IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: NAVY CHAPLAINCY) 1: 07-mc-269 (RMU)

PLAINTIFFS' RENEWED MOTION FOR A PRELIMINARY INJUNCTION FOLLOWING REMAND ADDRESSING DEFENDANTS' DENOMINATIONAL PREFERENCE IN RETAINING CATHOLIC CHAPLAINS ON ACTIVE DUTY PAST THEIR STATUTORY SEPARATION AGES

In accord with the Court's Order consolidating all chaplain cases, all plaintiffs in the above case submit this motion renewing the *Chaplaincy of Full Gospel Churches v. Winter* and *Adair v. Winter* 2003 Motion for an Injunction following remand from the Court of Appeals in *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006). Their memorandum of points and authorities provided herein shows they are entitled to an injunction because the defendants' practice of continuing Catholic chaplains past their statutorily separation ages to enable them to qualify for retirement pay is an unconstitutional preference and contrary to statutory limitations limiting the time service personnel may remain on active military service.

In accord with Local Civil Rule 7(m), counsel for the parties discussed this motion and defendants' counsel stated they will oppose this motion.

Dated: July 10, 2007

Respectfully submitted,

/S/ Arthur A. Schulcz, Sr.

ARTHUR A. SCHULCZ, Sr.
D.C. Bar No. 453402
Counsel for *CFGC* 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

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

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR RENEWED MOTION FOR AN INJUNCTION PROHIBITING DEFENDANTS DENOMINATIONAL PREFERENTIAL RETENTION PRACTICE OF RETAINING CATHOLIC CHAPLAINS PAST THEIR STATUTORY SEPARATION AGES TO QUALIFY FOR RETIRED PAY

Respectfully submitted,

Dated: July 10, 2007

/S/ Arthur A. Schulcz, Sr.
ARTHUR A. SCHULCZ, Sr.
D.C. Bar No. 453402
Counsel for *CFGC* 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

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INTRODUCTION

All the plaintiffs in the above now consolidated case move the court for an order: (1) enjoining defendants from continuing their unconstitutional preference for Catholics manifested in their policy and practice[1] of allowing Catholic chaplains to remain on active duty past their statutory separation age for the purpose of qualifying for retired pay; 2) enjoining further violations by (a) stopping defendants' preferential retention practice and (b) requiring defendants to comply strictly with DOD instructions concerning classification of retired personnel; and (3) requiring defendants to remedy the constitutional and statutory violation by complying with the discharge statutes. The *Chaplaincy of Full Gospel Churches v. Winter* and *Adair v. Winter*, (*CFGC /Adair*) plaintiffs renew their original motion for such relief.

Because the law of the case holds that "a party alleging a violation of the Establishment Clause per se satisfies the irreparable injury requirement of the preliminary injunction calculus", *Chaplaincy of Full Gospel Churches v. England*, ("*CFGC*"), 454 F.3d 290, 303 (D.C. Cir. 2006), this motion focuses on the other three injunction criteria.

BACKGROUND

In 2003, defendants produced evidence in discovery establishing their practice of allowing Roman Catholic Reserve chaplains, and only Roman Catholics, to remain on active duty past the statutory separation ages for Reserve officers. At the time, 10 U.S.C. § 14509 established the separation age for Reserve officers at 60. Based on defendants' production of documents, plaintiffs identified 23 Reserve Catholic chaplains retained on active duty past age 60

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[1] Whether the course of conduct challenged here is called a practice, a pattern and practice, or a policy is immaterial. Plaintiffs refer to the challenged conduct or actions as a "practice", one that has existed well over a decade.

to acquire the necessary 20 years time in service ("TIS") to qualify for retirement pay. Seven of these were LTs and LCDRs over age 67, four of whom were in their 70s. The seven chaplains over age 67 were given the status "4109", meaning Retired Reservist, although none of the 4109 chaplains met any of DOD's criteria for Retired Reserve.

In June 2003, plaintiffs filed a motion for a preliminary or structural injunction to (1) stop the above denominational preferential practice, (2) enjoin further violations and (3) require defendants to remedy the statutory violation by complying with the discharge statutes. Plaintiffs argued they met the four criteria for an injunction. First, plaintiffs would prevail on the merits of their claim because (1) the practice constituted a denominational preference subjecting it to strict scrutiny, and (2) defendants would fail strict scrutiny because the defendants ability to hire contract clergy or auxiliary chaplains if they were needed showed the practice was not narrowly tailored to meet a compelling government objective. Second, defendants' First Amendment violation, "for even minimal periods of time [] results in irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Third, the injunction placed no burden on defendants because they were required to follow the law and the Constitution, there were legal alternatives available to meet the needs of Catholics, and the challenged chaplains would suffer no harm because they had been commissioned with age waivers requiring them to acknowledge they would not qualify for retirement pay. Fourth, requiring the military to follow the law was in the public interest. Plaintiffs' Motion for a Preliminary and Structural Injunction and Partial Summary Judgment (the "Inj Mot"), *CFGC* Docket No. 142 (incorporated by reference).

In the alternative, plaintiffs moved for summary judgment because plaintiffs were entitled to judgement as a matter of law. *Id.*

The Court denied plaintiffs' Inj. Mot., holding plaintiffs had not shown irreparable harm because *Elrod* did not apply to Establishment Clause violations; Plaintiffs appealed.

On July 9, 2006, the D.C. Circuit reversed, holding that *Elrod's* rule did apply to alleged Establishment Clause violations and "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 DC. Circuit remanded to the District Court the question whether plaintiffs satisfied the remaining three criteria. *Id*.

On October 20, 2006, as the parties were preparing a briefing schedule to address the remand issue, the Court stayed the *CFGC/Adair* case pending the D.C. Circuit's resolution of *Miller v. Secretary of Navy*, 476 F.3d 936 (D.C. Cir. 2007), an unrelated case. Plaintiffs moved for an order clarifying or lifting the stay because of the uncertainty as to when *Miller* would be decided and a stay was incompatible with the purpose of an injunction. *CFGC* Doc. No. 237. Defendants opposed. The Court denied the motion to lift the stay as moot, January 24, 2007, after release of the *Miller* decision. The parties proposed and the Court approved a briefing schedule on the mandate; briefing was completed May 21, 2007. Plaintiffs incorporate the *CFGC/Adair* Opening, Reply, and Sur Reply Briefs by reference.

On June 18, 2007, the Court denied the *Gibson v. U.S. Navy* plaintiffs' motion to retransfer their case to the Northern District of Florida, consolidated all the chaplain cases into a new case with the above citation, denied all pending motions without prejudice because the pending motions affected the new parties' rights, and invited the parties to resubmit their motions. *CFGC*. Doc. # 261. The *Gibson* plaintiffs now join the *CFGC /Adair* plaintiffs in moving for injunctive relief.

THE PLAINTIFFS HAVE STANDING

Defendants previously argued the *CFGC/Adair* plaintiffs had no standing because no named plaintiff was on active duty. Defendants' 3/9/02 Remand Opening Brief ("DefOpBr") at 7-12, Defendants' 5/1/07 Remand Reply (#257)("Def.RR") at 5-8. Plaintiffs showed that this Court had specifically found CFGC had standing as a representational plaintiff and could seek prospective and injunctive relief. *CFGC /Adair* Remand Reply ("Pl.Rem.Reply') at 8-11.

The *Gibson* plaintiffs include active duty chaplains, *e.g.*, Gibson, Demy and Stewart. Consequently they suffer direct irreparable injury resulting from defendants' Establishment Clause violations. *See CFGC*, 454 F.3d at 304. There can be no doubt as to plaintiffs' standing.

RECENT OR CURRENT EVENTS BEARING ON THIS MOTION

DefOpBr Exhibit 1identified six current Navy Catholic chaplains with a status of 4109, none of whom had qualified for retired pay because they did not have the required TIS. One of those, LCDR Erestain, now stationed at Bethesda Naval Hospital, will retire at the end of July at age 70, 10 years past the age at which he should have been separated. DefOpBr Exhibit 1 incorrectly shows his retirement eligibility as 2008. He makes the fourth 4109 allowed to illegally obtain a pension in their 70s since plaintiffs filed the original injunction motion in 2003.

Plaintiffs took the depositions of Mr. Thomas Bush and Mr. Samuel Wyvill, whose declarations tried to justify the "Honorary Retiree" program which allegedly allow the 4109s to be "retired" without 20 years TIS and then recalled to active duty. Both admitted: (1) the applicable Department of Defense (DOD) directives and instructions mandate the Secretary of Navy to place all Reserve personnel into Reserve Component Categories defined by DOD including the Retired Reserve; (2) DOD defines only 5 Retired Reserve categories, all of which

are defined in terms of eligibility for retired pay or entitlement to disability due to active service; (3) there is no category for those not entitled to retired pay, *i.e.*, no Honorary Retiree category. Consequently, this motion's injunctive request also seeks an order requiring the Secretary to comply with DOD's instructions concerning retired categories.

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 have met this criteria, both in 2003 and today in 2007.

SUMMARY OF ARGUMENT

This Memorandum shows plaintiffs have met all the criteria for an injunction. First, plaintiffs will succeed on their Establishment and Due Process Clause violation claims because the challenged practice is a clear denominational preference for which there is no compelling purpose or narrow tailoring and does not treat all chaplains equally. Even if such a purpose existed, defendants' pattern and practice is not narrowly tailored because alternatives exist allowing defendants to meet the free exercise needs of DON's Catholic personnel. The challenged practice also fails the endorsement and *Lemon* tests because it communicates an unmistakable message that Catholics are preferred and have a favored place in the Navy Chaplain Corps ("CHC") and the Navy.

Second, the Court of Appeals has already held that plaintiffs have shown irreparable harm by alleging defendants have violated the Establishment Clause. *CFGC*, 454 F.3d at 304.

Third, an injunction will not harm defendants or interfere with their mission of meeting free exercise needs of DON personnel because no harm results from following the Constitution and defendants have established viable alternatives that are readily available. Navy directives order commanders to hire contract clergy or auxiliary chaplains where free exercise needs exist. This option has met defendants' need for Catholic clergy and other faith group specific needs in the past when specific chaplains were not available to meet them.

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 religious favoritism preferring one religion over another. Courts have the constitutional authority and duty to confine other branches of government within their constitutional and statutory limits.

I. THE UNDISPUTED FACTS AND EVIDENCE SHOW DEFENDANTS HAVE BEEN OPERATING A SPECIAL PENSION PLAN SOLELY FOR CATHOLIC CLERGY, A CLEAR DENOMINATIONAL PREFERENCE

The Following Facts Are Undisputed

1. In 2003, 10 U.S.C. § 14509 "Separation at age 60; reserve officers in grades below brigadier general or real admiral (lower half)", (Exhibit 1, *see* comment on 2006 amendments at page 1), stated:

> Each reserve officer of the Army, Navy, Air Force, or Marine Corps in a grade below brigadier general or rear admiral (lower half) who has not been recommended for promotion to the grade of brigadier general or rear admiral (lower half) and is not a member of the Retired Reserve shall, on the last day of the month in which that officer becomes 60 years of age, be separated in accordance with section 14515 of this title.

2. Amendments to 10 U.S.C. § 14509 changed the age for separation from 60 to 62. *Id.*

3. From May 1986 to 2005, SECNAVISNT 1120.4A (Exhibit 2), ¶ 6 established the "Basic qualifications" for appointment as a chaplain, including age:

> 6. Basic qualifications. To be eligible for appointment as a Chaplain Corps officer in either the active-duty or Reserve components…, the applicant must meet the following requirements:
>
> ***
>
> b. Age. Must be able to complete 20 years of active commissioned service by age 60. The Deputy Chief of Naval Operations (Manpower, Personnel, and Training) (DCNO(MPT)) may waive the age restrictions up to age 62 for otherwise qualified applicants for appointment on the active duty list or in the Reserve component in [four] instances:

4. When plaintiffs filed their injunction motion in June 2003, defendants had a pattern and practice allowing Catholic Reserve chaplains to remain on active duty past 10 U.S.C. § 14509's mandatory separation from military service at age 60 for Reserve officers.

a. At least 23 Catholic Reserve chaplains over age 60 were on active duty in June 2003, all of whom were on the active duty list ("ADL"); none were on the Reserve Active Status List ("RASL") because the lists are mutually exclusive. Inj Mot Exhibits 8, 12.

b.. Seven of the 23 Catholic chaplains over age 60 were 67 or older, four of whom were in their 70s.

c. The vast majority of chaplains allowed to stay on active duty past their statutory separation ages are Catholics. "Does the Data Establish that the U.S. Navy Favors Roman Catholics?", Expert Opinion by Harald R. Leuba, PhD. (Exhibit 3) at 2 and Table 1; 6, Tables 4-5. No Protestant liturgical or Non-liturgical chaplains, Reserve or Regular, were allowed to remain on active duty as a 4109.

5. In 2003 there was no authority to extend Reserve officers on active duty beyond § 14509's age 60 limitation. 10 U.S.C. § 14703, the only authority for extending Reserve officers who had

not failed of selection to Commander and above, applied to Reserve officers on the RASL which excludes officers on the ADL. Inj Mot at 6 (incorporated by reference).

6. The seven Catholic chaplains over age 67 were given the status “4109", which is a Navy personnel status code for “Retired Reserve.”

7. No 4109 had the necessary 20 years time in service (“TIS”) to qualify for retired pay when given their 4109 status. Inj Mot at 8-9 and its FACTS 2-7.

8. No 4109 fit into any DOD defined Retired Reserve category. Fact No. 23 *infra*.

9. Prior to 2001, there was no statutory authority to extend or continue on active duty Reserve chaplains who had twice FOS. *See* Inj Mot Reply at 6.

a. Section 632 provided for the continuation of regulars who had twice FOS;

b. § 14101 provided authority to continue on the RASL Reservists who had twice FOS; Inj Mot Reply, 13-15;

c. No statute allowed for Reservists who had twice FOS to be continued on active duty until a statutory change in 2001; *Id.*;

d. Defendants provided no evidence any of the Reserve chaplains retained past age 60 had ever been validly continued by a board authorized to extend Reservists on active duty.

10. All of the 4109s, past and current, entered active duty with age waivers. SECNAVINST 1140.7A requires persons granted age waivers acknowledge “[b]efore appointment” they “will be unable to complete 20 years of creditable service for retirement ....” ¶ 6.b.

11. OPNAVINST 1730.1D (Exhibit 4) requires commanders to employ civilian clergy when necessary to meet the command’s free exercise needs. This OPNAVINST replaced

SECNAVINST 1730.G as the authority to employ civilian clergy when necessary to meet the command's free exercise needs.

12. 10 U.S.C. § 1251(a) establishes 62 as the normal retirement age for Regular officers.

a. § 1251(c)(2) allows the Secretary to "defer retirement under subsection (a) of an officer who was appointed or designated as a chaplain if the Secretary determines that such deferral is in the best interest of the military department concerned ....";

b. § 1251(c)(3)(A) limits "deferment under this subsection" to "the first of the month following the month in which the officer becomes 68 years of age", unless the exception in subsection (B) applies;

c. § 1251(c)(3)(B) allows the Secretary to "extend deferment under this subsection beyond the date referred to in subparagraph (A) if the Secretary determines that extension of the deferment is necessary for the needs of the military department concerned. Such an extension shall be made on a case-by-case basis and shall be for such period as the Secretary considers appropriate."

13. No statute allows the Secretary to authorize a chaplain to remain on active duty past age 67 for the purpose of qualifying for retired pay, *i.e.*, obtaining a pension.

14. The challenged 4109 chaplains and other Catholics continued past their separation ages, past and present, qualify for a pension only by remaining on active duty past their statutory separation ages.

15. Prior to 2006, few non-Catholic have been allowed to remain on active duty past their required separation age.

16. Three of the original seven 4109s plaintiffs identified in 2003 retired with pensions while

this issue was being litigated. Two other Catholics will reach the necessary 20 years time in service to qualify for a pension in 2007. One, LCDR Erestain, will retire July 2007. *See* DefOpBr Exhibit 1, p. 2.

17. Since the Inj Mot was filed in 2003, defendants granted two new Catholic chaplains 4109 status, neither met DOD's Retired Reserve criteria since neither had the required TIS.

18. An October 1999 (fiscal year 2000) "Study on Religious Affiliation in the Department of Navy," Exhibit 5, admitted "The Chaplain Corps has never conducted an in depth study of the religious affiliation of members in the Navy and Marine Corps," *id.* at 2 (3d page of document).

19. Evangelical and Pentecostal/charismatic Christians form the largest non-Catholic faith communities in overseas Navy chapels where there are limited religious worship alternatives for DON personnel and their dependents. Declaration of CAPT James Poe, CHC, USN (Ret.). ("Poe") (Exhibit 6), ¶ 14.

20. Both types of congregations have distinct worship styles. *Id.* at 11.

21. Although Evangelical and Pentecostal/charismatic Christians were the largest non-Catholic Christian congregations at the Navy bases in in Naples, Italy, and Rota, Spain, the CHC has routinely ignored their needs and failed to schedule chaplains with suitable backgrounds to replace chaplains who led these distinct congregations. *Id.* at ¶¶ 13-14.

22. The CHC has no means or program to identify the individual Free Exercise needs of DON personnel or identify special religious communities, *e.g.*, Pentecostal/charismatic, whether in the States of overseas. Extracts of Depositi9on of CAPT Carter, CHC (*Larsen v. U.S. Navy*), (Exhibit 7) at [31:15-33:3], [59:6-23].

23. DOD Directives (DODD) or Instructions (DODI) define the Retired Reserve solely in

terms of entitlement to retired, retainer or disability pay. *See* IV.B. *infra*.

II. PLAINTIFFS WILL SUCCEED ON THE MERITS OF THEIR CLAIM DEFENDANTS' 4109 PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE

Defendants' practice maintaining Catholic chaplains on active duty past their statutory separation ages to qualify for retired pay, hereafter the "4109 Program", violates every Establishment Clause test. This practice is and has been exclusively for Catholics since only Catholic chaplains (1) have consistently been continued past statutory separation ages and (2) are designated as 4109s to qualify them for retired pay, making the 4109 Program a per se denominational preference.

The 4109 Program has three components described below, each employing a clear denominational preference. Each part of the 4109 Program fails strict scrutiny, the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and the reasonable observer test which the Supreme Court has used frequently to evaluate whether a challenged program communicates a message of favoritism or preference. *See McCreary Co. v. ACLU of Kentucky*, 545 U.S. 844, 125 S.Ct. 2722, 2740 (2005) (defining and applying the reasonable observer test). These tests are addressed below. Failing these tests renders immaterial the question whether a valid statutory basis for defendants' Catholic pension system exists.

A. Each of the 4109 Program's Three Parts Demonstrates a Denominational Preference

The 4109 Program has three separate components enabling Catholic chaplains accessed or brought to active duty with age waivers to qualify for retired pay because they cannot reach the necessary TIS before statutory separation due to age. The first is an illegal system to bring chaplains on active duty who cannot complete 20 years TIS before statutory separation. This

includes illegal age waivers and recalls to active duty.

SECNAVISNT 1120.4A's ¶ 6.b established a *maximum* age of 42 for chaplain applicants providing the Deputy Chief of Naval Operations granted a waiver beyond the normal age limitation of 40. Age 40 enabled a reservist to qualify for retired pay with 20 years TIS before § 14509 mandated his separation at age 60. The age 42 maximum corresponded to the normal separation age for Regulars but also allowed a reservist to achieve 18 years TIS because § 12686 allowed "Reserve or active duty within two years of retirement eligibility" to continue on active duty for an additional two years until he qualified for retired pay. SECNAVISNT 1120.4A provided no authority to exceed the age 42 upper limit.

CARE board records and Vol. X biographical data show defendants operated an unofficial policy to grant age waivers beyond age 42 without authority to do so. Exhibit 8 is a list of chaplains accessed and/or brought to active duty from FY86-01 at ages which will not allow them to get 18 years TIS before they had to be separated at age 60. This unofficial policy was primarily for Catholics until FY2001 when chaplain shortages forced the CHC to provide more non-liturgical clergy age waivers.

Exhibit 9, the total number of age waivers and percentages by FGC from FY 86 to FY98-2001, shows non-Catholics are a minority (8%), non-liturgicals are a super minority (4%, one half that of Liturgical Protestants) with Catholics comprising 85-90% of the waivers. Exhibit 9 also shows the percentage of Catholic age waivers in three categories: (a) age 42-46, -about 38% - a Catholic could get 20 years TIS without needing to become a 4109 at age 67; (b) age 47-56 - about 53% - a Catholic would spend half his 20 year career as a 4109; and (c) age 57 and above - about 7% - more than ten years as a 4109. Over half of the Catholics accessed or brought to

active duty with age waivers were over age 46 requiring they be granted 4109 status to complete 20 years TIS to obtain retired pay. This is itself a denominational preference

The second component is an illegal policy continuing Catholic Reservists on active duty who should have been separated at age 60, now age 62. Material defendants provided in discovery shows only Catholic Reservists were allowed to continue on active duty past age 60. Inj Mot Exhibits 8-12. Many of these were LTs and LCDRs who had failed of selection and were not qualified to be continued until age 67 under 10 U.S.C. § 14507.

The third component is the process of designating as 4109s Catholic Reservists who have not qualified for retired pay at age 67, contrary to DOD's Directives and Instructions. Only Catholic Reservists *ineligible* for retired pay have been designated 4109s.

B. Strict Scrutiny of the 4109 Program Is Mandated

"When a denominational preference is at issue, *Larson v. Valente*, 456 U.S. 228 (1982), supplies the analytic framework for evaluation of [plaintiffs'] contentions. *Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions." *Hernandez v. C.I.R.*, 490 U.S. 680, 695 (1989); *Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle,* 212 F.3d 1084, 1090 (8th Cir. 2000), *cert denied,* 532 US 957 (2001) ("In considering appellants' facial challenge, we initially must determine whether section 4454 discriminates among religious sects. If so, we apply strict scrutiny review under *Larson v. Valente,* 456 U.S. 228 (1982)"). Strict scrutiny is not limited to alleged statutory denominational preferences. "On the contrary we have expressly required 'strict scrutiny' of practices *suggesting* 'a denominational preference,' *Larson,* 456 U.S. at 246, in keeping with 'the unwavering vigilance that the Constitution requires' against any violation of

the Establishment Clause." *County of Allegheny,* 492 U.S. 573, 608-09 (1989)(quoting *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J. concurring) (emphasis added)). The law of this case follows *Hernandez* and *County of Allegheny*: strict scrutiny applies to any challenged practice Plaintiffs can demonstrate "suggests a denominational preference." *Adair v. England,* 217 F.Supp.2d 9, 14-15 (D.D.C. 2003).

Ignoring the law of the case, defendants' recent *CFGC/Adair* injunction briefing suggested a decision in *Larsen v. U.S. Navy*, 486 F.Supp.2d 11 (D.D.C. 2007), applying the relaxed standard of *Goldman v. Weinberger*, 475 U.S. 503 (1986), should apply. Def.RR (*CFGC* Doc. No. 257) at 18. *Larsen* is inappropriate; it did not review a denominational preference because *Larsen* found those plaintiffs did not have standing to challenge the denominational preferences established in defendants' Thirds Policy accession goals. This Court's well reasoned analysis specifically rejected the *Goldman* standard in denying in part defendants' motion to dismiss, finding *Goldman* addressed the "Free Exercise Clause", not the Establishment Clause. *Adair v. England*, 183 F.Supp.2d 31, 50-52 (D.D.C. 2002); *see also Goldman*, 475 U.S. at 504 ("*Goldman* contends that the Free Exercise Clause ....") (cited by *Adair*, 183 F.Supp.2d at 51), 509 (same quote). *Adair* correctly holds the Supreme Court has never allowed any reduced standard for Establishment Clause cases, 183 F.Supp.2d at 52, following but not citing this Circuit's precedent.

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* only because strict scrutiny had not been briefed or raised by the parties in the district court. *Id*. It found none of Congress's proffered concerns for the law were "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, defendants may not do so either.

The Supreme Court has not confronted an Establishment Clause challenge to a military practice. However *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir.), *cert denied*, 409 U.S. 1076 (1972), did so, reviewing the constitutionality of the Service Academies' mandatory chapel

requirements for all cadets and midshipmen. The District Court had deferred to the Academies' military expertise arguments, *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"), but the D.C. Circuit rejected deference as 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" Establishment Clause violation). *Anderson* does not cite *Lemon* because *Lemon* was decided 20 days after *Anderson's* oral argument. However, *Anderson's* analysis follows *Lemon's*, as seen in the opinions by both Judges Bazelon and Leventhal, 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 others, *Anderson*, 461 F.2d at 291-93, and replicated in *Lemon*'s first two tests.

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. 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").

C. Defendants' Pension Qualification Program for Overage Catholic Chaplains Fails Strict Scrutiny

The 4109 Program, allowing Catholic chaplains whom Title 10 required and requires to be separated to remain on active duty to qualify for retired pay, is a "denominational preference on its face" because it has been limited to Catholics. With the recent exception for a rabbi, well after the Inj Mot was filed and remanded by *CFGC*, no other denomination benefitted or benefits from defendants' challenged practice, because no other denomination has been included in defendants' overage chaplain pension program. Defendants' practice has clearly said, "Only Catholics need apply."

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. **<u>The 4109 Program has no compelling purpose</u>**

The CHC's purpose is to enable DON personnel to "exercise their right under the Free Exercise Clause to practice [their] freely chosen religion", *Katcoff v. Marsh*, 755 F.2d at 223, 234

(2d Cir. 1985), and to avoid violating the neutrality requirement under the Establishment Clause.[2]

> [I]f the [DON] prevented [its personnel] from worshiping ... by removing them to areas where religious leaders of their persuasion and facilities were not available it could be accused of violating the Establishment Clause unless it provided them with a chaplaincy since its conduct would amount to inhibiting religion.

Id. at 232. The question before the Court is how does defendants' practice of allowing only Catholic chaplains to remain on active duty past their statutory separation age advance or meet the statutory and constitutional purpose for a Chaplain Corps? If defendants based this program on specific identified free exercise needs, complied with existing statutory and regulatory procedures, and made this program available to all denominations based on specific objective criteria, this case would be entirely different. Defendants have never done these things. The purpose of this challenged practice is evident in its structure and exclusivity: to prefer, advance and benefit Catholic chaplains by providing overage Catholic priests a pension program.

Defendants have produced no documents or testimony explaining why only Catholics must be continued on active duty until they acquire the necessary TIS to qualify for retired pay, well past the statutory age separation age limits Congress determined in the Defense Officer Personnel Management Act of 1980 ("DOPMA") were necessary to keep the Armed Forces fit. *See* 1980 U.S. Code and Congressional Administrative News (USCCAN), 6333, 6337-39 (explaining DOPMA's purpose to provide for a young, fit officer corps). Defendants cannot provide a compelling purpose under either the old (pre *CFGC*) or the current regulatory scheme.

Assuming arguendo the compelling purpose is to meet Catholic religious free exercise needs, several questions must be answered to verify the veracity of the disputed claim and

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[2] Congress established the Chaplain Corps by statute. All government branches must operate in accord with the Constitution. *United Christian Scientists*, 829 F.2d at 1162.

purpose. First, are DON's Catholics suffering a shortage of Catholic priests? In other words, are DON's Catholics worse off than their civilian counterparts? The answer is NO! DON's Catholics do better than civilian Catholics. Dr. Leuba's analysis, "Too Many Catholic Priests?" (Exhibit 10), comparing national civilian religious demographic data with military religious data shows DON's Catholics actually have one half the priest-parishioner ratio civilian Catholics face. Catholic priests are about 9% of all civilian clergy, but are about 25% of the CHC. Leuba at 1. The ratio of Catholic clergy to those served is also "twice as high for Catholics in the Navy as for Catholics in America at large." *Id.* at 4. Dr. Leuba's analysis is based on data produced by the annual Yearbook of American and Canadian Churches, a well recognized source of religious demographic information. Dr Leuba examined four perspectives of the issue, *id.*, 1-4, and in each case, DON's Catholics do better than their civilian counterparts.

Second, do defendants have a program that can identify and quantify DON's free exercise needs? Again the answer is NO! An October 1999 (fiscal year 2000) "Study on Religious Affiliation in the Department of Navy," (Exhibit 5) admitted "The Chaplain Corps has never conducted an in depth study of the religious affiliation of members in the Navy and Marine Corps," *id.* at 2 (3d page of document). Defendants do not identify officer faith group preferences[3], *id.* at pg.4.

Third, are there any other options or resources to meet or minimize the professed need? This question concerns or overlaps the "narrow tailoring" requirement but is also related to the

[3] Defendants provided some data in discovery which was supposed to be Navy officer faith group preferences, but the numbers did not add up and made no sense. Defendants were asked to explain the numbers provided but have yet to do so or provide accurate officer preference data.

"purpose" issue since other options would show there is no compelling purpose for this challenged practice. Here the answer is Yes! When the Inj Mot was filed, SECNAVINST 1730.G provided commands authority to employ contract civilian clergy or auxiliary chaplains when necessary to meet the command's free exercise needs. OPNAVIST 1730.1D (Exhibit 4) replaced SECNAVINST 1730.3G. 1730.1D's ¶ 5.e.(5), "Religious Ministry Requirements", *directs* commanders ((g) "Commanders shall") to hire contract clergy or auxiliary chaplains to provide religious services when no chaplain is available to meet a specific free exercise need. Assuming arguendo defendants had a valid secular objective, this "valid secular objective can be readily accomplished by other means." *Larkin v. Grendel's Den, Inc*., 459 U.S. 116, 123-24 (1982).

Moreover, these retained chaplains are not filling operational billets in Iraq or Afghanistan, they occupy places where civilian clergy are readily available to meet DON's Catholic needs. For example, LCDR Erestain is stationed at Bethesda Naval Hospital where many Catholic priests are available in the surrounding community.

2. The 4109 Program fails strict scrutiny because it is not narrowly tailored to achieve a compelling government purpose

To be narrowly tailored means that the practice or means defendants are using to achieve their compelling governmental purpose is so constructed and conducted that it does not endanger or invite any of the abuses which the Establishment Clause was designed to prohibit. Narrowly tailored also means that the procedure used is neutral, neither favoring nor disfavoring any denomination or system of beliefs. Defendants' practice cannot meet this test because it favors only one denomination and disparages others as part of its normal practice, does not treat

all religious groups equally, and there are alternatives available that do not require a practice which communicates denominational preference or provides financial support to a single denomination. The reasonable observer, *see* E *infra*, would recognize the need to hire a religious person to perform a religious ceremony to meet a free exercise need. The requirement to hire contract clergy under OPNAVINST 1730.1D to met free exercise needs shows the 4109 Program is not narrowly tailored because it is not focused to meet specific needs. Instead, separating non-liturgical and Liturgical Protestant chaplains in the face of chaplain shortages, *e.g.*, plaintiffs CHs Belt and Porter-Stewart for FOS while retaining FOS Catholics who had longer to serve to get to retirement than some of those discharged, shows defendants' practice clearly communicates a preference for Catholics and hostility to non-Catholics as shown below.

Larson examined the legislative history of a statute challenged under the Establishment Clause that required registration for some churches but not others. 456 U.S. at 230-34. It found "that the italicized language [of the statute in question] would bring a Roman Catholic Archdiocese within the Act, that the legislators did not want the amendment to have that effect, and that an amendment deleting the italicized clause was passed in committee for the sole purpose of exempting the Archdiocese from the provisions of the Act." *Id.* at 254. The Court described this as "religious gerrymandering". *Id.* at 255. The statute's "express design [was] to burden or favor selected religious denominations," and was "not closely fitted to the furtherance of any compelling governmental interest." The Court found the statute and government were not neutral and the statute violated the Establishment Clause. *Id.* That is the case here.

This case is like *Board of Ed. of Kiryas Joel v. Grumet,* 512 U.S. 687 (1994), which found the state's creation of a special school district for a village whose citizens were all Satmar

Jews violated the Establishment Clause. Because the legislation benefitted one sect, *id.* at 704 ("Here the benefit flows only to a single sect"), the Court rejected the normal presumption that the action of a state legislature was constitutional. The Court also rejected an accommodation defense because the "proposed accommodation singles out a particular religious sect for special treatment," violating the Constitution's mandate of religious neutrality. *Id.* at 706.

That is the case here. The practice favors a single denomination. Until very recently, defendants never continued chaplains of any denomination past statutory separation ages except Roman Catholic.

Defendants are currently short chaplains and they were short chaplains when they discharged *Adair* plaintiff CH Belt and *Gibson* plaintiff CH Porter-Stewart, who were closer to reaching their 20 years TIS than some of the continued chaplains. Yet the only chaplains defendants have continued on active duty are Catholic. This is a per se preference with no purpose except to grant Catholics special privileges.

D. The Challenged Practice Violates the *Lemon* Test[4]

"Under the *Lemon* analysis, a [] practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion." *County of Allegheny*, 492 U.S. at 592 (citing *Lemon*, 403 U.S. at

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[4] *Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985), declined to apply the *Lemon* test in reviewing an Establishment Clause challenge to the Army Chaplain Corps because the Chaplain Corps advanced religion and entangled the government "with religious accrediting bodies." *Katcoff* was decided before *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) explained the difference between accommodation and establishment. *Amos* shows a chaplaincy administered in a neutral manner will pass *Lemon*'s test.

612 – 613). Governmental action that unconstitutionally advances religion includes actions whose purpose or effect has endorsed or advanced a specific religion or religion in general, "attempting to convey a message that religion or a particular religious belief is favored or preferred", or favoring religious belief over disbelief. *Id*. at 292-93 (citing various cases and quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985)). Defendants' 4109 Program certainly "touches upon religion" and both advances a specific religion and financially supports it.

1. <u>The 4109 Program has no valid secular purpose</u>

On its face, the 4109 Program's only purpose is to allow Catholic chaplains whose separation 10 U.S.C. §§ 14509 and 1251 require when the chaplains reach statutory separation age to remain on active duty until they complete the 20 years TIS required to qualify for the retired pay they acknowledged they were ineligible for when they were commissioned with (illegal) age waivers. FACT 10. As shown above in C.1 and incorporated herein by reference, defendants have failed to show a compelling purpose because they have not identified DON's free exercise needs and shown DON Catholics are worse off than their civilian counterparts.

Defendants' concern for Catholic chaplains, demonstrated by the overage pension program for Catholics which ignores the law and violates the Constitution, stands in sharp contrast with defendants' gross failure to meet the free exercise needs of faith specific Non-liturgical communities in overseas locations. CAPT James Poe was the Regional Chaplain/Religious Ministries Program Director for the Commander, Naval Region Europe (CNRE). Declaration of James F. Poe, CHC, USN, (Ret.) (Exhibit 6), ¶ 4. He describes the specific free exercise needs of two different, vibrant Non-liturgical Protestant Evangelical and Pentecostal/charismatic communities in Naples, Italy, *id.*, ¶¶ 13, 14, and Rota, Spain, *id.*, ¶ 21.

Although he made the CHC aware of the need to provide appropriate replacement chaplains for these congregations, *id.* ¶¶ 25-26, the CHC ignored these communities' free exercise needs. *Id.*, ¶¶ 13, 15-21. Instead, they replaced the evangelical and Pentecostal chaplains at both locations with chaplains totally unsuited for those congregations' worship needs. *Id.* Defendants' efforts show they prefer Catholics contrary to the Constitution, while their different treatment of Non-liturgicals at Rota and Naples "illustrate an underlying indifference, if not hostility, to the free exercise needs of non-liturgical faith groups, especially those considered Evangelical." Poe at ¶ 23. The contrast shows the CHC's 4109 Program's purpose is to benefit Catholics, a religious purpose, rather than meet *all* of DON's free exercise needs, a secular purpose.

There can be no valid secular purpose when defendants have other options available which do not require financial support to and favoritism for one denomination. *See Larkin*, 459 U.S. at 123-24 ("valid secular objective can be readily accomplished by other means.").

2. <u>Defendants' 4109 Program fails *Lemon's* second prong by advancing the Catholic religion and inhibiting the religion of others</u>

Defendants can not pass the second prong of *Lemon*'s criteria, *i.e.*, the 4109 Program "must neither advance nor inhibit religion." The challenged practice clearly advances Catholic interests, and benefits Catholic clergy and the Catholic Church financially. The 4109 Program provides other benefits especially important to older persons such as medical care, a burden the Catholic Church would have to bear without the 4109 Program. Defendants cannot deny they are advancing the Catholic religion because until recently, the 4109 Program had allowed only Catholics to remain on active duty to obtain pensions. As shown below, the 4109 Program communicates defendants' hostility to other religions and faith groups because their

chaplains are denied the same opportunities and benefits, even in the face of current chaplain shortages. "Here the benefit flows only to a single sect", a forbidden preference. *See Grumet,* 512 U.S. at 704. Such hostility is not neutral and inhibits other religions.

Defendants have consistently admitted they do not collect any data on specific religious community needs like Rota and Naples. *See, e.g.,* Carter Deposition (Exhibit 7), [32:18-23] (not concerned about non-Catholic FGCs or communities); [59:6-23].. Defendants have demonstrated callous indifference to religious free exercise needs of Non-liturgicals, *e.g.*, the Evangelical and Pentecostal communities at Rota and Naples. *See* Poe at ¶¶ 13-29. They cannot argue here there is a need or legitimate purpose for retaining overage Catholic chaplains because since 2003, defendants have presented no data on Catholic or other communities' needs. Ms. Berto's Declaration, DefOpBr Exhibit 1, stated the 4109s met a Catholic requirement. This is contrary to defendants' argument in *Larsen* that the CHC had no requirements for any denominations, otherwise there would have been goals.

The 4109 Program is like the provisions of New York's kosher food fraud statutes struck down by *Commack Self-Service Kosher Meets, Inc., v. Weiss*, 294 F.3d 415 (2d Cir. 2002), *cert denied,* 537 U.S. 1187 (2003). *Commack* found the challenged provisions preferred "the dietary restrictions of Orthodox Judaism over those of other branches" and "the challenged laws discriminated in favor of the Orthodox view regarding the dietary requirements of *kashrut*." *Id.* at 430. This preference put the state's "imprimatur on the religious views of the one [sect] to the exclusion of others." *Id.* The 4109 Program benefits only Catholics; no other denomination has been allowed to keep its clergy on active duty past their statutory separation ages for the purpose of qualifying for a pension. In fact, defendants separated *Adair* plaintiff CH Belt and *Gibson*

plaintiff CH Porter-Stewart in March 2006 although they were younger and needed only a few years to come within the safe harbor of 18 years service, while retaining Catholics with many years left before becoming eligible for retirement and adding others to the 4109 category.

Defendants have continued the 4109 Program despite being on notice it was a religious preference, communicated a message of prejudice, and had no statutory or regulatory foundation for the practice. They have continued to defend their practice with bogus reasoning such as citing SECNAVINST 1820.2B as authority despite the fact the instruction, by its title and context, excludes active duty personnel from its coverage. *See* plaintiffs' Inj Mot Reply at 19-20.

3. <u>Defendants' 4109 Program unconstitutionally entangles the Navy and religion</u>

Defendants' unconstitutional entanglement with one specific denomination, *i.e.* Catholics, is readily apparent. The very act of providing a single program that benefits only Catholics essentially makes the government an agent for this denomination. *Commack* found the state's "imprimatur" on the Orthodox view of what is kosher entangled the state with religion. *Id.* at 430. Here, the preference exhibited by the 4109 Program is not merely symbolic; the challenged practice financially aids one denomination by providing a pension program and other benefits to members of its clergy, a benefit the Church itself would have to provide were it not for defendants' largess. Providing chaplains to meet individual free exercise needs is accommodation, but favoring one religion with an over-age pension qualification program which provides substantial financial support is forbidden establishment of religion. *See Amos,* 483 U.S. at 327.

D. The 4109 Program Fails the Reasonable Observer Test

1. **<u>The reasonable observer examines the 4109 Program's history and purpose</u>**

Recent Supreme Court precedents tend to collapse *Lemon'*s standard three-part test into a two-part test known as the "endorsement test." This combines *Lemon'*s second and third prongs, the result and entanglement questions, into the question 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. For example, *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 308 (2000), found an objective observer would perceive student led prayer at school athletic events was an endorsement of religion. *County of Allegheny*, 492 U.S. 573 (1989) 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 message the practices communicated and the practices' context.

McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005), 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. *McCreary County* held courts should analyze the purpose of the challenged practice from the viewpoint of the reasonable or objective observer. 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 purpose inquiry: "The Counties would read the cases as if the purpose enquiry were so naive that any transparent claim to secularity would satisfy it, and they would cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance of current circumstances." *Id*. at 863-64. "We hold that the Counties' manifest objective may be dispositive of constitutional enquiry, and that the development of the presentations should be considered when determining its purpose." *Id.* at 850. The Court emphasized "the purpose needs to be taken seriously under the Establishment Clause", and courts should reject sham reasons. *Id.* at 874.

Accordingly, plaintiffs will first address defendants 4109 Program from the reasonable observer's viewpoint, looking at its history, obvious purpose and message. *See, e.g., id.* at 871-72 (district court found the previous iterations of the challenged display violated the Establishment Clause because those iterations had an improper purpose, the advancement of religion).

2. The reasonable observer would conclude the 4109 Program is an illegal preference designed solely to advance Catholic interests

McCreary held the objective or reasonable observer must take into account both the complete history and the context of the challenged practice since the purpose of a challenged practice often becomes evident in the practice's history. 545 U.S. at 866. This means looking at the purpose for which defendants instituted their overage Catholic pension system, a purpose manifest by several factors. First, the reasonable observer would know the defendants admitted

"The Chaplain Corps has never conducted an in-depth study of the religious affiliation of members in the Navy and Marine Corps." Exhibit 5.

Second, the objective observer would know defendants acknowledge DON's free exercise needs have not been identified and they play no part in their chaplain accession system or in the detailing process. FACT 22. The objective observer would know there can be no justification for keeping chaplains of a specific faith past their statutory separation dates without an understanding and quantification of religious needs and a standard against which to measure them. As Dr. Leuba's analysis ("Too Many Priests?" at 4 (Exhibit 10) shows, DON's Catholics do better in terms of the ratio of Catholic members to priest than do their Catholic civilian counterparts. Third, the objective observer would know until very recently the 4109 Program was almost exclusively for Catholics. FACT 4c. The extension of a single rabbi for a few years cannot undo defendants' past history of Catholic exclusivity and the fact the primary beneficiaries (if not the sole beneficiaries) are Catholic chaplains and the Catholic Church.

Fourth, since the 4109 status has been limited solely to Catholics during its history, the objective observer would know the purpose of the program was to benefit Catholic chaplains.

The reasonable observer would conclude from the 4109 Program's history and the factors surrounding it that its only purpose is to benefit Catholic chaplains and thereby benefit the Catholic Church by providing a pension and continued medical benefits for some of its elderly clergy. *See* II.B.1. above.

> [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).

The objective observer's analysis of defendants' practice would also conclude defendants have established Catholicism as the Navy's preferred religion. There is no other explanation; despite being put on notice, defendants have closed their eyes to the law and very clear Supreme Court precedent that denominational preferences are subject to strict scrutiny. Any reasonable observer would understand defendants' 4109 Program fails strict scrutiny given the history of its practice, its limitation to one denomination, the lack of statutory authority, and defendants' failure to identify specific religious needs and a compelling purpose.

The objective observer would also conclude defendants' practice communicates a message of favoritism to Catholics and hostility to Non-liturgicals. "When the government puts its *imprimatur* on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs." *Lee v. Weisman*, 505 U.S. 577, 606 (1992). This is manifest in defendants' deliberate extension of only overage Catholic chaplains beyond their statutory age limit, while discharging non-liturgicals such as CHs Belt and Porter-Stewart, and showing indifference or active hostility to the Pentecostal/charismatic and evangelical Protestant congregations in Naples and Rota, *see* Poe Declaration at ¶¶ 13-29.

The objective observer would also note the obvious message of preference the practice communicates. Protestant churches send their young men and women to serve as chaplains because military service reflects Congress's desire for a young force able to endure the hardships

inherent in military service. Chaplains Belt and Porter-Stewart gave their youth to the Navy and then were discarded. The 4109 Catholics give their youth to their Church, then when they are older and not able to compete with younger chaplains, they give their old age and limited ability to the Navy. By accepting this offer, defendants communicate the message old Catholics are of more value than young non-Catholics. If defendants need priests to say Mass, they can hire contract clergy or auxiliary chaplains to replace these 4109 Program priests at minimal cost.

III. PLAINTIFFS WILL SUCCEED ON THEIR CLAIM THE CHALLENGED PRACTICE VIOLATES DUE PROCESS

The Fifth Amendment's Due Process Clause has an equal protection component which requires defendants to treat similarly situated chaplains equally. "[T]he Fifth Amendment requires the Navy to treat non-liturgical Christian chaplains in the same manner that it treats liturgical Protestant chaplains." *Adair*, 183 F.Supp.2d at 53. This Court has noted previously, "the Supreme Court has held courts must apply strict scrutiny to any policy or practice that involves a denominational preference." *Id.* (citing *County of Allegheny*, 492 U.S. at 608-09; *Larson*, 456 U.S. at 246).

On its face, the 4109 Program does not treat all chaplains equally. It allows overage Catholics, including those with multiple FOS, to remain on active duty to accrue sufficient TIS service to qualify for a pension, while discharging Non-liturgicals. *Adair* plaintiff CH Belt and *Gibson* plaintiff CH Porter-Stewart were discharged for FOS although they were much younger and needed fewer years to come within § 12686's safe harbor of 18 years service than the Catholics with FOS who were retained. Few non-Catholics have been allowed to remain on active duty past statutory separation age and no non-Catholic has been granted 4109 status.

Defendants failed to identify any non-Catholic chaplain on active duty over age 62 in their 2003 interrogatory responses. This is an example of the religious gerrymandering specifically condemned in *Larson*, 456 U.S. at 255. The practice in this case is the same one-way government benefit to a religious group *Grumet* found offensive to the Constitution. 512 U.S. 687, 703 (1994) ("Here the benefit flows only to a single sect"). As shown in II.A above, defendants have no compelling purpose nor can they show the means they have chosen, a program until recently limited to Catholics that violates Congress's specific determination as to separation ages, is narrowly tailored to achieve any government purpose.

IV. PLAINTIFFS WILL SUCCEED ON THE MERITS OF THEIR CLAIM DEFENDANTS' CONTINUATION OF CATHOLIC CHAPLAINS BEYOND STATUTORY SEPARATION AGES IS WITHOUT AUTHORITY

A. The Secretary of Defense Has Limited the Secretary of Navy's Authority to Place Reservists in the Retired Reserve to Those Who Meet Specific Criteria

Defendants have argued 10 U.S.C. § 264 gives the Secretary of Navy authority to place in the Retired Reserve chaplains who have not qualified for receipt of Retired Pay. DefOpBr at 15-17 and Def. Reply at 13-14. This is false as a matter of law. 10 U.S.C. § 10141 creates only three Reserve Component Categories ("RCC"): Ready, Standby and Retired Reserve (the "RRC"). 10 U.S.C. § 10154 defines the Retired Reserve as those eligible for retired pay under various statutes addressing each service in § 10154(a), and "Reserves who have been transferred to the Retired Reserve, retain their status as Reserves, and are otherwise qualified" in § 10154(b). Title 10 does not define "otherwise qualified" but 10 U.S.C. § 113(b) gives the Secretary of Defense authority to establish regulations governing the Reserve forces including the Retired Reserve.

The Secretary of Defense has exercised that authority and has issued four DOD Directives

(DODD) and DOD Instructions (DODI) that cover four areas addressing all aspects of the Retired Reserve: “Uniform Reserve, Training and Retirement Categories Administration”, DODI 1215.19 (dated 12/12/2000, which is relevant to the time period for the actions addressed in this motion), (Def.RR Exhibit A) (incorporated by reference), which has been replaced by DODI 1215.06 (dated 2/7/07 with the same title) (Exhibit 11); “Assignment to and ... Transfer to the Retired Reserve”, DODI 1200.15 (dated 9/18/97) (Exhibit 12); “Management and Mobilization of Regular and Reserve Retired Military Members”, DODD 1352.1 (dated 7/16/05) (Exhibit 13); and “Employment of Retired Members of the Armed Forces” DODD1402.1 (dated January 21, 1982, still listed by DOD as a valid authority), (Exhibit 14).

Each of the four regulations requires defendants to comply with the DODDs and DODIs. For example, Paragraph 5.2.1 of DODI 1215.19 direct’s the Secretary to “[d]esignate all Reserve Component members,” including the 4109s, “in a RCC ... in accordance with criteria established in enclosures 2 and 4”; Enclosure 2, ¶ E2.2.1.4, defines five “Retired Reserve Categories” (Def.RR Exhibit A. at 30), mirroring the five categories and qualifications defined in ¶ 6.5.4.4, *see* below. DODI 1200.15, ¶ 5.3, limits the Secretary’s authority to transfer personnel to the Retired Reserve to 3 cases; the two relating to those eligible for retired pay are mandatory (“shall”), the one case addressing disability is permissive. DODD 1352.1 states “The Secretaries of the Military Departments ... shall ensure plans for management and mobilization of military retirees are consistent with this directive”, ¶ 5.3 (“RESPONSIBILITIES”), and defines the Retired Reserve, linking it to eligibility for retired pay. These DODIs and DODDs, by using the word “shall”, make it clear the Service Secretaries must comply with the DODIs’ and DODDs’ provisions They provide no room for the Secretary of Navy not to comply or discretion to do

anything other than what the DODI directs. Mr. Bush testified that defendants' compliance with the DODIs is mandatory. Deposition of Thomas Bush (Exhibit 15) at [95:11-97:21].

B. DOD's Definition of the Retired Reserve Excludes the 4109s

Each DODI and DODD has defined the Retired Reserve in a uniform, historically consistent manner, linking eligibility for or assignment to the Retired Reserve with eligibility for retired, retainer or disability pay.[5] A chaplain not entitled receive payment for prior active service is not eligible for transfer to, or listing in, or inclusion in the Retired Reserve. Five categories constitute the Retired Reserve as defined by DOD.

> The Retired Reserve consists of the following categories:
>
> 6.5.4.4.1 Reserve members receiving retired pay under Chapter 1223 of reference(e) [Title 10].
>
> 6.5.4.4.2 Reserve members who have transferred to the Retired Reserve after completing the requisite qualifying years creditable for retired pay under 10 U.S.C. Chapter 1223 (reference(e)), but who are not yet 60 years of age, or are age 60 and have not applied for retired pay.
>
> 6.5.4.4.3 Reserve members retired for physical disability under Sections 1201, 1202, 1204, or 1205 of reference (e). Members who have completed the requisite years of Military Service creditable for non-regular retired pay under Chapter 1223 of reference (e) or are 30-percent or more disabled and otherwise qualified under Section 1201 of (reference(e)).
>
> 6.5.4.4.4 Reserve officers and enlisted members who have retired after completion of 20, or more, years of active Military Service. This does not include Regular enlisted members of the Navy or the Marine Corps, with 20 to 30 years of active Military Service, who are transferred to the Fleet Reserve (Navy) or the Fleet Marine Corps Reserve.
>
> 6.5.4.4.5 Reserve personnel drawing retired pay based on retirement for reasons other than age, service requirements, or physical

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[5] DODI 1200.15, ¶ 5.3.1 dated 9/18/1997 (DX L at 5), directed the Secretary to transfer to the Retired Reserve, in addition to those who qualified for retirement pay under Title 10, those found physically disqualified for active duty ... if more than 30% disabled, and "on application ... all personnel who belong in the categories listed in subsection F.4 of DOD Instruction 1215.19."

> disability. This category is restricted to those who are retired under special conditions, as authorized by the Assistant Secretary of Defense for Reserve Affairs under legislation.[6]

DODI 1215.19, ¶ 6.5.4.4 (Def.RR Exhibit A, pg. 17-18). DODI 1215.19's Enclosure 2 ¶ E2.2.1.4 (DX A. at 30) again defines "Retired Reserve Categories" using the five categories and qualifications defined in ¶ 6.5.4.4 above, *e.g.,* those Reserve Members: "who have *completed the requisite qualifying years creditable for non-regular retired pay* and are receiving retired pay under 10 U.S.C. Chapter 1223." Enclosure 4, Table 1 (Def.RR Exhibit A at 39) illustrates and defines the five categories. The entitlement to retired pay is the common feature of all five Retired Reserve categories. DODI 1215.19, ¶ 6.6.4.4, "Retired Reserve" (Exhibit 12) and ¶ E5.1.3 ("Retired Reserve Categories") of enclosure 5 (*id.* at 32) define five Retired Reserve categories which duplicate DODI 1215.19's categories. DODD 1402.1 (Exhibit 14) specifically defines the term "Retired Member of the Armed Forces" as "a member or former member of the Armed Forces who is entitled to retired, retirement, or retainer pay." ¶ 3.1. The use of the term "entitled" means that the person has met the statutory requirements to receive a benefit, creating a right to receive the benefit, *i.e.*, To qualify for; to furnish with proper grounds for seeking or claiming." Black's Law Dictionary 277 (Abridged 5th Ed. 1983). "Entitlement" means "Right to benefits, income or property which may not be abridged without due process." *Id.* DODD 1352.1, (Exhibit 13) ¶ E.1.1.4, defines "Military Retirees or Retired military Members" as those who retire or are eligible for retirement under Title 10's definitions after reaching the appropriate TIS.

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[6] These "special conditions" exclude 4109s because this category is limited to those "Reserve Personnel drawing retired pay" for which the 4109s are ineligible. *See* DODI 1215.19 ¶ 6.5.4.4.

DOD's definition of the Retired Reserve limits it to those Reservists entitled to retired, retainer or disability pay. No DOD Retired Reserve Category includes personnel who are not entitled to receive pay as a result of active duty service. DOD's regulations show it has defined § 10154's phrase "otherwise qualified" by defining what constitutes the RRC, limiting it to statutory categories consistent with the law and Congressional intent. In doing so, the Secretary of Defense has excluded from the Retired Reserve the 4109s because they are not entitled to retired pay.

C. Defendants Must Comply With DOD's Instructions

The law is clear, once the Secretary of Defense has established a policy or regulation, the Armed Services must obey it completely. Regulations promulgated by the Secretary "canalize the discretion of its subordinate officials" and restrict the discretion of subordinate Armed Services that statutes may otherwise provide. *See Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior*, 255 F.3d 342, 348 (7th cir 2001), *cert denied*, 534 U.S. 1129 (2002); *Center for Auto Safety v. Dole*, 846 F.2d 1532, (D.C. Cir 1988); (agencies are bound by issued regulations).

The facts and competing legal theories here are similar to *Bond v. United States*, 47 Fed. Cl. 641 (2000). Lieutenant Col. (LTC) Bond challenged a commander's classification of his duty on a two-day operational alert as active duty for training ("ADT") rather than active duty support ("ADS") which entitled him to active duty status and immediate retirement benefits. "The case before this court involves the application of a regulation-driven classification scheme governing reserve military duty assignments", *id.* at 650, similar to this case. The Air Force said its regulation allowed the commander complete discretion to classify LTC Bond's tour of duty any way he wanted. *Id*. at 648-49, 659 (citing Air Force Regulation (AFR) 35-41). The court disagreed. The court held "the Air Force must comply with governing regulatory definitions in

assigning TCCs [Training Category Codes]. The TCC is not to be assigned at the convenience of the commander." *Id*. at 659. The court found DOD and Air Force regulations defined the TCCs and AFR 35-41 "does not give the commander the discretion to assign duties to either TCC at will. To allow otherwise would allow commanders to undermine the intent of the classification scheme." *Id.* That is exactly the case here as shown below. Service practices that conflict with DOD's regulations "must give way." *Id*. at 622 (quoting *Casey v. United States,* 8 Cl. Ct. 234, 239 (1985)); *Poole v. Rourke*, 779 F.Supp. 1546, 1565-66 (E.D.Cal.1991). Unfortunately, defendants have not followed either the law or the DOD regulations. They have illegally classified the 4109s as retired reserve and allowed them to remain on active duty illegally.

D. The 4109s Have Been Illegally Classified and Illegally Continued on Active Duty

DOD requires defendants to legally categorize all Reservist into a RCC. DODI 1215.19, ¶ 5.2.8 ("The Secretaries of the Military Departments ... shall: Designate all RC members in a RCC and TRC according to the criteria established in Enclosures 5 and 6."). Prior to reaching their statutory separation age, the 4109s were Reservists on active duty. When they reached § 14509's former statutory separation age of 60, these 4109s were illegally continued until they reached age 67 because § 14703 is limited to extending Reserve chaplains on the RASL to age 67, and these chaplains were on active duty. When they reached age 67, the 4109s were transferred into the Retired Reserve illegally because they were not entitled to receive retired pay and therefore ineligible for transfer to the Retired Reserve as defined by DOD. Defendants are not free to create new Retired Reserve Categories or disobey DOD's orders to "[d]esignate all RC members in a RCC and TRC according to the criteria established in Enclosures 5 and 6." Both the transfer to

and recall from the Retired Reserve was illegal because the 4109s did not meet the criteria for transfer to the Retired Reserve.

E. Title 10 Provides Limited Authority to Extend *Regular* Chaplains Eligible for Retirement Beyond Age 62

10 U.S.C. § 1251(a) establishes age 62 as the normal separation age for each Regular officer. "Unless retired or separated earlier, each regular commissioned officer ... [below the grade of RADM] shall be retired on the first day of the month following the month in which the officer becomes 62 years of age." The word "retired" has a specific legal meaning and is defined by statute and DOD Directives, as shown in A and B above. It means a person has accumulated at least 20 years active TIS which entitles him to a pension, the amount of which is determined by his total length of service, his time in grade, and his grade upon the date of his retirement. These factors are all established by statute. *See, e.g.,* 10 U.S.C. §§ 6321-36.

Section 1251(c) allows the Secretary to "*defer the retirement* under subsection (a) of an officer who is appointed or designated as a chaplain if the Secretary determines that such deferral is in the best interests of the military department concerned." (Emphasis added). Subsection (d), "Limitation on deferment of retirements," limits such deferments until "the first day of the month following the month in which the officer becomes 68 years of age." § 1251(d)(1). A recent change to this provision of § 1251, effective October 10, 2006, allows the Secretary to "extend the deferment under subsection ... (c) beyond the day referred to in paragraph (1) [age 68] if the Secretary determines that extension of the deferment is necessary for the needs of the military department concerned."

A plain reading of the statute and the common understanding of the terms "defer" and the

DOD's use of the terms "retired" and "retirement" shows this subsection provides no authority to extend chaplains *who have not attained* the necessary time in service for retirement until they reach 20 years service. "Defer" means "to put off to a future time; postpone, delay." Webster's New World Dictionary 384 (1960); *see also* Black's Law Dictionary 219 Abridged 5th Ed. 1983 ("Deferral. Act of delaying, postponing or putting off."). "A fundamental canon of statutory construction is that unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Retirement is the specific point in time when a military person becomes "retired" as defined by DODD 1402.1. To "defer the retirement" of a chaplain under § 1251 is to postpone or delay the actual day when the chaplain who is eligible for retirement, *i.e.*, has met Title 10's requirements, actually changes his or her status from active to retired. The Secretary cannot defer "retirement" of a chaplain *who does not qualify for retirement*.

F. Title 10 Provides No Authority to Extend *Reserve* Chaplains on Active Duty Beyond Age 67

When plaintiffs filed this motion in 2003, 10 U.S.C. § 14509 required the separation of Reserve chaplains when they reached age 60. Changes to Title 10 in 2006 changed the separation age of Reserve chaplains to age 62, making it the same age as Regulars. Section 14703(a)(2) authorizes the Secretary to "retain in active status any Reserve officer appointed ... in the Chaplain Corps" beyond age 62. However, this authority is specifically limited by two aspects. First, it excepts "officers referred to in Sections 14503, 14504, 14505 and 14506," which address Reserve officers who have not been promoted to the grade of Commander. That excludes the 4109 chaplains at issue here who are FOS LTs and LCDRs.

The second limitation is subsection (b) "Separation at Specified Age." "An officer *may not be retained on active status* under this section later than the date on which the officer becomes 67 years of age." (emphasis added). There is no exception similar to 10 U.S.C. § 1251(d)(2) which allows the Secretary to defer Regular chaplain retirements past age 68 for a specific need of the service. The use of the term "may not" eliminates the permissive sense normally associated with the term "may." Had Congress wished to allow the Secretary the same latitude it provided in § 1251, it knew how to do so. The fact it did grant the Secretary authority to exceed the age 68 limit for Regulars but specifically denied it for Reservists shows that is what Congress intended, a result consistent with Congress's differing treatment of Regulars and Reserves. "When Congress 'includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the separate inclusion or exclusion.'" *American Chemical Council v. Johnson*, 406 F.3d 738, 741 (D.C. Cir. 2005) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)).

Title 10's structure and placement of § 14703's retention authority creates additional problems for defendants' attempt to justify their illegal retention of these FOS Catholic chaplains. Congress has provided no authority within the structure of Subtitle E to allow Reserve officers to continue on active duty past the mandatory separation age. Congress placed § 14703 in Chapter 1409, Part III, Subtitle E which specifically addresses the Reserve components. Part III addresses "Promotion and Retention of Officers on the Reserve Active-Status List" and Chapter 1409 addresses "Continuation of Officers on the Reserve Active-Status List and Selective Early Removal." The clear implication is that § 14703, by its placement in Chapter 1409 and Part III, addresses only officers on the RASL. These 4109 chaplains are not on the RASL. They must be

carried on the ADL because they are on active duty. 10 U.S.C. § 101(c)(7) defines the RASL and excludes anyone on the ADL. As noted above, the lists are mutually exclusive. The fact these chaplains cannot be covered under § 14703 is consistent with and follows from DOPMA's structure and focus on producing an all Regular Active Duty force. The recent changes to Title 10 making all entry level officers Regular officers is a further demonstration of Congress's intent that the active duty force should be regular.

There is no authority to extend these 4109 Reserve Catholic chaplains under § 14703. Congress specifically excluded those who have FOS to Commander, which addresses this group of 4109s and perhaps others, and § 14703(a), and § 14703(b) limit any such extension to the day the chaplain who is at least a Commander becomes "67 years of age."

V. PLAINTIFFS MEET THE OTHER INJUNCTION CRITERIA

A. Defendants' Establishment Clause Violation Produces Irreparable Harm

The unconstitutional 4109 Program produce irreparable harm. *CFGC*, 454 F.3d at 303.

B. Terminating Defendants' Unconstitutional Practice Poses No Burden or Injury on Defendants

The Navy will suffer no harm whatsoever if the Court orders it to comply with the statutory limits on active duty chaplains. The Navy can suffer no prejudice by ending its practice of preference for over-age Catholics. Navy officials are charged with following the law as well as their own regulations and cannot claim prejudice if forced to do so by the Court. OPNAVINST 1730.1D allows defendants to hire the 4109s as contract clergy if they are needed.

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

A consistent Supreme Court theme in many of the cases addressing Establishment Clause

challenges is that Clause's purpose was to avoid divisiveness, division, 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 to redress the government's alliance with and favoritism to another religious group, the Catholic Church. 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.Hawai'i 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."[7] *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 v. Alexander*, 603 F.2d 919, 920 (D.C. Cir 1979) ("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

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[7] *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).

chaplain management and retention programs in accord with the Constitution. Plaintiffs have met all the criteria for an injunction.

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

Defendants have previously improperly argued "[a]llowing plaintiffs to go forward with a motion that requires affirmative action affecting the rights of non-party naval officers, whose own rights must be considered and respected, prior to a final judgment that plaintiffs are entitled to any relief is not justified." Opp to Motion to Lift Stay at 9. As shown in the Background above and here, the Catholic 4109 chaplains in question were commissioned with age waivers under SECNAVINST 1120.4A which specifically requires the applicant's written acknowledgment he will be unable to reach 20 years of service necessary for a pension and retirement under Title 10. Their situation is addressed at the very end of ¶ 6.b. "Before appointment, applicants who will be unable to complete 20 years of creditable service for retirement [before reaching age 62] shall acknowledge the same in writing." *See* Inj. Mot. at 7 and 10, No. 14 (quoting 1120.4A, ¶ 6.b).

Consequently, these chaplains have no rights that must be protected should the Court order an injunction because their waivers show they had no legitimate expectation of being allowed to stay past their statutory separation age. The SECNAVINST makes it clear they should expect to be separated at the statutory separation age. Assuming arguendo they had such a claim due to defendants' actions, any abridgment of the challenged chaplains' expectations arising from a forbidden and illegal transaction and status that no Navy official was authorized to provide would have to be raised by them personally. The validity of any theory under which such claims could arise is not an issue in this motion. The injunction operates against the Navy, not these chaplains.

VI. PLAINTIFFS HAVE MET THE CRITERIA FOR AN INJUNCTION

Plaintiffs' evidence shows the 4109 Program is a denominational preference. The appropriate precedent for addressing such claims shows the 4109 Program is an unconstitutional denominational preference as shown in II-IV plaintiffs in violation of the Establishment Clause producing irreparable harm. An injunction will not harm defendants and is in the public interest. No valid third party rights are involved.

CONCLUSION

Defendants have failed to show any compelling purpose for their challenged practice. There are no competing interests that outweigh the need to terminate the irreparable harm from defendants' violation of the Establishment Clause. Defendants can show no prejudice, whereas allowing their continued violation of the Constitution would be unprecedented.

Plaintiffs ask the Court (1) to immediately enjoin defendants from continuing only Catholics past the statutory separation age of 62; (2) to order defendants to immediately end their 4109 Program and the retention of other Catholics over the age of 62; and (3) order defendants to establish objective criteria for extending chaplains past age 62, including identifying specific religious needs and other neutral, secular and non-ideological criteria.

Respectfully submitted,

Dated: July 9, 2007

/S/ Arthur A. Schulcz, Sr.

ARTHUR A. SCHULCZ, Sr.
D.C. Bar No. 453402
Counsel for *CFGC* 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

EXHIBIT LIST

Exhibit No.	Description
1.	10 U.S.C. § 14509.
2.	SECNAVINST 1120.4A.
3.	"Does the Data Establish that the U.S. Navy favors Roman Catholics", 7/7/07 Expert Opinion by Harald R. Leuba, PhD.
4.	OPNAVINST 1730.1D.
5.	October 1999 Navy Chaplain Corps "Study on Religious Affiliation in the Department of Navy"
6.	Declaration of CAPT James Poe, CHC, USN (Ret).
7.	Extract of Deposition of CAPT Thomas Carter, CHC, USN (Ret)
8.	List of Chaplains accessed or brought to active duty at age 42.
9.	Total number and percentage of chaplain age waivers for applicants 42 and above.
10.	"Too Many Catholic Priests?" Expert Opinion by Harald R. Leuba, PhD
11.	Department of Defense Instruction 1200.15
12.	Department of Defense Instruction 1215.06
13	Department of Defense Directive 1352.1
14	Department of Defense Directive 1402.1
15	Extract of Deposition of Mr. Thomas Bush
16	Declaration of Arthur A. Schulcz, Sr.