues before the Court. Defendants in the past have deceitfully argued that chaplains are solely naval officers and their religious identification has no bearing on constitutional analysis, *see e.g.*, Navy 6/16/2000 Motion to Dismiss at 23, *Adair v. Danzig*, 00cv566, Doc. No. 5 (“Navy chaplains are not private clergy but are officers in the Navy”). Plaintiffs do not doubt chaplains are naval officers; however, as this Circuit has found, chaplains are “unique” naval officers, serving simultaneously “as clergy or a professional representative of a particular religious denomination and as a commissioned naval officer.” *In re England*, 375 F.3d 1169, 1171 (D.C. Cir. 2004) [citation omitted], *cert denied*, 543 U.S. 1152 (2005). The constitutional importance of that uniqueness is manifest in many ways and is an essential part of any Establishment Clause analysis.²

² *Adair v. England*, 183 F.Supp.2d 31, 60-62 (D.D.C. 2002), applying the presumption of regularity in the Navy’s motion to dismiss, found chaplains served on promotion boards as naval officers, not denominational representatives. Plaintiffs’ Motion to Amend/Correct Interlocutory Order, Doc. No. 21 (7/18/08), seeks correction of that determination based on evidence rebutting the presumption that shows chaplains act as denominational representatives in distributing benefits, the Navy hires and treats chaplains as denominational representatives, and the Navy itself has argued to this and other courts they serve as denominational representatives on boards.

A. Chaplains Are Denominational Representatives on Loan from Their Faith Community

Chaplains are hired and commissioned as faith group representatives “on loan from ... their faith communities” to the military, Declaration of CH (Col.) Cecil Richardson, Exec. Dir. Armed Forces Chaplains Board in *Rigdon v. Perry*, 962 F.Supp. 150 (D.D.C. 1997) (Exhibit 6), ¶ 2. Unlike all other officers, chaplains have “rank *without command*”, *id.* ¶ 4; *Rigdon*, 962 F.Supp. at 159 (emphasis in original), 157-158 (same). Naval Regulation (NR) 1140.3 reflects this principle: a chaplain can not be “a superior commissioned officer with respect to a person in the naval service who is junior in rank.” Prom. PSJ Exhibit 6, incorporated by reference. Navy regulations treat chaplains differently than all other officers because of their uniquely religious status as denominational representatives. Chaplains are forbidden to carry arms, OPNAVINST 1730.1D (Exhibit 7) at 4, ¶ 5.a (7); “shall not be assigned duties that violate their noncombatant status or the religious practices of the chaplain’s religious organization, undermine privileged communication, ... involve the management of funds other than the ROF [religious offering fund]”, or perform normal duty watches, *id.* at 9, ¶ 5.e (11). Chaplains alone are excused from the duty under NR 1134 to report all violations of the uniform Code of Military Justice. Prom. PSJ Exhibit (“Ex.”) 6

The Navy’s unique restrictions on chaplains forbid chaplains from engaging in practices that might suggest the exercise the sovereign’s authority, in contrast to the very nature and role of a commissioned officer, to give orders in the Sovereign’s name. Chaplains’ uniquely religious nature and role is evident in the fact they must have an endorsement to be appointed as a chaplain, Department of Defense (DOD) Instruction 1304.28 (Prom. PSJ Exhibit 5), and must be separated if they lose their denominational endorsement, decisions outside the Navy’s control.

10 U.S.C. § 643 (separation required upon loss of professional qualification).

The DOD 2/9/1987 report to Congress, “Study of the Representation of Religious Faiths in the Armed Forces”, required by § 513 of the FY 1987 National Defendants Authorization Act, stated the “substantial majority of a chaplain’s time is spent in tasks that are clearly religious in nature, such as conducting religious services, education, and pastoral counseling [which] are primary to the chaplain’s role as a cleric in the military.” Section I-12 (Relevant extracts at Exhibit 8) (emphasis added). “Because of their role as religious leaders, chaplains are sought after and become deeply involved in such programs as substance abuse, marriage enrichment, ethics and moral development, interpersonal relationships, and leadership”, *id.* at I-13, and “even those activities not clearly identified as religious in nature are related to the execution of pastoral ministry.” *Id.* at I-14 (emphasis added).

B. Navy Regulations, the Military Code of Conduct and the Geneva Convention Recognize Chaplains’ Religious Nature Makes Them Unique Officers

Chaplains and the Navy are constantly reminded of chaplains’ uniquely religious nature because each chaplain must carry a military identification card identifying him as a member of Geneva Convention Category IV. Recognizing the uniquely religious nature of chaplains, the Geneva Convention treats chaplains differently than all other military personnel, including medical personnel, who also have a separate and distinct status under the Geneva Convention. The Convention classifies chaplains as “retained personnel”, not prisoners of war. Chaplains must be allowed to exercise their ministry while in a retained status, and unlike all other military personnel, must be returned to their parent military organization if there is no need for their services as a religious leader. *See* Prom. Facts 22-24; Prom. PSJ at 14-15.

The Armed Forces' Code of Conduct (the "Code") establishes unique responsibilities for chaplains when they are in captured status. For example, all military personnel except chaplains have an obligation to seek to escape by any means possible. Chaplains however, must stay and minister to prisoners of war, as long as the capturing power recognizes their religious nature and treats them as retained personnel. DODI 1300.21 (Code of Conduct Training and Education) ¶ E2.3.3.3 (Prom. PSJ Ex. 10).

The most significant indicator of chaplains' religious nature is that the Code, *id.*, ¶E2.3.4; NR 1140.3, Prom. PSJ Ex. 11; and the Navy's Code of Conduct, SECNAVINST 1000.9 (Prom. PSJ Ex. 9), forbids chaplains from exercising command over any military personnel, even if they are the only officer among captured forces. Command is the ability to give orders in the Sovereign's name which the law requires subordinates obey. Even under the extreme situation of capture by an enemy force and the absence of any other commissioned officer, the senior enlisted member becomes the "commander", whose orders the chaplain must obey.

C. Chaplains Act as Denominational Representatives When Awarding Benefits to Denominational Representatives

The evidence measuring CHC selection board results when chaplains serve as board members shows the denominations of the chaplain board members matter and candidates for the award of benefits who share a denomination with a board member do better and have a higher probability of selection than a similarly situated candidate who does not. Facts 5-20. Among those preferred denominations are those who have had the Chief as board president. Fact 14.

II. PLAINTIFFS WILL SUCCEED ON THE MERITS OF THEIR CLAIM THE CHALLENGED PRACTICES VIOLATE THE ESTABLISHMENT CLAUSE

Plaintiffs claim three distinct Navy selection board practices violate the Establishment Clause. First, the Navy appoints the Chief or his Deputy as president of chaplain selection

boards.³ Second, the Navy's practice of using small boards and secret voting allows one chaplain board member to manipulate the board results with no accountability, a fact the Navy's own investigations verify, Facts 2-4. Third, is the use of chaplains as board members without effective guarantees the delegated power to vote for the award of government benefits to other denominational representatives is exercised in a manner neutral to religion, *i.e.*, solely for secular, neutral, and non-ideological purposes.

The question is not will every chaplain act as a denominational representative and prefer his/her denomination on boards awarding or denying benefits, but whether the “potential for conflict” between religious neutrality and/or favoritism “inheres in the situation.” *Larkin v. Grendel's Den Inc.*, 459 U.S. 116, 125 (1982) (emphasis added) (quoting *Levitt v. Committee for Public Ed.*, 413 U.S. 472, 480 (1979)). When evidence suggests a challenged practice results in denominational preferences or favoritism, the practice must be reviewed under strict scrutiny. *Adair II*, 217 F.Supp.2d at 14-15; *County of Allegheny*, 492 U.S. at 608-09 (“we have expressly required ‘strict scrutiny’ of practices suggesting ‘a denominational preference’”). The practice fails strict scrutiny unless the government can show a narrow tailoring of the means to achieve a compelling purpose. Each challenged practice fails strict scrutiny, the three-part *Lemon* test, or the “objective observer” standard. *See McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862-63, 866 (2005) (defining and applying the objective observer test).

A. The Navy's Award of Government Benefits to Clergy and Commissioned Denominational Representatives is not Denominationally Neutral

The Navy awards government benefits to denominational representatives beginning with

³ The issue is the Chief being president of chaplain selection boards selecting denominational representatives for the award of benefits.

the process of accessioning civilian clergy into the Navy, resulting in the appointment of civilian clergy and religious leaders as Navy chaplains. The Navy continues to award government benefits to commissioned denominational representatives, *i.e.*, chaplains, in the form of various choice assignments necessary for progress up the career ladder, continuation on active duty after the initial three-year tour of service, promotions, and continuation on active duty when it becomes necessary to reduce the ranks of active duty officers through selective early retirement (“SER”).

1. **The Chief of Chaplains’ role and influence as a decision maker in the award of Navy benefits introduces religion into the decision and results in denominational favoritism**

Statistical analysis shows two distinct groups of chaplains in terms of those who benefit from the power of the Office of the Chief of Chaplains: those who belong to a Chief’s denomination and those who do not.

Plaintiffs’ expert, Dr. Harald Leuba, PhD, examined the extensive impact of the role of the Chief in the distribution of government benefits to denominational representatives. His analysis is very simple. He looked at the results in the award of various benefits, *i.e.*, accession, retention, and promotion, in terms of two groups: those denominations who have had a Chief, and those denominations who have not had a Chief. *Preferences*, ¶¶ 2.10.4-2.10.11 (accessions); 2.20.4-2.20.5 (promotions); 2.24 (retention). His statistical analysis shows chaplains who share the denominations of the Chief are preferred, uniformly receive substantial benefits because of the Chief’s position of influence, and those benefits linger after the Chief retires. Facts 14 -18. During a Chief’s tenure, accessions for his denomination increase, *Preferences*, ¶¶ 2.10.4-2.10.11 and Fig. 6, his denomination has higher promotion rates than other denominations who have not had a Chief, Facts 14-15, and the percentage of the Chief’s denomination at the critical rank of commander likewise increases, *Preferences*, ¶¶ 2.20.4-2.20.5. This result is unexplainable

except by the Chief's influence on selection, retention and promotion boards, discussed below, because it is a characteristic of all Chiefs regardless of denomination.

Fact 14 provides a chart comparing promotion results at commander and captain of two groups, those denominations who have had a Chief and those groups which have not. The higher promotion rates for the Chiefs' denominations is irrefutable evidence the status of the Chief results in greater benefits to his denomination. *See Preferences* at 35, Table 9. The difference in selection rates for each rank are statistically significantly different.

There is also a lingering favorable effect for the Chiefs' denomination because during his tenure, its chaplains have assumed greater positions of responsibility, which also increases promotion potential. *See* report by CAPT Larry Ellis, Non-Denominational Detailing, 3P-PSJ Ex. 49, ¶¶ 4-5 (showing domination of key CHC positions by liturgical denominations which are also the Tier I and II favorites, Fact 11, which have had the most Chiefs).

2. **The denomination of the Chief of Chaplains benefits during his tenure as Chief and afterward in every personnel management area that awards benefits to chaplains**

Promotions are just one aspect of the substantial career benefits the Navy distributes to denominational representatives through Chaplain Corps programs. Other benefits awarded to denominational representatives are accessions, continuation of active duty after an initial tour or as a result of SER, and key assignments. Statistical analysis of all these areas and the CHC's benefit distribution programs, whose decisions are often made by various chaplain staffed boards in which the Chief of or his Deputy serve as board presidents and other chaplains serve as board members, shows those denominations which have had a Chief receive higher benefit award rates, *i.e.*, the denomination of a Chief receives an advantage. Fact 14, 18.

B. The Navy's Chaplain Selection Board Secret Voting Procedures Violate the Establishment Clause's Mandate that the Distribution of Government Benefits To Denominational Representatives Must Be Religiously Neutral

The Establishment Clause forbids the Navy from making a naval officer's "adherence to a religion relevant in any way to a person's standing in the political [or naval] community." *County of Allegheny*, 492 U.S. at 594 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 686 (1984)). The Navy cannot use practices to award benefits that convey "a message that religion or a particular religious belief is favored or preferred." *Id.* at 593 (emphasis in original) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment); *Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981) (government cannot award or deny benefits on the basis of religion); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (same)).

The ability of the Chief to impact or influence the award of current benefits through selection boards arises from the fact he is a Rear Admiral and the head or chief officer of his Corps with its corresponding status, power, and influence that necessarily comes with his rank and ability/power to affect the lives of all chaplains below him. It is also the reality of organizations and bureaucracies, subordinates try to please the boss. The challenged board procedures facilitate favoritism with no accountability, checks or balances.

The board voting procedures, which Plaintiffs have challenged in their Promotion PSJ, allow one board member to manipulate the board's results. The NIG investigation of the FY 00 Chaplain Captain selection board documented in detail the process the CHC called "zeroing out", where one board member's zero vote effectively destroyed a candidate's chances for promotion because of the small number of board members and the secret "zero" vote. In that case, the female board member zeroed out the female candidate because of the board member's view of women in ministry, a theological or "ideological" issue, differed from the applicant. This and the

evidence in this case are examples why, “[t]he potential [for abuse of government power] inheres in the situation.” *Larkin, op. cit., Grumet*, 512 U.S. at 698-99, and the delegation of discretionary civic power to persons defined by their religious identity must be accompanied by “effective guarantees the delegated power will be used exclusively for secular, neutral, and nonideological purposes.” The Supreme Court did not choose the words “effective guarantees” lightly, nor can they be considered dicta; they mean effective guarantees, consistent with the Court’s long-standing rule that it is the Judiciary’s role and duty to carefully examine the practices to make sure Establishment Clause values, protections and concerns are not evaded.

The Baker NIG, Fact 2, provides an example of a Rear Admiral board President’s ability to influence the board through a comment that to some may seem innocuous, but results in a denied promotion. The NIG found RADM Baker made a comment suggesting a candidate lacked leadership. Neither the Board members nor RADM Baker remembered the comment, but the recorders did and their recollection was enough to convince the NIG RADM Baker’s comment produced the challenged non-selection. This validates RADM Holderby’s testimony to the NIG investigating the FY 97 and 98 CHC Commander that he could influence board members because of his position and rank. Chiefs’ PSJ Exhibit 9.

Absent strict accountability in the award of benefits to other denominational representatives, there can be no effective guarantees to preclude such improper influences when a denominational representative exercises such discretionary civic power. “The potential for conflict inheres in the situation.” *Larkin*, 459 U.S. at 125 (quoting *Levitt*, 413 U.S. at 480).

C. The Denomination of Chaplain Selection Board Members Improperly Influences the Board results

“More than 80% of the uncertainty in whether one will be promoted or not can be explained by the correlation (similarity) between the religious beliefs of the Promotion Board members and the candidate’s denomination!” *Preferences*, ¶ 2.19.11.2 and Figure 7. Facts 8, 11, 14, and 20 all show denominational prejudice and favoritism at work in the chaplain selection processes that award or deny benefits to chaplain candidates or chaplains. Facts 8 and 11 show a relationship/correlation between aboard member’s denomination and selection board results.

D. The Challenged Practices Fail Strict Scrutiny

Strict scrutiny assumes a practice is unconstitutional and places the burden on the defendant to show the practice is narrowly tailored to achieve a compelling governmental purpose. *Lac Vieux Desert Band of Lake Superior Chippewa v. Michigan Gaming Control Board*, 276 F.3d 876, 879 (7th Cir.) (“We start by presuming the statute is unconstitutional. Detroit can overcome that presumption by proving that the ordinance is necessary to serve a compelling state interest and narrowly drawn to achieve that interest.”), *cert denied*, 536 U.S. 923 (2002). Defendants can show neither.

1. Using the Chief or Deputy as a chaplain selection board president is not narrowly tailored to achieve a compelling government purpose

Narrow tailoring requires the practice be designed in such a manner that it does not violate the Establishment Clause’s purposes or produce the results the Clause was designed to prevent. Fact 8 shows that allowing the Chief or his Deputy to serve as a chaplain selection board president results in denomination becoming an influence, with the Chief’s denomination receiving a benefit that cannot be explained other than by his influence, rank, and the fact he is the “boss.” This is not narrow tailoring.

2. Using chaplains as chaplain selection board members is not narrowly tailored to achieve a compelling government purpose

Plaintiffs un rebutted evidence, Facts 11-20, shows that allowing chaplains to serve on chaplain selection boards using the current procedures results in denomination becoming relevant to a candidate's standing in the community, violating the Establishment Clause's mandate of governmental religious neutrality. *County of Allegheny*, 492 U.S. at 594.

E. The Challenged Practices Violate the *Lemon* Test

The D.C. Circuit has made it clear that *Lemon* or strict scrutiny is the law of the Circuit, regardless whether Congress, the military or some other form of government is accused of violating the Establishment Clause. "The touchstone for evaluating church-state relations under the Establishment Clause is the test enunciated by the Supreme Court in *Lemon v. Kurtzman*." *United Christian Scientists v. First Church of Christ Scientist*, 829 F.2d 1152, 1161 (D.C. Cir. 1987). No intervening decision has changed this Rule. *United Christian Scientists* is especially instructive and controlling because it reviewed a law passed under the Constitution's plenary grant of exclusive patent and copyright authority to Congress in Article 1, § 8, clause 8. The same section, clauses 11-16, contains Congress's authority to organize and regulate the Armed Forces. While courts often defer to Congress's authority in such special areas, *United Christian Scientists* did not defer, applied *Lemon* and held Congress violated the Establishment Clause by granting to one branch of the Christian Science Church exclusive control over its primary doctrinal publication. 829 F.2d at 1154, 1168, 1171.

United Christian Scientists held *Lemon's* approach was mandated, *id.* at 1161. It then distinguished between *Larson's* strict scrutiny of facial discrimination among religions and *Lemon's* tri-part test, which was "intended to apply to laws affording a uniform benefit to all religions, not to provisions like the statute in [*Larson*] that discriminate among religions." *Id.* at

1163 n. 49 (quoting *Larson*, 456 U.S. at 252). *United Christian Scientists* applied *Lemon* rather than *Larson* because strict scrutiny had not been raised by the parties in the District Court, *id.*, and found Congress's proffered concerns for the law were not "clearly secular," *id.* at 1165, Congress had fused civil and religious power, and placed its "official stamp of approval" on one set of religious views. *Id.* at 1165-66. If "Congress ... may not exceed the bounds of benevolent neutrality toward religion", *id.* at 1166, the Navy may not do so either.

The Supreme Court has not confronted an Establishment Clause challenge to a military practice. This Circuit did so in *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir.), *cert denied*, 409 U.S. 1076 (1972), holding the Service Academies' mandatory chapel regulations for all cadets and midshipmen were unconstitutional. The *Anderson* district court gave great deference to the Academies' "military expertise" arguments, *see id.* at 285 ("the court accorded great weight to the opinions and judgments of the military personnel concerned with officer training"), 290, 293 ("deference to the unique role of the military in our society"). The D.C. Circuit rejected that because such deference was incompatible with the Establishment Clause. *Id.* at 285 ("These regulations ... exceed the constitutionally permitted scope of governmental power."), 290 ("This principle was mistaken by the District Court"), 293 ("language of the regulations reveals" an Establishment Clause violation). *Anderson* did not cite *Lemon*, decided 20 days after *Anderson's* oral argument. However, *Anderson* replicated *Lemon's* first two tests and its analysis follows *Lemon's*, as seen in both Judges Bazelon's and Leventhal's opinions, including discussion and application of the "purpose and effect test" developed in *McGowan v. Maryland*, 366 U.S. 420, 453 (1961); *Torcaso v. Watkins*, 367 U.S. 488, 489-90 (1961); *Engel v. Vitale*, 370 U.S. 421, 424 (1962), and other precedents, *Anderson*, 461 F.2d at 291-93.

Anderson recognized that religious issues did “not involve programs vital to our immediate national security, or even to military operations or disciplinary procedures” and held “it is for this Court to assess that decision [to require mandatory chapel participation] in constitutional terms.” *Id.* at 296; *see Adair v. England*, 183 F.Supp2d 31, 50 (D.D.C. 2002) (“These [challenged] policies relate to quality of life issues for military personnel and have no specific operational, strategic or tactical objective”). Rejecting the District Court’s holding “that all First Amendment rights must bend when they conflict with military interests,” *Anderson* held “[t]he Supreme Court’s interpretations of the Establishment Clause refer to no overriding secular interests which could ever justify a government’s imposition of those religious activities which the Clause was written to abolish.” *Id.* at 290. Judge Leventhal’s concurrence found no military necessity justifying an establishment of religion, *id.* at 297, or a compelling government purpose, *id.* at 298. In effect, he applied a strict scrutiny analysis. *See, e.g., id.* at 302 (various references to the requirement the government show its “interest is compelling”).

1. The challenged practices fail *Lemon*’s second prong by creating denominational preferences and prejudice

Defendants can not pass *Lemon*’s second test, *i.e.*, the challenged programs “must neither advance nor inhibit religion”, 403 U.S. at 412. The challenged practices clearly advance the denominational interests of the Chiefs’ denominations and benefit both the favored clergy applicants and chaplains and the denominations themselves financially. *See* Facts 14-18. The challenged practices allow one member of the board to manipulate the board results allowing theological or ideological purposes to influence who is awarded or denied government benefits. Facts 2-4.

The Navy's challenged practices have produced a denominational hierarchy of favorites and those favored denominations have received more promotions and other benefits than the disfavored denominations, which include Plaintiffs. Facts 6, 11. Thus, the challenged programs resulted in favoritism for some denominations and prejudice for others, making religion relevant to a chaplain's standing in the naval community. This violates the Establishment Clause's neutrality mandate. *County of Allegheny*, 492 U.S. at 594; *Larkin*, 459 U.S. at 125 (civic power not "used in a religiously neutral way"); *Grumet*, 512 U.S. at 703.

2. The challenged programs entangle the government with religion

The government becomes entangled in religion when it makes religion important to the award of benefits or to an individual's standing in his community. *County of Allegheny*, 492 U.S. at 594. Analysis of the practices' results show when awarding benefits (a) the Navy prefers certain religions, especially those of the Chief, (b) the Navy awards these benefits without the necessary effective guarantees, and (c) the symbolic union of government and religion conveys the message that religion is important and has meaning in the award or denial of government benefits. Facts 8 and 11-20 show these practices put the Navy's power and influence behind religion and specific religions and delegates unchecked, discretionary civic power "to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism", violating the Establishment Clause. *Grumet*, 512 U.S. at 709 -10.

The challenged practices here are similar to the delegation of civic discretionary authority *Grumet* found violated the purpose of the Establishment clause, preventing fusion of government and religion. The challenged practices allow the delegation of discretionary civic authority to persons defined by their religious character without any effective guarantees, as shown by Facts 8 and 11-20, the delegated power would be used solely for secular, neutral, and nonideological

purposes. The Facts show the power is used in a religiously non-neutral manner to advance ideological and sectarian purposes.

The practices challenged here create the same problem confronted in *Grumet*, the challenged practices “leaves the court without any direct way to review such state action for the purpose of safeguarding a principal at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion.” *Id.* at 703 (citing various precedents). “The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with [denominational representatives].” *Larkin*, 459 US at 127. Here, the challenged practices create “a fusion of governmental and religious functions,” *id.* at 126 (citing various precedents). The specific religious function fused with government is the advancement of a denomination by its denominational representatives. *See Corporation of Presiding Bishop v. Amos*, 485 U.S. 327, 337 (1987) (church’s “very purpose” is to advance religion).

The mere appearance of a joint exercise of [executive] authority by church and state provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred. It does not strain our prior holdings to say that the [practices] can be seen as having a ‘primary’ and ‘principal’ effect of advancing religion.

Larkin, 459 U.S. at 125-26.

D. The Challenged Programs Fail the Reasonable Observer Test

Recent Supreme Court precedents have collapsed *Lemon*’s three-part test into a two-part test known as the “endorsement test” combining *Lemon*’s second and third prongs, the result and entanglement questions. The test asks whether the objective or reasonable observer would perceive the challenged governmental action as an endorsement or preference for or against religion, a specific religion, or a religious viewpoint. *County of Allegheny* asked whether the

reasonable observer would perceive as religious endorsements the displays of (1) a crèche on the main staircase of the county courthouse and (2) a menorah in another display including other seasonal symbols. The Court found the placement of the crèche communicated endorsement because of its location, 492 U.S. at 599-602, whereas the menorah passed constitutional review because it was merely one of several holiday symbols in a group. *Id.* at 613-16, 620-21. In each case the Court reached its answer after examining the practice's context and the message the practice communicated.

1. The reasonable observer examines the challenged programs' history and purposes

McCreary County held courts should analyze the purpose of the challenged practice from the viewpoint of the reasonable or objective observer and asked whether an objective observer would conclude the display of the Ten Commandments with other historic documents in two county courthouses communicated governmental endorsement of religion. The *McCreary* petitioners argued the Court should ignore the history of the challenged displays and only look at the last iteration of the display. 545 U.S. at 863-66, 871-72. The Court rejected this argument and held the "objective observer's eyes" were to look closely at the historical facts which often revealed the purpose behind the challenged practice or statute. *Id.* at 862. The Court also rejected petitioner's attempt to trivialize the inquiry into the practice's purpose. *Id.* at 863-64. The Court emphasized "the purpose needs to be taken seriously under the Establishment Clause", and courts should reject sham reasons. *Id.* at 874.

2. The reasonable observer would conclude the challenged programs result in illegal preferences that advance denominational interests

The reasonable observer would conclude (1) the challenged practices clearly benefit a specific number of all denominations while prejudicing those which have not been

fortunate enough to have a Chief; (2) the fact that Catholics are treated more favorably and Southern Baptists are not treated the same as the other denominations who have had Chiefs is another indication of religious bias at work; and (3) the message communicated clearly in the results of these practices is that denomination is relevant to a chaplain's standing in the chaplain and naval communities.

[T]he Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Wallace v. Jaffree, 472 U.S. at 69 (O'CONNOR, J., concurring in judgment) (internal quotation marks omitted). *CFGC*, 454 F.3d at 302 adopted this standard: "Where, as here, the charge is one of official preference of one religion over another, such governmental endorsement 'sends a message to nonadherents [of the favored denomination] that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" (Citing *Lynch*, *op. cit.*).

The objective observer would also know the denominational preferences follow the same pattern of prejudice in all areas with Catholics being preferred while Non-liturgical chaplains like Plaintiffs are prejudiced; they always start out with the most personnel at the entry ranks of LTJG and LT, but they do not receive their fair share the benefits at the higher ranks. Facts 8, 14, 16, 19-21. The objective observer would know this results in financial and other benefits to the preferred denominations. Fact 20; *Preferences*, ¶¶ 25.1-25.8.3. The objective observer would also recognize that if the categories before the Court were racial or ethnic origin instead of

denominations, FGCs or denominations who have had Chiefs, there would be no question forbidden prejudice was the apparent message the practices communicated.

III. PLAINTIFFS WILL SUCCEED ON THEIR CLAIM THE CHALLENGED PRACTICES VIOLATE DUE PROCESS

The Fifth Amendment's Due Process Clause has an inherent equal protection component which requires the Navy to treat all similarly situated persons equally. In the promotion or selection for government benefits context, this means that each applicant has an equal opportunity to receive the benefit and a selection is made solely on the strength of his or her record. "Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943).

Larson illustrates the inherent conflict denominational favoritism creates with the Equal Protection component of the Due Process Clause. Striking down the challenged statute that sought to impose regulations on some religious organizations but not others based on the source of their contributions, the Court found "this statute does not operate evenhandedly, nor was it designed to do so. The 50% rule ... effects the *selective* imposition of burdens and advantages upon particular denominations." *Id.* at 253-54 (emphasis in original). *See also Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010) (the Equal Protection Clause "protects against invidious discrimination among similarly situated individuals or implicating fundamental rights"); *Larkin*, 459 U.S. at 125 ("The churches' power under the statute is standards, calling for no reasons, findings, or reasoned conclusions. That power may therefore be used . . . to promote goals" that are not religiously neutral or secular).

The evidence shows all applicants for Navy benefits do not have an equal opportunity to receive them because some denominations are preferred and others, like Plaintiffs', are not.

IV. THE CHALLENGED PROGRAMS CAUSE IRREPARABLE HARM

Irreparable harm is always measured against the liberty interest concerned; “the pertinent liberty here is protection against government imposition of a state religion or religious preference.” *CFGC*, 454 F.3d at 302. Plaintiffs allege the challenged practices violate the Establishment Clause, introducing and producing religious favoritism and denominational considerations into the award of government benefits. They support their allegation with evidence, *see* Facts 2-20 above. “[W]hen an Establishment Clause violation is alleged, infringement occurs the moment the government action takes place-without any corresponding individual conduct-then to the extent that the government action violates the Establishment Clause, First Amendment interests *are* “threatened or in fact being impaired.” *CFGC*, 454 F.3d at 303 (citing *Elrod v. Jones*, 427 U.S. 347, 373 (1976) (plurality opinion)). *CFGC* makes it clear

because of the inchoate, one-way nature of Establishment Clause violations, which inflict an “erosion of religious liberties that cannot be deterred by awarding damages to the victims of such erosion,” *City of St. Charles*, 794 F.2d at 275, we are able to conclude that where a movant alleges a violation of the Establishment Clause, this is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination.

Id.

V. PLAINTIFFS MEET THE OTHER INJUNCTION CRITERIA

A. Terminating Defendants’ Unconstitutional Practices Poses No Burden or Injury on Defendants

The Navy will suffer no harm whatsoever if the Court orders it to stop the challenged practices that result in denominational preferences, favoritism and prejudice. The claims and procedures challenged here do not involve national security, military training or some aspect of

the Navy's operations where a stay until the Court can evaluate Plaintiffs PSJs' issues would result in possible damage to the nation or naval operations. The issue is whether certain procedures involving ordinary personnel decisions awarding or denying government benefits to commissioned denominational representatives violate the Constitution. The Navy simply cannot show any legitimate interest harmed by being enjoined from violating the Establishment Clause in chaplain promotion decisions. Navy officials are charged with following the law as well as their own regulations. "It is a basic tenet of our legal system that a government agency is not at liberty to ignore its own laws and that agency action in contravention of applicable statutes and regulations is unlawful." *Dilley v. Alexander*, 603 F.2d 919, 920 (D.C. Cir. 1979).

The Navy cannot claim any prejudice to its promotion operations. The promotion planning cycle and implementation has not yet begun, no orders and travel arrangements have been issued for board members. If the Navy wants or needs to hold promotion and accession boards, it may do so by following the same procedures used by the other services, using bigger boards, providing procedures that ensure accountability, such as having each board member's vote for each candidates recorded publicly and using other Admirals as selection board presidents. Some of these are the same recommendations urged on the Navy by its consultant, CNA in its March 2000 Promotion Study at 2, Prom. PSJ Ex. 14 ("The Navy may want to adopt the policy of the Army and Air Force" using bigger boards made up of line officers). The Navy simply cannot show any legitimate interest harmed by being enjoined from violating the Establishment Clause in chaplain promotion decisions.

B. There Are No Third Party Rights That must Be Addressed

There are no unrepresented parties here that would be prejudiced by a preliminary injunction. Chaplains other than Plaintiffs and those within the putative class would not be

prejudiced because they would be protected from the denominational bias and favoritism inherent in the current system. Plaintiffs seek a level playing field for the award of benefits, not favoritism or a preferred status.

C. Terminating Defendants' Unconstitutional Practice Is in the Public Interest

“When a constitutional violation is likely, moreover, the public interest militates in favor of injunctive relief because ‘it is always in the public interest to prevent violation of a party's constitutional rights.’” *Id.* (quoting *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)).

A consistent Supreme Court theme in many of its Establishment Clause cases is that Clause's purpose was to avoid the divisiveness, hostility and friction resulting from the government's union and cooperation with religion. “The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy.” *Everson v. Board of Ed.*, 330 U.S. 1, 8-9 (1947). “At the time of the Revolution, Americans feared not only a denial of religious freedom, but also the danger of political oppression through a union of civil and ecclesiastical control.” *Larkin*, 459 U.S. 126 n.10 (citing B. Bailyn, *Ideological Origins of the American Revolution* 98 – 99, n. 3 (1987)).

By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power.

Engel v. Vitale, 370 U.S. 421, 429 (1962); *accord Everson*, 330 U.S. at 8-11.

This case illustrates the very evil the Establishment Clause was designed to prevent. A group of chaplains from various Non-liturgical faith groups is before this Court seeking redress from the government's alliance with and favoritism to other religious groups. Benefits are given and denied based on religious affiliation.

Confronting and forbidding the very government actions that produce "the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval" serves the public interest. Courts have held it is in the public interest to vindicate First Amendment rights. *Rigdon v. Perry*, 962 F.Supp 150, 165 (D.D.C. 1977); *see also, e.g., Utah Licenced Bev. Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001). It is in the highest public interest to make sure our military remains neutral in matters of religion. The public has a strong interest in having a military that conducts itself fairly and according to the law. *Cooney v. Dalton*, 877 F. Supp. 508, 515 (D.Hawaii 1995) (enjoining the discharge of a sailor). That interest is particularly evident in this case. "We ... hold that a party alleging a violation of the Establishment Clause per se satisfies the irreparable injury requirement of the preliminary injunction calculus." *CFGC*, 454 F.3d at 304. The very purpose of an injunction is to stop irreparable harm. The Navy has clearly violated Title 10, the Secretary's own instructions and the Establishment Clause. When agencies stray beyond the limits set for them by Congress, courts have a duty to require that they comply with the law. *See Dilley*, 603 F.2d at 914.

"The federal Constitution embraces and embodies the cardinal principle that this is a nation subject to the rule of law, and as such, agents of the government are bound to follow the

law.”⁴ *Wilkinson v. Legal Services Corp.*, 27 F. Supp. 2d 32, 57 (D.D.C. 1998) (citing *United States v. Lee*, 106 U.S. 196, 220-21 (1892) and other cases). *See also Dilly*, 603 F.2d at 920 (“It is a basic tenet of our legal system that a government agency is not at liberty to ignore its own laws and that agency action in contravention of applicable statutes and regulations is unlawful”), and 921 (“courts have shown no hesitation to review cases in which a violation of the Constitution ... is alleged”).

It is both absurd and seditious to argue that allowing the government to operate outside of the Constitution is in the public interest. Defendants can show no burden if they must operate their chaplain management and retention programs in accord with the Constitution. Plaintiffs have met all the criteria for an injunction.

CONCLUSION

The Plaintiffs will succeed on the merits of their Establishment Clause claims. First, the challenged practices fail strict scrutiny, the endorsement and *Lemon* tests because they communicate an unmistakable message that some denominations are favored and a chaplain’s denomination is important to his or her standing in the CHC and the Navy.

Second, the Court of Appeals has already held Plaintiffs allegation the Navy has violated the Establishment Clause shows irreparable harm. *CFGC*, 454 F.3d at 304.

Third, an injunction will not harm the Navy or interfere with its mission of meeting free exercise needs of DON personnel. No harm results from following the Constitution and viable alternatives are readily available. The other Armed Services do not employ the challenged practices in their selection boards.

⁴ *Wilkinson*, 27 F. Supp. 2d at 57-64 provides an extensive discussion of the *Accardi* Doctrine, the rule government must obey the law, referring to *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

Fourth, ordering the Navy to follow the Constitution is in the public interest. The Establishment Clause's purpose is to preclude the divisiveness, animosity, factionalism and strife that follows preferring one religion over another. Courts have the constitutional authority and duty to confine other branches of government within their constitutional and statutory limits.

Respectfully submitted,

Dated: July 22, 2011

/S/ Arthur A. Schulcz, Sr.
ARTHUR A. SCHULCZ, Sr.
D.C. Bar No. 453402
Counsel for *Chaplaincy* Plaintiffs
2521 Drexel Street
Vienna, VA 22180
703-645-4010 Of Counsel:

Douglas McKusick, Esq.
THE RUTHERFORD INSTITUTE
P.O. Box 7482
Charlottesville, VA 22906-7482

EXHIBIT LIST

<u>Exhibit No.</u>	<u>Description</u>
1.	Dr. Harald R. Leuba, Ph.D., 12/24/08 Expert Declaration, <i>Features (policies and practices) of the U.S. Navy Chaplain Corps' personnel system which enable, foster, and encourage denominational discrimination</i>
2.	CNA's Senior Leadership Conference 2000 briefing chart: promotion percentage by faith group cluster
3.	Dr. Harald R. Leuba, Ph.D., 9/13/10 Expert Declaration, <i>Old Warnings, New Data</i>
4.	Dr. Harald R. Leuba, Ph.D., 1/1/11, Expert Declaration, <i>Statistical Evidence of the Navy's Religious Preferences</i>
5.	Dr. Harald R. Leuba, Ph.D., 5/30/11 Expert Declaration, <i>Reasons Change, Seasons Change</i>
6.	Declaration of CH (Col.) Cecil Richardson, Exec. Dir. Armed Forces Chaplains Board in <i>Rigdon v. Perry</i> , 962 F.Supp. 150 (D.D.C. 1997)
7.	OPNAVINST 1730.1D, "Religious Ministry in the Navy"
8.	DOD 2/9/1987 report to Congress, "Study of the Representation of Religious Faiths in the Armed Forces", required by § 513 of the FY 1987 National Defendants Authorization Act
9.	Declaration of Arthur A. Schulcz, Sr., Authenticating Exhibits

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2011, I electronically filed the foregoing **Plaintiffs' Motion for a Preliminary Injunction Enjoining Defendants' Use of the Chief or Deputy Chief of Chaplains and Chaplains as Chaplain Selection Board Members in Decisions Awarding Government Benefits to Denominational Representatives Without Effective Procedural Guarantees Precluding Denominational Favoritism or Bias** with the Clerk of the Court to be served by the Court's CM/ECF system on the following:

Christopher Hall
Attorney, Civil Division
U.S. Department of Justice
20 Massachusetts Ave., NW
Room 7322
Washington, D.C. 20001

/s/ Arthur A. Schulcz, Sr.
ARTHUR A. SCHULCZ, SR.
Counsel for *In e Navy Chaplaincy* Plaintiffs
D.C. Bar No. 453402
2521 Drexel Street
Vienna, VA 22180
703-645-4010